



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 340 OF 2006

JOHN KUNG'U KIARIE.....PLAINTIFF

- V E R S U S -

HON. ATTORNEY GENERAL.....DEFENDANT

RULING

1) When this came up for defence hearing on 4th December 2018, the defendant sought to produce in evidence as exhibits the documents in the defendant's list dated 16th November 2012 and the supplementary list dated 29.11.2018. The plaintiff strenuously opposed the defendant's application. This court considered the arguments put forward by both sides in support and against the application after which it reserved its ruling after having the aforesaid documents marked for identification as D.M.F.I 1 and 2.

2) In the defendant's list of documents dated 6th November 2012, the defendant sought to produce as exhibits the following documents:

- (i) a covering report prepared by C.I.P Geoffrey G. Kahiro,
- (ii) Investigation Diary and
- (iii) Witness statements of 9 witnesses.

3) Mr. Opiyo, learned advocate for the plaintiff, urged this court not to admit the aforesaid documents because the list contained witness statements of witnesses who are either dead or of witnesses who did not testify. It is also the argument of Mr. Opiyo that the witness statements relate to a criminal case where the plaintiff was acquitted.

4) Miss Mutsoli, learned litigation counsel urged this court to admit the documents as exhibits in evidence stating that the covering report prepared by the police which is relevant to this case. The learned litigation counsel further pointed out that the aforesaid documents were forwarded to the plaintiff more than six years ago and the plaintiff did not raise any objection to their production as exhibits in evidence.

5) It is not in dispute that the case before this court is a claim based on malicious prosecution. The claim is clearly defended by the Hon. Attorney General.

6) In objecting to the production of the documents in the defendant's list dated 6.11.2018, the main argument put forward is that the witness statements are of persons who are either dead or of persons who did not testify. There is no dispute that the aforesaid witness statements were lawfully procured by the investigating officer who unfortunately passed on before the commencement of the hearing of this case.

7) The plaintiff has produced as exhibits in evidence copies of the typed proceedings and judgment in respect of the criminal charges which were preferred against him vide Nairobi C.M.C.C. no. 1218 of 2003. It is apparent from the proceedings in the criminal case that the witnesses whose statements the defendant now seeks to be admitted in evidence in his defence actually testified.

8) In my humble view, I find no prejudice if the aforesaid documents are admitted in evidence. Of course this court is

aware that the weight attached to witness statements where the makers have not been summoned to testify is very low if not nil. Consequently, I overrule the plaintiff's objection and make an order admitting the documents marked D.M.F.I. 1 as D.Exh.1.

9) In respect of the documents in the defendant's supplementary list dated 29th November 2018, Mr. Opiyo, was of the opinion that the same should not be produced because the complainant was not called upon to testify and produce before the criminal trial therefore it is unfair to have the same produced in this suit.

10) Miss Mutsoli is of the submission that even if the aforesaid documents were not produced before the court which tried the criminal case, the defendant is entitled to produce them before this court.

11) With respect, I agree with Miss Mutsoli that there is nothing which can bar the defendant from relying on documents which were not relied upon in the court trying the criminal case. The case before this court is not an appeal against the decision to acquit the plaintiff from the criminal charge but it is a claim based on the tort of malicious prosecution.

12) I find no merit in the plaintiff's objection. Consequently the documents contained in the defendant's supplementary list dated 29.11.2018 and marked D.M.F.I. 2 are admitted as DExh. 2.

13) Costs of the objection to abide the outcome of this suit.

Dated, Signed and Delivered in open court this 27th day of February, 2019.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant