



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 350 OF 2013**

**WAINAINA KIGATHI MUNGAL.....APPELLANT**

**VERSUS**

**KAMAU J. KINYANJUI.....RESPONDENT**

(Being an Appeal from the Ruling and Order of the Chief Magistrate's Court

at Milimani Commercial Courts, Nairobi delivered on the 23<sup>rd</sup> May, 2013

by the Hon. Resident Magistrate Mr. Wanjala)

**JUDGMENT**

The appellant herein was the defendant in the lower court. The genesis of this dispute is what was said to be malicious prosecution and defamation against the defendant herein. By a Notice of Motion dated 1<sup>st</sup> March 2013 the defendant moved the court to strike out the plaint herein for reasons set out on the face of that application. These reasons included the following,

1. The plaint does not disclose any reasonable cause of action against the defendant.
2. The defendant lacks any locus or capacity in law to arrest, detain, charge and prosecute the plaintiff for a criminal offence, and
3. The plaintiff having failed to sue the Attorney General, then the plaint and the entire suit is fatally defective and cannot be sustained.

In the ruling delivered on 23<sup>rd</sup> May, 2013 the lower court stated as follows,

**“The prayers outlined hereinabove may be granted either against the defendant herein or against the Attorney General or both. A claim for malicious prosecution for example may be proceeded against the person who made the malicious complaint as well as the police who lodged the prosecution. A claim for defamation may be proceeded as against the person who made the complaint alone.**

**It follows therefore that it is not mandatory for a claimant to sue both the complaint in a criminal matter that was dismissed as well as the police that prosecuted, for him to succeed in a civil matter. The claims against the two parties are not interdependent and a party is at liberty to proceed against either of them as long as he can prove specific claim that he has against him. It is not mandatory that the Attorney General be enjoined in each claim that the plaintiff seeks. ....it is the plaintiff's case and if he can, at the hearing prove whatever claim he has against the defendant without necessarily enjoining the Attorney General, then he cannot be stopped from so doing as this stage.”**

Upon the foregoing reasoning the defendant's application dated 1<sup>st</sup> March, 2013 was dismissed with costs.

I have considered the appeal against what transpired before the lower court. The appellant moved the court to invoke summary procedure of striking out the suit. In effect, he was saying the respondent herein had no case whatsoever against him. A look at the plaint lodged by the respondent and the statement of defence filed by the appellant herein, clearly shows several triable issues which may not be determined before a trial is conducted. The lower court was therefore correct in reaching the conclusion that the appellant's application was devoid of merit.

Where summary procedure is sought to determine a dispute and that step fails, then delay is occasioned yet, had the appellant been patient enough to follow the laid down procedure to facilitate expeditious disposal of the dispute, such a case would have been determined timeously. The effect in this matter is that delay has been occasioned by this step. It is important to observe that, striking out a pleading should be the last resort and in many cases, summary procedure is not appropriate. The end result is that this appeal is dismissed with costs to the respondent.

The lower court file shall now be returned for parties to be heard on their pleadings on merit.

**Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of October, 2018**

**A. MBOGHOLI MSAGHA**

**JUDGE**