



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 98 OF 2009**

**(CORAM: F. GIKONYO J)**

**JOSEPHAT KUGERIA .....1<sup>ST</sup> APPELLANT**

**INSPECTOR ERASTUS GICHUKI ..... 2<sup>ND</sup> APPELLANT**

**HON. ATTORNEY GENERAL .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**JOSEPHAT NJERU MUTHUNGU .....RESPONDENT**

***(Appeal from the judgment of Hon. W.K. Korir Principal Magistrate Meru in CMCC. NO. 506 of 2008)***

**JUDGMENT**

1. This Appeal has been filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants against the Judgment of Hon W.K.Korir, Principal Magistrate (as he then was)delivered on 28<sup>th</sup> August 2009 and in which the learned trial magistrate awarded the Respondenta sum of Kshs 900,000 as General Damages for wrongful arrest, unlawful imprisonment and malicious prosecution. In this appeal, the following nine (9) grounds of appeal were proffered:

***1. That the learned principal magistrate erred in law and fact in finding that the prosecution was instituted without reasonable and probable cause inspite of the overwhelming evidence by the 2<sup>nd</sup> and 3<sup>rd</sup> appellandthe exhibits produced.***

***2. That the judgmentof the learned principal magistrate is against the weightof evidence.***

***3. That the learned principal magistrate erred in law and fact innotfinding that the suit was timebarred and that evenifleave to file suit out of time, the reasons givenbythe plaintiff that the proceedings hadnot been typed wasoutside the meaning and reason givenby section 5 of PublicLimitationsAuthorities Act Cap. 39 Laws of Kenya.***

***4. That the learned principal magistrate erred in law and factinfinding that proper investigationshad been carried out despite evidence on record to the effect that there was blood discovered in one of the plaintiffs' bed.***

**5. The learned principal magistrate erred in law and fact in disregarding the evidence by DW1 while delivering judgment the same was overwhelming in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants.**

**6. The learned magistrate erred in law and fact in purporting to infer/impute malice on the side of the 2<sup>nd</sup> and 3<sup>rd</sup> appellant yet the burden of proof was on the said plaintiff to prove the same.**

**7. The learned principal magistrate used the wrong principles of law in arriving at the judgment purporting to rely on criminal proceedings of No. 32/03 yet the learned judge in those proceedings did not find any malice on the side of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants.**

**8. The learned principal magistrate erred in law and fact in awarding the plaintiff excessive general damages which was neither unsupported nor proved by the plaintiffs.**

**9. The learned principal magistrate erred in law and fact in finding that the prosecution was instituted maliciously against the weight of evidence and which malice was never proved by the plaintiff.**

2. On 9<sup>th</sup> June, 2011 parties agreed that this appeal shall be canvassed by way of written submissions. Pursuant thereto, parties filed Submissions. In the submissions the following arguments were made.

### **The Appellants arguments**

3. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants filed submissions on 16<sup>th</sup> June, 2014. In those submissions, they argued that, contrary to the finding of the trial magistrate, there was reasonable and probable cause to charge the Respondent. They claimed that the decision to charge him was made after proper investigations were done. In addition, they contended that the prosecution adduced evidence in the criminal trial which showed that investigations had been carried out properly. Therefore, according to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, it was wrong for the trial magistrate to have made a finding that investigations were not done before charging the Respondent with a criminal offence. They urged the court to find the plaintiff did not prove all the four elements of malicious prosecution, to wit:

- (a) The defendant instituted the prosecution against the plaintiff;
- b) The prosecution ended in plaintiff's favour
- c) The prosecution was instituted without reasonable and probable cause; and
- d) Prosecution was actuated by malice.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were of the view that the trial court purported to rely on criminal case no.32 of 2002 yet there was no malice that had been imputed against 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in that case. They concluded therefore that the trial magistrate was wrong in imputing malice in the civil trial.

5. Other arguments put forth by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were that: Under the Government Proceedings Act, especially Section 12, proceedings against Government must be brought against the Attorney General. Therefore, joining the 2<sup>nd</sup> Appellant who was a mere officer of the government is misjoinder of parties, and the suit should be dismissed on that account. Finally, the

2<sup>nd</sup> and 3<sup>rd</sup> Appellants submitted that the award made was not supported by law and was not even proved; the award was excessive and should be quashed.

6. On all the above reasons the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants beseeched the court to set aside the entire judgment of the trial magistrate.

### **The Respondent's submissions**

7. The Respondent was categorical that he proved his case and more specifically that the prosecution was instituted without reasonable and probable cause. He made reference to his evidence which he was convinced showed that the 2<sup>nd</sup> Appellant locked him up in the cells without asking anything. The Respondent insisted that no proper investigations that were carried out and this is evidence by the fact that the trial court (Sitati J) found that there was absolutely no link between the Respondent and the commission of the offence. This led to the finding of no case to answer and his acquittal under section 306(1) of the Criminal Procedure Code. He was of the opinion that he was a mere sacrificial lamb so that the police could be seen to be working. He says that his "crime" was that he was the brother of the deceased. According to the Respondent, the 1<sup>st</sup> Appellant knew he was giving false information to the police. These facts and the finding by the trial judge in the criminal case portend malice. To him, the claim of malicious prosecution was proved. He cited the case of **MURUNGA vs. REP, MERU HCCC.NO. 25 OF 2000** and **MERU HCCC. NO. 11 OF 2000** to support his arguments.

8. The Respondent made further submissions that leave to file suit out of time was not challenged at the hearing of the suit and it cannot, therefore, be challenged on appeal. He was of the view that the Leave to file suit out of time was in order.

9. He also addressed the claim that the award of damages was excessive. His position was that the award was fair and just given the circumstances of this case. He stated the damage he suffered; when he was arrested he was in class seven (7) and had to drop out of school; he was in custody for three (3) years; his future was tally compromised. He asserted that there is no amount of damages that would give him back his lost life. He defended the award; the trial magistrate did not take into account irrelevant factor or fail to take into account any relevant fact; it was not an erroneous assessment of damages; and should not be disturbed. He cited **KITAVE vs. COASTAL BOTTLERS LIMITED [1985] KLR 470** to support this submission. They urged the court to reject the appeal.

### **DETERMINATION**

10. I would summarize the grounds of appeal into four issues:

*(1) Whether the 2<sup>nd</sup> Appellant was wrongly joined as a party in the primary suit.*

*(2) Whether leave to file suit out of time could be challenged on appeal when it was never challenged at the trial.*

*(3) Whether a claim of malicious prosecution was proved, and*

*(4) If the answer to (3) above, whether the award of damages herein was excessive.*

### **Misjoinder of parties**

11. I will start on a wider scope. Needless to over-emphasize that, proper parties must be before the court if the court is to exercise its jurisdiction in the suit. See the Nigerian case of **GOODWILL & TRUST INVESTMENT LTD AND ANOTHER vs. WILT & BUSH LTD**, where Justice Ayelola Adkeya Olufunla stated:

***“ . . . The question of parties is a very important issue which would affect the jurisdiction of the suit. . . . . When proper parties are not before the court, the court lacks jurisdiction to hear the suit, . . . ”***

But this is not a case of lack of proper parties but one of alleged misjoinder of the 2<sup>nd</sup> Appellant in this suit. It has been argued that the 2<sup>nd</sup> Appellant was a mere officer of Government exercising his functions as a police officer and could not therefore be sued as a party in the suit. I note that the AG is a party in the primary suit. Therefore, the suit cannot be defeated by a misjoinder, even if it is found there is misjoinder. See Order 1 rule 9 of the Civil Procedure Rules that:

***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and obligations of the parties actually before it.”***

I should, however, state that there is no misjoinder of the 2<sup>nd</sup> Appellant in the suit, because in a case for malicious prosecution the particular officer who investigated the matter and is alleged to have committed the alleged malicious acts should be joined as a party. Although, however, the government will be held vicariously liable for the actions of the police officer: because the arrest and prosecution were carried out within the scope of officer's authority and employment of government. On this point see what the Court of Appeal said in the case of **NYAGA vs. SILAS MUCHEKE – COURT OF APPEAL AT NYERI C.A. NO. 59 OF 1987** (unreported) that:

***“...the Respondent's case as it appears in the plaint was that he claimed damages for false arrest, malicious prosecution and false imprisonment. He did not join the police in the suit although it was clear that the acts complained of were in fact committed by the police. The Appellant had made a complaint or the report to the police and nothing more. What followed had nothing to do with him. The decision to arrest the Respondent was made by the police who must have found some merit in the report. They decided to detain, to charge and to prosecute the Respondent. The mere fact that the prosecution aborted for failure of the prosecution witness including the Appellant to attend the hearing is not there or there. It was the responsibility of the police to bond possible prosecution witness including the Appellant. They did not do that but instead the prosecutor told the court that he had no witness to call instead of applying for an adjournment to try and secure these witnesses. The blame for the abortive prosecution was squarely on the police but not the appellant. The Respondent's suit was a non-starter for failure to join the police who were the main actors on the stage as far as the Respondent's claim was concerned. It is trite law that false arrest and false imprisonment may very well be founded where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution is in favour of the accused. The police investigated the complaint and arrested the Respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the Respondent himself or that the report was false. Police action cannot be attributed to the Respondent who had no authority over them. There was no evidence to suggest that the arrest and prosecution of the Respondent was brought without reasonable or probable cause.”***

On the basis of the above, there is no misjoinder of the 2<sup>nd</sup> Appellant especially because the acts complained of were alleged to have been committed by the 2<sup>nd</sup> Appellant. These arguments emerged in the submissions and there is no specific ground of appeal on that point. Nonetheless, nothing turns on the arguments and I reject them.

**Leave to file suit out of time**

12. The other ground of appeal which bears preliminary importance is that the leave to file suit out of time cannot be challenged on appeal if it was not challenged at the trial. In law the defence of limitation of action is a matter for trial: therefore, any *ex parte* leave to file suit out of time will be challenged in the trial- a procedure that departs from the general rule that a party against whom an *ex parte* order has been made should apply to the court which made it to set the order aside. Thus, the law on pleadings as encapsulated in Order 2 Rule 4 of the Civil Procedure Rules is that, the party wishing to rely on limitation as a defence must plead it specifically in any subsequent pleading to the plaint. He may or may not do so for any or no reason. Therefore, the plaintiff is in law entitled to wait to hear from the defendant whether limitation is taken up as a defence. And if it is so taken, it is upto the plaintiff to bring his case within any of the exceptions provided in the relevant statute of limitation. This position of the law is replete with judicial decisions which I do not wish to multiply but you may consider reading: (1) **OUTA vs. SAMUEL MOSENYAMATO [1984] KLR 990**; (2) **TRANSWORLD SAFARIS KENYA LTD vs. SOMAKTRAVEL LTD [1997] EKLR**; (3) **MBITHI vs. MUNICIPAL COUNCIL OF MOMBASA AND ANOTHER [1990-1994] EA**; and (4) **DISECON LTD vs. SHRINMKHANA S. SAMANI CIVIL APPEAL NO. 142 OF 1997**. The question now becomes: Was the defence of limitation taken up by 2<sup>nd</sup> and 3<sup>rd</sup> Appellants in the primary suit? The record will provide the answer.

13. Paragraph 9 (b) of the defence read as follows:-

***(a) That the suit is time barred by virtue of the public authorities Limitations of Actions Act Cap. 39 Laws of Kenya. The alleged leave is unknown to the defendant.***

The Respondent did not file a reply to defence especially on the defence of limitations. But he produced as exhibit P2 the order extending time to file suit which had been issued in Meru CM Misc. No. 41 of 2008. Surprisingly, the extension of time was not challenged during cross-examination by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant's counsel. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellant merely made a terse statement in their submission on the question of limitation in the following manner:

***“Necessarily the evidence tendered shows that the suit was time barred and even if leave was granted, the same was outside the ambit of CAP 39 Laws of Kenya.”***

I have not seen the evidence alluded to by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. The Respondent also submitted briefly on the limitation and referred to the order of extension which had been produced as exhibit. In these circumstances, limitation of action was not seriously contested by the appellants in the trial court. Similarly, in such situation and on the evidence on record, I do not find anything tangible which would make the court overturn the leave granted to file the suit out of time. The suit was properly filed and was not time barred. It was therefore proper for the trial court to have treated the suit as proper. But before I close on this subject, I am minded to say something about the applicable laws on extension of periods of limitation in this case. The relevant statutes of limitation are Public Authorities Limitations of Actions Act and Limitation of Action Act, Cap 39 and 22, respectively. Section 3 (1) of the CAP 39 relates to *limitation of proceedings founded on tort* like the current proceedings, which the law states must be brought within twelve months from the time the cause of action accrued. But under Section 5 of Cap 39, the limitation period prescribed in section 3(1) thereof may be extended in case the plaintiff is under disability on the date when the right of action accrues. Notably, Section 6 of Cap 39 refers to Section 27 of the Limitations of Actions Act in relation to matters of tort under S. 3 (1) of Cap. 39. By dint of Section 6 of Cap 39, except Section 22 and 42 Part III of Cap. 22 on extension of periods of limitation apply to Cap 39. I do not therefore accede to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant's arguments that extension of period of limitation is unknown to the Cap. 39. The arguments being raised now that the learned trial magistrate overlooked the provisions of Section 5 of Cap. 39 on extension of time may not assist in this appeal. As I stated earlier, the ground on limitation of time fails. I reject it.

**Threshold for Malicious prosecution**

14. Prosecution of an offender is a constitutional mandate. Therefore, prosecution of a person alleged to have committed an offence is not per se an infringement of any right. However, not all prosecutions are bone fide: there are those which are malicious or instituted for collateral advantage. Therefore, any prosecution which amounts to abuse of the process of the court by wrongfully setting the law in motion on a criminal charge is malicious and is actionable as a tort. But the person claiming damages for malicious prosecution has to prove all the following elements, to wit, that:

- (i) The appellant instituted the prosecution.***
- (ii) The prosecution terminated in his favour***
- (iii) The prosecution was initiated without reasonable and probable cause; and***
- (iv) The prosecution was actuated by malice or carried on maliciously.***

On these thresholds, see Conran, J in the case of **MURUNGA vs. ATTORNEY GENERAL (1979) KLR, 138**; and the decision of the Court of Appeal for Eastern Africa in the case of **MBOWA vs. EAST MENGO DISTRICT ADMINISTRATION [1972] EA 352**. I will apply this test in my re-evaluation of the facts of this case and determine whether the Respondent proved his case on a balance of probability.

#### **There was a prosecution**

15. I will not spend much time on the first element. Doubtless there was a prosecution against the Respondent in Meru Criminal Case no. 32 of 2002. The prosecution was as a result of the report made to the 2<sup>nd</sup> Appellant, who was the officer in charge of investigations and preferred charges against the Respondent. That element is satisfied and I move on to the other one.

#### **Prosecution terminated in favour of Respondent**

16. Again without much ado, and the evidence produced will support this; the prosecution terminated in favour of the Respondent when the trial court found that the Respondent had no case to answer. The second requirement has been met too. The major elements remaining for my determination are; (1) whether the prosecution was initiated without probable and reasonable; and (2) therefore malicious.

#### **Reasonable and probable cause**

17. This element is the linchpin of the tort of malicious prosecution. In a tort for malicious prosecution,

***“...reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonable lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime...”***

***“See Halsbury’s Laws of England, 4<sup>th</sup> Edition - Reissue, Vol. 45 (2).***

This test recognizes two important constitutional realities; (1) the innocence of the accused until proven guilty; and (2) the constitutional mandate of government to arrest and prosecute offenders. To balance these two realities, it is imperative that the belief in the guilty of the subject should be founded upon a decision made after due inquiry into and consideration of the facts presented to the police. But the reasonable belief need not be based on actual existence of a definite cause but upon reasonable belief held in good faith in the existence of facts as are perceived by and laid before the police officer. It is not therefore a requirement that the police officer or prosecution

should test each and every possible relevant fact before taking action to prosecute. I will therefore be asking myself whether the impression produced by the facts before the police officer and prosecution would for a discreet and reasonable man justify a prosecution.

18. From the record, there is no doubt that the Respondent was arrested by the 2<sup>nd</sup> Appellant following a report by the 1<sup>st</sup> Appellant and others. He was arrested upon that report and later charged with the murder of Daniel Mutemi Garcu in Meru High Court criminal Case No 32 of 2003. Again, it is not in dispute that he was acquitted under Section 306 of the Criminal Procedure Code after the court found that he had no case or answer. At the time of acquittal he had been in custody for about three years. The Respondent testified that the 2<sup>nd</sup> Appellant did not investigate the complaint before charging him in Court. According to his evidence, following the killing of his brother, the 1<sup>st</sup> Appellant told him that they should go to the police station and report the death of his brother. He obliged. But upon making the report, Inspector Erastus Gichuki, the 2<sup>nd</sup> Appellant, immediately arrested the Respondent without asking him anything. He stated that he was later charged in court but after 3 years he was acquitted. His evidence was that the 1<sup>st</sup> Appellant had a grudge with the Respondent's father due to a land dispute between them. The said grudge actuated the 1<sup>st</sup> Appellant to make the allegations of murder against the Respondent. He accused the 2<sup>nd</sup> Appellant for acting on the malicious allegations by the 1<sup>st</sup> Appellant without proper investigations. That is the evidence as was captured by the trial magistrate.

19. I have looked at the record which includes the evidence of DW1 which had been produced by consent of the parties in Meru CMCC NO 505 OF 2005 and also the proceedings in the criminal case. The evidence of DW1 related to the allegations that the 2<sup>nd</sup> Appellant did not carry out any investigation in the matter before charging the Respondent with the murder of Daniel Mutemi. The evidence was crucial as it provides a direct link between the civil case before the court and the proceedings in the criminal trial on which the trial magistrate relied heavily in his decision. But, for no apparent reason the trial magistrate simply rehashed the evidence of DW1 without paying any attention or making any reference to it in his analysis of the evidence adduced before him. I will revisit this issue later. Meanwhile, the record shows that the 2<sup>nd</sup> Appellant testified in the murder proceedings as PW7 and he narrated all the steps he took in his investigations and the sources of his information. He stated how the father of the deceased one Ruka Mugao came to the station with two other people who are brothers. They were accompanied by three sons of Mr. Muthungu and Mr. Muthugu's wife. The other accused were also in the group. He stated that the deceased's father narrated all he knew about the death of his son and at the centre of things was a land dispute in which the Respondent was one of the disputants. He talked of blood under the bed of the 1<sup>st</sup> accused person which he said he confirmed was present. The 2<sup>nd</sup> Appellant recorded witness statements for all the witnesses who testified in the criminal trial but it seems some witnesses recanted their earlier testimonies. There were confessions which the 2<sup>nd</sup> Appellant had recorded from the accused persons including the Respondent especially on the alleged disposal of the body of the deceased into the river. But again the confessions were discarded because the law on confessions had been amended and did not support production of the confessions. The court (Sitati J) observed all these matters. DW1 also clearly stated the kind of investigations that the 2<sup>nd</sup> Appellant carried out in the matter and set out all the relevant steps the 2<sup>nd</sup> Appellant took. His view was that the police investigated the matter properly and that they did not concoct the murder charge against the Respondent as it was being claimed. With the above, and after considering the entire circumstances of the case and the material before court, it is not true that the 2<sup>nd</sup> Appellant did not conduct any investigations. It is not also true that the Respondent did not know what he was being charged with. Even if investigations may have been shoddy, it does not mean that the 2<sup>nd</sup> Appellant did not carry out any investigations on the murder as alleged by the Respondent. I will discuss the later aspect later. I have also considered the kind of facts and evidence which was before the 2<sup>nd</sup> Appellant, the police officer and the prosecution, and on the basis of those facts, it cannot be said that a prosecution was not justified. A discreet and reasonable man would have instituted a prosecution in the circumstances of this case. I said earlier and I now repeat that; it is not required of any prosecutor that he must test each and every possible relevant fact before he

makes a decision to prosecute; his duty is only to ascertain reasonable and probable cause for prosecution based on honest belief in the existence of facts before him and that they justify a prosecution, or may prove the guilt of the accused. I should state also that it is probable and reasonable cause to prefer a charge on *prima facie* evidence as long as the evidence would produce an impression to a cautious and reasonable man to prosecute. And given the circumstances of this case, absence of corroboration of an accomplice statement or recanting of evidence by witnesses or inadmissibility of confessions should not be taken to mean want of probable and reasonable cause for purposes of a claim for malicious prosecution.

### **Want of reasonable and probable cause to prosecute**

20. I promised to revisit the question of investigations carried out by the 2<sup>nd</sup> Appellant. It may be that the 2<sup>nd</sup> Appellant carried out shoddy or sketch investigations on this matter; but that failure will only entitle the accused to an acquittal. It may not necessarily result into want of probable and reasonable cause to prosecute on which a claim of malicious prosecution could be founded. This court (Sitati J) in her ruling stated:

***“The conclusion I have reached is that the case was either not properly investigated or the witness deliberately refused to tell the truth as was the case with PW3. My sixth sense tells me that the accused persons may very well have killed the deceased for the reasons given by PW7, but this is mere sixth sense feeling which has neither legal or factual basis.”***

I, therefore, find and hold that the Respondent did not prove on a balance of probabilities that the prosecution against the Respondent was instituted without probable and reasonable cause. Therefore, the trial magistrate erred in finding the contrary which was clearly against the import of the evidence before him.

### **Necessity of malice**

21. Despite the above finding, inference of malice by the trial magistrate is subject of contestation. Accordingly, I still have to answer whether the prosecution instituted was actuated by malice; either by spite or ill-will or improper motives or other purpose other than of bringing the Respondent to justice? I am aware that where malice is proved but not want of probable and reasonable cause, the claim for malicious prosecution will still fail. I am also alive to the law that malice may be inferred from want of probable and reasonable cause but not vice versa. In this case I have found that there was probable and reasonable cause to prosecute. I similarly know that shoddy or inadequate investigations due to incompetence or negligence on the part of a police officer does not in itself translate into an automatic inference of malice on the prosecution. See the case of **THACKER vs. CROWN PROSECUTION SERVICE (1997) Times, 29, December,** and **ELGUZOULI-DAJ vs. METROPOLITAN POLICE COMR [1995] QB 335, [1995] 3 All ER 1074, CA.** Looking at the circumstances of this case, I do not think the 2<sup>nd</sup> Appellant and the prosecution could be said to have brought the charges against the Respondent for any other reasons other than of bringing the Respondent to justice. There is absolutely no malice shown to have existed on the part of the 2<sup>nd</sup> Appellant and the prosecution. Thus, the trial magistrate erred in making an abrupt inference of malice simply because the Respondent was not placed on his defence without intense consideration of the entire evidence before him.

22. And was there any damage suffered? I have found that the Respondent did not prove the claim for malicious prosecution against the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. Injury for which a remedy would lie in form of an award for general damages is in the tort of malicious prosecution. Where malicious prosecution is not proved there is no actionable cause of action for which damages will be awarded. Accordingly the trial magistrate erred in making an award for damages. The Respondent was not entitled to any award of damages for malicious prosecution. He did not prove his case on balance of probabilities.

23. The upshot is that I allow this appeal in its entirety and set aside the judgment of the trial Court in so far as it relates to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. Each party shall bear its own costs in the primary suit as well as this appeal.

**Dated, Signed and delivered in open court at Meru this 9<sup>th</sup> day of June, 2016.**

**F. GIKONYO**

**JUDGE**

**In the presence of:**

M/s. Njenga advocate for the respondent.

Mr. Kiongo advocate for appellants

**F. GIKONYO**

**JUDGE**