



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 597 OF 2015

JOSEPH MUINDE MUTUKU APPLICANT

VERSUS

DIANA RACHAEL KAVEDZA1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

NAIROBI CITY COUNTY3RD RESPONDENT

RULING

The applicant filed this Originating Summons for orders that leave be granted to file suit out of time. The grounds relied upon are set out on the face of the application and there is also a supporting affidavit sworn by the applicant.

The learned counsel for the applicant has filed written submissions and cited some authorities to assist the court in arriving at a just decision. The cause of action is based on the actions blamed on the 1st respondent who is said to have given false and misleading information or report to the 2nd and 3rd respondents resulting in criminal proceedings against the applicant.

Those proceedings ended with the acquittal of the applicant on 15th November, 2012. It is the applicant's case that the proceedings were malicious and blamed all the three respondents herein. A cause of action based on malicious prosecution crystallizes when the criminal proceedings come to an end in favour of an applicant. See **Mbowa Vs. East Mengo District Administration (1972) EA 352**. In that case, the court stated as follows,

“.....the law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge.... His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and then he had the right to bring this action for damages.....Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time “.

The 2nd and 3rd respondents fall within the protection afforded by Section 3 (1) of the Public Authorities Liability Limitations Act which provides that, no proceedings founded on tort shall be brought against the Government or a Local Authority after the end of 12 months from the date on which the cause of action accrued.

The applicant contends that his cause of action is founded on violation of his fundamental rights as

enshrined in Article 23 of the Constitution. He cited the case of **Otieno Mak' Onyango Vs. Attorney General and Another [2012] eKLR** in which the court agreed with the case of Wachira Vs Attorney General Misc Civil Case No. 1184 of 2003 (OS) and stated as follows,

“.....there is no limitation period for seeking redress for violation of fundamental rights and freedoms of the individual, under the Constitution of Kenya. Indeed, Section 3 of the Constitution provides that the Constitution shall have the force of law throughout Kenya, and if any other law is inconsistent with the Constitution, the Constitution shall prevail. In our view, the provisions of the Public Authorities Limitation Act limiting the period of initiating action against public authorities is inconsistent with the Constitution, to the extent that it limits a party's rights to seek redress for contravention of his fundamental rights. The Public Authorities Limitations Act cannot override the Constitution and it cannot therefore be used to curtail rights provided under the Constitution. We therefore find and hold that the plaintiff's claim arising from violation of his Constitution right is not statute barred”.

In the case of **Albert Ruturi and Others Vs the Minister for Finance and another HC MSC. Application No. 980 OF 2001** also cited by the applicant, the court stated as follows,

“We must be goal - oriented ie vigilantly uphold the Constitution of Kenya, and do justice according to the law in the context of our socio-cultural, environment and avoid paying undue attention to abstract technical strictures and procedural snares merely for the sake of technicalities which may have the effect of restricting access to justice which is itself a Constitution right which cannot be abrogated or abridged by trazon or subtle schemes or maneuvers “

I have considered the material before me, the submissions and cited authorities. I am persuaded that, notwithstanding the period that has gone by from the time when the cause of action accrued, the applicant should be granted leave to file his suit against the respondents. No prejudice may result to the respondents if that leave is granted while if it is denied injustice will be visited upon the applicant.

The applicant shall file his suit within 21 days from today. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 8th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE