



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.10 OF 2016

BETWEEN

JACKSON ODHIAMBO SUMBA APPELLANT

AND

ENOCK ONYANGO OSANO.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT

(Being an appeal from the Ruling and Orders of the RM's Court Homa Bay in

Civil Suit No.80 of 2012 – N. Kariuki, RM dated 26th February, 2016)

JUDGMENT

1. **JACKSON ODHIAMBO SUMBA** (the Appellant) has filed this appeal against **ENOCK ONYANGO OSANO** (the 1st Respondent) and the **HON. ATTORNEY GENERAL** (the 2nd Respondent).
2. The plaintiff had sought judgment against the respondents jointly and severally for:-
 - a) *Kshs.40,000/= as special damages.*
 - b) *General damages on account of malicious prosecution and forcible detainer.*
 - c) *Interest on (a) and (b) at 16% interest and costs of the suit.*
3. The basis for the claim was that on 17th February 2009, the appellant was arrested and detained in police custody at Mbita police station on allegations of forcible detainer of a parcel of land ostensibly belonging to the 1st Respondent.
4. He contends that the allegations were baseless and malicious and the 1st Respondent's intention was to have him maliciously prosecuted.
5. The particulars of malice were that the 1st Respondent lied that the appellant had unlawfully entered into his parcel of land NO. LAMBWE EAST/1318 without any colour of right and built a semi-permanent house thereon.

6. He accused the 2nd Respondent of acting maliciously by arresting him and preferring charges against him at the Homa Bay Law Courts, without ascertaining the truth. As a result he claimed to have suffered loss and damage comprising paying Kshs.40,000/= so as to engage the services of an advocate to represent him at the Criminal trial. The 1st Respondent admitted reporting to police that 1st appellant had entered his parcel of land but denied that he instituted, continued or carried on the criminal prosecution or proceedings referred to, saying the arrest was effected by police after proper investigations had been conducted. He defended his action saying it was done bona fides and in discharge of his public duty to prevent one from entering the disputed land before taking legal steps to confirm the property rights. In doing so he was exercising his constitutional rights and had reasonable and probable cause because the survey map showed that the land belonged to him and his brothers.

7. The appellant had erected his house on that portion, and refused to vacate. The 1st respondent also contended that although the appellant was acquitted of the criminal charges, there was no malice in the action he had taken.

8. The 2nd respondent also denied that the appellant's arrest and prosecution were instigated by malicious intent, saying that their action was based on a report honestly made to him.

9. Upon hearing the evidence presented, the trial court found that the 1st respondent had probable cause to make a complaint to police regarding the infraction of his land. She observed that in so doing, the 1st respondent was enforcing his rights to the land, and police were under an obligation to investigate.

10. She held that the police had probable cause to charge the appellant on the basis of the evidence. 1st respondent said that he owned the property on which the complaint was based. She thus concluded that the appellant could not rely on the fact that he was acquitted of the criminal charges, to allege that the respondents acted maliciously; and so his claim was dismissed.

11. In appealing against the decision, the appellant stated that the trial magistrate ignored evidence which was favourable to him and treated the same in a superficial manner. He also claimed that the trial magistrate acted on a wrong principle in arriving at her conclusions and the entire decision was unfair and unjust.

12. At the trial the appellant told the court that he'd travelled from Mombasa to his home in Lambwe to witness the destruction that had taken place on his land parcel **NO. LAMBWE/EAST/1381**. 1st Respondent had damaged his house. However, when he got to the scene, police (who were in the company of the 1st respondent) arrested him and took him to Mbita police station where he was detained, and subsequently charged in court.

13. Eventually, during the trial, the court visited the disputed land accompanied by a surveyor and it was conceded that the land belonged to the appellant. The appellant lamented that the respondent should have engaged services of a surveyor to clarify the 1st respondent's claims before taking adverse action against him. He stated:-

“If it had been investigated, I would not have been charged and gone through the suffering I went through.”

14. It was his contention that police were simply acting on hearsay.

15. The defence did not present any evidence.

16. The appeal was canvassed by way of written submissions. There was no dispute that the appellant was arrested subsequent to a report made against him by the 1st respondent who claimed that he had allegedly constructed a house on his land.

17. Appellant's counsel submitted that the respondents failed to even present adequate evidence to justify a conviction that there was reasonable and probable cause in their actions.

18. It was also pointed out that in the criminal trial, the 1st respondent could not produce any documentary evidence to support his claim about a sale agreement between their grandfathers over the land.

19. Counsel argued that the trial court failed to appreciate that the appellant was being prosecuted for building on his family's land, which did not form part of the land owned by the 1st respondent.

20. The 1st respondent's counsel submitted that there was no proof of the Kshs.40,000/= claimed as legal fee paid in the criminal prosecution because the appellant did not produce any receipt.

21. As regards the issue of malicious prosecution, counsel submitted that there was no document presented by the appellant to show that he owned the parcel in dispute, and the only document produced showed that the parcel belonged to the respondents.

22. I have considered submissions by both counsel –certainly the mere fact that one is acquitted in a criminal trial following a complaint made by an individual, does not in itself prove that the complaint was made maliciously, or that the arrest and subsequent prosecution were propelled by malicious intentions. Indeed the decision in **NZOIA SUGAR COMPANY LTD –VS- FUNGUTUTI [1988] KLR 399** set out the position clearly that:-

“Acquittal per se in a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spelt or ill-will must be proved against the prosecutor ...”

23. In a claim of malicious prosecution, the mental element of ill-will must be adequately established. The standard of proof was spelt out in **MURUNGA –VS- REPUBLIC (1979) KLR 138** as placing a burden on the plaintiff to show that:-

a) Prosecution was at the instance of the defendant.

b) The criminal case was terminated in his favour.

c) The defendant had no reasonable or probable cause to prosecute him.

d) The prosecution was actuated by malice.

24. From what was presented at the criminal trial and made available to court, the trial magistrate was persuaded that there was reasonable and probable cause for the report, arrest and prosecution.

25. The case of **HICKS –VS- FAWKNER (1878) 8 QBD 167 at page 171** defined reasonable and probable cause as:-

“... an honest belief in the guilt of the accused based upon a full connection, founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

26. Indeed as submitted by respondent's counsel, this definition was adopted by RUDD J, in **KAGANE –VS- ATTORNEY GENERAL & ANOTHER (1969) E.A 643** that:-

“... to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material

consisted of the facts discovered by the prosecutor, or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.”

27. From the criminal proceedings in the lower court, the 1st respondent, relying on a map he had plus a title document, honestly believed that the disputed parcel was his when he realized that the appellant had constructed therein – he did what is legally recognized – he made a report to police. I don't think the mental element of ill will was established against the 1st respondent.

28. The police acting on the complaint and documents which the 1st respondent had, found there was reason to charge him. Perhaps if they had been more diligent and asked the parties to get a survey to establish the boundary lines, things would have been different. However lack of diligence does not translate to malicious intent.

29. It is significant that even during the hearing of the civil suit, the appellant did not produce a title document nor did he say that upon arrest he produced a title document showing that he was the owner of the land but police and 1st respondent rejected it. Infact the act of getting the surveyor to establish the boundary lines came after the fact – initiated by the court.

30. So yes, the prosecution was at the instance of the respondents and the criminal prosecution was terminated in the appellant's favour **BUT** there was evidence to show that the respondents had reasonable and probable cause for doing so. Further the appellant has not established that the prosecution was actuated by malice in the part of the respondent. I therefore find that the trial magistrate properly examined and analysed the evidence and arrived at a sound conclusion by dismissing the suit.

31. I hold that the appeal has no merit and is dismissed with costs.

Delivered and dated this 22nd day of **September, 2016** at Homa Bay.

H.A. OMONDI

JUDGE.