



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL SUIT NO. 17 OF 2013

GEOFFREY MURIUKI MURAGE PLAINTIFF

VERSUS

KIRINYAGA DISTRICT FARMERS SACCO..... 1ST DEFENDANT

THE HON. THE ATTORNEY GENERAL 2ND DEFENDANT

(Appeal from the judgment in Criminal Case Number 72 of 2002 in the Senior Resident Magistrate's Court at Kerugoya – HON. J.N. ONYIEGO (SRM))

RULING

1. The second defendant herein through litigation counsel filed a Preliminary Objection on the suit herein on the following grounds:-

- i. *That the plaintiff's suit offends mandatory provisions of Section 3(1) of the Public Authorities Act (Cap 39) Laws of Kenya and as such the suit is a non-starter incurably bad in law and an abuse of the Court process*
- ii. *That the 2nd defendant will be highly prejudiced unless this Preliminary Objection is determined in the first instance.*

The 2nd defendant is on the above ground seeking to have the plaintiff's suit struck out with costs.

2. The suit before Court is seeking the following reliefs:-

a. *A declaration that*

- i. *The plaintiff's right not to be held in custody for more than 24 hours as set out under Section 72(3) of the former Constitution of Kenya was violated*
- ii. *The right to be presumed innocent under the Constitution of Kenya was violated.*

- b. *General damages for false imprisonment and malicious prosecution*
- c. *General damages for violation of the plaintiff's Constitution rights*
- d. *Costs of the suit.*

3. The plaintiff's basis for the reliefs as per the plaint filed indicates that he was arrested sometime in January 2002 and charged in Court for:-

- i. *Conspiracy to defraud*

- ii. ***Forgery contrary to Section 349 of Penal Code***
- iii. ***Stealing by servant***
- iv. ***Stealing by clerk.***

After trial, he was convicted. However, he successfully appealed against conviction and the same was set aside on 6th May 2010 vide Embu Criminal Appeal No. 161 of 2007. As a result of the criminal proceedings, the plaintiff felt that his Constitutional rights under **Section 72(3)** were violated and sought the above reliefs both for:-

- i. ***False imprisonment and malicious prosecution***
- ii. ***Violation of plaintiff's Constitutional rights.***

4. The 2nd defendant's Preliminary Objection to the plaintiff's suit was mainly against the reliefs sought by the plaintiff for false imprisonment and malicious prosecution. Mr. Makori appearing for the 2nd defendant contended that the claim was time barred quoting the provisions of **Section 3(1) Public Authorities Limitations Act** which provides that tortious claim against the Government must be brought within 12 (twelve) months from the date the cause of action occurred. To buttress this legal position, Mr. Makori cited the following authorities:-

- 1. ***CHARLES WANDUTO KIHORO VS NATIONAL BANK OF KENYA & ANOR. (2004) e K.L.R***
- 2. ***DANIEL KARUGI MAINA VS HON. ATTORNEY GENERAL (2013) e K.L.R***
- 3. ***MANFRED WALTER SCHMITT & ANOR. VS ATTORNEY GENERAL & 3 OTHERS (2014) e K.L.R at paragraph 15 & 16***
- 4. ***NJAU KABUE NJAU & 3 OTHERS VS SAMUEL NGUGI WAITITU & 4 OTHERS (2014) e K.L.R at paragraph 15.***

Mr. Makori argued that the plaintiff's suit was filed on 18th May 2011 when the cause of action had already dissipated. He argued that by dint of provision of the law cited and the authorities above, the suit against the State was statute barred on 6th May 2011.

5. Mr. Makori further contended that the plaintiff's suit is not a Constitutional petition and the prayers based on violation of the Constitution are misplaced and relied on the case of **MANFRED WALTER SCHMITT & ANOR. VS ATTORNEY GENERAL** (supra).

6. The 2nd defendant further argued that in view of the fact that the claim based on malicious prosecution is bad in law, the reliefs cannot be severed as argued by the plaintiff arguing that when one relief is unsustainable, the rest should follow suit and be struck out as well as the reliefs cannot be severed. He relied on the case of **NJAU KABUE NJAU & 3 OTHERS VS SAMUEL NGUGI WAITITU & 4 OTHERS (2014) e K.L.R** at paragraph 15 to support the position.

7. The plaintiff through Mr. Magee Advocate opposed the objection. In his view, the plaintiff's claim is not based on tort and pointed out that paragraphs 1 to 6 of the plaint set out the facts of the claim which according to him indicates that the plaintiff's claim is based on violation of his Constitutional rights. The plaintiff's contention is that the old and the new Constitution places no limit on time when an action can be brought for violation of rights. To support his arguments, he relied on the following authorities:-

- a. ***DAVID GITAU NJAU & 9 OTHERS VS ATTORNEY GENERAL (2013) e K.L.R paragraph 43.***
- b. ***ZOAN AKINYI KABASELLEH & 2 OTHERS VS ATTORNEY GENERAL (2014) e K.L.R at paragraph 24.***
- c. ***MWANGI STEPHEN MUREITHI VS DANIEL TOROITICH ARAP MOI (2011) e K.L.R page 18.***

8. Mr. Magee urged this Court to strike out prayer 'b' of the reliefs sought if I was to find that the same is indeed a tortious claim but spare the rest of the claim intact for determination at the trial.

9. I have considered the submissions ably made by the 2nd defence counsel and the plaintiff's counsel. I have looked at the pleadings before me and I will be as brief as possible in determining this Preliminary Objection for reasons that will clearly come out towards the end of this ruling. It is clear from what is pleaded in the plaint that the plaintiff's claim is based on:-

- a. ***False imprisonment and malicious prosecution for which the defendant now seeks general damages as per prayer 'b' of the reliefs sought***
- b. ***Violation of his Constitutional rights for which he is seeking a declaration under prayer 'a' and general damages under prayer 'c' in the plaint.***

10. The plaintiff's alleges in the plaint that he was arrested, charged sometime in January 2002. Although he does not say when he was convicted, he states that his conviction was quashed on 6th May 2010 and his sentence was set aside. A look at the facts set out under paragraph 4 of the plaint clearly shows that the plaintiff's part of the claim is based on tort of malicious prosecution and it shows that the same cause did accrue to the plaintiff on 6th May 2010. The law cited by the 2nd defendant is clear. **Section 3(1) of Public Authority Limitations Act Cap 39** reads as follows:-

“No proceedings founded on tort shall be brought against the Government or a Local Authority after the end of twelve months from the date on which the cause of action occurred”

In light of the above provisions, the plaintiff ought to have brought this claim on or before 5th May 2011. By filing this suit on the 18th August 2011, the plaintiff's tortious claim was time barred by operations of the above statute. I have gone through the authorities cited and the parties appear to agree at least on this position of law and that is why Mr. Magee urged me to spare the other relief which is not time bound in his view. Mr. Makori has however urged me to strike out the entire suit as in his view, the reliefs sought cannot be severed.

11. This Court has considered the authorities cited by both counsels. I have also looked at the following authorities:-

- I. ***KINYATTI VS ATTORNEY GENERAL (1988) e K.L.R***
- II. ***STEPHEN OGAMBA & 2 OTHERS VS ATTORNEY GENERAL & 2 OTHERS CIVIL APPEAL NO. 243 of 2003 at NAIROBI.***

The above Court of Appeal decisions are in tandem with the decisions cited by both the 2nd defendant herein and even the plaintiff. A claim on tort cannot be instituted against the State officer after 12 months. In KINYATTI case, the Court observed inter alia as follows:-

“---- the learned trial Judge was clearly right in holding that the plaint filed in Court on 3rd April 1988 was filed when the cause of action was statute barred by Section 3(1) of the Public Authorities Limitation Act having been commenced more than 12 months after the cause of action arose”

It is therefore obvious that the plaintiff's claim based on malicious prosecution cannot be sustained in law and must be struck out.

12. I do agree with the plaintiff's counsel in the light of the authorities cited that his claim based on violation of Constitutional right is not limited by any statute or the Constitution itself. This Court has been called upon by the 2nd defendant not to sever reliefs but to treat them as one claim, have them face the same fate. A look at the facts under paragraph 7 of the plaint clearly shows that the claim on violation of Constitutional right of the plaintiff is separate and distinct. The claim in my view can stand on its own and I am not persuaded that the same should not be severed from the bad claim as decided in the case of **NJAU KABUE NJAU & 3 OTHERS** (supra) cited by the

2nd defendant. This suit in my view is distinct and different from the case of **NJAU KABUE NJAU** where the reliefs sought were so intricately interwoven involving several defendants that it was practically not possible to strike out one relief and leave out the others. The claim also involved several defendants against whom the causes of action had. In my considered view that were the reasons underpinning the decision of the Court to strike out the entire suit. That basis do not obtain in this present suit. The 2nd defendant has of course correctly faulted the plaintiff's option to seek redress from this Court through a plaint rather than a Constitutional petition.

13. This Court is however minded to determine matters on substance rather than form or procedural technicalities in line with the Constitutional demands under **Article 159(d) of the Constitution**. I have looked at the Constitution of Kenya (**Protection of Rights and Fundamental Freedoms**) **Practice and Procedure Rules 2013** contained in Legal Notice No. 117 of 28th June 2013 and it is true that a person seeking to enforce Constitutional right or a person claiming contravention of his rights of his fundamental freedoms is required to file a petition to this Court. However, the requirement is not mandatory as the operative word used is "**may**" which denotes that a party may choose to file a Constitutional petition or a plaint and this Court has jurisdiction to determine the same based on the evidence tendered. The spirit of the current Constitution really is to sustain causes in Court and determine them on merit and so unless there is a clear violation of the law like the tortuous claim brought herein, Courts of law will normally look at the substance rather than the form of the claim. It is on this basis that I decline to strike out the entire suit herein.

In sum from the foregoing, the Preliminary Objection raised by the 2nd defendant is partly sustained to the extent that the plaintiff's claim on malicious prosecution (prayer b) is strike out with costs. The remaining reliefs/claim shall be determined after the full trial of the case. This ruling will also apply in Kerugoya HCCC No. 18 and 32 of 2013 in view of the consolidation of the 3 cases.

It is so ordered.

R.K. LIMO

JUDGE

18/5/2015

18/5/2015

Before

Hon. Justice R. Limo

CC – Willy

Wangechi for 1st Defendant

Abubakar for Plaintiff

Mwangi holding brief for Makori for Attorney General.

COURT: Ruling signed, dated and delivered in open Court in the presence of Abubakar for Plaintiff

Mwangi holding brief for Makori for 2nd Defendant

Wangechi for 1st Defendant.

R.K. LIMO

JUDGE

18/5/2015

WANGECHI

I pray for certified copy of the ruling.

ABUBAKAR

We also pray for the same.

COURT

Application allowed. Parties to be supplied with certified copy of the ruling upon payment of the requisite Court charges.

R.K. LIMO

JUDGE

18/5/2015