



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NUMBER 1959 OF 2000**

**MURIITHI WANJAU..... PLAINTIFF**

**VERSUS**

**ANN WAIRIMU. .... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL. .... 2<sup>ND</sup> DEFENDANT**

**CHARLES OUMA. .... 3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

In his plaint dated 24/11/2000 the Plaintiff sought: -

- a. Special damages in the sum of Ksh.435,000/-
- b. General damages
- c. Exemplary and punitive damages
- d. Interests and costs.

The facts leading to the suit were that the 1<sup>st</sup> Defendant, Ann Wairimu and a Mr. Peter Kiarie Kamau, approached the Plaintiff, an advocate of the High Court in private practice in Nairobi and instructed him to act for them in a land sale transaction concerning L. R. No. Nairobi/Block 110/135. The 1<sup>st</sup> Defendant was the purchaser while the said Peter Kiarie Kamau was the vendor. They requested the Plaintiff to transfer the plot at an agreed price of Ksh.850,000/-. They agreed that the Plaintiff acts for both the buyer and seller in the transaction. The Vendor then left the Plaintiff with what appeared to be a title deed to the plot. The Plaintiff further pleaded, that he advised them to pay the purchase price through his office but because they wanted the transaction to move fast, the vendor offered vacant possession in return for the receipt of the purchase price cash of Ksh.850,000/-. That the Defendant had paid the purchase price to the vendor there and then.

It is in evidence that while the Plaintiff was left to officially transact the transfer through the relevant registration processes, the 1<sup>st</sup> Defendant, Ann Wairimu took up possession and authorized her brother to clear the plot for development.

It was the Plaintiff's case that he drew a transfer and after stamping it, and taking it for registration at Lands Office, he found and realized that the title deed the Vendor had given to him, was fake. He said that he immediately reported the fraud at Nairobi Central Police Station before informing the 1<sup>st</sup> Defendant who was, the Purchaser.

Further facts show that the 1<sup>st</sup> Defendant either went to Kamukunji Police Station or was summoned to the Police station where she wrote her statement concerning the sale transaction at the Plaintiffs office. Apparently, she also took the opportunity to complain that she had been defrauded of her money and that had the Plaintiff, as an advocate made an official search of the property and handled the transaction professionally before the money was paid to the Vendor, he would have prevented the fraud. She requested an investigation which the police carried out and the police having felt that the Plaintiff may have known or ought to have suspected the fraud before hand, he should be taken to have played some part in the fraud himself.

On the other hand, the Plaintiff's case was that the 1<sup>st</sup> Defendant maliciously and without reasonable cause, reported him to Kamukunji Police station as one of the people who had colluded with the Vendor aforesaid to defraud her of the Ksh.850,000/-. That as a result the 3<sup>rd</sup> Defendant, Charles Ouma, a police officer, arrested and detained the Plaintiff at the police station before he was released on bond/bail and that later and without any reasonable cause, maliciously prosecuted the Plaintiff. He was however, eventually acquitted of the offence, for which reason he filed this case seeking general damages for malicious prosecution on the part of the Defendants.

I have carefully considered the Plaintiff's and Defendant's evidence together with the evidence of their witnesses. It is not disputed that the 1<sup>st</sup> Defendant and a person called Peter Kiarie Kamau instructed the Plaintiff to act for them in a land sale transaction where the 1<sup>st</sup> Defendant herein paid Peter Kiarie Kamau the sum of Ksh.850,000/-. It is not in dispute also that the Plaintiff himself found that the title deed that Peter Kiarie Kamau had left with him to enable him transfer the plot, was a fake and that he reported the matter to the Nairobi Central Police Station. Thirdly, it is not in dispute that the same issue was reported to Kamukunji Police station where the 3<sup>rd</sup> defendant worked as a Police Officer.

What was disputed was whether it was the 1<sup>st</sup> Defendant who lodged a complaint at Kamukunji Police Station or it was the genuine owner of Plot No. Nairobi Block 110/135 who lodged a complaint that his land was being fraudulently sold to the 1<sup>st</sup> Defendant through the office of the Plaintiff who was an advocate.

I have perused the evidence on record. I am persuaded on the balance of probability that it was the genuine owner of the above plot and not the 1<sup>st</sup> Defendant, who lodged a complaint at Kamukunji Police Station. I also find that the 1<sup>st</sup> Defendant only went there to write a statement at the request of the Police who included the 3<sup>rd</sup> Defendant, Charles Ouma. It is not denied by the 1<sup>st</sup> Defendant however, that she gave the full story as to how the Plaintiff acted as the advocate for both the Vendor and herself, the buyer, and how the purchase price was paid after the Plaintiff drew up a sale agreement which the parties executed.

The main issue to be answered in this claim is whether the 1<sup>st</sup> Defendant maliciously reported the Plaintiff as having colluded in the clear fraudulent transaction wherein the 1<sup>st</sup> Defendant lost much money. I answer the issue is the negative. In the view of the court from the evidence on the record, the 1<sup>st</sup> Defendant only recorded her statement and the police including or through the 3<sup>rd</sup> Defendant, carried out independent investigations. The police decided that the Plaintiff did not act professionally because he allowed the purchase money to be paid to the Vendor directly without having carried an official search to confirm that the title deed given to him was genuine. The fact that the Plaintiff later presented a transfer document for registration only for it to be rejected at that late hour strengthened the police's finding that the Plaintiff may have had part to play in the fraud.

In the court's view, at that stage far the police had a reason or cause to decide to arrest, and later, criminally prosecute the Plaintiff as it did. The Prosecution in this court's view, although it ended without a conviction and in favour of the Plaintiff, who was acquitted, was neither malicious nor without a reasonable cause. As stated in **MURUNGA VS THE ATTORNEY GENERAL [1979] KLR, 138** by Cotran, J

**“... In proceedings of malicious prosecution the Plaintiff must show: -**

- i. That a prosecution was instituted by the defendant or someone for whose acts he is responsible;**
- ii. That prosecution was terminated in the Plaintiff’s favour;**
- iii. That the prosecution was instituted without reasonable and probable cause; and**
- iv. That it was actuated by malice.”**

In the instant case the prosecution was not instituted by 1<sup>st</sup> Defendant. Although instituted by the 3<sup>rd</sup> Defendant and it terminated in the Plaintiff’s favour, the prosecution as hereinabove found, was not without reasonable and probable cause. Nor was it actuated by the malice of the 3<sup>rd</sup> Defendant who after investigations, reasonably saw a probable or likely participation of fraud by the Plaintiff before he decided to arrest and prosecute him.

In so far as the 1<sup>st</sup> Defendant was concerned, I find that she only responded in writing in her statement after the owner of the plot had laid a complaint. On the other hand, I find that she was herself entitled to record her own complaint at the police station since she had a genuine claim. The evidence already collected and in the hands of the prosecution when it decided to arrest and prosecute the Plaintiff in this case, was sufficient and would have satisfied a prudent and cautious man that the Plaintiff was probably involved in the said fraud and was probably guilty of the offence they decided to charge him with. That he was later acquitted of the charge, is neither here nor there.

In the circumstances, the Plaintiff’s suit herein must fail. It is dismissed for lack of sufficient proof to persuade this court on the balance of probabilities. Costs are to the Defendants. Orders accordingly.

Dated and delivered at Nairobi this 22nd day of September, 2014.

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**D A ONYANCHA**

**JUDGE**