



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 6031 of 1991

HARUN THUNGU WAKABA.....PLAINTIFF/DECREE HOLDER

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT/JUDGMENT DEBTOR

R U L I N G

1. The Plaintiff filed suit herein on 23<sup>rd</sup> October 1991 against the Attorney-General (on behalf of the Kenya Police) claiming general damages on account of illegal arrest, illegal detention, assault, torture and malicious prosecution.
2. The Defendant filed defence and denied the Plaintiff's claims.
3. Eventually the suit went to full trial.
4. In a **judgment dated and delivered on 7<sup>th</sup> December 2009** (Ali-Aroni, J) the Plaintiff was awarded general damages of KShs 1.7 Million. He was also awarded costs of the suit. Decree issued.
5. Unsuccessful efforts to have the Defendant pay the decretal sum resulted in the Plaintiff filing **notice of motion dated 15<sup>th</sup> December 2011** in order to compel the Defendant by contempt proceedings to pay up.
6. In the meantime the Defendant had **filed chamber summons dated 22<sup>nd</sup> March 2010** and later **notice of motion dated 23<sup>rd</sup> December 2012** in which he sought two main orders –
  - (i) that the court be pleased to set aside the judgment herein dated and delivered 7<sup>th</sup> December 2009; and
  - (ii) that the court be pleased thereafter to strike out the suit herein with costs.

This ruling concerns those two applications.

7. The main point taken in the two applications is that after judgment in the present suit the Defendant discovered that the Plaintiff had “filed another suit in respect of the same cause of action being **Nairobi Misc Application No. 1411 of 2004** where he obtained judgment which was satisfied”, and that therefore the present suit was an abuse of the process of the court.

8. The Plaintiff opposed the applications by replying affidavits filed on 12<sup>th</sup> January 2012. The main

points taken are –

- (i) that the judgment in the Nairobi Misc Application No. 1411 of 2004 was given before the judgment herein; and
- (ii) that the causes of action in both suits are different.

9. The applications were canvassed by way of written submissions which I have read and considered, together with the authorities cited. I have also perused the papers concerning Nairobi Misc. No. 1411 of 2004. This case was a constitutional reference under section 84 of the then **Constitution of Kenya**. The Plaintiff alleged violation of various fundamental rights and freedoms under **sections 70, 72, 74, 77, 78, 79, 80 and 82** of that Constitution and sought various damages under **section 84(2)** of that Constitution.

10. The reference was heard together with several other similar constitutional references filed by other persons. In a **consolidated judgment dated and delivered on 21<sup>st</sup> July 2010** (Okwengu, J as she then was) the Plaintiff was awarded general damages of KShs 3 million.

11. As already seen the present suit (Nairobi HCCC No. 6031 of 1991) was based on the torts of illegal arrest, false imprisonment and malicious prosecution. The damages awarded were based on those pleaded torts. On the other hand, Nairobi HC Misc. Civil Case No. 1411 of 2004 was based on violation of fundamental rights and freedoms under the Constitution then in place, and the damages awarded were specifically for those violations.

12. It is also to be noted that judgment herein was delivered **on 7<sup>th</sup> December 2009** while judgment in Nairobi HC Misc. Civil Case No. 1411 of 2004 was delivered on **21<sup>st</sup> July 2010**. So, if any judgment were to be challenged it ought to be the latter one, which was in the latter case. There is absolutely no cause to challenge the earlier judgment which was delivered in the earlier case.

13. For the above reasons I find no merit in the two applications, and the same are dismissed with costs. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY 2013**