



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 72 OF 2011 (OS)**

**MOHAMED HATIBU DZUGWEH.....1<sup>ST</sup> PLAINTIFF**

**DANIEL TSOFWA MASHA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> DEFENDANT**

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

**RULING**

Before me, is the Plaintiff's originating Summons dated 25<sup>th</sup> February, 2011 seeking leave to be allowed to institute a suit for malicious prosecution against the Defendants out of time. It is supported by the Supporting Affidavits of Mohamed Hatibu Dzugweh and Daniel Tsofwa Masha both sworn on 25<sup>th</sup> February, 2011.

The Plaintiffs' case is that on 1<sup>st</sup> January, 2005 they were charged with trafficking and aiding in the trafficking of narcotic drugs contrary to the provisions of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994, they produced charge sheets dated 7<sup>th</sup> January, 2005 which contained five (5) counts, that the 1<sup>st</sup> Defendant instigated their arrest and prosecution, that they were acquitted on 17<sup>th</sup> November, 2005, that they had not been paid their salaries by the 1<sup>st</sup> Defendant ever since they were arrested in January 2005.

The Plaintiffs pleaded that they sought the services of Messrs V.A Nyamodi and Co. Advocates to pursue legal proceedings against the Defendants but due to the fact that they did not have funds to raise legal fees, no action was taken. That they could therefore not file the said proceedings at the time.

The 1<sup>st</sup> Defendant filed a Replying Affidavit opposing the application. In it, Crispin Nyamwaya Agata swore on 5<sup>th</sup> October, 2011 that the Plaintiffs were the Defendants employees, that they were suspended from duty on 7<sup>th</sup> November, 2005, that they were dismissed from employment on 14<sup>th</sup> June 2006 which dismissal was replaced with retirement on 16<sup>th</sup> January, 2007 and 25<sup>th</sup> October, 2007 respectively, that they were advised that on retirement the Plaintiffs could collect their dues upon production of a duly completed and endorsed pension commutation form, this they did not do. The 1<sup>st</sup>

Defendant urged the court to dismiss the application.

I have considered the Affidavits and the written submissions of Counsel. The Plaintiffs cause of action arose on 17<sup>th</sup> November, 2005. The said cause of action being in tort subsisted for three years (see Section 4(2) of the Limitation of Actions Act Cap 22) or for one (1) year as against the Attorney General by virtue of the Government Proceedings Act. The Plaintiffs filed their present application on 2<sup>nd</sup> March, 2011. That is five (5) and a half years later.

Although such an Originating Summons is supposed to be ex-parte this was opposed and I cannot therefore ignore the documents filed by the 1<sup>st</sup> Defendant in opposition.

From the foregoing, it is clear that the Plaintiff's action was statute barred as from 17<sup>th</sup> November, 2006. The application for leave was filed approximately over four (4) years later. Save for lack of fees in 2005 and 2006, the Plaintiffs have not given any explanation as to why the application was not filed between 2006 and March, 2011. They have not disclosed as to when they were able to raise fees to have to come to court at this late point in time. The Plaintiffs would have been expected to disclose to the court when and how their financial incapacity disappeared. My view is that while it may be true that they may have been hampered by financial inability, they were duty bound to disclose to the court when such inability ceased for the court to consider whether or not to exercise its discretion in their favour.

Furthermore, the Plaintiffs did not respond to the Replying Affidavit of the 1<sup>st</sup> Respondent. In the Replying Affidavit, the 1<sup>st</sup> Respondent averred that had the Plaintiffs filed the requisite pension forms and submitted the same to the 1<sup>st</sup> Respondent's they would have been paid their dues anytime after October, 2007. What was payable included salary and allowances for the period January, 2005 to October, 2007. The Plaintiffs are silent on what they did after they received the 1<sup>st</sup> Defendant's letter dated 25<sup>th</sup> October, 2007 produced as "CNA4". I think since they are seeking a discretionary remedy, it was incumbent upon them to be candid with the court and give an explanation for example whether they ever collected their said dues, if so when? If not why? This is believe would have assisted the court to consider the bona fides or otherwise of the application.

The foregoing being the position, I am of the view that the Plaintiffs have not given any reason or grounds why time for filing suit for malicious prosecution should be extended.

Granted, Article 50 of the Constitution of Kenya 2010 has given citizens of this country a right to have their disputes resolved in a fair and public manner. Further Article 48 of the same Constitution has given a right to access justice but I believe those rights have to be exercised within the parameters allowed in law.

The upshot of the matter is that the Plaintiff's originating Summons dated 25<sup>th</sup> February, 2011 is without merit and is dismissed. I will not award costs to the 1<sup>st</sup> Respondent as this application was supposed to be Ex-parte and the court was not told the circumstances under which the 1<sup>st</sup> Respondent came in.

It is so ordered.

DATED and delivered at Nairobi this 17<sup>th</sup> day of January 2012

**A.MABEYA**

**JUDGE**