REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 934 of 2004

EMMANUEL KURIA WA GATHONI.....PLAINTIFF

VERSUS

THE COMMISSIONER OF POLICE.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

The plaintiff/applicant moved to the seat of justice vide a plaint dated the 2nd day of September, 2004 and filed the same date. The salient features of the same are that:-

At the material time the plaintiff was an Architect by profession and a Town Planner and a former Director of the City Planning and Architecture of the city council of Nairobi. On the 14th day of February, 2001, the plaintiff on learning through both the print and electronic media that he had been adversely mentioned in connection with the murder of one Charles Yaw Sosah on the 12/2/2001 presented himself to Kilimani police station with a view of clearing his name. Instead of clearing his name, the 1st defendant illegally and maliciously caused the plaintiff to be arrested and detained at Kileleshwa police station on false, malicious and unfounded allegations that he had along with others murdered the deceased. Where upon the plaintiff was subsequently charged with the murder of the deceased for which the plaintiff was tried but vide criminal case No. 70 of 2001, the plaintiff was subsequently acquitted of the charge by the Hon. Mr. Justice Mutitu as he then was under section 306 of the penal code after the advocate's submission of no case to answer. During the time of incarceration the plaintiff was held at Kamiti maximum prison from 14th day of February, 2001 to 8th day of September, 2003 for 937 days when he was acquitted of the said charges.

The plaintiff became aggrieved by the said act of incarceration and prosecution alleging that the said charge was illegal, unlawful. Malicious and therefore an abuse of the process of the honourable court in that the defendant knew all along that the plaintiff had not committed the said offence.

Particulars of illegality, false hoods and malice of the defendants are particularized as arresting the plaintiff for the alleged offence of murder before carrying out investigations; acting on rumours and propaganda circulated both through the print and electronic media that the plaintiff was involved in the murder of the deceased; arresting and detaining the plaintiff for the alleged offence so as to appease and

please certain quarters when there was no basis whatsoever for his arrest and detention; arresting and charging the plaintiff of the said murder so as to please and or appease the general public and in particular the residents of Woodley estate who had all along waged a hate campaign against the plaintiff owing to the decision by the city council of Nairobi (his employer by then) to sell and or dispose off the houses comprised therein to individuals; arresting and arraigning the plaintiff in court for the said offence so as to down play the hue and cry that followed after the murder of the deceased who was an official of the Woodley welfare Association which was agitating against the sale of the said houses; failing to appreciate and or consider at all that the sale of the said houses which the deceased was agitating against could not have been a motive for the plaintiff to commit and or participate in the said heinous crime. The action of the defendants in arresting and arraigning the plaintiff in court for the said offence without any evidence whatsoever was oppressive, arbitrary high handed, and unconstitutional; rushing the arrest and arraigning the plaintiff in court for the said offence so as to cover up for their incompetence in efficiency, laxity and lack of diligence in investigating and apprehending the real culprits; arresting and detaining the plaintiff in custody for no good reason where as he is the one who presented himself to the police so as to assist them in their investigation of the said murder after he learnt from the newspaper and electronic media houses that he was being adversely mentioned; by the defendants causing the plaintiff to be arrested and detained at Kileleshwa police station and then at Kamiti maximum prison, whereas there was no valid and /or good reason whatsoever for his arrest, arraignment in court and prosecution of the said offence, by the defendants causing the plaintiff to be arrested incarcerated and prosecuted of the said offence of murder out of spite hatred improper and or ulterior motive as there was no evidence whatsoever concerning and or linking him with the murder of the deceased; by causing the plaintiff to be arrested without first carrying out any investigation to establish whether or not he had committed the said murder; making allegations that the plaintiff had committed the said murder of the deceased whereas they had no evidence whatsoever to that effect; by the defendants not bothering whatsoever to carry out the necessary investigations of the murder of the deceased before causing the arrest detention and subsequent prosecution of the plaintiff for the said offence; by knowing and or ought to have known that the plaintiff was not only innocent but also that he had no grudge, cause and or any motive at all to make him murder the deceased.

Further particulars are that the defendants were driven by their evil intention to malign and injure the name of the plaintiff who had held since 1990 the prestigious post of the Director of city planning and Architecture of the city council of Nairobi during which time while in the cause of duty he may have stepped on the toes of some prominent personalities innocently and or unknowingly and which prominent personalities may have wanted to square with the plaintiff by implicating him in the helnous murder crime; by arresting and subsequently prosecuting the plaintiff of the said offence of murder which was culculated to inflict on the plaintiff the greatest possible mental injury and anguish, embarrassment, ridicule, contempt, and hatred both in his own personal capacity and also in his own profession, image reputation, status and standing in the eyes of the general public including his professional colleagues; that the defendants action complained of was in violation of the plaintiffs liberty and freedom motivated not only by extreme malice but also by other virerior malice so as to cause the greatest mental and physical agony to the plaintiff. It is further the plaintiffs assertion that the defendants knew and or ought to have known that the offence of murder for which the plaintiff was charged of without evidence whatsoever was the greatest indecible stigma and or scar one could inflict on him; by the defendants deliberately and maliciously misusing their office and the criminal process of this honourable court so as to cause maximum injury and mental agony to the plaintiff; by prosecuting the plaintiff of the said murder charge whereas they had been informed by the investigating officers that there was no evidence at all to connect the plaintiff with the murder and lastly by opposing the plaintiffs constitutional application in Nairobi High Court Misc. Application No. 138 4 of 2001 in which the plaintiff and his co-accused were challenging the said charge of murder for want of any and/or adequate evidence to sustain the said charge, whereas all along the defendants knew that there was no sufficient ground and or reason to arrest the plaintiff in the first place let alone to arraign him in court for the said offence of murder.

In consequence thereof the plaintiff sought from the defendants jointly and severally judgment for:-

(a) Special damages of the said sum of Kshs.6 million with interest at court rates from the date of filing of this suit.

(b) Loss of income/earnings of Kshs.18, 060,000.00 pleaded above with interest from the date of filing of this suit.

(c) General damages

(d) Aggravated and exemplary damages

(e) Loss of income, the quantum thereof to be determined by this Honourable court.

(f) Costs of the suit

(g) Interests on (c) (d) (e)_ and (f) above at court rates.

The defendant replied to that claim vide a defence dated the 19th day of November, 2004, and filed on the 1st day of December, 2004. The salient features of the same are that they are strangers to the averments in paragraph 4 of the plaint and would seek further and better particulars; denied acting illegally and maliciously as alleged in arresting the plaintiff. Without prejudice to the foregoing, averred that the defendants' servants had reasonable cause to believe that the plaintiff had committed the alleged offence of murder hence the said arrest and subsequent prosecution of the plaintiff was lawful and justifiable; denied that the charge laid against the plaintiff was illegal, unlawful , malicious and grave abuse of the process of the court as alleged, denied the particulars of illegality, false hoods and malice itemized at paragraph 7(a)-(w) of the plaint; maintains that they had reasonable and probable cause for preferring the said charges and for taking and causing to be taken the said proceedings against the plaintiff and in doing so they acted without any malice. Further and or in the alternative averred that the defendants had reasonable and probable cause for preferring the said charge against the plaintiff and for prosecuting the plaintiff therefore. Denied that the plaintiff had suffered the alleged special and general damages or that any damage suffered by the plaintiff was occasioned by or resulted from the prosecution of the said charge as alleged or at all. Denied particulars of special damages itemized in the plaint; denied the plaintiffs entitlement to exemplary and aggravated damages as alleged and put the plaintiff to strict proof. In the result prayed for the dismissal of the plaintiffs claim against them with costs.

Against the afore set out back ground content of the rival pleadings the plaintiff has anchored an application brought by way of chamber summons dated the 7th day of June,2005 and filed on the 28th day of June, 2005. It was brought under the then order VI rule 13(1) (b) (c) and (d) of the CPR and section 3A of the CPA and all other enabling provisions of the law. Three reliefs are sought namely:-

1. **That the defendants defence filed herein be struck out with costs and the plaintiffs suit do proceed for assessment of damages.**

2. **That the costs of this application be provided for.**

3. **Such other and /or further relief as this Honourable Court may deem fit and just to grant.**

The application is supported by the grounds in the body of the application summarized as the defendants having ordered the arrest and the prosecution of the plaintiff for the criminal offence of murder of one deceased Charles Yaw Sosah without having first to carry out investigations to establish that the plaintiff had committed the alleged offence before charging him with the criminal case which prosecution determined in his favour for no case to answer. It is the contention of the plaintiff further in the said grounds that the defendants were influenced not by the evidence on record but on some undisclosed factors beyond the powers of the investigating officer. That the plaintiff has put out a genuine claim against the defendants against which the defence put up by the defendants cannot hold and for this reason it should be struck out.

There is also a supporting affidavit to boost the grounds in the body of the application. Scheming through its content reveals a reiteration of the content of the grounds in the body of the applications and the content of the averments in the plaint summed up as the plaintiff being adversely mentioned in connection

with the death of one Charles Yaw Sosah; he learned of that suspicion through the print and electronic media; he presented himself to the police in order to clear his name and instead of clearing his name they caused him to be charged with a criminal offence involving the murder of the alleged deceased which ended in his favour. He had no knowledge of the alleged murder of the deceased save that after his arrest is when he came to learn that the deceased and one Samson Njuguna Gacha go had lodged a complaint with the police to the effect that him plaintiff had issued a death threat to the two which he denied. Further deponed that the only knowledge he has of the alleged threatened persons was that the two were opposed to the sale of Woodley houses to the members of the public whose decision of sell had been made by the City Council of Nairobi. Him deponent was only involved jointly with the office of the city council as implementers of which explanation the deponent gave to the police but the same was not heeded and instead him plaintiff and one David Kimani Kongo were arraigned in court for the offence complained of. Still reiterates the content of the plaint that upon arrest and arraignment in court he remained incarcerated till he was released after a no case to answer acquittal was handed out. It is the deponents stand that the instigation of the false charges against him had something to do with one Sam Njuguna Gachago who had shortly before waged a war of hate against the deponent. By reason of the afore stated, the deponent depones that he has made out a case to demonstrate that the decision to arrest and arraign him in court and then prosecute him, had been based on some other reasons other than evidence and since the fact of arrest, arraignment and prosecution have not been denied, the defendants statement of defence which is full of denials is no answer or reasonable response to the claim laid by him for compensation and it should therefore be struck out.

The affidavit is fortified by a bundle of exhibits whose perusal reveals the presence of a charge sheet whose charge reads the offence of murder contrary to section 203 as read with section 204 of the penal code. Where as the particulars thereof read that "**the two persons named in the charge sheet namely Emmanuel Kuria Gathoni and David Kimani Kongo on the 12th day of February, 2001 along Ole Odume road in Nairobi within the Nairobi area jointly with others not before court murdered Charles Yaw Sosah. The exhibits also comprise the committal bundle containing witness's statements. Also annexed is the entire record of the criminal trial proceedings as well as the ruling on no case to answer.**

The defendants responded to that application by way of grounds of opposition dated the 4th day of October, 2005 and filed on the 5th day of October, 2005. These read:-

1. That the application is misconceived incompetent and bad in law.

2. That the application lacks merit and the applicant has not shown any justifiable grounds upon which the defence should be struck out.

3. That the defence herein is arguable and raises triable issues which can only be fully canvassed at the full hearing thereof.

4. That the application raises opinions and seeks to deal with merits of the suit without the evidence being put through the rigour of a full trial.

Parties elected to file skeleton arguments on the disposal of the said application. Those of the plaintiff/applicant are dated the 18th day of October, 2007 and filed on the 22nd October, 2007. The salient features of the same in a summary form are as follows:-

(i) The plaintiffs claim is well articulated in the plaint which the plaintiff asserts has not been met by the mere denials of the defendants' defence.

(ii) The application presented is merited as the same is supported by the content of the annextures exhibited which speak for themselves.

(iii) The court is urged to make a finding that the defendants have no defence to the plaintiffs assertions

that the arrest, arraignment and prosecution of the plaintiff was based on something else other than evidence a position confirmed by the findings of the trial judge as demonstrated in the learned judges ruling.

(iv) There is no way the defendant can be allowed to deny the plain truth as the annextures clearly reveal the presence of a charge sheet confirming that indeed the plaintiff was arrested and arraigned in court. The committal bundle proceedings show that indeed the plaintiff was committed to the high court for trial. Whereas the proceedings and the resulting ruling confirm that indeed the plaintiff was prosecuted and acquitted after a no case to answer submission.

(v) The defendants' defence has not answered the particulars of illegality, false hoods and malice of the defendant as particularized in the plaint as these have been merely denied by the defendant and more particularly the plaintiff's assertion that he presented himself to the police and it is at the police station that he learned of his issuance of the alleged death threats to the deceased and one Sam Njuguna Gachago have not been controverted.

(vi) They contend the defendants have no new issues to bring on board to tilt the status quo crystallized by the acquittal in the criminal trial as the very statements which they intend to rely on of the alleged death threats issued by the plaintiff to the deceased and another form the basis of the evidence which was rejected by the criminal trial case.

(vii) It is on record that the plaintiff filed a constitutional reference challenging the defendants right to prosecute him asserting that there was no evidence to sustain the prosecution and the defendants well knowing that they had no evidence opposed the plaintiff s move a matter fortified by the production of correspondence exchanged between the defendants and their officers which indicate clearly that the defendants had no evidence to support the charge and that they did not call off the plaintiffs' prosecution after being so advised by their officers. The said correspondence have been exhibited herein and they clearly show that these were exchanged even before the plaintiff and his co accused were committed to the high court which fact fortifies the plaintiffs' assertion that the committal to the high court for trial and the resulting prosecution were unmerited.

(viii) The defendants in their defence have not stated the grounds for committing the plaintiff to the high court for trial and the only reasonable conclusion to be drown from this is that the defendants were not only actuated by malice but also to dawn play the hue and cry that followed the murder of the deceased.

The defendant respondents filed their submissions dated the 5th day of December, 2007, and filed on the 6th day of December, 2007. The salient features of the same are that not withstanding that the court has jurisdiction to dismiss an action which is an abuse of the process of the court, the court is reminded that the power to do so must however be exercised sparingly and only in exceptional cases which are clear and beyond doubt. It is the stand of the defence that the plaintiffs' case is not one such clear case and one which is beyond doubt because:-

(i) The issue of facts and law disclosed in the application do not warrant the striking out of the respondents defence as the rule applies only to situations that are plain and obvious.

(ii) The plaintiff is attempting to agitate the merits of his suit which should not be allowed as this should be reserved for the trial judge.

(iii) The said power to strike out can also be exercised only if the defence raises no triable issue. To them the defence filed by them raises triable issues of facts and law.

(iv) Issues as to whether the defendants and or their agents were motivated by malice, spite and unknown motives as alleged can only be proved at the trial.

(v) That since the dependants have joined issue with the averments of the plaintiff they are proper candidate for full trial considering that the defendants have pleaded that they had reasonable suspicion

that the plaintiff had committed a punishable offence and therefore the arrest and the arraignment of the plaintiff was lawful.

(vi) If the orders sought by the plaintiffs are granted they will have the effect of concluding the suit in a summary contrary to the requirement of law that any condition of mind must be specifically pleaded and proved at the trial.

(vii) Indeed the plaintiff relies heavily on the criminal law process which to the defendant was a different jurisdiction of the court where in the standard of assessment of evidence and the standard of proof is totally different from the standard of assessment and proof of liability in civil matters. In the criminal proceedings the standard of proof and the assessment aims at proof beyond reasonable doubt whereas that in civil proceedings is one on a balance of probability.

(viii) Concedes that indeed the plaintiff was tried by the high court after being committed to the high court following committal proceedings conducted by the chief magistrates who was satisfied that there was sufficient evidence to warrant the committal of the plaintiff to the high court for trial.

(ix) Concede that indeed the plaintiff and the co accused filed a constitutional reference arguing that there was no reasonable ground to warrant the defendants proceeding with the prosecution which stand was faulted by the constitutional court which found that the Attorney General had not acted in contravention of the provisions conferred by section 26 of the constitution after analyzing the privileged communication between the defendant and its officers the director of public prosecution, and the Director of criminal investigation; still found that the second respondent had sufficient reason to prefer the charge of murder; also found that the second defendant had not acted in contravention of the law or acted capriciously in the exercise of the powers conferred upon him by the constitution and on that account dismissed the constitutional application and directed that the matter do proceed to trial.

(x) The court is invited to censor the applicant and deny him the relief sought because he deliberately withheld this important information from the court.

(xi) The court is further invited to fault the application and deny the relief sought because the plaintiff seeks to rely on documents which need to be introduced through evidence in order for the same to be tested as required by the evidence Act and if this court were to act on the said documents and deny a trial then this will amount to a usurpation of the inherent powers of the trial court which case law relied upon by them clearly go to demonstrate that such an exercise should be left to the trial court.

(xii) Also contend that the application is premature as the pre trial procedures like the issuance of interrogatories have not been done and exchanged. Further considering that the documents produced by the plaintiff are voluminously and detailed these require a full trial in order to enable the court make a proper finding.

(xiii) Further the court is invited to hold that the plaintiff will not suffer any prejudice should the suit proceed to full trial as the alleged inherent weaknesses in the defence therein not withstanding will not diminish in any way the defendant's right to defend. This right stands to be dealt a heavy blow if the defence is struck out. If the defendants right to defend is respected no prejudice will be suffered by the plaintiff should he ultimately succeed at the end of the trial.

(xiv) Public interest as well as the interest of justice to both parties herein demand that a full trial be held.

Parties have also cited principles of case law for the guidance of the court. The plaintiff relies on the case of **ARI & FINANCE LIMITED VERSUS TRANS-ASIA TRADING CO. LIMITED & 2 OTHERS NAIROBI HCCC NO. 1057 OF 1995** decided by Hayanga J as he then was in 1997; **T.P. MACHIRA T/A MACHIRA & CO. ADVOCATES VERSUS WANGETHI MWANGI AND NATION NEWS PAPERS NAIROBI CA NO. 179 OF 1997** decided by the CA on the 4th day of June, 1998; the case **of MARINGA VERSUS THE ATTORNEY GENERAL (1979) KLR 138.**

The defence on the other hand referred the court to the case of **D.T. DOBIE & COMPANY (K) LIMITED VERSUS MULLINA (1984) KLR 1, NJUKI VERSUS COMMISSIONER OF LANDS AND 4 OTHERS (1981) KLR 46** and lastly **MUCHINI AND ANOTHER VERSUS PARTEL & ANOTHER (1990) 228.**

The court has given due consideration to the afore set out rival interlocutory pleadings and submissions as well as principles of case law cited and the court finds that the court has been invited to make a determination of this matter on two fronts namely firstly to determine the factual situation as presented herein; secondly determine the principle of law applicable to the factual situation and then draw out appropriate conclusions in determining the interlocutory application with a view to either granting or with holding the reliefs sought.

On the factual aspects of the interlocutory application, the court proceeds to make the following findings on the same namely:-

(i) The the police station set in motion by the plaintiff taking himself to the police with a view to clearing his name following adverse reports in the media that he was being linked to the murder of a deceased person who later became a subject of the criminal trial.

(ii) It is not disputed that following that self presentation to the police station the plaintiff was arrested, arraigned in court jointly with another and prosecuted which protection resulted in his favour at the no case to answer stage meaning that the plaintiff was not even called upon to defend himself.

(iii) It is common ground that the plaintiff had even attempted to fore stall the criminal prosecution by filing a constitutional reference arguing that there was no basis for prosecuting him which is admitted on both fronts that it was dismissed and the prosecution went on as scheduled culminating in the no case to answer decision.

(iv) It is common ground that the plaintiff was indeed aggrieved by the defendants actions and has moved to this court seeking relief in the manner sought. The basis of this grievance are outlined in his averments in the plaint and have been summarized herein extensively.

(v) It is also common ground that the defendant has moved to defend that claim on the basis of the defence whose salient features have already been high lighted herein.

(vi) The stand of the defendant to defend the plaintiffs claim is what has prompted the plaintiff to file the application subject of this ruling seeking to strike out the said defence. It is common ground that the documentation relied upon by the plaintiff to argue that the defendants right to defend should be with held include the entire evidence the defendants placed before the lower court at the committal stage and the high court after the committal and which formed the basis of the evidence adduced by the prosecution in support of its case. In addition, the plaintiff has managed to lay a hands on communication exchanged between the director of prosecution and the Director of criminal investigation to the effect that there was no basis for the prosecution but that advise not withstanding the prosecution was undertaken.

(vii) This paper work as well as the evidence was assessed by the high court and found wanting and that is why the plaintiff says that there should be no repeat of a trial but an assessment of damages as a civil trial will not upset the result of the criminal trial which was never appealed against by the defendants and remains intact.

(viii) It is undisputed that apart from conceding that the trial took place and evidence adduced assessed and found wanting by the criminal court none the less the defendant has argued that finding does not preclude the civil court from revisiting that issue as the standard of proof are different, Further that the plaintiff has introduced some privileged information which needs to be interrogated but the defence has not denied that these were indeed genuine correspondences. A part from saying that these need to be interrogated at the trial and evidence adduced in their respect thereof, it has not been suggested what other additional evidence will be required to be adduced to add or subtract from the content of the documents

complained off.

(ix) Where as the plaintiff has brought on board all that he intends to deny the defendant the right of defence the defendant respondent has not deponed an affidavit and or exhibited any other evidence which is likely to tilt the balance in their favour in the civil trial besides that which they presented in the criminal proceedings.

Against the afore set out findings of facts is to be applied the principles of law relied up by both sides. These will be set out herein but not in any particular order.

(1) D.T.Dobie & Company (K) Limited versus Muchina (1984) KLB is a decision ofthe court of appeal laid out the following principle when it comes to the court making a determination as to whether to strike out or not to strike out a pleading.

1. The words reasonable cause of action in order VI rule 13(1) means an action with some chance of success when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.

2. The word cause of action means an act on the part of the defendant which gives the plaintiff his cause of action.

3. As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.

(8) (Obiter) the power to strike out should be exercised only after the court had considered all the facts but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

(9) (Obiter) the court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment it should not be struck out.

(2) The case of **NJUKI VERSUS COMMISSIONER OF LANDS AND 4 OTHERS (1987) KLR 46** wherein Owuor J as she then was held inter alia that:-

(1) **The practice in our courts which is now well established is that the court will only exercise its discretion under order VI rule 13 when it is satisfied that the defence on record does not raise any triable issue at all.**

(3) The case of **Muchini and another versus Patel and another (1990) KLR 228** decided by Bosire J as he then was wherein the court held inter alia that:-

(1) **The court has power under order VI rule 13(1) civil procedure Rules to strike out pleadings. The jurisdiction however may only be exercised in very exceptional circumstances.**

(4) The case of **ARI CREDIT & FINANCE LIMITED VERSUS TRANS-ASIA TRADING CO. LTD & 2 OTHERS Nairobi HCCC NO. 1057 of 1995** decided by Hayanga J as he then was. In this decision it is observed that the learned judge explored both the legal texts as well as case law construing the provisions of law governing the granting or withholding of the relief for striking out. The observations which were made by the said Judge (Hayanga J) are as follows:-

(i**) The discretionary and persuasive jurisdiction given under this rule is supplementary to the inherent jurisdiction of the court which is also invoked by the plaintiff under section 3A of the CPA.**

(ii) Where the court has been invited to strike out a pleading, it can also make an order for amendment.

(iii) The relief of striking out of pleadings because it is scandalous is invoked firstly where there is need to protect the opposite party by stopping a party from sniping at the opponent where allegation are made with imputation against the opposite party, or by making charges of misconduct against the opposite party, or by making charges of bad faith against the opposite party or making charges to degrade and or debase the opposite party. Such a pleading is scandalous when it is indecent or offensive and when it is shown that it is made to abuse or prejudice the opposite party hence termed sniping at the opposite party. Also where the pleadings employ plethoric superficially unnecessary prolixity.

(iv) Frivolous pleadings means that pleading which is not in itself serious or in capable of being treated with seriousness, a pleading which has no reasonable cause disclosed on the face of the record, a pleading that has no substance ground less and or fanciful.

(v) A vexatious pleading is that which lacks bonafides. It is hopeless or oppressive and stands to cause the opposite party unnecessary anxiety, trouble and expense where it is a case that has no foundation and has not possible chance of success or is brought to annoy or get fanciful advantage or when in totality it can lead to no possible good.

(vi) A pleading is an abuse of the courts' process where the court process is carried out improperly, dishonestly and in bad faith in away that shows that the functions of a court of law is being misused. It is used to include those pleadings that are vexatious and frivolous.

5. The case of **J.P. MACHIRA T/A MACHIRA & CO. ADVOCATES VERSUS WANGETHI MWANGI AND NATION NEWS PAPERS (SUPRA).**

(i) As per Akiwumi JA as he then was drawing inspiration from the decision in **WENLOCK VERSUS HALONEY AND OTHERS (1965) 1.W.L.R 1238** from the observation made there in at page 1244 thus:-

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive and confers discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleadings and rejected a mere suggestion that the defence could be amended as there was no demonstration of even a mere semblance that the pleadings could be injected with life after amendment being effected to it."

(ii) In the same case as per the decision of **Omollo JA drawing inspiration from the decision in the case of Dr. Murray Watson versus Rent a plane Limited & 2 others HCCC NO. 2180 of 1994 (UR)** opined that:-

"a trial must be based on issues, otherwise it would become a farce and went on to opin that the meaning of scandalous is not restricted to that which is indecent, offensive or improper. A denial of a well known fact can also be rightly described as scandalous.

(b) Malice can be inferred from a deliberate or reckless, or even negligent ignoring of facts where no amount of evidence can change that situation"

(c) Further drawing inspiration from the decision in the case of **D.T. Dobie & Company Kenya Limited versus Joseph M. Baria Mililline (Supra)** made observation that : **"I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable parties to create all sorts of defences in the course of litigation. Neither does the said decision mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on the merits.**

(d) Drawing inspiration from the case of **CHATTE VERSUS NATIONAL BANK OF KENYA (LTD) Civil appeal No. 50 of (1996) UR** that:-

"The **powers of striking out are drastic and should be exercised with great caution and only in the clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out the pleadings for there is no magic in holding a trial on the merits particularly when it is obvious to every one that no useful purpose would be served by it…"**

(iii) (In the same case as per the decision of Bosire JA who agreed with the submission of the applicants counsel that the respondents defence had consisted of bare denials, published false information, after they had been given the correct information by the appellant; that malice could be inferred. Drawing inspiration from the case of **CAPTAIN HARRY GANDY VERSUS CASPER AIR CHARTERS LIMITED (1956) EACA 139** ruled that: "**cases must be decided from issues which flow from pleadings.**

5. In addition to the principles of case law set out is number 1, 2, 3 and 4 above, the court cannot lose sight of the constitutional provisions on how courts should handle issues of technicalities arising in the discharge of their duties. The prescriptions on these are found in Article 22(30)((d) and 159 (2) (d). these provide:-

"22(3) (d)….The court while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities…

159 (2) (d) justice shall be administered without undue regard to procedural technicality…"

This court has applied the afore set out principles of case law on to the findings of facts made herein and in this courts opinion, the following are the guiding principles extracted from the said case law.

(1) What is prohibited from being used to fault a litigation by a court of law vide the constitutional provisions cited are procedural technicalities. When applied to the rival arguments herein, it means that in order to fault the defendants defence and earn the relief sought, it has to be demonstrated by the plaintiff that the move to fault the defence is on the basis of its substance content and not on account of any technical irregularity. Where as in order for the defence to oust that assertion they have to demonstrate that the move made by the plaintiff falls within the prohibition contained in the afore said constituional provision.

(2) The relief being sought by the plaintiff of striking out the defendants defence is known to law. It is exercisable by courts of law with the only caveat being that it has to be exercised sparingly, with caution and within acceptable limits granted by the donating provisions and as construed by case law.

(3) The donating or empowering provision is the one on the basis of which the plaintiff anchored the application subject of this ruling. The applicable principles are those set out in the case law cited to court and as summarized above and for purposes of drawing out the conclusion in the determination of this matter these are:-

(a) The exercise of this power is discretionary and being discretionary it has to be exercised within the applicable limits namely that it has to be exercised judiciously and with a reason.

(b) The exercise of this discretionary power is in addition to the inherent power of the court donated by section 3A of the CPA which has also been cited by the plaintiff/applicant.

(c) The donated power of striking out is draconian or drastic and the same has to be exercised sparingly, with caution and or restraint.

(d) The reason why the said power has to be exercised with caution and with restraint is because the

business of the court is to hear and determine disputes on their merits and not to determine them on technicalities. By reason of this requirement, it means that a court of law can only deny any pleading a merit disposal where the said pleading discloses no reasonable cause, action or defence, it is hopeless that it cannot be injected with life via an amendment either at the instigation of the court on its own motion or at the instigation of either of the parties and one which does not disclose triable issue.

This court has applied the afore set out guiding principles with regard to rival arguments as regards whether the plaintiff has made out a case to strike out the defendants defence or not and the court is satisfied that the plaintiff is entitled to the relief sought of striking out of the defendants defence because of the following reasons:-

1. The plaintiffs claim is basically based on the documentation forming the basis of the decision to commit the plaintiff for trial to the high court, the decision of the constitutional court to decline to halt the criminal prosecution and the fact of the criminal prosecution having resulted or ended in favour of the plaintiff upon submission of a no case to answer. It would be reckless on the part of the defendant to deny the existence of this state of affairs.

2. The defendant has not denied the existence of the set of facts mentioned in number 1 above save that to qualify that, they assert that the constitutional court has already made a determination that the 2nd defendant had a basis for preferring the charges preferred and on insisting that the prosecution be carried out. It is the finding of this court that the decision of the constitutional court was preliminary and cannot be relied upon retrospect fully as it did not go to the root of the charges that the plaintiff was to face where justification was to be determined by either an acquittal or a conviction which in the case of the plaintiff herein were determined by an acquittal. It means that in order to go round that finding the defendant has to demonstrate existence of some other evidence which will be tendered in the civil court besides that which was tendered in the criminal proceedings. when given an opportunity to do so the defendant elected to file grounds of objection instead.

3. The court is in agreement that indeed the standard of the proof in the criminal proceedings is higher than that applicable to civil proceedings. The one in criminal proceedings is beyond reasonable doubt whereas that in civil litigation is one of proof on a balance of probability. It was also correctly submitted by the defence that in a civil trial, the court is entitled to revisit the same set of facts that were presented in the criminal proceedings and then arrive at its own conclusion on the matter. However the defence failed to note that the proceedings relied upon by the plaintiff as forming the anchor of his claim are court records. They have not been upset on appeal and for this reason they have earned the protection provided for under section 84 of the evidence Act cap 80 laws of Kenya. It provides :-

"**84 Whenever any document is produced before any court purporting to be a record or memorandum of any evidence given in a judicial proceeding or before any officer authorized by law to take such evidence, and purporting to be signed by a judge or magistrate or any such officer as afore said, the court shall presume.**

(a) That the document is genuine.

(b) That any statements as to the circumstances in which it was taken purporting to be made by the person signing it are true; and

(c) That such evidence was duly taken"

As long as the said documentation stands it goes to support the plaintiff's assertion that there is no defence against their assertion that there was no basis to prosecute. To counter that it has to be demonstrated that the defendants intend to adduce additional evidence to prove the contrary something not relied on by them.

4. The plaintiff has sought to rely on the set of documents which were classified, exchanged between the relevant mentioned authorities to show that there was no basis for prosecution. To counter this, the

defendant has not argued that the said documents were never exchanged by the named relevant authorities. All that the defendant has tended to assert to counter them is that they are classified and evidence will be required to clarify them. This argument does not hold on two fronts namely, being documents, the best way to deny their authenticity should have been through affidavits sourced from their alleged originators to deny their authenticity. This was not done and for this reason they stand as documents. Upon being accepted as such they became protected by the provisions governing proof of documents namely section 64-79 of the evidence Act to the effect that the document itself is proof of its content and no oral evidence can be tendered to controvert it. It means that the defendants assertion that the contents of the alleged classified documents need to be interrogated through evidence does not hold and the calling of the makers of the said documents other than for purposes of tendering them in evidence for purposes of production as exhibit and not for purposes of oral evidence to controvert the alleged contents is unnecessary .

(9) Indeed the plaintiff has pleaded malice and improper motive other than evidence as a basis for the prosecution. The defendant asserts that these need to be proved by evidence. Case law assessed above demonstrates that malice and improper motive can be implied and or inferred from the surrounding circumstances. There is nothing to show that improper motive and malice cannot be implied and or inferred from the documentary exhibits exhibited in the absence of oral evidence.

(10) As for public interest and interests of justice to both parties, this court is of the opinion that these are of paramount consideration when it comes to the issue of determination as to whether to strike out a pleading or not. However on the basis of the case law assessed these do not oust the courts Jurisdiction to strike out a pleading where a case has been made out for striking out one.

(11) On the issue of triable issues, indeed the plaintiff has asserted that there are no triable issues in the defence. Where as the defendants have asserted that there are triable issues, but have not pointed out what these triable issues that the court will be called upon to interrogate are. In this courts' opinion there are no triable issues in the defence laid because the following aspects of the plaintiffs claim have not been controverted namely that he took himself to police; that he was arrested; that all he wanted was to clear his name; that he was committed by the CMS court to the high court for trial of an offence of murder; that he challenged committal to high court for trial and which challenge was thrown out. That he stood trial which ended in his favour; that there was no appeal preferred against his acquittal. Any pleadings of justification beyond what was shown in the criminal trial in the absence of disclosure of what this other evidence is not a sufficient answer to the plaintiffs claim.

9. As regards restraint on forming an opinion on the evidence as this is apreserve of the trial judge, this court has borne this caution in mind and has accordingly restrained itself from forming an opinion as to whether the plaintiffs claim will succeed or not. All that the court has done is to operate within the permitted limits to the effect that on the face of both pleadings, the content of the defence is not a sufficient response to the content of the plaint.

10. With regard to the meaning of what a triable issue is this court has judicial notice of the fact that existence of a triable issue is determined by existence of an arguable point which need not succeed at the end of the trial. So long as it needs to be interrogated. Herein there is nothing to be interrogated by the court with regard to the self presentation to police arrest, incarceration, prosecution and acquittal.

11. With regard to the issue of the defendants suffering prejudice if their right of defence is with held, the court is of the opinion that this have held had there been demonstrate that they had some other evidence besides what has been exhibited to bring on board. In the absence of that, the right that this court can grant them is the right to participate in the assessment of damages with a right to cross-examine the plaintiff and his witnesses if any on the veracity of the evidence to be relied upon to prove the plaintiffs claim of loss suffered . Further it is now trite and this court has judicial notice of the same that even where there is no defence, in place or evidence tendered by the defence the plaintiff will not be given a clean bill of health on his claim. He will be required to prove his claim on a balance of probability. He has the onus and the burden to prove his claim hence no prejudice will be suffered by the defence.

For the reasons given in the assessment in number 1, 2,3,4,5,6,7,8,9,10 and 11-

(1) Prayer 1 of the plaintiffs application dated 7th day of June, 2005 and filed on the 28th day of June, 2005 be and is hereby allowed as prayed. The defendants defence dated 9th day of November, 2004 and filed on 1st December, 2004 be and is hereby struck out.

(2) The plaintiff will have costs of both the struck out defence as well as the costs of the application.

(3) The striking out of the defendants defence not withstanding the defendant has liberty to participate in the proceedings for the assessment of damages if they so wish.

(4) The defendant is at liberty to set out the suit for assessment of damages.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA

DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS 28TH DAY OF SEPTEMBER, 2012.

JUDGE