

against the plaintiff initiated vide criminal case number 3097 of 1996.

(viii) In the afore said criminal proceedings the plaintiff had been charged with an offence contrary to section 291/1 of the penal code being fraudulent disposition of mortgaged goods.

(ix) It is the stand of the plaintiff that the prosecution was not justified because the defendant was aware through its agents and or representatives that there was no disposition of mortgaged goods because the said goods were in the store as motor vehicle KWD.997 had broken down and became unroadworthy and the goods had been stored to avoid pilferage and theft and the defendants agents and representatives had been invited to inspect the said stored goods.

(x) By reason of what has been averred in number (viii) -(ix) above, the plaintiff averred that the prosecution instigated by the defendants was therefore unjustified and malicious considering that the defendants knew that no criminal offence had been committed by the plaintiff.

(xi) Particulars of malice were given as failing to satisfy themselves through their servants and/or agents that the goods in question were stored, refusing to investigate the offence in a lawful manner; threatening and causing the plaintiff to pay monies and thereafter reneging on an agreement; the plaintiff was duly acquitted of the afore said offence on 6th February, 1998;

(xii) By reason of what has been averred in number (xi) above it is the plaintiff's contention that he suffered unlawful arrest, detention malicious, prosecution and thereby suffered ridicule, and damage and claims general damages as a result.

In consequence thereof the plaintiff sought the following reliefs from the court:-

(a) An injunction restraining the defendant from interfering with the quiet possession of vehicle numbers KWD.997, KWS264 and KWS.171.

(b) An injunction restraining the defendant by itself its agents and or servants from taking possession of the afore said vehicles.

(c) A declaration that the defendant is not entitled to detain the afore said log Books and Transfer Forms pertaining to the said vehicles.

(d) Special damages of Kshs.348,000.00

(e) General damages.

(f) Punitive damages.

(g) Costs of this suit.

(h) Interests in (d) and (g).

(i) Such other or further relief as this Honourable court may deem fit to grant.

The defendants were served and they entered appearance on 5th January, 1999, followed by the filing of a defence dated the 21st day of January, 1999 filed on the 21st day of January, 1999. The defence was subsequently amended on the 17th day of May, 2002 and filed on the 24th day of July, 2002. The salient features of the same are as follows:-

(i) Conceded that their predecessors in Title. Indeed at the express request of the plaintiff lent to the plaintiffs company M/S Aberdare Oil Millers limited an amount of Kshs.940,000.00 which was to be repaid with interest, the subject vehicles namely KWS 171, KWS 264 and KWD995 were tendered as

security; the plaintiffs company failed to repay the loan despite persistent demands; the plaintiff made an effort to pay Kshs.1,500,000.00 around 1996 leaving a balance which continues to attract interest at commercial rates of 34% which stood at Kshs.10,552,007.70 as at 31/12/1998.

(ii) By reason of what has been averred in number (i) above the defendant is not obligated to discharge or release the securities save that the defendant is ready and willing to release the same as soon as the outstanding amount is fully paid and denied that the defendant agreed to release the security upon the plaintiffs payment of Kshs.1,500,000.00

(iii) Denied institution of the criminal proceedings against the plaintiff save that the defendant has knowledge that the said prosecution was carried out by the police and all the defendant did was to give evidence which it did honestly and in good faith. In the alternative if the defendant was responsible for the said prosecution then they deny that they acted maliciously and consequently denied the particulars of special damage and malice attributed to them.

The defendant put in a counter claim for the outstanding loan of Kshs.10,522,007.70 plus interest at 34% p.a until payment in full, costs of the counter claim and any other relief the court deems fit to grant in the interest of justice.

The plaintiff had responded to the first initial defence vide reply to defence dated 1st day of February, 1999 and filed on the 19th day of February, 1999. This was followed by two documents both titled reply to amended defence and defence to counter claim dated 12th day of July, 2002 and filed on the 16th day of July, 2002 while the other one is dated 8th day of August, 2002 and filed on the 12th day of August, 2002. The court has perused both and in a summary the salient features of the same are that:-

(i) Concedes the defendant's predecessor lent money to Aberdare Oil Millers limited but the plaintiff denies that the said lending was done at the plaintiffs request and even if he did so he did not become liable in law to personally pay off the said amount.

(ii) Concedes the plaintiff pledged his vehicle number KWS 171, KWS 264 and KWD 997 as security for the repayment of the said loan but to him such a pledge was limited to Kshs.1.5 million and nothing more.

(iii) Concedes the money owed by the company was not repaid because the company was placed under receivership.

(iv) Asserts that the money paid of Kshs.1.5 million was in full and final settlement of claims owed by the plaintiff to the defendant and not the company and the defendant stopped by their own conduct and or otherwise from claiming any further monies whatsoever from him.

(v) The plaintiff denied responsibility for the amount counter claimed by the defendant or interest payable thereon by reason of the loan having been granted to accompany.

(vi) Contends the security of the plaintiffs' vehicle was limited to 1.5 million and not the amount claimed by the defendant.

(vii) By reason of what has been stated in number (vi) above the plaintiff contents that the defendant was obligated to release the log books of the said motor vehicles upon receipt of Kshs.1.5 million and he is not entitled to retain the said security.

(viii) Maintains that prosecution of the plaintiff was instigated by the defendant's servants a Mr. Mwanzia and other members of the police Unit specifically seconded to the defendant and for this reason the defendant is liable for the said prosecution.

(ix) Denied responsibility for the counter claimed amount of Kshs.10, 552,607/70 together with its

interests at 34% which amount should be claimed from Aberdare Oil Millers limited and for this reason prayed for the dismissal of the counter claim with costs to them.

Parties were heard. The plaintiff Kapurchand Devar Shah gave evidence as PW1. The sum total of his evidence is a reiteration of the content of the plaint and reply to defence and defence to counter claim and in a summary the following are the salient features of that evidence. He has been a business man in Nairobi and Nyeri since 1943; he had retired from that job in 2007; he brought action against the defendant as Consolidated Bank Limited formally Consolidated Finance limited because it took over the business of Jimba Credit Limited PW1 recalls that Jimba Credit Limited advanced credit to Aberdare Oil Millers Company limited to the total tune of Kshs.940,000.00. This amount was secured against motor vehicle Reg. No KWD 997, KWS 264, KWS 171 all of which had been registered in the names of Nyeri General Stores of which the plaintiff was the sole proprietor.

The plaintiffs source of grievances against the defendant arises from the fact that Aberdare Oil Millers Company Limited fell into arrears. Him plaintiff approached the defendant and had discussion with one of their officers a Mr.Mwanzia and they agreed that if the plaintiff paid 1.5. Million in full settlement of the indebtedness of the Aberdare Oil Millers Limited to the defendant the whole matter would be settled. The plaintiff fulfilled his part of the bargain on 14/10/96 by paying the agreed 1.5. Million to the defendant on 23/10/96 the defendant summoned the plaintiff to their office which call the plaintiff responded to. He arrived at the defendant's office at 10.00 a.m. and met one Mwanzia the very person who had negotiated the payments of 1.5. Million. While here, the plaintiff was asked to make a statement after which he was informed that the defendants were charging him with a criminal offence. PW1 was thereafter hand cuffed and taken to Kileleshwa police station and booked in the OB and the next day taken to court on 24/10/96 charged. He pleaded not guilty and was released on cash bail of Kshs.200, 000.00. It is PW1s testimony that as a result of him being arraigned in court he attended court as required at least 22 times; the trial lasted 16 months; the judgment was on 6/2/98.

With regard to the debt owed to the defendant , PW1 maintained it was owed by the company Aberdare Oil Millers Limited, PW1 was the one paying but he stopped paying because the company Aberdare Oil Millers Limited was under a receivership and the vehicles were very old to enable PW1 continue generating income to continue servicing the loan. He sought permission from the defendant to cannibalize one vehicle and use the spares to make the other two serviceable. These negotiations were through correspondences exhibited as well as personal visits by agents and servants of the defendant to the plaintiff's yard to view the spare parts of the cannibalized vehicle and the mobile vehicles.

It is his testimony that the defendant sent its agents to seize the vehicles and PW1 cooperated by showing them the mobile vehicles and the parts of the cannibalized ones and even offered to deliver them himself to the defendants but they never allowed him to do so and instead they had him charged in court and prosecuted for a criminal offence.

PW1 maintained that the documentary exhibits all went to show that the defendants knew all along that the loan had been advanced to Aberdare Oil Millers Limited; the loan accounts was in the name of the company; that the company was in Receivership. On the basis of that testimony, he asked the court for the reliefs sought.

When cross-examined PW1 responded that he had knowledge of who Aberdare Oil Millers Limited was as he was one of the two Directors of the said company. It is his further response that the payments he made were on behalf of the company. He concedes to have signed the mortgage and undertaken to pay the principle sum given as interests but not to personally pay. He concedes that by virtue of the motor vehicle having been given as security for the loan him PW1 could not do anything with them without the consent of the defendants.

It is his response that every action he took with regard to the said vehicles he informed the defendants in writing. He concedes to have asked the defendant to accept the sum of 1 million in full and find settlement of the debt. That there was exchange of correspondences with regard to payment.

The defence called one witness (DW1) John Mwaniki Gikonyo an employee of the defendant who gave evidence on behalf of the defendant based on the record held by the defendant with regard to the transaction leading to these proceedings and in a summary, the salient features of DW1s testimony are that A berdare Oil Millers limited applied to Jimba Credit corporation seeking a loan of 2 million signed by K.D. Shah a director; Jimba Credit Corporation Limited agreed to Finance only Kshs.940, 000.00. To secure the loan, a chattels mortgage was executed on 11/5/89 between the plaintiff trading as Nyeri General Grocers & Jumba Credit Limited. By reason of the execution of this chattels mortgage, the plaintiff undertook to pay the principal sum together with interest; the plaintiff undertook to comply with the conditions in the said chattels mortgage concedes there are correspondence between the plaintiff and the lawyers of Jimba Credit Corporation concerning the release of one of the log books of the secured lorries for a trade in.

DW1 recalled that at one time the defendant instructed their resposessers to reposes the vehicles and on arrival they found one lorry KWD 997 an empty shell while the others were alleged to have been mobile but the reposessors did not see them. DW1 denied any knowledge of the defendant having authorized the plaintiff to vandalize one of the Lorries in order to mobilize the other two.

With regard to the payment of 1.5. million in full and final settlement of the plaintiffs indebtedness to the defendant, it is conceded that indeed there is communication from one Mwanzia dated 29/2/96 on behalf of the defendant in which the said Mwanzia informed the plaintiff that he could pay 1.5.million in full and final settlement of his indebtedness to them but the plaintiff gave a counter offer vide a letter dated 26/4/96. There were no further correspondences on the issue until October when the plaintiff paid 1.5.milion to the defendant.

To DW1, this payment of 1.5 million had nothing to do with the offer made by Mwanzia but it was accepted as it went to reduce the plaintiff's indebtedness to them.

DW1 concedes that indeed the defendant was responsible for the plaintiff's prosecution in criminal case number 3097/96 wherein the plaintiff was charged with the offence of fraudulent disposition of mortgage goods but denied that the complaint was malicious as there was no agreement by the defendant to release the motor vehicle documents after the payment of 1.5 million. It is DW1s testimony that the loan owed by Aberdare Oil Millers Limited is still outstanding and had accumulated to Kshs.10, 522,007.00 as at the time of the filing of the counter claim.

When cross-examined DW1 responded that the defendants debtors were Aberdare Oil Millers Limited, conceded that indeed at one time the plaintiff was asked to pay Kshs.1.5.million in full and final settlement of the indebtedness to the defendant and this amount was accepted by them; conceded that upon receipt of the 1.5 million payment from the defendant he never wrote back to the plaintiff to state that they had not received the said amount in full and final settlement of the indebtedness owed to them on account of Aberdare Oil Millers Limited. DW1 confirmed that according to the records there was only one loan account between the plaintiff and the defendant and this was the loan account held on account of Aberdare Oil Millers Company Limited.

DW1 conceded that indeed the chattels mortgage was signed by the plaintiff but he gave no personal guarantee to pay off the indebtedness.

With regard to the criminal prosecution, DW1 agreed that indeed this took place, both sides gave evidence and the court ruled that there was no guarantee in writing from the plaintiff, there was no repudiation on the part of the defendant that the 1.5 million received by them was not in full and final settlement of the indebtedness owed to them by Aberdare Oil Millers Company Limited. Lastly conceded that the bank never made any attempt to take possession of the vehicles. To him the bank never authorized the vandalization of the vehicles.

At the close of the hearing parties elected to file written submissions. Those of the plaintiffs were dated 8th day of November, 2010 and filed on the 9th day of November, 2010. In them the following have been stressed:-

(i) The undisputed facts of the case are that the loan from the defendant was granted to Aberdare Oil Millers Limited; the said Aberdare Oil Millers Limited was in Receivership to the knowledge of the defendant; indeed it is the plaintiff who negotiated for a loan on behalf of Aberdare Oil Millers Limited in his capacity as a Director of Aberdare Oil Millers Company Limited; the amount negotiated was Kshs.2million but only Kshs.940, 000.00 was granted.

(ii) It is undisputed that the said amount advanced of Kshs.940, 000.00 was to be secured by way of the plaintiffs personal vehicle and a chattels mortgage over the said motor vehicles was signed by the plaintiff.

(iii) It is admitted the chattels mortgage was comprehensive but nowhere in it does it state that vehicles could not be cannibalized; t

(iv) The evidence tendered in the criminal proceedings tendered as evidence goes to show that the other motor vehicles were intact. Only one was a shell but there is no indication that the witness inquired about the body parts of the shell vehicle and he was not told where they were. As found by the trial magistrate that investigations were shoddy it is evident that no investigation were carried out before prosecuting the plaintiff and for this reason the plaintiff has made out his case that the prosecution was without reasonable cause.

(v) With regard to the civil claim herein, the court is invited to accept the plaintiffs evidence that:-

(a) Indeed an offer of settlement upon payment of 1.5 million was made and accepted without any qualification. This coupled with the fact that the defendants agents never checked the plaintiffs store to confirm the non existence of body parts of the vehicle which had been cannibalized all go to prove malicious prosecution on the part of the defendant whose own witness DW1 has conceded that the prosecution was instigated by the defendant through their own investigation unit.

(vi) Reliance is placed on the law cited to court of guidance and on that account the court was asked to find for the plaintiff and dismiss the counter claim.

The defendant submissions are dated 27th day of October, 2010 and filed the same date. The following have been stressed:-

(i) The basis for the plaintiffs claim for malicious prosecution is the proceedings in criminal case number 3097/96 wherein the plaintiff was charged with fraudulent disposition of mortgage goods. The court is invited to note that in the said prosecution the plaintiff never denied that he indeed cannibalized motor vehicle registration number KWD 997.

(ii) Although the plaintiff alleged that he had been authorized by the defendant to cannibalize the said motor vehicle, he could only produce proof that the defendant had authorized him to repair the said motor vehicle and the court is invited to believe the evidence of the defence through DW1 that the bank never authorized the plaintiff to cannibalize the said motor vehicle.

(iii) By reason of what has been stated in number (ii) above the court is invited to believe the defendants stand that their complaint to the police that the plaintiff had cannibalized one of the secured vehicles without the defendants consent to be true and justified hence the prosecution was normal.

(iv) It is their contention that Mwanzia's role was limited to the investigation of the case and he had no authority to offer the payment of Kshs.1.5million in full and final settlement of the outstanding loan which was payable to the defendant by the plaintiff.

(v) In the alternative to number (iv) above even if it can be taken that such an offer had been made, the counter offer made by the plaintiff cancelled the defendants earlier offer and the subsequent correspondence from the defendants manager that the plaintiff should be prepared to pay the then 8 million outstanding then is proof that the counter offer was not accepted and it matters not that the

plaintiff later on made payments of the 1.5. Million. More so when it is evident that no further correspondence on the issue were engaged in between the parties regarding the issue culminating in the payments of the 1.5. Million. On the basis of the foregoing the court has been urged to dismiss the entire plaintiffs claim.

In response the plaintiff filed a reply to the defences' submission dated 9th day of December,2010 and filed on the 14th day of December,2010 and in them the following points have been stressed;-

- (i) The issue of cannibalization of the motor vehicles was dealt with in the criminal proceedings, the court ruled upon it in a judgment the defendant chose not to appeal against. The said prosecution ended in the plaintiff's favour which have gone to confirm the defendant's malicious intent to prosecute the plaintiff without any justification.
- (ii) Contends that the making of a counter offer does not mean that the main offer had been rejected. All it means is that where the counter offer is rejected then the offer stands hence the plaintiff was justified to make the payment of 1.5.million in full and final settlement of the indebtedness to the defendant. If this had not been the correct position the defendant would have said so.
- (iii) The court is invited to note that the defence submission have not urged this court to make any findings on the counter claim as against the plaintiff which is proof that such a claim cannot lie against the plaintiff .
- (iv) That it was not necessary to add the Attorney General as a party to these proceedings as the prosecution was instigated and instituted by the officers attached to the defendants investigation unit.

Parties also relied on case law for the courts guidance. The plaintiff referred the court to the case of **KASANA PRODUCE STORE VERSUS KATO (1973) EA 190**. At page 191 paragraph G-I Duffus V.P laid out the ingredients to support a claim for malicious prosecution as:-

- 1. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.**
- 2. That the prosecution was determined in the plaintiffs favour.**
- 3. That it was without reasonable or probable cause- On the evidence the defendant did not believe in the justice of his own cause (clerk & land sell on toots (12th Edition 902)**
- 4. It was malicious- The defendant had improper and indirect motives in pringing this false charge against the plaintiff'**

On the basis of that reasoning the court held inter alia that:-

- (i) An action for false imprisonment lies when there has been an imprisonment without any order of a court.**
- (ii) Where the imprisonment is by the order of a court following a prosecution the appropriate action is for malicious prosecution**

The case of **HERNIMAN VERSUS SMITH (1938) AC 304** ahouse of Lords decision. At page 313 there is observation that:-

“The reasonable and probable cause for instituting the prosecution must appear not only to be deducible in point of law from the facts but have existed in the defendants mind at the time of his proceeding:-...

The Respondent should have made further inquiry and not having done so it cannot be said that he took reasonable care to inform himself of the facts before instituting prosecution. The appellant has satisfied the condition laid down by Bower L.G in ABRATH VERSUS NORTH EASTERN RY CO.(3) namely that he was innocent of the charge against him, and that there was a want of reasonable and probable cause for the prosecution....”

At page 314 as per Lord Atkin the questions to be posed for determination in such a litigation should be:-

“(1) Has it been proved that the defendant commenced and proceeded with the prosecution without any honest belief that the plaintiff was guilty of fraud?

(2) Has it been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution?

(3) Has it been proved that the defendant in commencing or proceeding with the prosecution was actuated by other motives than a desire to bring to justice one whom he honestly believed to be guilty?”

Then the court went on to hold that:-

“In an action for malicious prosecution the function of the jury is to find out what are the relevant facts of these are in dispute. When the facts operating on the mind of the prosecutor are ascertained; it is for the judge to decide whether they afford reasonable and probable cause for prosecuting the accused person. Definition of reasonable and probable cause by Hawkins J in HICKS VERSUS FAULKNER (1878) 80.B.D. 167,171 as

“ An honest belief in the guilt of the accused based upon a full conviction.

Founded upon reasonable grounds the existence of a state.

Of circumstances which assuming them to be true would reasonably lead any ordinarily prudent and cautious man.

Placed in the position of the accuser guilty of the crime imputed...it is not required of the prosecution that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is defence, but whether there is reasonable and probable cause for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct, to ask him for an explanation but no general rule can be laid down and where a person is satisfied or has apparently sufficient evidence, that he has in fact been cheated there is no obligation to call on the cheater and ask for an explanation in as much as to ask for this may only have the effect of causing material evidence to disappear or be manufactured...”

The case of WACHIRA WAHEIRE VERSUS THE HON ATTORNEY GENERAL IN MISC APPLCIATION NO. 1184 OF 2003 which is a constitutional reference.

Lastly the case of JOSEPH C. MUMO VERSUS ATTORNEY GENERAL AND ANOTHER (2008) EKCR wherein on the 19th May,2001 Mr. Mumo was arrested on the basis of false information by the defendant chief inspector Joseph Gitau claiming that the plaintiff while acting in his capacity as a former Assistant chief of Gatundu North, had falsely sworn a document. As a result of that intimidation, he was arrested and imprisoned for 5 days and arraigned in court on criminal charges. He was tried and subsequently acquitted. Findings for the plaintiff Nambuye J as she then was held inter alia that:-

“To prosecute a person is not wrong but to do so dishonestly or unreasonably amounts to malicious prosecution. The burden of proving that the prosecutor did not act honest or reasonably is on the person prosecuted.”

The defence on the other hand referred the court to the case of **NZOIA SUGAR COMPANY LIMITED VERSUS FUNGUTUTI (1988) KLR 399** wherein the court of appeal held inter alia that:-

(4) An acquittal perse on a criminal charge is not sufficient basis to ground of suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill will or improper motive canto be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.

The case of **SIMBA VERSUS WAMBARI (1987) KLR 601** wherein Mbaluto J as he then was held inter alia that:-

1. In order to succeed in an action for the tort of malicious prosecution , a plaintiff has to establish the following essential ingredients:-

(a) That the proceedings were instituted or continued by the defendant.

(b) That the defendant acted without any reasonable and probable cause.

(c) That the defendant acted maliciously.

(d) That the proceedings were terminated in favour of the plaintiff's

2. In the circumstances of the case the police had reasonable grounds to suspect that the plaintiff had committed the offence alleged by the defendant namely obtaining money by false preference, which is a cognizable offence as provided in the first schedule to the criminal procedure code (cap 75). The arrest of the plaintiff was therefore justified in law and the tort of false imprisonment was not committed.

3. The initial arrest having been lawful and the plaintiff having failed to join the Attorney General as a party to these proceedings he could not blame the defendant for the action of the police in detaining him for ten days after the arrest.

4. The plaintiff had only proved that his prosecution had been terminated in his favour and he failed to establish the other elements of the tort of malicious prosecution.

The case of **KIIRU VERSUS MWAMBURI AND 2 OTHERS (2001) KLR 46** where in the court of appeal held inter alia that:-

(2) The burden of proof is on the arresting officer to demonstrate that he had reasonable cause for suspecting that the appellant had committed an offence.

(4) To prosecute a person is not prima facie tortuous but to do dishonestly or unreasonably is

(5) Malicious prosecution differs from wrongful arrest and detention in that the onus of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.

Lastly the case of **JEDIEL NYAGA VERSUS SILAS MUCHEKE C.A. NO. 59 OF 1998** decided by the court of appeal on the 10th day of January, 1993 wherein there is observation that:-

“There is no dispute that the appellant had reported to police complaining about damage to his crop. The respondent was arrested, detained and charged. No evidence was adduced to show the exact nature of the report except that the appellant admitted having made the report to the police to the effect that the respondent had damaged his crops and trees. The police investigated the matter and arrested the respondent. The nature of the police investigation was not disclosed in evidence because there was premature dismissal for lack of prosecution. The respondent moved to court seeking damages for false arrest, malicious prosecution and false imprisonment. He did not

join the police in the suit although it was clear that the acts complained of were committed by the police. The decision to arrest the respondent was made by the police who must have found some merit in the report. They decided to detain, charge and to prosecute the respondent. The mere fact that the prosecution aborted for failure of the prosecutions witness including the appellant to attend the hearing. The blame for the abortive prosecution was squarely on the police and not the appellant. ... the respondents suit was a non-starter for failure to join the police who were the main actors on the state as far as the plaintiff is concerned. It is trite law that false arrest and false imprisonment may well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution is withdrawn and the accused is not re-charged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by the malice. In the instant case there was no evidence adduced to show that the report by the appellant was false. He admitted as having made the report. There was evidence that the respondent had erected a stone building on the appellants land although the dispute was not on the ownership of the land. The police investigated the complaint and arrested the respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false... There was nothing to show that the arrest and prosecution of the respondent was brought without reasonable or probable cause”

The court of appeal lastly drew inspiration from the decision of its predecessor in the case of **EBBEMA VERSUS WENT NILE DISTRICT ADMINISTRATION (1972) EA60** wherein :-

“the appellant was arrested by a constable of the administration police on suspicion of theft of a cash box. He was handed over to the general police who detained him in custody and brought him before the magistrate. The appellant was finally discharged and was not recharged with any offence. The administration police were found to be liable for false imprisonment as a distinct cause of action because discharging the appellant without bringing a fresh prosecution was sufficient to establish a determination of the prosecution in favour of the accused”

The court of appeal then went on to quote with approval a passage in the quoted case as per LAW Ag. V.P Thus:-

“Is the respondent also liable in damages in respect of the abortive prosecution? I do not think so. The decision whether or not to prosecute was made by the Uganda police who are not servants or agents of the respondents. After investigation, I can see no evidence of malice on the part of the respondent. The appellant was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda police. As the judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this court must make its own findings. In my view the circumstance of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda police for his case to be investigated and, if necessary prosecuted, the respondent was actuated by malice”

On the basis of the observation made on the evidence and the application of the reasoning in the cited case the C.A went on to hold that:-

“The appellant having reported to the police about the respondents’ action of damaging his crop, the police took over the matter to investigate the respondent for a possible offence. There was evidence that they visited the scene and took some exhibits. Once the appellant gave the report, he ceased to have anything to do with the matter and the respondent became a natural suspect. There was no evidence of malice on the part of the appellant or absence of reasonable and probable cause against the police investigating we find the appellant who made the report to the police was not responsible for the arrest of the respondent. The mere fact that he was a probable prosecution witness did not render him responsible for the arrest or the prosecution of the respondent by the

police. The police through the authorized officer were not a party to the suit and no findings could be made against them. Even if they were, there was no evidence to show absence of reasonable and probable cause. The inadvertence to bond the prosecution witnesses was not sufficient to establish any malice on their part. The respondent's acquittal constituted a determination of prosecution in his favour and this fact also may very well have rendered the police liable for malicious prosecution"

This court has given due consideration to the afore set out rival pleadings, evidence, submissions, documentary exhibits tendered in evidence as well as principle of case law relied upon by either side and the court proceeds to make the following findings:-

1. That the transaction leading to these proceedings were transacted between the plaintiff in his capacity as a Director of Aberdare Oil Millers Limited and the predecessor of the defendant namely Jimba Credit Corporation Limited.
2. The chain of events leading to these proceedings were set in motion by a letter emanating from the plaintiff to the defendants' predecessor dated 8th day of February, 1989 wherein M/S Aberdare Oil Millers Limited was applying for a loan of Kshs.2 million. The defendant responded vide its letter exhibit D2 dated 5th April, 1989 wherein the defendants agreed to advance Kshs.940, 000 which was granted and accepted.
3. The indebtedness was secured by three motor vehicles namely KWD 997, KWS 264, KWS 171 all of which were the property of Nyeri General Stores whose sole proprietor was the plaintiff. It is common ground that a chattels mortgage was duly executed between the disputants as shown by the entries in exhibit D3 and 17.
4. The amount of loan granted found its way into the loan bank account of Aberdare Oil millers Limited as shown by the bank statements exhibit 11.
5. The company defaulted on the payments and since repossession of the secured motor vehicles became imminent. The reason for failure to produce sufficient funds to service the loan was on account of the unroad worthiness of the said vehicles. By reason of this, the documentation exhibited exhibit 7 (plaint). If indeed show that the plaintiff sought permission to cannibalize one of the vehicles and use the parts to repair the other two vehicles and make them serviceable and mobile so that they can generate income to continue servicing the loan. In the alternative sell them to pay off the indebtedness.
 - (ii) According to the plaintiff authority was given to cannibalize one of the vehicles. He indeed did so which action breathed life into the other two of the three motor vehicles which became mobile. Where as according to the defendants no such authority was given.
 - (iii) Along the lines the defendants sent its agents to check on the said assets and according to the plaintiff indeed the defendants agents come to their yard. Two of their vehicles were out when the defendants agent came on to the site. They were accordingly informed that two of the said vehicles were away as they were mobile. The 3rd one which had been cannibalized had its body parts stored in a store and him plaintiff volunteered to take the defendants agents to the store but they did not bother to heed his request. The plaintiff also offered to deliver the mobile vehicles to the defendants for verification but they did not require him to do so.
 - (iv) The defendant has not disputed the plaintiff's assertion as there is no documentation exhibited by them which goes to show that indeed their agents inspected the stores where the spares had allegedly been stored and found no spares therein. Also there is no documentation that indeed the defendants required the plaintiff to produce the two alleged mobile vehicles and he failed to do so.
6. By reason of the findings and reasoning in number 5 above the court makes a finding that there is nothing to oust the plaintiff's assertion that the parts of the cannibalized vehicle were available and they had not been disposed off.

7. The finding in number 6 above notwithstanding it is common ground that the defendants has not ousted the plaintiffs assertion that the assurance made in number 5 notwithstanding the defendants required him to call on their head quarters which he did and upon arrival he was requested by the defendants investigation unit to record a statement regarding the disposition of the parts of the motor vehicle alleged to have cannibalized without the defendants consent. The plaintiff allegedly gave an explanation as mention in number 5. The said statement has not been exhibited. It is apparent the defendants did not accept that explanation and handed over the plaintiff to police for arrest detention, charging in the court vide criminal case No.3097/96. The particulars of the charge for purposes of the record read as follows:-

“Charge fraudulent disposition of mortgaged goods contrary to section 291(1) of the penal code.

Particulars of offence: Kapurchand Depar Shah between May 1989 and October, 1996 Nyeri Town in Nyeri District control province with intends to defraud and being the mortgagor of mortgaged goods namely a motor vehicle Reg. No. KWD 997 Isuzu Lorry, removed and disposed off parts of the said mortgaged good namely Engine Block, 10 tyres, 10 rims, rear axle propeller shaft, fuel tank, gear box, rear lights, 4 head lamps, battery starter, two side mirrors, grill and registration number plates without the consent of the mortgagor namely M/S Jimba Credit Corporation (Consolidated Bank of Kenya Finance Limited)”

8. It is common ground that the plaintiff was fully prosecuted. The prosecution gave evidence on behalf of the defendant. The plaintiff gave his defence.

9. The said proceedings resulted in a judgment by O. Tunya (Mr.) CM as he then was. It was delivered on the 6/7/98 in open court. The salient features of the same for purposes of assessment are as follows:-

(i) That the facts of the case were brief and straight forward namely that the defendants had advanced a loan to Aberdare Oil Millers Limited. The named 3 vehicles inclusive of one subject of the criminal prosecution were used as security; the plaintiff (accused) was one of the two directors of Aberdare Oil Millers Limited; that the plaintiff is the one who negotiated the loan; that along the lines the lorry subject of the proceedings broke down and the parts were removed by the owners; the plaintiff (accused) is alleged to have explained that he cannibalized those parts in order to sustain the other two vehicles; that the view of the bank investigator was that the plaintiff (accused) had disposed off the said motor vehicle parts without the defendants consent.

(ii) that the plaintiffs **“accused”** had given an explanation in his evidence that he removed the serviceable part to store them to avoid theft; that him plaintiff had paid 1.5. million in full and final settlement of the entire indebtedness to the defendants which action reverted the ownership of the motor vehicles back to him; that the said loan was never advanced to the plaintiff (accused) but to Aberdare Oil Millers Limited; that the extracts of the content of the loan file between the defendants and Aberdare Oil Millers Limited showed that the company had express authority from the financiers to repair the lorry in question amongst them the lorry subject of the proceedings.

(iii) That there is no evidence that the store of the (accused) plaintiff had been checked for parts alleged to have been disposed off and no witnesses alleged that he had investigated that aspect.

(iv) That information gathered from the file showed that the company was under immense pressure to repay the loan and even if it cannibalized one lorry to repair the others in order to make money that action did not amount to intend to defraud.

(v) That the company had authority to repair.

(vi) The court found that the material ingredient on fraud had not been proved beyond reasonable doubt.

(vii) The plaintiff (accused) had good defence of the charge as he had been charged in his personal capacity rather than as director of the company.

10. It is common ground that the said judgment of the criminal prosecution was not appealed against. Both the criminal court proceedings as well as the judgment were produced in evidence as exhibits without any objection. These fall into the category of documents catered for under section 84 of the Evidence Act. It provides:-

“Section 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 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.

(ii) By reason of this provision the court makes a finding that the said documents exhibits 1, 2 and 3 and the proceedings 5 are genuine.

(iii) In the absence of any appeal having been lodged against the resulting decision from the criminal prosecution, the said proceedings crystallized the following issues with regard to these proceedings (current).

(a) That the loan granted by the defendant was granted to Aberdare Oil Millers Limited.

(b) That indeed the plaintiff executed the chattels mortgage in his capacity as a Director of Aberdare Oil Millers Limited and not in his personal capacity.

(c) That there was no proof that indeed the plaintiff had any intention to defraud the defendant and in fact there was no such fraud committed against the defendant.

(d) That the plaintiff was absolved of any blame in so far as the criminal charges preferred against him were concerned.

(e) That by reason of failure to appeal against that decision the correct position as it stands now is that the criminal prosecution was determined in favour of the plaintiff.

11. The court is alive to the fact that the standard of proof in the criminal proceedings is higher than that in the civil proceedings. In the criminal proceedings the standard of proof is one of beyond reasonable doubt. Whereas that in the civil proceedings is one which is on a balance of probability.

(ii) The court also has judicial notice of the fact through the exercise of its judicial function of the fact that where parties have relied on evidence adduced in a criminal proceedings in support of their civil claim, the court dealing with the civil claim is entitled to revisit the evidence on its own and arrive at its own independent conclusion on the matter.

(iii) Herein there is no doubt that indeed the plaintiff is relying on the said criminal prosecution proceedings in support of its cases. This court has given due consideration to the deposition of the witnesses as well as the findings on them in the light of the rival pleadings, evidence, documents and submission of both sides of the divide and the court is of the opinion that the defendant has not tendered any contrary or additional evidence to alter the correct position of the issue crystallized by the decision in the criminal proceedings as stated herein above.

12. The issue of the loan repayment has featured prominently even in the criminal proceedings. It is on record that the criminal court proceedings made a determination that there was no proof that the plaintiff (accused) had paid the loan in full and final settlement of the indebtedness to the defendant. Both parties

have relied on the chattels mortgage plaintiff exhibits 17, and exhibit D3 that the plaintiff never gave a personal guarantee to repay the loan meaning that it was the responsibility of the company to pay off the loan indebtedness to the defendant failing which the bank had to fall back on to the securities secured in order to recover the money owed to it.

(ii) There is traced on the record a document in the bundle of documents produced as exhibit 7, a letter from the plaintiff to the defendants dated 15th September, 1995 to the effect that the company was under Receivership a matter not disputed by the defence.

(iii) It is also common ground that the defendant made no attempt to realize the security.

(iv) Instead of opting to realize the securities there appears to have been negotiation for payment of an agreed sum. The negotiation gave rise to a letter dated 29th day of February, 1996 exhibit 8 under the hand of one J.N. Mwanzia whereby the plaintiff was advised to pay Kshs.1.5 million in full and final settlement of the companies indebtedness to the Respondent. The defendants have not claimed that the said Mwanzia had no authority to commit the defendant to that settlement.

(v) It is apparent that the plaintiff made a counter offer to pay Kshs.1,000,000.00 instead which counter offer was rejected by the defendants vide their letter dated the 26th day of April, 1996 in which they rejected the court offer.

(vi) The rejecting of the counter offer afore said notwithstanding went a head and paid the 1.5 Million shillings by cheque exhibit 9 which was accepted by the defendant. It has been the stand of the plaintiff that the rejection of the counter offer notwithstanding the defendant accepted the said payment without indicating that it was not in full and final settlement. To them failure to indicate that it was not in full and final settlement went to show that the offer was still standing and for this reason, the offer was satisfied they deny that the counter offer cancelled the offer.

(vii) In the alternative to the above in (Vi) above the plaintiff contends that even if Kshs.1.5 million paid was not in full and final determination of the indebtedness owed to the defendant by Aberdare oil Millers Limited, then the defendant ought to have followed the said company to meet its indebtedness to the them they have to follow the company under Receivership and recover the outstanding amount.

13. It is on record that besides the documentation exhibited and assessed above the defendant has not exhibited anything else or adduced evidence to show that the plaintiff is personally liable to make good the indebtedness owed by the company to the defendant.

(ii) It is further noted that no submission and or case law was made and cited by the defence in support of the counter claim. The plaintiff has urged the court to treat the counter claim to have been abandoned.

14. There was also the issue of whether the defendant was the right party to be sued for malicious prosecution considering that the Attorney General was not joined to the proceedings as a party. The plaintiff has argued that prosecution was instigated by the defendants' agents and they are therefore the only proper defendants. That the case law whose claims were faulted by reason of failure to join the Attorney general as a defendant are distinguishable because in those cases it is the police who had carried out the investigations as well as the making of the decision to prosecute. Herein it is evident that it is the defendant's agents who carried out the investigation made a decision to prosecute and merely handed the plaintiff over to the police for prosecution.

(ii) When considered against the back ground evidence on the record, the court makes a finding that the cases which were faulted on account of failure to join the Attorney general as a party are distinguishable to the facts herein because herein the investigation and the decision to prosecute was taken by the defendants agents. They are therefore the only proper defendants.

This court has given due consideration to the findings in number 1,2,3,4,5,6,7,8,9,10,11,12 and 14 above and in its opinion in the absence of the parties having agreed on the issue for determination the

court finds that there are only two issues for determination.

(1) Whether the plaintiff has made out his case as claimed against the defendants.

(2) Whether the defendant has made out its case in the counter claim as against the plaintiff. Bearing in mind the findings above, the court proceeds to make the following findings on the reliefs sought.

1. Prayer (a) (b) are inter related. In them the plaintiff seeks an injunctive relief to restrain the defendant from interfering with the quiet possession of vehicle numbers KWD 997, KWS 264 and KWS 171 in the first part, and in the other part to restrain the defendant agents and or servants from taking possession of the afore said motor vehicle. Being an injunctive relief all that the plaintiff has to demonstrate to exist in order to earn these reliefs is to come within the ambit of the ingredients favouring an award of an injunctive relief as set by the land mark case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358** namely:

(a) Demonstration of existence of a prima facie case with a probability of success; that damages will not be an adequate compensation and lastly on a balance of convenience.

(ii) When applied to the rival arguments herein the court is satisfied that the plaintiff has demonstrated existence of a prima facie case with a probability of success in that the court has already found as a fact that the payment of Kshs.1.5 million was made in full and final settlement of the indebtedness of Aberdare Oil Millers company limited to the defendant.

(ii) That the plaintiff who had given out the afore said motor vehicles as security to secure the payment of the indebtedness of Aberare Oil millers limited to the defendant did not give a personal guarantee for the repayment of the Said indebtedness in case of default of repayment of the said loan to the defendant by Aberdare Oil Millers Limited.

(iii) At no time has the defendant ever made moves to realize the said motor vehicles inspite of their status as securities. No explanation was given by the defendant either in the criminal proceedings or in the current proceedings as to why such an action was never taken. The only reasonable conclusion and or inference to be drawn from the defendants conduct not to do so is because they knew that there was no personal guarantee given by the owner of the said motor vehicles to personally pay the said indebtedness of Aberdare Oil Millers Limited in case of default. There was no indication as at the time of trial that the defendant was contemplating taking such action in future. In the premises there is nothing put forth by the defendant which this court can use as an ouster of the plaintiffs claim as presented in prayer (a) (b) above.

(3) With regard to the claim in prayer (c) for a declaration that the defendant is not entitled to detain the afore said log Books and Transfer Forms pertaining to the said vehicles, this court adopts the reasoning in number (2) above as applying to the reasoning with regard to the relief sought under prayer (c) and rules that the plaintiff is entitled to seek the return of the said log books and the court will proceed to make orders for their return.

(4) With regard to the special claim of Kshs.348, 000.00. It is evident from the evidence adduced that these relate to costs incurred by the plaintiff as legal costs for his defence during the criminal proceedings. It is now trite that the correct position in law is that the law requires that these be pleaded, particularized and strictly proved. See the case of **OUMA VERSUS NAIROBI CITY COUNCIL (1976) KLR 297** decided by the high court and as crystallized by the court of appeal in the case of **HANN VERSUS SINGH (1985) KLR 716** when applied to the plaintiffs claim herein, the court finds that the ingredient of pleading and particularization have been proved. As for proof the plaintiffs rely on the claims demand note produced as exhibit 11 showing clearly that the advocate charged Kshs.348,000.00 for representing the plaintiff in the criminal proceedings. The criminal proceedings produced herein and assessed above all show that indeed the advocate who issued the demand note is the one who represented the plaintiff in the criminal proceedings. The court finds this claim proved and the same is accordingly allowed as claimed.

(5) With regard to the claim for general damages it is undisputed that these are in relation to the defendant agents accusing the plaintiff of cannibalizing one of the vehicles pledged to secure the indebtedness to the defendants in favour of Aberdare Oil Millers Limited making him record a statement to that effect in the defendants offices; handing over the plaintiff to the state for prosecution, participating fully in the prosecution by tendering witnesses; which prosecution terminated in favour of the plaintiff.

(ii) The court is alive to the requirement that in order for a litigant to succeed in such a claim there has to be demonstration that the defendant instigated the proceedings without probable or reasonable cause and that the said prosecution resulted in a determination in favour of the plaintiff. When applied to the facts herein the court is satisfied that the plaintiff has satisfied the afore set out ingredients because as found by the criminal court judgment, the defendant instigation of the prosecution of the plaintiff for fraudulent disposition of mortgaged goods contrary to section 291 (1) of the penal code was without foundation and or reasonable justification or reasonable cause because the defendants did not confirm that the parts from the cannibalized vehicle were not available and stored as claimed by the plaintiff and instead that they had been disposed off as claimed by the defendant before moving to prosecute the plaintiff. The court therefore finds that the plaintiff has proved his claim under this head.

(iii) Being a general claim the court has to bear in mind the new crystallized applicable principles with regard to its assessment namely:-

(a) Being general, their assessment is a discretionary exercise on the part of the court which discretion has to be exercised judiciously and with a reason.

(b) These should not be inordinately too high and or too low.

(c) These should be awarded to compensate the victim for the injury suffered and not to enrich him/her.

(d) Where past awards are taken into consideration their ages when made and the length of time passed between these and the intended award are of importance as the court is required to take into consideration the element of inflation. Doing the best it can and bearing in mind principles of case law cited and bearing in mind all the relevant factors in this matter the court awards Kshs.300, 000.00 as being appropriate to be awarded as general damages in the circumstances of this case.

(6) As for punitive damages the court has judicial notice that these are usually awarded as compensation for the defendants high handed and highly oppressive action committed against the plaintiff. When applied to the facts herein the court is of the opinion that what the defendant failed to do is to confirm that the parts of the cannibalized secured motor vehicle had in fact been disposed off as claimed by the defendant and not stored as claimed by the plaintiff before instigating the prosecution. The court finds no high handedness and oppressiveness in the defendants action and in the premises this claimed fails.

(7) As found by this court in the assessment the plaintiffs failure to include the Attorney General as a party to these proceedings is not fatal to the plaintiffs case because the facts of this case are distinguishable from the facts of the cases which were faulted by the courts on account of failure to include the Attorney General as a party because in the said faulted cases the agents of the Attorney General had both investigated and made a decision to prosecute independently of the act of reporting. Where as herein the decision to investigate and prosecute had been taken by the agents of the defendant.

(8) Costs usually follow the event and the plaintiff who had succeeded in his claims in the plaint will have costs of the suit.

Turning to the counter claim the court adopts the reasoning and findings with regard to the plaintiffs claim and order that, that reasoning and findings do operate as reasoning and findings with regard to the defendants counter claim. The reason for saying so are that:-

(a) The defendant accepted payment of Kshs.1.5 million in full and final settlement of the defendants claim for Aberdare Oil Millers limited with regard to the said company's indebtedness to the defendant.

(b) There was no personal commitment on the part of the plaintiff to pay that indebtedness to the defendant in the event of any default in the payment by the said borrower company of Aberdare Oil Millers Limited.

(c) The defendants made no efforts to realize the securities given to secure the said loan which is a clear indication that the plaintiff assertions that the amount of Kshs.1.5 million paid by the plaintiff to the defendant was in full and final settlement of the indebtedness of Aberdare Oil Millers limited to the defendant was the correct position in law.

(d) No additional evidence was adduced by the defendant with regard to this claim besides those used by the plaintiff to support his claim.

(e) No submissions were made by the defence on this counter claim and by reason of this conduct, the court agrees with the submissions of the plaintiff that this is a clear case of abandoning this claim.

(f) By reason of what has been stated in number (a) (b) (c) (d) and (e) above the defendants counter claim fails and the same is dismissed with costs to the plaintiff.

For the reasons given in the assessment the court proceeds to make the following final orders in the disposal of both the plaint as well as the counter claim.

1. In terms of prayer (a) (b) and (c) of the plaint, the court makes an order restraining the defendants, its servants and or agent from interfering with the plaintiffs quiet possession and enjoyment of motor vehicle number KWD 997, KWS 264 and KWS 171.

(ii) The defendant its servants and agents are restrained from taking possession of the afore mentioned motor vehicles.

(iii) The defendant is accordingly ordered and directed to hand over forthwith the log books and transfer forms with regard to the afore said motor vehicles.

2. Special damages of Kshs.348, 000.00 is accordingly allowed as prayed for the reasons given.

3. General damages of Ksh.300, 000.00 three hundred thousand shillings only has been awarded as being adequate compensation under this head.

4. The claim for punitive damages is refused and dismissed for the reasons given.

5. The plaintiff will have costs of the suit.

6. The special claim will carry interests at court rates from the date of filing till payment in full.

7. The general damages awarded will carry interests at court rates from the date of judgment till payment in full.

8. For the reasons given in the assessment, the defendants counter claim be and is hereby ordered to be dismissed in its entirety.

9. The plaintiff will have costs of the dismissed counter claim.

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

DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS 21ST DAY OF SEPTEMBER,2012.

JUDGE