**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO.13 OF 2004**

**COSMAS BULUMA.....APPELLANT**

**=VERSUS**

**KIZITO NAMULANDA.....RESPONDENT**

***[From the ruling and Order of Honourable E. Nyaloti, SRM, busia in Busia SRMCC NO. 394 of 1998]***

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

This is an appeal by the Defendant from the Busia Senior Resident Magistrate Court Civil Case No.394 of 1998. The honorable Magistrate had dismissed an application filed by the Defendant seeking that the plaintiff's suit to be dismissed for being technically and fatally incompetent. To understand what happened a summary of facts is necessary.

The respondent who was the plaintiff in the court below was arrested by the Nambale Police Officers as he sat at Nambale Trading Centre on 10.12.1997. The police were in the company of the Defendant/Appellant who apparently had reported to the police that the plaintiff/Respondent had maliciously damaged the defendant's crops. The plaintiff was eventually tried for malicious damage but acquitted under Busia SRM CR. Case No.1800 of 1997. He had hired an advocate to defend him and had paid him kshs5000/=.

Being aggrieved the plaintiff thereafter filed this civil case against the Defendant/Appellant herein, Cosmas Buluma. He alleged that the arrest and prosecution was a direct consequence of a false and malicious report which the Defendant had lodged with the Police at Nambale Police Station. He further alleged that since the arrest and prosecution caused on him mental anguish, humiliation and embarrassment, and thus causing damage to him, the defendant should be liable to both special and general damages.

It was as the suit pended for trial after an earlier *ex Parte* judgement had been set aside that the Defendant, as I understand it, filed this Notice of Preliminary Objection to have the suit technically dismissed for incompetency.

In his ruling the trial Magistrate overruled the defendant. He ruled that there was nothing on the plaint that made it a non-starter and bad in law. He further ruled that the suit should go for a hearing since the plaintiff may proceed to amend the plaint to enjoin the police or the Attorney General as defendant.

The above is the ruling that aggrieved the defendant who, with the leave of the lower court, filed this appeal.

I have carefully perused the record of appeal and the court below. I have also studied the case of Stephen Taiti Warhu and James Wycliffe Warhu vs Calistus Makokha Akunda being Kakamega High Court Civil Appeal No. 52 of 1998, decided by my brother, Waweru J. The thrust of the above case is an objection raising the following grounds:-

1) That the suit is a non-starter.

2) That the suit is statutorily time-barred.

3) That the suit is bad in law.

The Defendant on 29.6.2004 prosecuted his Preliminary Objection upon the grounds above. The Defendant argued that the plaint is bad in law and could not be sustainable in the manner it was constructed.. He further stated that since the defendant had only reported the claimed malicious damage to the police, who independently investigated and decided to arrest and charge the plaintiff with an offence, no claim could succeed against any other party unless the police or Attorney-General representing the police, was made a party. He argued that the police were the main actors in the process of arrest and prosecution of the plaintiff. Failure to enjoin the State therefore, the Defendant had argued, was a fatal omission. That the court was accordingly bound to strike out the plaint as fatally incompetent if it had not joined the police or the Attorney-General on Police behalf. The defendant did not explain or expound the other ground of objection that the suit was time-barred. This court will accordingly find need to mention the issue of time-bar again.

On their part, Manwari & Company Advocates on behalf of the Respondent/Plaintiff, stated that the statement of Defence filed at the lower court by the Defendant, had not raised the issues forming the Preliminary Objection. They then made reference to definition of a Preliminary Objection as defined in the case of Mukhisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696, at page 700. The Preliminary Objection which the Defendant had raised at the lower court they argued, did not amount to one.

It can be observed that the Plaintiff skirted around the really issue, the subject of this appeal. Whether or not it was mandatory to enjoin the police as party in the case against the Defendant was and is the real issue to be decided. Whether or not the Preliminary Objection before the lower court amounted to one, was not an issue, was not raised there by the plaintiff as an issue, and was indeed not considered and decided on by the trial magistrate. In my view therefore, the Plaintiff/Respondent cannot rightly introduce

the said legal issue about a Preliminary Objection during the appeal process, out of the blues and in circumstances in which the Defendant/appellant has no opportunity to reply.

As to the issue as to whether the suit at the lower court was time barred or not, the appellant/defendant did not explain the issue or argue it. This court therefore, has no material upon which to consider it one way or the other and the court assumes that the appellant abandoned it.

I will now turn to the main ground of appeal. Was it fatal for the defendant/Appellant to fail to enjoin the police as party in this suit?

The appellant answers in the positive. He relies on the case of Stephen Taiti Wakhu & James Wycliffe Wakhu Vs Calistus Makokha Akunda Kakamega High Court Civil Appeal No.52 of 1998. In the said appeal with a similar situation,Waweru, J,relying on the Court of Appeal decision in the case of Jediel Nyanga vs Silas Mucheke – Nyeri, Courtof Appeal Civil Appeal No.59 of 1987, unreported, stated as follows at page 12:-

**“ In the present case it is clear that the police acted after the Appellants complained that the Respondent had trespassed upon the 1st Appellant’s land. The police decided to arrest the Respondent before first investigating the matter fully. Apparently, after investigations they decided ultimately not to charge him. But the police were clearly the main actors in the decision to arrest the Respondent and to place him in the cells. It cannot be said that in doing so they were under the direction and control of Appellants. They ought to have been joined in the action. The failure to do so rendered the Respondent’s suit a “non-starter” to use the term used by the Court of Appeal in the cited case.”**

Waweru, J proceeded to allow the appeal before him.

I have carefully considered the appellant’s arguments and the decisions of the Courts above. I completely agree with the above quoted decision as it affects this appeal before me. It cannot be easily proved that the police to whom the Appellant herein had reported, were under direction or control of the complainant when they decided to arrest the Respondent. Unless there is evidence to the contrary, the police after receiving an official complaint from a citizen, make an independent decision whether or not to act on the report to arrest and later to charge the suspect on a possible offence. Put differently, the police become the main actors in the decision whether or not to arrest and charge a person reported to them.

In those circumstances the police should logically and indeed necessarily be enjoined in any suit arising afterwards out of their above stated conduct.

I was not given the benefit of reading the cited Court of Appeal decision in the case of Jediel Nyanga vs Silas Mucheke to understand the *stare decis* therein as the judgement was not annexed. I however, believe that the logic in it was that since the main actors in the process of decision making to arrest and charge a suspect, lies with the police who receive a report from a party, then it follows that any reasonable cause of action arising therefrom, can only properly and squarely face the police as the main actors. Otherwise the civil suit arising, cannot raise a reasonable cause of action against the party who merely reports to the police and whose report the police can ignore if the circumstances and facts do not warrant arrest or for any other reason.

It also means that a civil suit filed without enjoining the police who were the main actors in constituting the reasonable cause of action therein, has no chances of succeeding. It should not accordingly be left to go to a hearing since that would be a pure waste of time and resources. Hence the basis of striking it out before or at the hearing stage.

It is clear in my mind therefore, that where the plaintiff in the circumstances stated above, files a civil suit by a plaint which omits enjoining the police as party, the suit can be ruled to be showing no reasonable cause of action and should be struck out before or during the hearing. The trial court in this case in my view recognized that position at the end of the Magistrate's ruling which is the one targeted by this appeal, when he stated thus:-

**"……..As the police has not been joined as a party, this is a matter that can be addressed by the plaintiff amending the plaint and enjoining the Attorney-General as a defendant."**

It seems to me however, that the lower court magistrate using his discretion, decided not to strike out the plaint but to give the plaintiff an opportunity to amend his plaint, to enjoin the police and the Attorney-General, before the next hearing date. The Resident Magistrate clearly appears to have acted '*suo motto*' since there is no evidence on record that the plaintiff/Respondent, sought leave of court to amend his plaint. The said court, in my opinion, hath the power and discretion to do so under former Order VIA Rule 5 of the Civil Procedure Rules which state as follows:-

**"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court of its own motion or on the application of any party may order any document to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just."**

The above rule has been sustained as Order 8 rule 5.

The position this court has taken must be clarified, however. Had the lower court decided to proceed and, had it proceeded with the hearing of the suit without exposing the plaint to amendment, this court being bound by the Court of Appeal case earlier discussed, would have allowed this appeal on the same principle therein cited.

The lower court did not state the reason why it exercised its discretion *suo motto*, in favour of sustaining the suit instead of striking it out. In my opinion however, it is now trite that where the court has reasons for and against sustaining a suit, it would consider it more appropriate and in the interest of justice, to sustain the suit, so that a party would have his day in court. This would sustain a party's right to prosecute his case or defend his case, as the case may be. That would also in general, sustain greater access to justice, a policy now strongly recommended under the Constitution.

The conclusion I come to therefore, is that the moment the trial court decided to adjourn the suit and give the plaintiff an opportunity to amend his plaint to enjoin the police, is the moment when it also took away from the Appellant his only good ground of appeal. This is so because the appellant's other ground of appeal that the suit was time barred was not argued before this court. The appellant/defendant should have at that moment at the lower court, let go and sought for his costs, probably throw-away costs. That, he did not do, but chose to pursue the matter on appeal which has turned out to have no merit.

The result is that this appeal must fail and is hereby dismissed. Taking into account the way the

Respondent and the appellant handled the process both in the lower court and here, the costs of the whole suit will abide the result of the suit at the lower court.

This is an old suit and the plaintiff should amend it, if he so wishes, within 14 days, with leave to the defendant to amend his defence within 14 days of service of the amended plaint

Dated and delivered at Busia this 14t day of June 2011.

D.A. ONYANCHA

JUDGE.