No. 121
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 313 OF 2006

GEKARA AYIOKA ……..…….. APPELLANT

-VERSUS-

STEPHEN NYAMOKO NYANGENA……...…… RESPONDENT

JUDGMENT

(Being appeal from the judgment and decree of L. Komingoi, SRM at Nyamira SRMCCC.No. 26 of 2004)

This appeal arises from a judgment and decree of **L. Komingoi**, **SRM** in Nyamira **SRMCC NO. 26 of 2004**. By the said judgment and decree dated 22nd November 2006 the appellant who was the 2nd defendant together with the Attorney-General sued as the 1st defendant were found liable for malicious prosecution of the respondent and a sum of Kshs. 150,000/= was awarded as general damages plus costs in respect thereof. It is against the finding and the award aforesaid that this appeal was preferred.

The background information leading to this appeal is that the appellant is and was the registered owner of land parcel No. **EAST KITUTU/BOTABORI III/143** which he bought from the father of the respondent one **Nyangena Machora**, and had Title to the same. By a letter dated 31st March, 2003 from **M/s Nyamai & Co. Advocates** addressed to the appellant amongst others and copied to the Officer commanding Police Division, Nyamira amongst others as well, and written on the instructions of the respondent amongst others, the respondent accused the appellant of trespassing in their land and surveying the same without their consent and knowledge. They demanded that the illegal survey infavour of the appellant be nullified. By a copy of the said letter they requested the OCPD, Nyamira Police Division to investigate the trespass and the illegal survey if possible and prefer criminal charges against those involved. Upon the OCPD receiving the said letter, he apparently instructed his officers to investigate the complaint which led to the summoning of the appellant to the police station as a suspect.

After the investigations, the police decided not to charge the appellant but the respondent instead in the Senior Resident Magistrate's Court at Nyamira in Cr. Case No. 368 of 2003 for the offence of trespass with intention to annoy contrary to section 5(1) (c) of **Trespass Act.** Apparently the said proceedings terminated in favour of the respondent as he was acquitted under S. 210 of **Criminal Procedure code.** Soon after that acquittal the respondent sued the appellant claiming general damages for malicious prosecution.

In support of the case, only the respondent testified. The same applied to the appellant. Though the Attorney general entered appearance and filed a defence he failed to attend court on the hearing date. The case thus proceeded in his absence. Of course the appellant in his defence had denied the respondent's claim. Indeed it was his defence that he bought the land from the respondent's father and had a title deed to the same. He denied that he reported the matter to the police and or caused the arrest and subsequent

prosecution of the respondent.

The learned magistrate having evaluated evidence tendered by each side found in favour of the respondent holding: ***"…..The issue for determination is whether the 2nd defendant did report the plaintiff to the police who then arrested and prosecuted him before a court of law. The plaintiff stated that the 2nd defendant was driven by malice when he reported the matter to the police. The conditions of liability for damages for malicious prosecution must be satisfied. In this case the proceedings in criminal case No. 368/2003 were instituted by the 2nd defendant when he reported the matter to the police. The police then arrested the plaintiff, beat him up and eventually had him arraigned in court. The police officers who prosecuted the plaintiff were the 1st defendants agents. The plaintiff was later acquitted under section 210 of the Criminal Procedure code because the court found that this was a boundary dispute and yet the plaintiff had been charged with trespass. This demonstrates that the proceedings were terminated in the plaintiff's favour. The plaintiff also proved that the defendant acted without reasonable or probable cause. In the ruling the court found that the land registrar had not determined the boundaries so there was no basis for the plaintiff to be charged. This shows that the police without carrying out proper investigations arraigned the plaintiff in court.***

Finally the plaintiff has proved that the 2nd defendant was driven by malice to report him to the police. He knew that the boundaries had not been determined and yet he went ahead. The District Surveyor told the court in criminal case No. 368/2003 that the 2nd defendant could not recognise his boundary on the ground. The proceedings of the criminal case were produced as exhibit P1 in this case. I find that the proceedings in criminal case No. 368 of 2003 were malicious. I therefore hold the defendants liable to the plaintiff for malicious prosecution. The plaintiff said he was in police custody for three days before being arraigned in court. He said he was beaten while there. This was not challenged as the 1st defendant did not offer any evidence or written submissions. I award Kshs. 150,000/= which I think is adequate compensation. I rely on the authority of Doctor Odhiambo Olel versus The Attorney General Kisumu HCCC. 366/2005 where the plaintiff was awarded Kshs. 4,500,000/= for malicious prosecution. It should however noted that the plaintiff in the 2005 case was held for longer days in police custody and was tortured. Accordingly judgment is entered for the plaintiff as against the 1st and 2nd defendant jointly and severally for:-

a) General damages for malicious prosecution Kshs. 150,000/=.

b) Costs of the suit plus interest.

Right of appeal 28 days."

The appellant was aggrieved by the judgment and decree aforesaid hence this appeal. 5 grounds of appeal were advanced, These are:-

1. THAT the learned trial magistrate erred in law and in fact in finding the case proved when the evidence tendered falls short of proving the claim for malicious prosecution

2. THAT the learned trial magistrate erred in law and in fact in finding malice proved when there was no evidence, direct or implied, on the issue of malice.

3. THAT the learned trial magistrate erred in law and in fact in failing to find that it was actually the respondent's acts that triggered his own arrest and hence the appellant could not have been responsible for his arrest.

4. THAT the learned trial magistrate erred in law and in fact in not considering the appellant's case as put together with the exhibits tendered in evidence thereof.

5. THAT the learned trial magistrate erred in law and in fact in finding that the appellant acted without reasonable cause, without basis for the finding.

When the appeal came up for directions, parties agreed to canvass the same by way of written submissions. However only the appellant managed to file his. The respondent was given time on no more than 2 occasions to file his written submissions but failed to do so. Accordingly this appeal has proceeded as uncontested. I have read and considered the written submissions of the appellant and cited authorities.

As a first appellate court, it is my duty to subject the evidence tendered during the trial to fresh and exhaustive examination so as to reach my own decision as to whether the judgment can stand or not.

The respondent's claim in the trial court was anchored on false and malicious prosecution. For him to succeed he had to show:-

That the prosecution was instituted by the appellant or by someone for whose act, he is responsible.

That the prosecution terminated in his favour.

That the prosecution was instituted without reasonable and probable cause.

That it was actuated by malice.

See generally **Murunga V The Attorney General (1979) KLR 138.**

In the instant case, the gist of evidence of the respondent was that he was arrested on 30th April, 2003 by police officers from his home and taken to Nyamira Police Station and was not arraigned in court until after 3 days. Whilst at the police station he was assaulted. Subsequent thereto he was taken to court on a criminal charge of trespass with intention to annoy contrary to section 5(1) (c) of the **Trespass Act.** After trial, he was acquitted. It was his testimony that he was arrested for no apparent reason. He would not have been arrested had the appellant not complained and that the police had not investigated the case well.

To begin with, there was no evidence whatsoever that the appellant instituted the proceedings and that the police who filed the criminal charge against him were ***"a people"*** for whose acts he was responsible. Indeed the matter was commenced by the respondent himself vide the letter to the appellant and which he copied to the OCPD. The appellant was summoned and he presented his side of the story and it is the police who upon conducting their investigations and without the appellant's directions, influence or control, decided to charge the respondent with offence instead. There was no evidence that the appellant influenced the police in their investigations and or he acted in collusion or cohorts with them. It is the police in their wisdom or lack of it who preferred the charge against the respondent after I would imagine having interrogated the appellant as well as the respondent. The police are a mandated to carry out investigations once a complaint is lodged and upon being satisfied on the evidence gathered by them to either charge or not charge a suspect. The appellant cannot therefore be held liable for the acts or omissions of the police, if any.

The particulars of malice alleged by the respondent are that the appellant presented information to the to the police that he knew to be false or untrue, causing the arrest of the respondent without any reasonable cause, framing accusations against the respondent that were found to be false by a court of competent jurisdiction and testifying or procuring false testimony against the respondent on a false charge. None of these allegations of malice were alluded to by the respondent both in his testimony in chief, cross examination and even in re-examination. Accordingly the learned trial magistrate erred in law and in fact in concluding that malice was proved on the basis that appellant was driven by malice when he lodged with the police of a complaint against the respondent when he knew that boundaries had not been determined. He who alleges must prove. It is not up to the court to draw in references as happened in this case. In any event the totality of the evidence in this case is that the appellant had a genuine complaint against the respondent as the said respondent had ploughed his land, whose title he produced in court.

In short none of the particulars of malice were proved. Even in his ruling the learned magistrate in the criminal case and though he acquitted the respondent, the learned magistrate did not make a finding that the complaint of the appellant was false or untrue. The respondent was acquitted because of the defective charge sheet as there variance between the evidence led and the particulars of the charge sheet and also because the Land Registrar had not determined or established the common boundary between the appellant's and respondent's parcels of lands as required under S. 21 of the **Registered Land Act**.

The appellant has complained that the learned trial magistrate erred in law and in fact in not considering the appellant's case as put together and the exhibits tendered in support thereof. As already stated, the totality of the case that formed the cause of action of this suit in the lower court was not one instituted without reasonable and probable cause. The respondent, had a complaint against the appellant, which he considered to be trespass onto his land by the appellant. However the appellant had title to the same and by presenting his side of the story as well as the respondent's which the police investigated thoroughly and found to be reasonable or probable, the police officers preferred charge against the respondent.

For all the foregoing reasons I find that the prosecution of the respondent was not instituted by the appellant or someone for whose act, or omission he was responsible. Though the prosecution terminated in the respondent's favour, it was not activated by malice. Indeed the prosecution it would appear was instituted with reasonable and probable cause and that none of the particulars of malice as set out in the plaint were proved.

In circumstances this appeal has merits and is accordingly allowed. I set aside the lower court judgment and decree and substitute therefore with an order dismissing the suit with costs. The appellant will have the costs of this appeal too.

Judgment dated, signed and **delivered** at Kisii this 16th day of July 2010.

ASIKE-MAKHANDIA

JUDGE