



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL NO.90 OF 2006

ISAAC ANYULA KHATETE APPELLANT
V E R S U S
WILSON FRANCIS ONJUNJI
JOSEPH KHALWENYI OMWALO RESPONDENT

J U D G M E N T

1. In the Complaint dated 22.1.1998 and filed on 26.1.1998 in CMCC 38/1998 (Kakamega), the Appellant Isaac Anyula Khatete and Ibrahim Wechuli sued one Wilson Francis Onjunju, Joseph Khalwenyi Omwalo and the Attorney-General seeking general damages for malicious prosecution, special damages of KShs.86,440/= plus costs and interest thereon. The special damages were said to be the cost of travel and subsistence as well as advocates fees expended and paid in defending charges laid against them in Kakamega CM's Court Criminal Cases nos. 85 and 86 of 1995 and in Kakamega H.C. Criminal Appeal no.127/1996. The charges were that they had interfered with a boundary contrary to **Section 24 (1)** of the Registered Land Act Cap 300 Laws of Kenya. They were apparently convicted of those charges but in Kakamega H.C. Criminal Appeal no.127/1996, the conviction was quashed and sentences set aside.

2. In the civil suit aforesaid, and subject of this Appeal the learned trial magistrate decided as follows;

***“For reasons shown above while dismissing the Plaintiff’s case against 1st and 2nd defendant with costs, I find the Plaintiffs have proved their case against the 3rd Defendant and I enter judgment for Plaintiffs against the 3rd Defendant for payment of 50,000/= (fifty thousands) as general damages for malicious prosecution, Shs.30,840/= legal fees for 1st and 2nd Plaintiff plus KShs.22,500/= and KShs.8660/= respectively for transport and subsistence all totaling KShs.162,000/= (One hundred, sixty two thousands only) plus costs and interests.
Right of appeal 30 days.”***

3. In the Amended Memorandum of Appeal dated 4.5.2009 against the above decision, the Appellant has raised the following grounds of appeal;

- “1. That the Trial Magistrate erred in law when he entered judgment for the Appellant/Plaintiff against the Attorney General alone when the Appellant had also proved his case on a balance of probability against the respondents above sued as first and second Defendants respectively.***
- 2. That the Trial Magistrate erred in law by holding that the Appellant’s case against the Respondent was time barred in the absence of any specific pleading by the Respondents.***
- 3. That the Trial Magistrate erred in law and misdirected himself by evaluating and analyzing the evidence in a contradictory manner thereby arriving upon [an] erroneous decision as regards the case of the Respondents.***
- 4. That the Trial Magistrate erred in law in holding that the Plaintiff’s suit against the Respondents was time barred.***
- 5. That the Trial Magistrate erred in law in failing to take into account that time does not run***

during the Christmas vacation while computing the time within which the Appellant's suit was filed."

4. From the above grounds of appeal and in submissions, only two issues need to be addressed;

i. whether the claim against the 1st and 2nd

Defendants was time-barred, and

ii. whether the case against the 1st and 2nd

Defendants had been proved on a balance of probability.

5. If I should find that in fact the claim was time-barred, then any answer to the second question would be superfluous.

6. In dismissing the case against the 1st and 2nd Defendants, the learned magistrate rendered himself as follows;

"Before deciding whether or not to go to the stage of assessing damages payable, I notice the issue of limitation was raised during cross-examination of both plaintiffs and in the submissions of both counsels.

I have already pointed out that the court file contains an application dated 6.2.98 for leave to file this suit out of time. Prayer one clearly shows the prayer was in respect of suit against the 3rd Defendant. The proceedings shows Amasakha Advocate moved the court in respect of the said application on 4.3.1998 and ruling was to be delivered on 24.3.98. There is nothing to show what happened after this but the application being exparte and as 3rd defendant has not raised an issue about it. I will take it that leave to file suit against 3rd Defendant was obtained.

As for 1st and 2nd Defendants, there is nothing to show any application was filed for leave to file suit against them out of time. The incident complained of occurred on 4.1.95 going by the evidence of 2nd Defendant while the suit was filed in 1998 January 26th. The period of 3 years had therefore expired on or about the 4th or 5th January 1998 and therefore leave to file the suit out of time needed to be obtained before continuing with the suit against 1st and 2nd Defendants. As this was not done, the suit against 1st defendant and 2nd Defendant must fail. The Plaintiffs are therefore entitled to recover their damages against the 3rd Defendant."

7. Can the above reasoning be faulted? Malicious prosecution is a tort and as correctly pointed out by the learned magistrate, the limitation period from the date when the cause of action arose was three (3) years. Section 4(2) of the Limitation of Actions Act, Cap.22 Laws of Kenya provides as follows;

"S.4 (1)

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

That is the law on the subject.

8. The next question would be when the cause of action arose because it is not contested that the suit was filed on 26.1.1998. Working backwards the cause of action should have occurred between 26.1.1995 and 26.1.1998 for it to be admissible without leave.

9. In evidence before the learned magistrate, the Appellant stated that he was arrested prior to 23.1.1995 by the 1st Defendant and he was given a bond to attend court on that day. He did not do so and he finally appeared on 13.2.1995 while the incident complained of occurred on 4.1.1995 and that fact also borne by the evidence of the 2nd Defendant.

10. In answer to the question above, I have seen the decision of Waweru J. in Peter Kamau Josephat vs AG & Another [2008] e KLR and in it the learned judge stated inter – alia as follows; ***"The cause of action appears to have arisen on or about 26th April, 2007 when the Applicant was acquitted."***

11. The Appellant takes the same approach because he alluded to the date when his appeal was allowed i.e. 25.9.1996 as being the date when the cause of action arose.

12. So then I have three dates said to be the ones when the cause of action arose i.e. the date when the complaint was made and the date when the appeal against the conviction was allowed as well as the date when the charges were first laid i.e. 23.1.1995.

13. I am of the humble view that the Appellant is right. For the tort of malicious prosecution to be proved, the ingredients of a prosecution and malice must be present. Malice is however the one crucial fact that must be proved and the prosecution must be in favour of the Plaintiff because a

successful prosecution cannot certainly be malicious. That then points to the date of acquittal or a successful appeal against conviction as the date when the cause of action arises. In the event, the cause of action arose on 25.9.1996 and therefore the suit as against the 2nd and 3rd Defendants was within time and contrary to the findings by the learned magistrate, the same was not statute time-barred.

14. The second question regarding the case against the 1st and 2nd Defendants is straightforward. It was the 1st Defendant who lodged a complaint to the police and the complaint was that the Appellant had interfered with the boundary between land titles numbers Butso/3366 and Butso/4460 and 3105 by closing the access road and fencing the road off. The complaint was initially triggered by the 2nd Defendant who was the affected party and whose access to his land had allegedly been interfered with. The police thereafter took up the complaint, and upon investigations, charged the Appellant with a criminal offence. He was convicted and on appeal, the conviction was set aside.

15. I have perused the record of the trial court and sadly, no malice was ever proved against the 1st and 2nd Defendants. Nowhere in pleadings or in evidence was there evidence of such a fact. In Black's Law Dictionary, 8th Edition it is stated thus;

“Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious and this legal usage has etymology in its favour. The Latin, “militia”, means badness, physical or moral – wickedness in disposition or in conduct – not specifically or exclusively ill-will or malevolence hence the malice of English law, including all forms of evil purpose, design, intent, or motive. [But] intent is of two kinds, being either immediate or ulterior, the ulterior intent being commonly distinguished as the motive. The term malice is applied in law to both these forms of intent, and the result is somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously, we mean one of two distinct things. We mean either that it is done intentionally, or that it is done with some wrongful motive. See “John Salmond, Jurisprudence 384 (Glanville L. Williams ed. 10th ed. 1947).”

[M]alice in the legal sense imports (1)

the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a claim and strong likelihood that such harm may result The model Penal Code does not use ‘malice’ because those who formulated the code had a blind prejudice against the word. This is very regrettable because it represents a useful concept despite some unfortunate language employed at time in the effort to express it.” - see “Rollin M. Perkins & Ronald N. Boyce, Criminal Law 860 (3rd ed. 1982.)”

16. From the above definition, it is clear that it was upon the Appellant to prove that there was an intent to cause harm to it by the initiation of the prosecution. In Black's Law Dictionary it is further stated as follows;

“The distinction between an action for malicious prosecution and an action for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, [while] an abuse of process is the employment of legal process for some purposes other than that which it was intended by the law to effect – the improper use of a regularly issued process. For instance, the initiation of vexatious civil proceedings known to be groundless is not abuse of process, but is governed by substantially the same rules as in malicious prosecution or criminal proceedings.”

I am duly persuaded by the above definitions and will apply the same to the case before me.

17. I should only reiterate that no evidence whatsoever points to the Appellant's prosecution as having been instituted for an improper purpose or without probable cause. The fact of a successful appeal or an acquittal cannot be itself, be such evidencesee the Court of Appeal decision in David Kiriimi Julius vs Fredrick Mwenda [2009] eKLR.

18. In the end and without saying more, I see no basis for entering judgment against the 1st and 2nd Defendants in the subordinate court case and will instead dismiss the Appeal for that reason.

19. Let each party bear their own costs to minimize further friction between them.

20. Orders accordingly.

Delivered, dated and signed at Kakamega this 30th day of September, 2010

ISAAC LENAOLA
JUDGE