REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 574 of 2002

CRISPUS KARANJA NJOGU…….……PLAINTIFF/APPLICANT

VERSUS

THE ATTORNEY-GENERAL..……1ST DEFENDANT/RESPONDENT
KENYATTA UNIVERSITY…..……..2ND DEFENDANT/RESPONDENT

RULING

I. PLAINTIFF'S APPLICATION AND DEPOSITIONS

The plaintiff's application by Chamber Summons dated 10th December, 2003 and filed on 16th December, 2003 was brought under Orders VIA and VI, rule 13(1)(a), (b), (c) and (d) of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21). It carried the following prayers:

> (i) that, the 1st defendant's defence dated 21st May, 2002 and filed on 22nd May, 2002 be struck out;
>
> (ii) that, the 2nd defendant's defence dated and filed on 10th June, 2002 be struck out;
>
> (iii) that, judgement be entered for the applicant as claimed in the plaint;
>
> (iv) that, the respondents be condemned to pay the costs of this application.

The application is premised on the grounds, firstly, that there is no reasonable defence by the 1st and 2nd respondents to the applicant's claim. Secondly, it is stated that the defences filed herein are scandalous, frivolous and vexatious. Thirdly, it is averred that continuing with trial proceedings will only prejudice, embarrass and delay the fair trial of the applicant's suit. Fourthly, it is contended that the defences by the 1st and 2nd respondents amount to an abuse of the process of the Court. Fifthly, it is stated that the defences by the 1st and 2nd defendants are bare denials and do not in any way answer the applicant's case. Sixthly, reference is made to earlier proceedings in a constitutional reference by the applicant herein,***Crispus Karanja Njogu v. Attorney-General***, H.C.Cr. Application No. 39 of 2000, in which counsel for the 1st respondent had admitted that the Attorney-General had sought to withdraw, or terminate the criminal proceedings against the applicant herein — because there was no evidence at all to sustain the criminal charges. It is stated, seventhly, that the Chief Magistrate's Court, in acquitting the applicant of the said criminal charge, under s.210 of the Criminal Procedure Code (Cap.75), in ***Republic v. Crispus Karanja Njogu***, CMCC Crim. Case No. 707 of 1998, stated that the applicant was prosecuted in order to cover up a scam involving the issuance of fake degrees, from public glare and that there was collusion between the 2nd defendant and the police. Lastly it is urged that it is in the interests of justice that orders be granted as prayed.

In the plaintiff's supporting affidavit sworn on 10th December, 2003 he depones that he had filed suit on *4th April, 2002*; the 1st defendant had filed his defence on 2*2nd May, 2002*; and the 2nd defendant had filed its defence on *10th June, 2002*. He states his belief, based on advice from his advocates, that the said defences are bare denials and are scandalous, frivolous and vexatious, and their sole purpose is to delay the fair trial of the suit.The deponent avers that he had, on 25th March, 1998 been arraigned in Court and charged with the offence of

making a document without authority contrary to s.357(a) of the Penal Code in C.M.C.Crim. Case (Nairobi) No. 707 of 1998 (***Republic v. Crispus Karanja Njogu***), and he had pleaded "*not guilty*", to the charge. During the pendency of the criminal case, the respondents had publicly stated that investigations had shown that the allegations about the making of fake degree certificates of the 2nd respondent, which had led to the commencement of the criminal case, were untrue. On or about 22nd February, 1999 the 1st respondent sought to have the criminal case against the applicant withdrawn on unspecified grounds, but this attempt was successfully resited, and the trial Magistrate set the case down for hearing on 22nd March, 1999.Come that day, the 1st respondent sought to enter nolle prosequi, dated 22nd March, 1999 and signed by Mr. J.M. Bw'onuong'a, Assistant Deputy Public Prosecutor. The applicant again objected to the termination of the case against him through nolle prosequi, and successfully sought a reference of the relevant constitutional question to the High Court under s. 67 of the Constitution — for interpretation of the terms on which a criminal case such as the one then in Court, could be terminated by means of nolle prosequi. At the hearing of the constitutional reference (Crispus Karanja Njogu v. Attorney-General, High Court Cr. Application No. 39 of 2000), counsel for the 1st respondent admitted that his client was seeking to withdraw, or terminate the criminal proceedings because there was no evidence to sustain the criminal charges preferred against the applicant herein; and on that occasion the 2nd respondent was represented by counsel who held watching brief.On 30th March, 2001 the High Court sitting as Constitutional Court, allowed the application by the applicant herein, and ruled that the nolle prosequi dated 22nd March, 1999 was invalid — because the Attorney-General's exercise of his power of nolle prosequi had been capricious and oppressive, and amounted to an abuse of Court process, as against the applicant herein. The Constitutional Court directed that the criminal case should proceed to full hearing; and thereafter, on 9th November, 2001 the trial Court in Criminal Case No. 707 of 1998 acquitted the applicant herein, under section 210 of the Criminal Procedure Code (Cap.75). The trial Court found the prosecution to have been commenced in the context of a collusion between the 2nd respondent and the police.The applicant believes such prosecution to have resulted from an abuse of power, and that it was ill-motivated and malicious. He believes the defences filed to amount to an abuse of Court process. The applicant believes to be true the advice of his counsel, that it will serve no purpose to allow his suit to proceed to full hearing, as the *main issues have already been conclusively determined in his favour.*

II. THE ATTORNEY-GENERAL'S GROUNDS OF OPPOSITION

On 3rd February, 2004 the Attorney-General's grounds of opposition were filed. These were two, as follows:

(i) the 1st defendant has already filed a statement of defence which discloses reasonable defence;

(ii) the plaintiff's suit was bad in law and should be struck out.

III. THE 2ND DEFENDANT'S REPLY

On 22nd November, 2004 the advocate for the 2nd defendant, ***Lawrence Mungai***, filed a replying affidavit, in which he avers that the 2nd defendant's defence raises serious triable issues — especially in paragraphs 5(a), (b), (c), (d), (e), (f) and 6. He depones that all the 2nd respondent had done was to lodge a complaint with the police, and thereafter it became incumbent upon the police to investigate, detain, charge and/or prosecute the plaintiff/applicant herein, and the complainant, at that stage, had no further role.

IV. A SHAM PROSECUTION? — SUBMISSIONS FOR THE PLAINTIFF/APPLICANT

On the first occasion of hearing, on 22nd November, 2004 the applicant was represented by learned counsel ***Mr. Kibe Mungai***; the 1st respondent, by learned counsel ***Mr. Meso***; the 2nd respondent by learned counsel ***Ms. Yieke.***

Mr. Mungai stated the applicant's reason for challenging the prosecution's attempt to have the criminal charge in the Subordinate Court withdrawn, on 22nd February, 1999 as that: such withdrawal would have been under s.87 of the Criminal Procedure Code (Cap.75); and the effect would have been to subject the applicant herein to uncertainty, as he could have been re-arrested afterwards.

The Court upheld the applicant's position and directed that trial do proceed. When, one month later, the prosecution now attempted to take control over the continuation or discontinuation of the case, neutralising the learned Magistrate's discretion, by the unilateral exercise of the constitutional power of nolle prosequi, the applicant now moved the High Court, in a constitutional reference regarding the exercise of the power to enter nolle prosequi.

The grounds for this objection were, firstly, that only the High Court could assert control over the exercise of a power (nolle prosequi) which itself claimed constitutional status; and secondly, that

termination of the criminal proceedings by nolle prosequi placed the accused in the same state of uncertainty as would be the case if withdrawal took place under s.87 of the Criminal Procedure Code (Cap.75): the Attorney-General could at his own choosing, later re-institute charges against the applicant. So at the request of the applicant, the learned Magistrate referred the matter, by virtue of s.67 of the Constitution, to the High Court; and on 30th March, 2001 a three- Judge Constitutional Bench (High Court Criminal Application No. 39 of 2000) held the nolle prosequi to have been entered capriciously and in abusive manner, and declared the same null and void. The criminal trial was ordered to proceed; it did, and on 9th November, 2001 the learned Senior Resident Magistrate decided as follows:

> **"I am persuaded by the defence assertion that the prosecution of the accused was an attempt to cover [up] a fake-degree [scam] from the public glare. This [then, was a] collusion [between] the University authorities and the police. I find [it] [abhorrent] and detestable.**
>
> > **"In conclusion…, I find no shred of evidence against the accused in support of the charge facing him and, accordingly, acquit him under section 210 of the [Criminal Procedure Code]."**

On the basis of the learned Magistrate's finding, ***Mr. Mungai*** submitted that lack of evidence was the reason the Attorney-General had endeavoured repeatedly to withdraw the criminal charge against the applicant herein. Learned counsel submitted that where a person is arraigned before the Court on criminal charges, but there is no evidence to support the charges, it is not a proper plea by the defendant, in a suit founded on malicious prosecution as cause of action, that there was no malice. Mr. Mungai recalled the remarks of the Judges on the Constitutional Bench, in the constitutional reference, Criminal Application No. 39 of 2000:

> **"In this particular application, Mr. Okumu [for the Attorney- General] submitted that the Attorney-General decided to enter Nolle prosequi because there was no evidence to sustain the charge preferred against the applicant. We do not accept the proposition that the role of the Attorney-General in criminal prosecution is always to secure a conviction. The very thought of it sends shivers down out spines because the legal implications are monumental.**
>
> **"A good prosecutor is one who presents all evidence before the Court, even evidence which may be favourable to an accused person and after that to let the Court…adjudicate on the merits of the case."**

Mr. Mungai submitted that there had been no factual basis to sustain the charge against the applicant. The applicant, as accused, had no case to answer; he was not even put to his defence. He was acquitted. So counsel wondered: "Why was the arraignment done?" In learned counsel's view, "Any average investigator ought to have dismissed the claim." He noted that the trial Magistrate had found as a fact that the applicant's role in the preparation of certificates for the 2nd defendant was lawful and in the nature of public duty, and even an average investigator could not have formed the impression that an offence was entailed in the preparation of the 2nd defendant University's certificates.

Learned counsel submitted that the defendants had no reasonable defence, and that their defences could only lead to unnecessary delay in resolving the dispute in hand. He submitted that the defendants had raised no triable issues in their defences. He contended that the denial of malice by the 1st defendant had no basis; there was similarly no basis for the claim by the 2nd defendant that its role in the failed prosecution was only nominal. The complainant (2nd defendant), counsel submitted, was the real prosecutor, and hence the University's role in the applicant's tribulations could not be typified as only nominal. It was provided in s. 208(1) of the Criminal Procedure Code that, in the conduct of prosecution, the complainant and his witnesses were to be heard: which indicated that the whole case was the case of the complainant, above all.

All evidentiary matters had to do entirely with the complainant, while the prosecution as a unit, had a different role — formally instituting and conducting the complainant's case.

Mr. Mungai submitted that as the learned Magistrate had given his ruling in the criminal case with finality, and there would be no appeal or review, it had been determined that there was no proper purpose guiding the prosecution, and, in the circumstances, there could not possibly be a more suitable case than this in which the defences merit being struck out.

Learned counsel invoked in aid of his contention the Court of Appeal decision, ***J.P. Machira t/a Machira & Co. Advocates, v. Wangethi Mwangi and Another***, Civil Appeal No. 179 of 1997.

> **In that case the following passage appears (Bosire, J.A.): "In a case like this one a Court may only look for triable issues from either the pleadings or, in an appropriate case, from affidavits filed in answer to an application seeking to strike out the pleadings concerned. Where, as in this case, issues are not clearly identifiable from both the written statement of defence and the affidavit filed, there would be no proper basis for sustaining the written statement of defence."**

Mr. Mungai submitted that the defences in the instant matter are but bare denials, leaving the Court with no issue to decide; it has already been placed on the record by two different Courts that the impugned trial was guided by malice and by collusion, and *so no amendment to the pleadings could create triable issues in the defences*. Learned counsel urged, in the circumstances, that only a striking out of the pleadings could ensure expedition in the process of obtaining justice.

IV. IS THERE A REASONABLE DEFENCE? — SUBMISSIONS FOR THE 1ST DEFENDANT

Learned counsel ***Mr. Meso***, for the Attorney-General, submitted that the 1st defendant's case disclosed a reasonable defence. He cited several paragraphs in the 1st defendant's defence of 21st May, 2002 as particularly well demonstrating the required element of triability. One of these is paragraph 3, which reads:

> "*The 1st defendant avers that if indeed the plaintiff was arrested and charged as claimed in paragraphs 4 and 5 of the plaint, the same was done lawfully and in accordance with the legal procedure governing such arrest and prosecution."*

Quite clearly such a claim does not stand up, in the light of the decisions of both the Magistrate's Court, in the impugned criminal trial, and the High Court in the constitutional reference. Both Courts found no colour of lawfulness in the manner in which the prosecution had been mounted. In paragraph 6 of the 1st defendant's defence it is asserted:

> *"The 1st defendant denies all the particulars of malice attributed to him in paragraph 13 of the plaint and avers that the police officers reasonably suspected that the plaintiff had committed a criminal offence — hence they arrested and prosecuted him in accordance with the law."*

This assertion, once again, is negated by the determinations of both the Magistrate's Court, and the Constitutional Bench of the High Court. In paragraph 9 of the defence the 1st defendant pleads:

> *"**WITHOUT PREJUDICE** to the foregoing, the 1st defendant avers that the plaintiff's suit against him does not lie since no proper notice to sue was served upon him as is required under section 13A of the Government Proceedings Act (Cap.40)…."*

Mr. Meso contended that the suit was incompetent; and that such a suit cannot sustain an application to strike out a defence, on the claim that the defence does not disclose a reasonable cause of action.

Learned counsel submitted that at the time of arrest of the applicant herein, and his arraignment in Court, there had been reasonable and probable cause for preferring charges — and therefore there had been no malice. Assuming the validity of such a factual position, counsel went on to cite supporting authority: ***Nzoia Sugar Company Ltd. v. Fungututi*** [1988] KLR 399. In that case the Court of Appeal had held

(p.400):

"Acquittal per se on a criminal charge is not [a] sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person…but there must be evidence of spite in one of its servants…"

Counsel went on to argue that were the prosecution to be found to have made a mistake in the investigations, that by itself would not be evidence of malice.

Mr. Meso urged that even were the defence to be found somewhat wanting in terms of triability, this by itself need not condemn it to being struck out; and supporting authority was here cited: ***Galeb Gulam & Another v. Cyrus Shakhalaga Kwah Jirongo***, HCCC No. 393 of 2003. Mr. Justice Ringera in that case remarked:

> **"…where the defence raises a substantial and bona fide arguable point, can it be for striking out under Order VI, ule 13(1)(b), (c) and (e) of the Civil Procedure Rules? Obviously not. And I cannot enter judgement for the amount which I find due to the plaintiff as the relief is not sought in the alternative but conjunctively with vacant possession…"**

Counsel's contention here was that, however the 1st defendant's position was viewed, it did carry a bona fide, arguable point — and so was not for striking out. Counsel urged that the Court should exercise its discretion before striking out a defence — and that a defence should be struck out only in plain and obvious cases.

VI. SUBMISSIONS FOR THE 2ND DEFENDANT

Learned counsel ***Mr. Kuria***, for the 2nd defendant, adopted in substance that submissions made by ***Mr. Meso***. He contended, further, that the 2nd defendant's statement of defence of 10th June, 2004 was a good one. He submitted that, as pleaded in paragraph 5 of the statement of defence, the 2nd defendant was not a prosecutor; "the 2nd defendant did nothing, other than lodging a complaint [with] the Police Department." Mr. Kuria urged that the plaintiff had an obligation to show that his arraignment in Court, on a criminal charge, had been instigated by the defendant and out of malice.It was submitted that the presence of malice could not be proved by affidavit. Counsel relied on ***Gitau v. East African Power & Lighting Co. Ltd***. [1986] KLR 365, a decision of the High Court (Schofied, J) in which it had been held (p.365):

> **"In order for a claim of malicious prosecution to succeed the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendants and that there existed malice and which malice he must prove. In this instance the plaintiff failed to prove malice."**

The 2nd defendant's position was that it was not capable of harbouring malice — because the University was an artificial entity. Reliance for this proposition was drawn from ***Halsbury's Laws of England***, 3rd ed. Vol. 25 (1958), para. 691:

> **"Where it is sought to make a corporation or company liable for a malicious prosecution undertaken by its servant or agent, the malice or indirect motive which a plaintiff will have to prove may be that of the servant or agent, if it is shown that he was acting within the scope of his employment."**

Although the name of Professor John Shiundu is repeatedly mentioned in the earlier decisions, as the 2nd defendant's Academic Registrar and the officer immediately perceived as having instigated the impugned criminal process, by laying a complaint, learned counsel submitted that "any allegations by Prof. Shiundu did not fall within his ordinary course of duty." The justification for such a submission is not entirely clear; but counsel went further and contended that, upon the 2nd defendant making the report which was the basis of the complaint, "its role ended there and then." Counsel went on to remark:

"All the witnesses called by the prosecution had nothing adverse about the applicant." Counsel maintained that "It's the Police who decided to prosecute the applicant. This was the work of the police, and they conducted investigations." So he urged that the plaintiff's application be dismissed.

VII. THE PLAINTIFF'S REJOINDER

Learned counsel ***Mr. Mungai*** submitted that the burden of the arguments tendered on behalf of the defendants had not addressed the *specific elements of malicious prosecution* raised in the plaint, and that on this account, the plaintiff's application stood unchallenged.

Both defendants acknowledge that the plaintiff had been subjected to a wrong, save that the 2nd defendant alleges that this wrong is to be attributed solely to the 1st defendant. The 1st defendant for his part, contends that he had done everything to correct the mistake. The long and short of it, learned counsel submitted, was that the plaintiff had been wronged by the 1st defendant as prosecutor, and by the complainant, namely the 2nd defendant; the wrong arose from a criminal prosecution which was conducted by the 1st defendant using material and gravamina emanating from the complainant, the 2nd defendant.

The Attorney- General probably had no personal interest in the arraignment of the applicant in Court on a criminal charge; but the position of the 2nd defendant was different, as it has been determined by another Court that the officials of Kenyatta University were endeavouring to cover up a scandal and this led them to raise the complaint. Mr. Mungai contested the submission made on behalf of the 1st defendant, that the plaintiff's suit is incompetent: no application had been made to strike out the suit since its filing in 2002. Had such an application been made, then the plaintiff would have exercised his rights to file a relying affidavit — but no such opportunity had been created.

Counsel distinguished the ***Nzoia Sugar Company*** case [1988] KLR 399 on the basis that, although it was a malicious prosecution case, the Attorney-General's office was not involved. In the instant case there were attempts by the Attorney-General to withdraw the criminal case and to terminate the same through Nolle prosequi, both of which were successfully resisted, and the applicant was acquitted. Counsel submitted that the Attorney- General in the instant matter, rather than admit he had no evidence to sustain a prosecution, opted to use procedures which would leave behind a cloud of suspicion, regarding the integrity of the applicant. Such action by the Attorney-General, it was submitted, was oppressive to the applicant.

Mr. Mungai submitted that the submission made for the defendants, that none of the witnesses (who were all from the 2nd defendant) said anything in Court adverse to the applicant, was proof that the prosecution case had not been supported by evidence — and hence only malice could have moved the prosecution initiative. Learned counsel submitted that the basic tests for malicious prosecution were fully satisfied, in the criminal case which had been brought against the applicant. These tests are to be found in Gichanga v. BAT Kenya Ltd [1989] KLR 352 where it was held (Aluoch, J) (p.353):

> **"In order to succeed in a claim for malicious prosecution the plaintiff must show that —**
>
> **(a) the prosecution was instituted by the defendant;**
>
> **(b) the prosecution terminated in the plaintiff's favour;**
>
> **(c) the prosecution was instituted without reasonable and probable cause;**
>
> **(d) the prosecution was actuated by malice."**

All these ingredients, counsel submitted, were satisfied.

VIII. FURTHER ASSESSMENT, AND ORDERS

The plaintiff's plaint dated 3rd April, 2002 and filed on 4th April, 2002 is a detailed claim which carries particulars of malicious prosecution, in the prosecution process initiated and conducted by the 1st defendant, on the basis of information supplied by the 2nd defendant. That there was no basis for prosecution, is evident from the acquittal decision in Chief Magistrate's Court Criminal Case No. 707 of

1998 (***Republic v. Crispus Karanja Njogu***), and the decision in the constitutional reference, High Court Criminal Application No. 39 of 2000 (***Crispus Karanja Njogu v. Attorney-General***).

It is clear from the content of the 1st defendant's statement of defence, dated 21st May, 2002 and filed on 22nd May, 2002 and from the submissions of counsel representing the Attorney-General, that there is no effective pleading to match the assertions in the plaint. A similar deficiency marks the 2nd defendant's statement of defence dated and filed on 10th June, 2002. The vital reference points in this litigation are marked, firstly, by the pleadings, and then by the said two authoritative Court decisions. From these three pillars of the case, no foundation, I believe, exists for any meaningful defence to the plaintiff's claims. From listening to all the counsel representing their clients, I have formed the clear impression that there is no momentum of legal argument to move the defence case forward, in the face of the vitality of the plaintiff's case.

I have become convinced, in the circumstances, that sustaining this litigation will be an unduly expensive and an unnecessary claim on the time and resources of the Court, as well as an unjustified denial of the just deserts of the plaintiff as demonstrated in the claims in the plaint. Therefore, in my ruling on the plaintiff's application by Chamber Summons dated 10th December, 2003 I will make the following Orders:

1. The 1st defendant's statement of defence dated 21st May, 2002 and filed on 22nd May, 2002 is hereby struck out.

2. The 2nd defendant's statement of defence dated and filed on 10th June, 2002 is hereby struck out.

3. Judgement shall be and is hereby entered for the applicant as claimed in the plaint.

4. The respondents shall, jointly and severally, bear the costs of this application in any event.

DATED and **DELIVERED** at Nairobi this 2nd day of December, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Mungai, instructed by M/s. Kinoti Kibe & Co.

Advocates

For the 1st Defendant/Respondent: Mr. Meso, instructed by the Hon. The Attorney-

General

For the 2nd Defendant/Respondent: Mr. Kuria, instructed by M/s. Lawrence Mungai

& Co. Advocates