



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1403 OF 2000

CHARLES WANDUTO KIHORO PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD & ANOTHER .. DEFENDANT

R U L I N G

The case was scheduled for trial on 8th March 2004, and on that date, it was listed before me.

However, before the trial could commence, the 2nd Defendant intimated to the court that he wished to canvass a Preliminary Objection. This Ruling is in respect to the said Preliminary Objection.

The substance of the Preliminary Objection raised by the 2nd Defendant was that the suit against it was time-barred. In his submissions, Mr. Meso state counsel, placed reliance upon the provisions of section 3 (1) of The Public Authorities Limitations Act (Cap 39) of the Laws of Kenya. The said section 3 (1) stipulates as follows;

“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued”.

The case before me is for compensation, on the basis of claims by the Plaintiff that he was maliciously prosecuted. All three parties to the suit are in agreement that a claim for malicious prosecution is founded on tort.

One of ingredients of that tort is clearly that there had been criminal proceedings preferred against the Plaintiff, and that the said proceedings were terminated in favour of the Plaintiff. It is common ground in this case that the Plaintiff had been charged with a criminal offence, for which he was prosecuted. It is also common ground that the prosecution of the Plaintiff ended in his acquittal, on 6th June 1997. There is therefore no doubt whatsoever that the cause of action for the tort of malicious prosecution did accrue to the Plaintiff on 6th June 1997.

In the light of the provisions of section 3 (1) of The Public Authorities Limitation Act (Cap. 39), the Plaintiff ought to have instituted these proceedings on or before the 5th June 1998. When the court asked the Plaintiff's advocate, Mr. Mureithi, if he had any explanation that would exonerate the Plaintiff from the failure to comply with the time limit set by statute, his explanation was that the 2nd Defendant was a necessary party.

The court does acknowledge the fact that almost all criminal cases are prosecuted by the state. It therefore follows that in such cases, if the accused is convinced that he has been maliciously prosecuted, the Attorney General would be a necessary party in the civil proceedings. However, the need to have the Attorney General enjoined as a Defendant in civil suits for malicious prosecution does not in any way

whatsoever imply that the Plaintiff can disregard the limitation period set out in Section 3 (1) of Cap 39.

The Plaintiff also submitted that whenever the Attorney General was carrying out his statutory duties of prosecution, he was doing so by “executing the complaint”, however malicious such a complaint may be. It was the Plaintiff’s view that the Attorney General collects evidence from the complainant, and that such evidence has to be tested before a court of law. In effect, the Attorney General does not have any independent evidence. If the Plaintiff intended to say that the Attorney General has no option but to prosecute all cases in which there is a complainant, I am unable to agree. The Attorney General does not have any obligation to prosecute a case, merely because there is a complainant. It is incumbent upon the Attorney General to assess each and every complaint laid at his door. He may then decide whether or not there was sufficient evidence upon which a prosecution could be sustained. He could then decide either to prosecute on the basis of the evidence already presented; or alternatively, seek further evidence through the complainant or even through independent police investigations. The other option available to the Attorney General was to conclude that no prosecution would be commenced at all.

The foregoing illustrates that the Attorney General is not expected to be a simple automated machine, who prosecutes whenever a complaint has been lodged with him. But even in the very improbable event that the Attorney General was obliged to prosecute each and every complaint brought to him, that would still not excuse the Plaintiff for instituting the suit after more than 12 months after the cause of action accrued. I do therefore uphold the Preliminary Objection and strike out the suit against the 2nd Defendant, with costs.

Meanwhile, the 1st Defendant has also applied that the suit against it should be similarly struck out. The 1st Defendant has submitted that the claim against it should have been instituted within 3 years from 6th June 1997, when the Plaintiff was acquitted.

By virtue of the provisions of Section 4 (2) of the Limitation of Actions Act (Cap 22) of the Laws of Kenya,

“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”.

In effect, any suit by the Plaintiff against the 1st Defendant ought to have been filed on or before 5th June 2000.

Yet the Plaint herein was filed on 29th August 2000. It is therefore, clearly filed outside the period stipulated by statute.

However, the Plaintiff contends that the suit was filed within time. He submits that insofar as the relationship between the Plaintiff and the 1st Defendant was that of employee/employer, the former was entitled to file suit at any time, before the expiry of 6 years. It was argued by the Plaintiff that however tortious the cause of action may be, the claim is founded on the employer/employee relationship between the Plaintiff and Defendant. I must confess that I did not quite follow that line of reasoning. However, if the Plaintiff meant that the case before the court is founded on contract, he would be wrong. Prayer (a) in the Plaint is for “General and aggravated damages for malicious prosecution”.

To my mind that prayer sets out the primary and substantive remedy, as well as the foundation for the same. I am therefore unable to fathom how the said claim is said to be founded on some perceived contractual employer/employee relationship. Whilst the parties may have had a contractual relationship, the cause of action in a claim for malicious prosecution remains a tort.

Accordingly, I also order that the Plaintiff’s suit against the 1st Defendant, be struck out with costs.

Dated at Nairobi this 16th day of March 2004.

FRED A. OCHIENG

Ag. JUDGE