



**Wasike & another v Isuzu East Africa Limited (Formerly General Motors East Africa Limited) & 2 others (Civil Suit 6 of 2015) [2025] KEHC 10841 (KLR) (Civ) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 10841 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT 6 OF 2015**

**JM OMIDO, J**

**JUNE 24, 2025**

**BETWEEN**

**SWINSTONE WASIKE ..... 1<sup>ST</sup> PLAINTIFF**

**SAMUEL KIPKIRUI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ISUZU EAST AFRICA LIMITED (FORMERLY GENERAL MOTORS EAST AFRICA LIMITED) ..... 1<sup>ST</sup> DEFENDANT**

**THE INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**A. Background**

1. Swinstone Wasike and Samuel Kipkurui brought this claim, premised on the tort of malicious prosecution, vide a plaint dated 15<sup>th</sup> December, 2014, and filed in court on 13<sup>th</sup> January, 2015 seeking the following reliefs jointly and severally against the Defendants:
  - a. Special damages for malicious prosecution to be proved during the hearing of this suit.
  - b. General and pecuniary damages.
  - c. Costs of this suit.
2. The Plaintiffs pleaded in the plaint that on the morning of 24<sup>th</sup> September, 2012 whilst they were in the ordinary course of their employment, the 1<sup>st</sup> Defendant made a false and malicious criminal complaint



at the Embakasi Police Station to the effect that the two Plaintiffs had been involved in theft of motor vehicle parts.

3. The Plaintiffs pleaded that they were as a result arrested by the 2<sup>nd</sup> Defendant and subsequently maliciously charged at Makadara Law Courts, *vide* Criminal Case No. 5107 of 2012 on 2<sup>nd</sup> October, 2012. The Plaintiffs averred that the falsified criminal charges against them were orchestrated by the 1<sup>st</sup> Defendant's employees in a conspiracy with the 2<sup>nd</sup> Defendant.
4. The Defendants resisted the suit by filing their respective statements of defence.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a notice of preliminary objection dated 1<sup>st</sup> July, 2021 to challenge the competency of the suit for being time barred and for contravening Section 3 of the *Public Authorities Limitation Act*, 39 Laws of Kenya. The preliminary objection proceeded and the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was struck out for being time barred, *vide* the ruling delivered by my brother Serگون J on 22<sup>nd</sup> October, 2021.

#### **B. The Chamber Summons dated 30<sup>th</sup> September, 2024**

6. Following the order striking out the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the 1<sup>st</sup> Defendant moved the court *vide* the Chamber Summons application dated 30<sup>th</sup> September, 2024 seeking the following orders:
  1. That the Honourable Court be pleased to strike out this suit in its entirety as against the 1<sup>st</sup> Defendant.
  2. That in the alternative, the Honourable Court be pleased to strike out the suit (if any) against the 1<sup>st</sup> Defendant for want of prosecution.
  3. That the Honourable Court grants any other orders that it may deem fit to grant.
  4. That the costs of this application be awarded to the Applicant.
7. The grounds upon which the application is premised are in precis that following findings of the court *vide* the orders of 22<sup>nd</sup> October, 2021 that the Plaintiffs' suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was time barred by statute, the court ought to have proceeded to strike out the suit, not just as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but also against the 3<sup>rd</sup> Defendant.
8. The 3<sup>rd</sup> Defendant thus faulted Serگون J for rendering the ruling in which the resulting orders were "contrary to the parties' expectations" for the reason that a suit for a claim for the tort of malicious prosecution was not tenable and could not possibly succeed where the Attorney General (and the Inspector General of Police) is not a Defendant.
9. The application is supported by the affidavit of Vallerie Akinyi Onjula, who describes herself as Legal Counsel for the 1<sup>st</sup> Defendant. The affidavit expounds on the above grounds. In particular, the said deponent queries why the suit against the 1<sup>st</sup> Defendant was not struck out following the court's finding that the suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was by statute time barred, which finding rendered the suit as against the 1<sup>st</sup> Defendant untenable.
10. The Deponent, in the alternative proffers that the suit as against the 1<sup>st</sup> Defendant should be struck out (dismissed?) for want of prosecution as the Plaintiffs have taken no steps to list it down for hearing since the delivery of the ruling of 22<sup>nd</sup> October, 2021. She urges that the Plaintiffs' inaction for 4 years is inexcusable as the delay is inordinate and unreasonable.



11. The Plaintiffs resist the application and to that end filed a notice of preliminary objection dated 15<sup>th</sup> October, 2024 in which they state that the court lacks jurisdiction to determine the prayer seeking to strike out the suit as against the 1<sup>st</sup> Defendant on the ground that the Attorney General is not a party to the claim for malicious prosecution.
12. The Plaintiffs take the position that the same issue was presented before Seron J and that he proceeded to allow the application only with respect to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and that as such, the issue is res judicata.
13. With regard to the alternative prayer for dismissal of the suit for want of prosecution, the Plaintiff stated that the same issue had been raised *vide* a Notice of Motion dated 25<sup>th</sup> October, 2016 and the court (Seron J) upon deliberating on the same, dismissed the application *vide* a ruling that was rendered on 18<sup>th</sup> August, 2017 whereby the court reached a finding that the Plaintiff had satisfactorily explained the delay in prosecuting the suit. In my understanding, the Plaintiff's position is that the issue is also res judicata.
14. This court directed that the application be canvassed by way of written submissions and both parties filed their respective submissions.

**C. The 1<sup>st</sup> Defendant's Submissions in support of the Application dated 30<sup>th</sup> September, 2024.**

15. The 1<sup>st</sup> Defendant posits that the implication of the ruling that resulted in the order of the court striking out the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from the suit was that the cause of action as against the 1<sup>st</sup> Defendant was also extinguished and that the court should then have gone ahead to strike out the suit against the 1<sup>st</sup> Defendant.
16. To that end, the 1<sup>st</sup> Defendant relied on the High Court authority of *Joackim Mwandale Okesa v The Deposit Protection Fund Board* [2024] eKLR in which the court observed as follows:

“ 19. The foregoing position accords with the long line of decisions on the subject by superior courts, including those cited here by the parties herein, since the court delineated the ingredients of malicious prosecution in the celebrated case of *Mbowa (supra)*. In a word, a claim based on malicious prosecution cannot be sustained or succeed where the Attorney General has not been enjoined as a defendant in the suit or ceases to be a defendant. A complainant, such as the Applicant herein, sued alongside the Attorney General is merely a necessary party and who, upon the exit of the said co-defendant, could not legally be made to bear any liability for a prosecution instituted by agents of the Attorney General.

20. The next logical question to be considered is whether with the exit of the Attorney General, the suit herein became moot, or in the Applicant's words, was entirely compromised. According to Black's Law Dictionary, Tenth Edition, a matter is moot when it has no practical significance, is hypothetical or academic. A moot case is similarly defined therein as “A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights”.

21. In discussing the rationale and relevance of the doctrine of mootness in the administration of justice, the High Court in *National Assembly of Kenya &*



*another v Institute of Social Accountability & 6 others* [2017] eKLR held as follows:

“...it is clear that the mootness doctrine is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of Judicial economy and functional competence of the courts and the integrity of the Judicial System... the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly the constitution law and public interest.”

22. In *Okiya Omtata Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR, the Court of Appeal adverted to the foregoing cited with approval the High Court decision in *Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR to the effect that:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact...No court of law will knowingly act in vain ... a suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.”

23. This court is alive to the right of every party to be heard in his case and the exhortation in *D.T. Dobic (supra)* to courts to eschew the summary dismissal of suits. However, upon reviewing the existing facts in the Respondent’s suit the court is persuaded by the Applicant’s argument that to proceed further with the suit after the exit of the Attorney General would be contrary to clear legal principles. Additionally, in the court’s view, such a course of action would amount to an exercise in futility. The moment the Attorney General exited the suit, the ground shifted beneath the Respondent ‘s feet. His suit was rendered compromised and moot.”

17. The court went on to conclude as follows:

- “26. Applying the foregoing dicta to the events in the matter at hand, considering the law applicable in malicious prosecution suits, the principle that courts do not act in vain, the age of the suit (almost 24 years since filing), the need for judicious and prudent use of judicial time and resources , the overriding objective encapsulated in Section 1A *Civil Procedure Act* and the fact that the Applicant is a public body funded from the exchequer, this court is persuaded that the Applicant has demonstrated sufficient reason for the Court to review its ruling of 25<sup>th</sup> May 2023. The court will therefore vary its said ruling by way of an order to the effect that although the Applicant had been found to be a



necessary party in the suit, the suit stood compromised or rendered moot as a consequence of the court striking out the case against the Attorney General. To that extent the Applicant’s motion has succeeded.”

18. 1<sup>st</sup> Defendant further relied on the High Court decision of *Douglas Odhiambo Apel & another v Telkom Kenya Limited & 2 others* [2006] eKLR where the court observed as follows:

“The Second difficulty is that by the time the case came before me with a direction to write judgment, the claim against the Commissioner of Police and the Attorney General had already been withdrawn leaving Telkom Kenya as the sole Defendant in the suit. The Plaintiffs were arrested and charged by the Police. And the prosecution was undertaken by the Attorney General as the public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the Plaintiffs was taken by the Police and the Attorney General. Telkom Kenya as a complainant would not have been involved in that process. Once Telkom Kenya had made a complaint to the Police, it was left to the Police to investigate the complaint and decide whether or not to charge the Plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney-General.”

19. In further support of its position, the 1<sup>st</sup> Defendant invited this court to consider the holding in the case of *Lake Victoria Water Services Board v Martin Okola* [2015] eKLR where the court stated as follows:

“Although the above grounds ought to dispose this appeal, the other issues of failing to enjoin the Attorney-General and police are equally valid. Clearly the complainant in that case was not the one who led to the arrest and prosecution of the respondent. In his testimony he told the court that he was incarcerated for about 5 hours and released at the police station. In the criminal regime it is only the business of a complainant to raise forth a complaint but the decision of arrest and prosecution is left to the wisdom of the police. In that case the police were not enjoined which then made the entire case fatal.”

20. The submissions by the 1<sup>st</sup> Defendant thus were that in light of the jurisprudence provided in the cases above that a suit for malicious prosecution is rendered preposterous if the Attorney General is not a party, this court should proceed to strike out this suit as against the 1<sup>st</sup> Defendant, following the orders that resulted in the striking out of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
21. The 1<sup>st</sup> Defendant seeks the alternative prayer that the suit against it be dismissed for want of prosecution. The 1<sup>st</sup> Defendant states that the suit has been pending for nine years and that the delay in prosecuting it is inordinate and inexcusable.

#### **D. The Plaintiff’s Submissions in opposition to the Application dated 30<sup>th</sup> September, 2024.**

22. The Plaintiffs submitted that this court has no jurisdiction to determine the two prayers sought in the alternative – striking out the suit against the 1<sup>st</sup> Defendant and/or dismissing the suit for want of prosecution – as the same had been dealt with by the court through previous applications and are therefore res judicata.
23. With regard to the prayer for dismissal for want of prosecution, the Plaintiffs proffered the position that the delay was not prolonged and inexcusable as they demonstrated that they had since filed their statement of issues and pretrial questionnaire and that this court should then proceed to set down the matter for hearing.



24. The Plaintiffs stated that there was a pending appeal seeking to reverse the order that struck out the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from this suit hence the reason as to why this matter was not prosecuted against the 1<sup>st</sup> Defendant.
25. To that end, the Plaintiffs submitted that the threshold for dismissal of the suit for want of prosecution had not been met.
26. The Plaintiffs relied on the authority of *Charles Mwaniki Ireri v ZTE Kenya Limited* [2022] eKLR in which the court cited with approval the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in liquidation)* [2015] eKLR where it was held that:
- “The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 150 of the Constitution. Article 50 coupled with Article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties respectively, constitutes the defined principles which should guide the Court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court.”
27. The Plaintiffs also relied on the authority of *Oyatsi v Wangui and another* [2024] eKLR where the Plaintiffs stated that the court cited the following phrase from the case of *Njoki King’au & another v Shaba Trustees Limited & another* [2018] eKLR.
- “In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated *inter alia*, that, by “inherent power” it means that;
- “Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”
28. The above holding was in actual fact made in the case of *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, and not Njoki King’au as stated by the Plaintiffs.

#### **E. Issues for Determination.**

29. Having considered the application, the affidavit in support thereof, the grounds of opposition, the submissions by the parties and the record in its entirety, I discern that the following issues have been presented for adjudication by this court:
- a. Whether, following the order of the court of 22<sup>nd</sup> October, 2021 striking out the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the suit as against the 1<sup>st</sup> Defendant should be struck out.
  - b. In the alternative, whether the Plaintiffs’ suit should be dismissed for want of prosecution.

#### **F. Analysis and Findings.**

30. I will proceed to address the first challenge, which is whether I should proceed to strike out the suit against the 1<sup>st</sup> Defendant. There is no dispute that there is presently only one Defendant in this case – the 1<sup>st</sup> Defendant.



31. It is trite law that in a claim premised on the tort of malicious prosecution, the Attorney General must be brought on board as a Defendant. Such a claim cannot succeed without the Attorney General as a Defendant. That indeed was the position espoused in the cases of Okesa, Apel and Okola, which the 1<sup>st</sup> Defendant relied upon in its submissions. That then means that the current position being that the Attorney General is not a Defendant in this case, the Plaintiffs' suit cannot succeed.
32. But then, the Plaintiffs have proffered the position that they indeed joined the Attorney General as a party (Defendant) in this suit but the court, on the application by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, struck out the Attorney General and the 3<sup>rd</sup> Defendant from the suit.
33. The Plaintiffs urge that as there is pending before the Court of Appeal an appeal from the order striking out the Attorney General, the present application should not succeed as there is a possibility that the order striking out the Attorney General could be reversed.
34. An important aspect of the proceedings before this court and the pending appeal before the Court of Appeal is that the Plaintiffs have not sought for and/or obtained (or have not demonstrated that they have sought for and/or obtained) an order to stay the instant suit pending the determination of the question whether the order for striking out the Attorney General from the suit will be reversed by the higher court on appeal.
35. The position in law is that where there is no positive order made in favour of a party to stay proceedings, then the matter ought to proceed as is. In the present case thus, the matter proceeds with the 1<sup>st</sup> Defendant as the only Defendant and the argument that there is a pending appeal as a reason not to allow the application before me is not in the premises tenable.
36. The Plaintiffs urge that this court has inherent power to save the suit under the Oxygen rule. We have however seen from the decision of Omtata that to proceed further with the suit after the exit of the Attorney General would be contrary to clear legal principles.
37. As I wind up, let me say that although my sympathies lean heavily in favour of the position taken by the Plaintiffs that this court should not strike out the suit against the 1<sup>st</sup> Defendant as there is a pending appeal against the order that struck out the Attorney General from the instant proceedings, I am constrained to observe that I cannot do so and must proceed to determine the application with only the 1<sup>st</sup> Defendant as the party from whom reliefs are sought, as there is no stay of proceedings order.
38. The Plaintiffs can only blame themselves for failing to appropriately move the court to secure the order of stay. The suit stood compromised or rendered moot as against the 1<sup>st</sup> Defendant the moment the court struck out the case against the Attorney General.
39. Having reached the decision above, I find it unnecessary to address the alternative prayer seeking to strike out the suit for want of prosecution.
40. The foregoing being my inclination, I reach the result that the 1<sup>st</sup> Defendant's application dated 3<sup>rd</sup> October, 2024 is meritorious. I proceed to allow it and strike out the suit as against the 1<sup>st</sup> Defendant.
41. Section 27 of the *Civil Procedure Act* dictates that costs ought to follow the event. Accordingly, the Plaintiffs shall bear the 1<sup>st</sup> Defendant's costs of the application and the suit.
42. Orders accordingly.

**DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 24<sup>TH</sup> DAY OF JUNE, 2025.**

**JOE M. OMIDO**



## **JUDGE**

For Plaintiffs: No appearance.

For 1<sup>st</sup> Defendant: Ms. Njuguna for Ms. Okina.

For 2<sup>nd</sup> & 3<sup>rd</sup> Defendants: No appearance.

