



**Mugeni v Attorney General & another (Civil Appeal E494 of 2021)  
[2024] KEHC 11637 (KLR) (Civ) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11637 (KLR)

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

**CIVIL**

**CIVIL APPEAL E494 OF 2021**

**JM NANG'EA, J**

**OCTOBER 2, 2024**

**BETWEEN**

**JAMES MUGENI ..... APPELLANT**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**JIHAN FREIGHTERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the ruling of the Hon. Mrs. L.L gicheha -CM in Nairobi  
CMCC MISC. APP. NO. 168 of 2020 (Originating Summons) delivered on 30.4.2021)}*

**RULING**

**Grounds of Appeal and reliefs sought**

1. The appeal before me is from the above trial court’s ruling by which the appellant’s Originating Summons dated 5<sup>th</sup> March 2020 (hereinafter referred to as “the O.S”) seeking leave to institute a suit for malicious prosecution out of time was struck out with costs for want of jurisdiction pursuant to the 2<sup>nd</sup> respondent’s preliminary objection of even date. The learned trial magistrate determined that she had no jurisdiction to extend time for bringing such action. Aggrieved by the ruling, the Appellant filed a Memorandum of Appeal amended on 16/2/2022 upon grounds that may be condensed as hereunder:-

1. That the Learned Trial Magistrate erred in fact and law by failing to appreciate the import of sections 27 and 28 of the Limitations of Actions Act Cap 22 Laws of Kenya as underscored in judicial precedents in relation to malicious prosecution suits.

And



2. That the trial magistrate erred in law and in fact by holding that the court lacked jurisdiction to entertain applications for extension of time in malicious prosecution suits and thus misdirected herself.
3. In the premises the court be pleased to grant the following orders:-
  - a. That this appeal be allowed with costs.
  - b. That the said ruling of the Honorable Mrs. L.L Gicheha (CM) be set aside in toto.
  - c. That this Honourable Court does finally determine the O.S.
  - d. That the court may issue such other orders as may be deemed appropriate.
2. The appeal was directed to be disposed of by written submissions and learned Counsel for the parties filed their respective submissions. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified { (see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123}. The Court of Appeal for East Africa in *Peters V. Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:”
  - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

### **Background to the appeal**

3. The appellant’s O.S brought under sections 27 and 28 of the Limitations of Actions Act ( “ the Act”) and Order 37 Rule 6 of the Civil Procedure Rules 2010 among other stated legal provisions sought leave to bring a suit for malicious prosecution against the respondents out of time and admission of a draft plaint annexed to the O.S on record as duly filed. The appellant further prayed that the costs of the O.S be provided for.
4. By an affidavit in support of the O.S. the appellant avers inter alia that on 5/11/2015 he was acquitted under section 215 of the Criminal Procedure Code of theft charges laid against him in Nairobi Criminal Case No. 1218 of 2013 . On advice of his Counsel he learnt that the period within which he was legally required to file suit for malicious prosecution lapsed on 5/11/2018, three years after his acquittal. The appellant explained that the delay was occasioned by his ill health while in prison and loss of employment that caused him depression, hence his application for extension of time.
5. The preliminary objection was mainly based on grounds that sections 27 and 28 of the Act do not provide for extension of time to institute malicious prosecution claims out of time and that the statutory provisions only limit time in respect of claims in tort relating to personal injuries arising from negligence, nuisance or breach of duty.
6. The appellant responded to the preliminary point through his further affidavit dated 6/7/2020. He deposed inter alia that his prosecution was malicious and although sections 27 and 28 of the Act do not expressly refer to actions for malicious prosecution , section 27 of the Act does allude to among



other causes of action, claims for damages for negligence, nuisance and breach of duty. The appellant contends that the public prosecutor in the criminal case breached a public duty he owed to him in the manner in which he conducted his prosecution negligently and with gross malafides. The court was therefore told that “the tort of malicious prosecution is inextricably intertwined with the tort of negligence and breach of duty as stated under sections 27 and 28” of the Act. The appellant further contends that sickness is a material fact relating to the cause of action in question that prevented him from filing the suit in time as contemplated in section 27(2) of the Act as per counsel provided by his advocates.

### **Analysis and determination**

7. The appellant’s advocates submit that the court has jurisdiction in law to extend time to file malicious prosecution suits. While acknowledging the Court of Appeal decision in *Mary Ofundwa V. Nzoia Sugar Company Ltd ( Kisumu CA No. 244 of 2000)* relied upon by the trial court that held that a malicious prosecution action is not among suits in respect of which time for filing may be extended under section 27 of the *Limitation of Actions Act*, Counsel nevertheless contends that the statutory provision does not “expressly oust applications for extension of time” to bring such action. According to Counsel, the enactment only provides a threshold the applicant has to meet before time is extended.
8. The 1<sup>st</sup> respondent did not file submissions. The 2<sup>nd</sup> respondent’s advocates support the trial court’s order. Counsel submit that time for bringing malicious prosecution suits cannot be extended in law, placing reliance on judicial decisions in the case of Peter Gichuki Mwangi V. Kenya Copyright Board & 3 Others (2018)eKLR and Omar Ismael Mazzha V. Office of the Director of Public Prosecutions & Another (2021) eKLR. The advocates further submit inter alia that pursuant to section 3(1) of the *Public Authorities Limitation Act* actions against the Government including the Attorney-General, who is the 1<sup>st</sup> respondent herein, must be brought before the end of 12 months from the date in which the cause of action accrued.
9. The point for determination is whether the trial court lawfully struck out the O.S for want of jurisdiction for the reason that suits brought for malicious prosecution are not covered by sections 27 and 28 of the Act. Section 4 (2) of the Act provides that 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.” Section 27 , however, enacts that section 4 (2) of the Act supra “does not afford a defence to an action founded on tort where;
  - a. The action is for damages for negligence; nuisance or breach of duty ( whether the duty exists by virtue of contract or written law or independent of a contract or written law; and
  - b. The damages claimed by the plaintiff for the negligence , nuisance or breach of duty consist of or include damages in respect of personal injuries of any person ; and
  - c. The court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
  - d. The requirements of subsection (2) are fulfilled in relation to the cause of action.
10. Section 27 (2 ) stipulates that the requirements of the “subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge ( actual or constructive) of the plaintiff until a date which –
  - a. either was after the three-year period of limitation prescribed for that cause of action or was not earlier than year before the end of that period; and



- b. in either case , was a date not earlier than one year before the date on which the action was brought.”
11. Section 28 of the Act governs applications for leave to bring actions out of time for the purposes of section 27 of the Act and guides the court on granting of such leave.
  12. The learned trial magistrate held regarding the 2<sup>nd</sup> respondent’s preliminary objection: “The issue is whether section 27 and 28 of the *Limitation of Actions Act* allows extension of time in a case of malicious prosecution .” Under section 27 (1) and 28 of the Limitation of Action Act provide that for a person to benefit for extension of Limitation period the torts claim should be for damages for negligence nuisance or breach of duty damages claimed in respect of personal injuries” (sic). The court therefore concluded that .....” the section (read section 27 of the Act) does not give jurisdiction to extend time for filing suit in cases involving contract or any other causes of action other than those on tort”. The lower court then struck out the O.S with costs, its opinion being fortified by superior courts’ decisions in Peter Gichuki Mwangi V. Kenya Copyright Board & 3 Others (2018) and Mary Ofundwa V. Nzoia Sugar Company Ltd Kisumu CA No. 244 of 2000 adverted to hereinabove and cited in the honourable magistrate’s ruling.
  13. I have perused the cited decisions. The Peter Gichuki Mwangi case is similar to the instant matter in that the claimant therein sought extension of time to file suit for malicious prosecution under sections 27 and 28 of the Act. My brother (Hon. Justice J.A. Makau) found that extension of time could only be considered in cases based on the tort of negligence, nuisance or breach of duty and not any other, including malicious prosecution. The latter decision by the Court of Appeal is a little different as it involved a claim for breach of contract. The superior court held that extension of time to file suit cannot be granted in breach of contract disputes, but also specifically observed that extension of time is only considered in cases of tort stated in section 27 of the Act and in no other instances.
  14. The learned trial magistrate correctly stated the law. The holding in Peter Gichuki Mwangi and Mary Ofundwa supra has been reiterated in more recent determinations in Kennedy Wambua Sukali v. Nairobi Hospital & Another (2022) eKLR and in the above mentioned case of Omari Ismail Mazzha V. Office of the Director of Public Prosecutions ( ODPP) & Another (2021) eKLR. The appellant’s advocates’ passionate submissions are appreciated but the law does not allow for extension of time to lodge claims for malicious prosecution. Malicious prosecution is indeed a tort as determined in Crispine Otieno Caleb V. Attorney-General (2014) eKLR and Stephen Gachau Githaiga & Another V. Attorney-General (2015) eKLR the appellant’s advocates have referred to. This court is, however, bound by the important doctrine of stare decisis in light of the Court of Appeal decision in the case of Mary Ofundwa to the effect that malicious prosecution is not among actions in tort for which time may be extended for purposes of sections 27 and 28 of the Act.

### **Determination**

15. The upshot is that both grounds of appeal above set out fail. Accordingly, the appeal is hereby dismissed with costs.

**J. M. NANG’EA, JUDGE.**

**JUDGEMENT DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF OCTOBER 2024 IN THE PRESENCE OF:**

The appellant’s Advocate,

The 1<sup>st</sup> respondent Advocate,



The 2<sup>nd</sup> respondent's Advocate,  
The Court Assistant,  
**J. M. NANG'EA, JUDGE.**

