



REPUBLIC OF KENYA



KENYA LAW
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**FC v CKC & 2 others (Civil Appeal 167 of 2018)
[2023] KEHC 20208 (KLR) (Civ) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 20208 (KLR)

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

CIVIL

CIVIL APPEAL 167 OF 2018

DO CHEPKWONY, J

MAY 3, 2023

BETWEEN

FC APPELLANT

AND

CKC 1ST RESPONDENT

JANET WANGUI MUCHIRI 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

(Being an Appeal from the Ruling of Hon. Nyaloti dated 7th March, 2018 in the Chief Magistrate's Court Civil Case No.4197 of 2014 Milimani Commercial Courts)

JUDGMENT

Background

1. By a Plaintiff dated June 27, 2014 and filed in court on July 22, 2014, the Appellant sought the following reliefs against the Respondents before the Trial Court;
 - a. Cancellation of the sale and subsequent transfer of Plot No Vxxx from the 1st Defendant to the 2nd Defendant or in the alternative 50% of the proceeds of the sale being Kshs 400,000/=.
 - b. General damages for malicious prosecution.
 - c. Special damages of Kshs 258,065/=.
 - d. Costs of this suit plus interest at Court rates until payment in full.



2. At Paragraph 4 of the Complaint, the Appellant pleaded that on May 7, 2012, the 1st Respondent fraudulently sold their matrimonial property Plot No Vxxx situated at Kayole South to the 2nd Respondent without the knowledge and consent of the Appellant.
3. The Appellant pleaded particulars of fraud as follows:-
 - a. The 1st Respondent selling Plot No Vxxx to the 2nd Defendant at Kshs 800,000/= without informing or seeking spousal consent from the Appellant.
 - b. The 2nd Respondent purchasing the said plot with full knowledge that the same was a matrimonial home and or was occupied by the Appellant.
 - c. The 2nd Respondent failing to confirm whether the occupant of the plot she was purchasing was aware of the sale and whether they had consented.
 - d. The 1st Respondent failing to share proceeds of the sale with the Appellant.
4. According to the Appellant, the 2nd Defendant claimed that on or about May 13, 2012, she trespassed onto their property and made a false and malicious complaint to the Police that the Appellant had committed an offence and she was arrested and charged with the offence of forcible entry, whereby the 1st Respondent caused the police to harass, assault and evict her from the plot. The police failed to conduct proper investigations in order to ascertain whether the Appellant had committed any crime. Subsequently, the Appellant was maliciously charged vide Makadara Criminal Case No 2537 of 2012 in which after hearing, she was acquitted on February 6, 2014 for lack of evidence under Section 210 of the *Criminal Procedure Code*.
5. The Appellant stated that as a result of the criminal proceedings and the fraudulent sale, she suffered loss and damages as particularized below:-
 - a. Advocates legal fees for defending Criminal Case No 2537 of 2012 – Kshs 120,000/=.
 - b. Fare from Nairobi to Mombasa to attend court on 13 occasions – Kshs 52,000/=.
 - c. Rent paid from June, 2012 upon losing her matrimonial home – Kshs 86,065/=.
 - d. Kshs 400,000/= being the Appellant’s 50% entitlement of the proceeds from the sale.
6. In opposition, the 3rd Respondent filed a Memorandum of Appearance and a Statement of Defence all dated December 8, 2014. The 3rd Respondent denied the contents of the Complaint and put the Appellant to strict proof. In further response, the 3rd Respondent avers that the discharge of the Appellant under Section 210 of the *Criminal Procedure Code*, does not amount to malice in the part of the police hence the particular of malice are denied in toto.
7. In the alternative and without prejudice to the foregoing, the 3rd Respondent states that if at all the Appellant was arrested and charged, the same was done after a legitimate complaint was made to Kenya Police, proper investigations done and in execution of Police Statutory Duty. The 3rd Respondent urged the trial Court to dismiss the suit with costs.



Evidence

8. On July 14, 2016, the matter proceeded for hearing before the trial Court. The Appellant, Florence Cheronye testified as PW1, and in her testimony, she stated that she works for [Particulars Withheld] Africa and was staying in Kayole in a plot owned by CC who sold the same to Janet Wangui. She produced the Sale Agreement. She stated that on May 13, 2012, at 9.00pm, the police from Kayole Police Station arrested her and she was charged at Makadara Law Courts. She produced a copy of the Charge Sheet. She was acquitted of the charges and produced the proceedings. The Appellant told court that she used to travel from Mombasa to Nairobi and attended 13 trials which she hired an advocate whom she paid Kshs 150,000/=. She produced the receipts for legal fees and travel. She also produced receipts for rent payment. It is her evidence that after acquittal, she wrote a demand letter to the Attorney General and 2nd Respondent and filed the matter in court. The Appellant told court that Constantine was her husband and produced a Marriage Certificate to confirm this. She asked that she be given part of the proceeds from the sale of the plot. She adopted her witness statement. The Appellant closed her case without calling any other witness.
9. On April 4, 2017, parties were directed to file written submissions whereby the Appellant filed her submissions dated April 24, 2017 on April 25, 2017. There are no submissions on record for the Respondents.
10. Upon considering the evidence and the submissions on record, the trial Court delivered its Judgment on 7th January, 2018 dismissing the Appellant's case with costs to the Respondents.

The Appeal

11. Being aggrieved and dissatisfied with the Judgment of Hon. E. Nyaloti (CM) delivered on January 7, 2018 in CMCC No 4197 of 2014, the Appellant filed this appeal vide a Memorandum of Appeal dated 3rd April, 2018, wherein the Appellant proffers the following Grounds of Appeal:-
 - a. That the Learned Magistrate erred in law and fact when by holding that the plot in question was not matrimonial property contrary to the evidence adduced.
 - b. That the Learned Magistrate erred in law and in fact when holding that the Plaintiff had not proved her case against the 2nd Defendant when there was Judgment against the 2nd Defendant and uncontroverted evidence adduced proving her liability.
 - c. That the Learned Magistrate erred in law and in fact when she failed to appreciate that the 1st and 2nd Defendants lodged malicious complaint against the Plaintiff who was acquitted under Section 210 of the Criminal Procedure Code.
 - d. That the Learned Magistrate erred in law and in fact when she failed to analyze and consider the evidence adduced as a result of which she arrived at the wrong conclusion.
 - e. That the Learned Magistrate erred in law and fact by discharging the Appellant's interests in the matrimonial property in question in light of the evidence adduced.



- f. That the Learned Magistrate erred in law and in fact in her failure to consider that the effect of her decision was to take away the only matrimonial property contrary to the law and in violation of the Appellant’s constitutional rights.
 - g. The Judgment does not disclose adequate basis upon which the court arrived at the decision.
 - h. The decision is unfair and unjust in the circumstances.
 - i. The Learned Magistrate erred in law and in fact in her having failed to take into account material facts and or her taking into account extraneous matters.
12. The Appellant prays that the appeal be allowed and the decision of the Chief Magistrate’s Court dated November 17, 2017 be set aside and to be substituted with a Judgment as per the prayers in the Plaint.
13. On May 13, 2022, this Court issued directions that the appeal be canvassed by way of written submissions. The Appellant’s submissions are dated July 15, 2022. There are no submissions on record filed on behalf of either of the Respondents. I have read through the said submissions and the Grounds of Appeal for consideration in the determination of the appeal.

Analysis and Determination

14. Upon careful consideration of the grounds in support of the appeal, the submissions on record, the evidence adduced before the trial Court and the cited authorities, I find the following issues emerging for determination by this Court.
- a. Whether Appellant proved that Plot No Vxxx was a matrimonial property?
 - b. Whether the prosecution of the Appellant was malicious?
15. It is well settled that this being a first appeal, this Court has a duty to analyze and re-evaluate the evidence adduced before the trial Court and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify in the lower court. In the case of *Abok James Odera T/A A. J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013]eKLR, the Court held as follows:-
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
16. The appellate court will only interfere with the Judgment of the trial court if the same is founded on wrong legal principles or wrong interpretation of the law. That position was reiterated by the Court of Appeal in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR, where it held that:
- “An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”



17. In determining the first issue, it is prudent that this Court first brings out the definition of what amounts to Matrimonial Property. Section 6(1) of the *Matrimonial Property Act* defines it as follows:-
- “For the purposes of this Act, Matrimonial Property means:-
- a. The matrimonial home or homes;
 - b. Household goods and effects in the matrimonial home or homes; or
 - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”.
18. Section 7 of the *Act* provides that:-
- “Subject to Section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved”.
19. Further, Section 2 of the *Act*, defines “Contribution as follows:-
- “Monetary and non-monetary contribution and includes:-
- a. Domestic work and management of the matrimonial home;
 - b. Child care;
 - c. Companionship;
 - d. Management of family business or property; and,
 - e. Farm work”.
20. Section 14 of the *Act*, provides that:-
- “Where matrimonial property is acquired during marriage;-
- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and,
 - b. In the names of the spouses jointly, there shall be rebuttal presumption that their beneficial interests in the matrimonial property are equal”.
21. Further, the Court is guided by the finding in the case of *P. O. M. v M. N. K.*[2017]eKLR, where Musyoka J. stated that:-
- “This is a suit for division of matrimonial property..... the prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made ...”
22. Having carefully considered that evidence adduced by the Appellant which forms part of the record, this court finds that the Appellant has failed to convince this Court that she contributed towards the purchase of the property being Plot No Vxxx if at all and or to what extent. In her evidence before the trial Court, the Appellant produced a Marriage Certificate confirming that she was married to the 1st



Respondent. However, there was no title document or evidence on record regarding the property and when it was acquired. In the absence of such information, the Appellant has failed to meet the letter and spirit of Section 6(1)(c) of the Act and the aforementioned provisions of the law.

23. It is therefore this Court's considered view that the trial Court made a correct finding regarding the question of whether or not the property was matrimonial home as alleged by the Appellant.
24. In respect to the second issue, it has been held without number that an Applicant must prove the certain elements in order to succeed in a claim for the tort of malicious prosecution. (See the case of *Mbowa v East Mengo Administration* [1972]1 EA 352 (CAK)).
25. The principles governing malicious prosecution claim were laid down by Cotran J, in the case of *George Masinde Murunga v Attorney-General* [1979]eKLR, as follows:-

“As to malicious prosecution the Plaintiff must prove four things:

- (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this);
- (2) that the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this);
- (3) that the prosecution was instituted without reasonable and probable cause; and
- (4) that it was actuated by malice”.

26. Differently put, the elements to be established in proving malicious prosecution are:-

- a. The prosecution was instituted by the Defendant.
- b. The Prosecution was terminated in favour of the Plaintiff.
- c. The prosecution was instituted without reasonable and probable cause.
- d. The prosecution was actuated by malice.

27. Further, in the case of *Stephen Gacharu Gitbaiga & Another v Attorney General* [2015]eKLR, Mativo J (as he then was) stated as follows:-

- i. The Plaintiff must prove that the prosecution at issue was initiated by the Defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental for any damage that results.
- ii. The prosecution termination in the Plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the Plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.
- iii. The absence of reasonable and probable cause to commence or continue the prosecution. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding



in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.

- iv. The initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a Plaintiff's case for malicious prosecution, regardless of whether the Defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the Defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain; between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect".

28. In the instant case, the Appellant was arrested and charged following a complaint by the 2nd Respondent. The matter was heard and the Appellant was acquitted under Section 210 of the *Criminal Procedure Code*. There is no dispute that the appellant proved the first two principles on malicious prosecution. However, the Appellant failed to prove that her prosecution was instituted without reasonable and probable cause and that her prosecution was actuated by malice.
29. The circumstances that led to the arrest and charging of the Appellant were that being in possession of Plot No Vxxx without any colour of rights, she held in possession of the said plot against the 2nd Respondent who was entitled to possession. The Appellant was eventually charged with the offence of forcible detainer contrary to Section 91 of the *Penal Code Act*. Based on the circumstances of this case, there was probable cause for the prosecution of the Appellant for being in possession of a property belonging to another person having purchased it from the 1st Respondent vide an Agreement dated May 7, 2012. The element on malice was not proved by the Appellant.
30. It is this Court's finding that the trial Court made the correct finding in dismissing the Appellant's claim. The trial Court cannot be faulted in its finding since this Court still holds the same position.
31. The upshot of the foregoing is that the Appellant's appeal dated April 3, 2018 is unmerited and is hereby dismissed. However, there will be orders as to costs.
32. It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...3RD ... DAY OF ...MAY... 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Kioko counsel holding brief for Mr. Mutua for the Appellant

No appearance for and by Respondent

Court Assistant - Mwenda

