



REPUBLIC OF KENYA



**Lalji v Lalji & 2 others (Civil Case E221 of 2020)  
[2023] KEHC 19168 (KLR) (Civ) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19168 (KLR)

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

**CIVIL**

**CIVIL CASE E221 OF 2020**

**CW MEOLI, J**

**JUNE 12, 2023**

**BETWEEN**

**DIAMOND HASHAM LALJI ..... PLAINTIFF**

**AND**

**BAHADURALI HASHAM LALJI ..... 1<sup>ST</sup> DEFENDANT**

**SULTAN H LALJI ..... 2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Sultan H. Lalji (hereafter the 2<sup>nd</sup> Defendant) took out the Chamber Summons (hereafter the Summons) dated 30<sup>th</sup> April, 2021 expressed to have been brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA), cap 21; orders 2 rule 15 (1) (b), (c) and (d) of the *Civil Procedure Rules* (CPR), and the *Limitation of Actions Act*. The Chamber Summons is seeking to strike out the suit filed by Diamond Hasham Lalji (hereafter the Plaintiff) with costs.
2. The Summons is premised on the grounds on its face and on the supporting affidavit sworn by the 2<sup>nd</sup> Defendant, who in summary, averred that the Plaintiff's suit which is founded on the tort of malicious prosecution, does not disclose any reasonable cause of action against him given that the alleged complaint leading to the prosecution of the Plaintiff were not made by the 2<sup>nd</sup> Defendant. He further averred that the Plaintiff's suit is time barred pursuant to the *Limitation of Actions Act*.
3. To oppose the Summons, the Plaintiff swore a replying affidavit on 24<sup>th</sup> November, 2021 wherein he stated that contrary to the averments by the 2<sup>nd</sup> Defendant, the said defendant participated in lodging the malicious complaint against him concerning the alleged theft of assets belonging to Atta Limited (hereafter the Company) vide the letters dated 19<sup>th</sup> April, 2004 and 3<sup>rd</sup> March, 2005 and



which culminated in his prosecution by the 3<sup>rd</sup> Defendant. The Plaintiff also stated that contrary to the averments made by the 2<sup>nd</sup> Defendant, the present suit is not time barred since the cause of action arose on 18<sup>th</sup> January, 2018 upon the termination of the criminal proceedings and that the suit was brought within the period of three (3) years stipulated for tortious actions. He stated that if the suit is struck out summarily, he stands to suffer great prejudice and injustice.

4. The Director of Public Prosecutions (hereafter the 3<sup>rd</sup> Defendant) also opposed the Summons through Grounds of Opposition dated 18<sup>th</sup> July 2022 to the following effect:
  1. Article 157 of *the Constitution* empowers the 3<sup>rd</sup> Defendant to ‘institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect to any offence alleged to have been committed.
  2. The plaint as drafted, on the face of it, does not demonstrate the existence of spite, ill will or malice on the part of the 3<sup>rd</sup> Defendant.
  3. The 2<sup>nd</sup> Defendant is a necessary party in the proceedings to prove the elements of malicious prosecution.
  4. The Application is otherwise incompetent, misconceived and is an abuse of the process of the Honourable Court and the same ought to be dismissed with costs.
  5. The Summons was canvassed through written submissions. The 3<sup>rd</sup> Defendant did not file any submissions however, electing to rely entirely on the Grounds of Opposition on record. In support of the Summons, counsel for the 2<sup>nd</sup> Defendant argued that in order for any suit to be sustained, the plaint must disclose a reasonable cause of action against the defendants and that in the present instance, no reasonable cause of action has been disclosed against him. Moreover, no particulars of malice have been set out against him. To buttress his point, counsel cited the cases of *Simion Ogada Andiwo v Safaricom Plc & 15 others* [2021] eKLR; *Triton Service Stations Limited v Pjp Holdings Limited* [2013] eKLR and *Kariunga Kirubua v Law Society of Kenya* [2009] eKLR among others.
  6. The 2<sup>nd</sup> Defendant’s counsel further submitted that the instant suit is scandalous, frivolous, vexatious and an abuse of the court process, purely intended to annoy and frustrate him, in view of an ongoing separate dispute between him and the Plaintiff, whom he disclosed to be his brother. He relied on two decisions, namely, *County Council Of Nandi v Ezekiel Kibet Rutto & 6 others* [2013] eKLR and *Katana Fondo Birya v Krystalline Salt Ltd & 2 others* [2018] eKLR in that regard. Counsel asserted that the suit is time barred, having been brought after the lapse of the statutory three (3) year period. The court was therefore urged to allow the Summons and to dismiss the suit as a result.
  7. In urging the court to dismiss the Summons and to sustain the suit, the Plaintiff through his counsel restated the averments made in the Summons that both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lodged the complaint with the Directorate of Criminal Investigations. Hence, the argument that the suit does not disclose a reasonable cause of action against the 2<sup>nd</sup> Defendant holds no water. Counsel cited the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR to argue that in principle, the striking out of a suit is a measure of last resort and should only apply in instances where it is clear that the suit is hopeless.
  8. On the question whether the suit is time barred, counsel submitted that the provisions of Section 4(2) of the *Limitation of Actions Act* stipulate that actions founded on tort ought to be brought within three (3) years of the cause of action accruing, and that the instant claim being



one founded on of malicious prosecution, the cause of action would have accrued on the date of termination of the criminal case. Counsel went on to submit that the suit is competently before the court, having been filed within three (3) years of the Plaintiff's acquittal on 19<sup>th</sup> January, 2018. He relied on the case of *Jacob Juma & another v Commissioner of Police & another* [2013] eKLR.

9. The court has considered the rival affidavit material, the Grounds of Opposition, and the submissions in respect of the Summons. The Summons essentially seeks the striking out of the Plaintiff's suit for failing to disclose a reasonable cause of action against the 2<sup>nd</sup> Defendant and for being time barred.

10. Striking out of pleadings is provided for under order 2, rule 15(1) of the *CPR* as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

11. The decision whether to strike out pleadings is discretionary and ought to be exercised judicially. In *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal held that:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases....Whether or not a case is plain is a matter of fact....Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

12. And in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)*[2000] eKLR the Court of Appeal expressed itself in the following manner:-

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial.... It cannot be doubted that the Court has inherent jurisdiction to dismiss that which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”



13. Earlier Madan JA in the locus classicus, *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR stated that:
- “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
14. As to the definition of a vexatious, scandalous or frivolous pleadings, the Court of Appeal in the case of *Uchumi Supermarkets Limited & another v Sidhi Investments Limited* [2019] eKLR expressed itself as follows:
- “As stated in the case of *Trust Bank Limited v Amin Company Ltd & Another* (2000) KLR 164, a pleading or an action is frivolous when it is without substance or is groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. In addition, an action should not be treated as an abuse of the process of the court unless it is plain beyond a peradventure at the interlocutory stage that the action cannot succeed (*D.T. Dobie & Company (Kenya) Limited vs. Muchina*) Supra.”
15. Upon the court’s consideration of the depositions and arguments presented by the 2<sup>nd</sup> Defendant, the court has not come across any credible material to demonstrate the manner in which the Plaintiff’s pleadings are frivolous, vexatious or amount to an abuse of the court process. Equally, and without going into the merits of the suit at this early stage, the court has not been persuaded that no reasonable cause of action exists against the 2<sup>nd</sup> Defendant. From the pleadings and material before the court, it is apparent that the malicious prosecution claim is laid against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the basis of the alleged complaint to the Director of Criminal Investigations; and against the 3<sup>rd</sup> Defendant arising from the prosecution of the Plaintiff. The above grounds must therefore fail.
16. As to whether the suit ought to be struck out for being time barred, Section 4(2) of the *Limitation of Actions Act* Cap. 22 Laws of Kenya stipulates 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:
- Provided that an action for libel or slander may not be brought after the end of twelve months from such date.
17. As already mentioned, and as seen in the pleadings on record, the present suit is founded on the tort of malicious prosecution, for which time would have started to run from the date of termination of the subject criminal proceedings against the Plaintiff. While it is noted that none of the parties furnished a copy of the criminal proceedings for the court’s perusal, it is apparent from the pleadings and material on record that the criminal proceedings against the Plaintiff terminated on 19<sup>th</sup> January, 2018 following the decision by the Court of Appeal that quashed the prosecution of the Plaintiff. The present suit was consequently filed sometime



on or about 6<sup>th</sup> October 2020, which is within the three (3) year statutory period for bringing tortious claims.

18. In the result, the Court finds that the Chamber Summons dated 30<sup>th</sup> April 2021 is without merit. It is therefore dismissed with costs to the Plaintiff.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the 2<sup>nd</sup> Defendant/ Applicant: Mr. Kinyanjui h/b for Ms. Darby

For the Plaintiff/ Respondent: Mr. Abdullahi

For the 1<sup>st</sup> & 3<sup>rd</sup> Defendants: N/A

C/A: Carol

