



**Sukali v Nairobi Hospital Ltd (Civil Suit E226 of 2021)  
[2024] KEHC 14785 (KLR) (Civ) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14785 (KLR)

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

**CIVIL  
CIVIL SUIT E226 OF 2021**

**CW MEOLI, J  
NOVEMBER 21, 2024**

**BETWEEN**

**KENNEDY WAMBUA SUKALI ..... PLAINTIFF**

**AND**

**THE NAIROBI HOSPITAL LTD ..... DEFENDANT**

**RULING**

1. For determination is the Preliminary Objection (PO) dated 18.06.2024 and application of even date, both filed by The Nairobi Hospital Ltd.
2. The pertinent history of this matter is that Kennedy Wambua Sukali (hereafter the Plaintiff) filed this suit in September 2021. He named The Nairobi Hospital Ltd and the Director of Public Prosecutions as the first and second Defendants, respectively in his plaint dated 15.09.2021. Filed contemporaneously with the plaint was his ex parte motion dated 15.09.2021. The motion sought leave to file the suit out of time against the Director of Public Prosecutions and that upon leave being granted, the suit be deemed as duly filed. In his ruling delivered on 1<sup>st</sup> April 2022, Sergon J dismissed the motion on the key ground that the court could not enlarge time for the institution of a claim based on the tort of malicious prosecution out of time. This outcome apparently necessitated the subsequent amendment of the plaint and filing of the amended plaint dated 04.09.2023. By which the Director of Public Prosecutions ceased to be a defendant, thus leaving the Nairobi Hospital Ltd (hereafter the Defendant) as the sole defendant.
3. The Plaintiff by his amended plaint inter alia sought against the Defendant, special damages in the sum of Kshs. 50,528,416/-; general damages for malicious prosecution, mental torture, loss of career advancement, loss of business opportunities; aggravated damages for malicious reporting without probable cause leading to his malicious prosecution; and costs of the suit. It was averred that the Plaintiff was employed by the Defendant pursuant to a letter dated 15.02.2011 appointing him as



- a System Administrator and later promoted him to the position of Senior Systems Administrator - Network and Server Administrator, in 2013. That at all material times during the Plaintiff's employment with the Defendant, he was an exemplary employee and nominated for recognition as employee of the year in 2012 and thereafter assigned various other duties and responsibilities due to his outstanding performance. It was further averred that on or about 03.04.2014, the Defendant wrote to terminate the services of the Plaintiff, for inter alia, loss of confidence in the Plaintiff due to circumstances surrounding failure of the system known as Care 2000, on 13.02.2014.
4. Further, the Plaintiff averred that on 05.06.2014, the Defendant reported to the Directorate of Criminal Investigations (DCI), alleging loss of Kshs. 92,965,239/- between 02.01.2014 and 07.04.2014 purportedly unearthed due to the system failure; and that following the report, the Plaintiff was arrested on 24.07.2014 and charged in Court with the offence of Stealing Contrary to Section 281 of the Penal Code in Nairobi Milimani Criminal Case No. 1059 of 2014. It was averred that the Plaintiff was prosecuted on baseless criminal charges which concluded in his favour vide the ruling delivered on 27.02.2020. Thus, the Plaintiff claimed general and special damages as particularized in the amended plaint.
  5. The Defendant filed a statement of defence dated 17.07.2023, subsequently amended on 18.01.2024 following the filing of the amended plaint. The amended defence admitted certain basic averments in the amended plaint. However, the Defendant pleaded inter alia that it was not responsible for the arrest and prosecution of the Plaintiff, such being statutory duties of independent bodies established by law, that is, the National Police Service (NPS) and the Office of the Director of Public Prosecutions (ODPP), respectively. It was further averred that the Plaintiff had in Nairobi ELRC Cause No. E505 of 2022 challenged the termination of his employment which claim was dismissed for being filed out of time and an application for enlargement of time denied. Moreover, that the High Court had no jurisdiction to entertain the claim based on the termination of the Plaintiff's employment, including the entire claim for special damages in the sum of Kshs. 50,528,416/- being the alleged loss of income resulting from termination of employment.
  6. The Defendant thereafter contemporaneously filed the subject PO dated 18.06.2024 and application of even date. The PO challenged the suit on grounds that: - this Court lacks jurisdiction to hear and determine claims relating to termination of the Plaintiff's employment, including the entire claim for special damages of Kshs. 50,528,416/- based on alleged loss of income as a result of termination of employment; that the Plaintiff's claim relating to the termination of his employment is time barred under Section 90 of the Employment Act; and that the Plaintiff's claim for unfair termination of employment is in any event res judicata, the same having been considered and dismissed by the Employment and Labour Relations Court (ELRC) in Nairobi ELRC Cause No. E505 of 2022 for being time barred.
  7. The motion was expressed to be brought pursuant to Order 2 Rule 15(1)(a)(b) & (d) of the Civil Procedure Rules (CPR) and sought inter alia that the amended plaint dated 04.09.2023 be struck out. The motion was premised on grounds: - that the amended plaint does not disclose a reasonable cause of action against the Defendant; that the necessary and mandatory parties in a suit for malicious prosecution, being the Attorney General (AG) and the Director of Public Prosecutions (DPP), are not parties to the suit; that the Plaintiff was charged and prosecuted by the ODPP, which exercises State powers of prosecution, following investigations conducted by the DCI of the NPS; that NPS and the ODPP were discharging Constitutional functions, which they are required and empowered to discharge independently; that the DPP does not require the consent of any person or authority for the commencement of criminal proceedings and is not under the direction or control of any person or authority in the exercise of his powers and functions; that the Defendant cannot be directly or



indirectly/vicariously liable for the actions and decisions of the NPS and the ODPP; and that the suit for malicious prosecution is therefore incompetent to the extent that it has been brought against a party that neither commenced nor conducted the criminal prosecution of the Plaintiff and to the extent that the Constitutional office that performs State functions of prosecution is not included as a Defendant.

8. A further ground in the motion reiterated the grounds in the PO to the effect that the Plaintiff's claim based on unfair termination was time barred under the *Employment Act*; and that the claim for unfair termination had been separately pursued by the Plaintiff in the Nairobi ELRC Cause No. E505 of 2022 and dismissed for being filed out of time and the application for enlargement of time denied; that this Court, in any event, lacks jurisdiction to hear and determine the Plaintiff's claim for unfair termination; that the plaint is scandalous, vexatious and otherwise an abuse of court processes; that and it is fair and just that the orders sought herein are granted.
9. The Defendant's PO and motion were canvassed by way of submissions; the Plaintiff filed written submission while the Defendant made oral submissions.
10. On the part of the Defendant, counsel asserted that the PO is premised on a jurisdictional question and that the instant suit is res judicata whereas the motion is premised on the fact that the suit discloses no reasonable cause of action and equally challenges this Court's jurisdiction. Concerning the latter, counsel argued that a portion of the plaint is based on an employment relationship pursuant to which the Plaintiff seeks Kshs. 50,528,416/-. All contrary to the provisions of Article 162(2) of *the Constitution*, pursuant to which the claim ought to have been filed before the ELRC and not the High Court (HC). He contended that although under Article 165(3) of *the Constitution* the HC enjoys unlimited jurisdiction in civil matters subject to 165(5) of *the Constitution*, this excludes claims arising from an employment relationship. Counsel here calling to aid the decision in Republic v Chengo & 2 Others (Petition No. 5 of 2015) [2017] KESC 15 (KLR) (26 May 2017) (Judgement). Citing Section 90 of the *Employment Act* and paragraph 9 of the plaint indicating the Plaintiff's dismissal date as 03.05.2014, counsel stated that even if this Court were vested with jurisdiction to entertain the matter, the claim was time barred. Concerning res judicata, counsel submitted that the Plaintiff's earlier suit, Nairobi ELRC Cause No. E505 of 2022 raised issues similar to those in the present suit. That upon that suit being dismissed, the Plaintiff had preferred an appeal to the Court of Appeal.
11. Counsel further submitted that a claim founded on malicious prosecution cannot be sustained without the joinder of the ODPP or AG who are the parties responsible for any action founded on malicious prosecution and in the absence of the said parties, the Plaintiff cannot properly hoist liability for actions carried out by the ODPP or AG on the Defendant. The decisions in Murunga v The AG (1976-1980) KLR 1251 as cited in Silvia Kambura v George Kathurima Japhet & 2 Others [2021] eKLR, Susan Mutheu Muia v Joseph Makau Mutua [2018] eKLR, Margaret Ndege & 3 Others v Moses Oduor Ademba [2021] eKLR, Stephen Gachau Githaiga & Another v AG [2015] eKLR and Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399 were cited in that regard. In conclusion, counsel urged the court to allow the PO and motion, and submitted that the Plaintiff had ample opportunity but failed to withdraw this suit and should therefore bear the costs of the P.O and motion.
12. In response, counsel for the Plaintiff in addressing the P.O, counsel anchored her submissions on several decisions including, Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696 as cited with approval by the Supreme Court in Hassan Joho Ali & Another v Suleiman Shabai & 2 Others [2014] eKLR; Hassan Nyanje Charo v Khatib Mwashetani & 3 Others [2014] eKLR; Aviation & Allied Union Workers Kenya v Kenya Airways Ltd & 3 Others [2015] eKLR; and IEBC v Jane Chepengere & 2 Others [2014] eKLR. In support of the submission that the Defendant's P.O does not satisfy the test set out in the decisions, because it does not raise pure points of law. And that



some pertinent facts were contested and can only be ascertained by the trial Court. Hence, the PO cannot be sustained.

13. On the question of the suit being res judicata, counsel citing the provisions of Section 7 of the CPA and decision in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, argued that the plea is inapplicable here. Because the parties in the plaint dated 15.06.2021 and the amended plaint dated 04.09.2023 were different, in addition to other issues being raised in the latter plaint. Counsel while relying on D.T. Dobie & Co. (Kenya) Ltd v Joseph Mbaria Muchina & Another [1980] eKLR finally asserted that the summary dismissal of suits is a draconian action and ought not to be taken here, so that the Plaintiff is accorded a full hearing.
14. The Court has considered the rival submissions by the parties and the record herein. The Defendant's PO is premised on Article 165(5)(b) as read together with Article 162(2)(a) of *the Constitution*; Section 90 of the *Employment Act*; and Section 7 of the CPA whereas the motion is anchored on Order 2 Rule 15(1)(a)(b) & (d) of the CPR. The two seek the same result, namely, the termination of the instant proceedings; the PO is primarily challenging the jurisdiction of the court while the motion is premised on the non-joinder of the DPP and AG and therefore the competence of the Plaintiff's cause of action against the Defendant, among others. In my considered view, a determination of the jurisdictional challenge is adequate to dispose of the PO and motion.
15. In the celebrated decision of Mukisa Biscuits Manufacturing Company Ltd (supra), it was stated:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....”

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

16. Ojwang J. (as he then was) in the case of Oraro v Mbaja [2005] KLR 141 in reiterating the foregoing stated that: -

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a Court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

See also Kigwor Company Limited v Samedy Trading Company Limited [2021] eKLR and Mulemi v Angwenye & Another (Civil Appeal 170 of 2016) [2021] KECA 214



17. The Plaintiff contends that the Defendant’s PO does not meet the above tests in so far as it is premised on contested facts. The Court having reviewed the grounds and submissions canvassed in respect of the PO, gathers that the Defendant’s PO is premised on Article 165(5)(b) as read together with Article 162(2)(a) of *the Constitution*; Section 90 of the *Employment Act*; and Section 7 of the CPA. Save for the latter, which despite being a point of law may involve facts liable to be contested, and in any event, to be determined on evidence, the balance of the grounds appear to fall within the definition of a PO.
18. In addressing the jurisdictional challenge, the court has considered the provisions of Articles 162(2)(a) and 165(5)(b) of *the Constitution* which state respectively, as follows:
1. Article 162-
    - ” (1) .....
    - (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
      - (a) a) employment and labour relations; and
      - (b) the environment and the use and occupation of, and title to, land.”
  2. Article 165-
    - “1 .....
    - 2 .....
    - 3 .....
    - 4 .....
    - (5) 5) The High Court shall not have jurisdiction in respect of matters—
      - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
      - (b) b) falling within the jurisdiction of the Courts contemplated in Article 162 (2)”.
19. As famously stated by Nyarangi. JA (as he then was) in the locus classicus case of Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 “...jurisdiction is everything. Without it, a court has no power to make one more step.....”. And more recently in Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR), the Supreme Court held that a Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding what is conferred upon it by law. See also Karisa Chengo (supra).
20. The High Court draws its original jurisdiction to entertain disputes from Article 165(3) of *the Constitution* and relevant statute. The pleadings of the Plaintiff patently disclosing a claim premised on unfair termination of employment, malicious prosecution and attendant loss of earnings, inter alia.



The Employment & *Labour Relations Act* is the sort of act of Parliament envisaged by Article 162(2) (a) of *the Constitution*. Section 12(1) of the said Act provides that: -

- “(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
- (a) disputes relating to or arising out of employment between an employer and an employee;
  - (b) disputes between an employer and a trade union;
  - (c) disputes between an employers' organisation and a trade union organisation;
  - (d) disputes between trade unions;
  - (e) disputes between employer organizations;
  - (f) disputes between an employers' organisation and a trade union;
  - (g) disputes between a trade union and a member thereof;
  - (h) disputes between an employer's organisation or a federation and a member thereof;
  - (i) disputes concerning the registration and election of trade union officials; and
  - (j) disputes relating to the registration and enforcement of collective agreements.”

21. The employment of the Plaintiff was admitted by the Defendant in its statement of defence. Inevitably, it is upon the said employment, subsequent termination, alleged malicious prosecution and resultant loss of earnings that the Plaintiff's claim for special damages amounting to Kshs. 50,528,416/- is premised. This despite non-joinder of the DPP and the AG. Admittedly therefore, the dispute arose within an employer/employee relationship during which the Defendant alleging theft against the Plaintiff, terminated his services, while at the same time lodging a complaint with the DCI, which resulted in the prosecution of the Plaintiff. The various damages sought with respect to unfair termination, and malicious prosecution, principally, flow directly from the actions attributed to the Defendant in the course of the employment relationship, specifically charges of theft against the Plaintiff and dismissal. That is the essence of the Plaintiff's claim.

22. In *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR, the court was faced with a similar situation. The Court was called upon to determine which Court, between the ELRC and the HC had the jurisdiction, to entertain a dispute founded on defamation and malicious prosecution, arising in an employment relationship. Upon considering the mandate of the ELRC as spelt out in the preamble of the *Employment and Labour Relations Court Act* and section 12 of the said Act, the Court stated inter alia that: -

“With those uncontroverted facts we turn to consider the ground on the jurisdiction of the Employment and Labour Relations Court. The preamble to *Employment and Labour*



Relations Court Act states that the court is established to hear and determine disputes relating to “employment and labour relations” and “for connected purposes”. Among its powers under Section 12, the court hears and determines all disputes relating to and arising out of employment and labour relations. In the exercise of that jurisdiction the court has the power to award compensation or damages in any circumstances contemplated under the Act or any other written law and to grant any other appropriate relief that it may deem fit.

The origin of the dispute between the 1<sup>st</sup> respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1<sup>st</sup> respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately. That ground lacks substance and we reject it.”

23. Similarly in this case, the ELRC has the jurisdiction to entertain the dispute herein in all its aspects and to award damages. In the result, this Court is persuaded that the Defendant’s PO is merited, and it is hereby upheld. Ideally, upon this outcome this court would have considered the transfer of the suit to the ELRC.
24. However, there is some difficulty here. First, arising from averments in the defence statement, and repeated here by the Defendant, that the Plaintiff’s earlier suit before the ELRC, namely, Nairobi ELRC Cause No. E505 of 2022 arising from the same transaction as the present suit was dismissed for being time-barred and that the Plaintiff lodged an appeal in the Court of Appeal. Apart from addressing the original plaint and amended plaint herein, counsel for the Plaintiff was reticent about the averments concerning the said ELRC cause. However, the court has not had the advantage of seeing the pleadings in the suit before the ELRC or ruling therein. Secondly, pursuant to the ruling of Seron J of 1<sup>st</sup> April 2022, the DPP is no longer a defendant or party in this suit. Where does that leave the suit against the Defendant which is apparently principally founded on the tort of malicious prosecution, but arising within an employer/employee relationship? In these circumstances, it appears questionable whether an order transferring this matter to the ELRC would serve any real purpose.
25. Thus, without seeming to determine the questions of res judicata and the existence of a reasonable cause of action as raised here by the Defendant, it appears to the court more judicious to strike out the suit at this stage. The costs of the PO and motion are awarded to the Defendant.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024.**

**C. MEOLI**

**JUDGE**

In the presence of

Ms Ngina holding brief for Ms Katasi for the Plaintiff/Respondent

Mr. Njuru with Mr. Tugee for the Defendant/Applicant

C/A: Erick

