



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 540 OF 2007

STOJANOVIC MILAN.....1ST PLAINTIFF

JACKSON NG'ANG'A WAWERU.....2ND PLAINTIFF

-VERSUS-

HAYAT AKASHA IBRAHIM.....1ST DEFENDANT

BAKTASH AKASHA.....2ND DEFENDANT

NURI AKASHA.....3RD DEFENDANT

BONIFACE NGATIA IREGL.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1) Hayat Akasha Ibrahim and Nuri Akasha, the 1st and 3rd defendants respectively took out the summons dated 24th June 2019 whereof they sought to be removed as parties in this suit. The plaintiffs each filed grounds of oppositions to resist the summons. When the application came up for interpartes hearing, learned counsels recorded a consent order to have the same disposed of by written submissions. The advocates were also permitted to present oral highlights.

2) I have considered the grounds stated on the face of the summons and the facts deponed in the supporting affidavits. I have also taken into account the grounds of opposition plus the rival written submissions and the oral highlights. It is the submission of the applicants that the plaintiffs failed to demonstrate the 1st and 3rd defendant's culpability as malicious prosecutors in this suit.

3) It was pointed out that the plaintiffs' oral testimony and written witness statements filed in court did not provide evidence proving elements of malicious prosecution.

4) The second ground argued by the applicants is that they are 9 step-mother and step-brother of the murder victim of the original crime that gave rise to this suit and pursuant to the provisions of the Victims Provisions Act (No. 17 of 2014) they are entitled to seek for statutory protection from further victimization pursuant to Sections 3(b) (v) and 4(2) (f) of the aforesaid Act.

5) It was argued that the continuation of this suit, in the absence of demonstrated culpability under the law of the 1st and 3rd defendants, is tantamount to harassment and a clear demonstration of further victimization.

6) Thirdly, that the applicants are being sued because they recorded statements with the police about the plaintiffs as potential perpetrators of crimes. It is the applicants' submission that the statements are absolutely privileged.

- 7) The Attorney General, the 6th defendant herein, supported the applicants' application and urged this court to strike out the suit as proposed.
- 8) The 1st plaintiff is of the submission that the application is frivolous and is meant to delay the conclusion of this matter. It was argued that the grounds raised and put forward in support of the motion can only be canvassed at the trial. It is said that the plaintiffs' suit has clearly set out the role played by the 1st and 3rd defendants leading to the prosecution of the plaintiffs for the offence of murder.
- 9) It was also pointed out that the Witness Protection Act is a statute which was passed after the criminal case and this suit had been filed hence the same cannot operate retrospectively.
- 10) It is further argued that since the plaintiffs have already been Acquitted, the Witness Protection Act no longer applies.
- 11) The 2nd plaintiff also opposed the summons stating that it is premature to deal with the application yet the Attorney has not testified to shed light on what happened leading to the arrest and prosecution of the plaintiffs. The 2nd plaintiff further argued that he was prosecuted at the behest of the 1st and 3rd defendants.
- 12) Having considered the rival submissions and the material placed before this court, it is apparent that this court has been invited to basically dismiss the suit against the 1st and 3rd defendants on the basis that there is no cause of action.
- 13) One of the preliminary issues which was ably argued is whether or not the witness protection act applies to this suit. In my humble view, the position taken by the plaintiffs appears to be the correct position in law that the Witness Protection Act no. 17 of 2014 was passed while this suit was pending cannot be applied retrospectively hence it cannot apply to this suit.
- 14) Even if it were to apply retrospectively, the same cannot be applied in this matter in that the plaintiffs have already been acquitted.
- 15) The applicants have submitted that the plaintiffs have failed to show that they are culpable for malicious prosecution. The applicants argued that they did not have the power to decide who to charge with a criminal offence, a discretion then held by the Attorney General but now bestowed upon the Director of Public Prosecutions.
- 16) There is no dispute that the then constitution bestowed the Attorney General with the power to decide who to prosecute. The current Constitution of Kenya, 2010 empowers the Director of Public Prosecution with such a power.
- 17) The record shows that the 1st and 3rd defendants recorded witness statements in the police station. The duo in fact testified before the High Court in Nairobi H.C.C.C. no. 153 of 2004 where the plaintiffs were jointly charged with the offence of murder. The duo were among the more than twenty witnesses who were summoned by the prosecution to testify against the plaintiffs. There is no dispute that the duo recorded witness statements which implicated the plaintiffs in one way or another for the murder of Kamaldin Akasha.
- 18) The question which has to be answered is whether or not they had malice to implicate the plaintiffs with such an offence. It is not in dispute that the prosecuting agency at the time was the office of the Attorney General of the Republic of Kenya.
- 19) The police recorded witness statements from more than twenty (24) witnesses which the Attorney General relied upon to decide to prefer a charge of murder against the plaintiffs.
- 20) It is not in dispute that the Hon. Attorney General is yet to be heard to explain the basis he used to decide who to charge with the offence of the murder of Kamaldin Akasha.
- 21) In their statement of defence, the plaintiffs aver that the 1st and 3rd defendants with others were jointly and severally, maliciously and without probable cause had them to be falsely imprisoned and prosecuted.

22) After a careful consideration of the rival submissions, I have come to the conclusion that the issues raised vide the 1st and 3rd defendants summons may as well be raised at the hearing of this suit. It cannot be concluded at this stage that the complainants or the witnesses who recorded statements over the death of Kamaldin Akasha did so with malice.

23) In the end, I find no merit in the 1st and 3rd defendants' summons dated 24th June 2019. The same is ordered dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered at Nairobi this 23rd day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendants