



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 178 OF 2016

THOMAS MAKORI HAMED GETANGE.....PLAINTIFF

- V E R S U S -

ATTORNEY GENERAL OF KENYA.....1ST DEFENDANT

INSPECTOR GENERAL OF POLICE.....2ND DEFENDANT

ECOBANK KENYA LIMITED.....3RD DEFENDANT

CREDIT BANK LIMITED.....4TH DEFENDANT

RULING

1) Ecobank Kenya Limited, the 2nd defendant herein, took out themotion dated 30th November 2016 in which it sought for the dismissal of the case against it on the basis that the plaint discloses no cause of action. The motion is supported by the affidavit of Simon Karuki. when served with the motion, Thomas Makor Hamed Getange, the plaintiff herein filed a replying affidavit to oppose the application. when the motion came up for interpartes hearing, parties agreed to have the motion disposed of by written submissions.

2) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival written submissions. It is the 3rd defendant’s submission that all defendants including it were sued by the plaintiff for damages for malicious prosecution, unlawful arrest and illegal confinement. The third defendant argued that it acted on the instructions of the 4th defendant and it had no control over what action the 4th defendant would take once n receipt of the information. It also argued that the 3rd defendant being a private entity, had no capacity to arrest the plaintiff and or arraign him in court. For the above mentioned reasons this court was beseeched to find that the action against it discloses no cause of action.

3) The plaintiff on the other hand was of the view that the 3rd defendant had him arrested and arraigned in court and that he has sufficient evidence to prove the assertion if the action is allowed to proceed to hearing. The plaintiff alleged that the 3rd defendant planned and executed the arrest and even sent one of the witnesses to testify against the plaintiff before the court where he was tried for a criminal offence.

4) Before determining the merits or otherwise of the motion, it is important to set out in brief the background of the application. The plaintiff seeks for damages from the 3rd defendant inter alia for malicious prosecution after he was arrested at the 4th defendant’s premises and charged for attempting to obtain money by false pretences contrary to Section 313 as read together with Section 389 of the Penal Code. The action was by way of the plaint dated 11.7.2016 where the plaintiff sought for damages arising from an arrest made by the Banking Fraud Investigation Department. The pleadings indicate that the plaintiff received a cheque for ksh.100,000/= from Credit Bank Ltd to enable an organization in which the plaintiff was an executive director, known as Africa Disaster Response & Ebola Virus Research, hold a conference scheduled for 12th and 14th November 2014 at K.I.C.C. Upon receipt of the cheque, the 3rd defendant called the 4th defendant to inform it that the conference had been postponed since the venue had not been secured. The 4th defendant then requested the plaintiff to return the cheque to it immediately. The plaintiff failed to do so, prompting the 4th defendant to be on the lookout and gave an alert to the 3rd defendant to inform it when the said cheque is presented for payment. When the plaintiff presented the cheque to the 3rd defendant for payment, the 3rd defendant informed the 4th defendant who in turn swung into action by informing the police to arrest and charge the plaintiff.

5) Having given the brief background of this dispute, I now turn my attention to the applicable principles in proving a claim for malicious prosecutions. In the case of **Teressia Wanjiku Njoroge =vs= Standard Chartered Bank (K) Ltd and Another (2015) ekLR** Justice Mbogholi restated the principles necessary to establish a case of malicious prosecution as follows:

a) That he/she was prosecuted by the defendant.

b) That the prosecution was determined in his/her favour.

c) That the defendant in prosecuting him/her acted without reasonable and proper cause.

d) That the prosecution was actuated by malice.

6) In the case before this court, the plaintiff has specifically pleaded in paragraph 5 of the plaint that the 3rd and 4th defendants maliciously colluded to name the plaintiff who was later arrested, confined in police cell and arraigned before court. In paragraph 6 of the plaint, the plaintiff further alleged that the 3rd and 4th defendants maliciously reported him and wrote false statements leading to his arrest. It is the 3rd defendant's argument that only a person who lodged a complaint against the plaintiff can be held responsible for malicious prosecution if the party being prosecuted is acquitted of the offence. The 3rd defendant submitted that it performed its fiduciary duty as required by the central prudential guidelines that govern the relationship between banks. It is not in dispute that the plaintiff was prosecuted and eventually acquitted. It is also admitted by the 3rd defendant that it informed the 4th defendant that the plaintiff had presented for payment the cheque he was issued by 4th defendant and that upon receiving the information the 4th defendant reported the matter to the police who went ahead to arrest and charge the plaintiff. The question as to whether or not the 3rd and 4th defendants colluded to fix the plaintiff cannot be determined through the current motion. There is need to interrogate the evidence before making a conclusive determination on the question. In the circumstances, it cannot therefore be said that the case filed against the 3rd defendant raises no reasonable cause of action.

7) In the end, I find no merit in the 3rd defendant's application dated 30th November 2016. The same is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 4th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant