



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 63 OF 2013**

**KENYA PORTS AUTHORITY.....APPELLANT**

**-VERSUS-**

**ALI CHEGE WAICHOGO.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon Joyce Gacheru, (SRM) Court at Mombasa, made on 23<sup>rd</sup> May, 2013 in CMCC NO 2035 of 2013)*

**JUDGMENT**

1. The Respondent, ALI CHEGE WAICHOGO instituted suit against the appellant claiming for

- a) General damages for Malicious Prosecution and defamation,
- b) Costs,
- c) Interest.

2. The Respondent pleaded that on or about **17<sup>th</sup> January 2003**, that he was lawfully in the course of his employment at Mombasa Port premises when the Appellant's security officer collaborated with its management and port police hatched a scheme that led to his arrest and subsequent charge for the offence of creating disturbance. He was detained at the Port police from 18<sup>th</sup> to 21<sup>st</sup> January, 2013 when he was arraigned in court vide Criminal Case No. 260 of 2003 at Mombasa. He was prosecuted and later acquitted on 10<sup>th</sup> June, 2003 under Section 210 of the Criminal Procedure Rules.

3. After the case was heard the court found that on liability, The Appellant was 100% to blame.

On General damages for Malicious Prosecution and Defamation, **Kshs.120,000/=** was awarded, plus Costs of suit and interest thereon

4. The Appellant being dissatisfied with the above decision, lodged instant appeal and set out 4 grounds as set out in the Appellants Memorandum of Appeal dated **30<sup>th</sup> March 2015**.

The Appellants Appeal herein is on the issue of the suit being time barred and on liability and as such the 4(four) grounds of Appeal shall be coalesced under three heads:

5. The Respondent averred that the aforesaid detention at the Port Police station for four(4) days and the subsequent prosecution vide Criminal Case No 260 of 2003 was malicious and meant to harass and torment him, a result whereby he suffered great loss and damages.

6. The Respondent particularized the particulars of malice on the part of the Respondent. Of importance is that the Appellant wrongfully and maliciously reported the Respondent for creating disturbance, detained at the port police station, and prosecuted when there was an evidence.

7. The appellant filed a defence in which it denied the allegations by the Respondent that his prosecution was malicious and wrongful and that not all prosecution must end up in convictions. The Appellant denied that the alleged prosecution was malicious and meant to harass and torment him and that it occasioned the Respondent loss and damages as alleged. The Appellant urged the court to dismiss the Respondent's suit with costs.

8. The case was heard whereby the trial magistrate found that the appellant was 100% to blame and awarded the Respondent Kshs120,000/= as General damages for malicious prosecution and defamation together with costs of the suit and interest therein.

9. The Appellant being dissatisfied with the said decision of the trial magistrate, lodged the instant appeal in what he set out four (4) grounds in the Memorandum of Appeal dated 30<sup>th</sup> March, 2015, challenging the decision of the trial magistrate in finding for the Respondent on both liability and damages. The appellant was aggrieved that:

(a) the trial magistrate found that the Respondents cause of action as agent the Appellant had been extinguished by dint of Section 66 of the Kenya Ports Authority Act;

(b) the trial magistrate finding the Respondents prosecution was malicious.

(c) trial magistrate failing to appreciate that an acquittal per se on a criminal charge does not *ipso facto* entitle a party to sue for malicious prosecution;

(d) the trial magistrate the finding that the Respondent is entitled to damages for malicious prosecution, advocate courts in the criminal case as well as costs of the suit.

10. The appeal came up for hearing on 9<sup>th</sup> October, 2018, parties having agreed to dispose of the same via written submissions. The counsel for the appellant opted to highlight their submissions and both counsel then proceeded to highlight their respective submissions.

11. In highlighting their submissions, counsel for the appellant, M/S Ikagu relied on the grounds set forth in the Memorandum of Appeal. She submitted that the trial court had no jurisdiction to try the case as the Respondent's suit was statute barred by dint of Section 66 of the Kenya Ports Authority Act, which issue was raised in their defence at paragraph 12 but was never considered by the trial magistrate who casually skimmed through it by relying on court of Appeal's decision in **Kenya Ports Authority Versus Cyrus Maina Njoroge C.A 89 of 2017 & Attorney General & Another Versus Andrew Maina Githinji & Another (2016)** and the celebrated case of **Owners of Motor Vessels Versus Caltex oil (Kenya) Ltd KLR 1**.

12. M/S Ikengu also submitted that the cause of action on the tort of malicious prosecution should either arise at the point the judgment is entered favourably or at the point the criminal proceedings are quashed in favour of the Respondent. In the instant case, the course of action arose on 10<sup>th</sup> June, 2003 when the Respondent was acquitted. He filed the case on 23<sup>rd</sup> July, 2009. Counsel for the appellant submitted further that the evidence was called by the Respondent to prove the issue of public ridicule as he did not call a work colleague or a friend to give evidence to his testimony or to show that he was viewed positively before the defamation.

13. Lastly, counsel for the Appellant submitted that no evidence was adduced to prove malice on the part of the Respondent officer and that the element for defamation was statutorily barred.

14. The appeal was opposed by counsel for the Respondent, M/s Aboudha, in its entirety by relying on the judgment of the trial court and their written submissions. M/S Aboudha submitted that the Respondent was granted leave to file his cause of action out of time as per the Limitations Act Cap 22, L.O.K. It was submitted that the Respondent suffered a continuing injury as he still worked at the port premises and he was only reinstated in the year 2006. She submitted that the Respondent sought leave to file the suit out of time for the reason that he was ill. That the said leave was granted and the Respondent proved malicious prosecution.

15. Lastly, the Respondent's counsel submitted that he was called a thief and this caused many people to shun and undermine him that he lost his job. She submitted that the appellant's four (4) witnesses did give a good reason as to why the Respondent was taken to the police station.

16. I have carefully considered the appeal herein, the orders appealed against and the grounds preferred, the submissions by counsel to both parties, the evidence that was adduced before the lower court, the cited authorities and the law. I have done this while alive to the fact that I did not hear the witnesses testify or observe their demeanour as did the lower court, and therefore should be shown to reverse the trial court's decision. It is however, not lost on this court that an appeal is in a way of retrial and that the court must therefore reconsider the evidence, evaluate it itself and draw its own conclusion (See the case of **Peters Versus Sunday Posts Ltd (1958) E.A 424**, at page 429), where the Court of Appeal had stated this:

*"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution, it is not enough that the appellate court might itself have come to a different conclusion."*

**In the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, it was held in regard to the duty of a first appellate court: "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. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that: "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"**

17. After warning myself accordingly, I find that the main issues for determination is whether the suit by the Respondent was time barred and on liability and as such the four(4) grounds of appeal shall be coalesced under the other three heads of the Memorandum of Appeal.

The issues for determination then become:

- (a) Whether the Respondent's suit against the Appellant was statute barred and therefore incapable of being reviewed by way of extension of the Limitation period.**
- (b) Whether the Respondent proved his case to the required standards.**
- (c) Whether the damages that were awarded to the Respondent were excessive.**

18. With regard to the first issue of whether the Respondent's suit against the Appellant was statute barred and therefore incapable of being revived by way of extension of the limitation period.

19. From the records, it is a fact that the Appellant raised the issue of the suit offending the provisions of Section 66 of the Kenya Ports Authority Act, at paragraph 12 of its defence dated 30<sup>th</sup> September, 2009 and filed on 1<sup>st</sup> October, 2009. The Respondent, during the trial was cross examined on this issue by Mr Sangoro, counsel for the Appellant and he stated that he was not aware that he was supposed to file the suit within one year and he also had no explanation for the delay in bringing upon the cause of action. Mr. Aboudha, counsel for the Respondent never bothered to conduct a re-examination on the issue with the Respondent so as to clarify the issue. He instead opted to close the Respondent's case.

20. The court's interest jurisdiction is a reserve upon which the court draws its powers to ensure the ends of justice are met and to prevent abuse of its processes. As was held in the case of **Industrial & Commercial Development Corporation Versus Otachi (1977) KLR 101 (1976-1980) 1 KLR 529** that Section 3A is not a panacea for all ills. It was therefore held in **Elephant Soap Factory Ltd Versus Nahashon Mwangi & Sons, Nairobi HCCC NO 913 OF 1971**, that;

**"... The court will not invoke its interest jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its interest powers.**

21. Similarly, it's my view that where the court has been deprived of jurisdiction it will not draw upon its reserve under the interest jurisdiction to confer upon itself such non-existent jurisdiction.

(a) The Court of Appeal for East Africa dealing with the policy behind statutory limitation periods in **Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321** expressed itself as follows:

**"The overriding purpose of all limitation statutes is based on the maxim *interest reipublicae ut sit finis litium*, and it has been the policy of the courts to lean against stale claims... The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case. It is most desirable that legislation which prejudicially affects the rights of citizens should be readily accessible".**

(b) **The Supreme Court in the case of Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed 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 that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."**

(c) **In the case of Thuranira Karauri vs Agnes Ncheche – Civil Appeal No. 19 of 19**, the issue of limitation goes to jurisdiction and whenever it is raised, the Court must deal with it before proceeding any further.

**(d) Whether the Respondent's suit against the Appellant was statute barred and therefore incapable of being revived by way of extension of the limitation period.**

**John Gachanja Mundia v Francis Muriira & Another [2017] eKLR Mabeya J stated that ...**

**"The view this Court takes is that, a Defendant can only challenge the leave at the trial by way of cross-examination on the circumstances of late filing of the case. It is only after he successfully mounts such a challenge that the incidence of proof shifts back to the Plaintiff to defend the leave obtained *ex parte*."**

22. Having appreciated the proceedings of the trial court, the grounds of appeal and submissions of both counsels, and being guided by the case of JOHN GACHANJA MUNDIA (Supra), I find that appellant discharged its duty by mounting a challenge on the delay and as a result the burden of proof shifted to the Respondent, who was expected to defend the failure to obtain the leave to file the suits, out of time. The Respondent, however, chose to defend the *ex parte* leave obtained and instead allow the plaintiff's case.

23. I therefore find that the Respondent failure to justify the ex parte leave obtained and the trial magistrate's failure to consider the issue of limitation of time that was pleaded and came up during the trial and as my jurisdiction in the suit, that was satisfactorily time barred, an error in law.

24. I, accordingly proceed to allow the appellants appeal in terms of ground No 1 of the Memorandum of Appeal, which rests the appeal. I also find that in view of that finding, it will be an academic exercise to go into the other grounds.

The appeal is thus allowed and in the circumstances of the case order that each party bears its own costs

It is so ordered.

**Judgment DELIVERED, DATED & SIGNED this 29<sup>th</sup> day of November, 2018.**

**D. CHEPKWONY**

**JUDGE.**