



## IN THE HIGH COURT AT KISUMU

### BETWEEN

AND

*(Being an appeal from the Judgment and Decree of Hon. Kasavuli, SRM dated 8<sup>th</sup> July 2016 at the Senior Resident Magistrates Court at Winam in Civil Case No. 8 of 2011)*

1. The respondent's case before the subordinate court was that because of a false and malicious complaint made by the appellant to the police, he was arrested without any justifiable cause and charged with the offence of trespass contrary to **section 5 (b)** of the *Trespass Act (Chapter 294 of the Laws of Kenya)* in **Winam Principal Magistrate's Court Criminal Case Number 424 of 2008**. The respondent stood trial and was acquitted under **section 210** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.
3. The trial court accepted the respondent's case and awarded him Kshs. 800,000/- as general damages for wrongful arrest and malicious prosecution. It is this judgment that that has precipitated this appeal.
5. The respondent's evidence in the lower court was that his friend, James Odhiambo, who was by then deceased, owned a parcel of land; Kisumu/Nyalenda 'B'/ 1200 (Plot 1200). On 28<sup>th</sup> April 2008, he was instructed by the deceased's brother to go to Nyalenda and fence the said plot. Before fencing the plot, he consulted a surveyor who pointed out the position of the plot on the ground. While he was beginning to fence, two police officers arrived in the company of three ladies one of whom was the appellant's wife. The respondent was arrested, taken to the police station and charged with offence of trespass on the appellant's land. The respondent further testified that the appellant knew that there was a problem with boundaries in the area and it was common knowledge that there was need for harmonization of the maps at the Land Registry with the actual position of the plots on the ground and despite such knowledge the appellant still went ahead to instigate his arrest.
7. The thrust of the appellant's complaint in the memorandum of appeal dated 27<sup>th</sup> July 2016 is that the respondent did not prove the elements of the tort of malicious prosecution. He complained that the trial magistrate was biased and violated his right to fair trial protected by the Constitution by ascribing to him to a higher burden of disproving wrongful arrest because of his being what the magistrate described as, "*a well-respected and senior advocate of the High Court who understood the nature of his claim very well*". The appellant criticised the trial magistrate for basing his decision on a survey report that had nothing to do with the suit property. In addition to the grounds set out in the memorandum of appeal, counsel for the appellant, Ms Pandit, added that the trial magistrate selectively looked at the evidence and shifted the burden of proof to the appellant and therefore came to the wrong conclusion that four ingredients of a case for malicious prosecution were established.
9. The parties are agreed on the legal principles applicable to this case. The ingredients to be proved in a case of malicious prosecution have been stated in several cases among them; *Kagane and Others v Attorney General and Another* [1969] EALR 643, *Katerregga v Attorney-General* [1973] EALR 287 and *Mbowa v East Menjo District Administration* [1972] EA 352 and are as follows;

- b) That the prosecution terminated in the plaintiff's favour
- d) That the prosecution was actuated by malice

*The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.*

12. On the issue of lack of reasonable and probable cause and malice, the respondent pleaded the following particulars:

- b) The appellant knew that the land parcels in the area had existing boundary problems.
- d) The appellant instigated the officer/s at Kisumu Central Police to arrest the respondent when there was no reasonable or probable cause to do so,

13. I now turn to the issue whether there was reasonable and probable cause. In assessing whether the respondent had established lack of reasonable and probable cause the court must cast an objective eye on the facts as they existed at the time the complaint was made. The court in **Kagane v Attorney General & Another (Supra)** stated that:

14. In the case of **Robert Okeri Ombeka v Central Bank of Kenya NRB CA Civil Appeal No. 105 of 2007 [2015]eKLR**, the Court of Appeal expressed the view that:

15. This is what the trial magistrate said about reasonable and probable cause:

*In my view that, unlike a case of an ordinary wanjiku with limited or no academic qualification and restricted appreciation of the law, this case involves a well respected and senior advocate of the High Court of Kenya who understood the nature of his claim very well. The evidence on record shows that despite his knowledge of a boundary dispute relating to the plots in issue, he nonetheless made a report to the police that the plaintiff had trespassed on his land.*

16. In the trial magistrate's view, there was no reasonable and probable cause because the appellant knew there was a dispute regarding the boundaries in the area which was evidenced by the testimony and report of the surveyor who testified in the criminal case as PW 3. A perusal of the surveyor's testimony before the criminal court shows that the plots which had boundary issues were Plots 1540, 1602 and 928 and that there existed a road between plots 1540 and 928 on the map which was not present on the ground. His opinion was that the problem of boundaries could only be resolved by synchronising the map with what was on the ground and that in the circumstances no one could say that the person trespassed on his property.

18. It is important to recall that the subject of the complaint by the appellant was trespass and the duty of the trial magistrate was to inquire whether there was evidence upon which a reasonable person could conclude that the respondent committed an act of trespass. The appellant gave a history of how he purchased the land and was shown the boundaries, processed the title and by the time he complained to the police he had a bona fide belief and documents to support his contention that the respondent was trespassing on his land. The Surveyor's report was an opinion and was not conclusive of the land occupied by Plot 928. Moreover, it could not displace the Land Registry map upon which the appellant's title and claim was grounded. Based on evidence, I find that the trial magistrate erred in concluding that there was no reasonable and probable cause upon which the police could prosecute the respondent based on the Surveyor's report.

20. I now turn to the issue of malice. The law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, the Court of Appeal held that, "*Acquittal per se on a*

*criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor.”*

22. I hold that the trial magistrate erred by putting too much emphasis on the Surveyor report to establish malice on the part of the appellant to the exclusion of all other evidence. What the trial magistrate seemed to suggest is that because the appellant was aware of the Surveyor’s report and as senior and well respected Advocate he should have kept quiet and not taken any steps to protect his interest. There is no evidence pointing to any malice or ill will by the appellant. If anything, it shows that the complaint was propelled by a need to protect his property.

**DATED and DELIVERED at KISUMU this 20<sup>th</sup> day of March 2017.**

**JUDGE**

Ms Ochanji-Opondo instructed by M. A. Ochanji-Opondo and Company Advocates for the respondent.