REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 52 OF 2008

DR LUCAS NDUNGU MUNYUA…….PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LIMITED……..…….1ST DEFENDANT

ATTORNEY GENERAL…….……...2ND DEFENDANT

JUDGEMENT

Plaintiff's Case

1. By a plaint dated 28th February, 2008 fid on 29th February, 2008, the plaintiff herein, **Dr Lucas Ndugu Munyua**, sued the defendants seeking general and special damages as well as the costs of the suit. The plaintiff cause of action was premised on an alleged invasion of the plaintiff's clinic situated at Kayole in Nairobi known as Liberty Health Care and Maternity Centre (hereinafter referred to as the suit premises) on 11th February, 2004 by police officers in the company of one **Jennifer Wanjiru Weru**, a journalist with the 1st Defendant, who was tasked by the 1st Defendant to investigate a purported illegal abortion practices in Kenya.
2. It was contended that the said police officers carried away the plaintiff's medical equipment and documents leading to the closure of the plaintiff's suit premises and arrested the plaintiff and a patient one **Christine Wanja Mbugua** under the pretext that the plaintiff had attempted to procure abortion of a woman namely **Jenniffer Wanjiru Weru**. Further the 1st defendant on 11th and 12th February, 2004 in their radio and television broadcast published news to the effect that the said journalist and the police had discovered and exposed an illegal den of abortion at the suit premises.
3. It was pleaded that the 2nd defendant proceeded to prosecute the plaintiff on charges of attempted abortion contrary to section 158 of the ***Penal Code*** in the Makadara CM's Criminal Case No. 3152 of 2004 from 12th April, 2004 to 30th March, 2007 when the said charges were terminated in the plaintiff's favour. And the plaintiff acquitted under section 210 of the ***Criminal Procedure Code***. In the plaintiff's view the said prosecution was motivated by malice.
4. Since abortion is a criminal offence punishable by imprisonment, the plaintiff averred that it is actionable *per se* and that as a result the plaintiff was injured in his calling hence the claim for general and special damages arising therefrom.
5. In support of his case, the plaintiff, who gave evidence as the sole plaintiff's witness testified that he was a medical Doctor from Nairobi University having qualified in 1981. He was operating two clinics at Kayole and Gill House. On 11th February, 2004 a lady by the name **Jenniffer Wanjiru**

Weru went to his Kayole Clinic pretending to be pregnant and seeking an abortion and paid consultation fee in the sum of Kshs 2,000/-. At that time there was another lady by the name of **Christine Wanja** in the clinic.

6. While waiting, police officers from Kayole entered the said clinic and arrested the plaintiff and his said patient and carried away the plaintiff's equipment and documents therefrom and took them to Kayole Police Station where the plaintiff remained in custody till 13th February, 2004 when he was arraigned in Makadara Court in Criminal Case No. 152 of 2004 and charged with the offence of attempting to procure an abortion and practicing without a medial practicing licence which he denied. He was released on a cash bail of Kshs 10,000.00 but on 4th April, 2007 was acquitted.
7. He testified that the said **Jenniffer Wanjiru Weru,** who was named as the complainant, as well as the police officers gave evidence in the said trial and that she was named as the complainant. Similarly, **Christine Wanja** testified though her ailment was unrelated to pregnancy.
8. According to the plaintiff the 1st defendant broadcast alleged that the plaintiff was carrying out illegal abortions and was not ashamed of doing so and described him by name, his car drive parking and the situations of his clinics and his car was shown on television.
9. The plaintiff's reason or suing the 2nd defendant was due to his arrest and prosecution while he sued the 1st defendant for defamation. He testified that his patients deserted him and he immediately closed his Kayole Clinic and similarly closed his Gill House Clinic thereafter. According to him he suffered financial loss as his equipment were never returned and as a result of his defamation he could not work as his reputation was severely damaged and his friends deserted him. He feared going to public places and his political ambitions vanished. Prior to going into private practice he practiced at Kenyatta National Hospital and was a human rights defender from 1999 to 2004 which activity he gave up after the case same as his ambition to vie for Kandara Parliamentary post.
10. According to the plaintiff from the evidence adduced **Jenniffer Weru** was not pregnant at the time of her visit to the plaintiff's clinic. Similarly **Christine Wanja** was found not to have been pregnant. Yet despite this the police insisted on prosecuting him. Apart from that the police inquiry confirmed that he was a registered medical practitioner. It was therefore the plaintiff's case that the defendants' actions were actuated by malice. As a result the plaintiff had to hire an advocate to defend him for which he paid Kshs 60,000/-.
11. According to the plaintiff the said **Jenniffer Weru** was not his patient. On the said date she went to the clinic alone though the police officer later went in with journalists **Waweru Mburu** and a cameraman though they declined to identify themselves. According to the plaintiff he was told the journalists were from Citizen Radio and Television. The police then carried away his documentary records and medical equipment.
12. Though he served the defendants with notices, the 1st defendant said it would not retract its publication. The plaintiff also testified that he sought for and obtained leave to file the suit out of time.
13. In cross examination by **Mr Gacheru**, learned counsel for the 1st defendant, the plaintiff admitted that though a doctor he was not a gynaecologist and said the patient went to him claiming to be suffering from abdominal period. He admitted that Christine's ailment fell within the female reproductive health and that she was telling the truth when she testified in the criminal trial that she was not an accomplice. He admitted that he refused to open for the police officers who had to jump over. According to him, at the time he only had two patients in the clinic, **Jenifer** and **Christine,** and denied that he was procuring abortion on them. He denied that he had been previously arrested on similar offences though he admitted that on 29th September 2003 he was arrested by Kayole Police with seven foetuses. He admitted that an issue of abortion is an issue of public interest. He admitted that while the 1st defendant has only one television station it has many radio stations. According to him he took the demand notice to the 1st defendant by hand and it acknowledged on delivery book which got misplaced. However by the time of the demand, the criminal proceedings were still pending.
14. On cross examination by **Mr Guyo**, learned counsel for the 2nd defendant, the plaintiff said that he sued the 2nd Defendant because the police arrested and prosecuted him. He admitted the police carried out investigations and were only giving assistance. He did not know any of the police

officers though according to him they were malicious because they arrested him, held him in custody and prosecuted him. He was unaware of any other investigation by the police save for the one for which he was arrested. He however admitted that there had been prior investigations on his medical practice though he was unaware that he was the subject of the investigation.

15. In re-examination by **Mr Kamiro**, the plaintiff said he that prior to the subject case, he was not arrested with suspicion of carrying out an abortion though he had been arrested on suspicion of killing unborn child when he was arrested with the foetuses though no charges were levied against him. According to him he was arrested as s suspect. He testified that the 1st Defendant confirmed they were carrying out investigative journalism and were in the company of the police who were the same officers who charged and prosecuted him. In his evidence the broadcast was made by **Waweru Mburu** on Citizen TV and Radio and that the said **Waweru Mburu** was one of the reporters.

Defendants' Case

16. On behalf of the 1st defendant, it was pleaded that the plaintiff had no cause of action against it and that if the plaintiff was defamed at all, the cause of action was barred by the ***Limitation of Actions Act***.
17. While denying the allegations made by the plaintiff, it was pleaded that the 1st defendant's journalist visited the suit premises in her ordinary performance of duty as a journalist to communicate to the public matters of public interest and broadcasted the same believing it to be true and taking precaution to ensure the information was correct.
18. The 1st defendant denied having been involved in the plaintiff's arrest and prosecution hence denied damaging the plaintiff's professional calling hence denied liability for malicious prosecution of the plaintiff.
19. In support of its case, the 1st Defendant called **Peter Waweru Mburu** as its witness and he testified as DW1.
20. According to him, he was a journalist working with the 1st Defendant as the head of Radio Citizen. According to him, in February, 2004 they received complaints from the members of the public concerning a certain clinic in Kayole by the name of Liberty Clinic on allegations that it was carrying out abortions and they set out to establish the truth thereof. According to him they prior survey confirmed that the clinic was situated in a residential area on 1st Floor with two bedrooms, a sitting room, a toilet and a kitchen. On the day of the survey there was not much traffic to the clinic. Since they had been informed that the doctor had been arrested before, the second day they went to Kayole Police Station and their inquiries about the said doctor were initially treated with reluctance though they later admitted that the plaintiff had been arrested in a case related to abortion. On the third day they visited he clinic in the company of **Jenifer Waweru** who booked herself in the clinic as a patient after he gave her Kshs 2000.00. However, the plan backfired because the door was locked when she entered the clinic and the gate thereto was chained. She however texted that she was the next patient. On realising this DW1 sought assistance from Kayole Police Station and was given two police officers and since access was denied them, they jumped over the metal grill and upon the door being opened by a young lady who on their identification jumped over the grill.
21. At this time the plaintiff was flushing in the toilet where an odious smell was emanating and it took some knocking before the same was opened. At the reception was a young man who similarly disappeared. When the plaintiff appeared he started shouting that they were creating a scene while smoking. According to him there was a lady lying in the bedroom-like ward and looked weak. **Jenifer**, in the meantime was seated wearing a green hospital dress. In the meantime the police proceeded with their investigations after which the police arrested the plaintiff together with the young lady and took then to Kayole Police Station where their statements were recorded. Thereafter DW1 went back to his station and did a commentary on the incident. According to him, he was informed that the case was sensitive due to previous incidents involving the plaintiff.
22. He was however informed that the case was dismissed by the Court though he was never called to testify in the case. DW1 averred that **Jenifer** was no longer working with the 1st Defendant. He confirmed that on the day of the incident he was also with the driver and the cameraman.

23. In cross-examination by **Mr Kamiro**, DW1 confirmed that he was employed by the 1st Defendant which owned Citizen Radio. In 2004, the 1st Defendant had just started *Inooro* TV Station and the witness was undertaking the role of investigative journalism for the 1st Defendant. Though the story ran on TV as well, he said that he was only involved in the Radio section. He however admitted that the story was broadcast all over Kenya.
24. According to him, they had received complaints from members of the public that there was a clinic in Kayole at *Tushauriane* Stage called Liberty Clinic. According to him, he did not record the complaint. After confirming the existence of the Clinic, the witness went to Kayole Police Station though he did not get any report of a complaint thereat. He however established that in 2003 there was a report regarding foetuses from the Clinic and that the plaintiff had been arrested or conducting abortions and that the OCS had been transferred, one demoted while some officers intimidated or reprimanded.
25. Although he based his argument on the fact that the female colleague he was with had been booked in for abortion, he admitted that there were no records from the said clinic. He admitted that the said colleague, Jennifer was not examined at all and he did not check whether she was pregnant. He admitted having made the story on TV although he conceded that he did not follow the criminal case and never attended the hearing.
26. According to him, whatever he did was his duty hence he never apologised and would never apologise. He said that he did not know the name of the lady who was arrested. The witness denied having defamed the plaintiff.
27. In re-examination by **Mr Gacheru**, the witness said that the basis of his conclusion that the plaintiff was conducting an abortion was the refusal to open the door to the clinic and when they entered, the young man ran away. He corrected the impression created in the defence that they effected the arrest of the plaintiff.
28. The second defence witness was No. 231144 CIP **David Sichangi** attached to CID Headquarters but was in 2004 based at Kayole Police Station as in charge of CID.
29. On 11th February, 2004 around noon a journalist by the name of **Waweru Mburu** went to his office and requested assistance on the ground that his colleague by the name of **Jeniffer Weru** was locked in a Clinic known as Liberty Clinic while carrying out investigations concerning the owner thereof and he was seeking police assistance to rescue the said colleague. The witness immediately constituted a team of police officers for the purpose and led by DW1 they went to the said clinic.
30. Upon arrival at the clinic which was on the first floor, they could not access the clinic as the door to the stairs was chained. Attempts to have the same opened were fruitless and one of the police officers jumped over the rails to the 1st Floor. Further attempts to have the door to the clinic was similarly fruitless though through the glass door it could be seen that there was a lot of activity therein and there was a sound of toilet flushing severally. When the door was finally opened by the plaintiff, they reached the toilet and only saw blood stains and a dustbin which had been emptied. On the bench was the lady from the Defendant Station in green dress and another lady was lying on the bed unconscious. According to him the air was had pungent smell but was sprayed. In his view there was a possibility of a cover up of some illegal activity arising from the refusal to open the door, the flushing and the bad smell.
31. He testified that in the meantime DW1 and his colleagues were taking live photographs. The house according to him looked like a 2 bedroomed house improvised into a clinic. There was an assistant to the plaintiff who ran away.
32. According to the witness whereas there may have been other reports in respect of the clinic this was the only report that was received by him. Based on the evidence gathered, he charged the plaintiff in Court and since the issue was a public interest issue it attracted a lot of public interest and on the very day of the rescue operation the incident appeared on Citizen TV. According to him, DW1 did not inform him he was conducting investigation but only that he was following the Clinic and never furnished them with the full information. In his view, the publicity affected their investigations to a certain extent since the lady who ran away shied away due to publicity. Further the immediate closure of the clinic also affected the investigations in terms of collection of evidence. However, the lady who was in the clinic, **Christine Wanja**, appeared in court and testified. The witness however denied that he had compromised the investigations and contended that he did his investigations thoroughly. While admitting making request to DW1 for

employment he said that was just a request and denied knowledge of any demotion by any officer.

33. In cross-examination by **Mr Gacheru**, DW2 admitted that he came to learn that the plaintiff had been arrested before on allegations of committing abortion.
34. In cross-examination by **Mr Kamiro**, the witness reiterated that he had not received any complaint touching the plaintiff or the clinic and that the first complaint was the one made by DW1 who informed him he was carrying out investigative journalism and that a colleague named **Jenniffer Wanjiru** had been locked in the clinic where she had gone to pretend that she was in need of procuring an abortion. While unable to say that the said journalists could create a story, he admitted that they were the ones enacting the drama and intended to report the same and in the evening the part of attempting to procure an abortion was broadcasted on Citizen TV in which the name of the doctor was shown as well as the name of the clinic and the photographs thereof taken by the journalists.
35. While admitting that the clinic was closed, he was unaware whether the same was opened again. His investigations however did not reveal that anyone had complained of having procured an abortion in the said Clinic or that anyone had been admitted in the clinic for the purposes of the same. Although they recorded a statement from **Christine Wanja**, who testified in Court, she denied having ever been pregnant and having gone to the clinic for abortion and exonerated the plaintiff. Further investigation from the Medical Practitioners Board revealed that the plaintiff was a qualified doctor from the University of Nairobi duly licensed and registered with them as a doctor. However the witness said that in the course of the investigations there was evidence to warrant charging the plaintiff with attempted abortion to **Jenniffer Wanjiru Weru** though at the time the plaintiff was charged the medical report for **Jenniffer** was not yet out. He however testified that they would still have arraigned the plaintiff in Court due to public interest though he denied that their action was due to public pressure.
36. Although the report confirmed that the plaintiff was not a quack, he did not have licence from the City Council to operate a Clinic. However he denied any malice in prosecuting the plaintiff.
37. In re-examination, DW2 testified that he conducted thorough investigations which informed their decision to charge the plaintiff. He reiterated that he only came to learn later that DW1 was carrying out investigative journalism and that the whole picture had not been revealed to him.
38. DW3 was No. 73411 **PC Gregory Gitonga Gichohi** testified that he was stationed at Kayole Police Station and only appeared to produce OB No. 35/29/9/3. Accordingly no questions were put to him.

Submissions

39. On behalf of the plaintiff, it was submitted that based on the evidence the plaintiff had proved his case hence was entitled to the prayers sought.
40. On behalf of the 1st Defendant it was submitted that since the plaint neither sets out with particularity the words/broadcast which is alleged to be defamatory of the plaintiff nor the radio stations or TV which made the alleged broadcast, the cause of action was based on defective pleading. Based on ***Gatley on Libel and Slander***, 10th Edn. paragraph 26.11 it was submitted that the law is that in libel/defamation, the alleged defamatory words must be set out verbatim and it is not enough to set out their effect. Further reliance was placed on **Kariunga Kirubua & Co. Advocates vs. The Law Society of Kenya & Others Meru HCCC No. 117of 2005**.
41. It was further submitted that in the absence of the production of the radio or TV clip there was no evidence upon which the Court could assess the alleged defamation and reliance was placed on **Clement Muturi Kigano vs. Hon. Joseph Nyaga, Nairobi HCCC No. 509 of 2008**.
42. It was further submitted based on ***Gatley on Libel and Slander*** (supra) at para 11.9 that since the 1st defendant raised the defence of truth or justification, it did not have to prove all the words were true so long as he could prove that the statement was substantially correct. It was submitted that as DW1 testified that all what was broadcast is actually what happened and what they saw, the broadcast they made was true. It was therefore submitted that the 1st Defendant proved a complete defence.
43. On the claim for malicious prosecution it was submitted that the same was not proved as all the elements of that tort were never proved i.e. that the prosecution was instituted against the plaintiff by the defendant; that the prosecution was terminated in favour of the plaintiff; that the

prosecution was instituted without reasonable and probable cause; and that the prosecution was actuated by malice. In support of this submission reliance was placed on **Peter Nagweya Chagome vs. AG, Nairobi HCCA No. 200 of 2004**, **James Karuga Kiiru vs. Joseph Mwamburi Court of Appeal Civil Appeal No. 171 of 2000**, **Patrick Onyango Imembi vs. Burns Enterprises (K) Ltd & Another, Civil Appeal No. 62 of 2007** and **David Kirimi Julius vs. Fredrick Mwenda Civil Appeal No. 270 of 2003**.

44. It was submitted that the plaintiff's claim for both general and special damages was not proved.

45. On behalf of the 2nd Defendant, it was submitted that the police merely acted with intent to restore law and order and not with any malice hence the plaintiff was not entitled to any damages but ought to be paid by the 1st Defendant who announced through e radio and television that the plaintiff had been nabbed conducting illegal abortions.

46. It was therefore submitted that the suit against the 2nd Defendant ought to be dismissed.

Determinations

47. I have considered the pleadings, the evidence and the submissions on record and in my view the following are the issues which fall for determination;

1. **Whether the suit was time barred.**
2. **Whether the plaint was bad for failure to set out the actual words published and the precise medium of transmission.**
3. **Whether the 1st Defendant published the words attributed to it.**
4. **Whether the plaintiff's credibility and reputation has been injured.**
5. **Whether the tort of malicious prosecution was proved.**
6. **Whether the plaintiff is entitled to damages.**
7. **Who should bear the costs of the suit.**

48. The first issue for determination is whether the suit was time barred. Section 4(2) of the ***Limitation of Actions Act***, Cap 22 Laws of Kenya provides:

An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

49. In this case the cause of action arose on 11th and 12th February, 2004. This suit was filed on 29th February, 2008 which was obviously out of time. However, by an order given on 22nd February, 2008, the Court seems to have granted an order extending time. However, section 27 of the ***Limitation of Actions Act*** aforesaid provides as follows:

(1) Section 4 (2) does not afford a defence to an action founded on tort where -

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which -

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect -

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

50. That section was the subject of the decision by **Mbito, J** in **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989** in which the learned Judge expressed himself as follows:
51. From the foregoing extension of time only applies to claims made in tort and even in tort the claims must be in respect of claims for personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law). Therefore section 27 aforesaid does not provide for extension of time in defamatory matter. This was confirmed in **Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000** where the Court of Appeal held:

"Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort".

52. It is therefore clear as was held by this Court in Republic vs. Principal Magistrate P. Ngare Gesora Principal Magistrate's Court & 2 others Ex-parte Nation Media Group Ltd [2013] eKLR, a claim for damages for defamation cannot lend itself to the remedy of extension of time under section 27 aforesaid.

53. What then is the remedy available to a party aggrieved by a decision extending time to file a suit where the circumstances do not warrant such extension? In **Mary Wambui Kabugu vs. Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995 Shah, JA** expressed himself as follows:

"By virtue of section 28(1) of the Limitation of Actions Act, Cap 22, Laws of Kenya (the Act) an application for leave of the superior court (for that matter of the subordinate court) has to be made ex parte. The proposed defendant is not a party to that application. Indeed he cannot be for the simple reason that section 28(1) mandated that such application "shall be made ex parte. This situation is reinforced by the provision of Order 36 rule 3C of the Civil Procedure Rules... In a situation such as outlined above the defendant only becomes aware of the order extending time when he is served with the summons, plaint and the order extending time. There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In the Court's view, the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts

brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is a dispute as to facts. It will be up to the judge presiding at the trial to decide the issue but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act particularly where leave to file an action against the defendant has been granted ex parte... Although it was a general principle in regard to ex parte orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intentions of the Limitation Act 1963 to allow a defendant to apply, before the trial of the action, to set aside an ex parte order obtained giving leave for the purpose of the section... The respondent having obtained leave to file action as required by the law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order ex parte will be rendered nugatory. It would appear that notwithstanding the provisions of section 27 of the Act, the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex parte order has been made, can apply to the court which made the order to set aside... The judge who heard the application for extension of time must first hear it (in case of an application filed before filing suit) ex parte. He has no discretion in the matter. He is bound by the requirements of the Act. If the evidence shows prima facie that the requirements of the Act are satisfied, leave should be given. It is in the action only that the defendant can challenge the facts in due course. This is, because the requirements of section 27 are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy, or because the applicant did not know the law etc. If evidence showing prima facie that the requirements of the Act are satisfied, leave should be given leaving the defendant to challenge the facts in the action in due course. The statute does not seem by its language to confer a discretion but merely a jurisdiction to decide whether the requirements of the statute are or are not fulfilled. That decision of course involves points on which judicial mind may differ... The trial judge will not be sitting in appeal on findings of the judge who granted leave in the first instance. His job would primarily be to decide if the leave was actually and legally properly obtained. There may be cases where medical evidence may be misleading enough to enable one judge to grant such leave but when correct medical data may be brought forward by the defendant, the picture may drastically change. There may be clear cases where the applicant may swear to facts which are not true, which can only be challenged at the trial. There may even be cases where a Judge, because of work-load in the superior court, may not have time to apply his mind to the requirements of the Act which Act of course limits the granting of such leave in respect of personal injury, Fatal Accidents Act, and the Law Reform Act claims only. Often the interpretation of section 27, 28 and 29 of the Act, as explained in section 30 of the Act may not have been brought to the attention of the judge. It follows that the order granting an extension stands and is binding on the parties. But that means that the order stands until it has been effectively set aside. And such an order, where the objection to it is of the character here set up by the appellants, can only be so directed to that special end... The trial judge is entitled to hear the challenges hurled at the ex parte order and decide whether or not the ex parte order was correctly obtained by the applicant. The issue as to whether or not leave to file suit out of time was granted properly or not is a matter to be challenged at the trial stage and not by a review application."

54. On his part, **Akiwumi, JA** held:

"When the judge of the superior court grants leave ex parte, under the Limitation Act to institute proceedings which can be challenged at the trial, he in a way, does no more than a judge does when he for instance, grants an ex parte injunction, which can also be successfully challenged before another judge at its inter partes hearing. Furthermore the question of a judge of the superior court sitting on appeal on the granting of an ex parte order under the Limitation Act by another judge of the superior court, does not in the particular circumstances, arise. In general a party affected by an ex parte order can apply to

discharge it but the procedure under the Limitation Act is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the Judge is to decide the application on hearing one side only. No provision is made for the defendant being heard. It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave. Statute can take away or limit fundamental rights or those given by the general rule of law which can also be described as the common law. It therefore cannot be said that the common law has an unassailable status. If this is so, even where statute law and the common law are held to be of equal standing, then a fortiori, on the assumption that in Kenya, the common law is of a lower standing than the statute law, statute law can make greater inroads into the common law."

55. The same position was re-affirmed in **Yunes K Oruta & Another vs. Samwel Mose Nyamato Civil Appeal No. 96 of 1984.**
56. What the foregoing decisions establish is that where an order has been made extending time, such order is not final but is merely provisional and that the defendant will have every opportunity of challenging the facts and the law afterwards at the trial. It is the trial judge who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar and he is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.
57. In this case limitation was clearly pleaded in the defence and as was held by **Law, JA** in **Okoth and Others vs. Godwin Wanjuki Wachira [1978] KLR 53; [1976-80] 1 KLR 768,** when limitation is relied on as a defence, it is sufficient to plead that the claim is barred by limitation. See also **Eaton vs. Tapley [1899] 1 QB 953.**
58. Even if the issue was not raised the issue of limitation is a jurisdictional matter. See **Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998.**
59. As was held in **Carmella Wathugu Karigaca vs. Mary Nyokabi Karigaca Civil Appeal No. 30 of 1995,** jurisdiction cannot be decided by an erroneous decision.
60. Being a jurisdiction matter it was held in **Owners and Masters of the Motor Vessel "Joey" vs. Owners And Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367:**

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

61. It follows that as there was no jurisdiction to extend time in respect of the claim in defamation, this suit in so far as the claim therefor is incompetent and cannot stand.
62. The next issue for determination is whether the plaint was bad for failure to set out the actual words published and the precise medium of transmission. In the plaint filed herein, the only paragraph which dealt with the publication of the alleged defamatory matter was paragraph 10 of the plaint where it was pleaded as follows:

"On 11th to 12th February 2004 the radio and television stations of the first defendant did broadcast false defamatory and malicious news report in their bulletins that it journalist Jenniffer Wanjiru Weru and police had discovered and exposed on (sic) illegal den of abortion, namely the plaintiff centre. The news report even described the physical geographical location of the plaintiff centre, they described the plaintiff identity including the description and registration particulars of his personal car."

63. However the actual words published were never pleaded. Similarly the language in which the said words were published was never disclosed. In their defence, the 1st defendant denied having published the said defamatory material. In his evidence, the plaintiff testified that 1st defendant broadcast alleged that the plaintiff was carrying out illegal abortions. No attempt was made to disclose the actual words of the publication so as to enable the Court determine whether the words were in actual fact defamatory. In **Hon. Nicholas Kipyator Kiprono Biwott vs. Hon. Paul Kibugi Muite & Another Nairobi HCCC No. 1369 of 2003**, it was held that the then Order 6 Rule 6A(1) required the actual words used to be set out whether it is a newspaper report or a TV interview and without it a cause of action cannot be established.
64. This Court is cognisant of the position adopted by the East African Court of Appeal in **Nkalubo vs. Kibirige [1973] EA 102** where it was held:

"In all suits for libel the actual words complained of must be set out in the plaint. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used *those* defamatory expressions alleged, which is the fact on which the case depends… This is not a mere technicality, because justice can only be done if the defendant knows exactly what words were complained of, so that he can prepare his defence. In this case the letter having been written in Luganda, the particular words complained of should have appeared in the plaint in that language, followed by a literal translation into English… Whereas it is true that relief not founded on the pleadings will not be given but a court may allow evidence to be called, and may base its decision, on an unpleaded issue, the court does not think that it can be invoked to allow the introduction of what amounts to a new cause of action…The essence of as defamation suit is that certain specific words used by the defendant were defamatory of the plaintiff. Where one is dealing with spoken, it may, of course, transpire in the course of the evidence that the words used were not exactly what the plaintiff believed them to have been, but if they are to the same effect, he can still recover, although an application for leave to amend would be prudent. If, however, a suit were founded on an allegation that certain words were used and then, without any amendment of the pleadings, the plaintiff were awarded damages on evidence that substantially different words were used, no defendant would know how to prepare his case and injustice rather than justice would result… Although the actual defamatory words allegedly spoken must be specifically pleaded, so that the defendant knows exactly what case he has to meet, the respondent and four witnesses called by him were allowed to testify about the allegation of witchcraft, without objection from the appellant's counsel, and without comment from the court. It may be that all concerned took the view that the allegations of witchcraft were covered by the allegation pleaded in paragraph 4(c) of the plaint. Be that as it may, the allegations of witchcraft were introduced without objection and formed the principal ground of complaint against the appellant. Whether these allegations were made or not became the main issue, or one of the main issues, at the trial, and could not have been more of an issue if it had been pleaded. The conduct of the trial shows that the parties allowed, and intended these allegations to be an issue although unpleaded. This is one of those cases where an unpleaded issue was, from the course followed at the trial, left to the judge for decision… The main duty of the court is to see that justice is done between the parties, and the court will, if possible, not allow an appeal on procedural defects or mistakes if in fact there has been no miscarriage of justice or failure of jurisdiction. It must, however be borne in mind that rules of court are drafted to aid the efficient administration of justice and that failure of one party to observe these rules can result in a failure of justice to the other. It all depends on the particular facts and circumstances of each case… Although the allegation of

witchcraft was not pleaded, as there was no objection raised, this accusation of witchcraft became an issue on the trial and the judge was justified on the evidence in coming to the decision that he did. This is a case in which there was no miscarriage of justice and it would be unjust to now allow the appellant to succeed on this issue."

65. Therefore where the words claimed to be defamatory are not set out in the plaintiff but in the course of the evidence the same come out clearly, the Court may well find for the plaintiff. In this case however, neither in the plaint nor in the evidence were the exact words reproduced so that the Court is handicapped in finding whether the words published were in fact defamatory.
66. Accordingly I associate myself with the decision of **Emukule, J** in **Kariunga Kirubua & Co. Advocates vs. The Law Society of Kenya & Others [2009] eKLR** in which he cited with approval **Collins vs. Jones [1955] 1 QB 564 at 571** and **Lougheed vs. CBC [1978] 4 WWL 388** in which it was held:

"A plaintiff is not entitled to bring a libel action in a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty. The court will require him to give particulars to ensure that he has a proper case to put before the court and is not merely a fishing one…In my view, a plaintiff in a defamation case involving an audio visual presentation should not be bound by the same strict rules as to particulars which apply to a written statement. However this privilege granted to such a plaintiff should not be extended to permit the pleading merely of general conclusions that the plaintiff has been defamed. The plaintiff must through his pleadings, clearly indicate to the Defendant which portions of the television play (or news cast) gave rise to the allegations of defamation…"

67. The Judge went on to hold that:

"Although there appears to be a relaxation of the rigours of the rules of pleadings where the matter complained of is part of a television, film or other audio visual presentation…the particulars of the claim must be pleaded with particularity to enable the defendant not only understand what it is the claimant alleges the words mean, but also enable him to decide whether they have that meaning as well as enable the court to frame (where necessary an injunction with sufficient precision."

68. In the premises the failure to particularise the words alleged to be defamatory in my view rendered the plaint and the suit incompetent and it follows that the Court is not in a position to find that the 1st Defendant published any words that may be attributed to it hence there is no basis upon which the Court can find that the plaintiff's credibility and reputation was injured.
69. With respect to the tort of malicious prosecution the law surrounding the tort of malicious prosecution is well settled in this country. In **Mbowa vs. East Mengo District Administration [1972] EA 352**, the East African Court of Appeal expressed itself as follows:

"The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal

proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...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. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

70. In **Gitau vs. Attorney General [1990] KLR 13**,**Trainor, J** had this to say:

"To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause…The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not.".

71. What amounts to reasonable and probable cause for the purposes of malicious prosecution was explained by **Rudd, J** in **Kagame & Others vs. AG & Another [1969] EA 643**. Citing **Hicks vs. Faulkner [1878] 8 QBD 167 at 171**, **Herniman vs. Smith [1938] AC 305** and **Glinski vs. McIver [1962] AC 726** the learned judge stated:

"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable

and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judges by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based".

72. However, as was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

"Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

73. With respect to 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. As was held in **James Karuga Kiiru vs. Joseph Mwamburi and Others Nrb C.A No. 171 of 2000 [2001] eKLR,** to prosecute a person is not *prima facie* tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the

complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.

74. In this case there was no evidence that the prosecution was carried out by the 1st Defendant or that the 2nd Defendant in prosecuting the plaintiff was acting as an agent of the 1st Defendant. Apart from that it has not been proved that the 2nd Defendant in prosecuting the plaintiff acted on malice. The conduct of the Plaintiff of chaining the entrance to the clinic and declining to open the same coupled with the evidence of pungent smell as well as the furious flushing of the toilet may have reasonably led to the police to believe that a crime may have been committed or was about to be committed. Accordingly, whereas I am not able to find that the plaintiff was procuring abortion in the Clinic, I cannot state with certainty that there was no reasonable and probable grounds for forming an opinion that a crime had been or was in the process of being committed. The plaintiff himself conducted himself in a manner which raised suspicions that the activities of the Clinic were up to no good.
75. In the premises apart from the fat that the claim for defamation was barred by limitation and beyond salvage by extension of time, it is my view and I hold that the whole suit was unmerited as the plaintiff failed to prove the ingredients of defamation and malicious prosecution.
76. As was held in **Nzoia Sugar Company Limited Vs. Collins Fungututi Civil Appeal No. 7 of 1988 [1988] KLR 399:**

    "A Judge cannot lawfully award damages for defamation in an action barred 12 months after the cause of action arose…The tort of malicious prosecution cannot stand unless it is shown that there was no reasonable or probable cause for making a report to the police as the case of malicious prosecution must founder on the absence of proof of malice or ill-will… It is trite learning that acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution without spite or ill will."

77. In the premises this suit fails and is dismissed with costs.

Judgement read, signed and delivered in Court this 10th day of October, 2014.

G V ODUNGA

JUDGE

In the presence of: