

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC No. 170 of 2017

BULLENT GULBAHAR

PLAINTIFF

VERSUS

NATIONAL HOSPITAL INSURANCE

FUNDDEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide the amended plaint dated 10th November 2020 against the Defendant seeking, inter alia:

- a) Special damages in the total sum of Kshs.2,500,000/- on account of legal fees, costs for air travel and transportation, costs of accommodation and expenses, loss of time and loss of salary income to attend court;
- b) General damages in the sum of USD 100, 000 for pain and suffering on account of criminal prosecution against the Defendant;
- c) General damages for defamation;
- d) General damages in the sum of USD 42, 500 for each of the 17 days that the Defendant caused the Plaintiff to be detained and deprived of his liberty;

- e) General damages of USD 100, 000 for depriving the Plaintiff of society and his family;
- f) General damages of USD 100, 000 for mental anguish;
- g) General damages of USD 100, 000 for public humiliation and injury to the Plaintiff's feelings;
- h) Punitive damages in the sum of USD 100, 000 for malicious falsehoods and prosecution against the Defendant.
- i) Interest on (a), (b), (c), (d), (e), (f) and (g) above at commercial compounded rates of 12% from the date of filing suit until payment in full.
- j) Costs of this suit on full indemnity basis.

2. The gist of the Plaintiff's case, as pleaded, is that on 6th May 2013, the Defendant instituted malicious criminal proceedings against him and Remax Construction Company Limited in Criminal Case No. 143 of 2013, Republic v Bulent Gulbahar and Remax Construction Limited. They were charged with "willfully refusing to produce records when requested to do so by an inspector of the NHIF, contrary to Section 32(3)(a) and (b) of the National Hospital Insurance Fund Act, No. 9 of 1998 (Laws of Kenya)." The Plaintiff contends that the Defendant initiated the said proceedings without serving him with the requisite notices or summons to notify him of the existence of the case. He avers that the matter was mentioned in court on 6th May 2013, 20th May 2013, 4th

June 2013, 18th June 2013, and 18th July 2013, all without his knowledge.

3. The Plaintiff states that on 18th May 2013, while he was in Dubai, he received a call from a gentleman who identified himself as an officer of the court and informed him that he was facing criminal charges and should attend court on 20th May 2013. Despite not having been served with any summons, the Plaintiff asserts that he flew back to Kenya and attended court accompanied by his advocate. Upon arrival, he was informed by the Defendant's representative that the court file could not be traced and that fresh summons would be issued. He further avers that he later learnt that the Defendant's representative returned to court and applied for a warrant of arrest against him, whereupon the court consequently issued the said warrant.
4. The Plaintiff further states that when the Defendant was challenged by the trial court to produce evidence demonstrating that the Plaintiffs had been served with the requisite NHIF notices, or that there existed any direct or indirect interaction between the Plaintiffs and the prosecution witnesses, the Defendant was unable to substantiate its position. The Plaintiff avers that the criminal court consequently found that the charges preferred against them lacked basis and acquitted them under Section 210 of the Criminal Procedure Code. He contends that the institution and prosecution of the said

charges were actuated by malice, cruelty, spite and ill will on the part of the Defendant.

5. The particulars of malice pleaded include: failure by the Defendant to serve the NHIF notices; arraigning the Plaintiff in court without any tangible or credible evidence; fabricating criminal charges; instituting proceedings founded on hearsay; preferring charges at Makadara Law Courts instead of Kibera Law Courts, despite the Plaintiff's office being located within a radius of three kilometres from Kibera; instituting criminal proceedings without undertaking basic due diligence, such as confirming from the Registrar of Companies the directorship of the company intended to be charged; discriminating against him by charging him alone despite the company having two directors; failing to serve him with summons to attend court; applying for extensions of warrants of arrest despite knowing that he had attended court; and deliberately prolonging the criminal proceedings by seeking adjournments on false grounds.
6. The Plaintiff claims that, as a result of the Defendant's actions, he suffered loss and damage, including the cost of air tickets, accommodation, and subsistence, as well as loss of salary and income.
7. On its part, the Defendant filed a Statement of Defence dated 14th April 2021, denying the key averments set out in the Plaint. It maintained that on 6th May 2013, it lawfully instituted criminal proceedings against the Plaintiff in Criminal Case No. 143 of 2013, *Republic v*

Bulent Gulbahar and Remax Construction Limited, on charges of “willfully refusing to produce records when requested to do so by an inspector of the NHIF,” contrary to Section 32(3)(a) and (b) of the National Hospital Insurance Fund Act, No. 9 of 1998.

8. The Defendant averred that the case proceeded to trial and that, at all material times, its officers prosecuted the matter in accordance with the law. It further contended that all requisite notices had been duly served upon the Plaintiff, but that he failed to attend court, leading to the issuance of a warrant of arrest pursuant to which he was lawfully apprehended. The Defendant also asserted that the Plaintiff’s subsequent acquittal under Section 210 of the Criminal Procedure Code did not, of itself, constitute proof of malicious prosecution, and that the claim as filed failed to meet the legal threshold for a cause of action in either malicious prosecution or defamation.
9. During the hearing, the Plaintiff testified and adopted his witness statement dated 14th July 2023 as his evidence-in-chief. He also produced the bundle of documents listed in the Plaintiff’s List of Documents dated 31st August 2021, which were admitted in evidence and marked as Plaintiff’s Exhibits 1 to 16. Upon cross-examination, the Plaintiff confirmed that he is a director and shareholder of Remax Construction Company Limited, a company incorporated in Kenya for the purpose of constructing residential apartments. He explained, however, that the intended development was eventually undertaken by

Paragon Electronics, and therefore the business purpose of Remax did not materialise. He testified that he was not aware of any documents that had been requested from Remax, and maintained that he was never served with any documents or a charge sheet.

10. He stated that on 20th May 2013, he attended Makadara Law Courts together with his advocate, but upon arrival, the prosecutor informed them that the court file could not be traced, whereupon they left the court. When confronted with the certified court proceedings of the same date, he acknowledged that the record indicates he was absent and that a warrant of arrest had been issued against him. The Plaintiff further testified that he could not recall any letter of complaint written by his advocate, and confirmed that Mr. Munyasa was not a witness in the matter.

11. When referred to paragraph 10 of his witness statement, where he stated that “on the same day, I proceeded to Kilimani Police Station and filed a complaint under OB No. 46/20/5/2013 for malicious prosecution and extortion,” he clarified that the complaint was directed against the individual who had telephoned him while he was in Dubai, purported to serve him with court documents, but failed to identify himself. He stated that although he did not possess any written proof of the complaint, he had been issued with the OB number at the police station.

12. The plaintiff further confirmed that no appeal was filed against the court's decision issuing the warrant of arrest, explaining that the court subsequently vacated the same. He testified that he only became aware of the warrant sometime in July 2013, and that as at June 2013, he had not been informed of it by the police. He added that he did not know whom to blame for the failure to notify him of the warrant, and expressly stated that he had no complaint against the police.
13. Regarding the proceedings of 18th July 2013 and 2nd August 2013, he confirmed that the warrants of arrest were extended in the presence of his advocate, who informed the court that he was out of the country at the time. He further testified that he attended court on 6th August 2013, when his advocate successfully applied for the lifting of the warrant of arrest.
14. The Plaintiff further confirmed that on 7th January 2014, the criminal case came up for hearing but was adjourned on account of his illness. On 12th November 2014, the matter was again adjourned at his instance following an application made by his counsel. He also testified that he changed advocates two or three times during the pendency of the proceedings. He stated that on 1st July 2014, his advocate, Mr. Anzala, resumed conduct of the case. The Plaintiff confirmed that none of the court's decisions to adjourn the matter were ever appealed. He acknowledged that the case eventually proceeded to hearing, during which the prosecution

called two witnesses. The court, however, found that the prosecution had failed to establish a prima facie case, principally on the ground that the Plaintiff had not been personally served, and accordingly acquitted him under Section 210 of the Criminal Procedure Code.

15. The Defendant called DW1, Mr. Peterson Ngare, who adopted his witness statement dated 9th August 2021 as his evidence-in-chief and produced the documents listed in the Defendant's List of Documents of even date. He testified that at the material time, he was employed as a Compliance Officer, a position equivalent to that of an Inspector under Section 32 of the NHIF Act. He stated that during the inspection visit, he established that Remax Construction Company Limited was not registered with NHIF. He further testified that as an inspector, he was authorised to identify himself by means of his official badge and to conduct inspections pursuant to the law. He confirmed that he had produced his badge during the criminal proceedings and indicated that he would do so again in this suit.

16. DW1 stated that Section 32(4) of the NHIF Act requires inspectors to produce their identification cards whenever conducting inspections. He, however, conceded that he had no documentary proof of having visited the site on 15th May 2012, nor did he take any photographs during the visit. When asked whether he had conducted a company search, he admitted that he had not, and that the names of the company's directors were provided to

him during the site visit. He testified that the Notice of Intention to Prosecute was issued by the Debtors Section upon conclusion of investigations. Regarding the Notice for Production of Records under the NHIF Act, he stated that he personally delivered the notice, which was received by one Florence on 17th May 2012. He testified that Florence provided some records for inspection, although he requested additional details. From the documents availed, he concluded that an amount of Kshs. 196,000 was payable to NHIF. He clarified that no formal demand for the said amount was issued, and instead, the matter was referred for prosecution under Section 32(6) of the Act. He further stated that the statutory fine for failure to produce records was Kshs. 10,000, and that although the total amount due was not conclusively established, the Plaintiff had failed to produce all the necessary records.

17. DW1 further testified that Florence, who had been the company's point person, was not charged. He explained that the usual procedure is to first issue a Notice to Produce, followed by a Notice of Intended Prosecution. He stated that when he and his colleagues went to deliver the latter notice, they found the director at the office premises but were informed that he did not wish to see them. Those who relayed that information, however, were not called as witnesses. DW1 added that he left his contact information, business card, and a

handwritten note indicating where the documents had been delivered.

18. Upon re-examination, DW1 testified that, as an inspector, he possessed the authority to visit any site for purposes of inspection under the NHIF Act. He explained that it was standard procedure for inspectors to identify themselves by producing their official identification cards during such visits. He stated that during one of the inspections, he visited a site known as Terrace, and upon making inquiries, he was directed to Remax Centre, where he met Florence, the company's accountant. He testified that he issued Florence with a letter requiring the production of records relating to the site and requested further documentation, upon which Florence referred him to the company's directors. He confirmed that the Plaintiff had never denied being a director of the company, nor having an employee by the name of Florence, and that the Plaintiff did not dispute the figures shown as outstanding. He further testified that the company had never produced any letter or document demonstrating compliance with NHIF requirements.

19. The Defendant also called DW2, Mr. Gilbert Mugambi, who testified that he is an officer of the National Hospital Insurance Fund, now in transition to the Social Health Insurance Fund. He adopted his witness statement dated 9th August 2021 as his evidence-in-chief and produced in evidence the Notice of Intention to Prosecute, the Charge Sheet, the Warrant of Arrest, the

Plaintiff's written submissions, and the criminal court's ruling. Upon cross-examination, DW2 stated that he is a trained public prosecutor, although not an advocate of the High Court. He explained that, as a statutory body, NHIF is vested with delegated authority to institute prosecutions on behalf of the Director of Public Prosecutions (DPP). He further testified that his prosecutorial training was conducted by the National Police Service, covering investigative procedures, evidentiary standards, and constitutional principles, and that the training lasted approximately six months.

20. DW2 testified that on 15th May 2012, he received information from Mr. Peterson Ngare, an officer of NHIF, indicating that Remax Construction Company Limited had failed to provide the requisite documents when requested. He stated that he relied on the evidence furnished by Mr. Ngare in making his prosecutorial decision. In particular, he considered the Notice to Produce Records dated 17th May 2012, the Notice of Intention to Prosecute dated 7th June 2012, and the witness statement of the Investigating Officer dated 2nd July 2012, before determining that there was sufficient basis to charge the Plaintiff and the company. DW2 testified that he could not personally confirm whether the Investigating Officer had served the authorised representative of the company, as he relied on the information relayed by the officer. He explained that, pursuant to Section 41 of the NHIF Act, all legal

proceedings are undertaken in consultation with the Legal Department, which, in this instance, granted approval for the institution of the criminal case. He added that such approval was also sanctioned by the NHIF Board, although the formal record of approval was not among the documents produced in court.

21. When questioned about the choice of accused persons, DW2 stated that he was not privy to the names of the Kenyan directors at the time, and that had such information been available, he would have prosecuted them as well. He further testified that he personally served the Plaintiff with summons and a copy of the charge sheet, but acknowledged that the summons were not included in the Defendant's bundle of documents. He stated that the charge sheet was prepared by Mr. Shem Obara, who was no longer serving as a prosecutor. At that point, the Plaintiff made an application seeking to have DW2's witness statement struck out on the ground that DW2 had not been the person who prepared the charge sheet.

22. Upon re-examination, DW2 clarified that the Plaintiff had never denied being a director of Remax Construction Company Limited or the fact that Florence was an employee of the company. He reaffirmed that he had lawful authority to prosecute under the provisions of the NHIF Act, and further stated that a prosecution need not necessarily result in a conviction for it to be properly instituted. He added that the Defendant remained at

liberty to institute charges where there is failure to produce records or comply with statutory obligations, and concluded by stating that he had no control over the court process once prosecution had commenced.

23. At the close of the trial, both parties filed written submissions. The Plaintiff's submissions are dated 28th June 2024, while the Defendant's submissions are dated 6th July 2024.

Plaintiff's Submissions

24. In his submissions, the Plaintiff began by setting out the background to Criminal Case No. 143 of 2013, *Republic v Bulent Gulbahar & Another*, and the subsequent proceedings before this Court. He submitted that when the present matter came up for hearing on 17th May 2023, he testified and thereafter closed his case. He contended that despite being granted several opportunities, the Defendant failed to call or produce any of its witnesses. While relying on the decision in **Mbithi v Attorney General (Civil Suit No. 1105 of 2001) [2024] KEHC 281 (KLR)**, the Plaintiff urged the Court to disregard or strike out the Defendant's documents for want of production through a competent witness. He therefore submitted that his evidence remained uncontroverted.

25. He identified the following issues for determination:
(a) Whether the Plaintiff has proven his case of malicious

prosecution against the Defendant; (b) Whether the Plaintiff is entitled for special damages; (c) Whether the Plaintiff is entitled for general damages; (d) Whether the Plaintiff is entitled for punitive damages; (e) whether the Plaintiff is entitled for interest on a), b), c), d), and e) at commercial compounded rates of 12% from the date of filing suit until payment in full and (f) whether the Plaintiff is entitled for costs on full indemnity basis.

26. On the first issue, the Plaintiff relied on the decision in **Chispine Otieno Caleb v Attorney General [2014] eKLR** and submitted that, with respect to the first essential ingredient of the tort of malicious prosecution, the Defendant, through its agents, unlawfully and maliciously instituted criminal proceedings against him by way of an undated charge sheet referenced NRB/130, Court File No. 1432/13. He contended that he had proved, beyond doubt, that the Defendant instituted the said malicious prosecution in Criminal Case No. 143 of 2013 and proceeded to prosecute him over a period of three years and three months.

27. Regarding the second ingredient, the Plaintiff submitted that the Defendant charged him with “wilful refusal to produce records when requested to do so by an Inspector of the National Hospital Insurance Fund,” contrary to Section 32(3)(a) and (b) of the National Hospital Insurance Fund Act, No. 9 of 1998. He argued that the Defendant’s witnesses, particularly DW1, admitted during the criminal trial that he had never directly or

indirectly interacted with the Plaintiff, and therefore the Defendant lacked reasonable and probable cause to charge him with wilful refusal to produce documents.

28. He further submitted that DW2 admitted that the case was presented to him by an investigating officer named Peterson, and that he was merely the maker of the Notice of Intended Prosecution. The Plaintiff contended that DW2 conceded that the said letter was not prepared on NHIF's official letterhead, which he himself acknowledged was "unusual" and not a formal mode of communication. The Plaintiff further observed that DW2 admitted that the letter was neither received nor acknowledged by the Plaintiff or the company, and therefore there was no evidence of service or delivery.

29. The Plaintiff maintained that, by their actions, the Defendant's officers violated the provisions of Article 10(1)(b) and Article 10(2)(a), (b) and (c) of the Constitution of Kenya, which enshrine the national values and principles of governance, including integrity, transparency and accountability. He also cited the decision of the **Supreme Court of Jamaica in Walker (Rennon) v Deputy Superintendent Leon Clunis and Attorney General [2016] JMSC Civ. 84**, in support of his argument that he had proved, beyond doubt, that the Defendant instituted a malicious prosecution against him without any lawful or reasonable basis.

30. On the third ingredient, the Plaintiff submitted that the Defendant, through its agents, acted with malice, cruelty,

spite, and ill will towards him. He contended that the alleged Notice of Intended Prosecution dated 7th June 2012 and stamped 20th June 2012 was never served upon him, a fact which, according to him, was admitted by the Defendant's witnesses. He further argued that the said notice was not prepared on the Defendant's official letterhead and that the Defendant's witnesses conceded that there was no evidence to demonstrate that it had ever been served. The Plaintiff maintained that the Defendant maliciously charged him without reasonable or probable cause and without first conducting a search at the Registrar of Companies to ascertain that Remax Construction Company Limited had two directors, Mr. Washiba Abdul and himself. He submitted that the Defendant had maliciously targeted him with the ulterior motive of extorting a bribe.

31. He further argued that the Defendant maliciously failed to serve him with the charge sheet and summons requiring him to appear in court on 20th May 2013 to answer what he described as "fabricated and malicious charges." He asserted that, notwithstanding the absence of proper service, the Defendant nonetheless requested and obtained a warrant of arrest against him on the same date. The Plaintiff further contended that on 18th July 2013, the Defendant again maliciously sought and obtained the extension and execution of the warrant of arrest by Kilimani Police Station, despite full knowledge

that he had never been served with the charge sheet or summons to appear in court.

32. With respect to the fourth essential ingredient of tort, the Plaintiff submitted that the criminal proceedings were determined in his favour when, in its ruling delivered on 3rd August 2016, the trial court found that the prosecution had failed to establish a prima facie case and that there was no basis to call upon him to defend himself.

33. On the second issue for determination, the Plaintiff submitted that the Defendant, through its agents, caused him to suffer loss, harm, and damage by instituting a malicious criminal prosecution against him without any lawful basis or reasonable and probable cause. He argued that as a result of the Defendant's wrongful acts, he incurred expenses and endured reputational harm, and therefore urged the Court to award him special damages as pleaded in the Amended Plaintiff.

34. With respect to the third issue and while relying on the decisions in **Chispine Otieno Caleb v Attorney General [2014] eKLR** and **Geoffrey M. Asanyo & 3 Others v Attorney General [2014] eKLR**, the Plaintiff submitted that he is entitled to general damages in the sum of USD 342,500, as prayed for in the Amended Plaintiff.

35. On the fourth issue, the Plaintiff contended that he had demonstrated that the Defendant and its agents orchestrated an illegal and malicious prosecution with

the intent to extort a bribe from him. He stated that he lodged a complaint with Kilimani Police Station regarding the alleged malicious prosecution and extortion, recorded under OB No. 46/20/5/2013, and therefore urged the Court to award him punitive damages in the sum of USD 100,000.

36. As to the fifth issue, the Plaintiff prayed for interest at a commercial compounded rate of 12% per annum from the date of filing the suit until payment in full. On the sixth issue, relating to costs, the Plaintiff relied on Section 27 of the Civil Procedure Act and the decision in **Mbithi v Attorney General (Civil Suit No. 1105 of 2001) [2024] KEHC 281 (KLR)** to submit that he had proved his entitlement to costs on a full indemnity basis.

37. In conclusion, the Plaintiff urged the Court to allow the Amended Plaint dated 10th November 2020 in its entirety and grant all the prayers sought therein.

Defendant's submissions

38. The Defendant commenced its submissions by outlining the procedural background of the matter before this Court. It submitted that it had consistently demonstrated readiness to prosecute its case and provided a chronology of the adjournments recorded by the Court. The Defendant stated that on 25th April 2022, the matter was scheduled for mention for the purpose of fixing a hearing date, during which counsel for both parties were

present and the hearing was set for 2nd June 2022. On that date, the Defendant was ready to proceed with one witness; however, the Court was unable to hear the matter as the presiding Judge was engaged in urgent election petition proceedings. The hearing was thereafter rescheduled to 13th December 2022, but the matter was again taken out of the cause list as the Court continued to handle election petition matters.

39. The Defendant further submitted that on 13th March 2023, the matter was listed for hearing, but the Plaintiff's witness was not in attendance, leading to a rescheduling to 17th May 2023, when the Plaintiff's case was heard and closed. Owing to time constraints, the Defendant's case did not proceed on that date, and the defence hearing was subsequently fixed for 3rd July 2023. On that day, the Court was not sitting, and the matter was deferred to 30th October 2023, when it was referred back to the Presiding Judge. When the file came up on 15th November 2023, it could not be traced, and the matter was later mentioned on 17th April 2024, when it was referred to the RRI. Based on the foregoing, the Defendant submitted that since the matter was referred to RRI.

40. The Defendant outlined four issues for determination: Whether the Defendant had factual basis of instituting a criminal case; Whether the prosecution was instituted without reasonable and probable cause; Whether the

prosecution was actuated by malice; and Whether the Plaintiff is entitled to damages.

41. On the first issue, the Defendant relied on the decisions in ***Murunga v Attorney General [1979] KLR 138***, ***Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR***, and ***Newton Ndirangu Gicheha v Attorney General & Another [2019] eKLR***, in identifying the essential ingredients of the tort of malicious prosecution. In addressing the first element, whether the Defendant had a factual basis for instituting the criminal proceedings, the Defendant referred to Section 32 of the National Hospital Insurance Fund Act, No. 9 of 1998, and submitted that, by a letter dated 17th May 2012, the Plaintiff was issued with a Notice for Production of Records for purposes of compliance with the Act. In that notice, the Plaintiff was requested to avail all payrolls, muster rolls, and payment vouchers for all permanent and casual employees from inception, together with a list of all employees and of all the Plaintiff's project sites. The Defendant submitted that this letter was duly received by Florence Ominde, an employee of the Plaintiff.

42. It further submitted that, by a subsequent letter dated 17th June 2012, the Plaintiff was issued with a Notice of Intended Prosecution for non-production of records, which required the Plaintiff to deliver the requested documents to the Defendant's offices within fourteen days, failing which legal proceedings would be instituted.

The Defendant maintained that upon the Plaintiff's non-compliance, it lawfully instituted Criminal Case No. 143 of 2013, *Republic v Bulent Gulbahar & Remax Construction Company Limited*, on 6th May 2013.

43. The Defendant noted that the criminal court, in its ruling delivered on 3rd August 2016, found that the prosecution had not established a *prima facie* case sufficient to warrant the accused persons being put on their defence, and consequently acquitted them under Section 210 of the Criminal Procedure Code. However, the Defendant submitted that an acquittal in criminal proceedings does not, of itself, imply that the prosecution was commenced maliciously. In support of this submission, it relied on **James Karuga Kiiru v Joseph Mwamburi & 3 Others [2000] eKLR** and **Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR**, both of which affirm that acquittal alone is not conclusive proof of malice. The Defendant further contended that the Plaintiff remains in violation of Section 32 of the NHIF Act, and that, in law, he remains liable to prosecution for non-compliance with the statutory requirements therein.
44. On the question of whether the prosecution was instituted without reasonable and probable cause, the Defendant relied on the decisions in **Hicks v Faulkner (1878) 8 QBD 167**, **Kagane & Others v Attorney General & Another (1969) EA 643** and **Samson John Nderitu v Attorney General [2010] eKLR**, to submit that the test lies in the facts, circumstances, and

evidence that the prosecution relied upon when deciding to charge the Plaintiff. The Defendant contended that, under Section 32 of the National Hospital Insurance Fund Act, No. 9 of 1998, the essential elements of the offence include wilfully delaying or obstructing an inspector in the exercise of his powers, and refusing or neglecting to answer questions, furnish information, or produce documents when required to do so. The Defendant submitted that during the hearing of the criminal case, the prosecution called two witnesses: PW1, the Defendant's compliance officer, who testified substantially as he did before this Court, and PW2, the Defendant's planning officer in charge of debt management, who also testified. The Defendant maintained that based on the material before it, there was reasonable cause to believe that the Plaintiff had committed an offence warranting prosecution.

45. It further submitted that the Plaintiff's acquittal was based not on lack of evidence of wrongdoing, but on a technical finding that there was no proof of personal service upon an authorised officer of the Plaintiff company. The Defendant referred to the trial court's ruling, which observed that although the prosecution's evidence indicated that the statutory notices were served upon a lady named Florence, she was neither a witness in the proceedings nor called to confirm that she had received the documents on behalf of the accused person. The trial court further held that the onus rested

upon the prosecutor to prove that the notices were properly served upon the accused.

46. Accordingly, the Defendant submitted that the criminal proceedings terminated on a technical ground that the director had not been personally served and that the persons upon whom the statutory notices were served lacked the requisite capacity to receive them on behalf of the Plaintiff.

47. On the issue of whether the prosecution was actuated by malice, the Defendant submitted that malice connotes the use of the legal process for a purpose other than that of bringing an offender to justice upon a reasonable belief in his guilt. The Defendant contended that the Plaintiff's accusation that it deliberately prolonged the prosecution for over three years and three months is unfounded, as the record of the criminal proceedings demonstrates that the matter took over two years before commencement of the hearing largely due to adjournments occasioned by the Plaintiff himself. The Defendant further submitted that nowhere in the Plaintiff's pleadings or submissions does he demonstrate, even remotely, that he complied with the requirements of the National Hospital Insurance Fund Act by furnishing the documents that were lawfully requested of him. It argued that having failed to show any compliance, the Plaintiff has not established any factual or legal basis for alleging malice on the part of the Defendant.

48. In conclusion, the Defendant submitted that the Plaintiff's claim fails to satisfy the legal threshold for the tort of malicious prosecution, and accordingly urged this Court to dismiss the suit with costs.
49. Before proceeding with the analysis, it is important to address a preliminary issue that arose during hearing. The plaintiff filed an application dated 7th October 2024, seeking a determination whether the Defendant is in contempt of court and whether it is meritorious to strike out the Defendant's pleadings.
50. The record reflects that on 9th October 2024, this Court directed that the Notice of Motion dated 7th October 2024, brought by the Plaintiff seeking to strike out the Defendant's pleadings for alleged contempt, be canvassed together with the highlighting of submissions in the main suit. The Plaintiff alleged that the Defendant had disobeyed certain court directions and was therefore in contempt, and sought that the defendant's pleadings be struck out on that basis.
51. I have carefully perused the record and it is evident that, apart from the procedural direction given by the Court on 9th October 2024, no substantive submissions were made by either party addressing the merits or otherwise of the contempt application. The Court notes further that the Plaintiff did not highlight or argue the said application, either orally or through written submissions, and the Defendant equally made no formal response or rejoinder in that regard.

52. The Plaintiff having not tendered any evidence or made any submissions to demonstrate how the Defendant disobeyed a specific, clear, and unambiguous court order, this Court finds that the threshold for contempt has not been met. It is further settled that the striking out of pleadings is a drastic remedy which ought to be exercised sparingly and only where there is clear and deliberate disobedience of court orders. In **Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**, the Court of Appeal reiterated that:

“The power to strike out a pleading is draconian and should only be exercised in the clearest of cases.”

53. In the absence of any evidentiary or submission basis to support the application, and there being no clear demonstration of willful disobedience by the Defendant, the Court finds that the Application dated 7th October 2024 lacks merit and is accordingly dismissed. I shall therefore proceed to consider the substantive issues arising from the Plaintiff’s claim.

Analysis and Determination

54. Having carefully considered the pleadings, the testimonies of the witnesses, the documentary evidence adduced, and the respective submissions of counsels, the following issues arise for determination:

- a. **Whether the Plaintiff has proved the tort of malicious prosecution against the Defendant.**

b. **Whether the Plaintiff is entitled to the reliefs sought in the Amended Plaint dated 10th November 2020, including special, general, and punitive damages, interest, and costs.**

Whether the Plaintiff has proved the tort of malicious prosecution against the Defendant.

55. The law on malicious prosecution in Kenya is well settled. The Court of Appeal in ***Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR***, stated:

“It is now trite that a plaintiff in a suit for malicious prosecution must demonstrate that the prosecution was instituted by the defendant, that it was terminated in his favour, that it was instituted without reasonable and probable cause, and that it was actuated by malice.

56. It is in the above context that the Court proceeds to consider the elements of malicious prosecution in the suit as presented before Court.

a) Whether the prosecution was instituted by the Defendant

57. It is common ground that the Plaintiff was charged before the Chief Magistrate’s Court in Nairobi in Criminal Case No. 143 of 2013, ***Republic v Bulent Gulbahar & Remax Construction Limited***, at the instance

of the Defendant's officers pursuant to Section 32 of the National Hospital Insurance Fund Act (NHIF Act).

58. The Defendant's witness, DW1 Peterson Ngare, testified that he was an inspector attached to the Defendant and that, during an inspection at the Plaintiff's company, a Notice to Produce was delivered to one Florence, an employee of the Plaintiff on 17th May 2012. He further testified that after a review of the records, NHIF's legal department sanctioned the prosecution of the Plaintiff for non-compliance. DW2 Gilbert Mugambi, from NHIF's legal department, confirmed that the legal office prepared the notice of intended prosecution and authorised the institution of the criminal proceedings.

59. From the foregoing, it is not disputed that it was the Defendant who set the criminal process in motion. The first element in a claim for malicious prosecution that the prosecution was instituted by the Defendant is therefore satisfied.

b) Whether the said prosecution was instituted or continued without reasonable and probable cause.

60. On whether there was reasonable and probable cause to prosecute the Plaintiff, Rudd, J in ***Kagane -vs- Attorney General (1969) EA 643***, as quoted in ***Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR*** which set the test for reasonable and probable cause. 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 thus:-

“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 judged 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.”

61. The law is settled that to establish absence of reasonable and probable cause, the plaintiff must demonstrate that the prosecutor did not honestly believe in the guilt of the accused or that the belief was not based on reasonable grounds. Applying the above test, the Defendant’s witnesses stated that they relied on inspection notes, notices to produce and an investigator’s report indicating non-compliance with the NHIF Act. The Defendant’s legal department then authorised

prosecution. It is also on record that the criminal proceedings were not frivolously maintained. The proceedings of 20th March 2013, 4th June 2013, 18th June 2013 and 18th July 2013 show that the Plaintiff failed to attend court, prompting the issuance and subsequent extensions of warrants of arrest, which were to be executed by Kilimani Police Station. These facts, supported by the court proceedings, confirm that the criminal process was properly engaged and not arbitrary.

62. The Plaintiff, on his part, argued that NHIF acted without probable cause because the notice was never personally served on him, and the witness alleged to have received it, Florence, was not called in the criminal proceedings.

63. It is also clear from the Ruling delivered on 3rd August 2016 in Criminal Case No. 143 of 2013, *Republic versus Bulent Gulbahar and Remax Construction Limited* that the accused persons were acquitted under Section 210 of the Criminal Procedure Code for the reason that there was no proof that the accused persons were served with the NHIF notices and that there was no evidence of direct or indirect interaction or contact between the accused persons and the two prosecution witnesses.

64. It bears repeating that an eventual acquittal does not, of itself, establish want of reasonable and probable cause. As was held in the case of **Robert Okeri Ombaka vs. Central Bank of Kenya [2015] eKLR**, the Court of Appeal observed;

“In this appeal there is no evidence that the respondent made a “false” report or that the it was actuated by “malice”, or that his prosecution was brought “without reasonable or probable cause”. That a suspect was acquitted of a criminal case is not a ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.” (Emphasis mine)

65. On the totality of the evidence, and the fact that the Plaintiff has yet to address compliance with the NHIF Act, the basis of the prosecution, I am persuaded that the Defendant had a reasonable and probable cause to institute the prosecution. The NHIF officers acted upon material before them, prepared within their statutory mandate under Section 32 of the NHIF Act, which empowers inspectors to demand and inspect records of contributors. The subsequent failure by the prosecution to prove service beyond reasonable doubt in the criminal trial is a matter of evidentiary insufficiency, not of lack of cause at inception.

c) Whether the said prosecution was actuated by malice.

66. The Plaintiff alleged that the Defendant acted maliciously, relying on an alleged extortion attempt and the decision to proceed without verifying company

directorships. He also contended that the Defendant targeted him personally.

67. Malice, however, is not presumed. It must be proved either directly or inferred from the absence of reasonable cause or from conduct manifestly inconsistent with good faith. In **Nzoia Sugar Company Ltd v Fungututi [1988] KECA 93 (KLR)**, the court held that;

“It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution.”

68. The Plaintiff’s allegations of malice rest solely on inference from procedural errors and on an unproven claim of extortion. There was no tangible evidence of a collateral motive such as personal spite, ill-will, or abuse of office. The NHIF officers testified consistently that they acted within their lawful mandate despite their infractions such as failure to include Florence or the Plaintiff’s co-director as a witness and co-accused, respectively. It is evident that the omissions by the Defendant in for instance failing to summon him, failing to call the appropriate witnesses or charge the Plaintiff’s co-director largely contributed to the Plaintiff’s acquittal.

69. Accordingly, I find no evidentiary basis for a conclusion that the Defendant’s officers acted with malice.

d) Whether the criminal proceedings terminated in the Plaintiff’s favour

70. It is not in dispute that on 3rd August 2016, the Chief Magistrate’s Court found that the prosecution had failed

to establish a prima facie case against the Plaintiff and acquitted him under Section 210 of the Criminal Procedure Code. That acquittal constitutes a termination of the criminal proceedings in the Plaintiff's favour within the meaning of the law.

71. Having carefully considered the evidence and the applicable law, this Court finds that while the Plaintiff has proved that the prosecution was instituted by the Defendant and that it terminated in his favour, he has failed to establish that it was instituted without reasonable and probable cause or that it was actuated by malice.

72. Consequently, the Plaintiff's claim for malicious prosecution is not proved on a balance of probabilities and therefore fails. At any rate, like any tort, the Plaintiff had to particularize the elements of malice by specifically pleading it, something he failed to do.

Whether the Plaintiff is entitled to the reliefs sought in the Amended Plaint dated 10th November 2020

73. The Plaintiff sought special, general, and punitive damages for malicious prosecution, false imprisonment and defamation. Having found that the prosecution was instituted with reasonable and probable cause and without malice, the Plaintiff's claim for malicious prosecution cannot succeed.

74.Regarding false imprisonment, the Plaintiff asserted that he was unlawfully detained for 17 days. However, the record does not demonstrate that he was held in custody continuously for the alleged period, nor that such detention was occasioned by the Defendant's unlawful acts. The warrants of arrest were issued by the court pursuant to due process and were lifted on 6th August 2013, consistent with lawful judicial orders.

75.As for defamation, there is no evidence that the Defendant made or published any false and defamatory statement about the Plaintiff outside the lawful prosecution process.

76.In the absence of proof of the constituent elements of the alleged torts, there is no foundation for an award of damages.

77. From the analysis above, it is this court's conclusion that the Defendant is not liable for malicious prosecution. The Plaintiff is therefore not entitled to the damages sought, the core ingredients of malicious prosecution not having been proved.

78.Consequently, the Plaintiff's suit is dismissed with costs to the Defendant.
Orders accordingly.

Dated, signed and delivered at Machakos this 14th day
of November 2025.

RHODA RUTTO
JUDGE

In the presence of;

.....for Plaintiff

.....for Defendant

Selina Court Assistant

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