

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. E054 OF 2025

**MARY
KIPTUI.....P
PLAINTIFF**

VERSUS

**DIRECTOR OF PUBLIC PROSECUTIONS.....1ST
DEFENDANT**
**THE HON. ATTORNEY GENERAL.....2ND
DEFENDANT**
**ETHICS AND
ANTI-CORRUPTION COMMISSION.....3RD
DEFENDANT**

RULING

Background

1. **Mary Kiptui** (hereafter the Plaintiff) instituted the present suit against **Director of Public Prosecutions, The Hon. Attorney General** and **Ethics and Anti-Corruption Commission** (hereafter the 1st, 2nd and 3rd Defendants) through a plaint dated 7th March 2025 seeking various reliefs including general damages, exemplary and/or punitive

damages and special damages arising from a claim founded on malicious prosecution.

2. The 1st and 2nd Defendants, upon entering appearance, filed an undated statement of defence denying liability, and seeking the dismissal of the Plaintiff's suit, with costs. The 3rd Defendant separately filed its statement of defence dated 3rd May 2025, similarly denying liability.

The Preliminary Objection

3. The 3rd Defendant filed a Notice of Preliminary Objection (PO) dated 31st July 2025 seeking to have the Plaintiff's suit struck out with costs on grounds that the suit is time-barred under Section 3(1) of the Public Authorities Limitation Act Cap. 39 Laws of Kenya and Section 4(2) of the Limitation of Actions Act Cap. 22 Laws of Kenya.
4. The PO was canvassed through oral submissions, pursuant to the directions of this court issued on 21st October 2025.
5. **Ms. Maina** counsel for the 3rd Defendant argued in support of the PO that the present suit is time barred by dint of Section 3(1) of the Public Authorities Limitation Act Cap. 39 Laws of

Kenya and Section 4(2) of the Limitation of Actions Act Cap. 22 Laws of Kenya. She argued that the cause of action accrued on 27th May 2014 when the criminal proceedings giving rise to the Plaintiff's claim terminated and that the Plaintiff ought to have brought the present claim against the 3rd Defendant within 12 months after the cause of action arose. **Ms. Maina** relied on the case of **Jeremiah Kigoro Ndungu v Crown Paints Kenya Ltd & 2 others (Civil Case 20 of 2021) [2023] KEHC 23284 (KLR) (6 October 2023) (Ruling)** where the court dismissed the plaintiff's claim for defamation and malicious prosecution for being time barred.

6. **Ms. Maina** argued that pursuant to Section 4(2) of the Limitation of Actions Act, the Plaintiff was required to bring her claim for malicious prosecution within three (3) years after the cause of action arose or seek leave of the court to enable her bring the present claim out of time in case of delay in filing the suit. She relied on the decision in **Caroline Wanjiru Nderitu v Phoenix Publishers Limited & Another [2012] KEHC 2036 (KLR)** where the court allowed an application seeking to have the plaintiff's suit struck out for being filed

outside the three (3)-year statutory period for claims founded on a tort. Counsel submitted that in the absence of any explanation for the late filing, the suit cannot be sustained and ought to be struck out with costs to the 3rd Defendant for being time barred.

7. On his part, **Mr. Baston** advocate for the Plaintiff submitted that following her acquittal in the criminal case, the Plaintiff proceeded to institute a Constitutional Petition vide High Court Constitutional Petition No. 230 of 2009 challenging the decision to prosecute her; that the Constitutional Court delivered judgment on 17th February 2014 in favour of the Plaintiff by finding that her prosecution was unconstitutional and discriminatory. The Defendants preferred an appeal against the that judgment. The appeal was determined on 22nd March 2024, with the Court of Appeal upholding the decision of the Constitutional Court.

8. It was submitted that time began to run from the date of the determination of the appeal and not the date of acquittal and therefore, the present suit is properly before this court. In support the above submissions, the Plaintiff through her

counsel, relied on, *inter alia*, the case of **Divecon Ltd v Shirinkhanu Sadrudin Samani, Civil Appeal No. 142 of 1997** where the court held the view that the right of a party to sue would only accrue once the right of action becomes complete. The Plaintiff also relied on the case of **Attorney General & another v Andrew Maina Githinji & another [2016] JELR 105975 KECA** where the court stated that the cause of action in claims for malicious prosecution would only accrue after the underlying claim has been determined in favour of a plaintiff.

9. The Plaintiff maintained that the right of action crystallized on 22nd March 2024, being the date on which the Court of Appeal upheld the decision of the Constitutional Court to the effect that the prosecution of the Plaintiff was both unconstitutional and discriminatory.
10. As the record of the court shows, the 1st and 2nd Defendants did not participate in the proceedings in respect of the PO.

Analysis and determination

11. I have considered the PO and the rival submissions. The pleadings of this case show that the Plaintiff was charged with

another with various offences relating to the sale of various houses belonging to Kenya Pipeline Company (KPC) in **Anti-Corruption Criminal Case No. 7 of 2009** at the Chief Magistrate's Court-Nairobi (the criminal case). During the pendency of the criminal proceedings, the Plaintiff and her co-accused filed, separately, constitutional petitions before the High Court at the-Constitutional and Human Rights Division, seeking to challenge and stop their prosecution. The Petitions, being **Constitutional Petitions No. 227 and 230 of 2009-George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another** were subsequently consolidated and heard together. Judgment was delivered on 7th February 2014, to the effect that the prosecution of the Plaintiff and her co-accused was discriminatory and unjustifiably selective, and that the charges and proceedings in the criminal case were unconstitutional and an abuse of the legal process. The Court further made an order prohibiting the Respondents therein from sustaining or in any manner dealing with the charges laid or proceedings conducted in the criminal case or instituting any other charges

in any other court against the Plaintiff and her co-accused, over the same subject matter in the manner contemplated.

12. The record shows that the aforementioned judgment triggered an appeal by the 1st and 2nd Defendants vide **Civil Appeal No. 236 of 2014 consolidated with Civil Appeal No. 238 of 2014-Attorney General (now Director of Public Prosecutions) v George Joshua Okungu & 3 others**. Upon consideration thereof, the Court of Appeal upheld the decision by the Constitutional Court and therefore dismissed the consolidated appeals, through a judgment delivered on 22nd March 2024.

13. The above circumstances gave rise to this suit which has attracted the instant PO.

14. I have identified two issues for determination: **(a) whether the instant PO meets the threshold of a PO** and **(b) whether the present suit is statute barred**.

15. A PO has been described in **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696**, as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of

law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

16.The above definition was further advanced by the Supreme Court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** when it pronounced itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

17.The instant PO is anchored on two (2) legal provisions: **Section 3(1) of the Public Authorities Limitation Act and Section 4(2) of the Limitation of Actions Act.** Section 3(1) of the Public Authorities Limitation Act stipulates that:

“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

18. On the first issue, it is my finding that the PO meets the threshold of a PO as defined in the above authorities.

19. In respect to the second issue, this court must determine when the cause of action accrued in this matter. The parties herein hold different views in regard to this issue. The Plaintiff holds the view that the cause of action accrued on 22nd March 2024 when the Court of Appeal determined the appeal lodged before it. The 3rd Defendant, on the other hand, has maintained that the cause of action accrued upon termination of the criminal proceedings on 27th May 2014.

20. I have read the authorities relied on in the oral arguments. My view is that the authorities cited by the Plaintiff's counsel are distinguishable from the circumstances and nature of the present claim. In the case of **Divecon Ltd v Shirinkhanu Sadrudin Samani, Civil Appeal No. 142 of 1997** it was the court's view that time cannot be extended in claims founded on a breach of contract contrary to the present claim which is founded on malicious prosecution. Similarly, the case of **Attorney General & another v Andrew Maina Githinji & another [2016] JELR 105975 KECA** involved a claim for

unlawful dismissal from employment and upon which the cause of action would accrue from the date of dismissal.

21. After considering this issue, I take the view that in claims founded on malicious prosecution, the cause of action would ordinarily accrue upon the acquittal of the plaintiff(s) in question. This position was reaffirmed by the Court of Appeal in the case of **Attorney General & another v Andrew Maina Githinji & another** where the Court stated that:

“ ...

It also leads me to the conclusion that the Mbowa case which was followed by the trial court, was distinguishable. The case itself was properly decided on its facts. It was about malicious prosecution and had nothing to do with unfair/wrongful dismissal from employment. Logically, the cause of action in the Mbowa case would not have arisen until after the plaintiff's acquittal in the criminal trial. The acquittal, as well as malice, were necessary elements of the cause of action. Not in this case.”

22. Upon the court's perusal of the material on record, it observed that none of the parties tendered copies of the criminal proceedings or other material to ascertain or support

the averment by the 3rd Defendant that the proceedings in the criminal case terminated on 27th May 2014. Nevertheless, going by the averments made by the parties herein and material on record, it remains undisputed that the criminal proceedings did not result in an acquittal; rather, they were discontinued following the determination by the Constitutional Court, which determination was subsequently upheld by the Court of Appeal on appeal.

23. Upon considering the foregoing circumstances, I am satisfied that the cause of action accrued after the delivery of the judgment on appeal, which was on 22nd March 2024. The record of the court shows that the present suit was filed on 11th March 2025. It was filed within the 12-month timelines stipulated under **Section 3(1)** of the Public Authorities Limitation Act.

24. The second limb of the objection that this suit is time-barred is based on **Section 4(2)** of the Limitation of Actions Act. This provision states that:

“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:

...”

25. Having found that the cause of action in this matter accrued after the determination of the Appeal, I am satisfied that the claim against the 3rd Defendant was filed within the statutory timelines and is therefore competently before the court.

26. Consequently, the PO dated 31st July 2025 is not merited and must fail. It is hereby dismissed, with costs to the Plaintiff.

27. Orders shall issue accordingly.

Dated, signed and delivered this 4th December 2025.

**S. N. MUTUKU
JUDGE**

In the presence of:

1. Mr. Baston for the Plaintiff
2. Mr. Kisaka for Ms Maina for the 3rd Defendant