



Barclays Bank of Kenya Limited v Attorney General & another (Civil Appeal E004 of 2023) [2026] KEHC 1655 (KLR) (Civ) (10 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E004 OF 2023

WM MUSYOKA, J

FEBRUARY 10, 2026

BETWEEN

BARCLAYS BANK OF KENYA LIMITED APPELLANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

GEORGE NDUNG’U KAMAU 2ND RESPONDENT

(Appeal from the judgement and decree, of Hon. SN Muchungi, Senior Resident Magistrate, SRM, of 3rd December 2022, in Milimani CMCCC No. 3410 of 2017)

JUDGMENT

1. The case, at the trial court, was by the 2nd respondent, against the 1st respondent and the appellant, for malicious prosecution and loss of employment. The claim was that he was falsely imprisoned and maliciously prosecuted, in CMCCRC No. 1448 of 2013, on allegations made by the appellant, of forgery. The 2nd respondent was acquitted, under section 210 of the Criminal Procedure Code, Cap 75, Laws of Kenya.
2. The claim was resisted. The appellant asserted that it merely presented a complaint, and all the necessary evidence to aid the prosecution, to prove the case against the 1st respondent, and, if the prosecution failed, then that failure, could not be attributed or apportioned to it. It averred that the complaint, made to the police, was neither unlawful nor malicious. It asserted that it had exercised due diligence, undertook thorough investigations, and verified and authenticated all the documents, before reporting the matter to the police. It argued that it acted on a probable and reasonable cause, to believe that the 2nd respondent had engaged in forgery.



3. The 1st respondent averred that the police had carried out investigations, to ascertain the truthfulness of the complaint, and, upon believing it to be true, had gone ahead with the prosecution.
4. A trial was conducted. The 2nd respondent testified, but he did not call a witness. The appellant presented 1 witness. The 1st respondent did not offer evidence. Judgment was delivered, on 2nd December 2022, in favour of the 2nd respondent, and damages were assessed at Kshs. 800,000.00.
5. The appellant was aggrieved, hence the appeal herein. The grounds are that the appellant was not involved in the making of the decision to prosecute, the involvement and role of the appellant, in the criminal proceedings, was not appreciated; the evidence led at trial and the submissions were not appreciated by the trial court; the elements of malicious prosecution were not appreciated; and the trial court did not indicate who was to bear the responsibility for payment of the damages.
6. Directions were given, on 2nd May 2025, for filing of written submissions. The parties complied. I have seen and read their written submissions, and noted the arguments made.
7. The elements of malicious prosecution, which is the principal tort herein, were correctly captured by the trial court, in the judgement, dated 2nd December 2022, by way of restatement, from the decisions in *Murunga vs. Republic* [1976-80] 1 KLR 1251 (Cotran, J) and *Katerregga vs. Attorney General* [1973] EA 287 (Mead, J). They are that the police and agents of the defendant instituted criminal proceedings against the plaintiff; the criminal proceedings terminated in favour of the plaintiff; the proceedings were instituted without probable and reasonable cause; the prosecution was actuated by malice; and the plaintiff suffered harm or loss. The claimant is expected or required to establish these 5 elements, if he hopes to obtain a favourable finding or determination. All the 5 elements must be established. They are not alternates to each other.
8. On the first element, about how the matter was initiated, it will be noted that prosecution is not just about the actual prosecution in the criminal trial. It is about how it all starts. Criminal proceedings start with a criminal complaint, being filed with the police, by a complainant. The complaint is then processed by the police, by way of investigations. Investigations would involve collecting documents from the complainant and others, which support the complaint. It could also involve interviewing witnesses and recording their statements. An investigation file is then compiled, and placed before the Office of the Director of Public Prosecutions, for evaluation, to determine whether the complaint is prosecutable. That is whether the material collected, by the way of investigations, establishes that a crime was committed, and, if so, whether, when that material is placed before the court, it can sustain a conviction. If the Office of the Director of Public Prosecutions is persuaded that the material discloses an offence, it would recommend prosecution, draw up charges and have the suspect, named in them, arraigned in court, to answer to the charges, after which the actual prosecution pans out, by way of a trial, through presentation of witnesses and evidence.
9. The key players, in a prosecution, are the complainant, the police and the prosecution. The complainant originates the complaint, which is then processed by the police, and prosecuted by the Office of the Director of Public Prosecutions. The prosecution involves the complainant, as the originator of the complaint, which is the basis for the prosecution, who provides the key evidence, and witnesses, to the prosecution. The case is, literally, that of the complainant, for without the complaint and complainant, there would be no prosecution. Without the complaint, the process would not commence. Without the evidence from the complainant, the case would not take off. For certain classes of offences, the complainant can trigger withdrawal of the prosecution, by merely dropping the complaint. This should explain why malicious prosecution cannot successfully be mounted, without



making the complainant a party, for he would be at the heart, if he is not the heart itself, of the prosecution.

10. So, what happened here? There was evidence that the prosecution was triggered by a complaint from the appellant. Winnie Chebet Cheboi and Mercy Mutuku were employees of the appellant, they testified at the criminal trial, and also in the civil case. They described how the 2nd respondent approached the bank, to apply for a credit card, using the credentials of a Daniel Kabui Maina. Verification of the application raised some red flags, whereupon the 2nd respondent, as Daniel Kabui Maina, was contacted, but when he showed up, he produced different identification credentials, showing that he was George Ndung'u Kamau, and not Daniel Kabui Maina. Whereupon a report was made to Banking Fraud Investigations Unit, who arrested the 1st respondent. The defence, filed by the 1st respondent, stated that the 2nd respondent was arraigned, hence the proceedings in Nairobi CMCCRC No. 11448 of 2013. So, criminal proceedings were, indeed, instituted by the police, at the instigation of the appellant.
11. On the second element, it must be established that the criminal proceedings terminated in favour of the plaintiff. According to the certified typed proceedings, relating to Nairobi CMCCRC No 14448 of 2013, the case terminated on 14th July 2016, under section 210 of the Criminal Procedure Code, after the prosecution had presented only 2 witnesses, and it was ruled that a prima facie case had not been established, against the 2nd respondent, to warrant his being put on his defence. He was, accordingly, acquitted. The criminal proceedings were established to have terminated in his favour.
12. The third element is about the plaintiff establishing that the proceedings were instituted without reasonable or probable cause. This is about establishing that there was no case at all, right from when the complaint was made, to warrant the prosecution. The testimony by the 2 witnesses, who testified, for the appellant, in both trials, was that the person who initially presented himself to the appellant, used the credentials of Daniel Kabui Maina, seeking to apply for a credit card, and the documents, he presented for that purpose, were a national identity card for Daniel Kabui Maina, certified bank statements from Kenya Commercial Bank and payslips. When Kenya Commercial Bank was approached by Mercy Mutuku, she was informed that an account was in the process of being opened by that person, the 2nd respondent, which meant that he had no account, in fact, at Kenya Commercial Bank, to support the bank statement that he had presented to Winnie Chebet Cheboi, which in turn meant, that that statement was not genuine, suggesting it was forged. On account of that, Winnie Chebet Cheboi called Daniel Kabui Maina, asking him to come to the bank. The said Daniel Kabui Maina showed up, but now with the ID card of George Ndung'u Kamau, the 2nd respondent herein, and denying that he was Daniel Kabui Maina. It was that that triggered the complaint.
13. The narratives given by Winnie Chebet Cheboi and Mercy Mutuku, formed the basis for the complaint, which then became the foundation for the criminal proceedings. That was the case that the prosecution had, and which it was to present at the criminal trial. The criminal trial terminated prematurely, before all the evidence was tendered, by the prosecution. The prosecution only presented 2 witnesses. There were indications that there were 2 more to be presented.
14. The matter was adjourned several times, for various reasons, before the court decided, on 14th June 2016, to rule on a case to answer, after it had taken evidence from only 2 witnesses. The first hearing was scheduled for 24th January 2014, it collapsed because the prosecution did not have witnesses in court. The next was on 19th March 2014, the adjournment was because the accused, the 2nd respondent herein, was unwell. The next was on 21st May 2014, the matter proceeded, 1 witness testified. The next was on 24th July 2014, the matter proceeded, 1 witness testified, Mercy Mutuku.



15. The next hearing was scheduled for 7th October 2014, but on 21st August 2014, the accused/2nd respondent had it moved to 5th November 2014, on grounds that he was set to travel abroad. On 5th November 2014, the hearing did not happen, the magistrate had been transferred. On 11th November 2014, directions, under section 200 of the Criminal Procedure Code, were taken, and the accused/2nd respondent indicated he would not be available until February 2015. The hearing, scheduled for 11th February 2015, did not happen, as proceedings were yet to be typed, upon transfer of the previous trial magistrate. The next hearing was scheduled for 8th July 2015, but it did not happen, for the prosecution did not have witnesses. The next hearing, on 26th August 2015, was adjourned, because the Advocate for the accused/2nd respondent was unwell, although a prosecution witness was said to be in court.
16. On 19th November 2015, the scheduled hearing was adjourned, although a prosecution witness was said to be on the way, on grounds that the Advocate for the accused/1st respondent was not available, and was asking for another date. The hearing scheduled, for 11th February 2016, was adjourned, as the police file was said to be unavailable. That scheduled for 10th March 2016 did not take off, because prosecution witnesses were not in court, and so was that scheduled for 6th June 2016. It was marked as the last for the prosecution. On 14th June 2016, the prosecution was still not ready. The prosecution opted to close its case, as it was on its last adjournment.
17. Whether there was a reasonable or probable cause solely rested with the narratives of Winnie Chebet Cheboi and Mercy Mutuku, as that was the root of the complaint and the prosecution. The question would be, did the 2nd respondent, at the civil court, establish that there was no reasonable or probable cause in those narratives. The 2nd respondent testified on 23rd November 2021, he did not address himself to the key aspects of the narratives by Winnie Chebet Cheboi and Mercy Mutuku. He merely referred to his witness statement, produced documents, and said that he was maliciously prosecuted. His witness statement did not address those issues either.
18. The case, that he faced, was about forging and altering a document from Kenya Commercial Bank. He did not address that in his witness statement, nor in his oral testimony. It was incumbent upon him to demonstrate and establish that the prosecution did not have a reasonable and probable cause, and that required that he target the case built by the prosecution, around the narratives by Winnie Chebet Cheboi and Mercy Mutuku, and the charge of forging the Kenya Commercial Bank account statement and uttering it to Winnie Chebet Cheboi. He did not deal with that.
19. The burden of proof was on him to establish that. That was a not criminal case, where the burden would have been on the prosecution throughout. That was a civil case, where he was the plaintiff, that is the person making the allegations or accusations, hence the person expected to drive the process, of proving those allegations or accusations. The duty was on him, to establish, on a balance of probability, that the case that the prosecution took to court, against him, in the criminal matter, did not have a reasonable or probable cause. The appellant and the 1st respondent would have been required to lead counterevidence, to show reasonable or probable cause, only after he discharged his burden, thereby shifting the evidential burden to them. He did not discharge the burden; hence the evidential burden did not shift to the appellant and the 1st respondent.
20. Lack of reasonable cause has nothing to do with the case that was actually presented at criminal trial. It is about the entire case that the prosecution had. The case they intended to present before the criminal court. The evidence that they had gathered, for the purposes of that case. The fact that the case collapsed, on technical grounds, as was the case here, does not give the plaintiff any leverage. It all starts with the complaint. The question would be, did it have any reasonable or probable cause, to be made in the first place. The complaint is the foundation of the prosecution, once it is demolished, whatever



the police or the Office of the Director of Public Prosecutions do, in terms of actual investigations and actual prosecution in court, would be of little significance.

21. A case, that terminates because it was weak from the beginning, or because it amounted to no case at all, from inception, would provide a basis for concluding that there was no probable cause, in the first place, for mounting the prosecution. That would be different from a scenario where the prosecution flounders, not on account of substantive weakness, but procedural weakness, in circumstances where there is available evidence to support the charge, but the case collapses on account of reasons similar to those that arose in this case.
22. The fourth element is about malice. It is about establishing that the prosecution was driven, or actuated, or motivated by spite or ill-will. That is that the whole case had no merit at all, but was initiated for the sole purpose of vexing or harassing the plaintiff, for ulterior motives, or to meet ulterior purposes, quite apart from dealing with criminality. That would require going beyond reasonable or probable cause, and looking at the motives behind the complaint and the prosecution. The focus, ideally, should be on the complaint, which is the foundation for the prosecution. It would have to require looking at the background to the matter, and, in particular, the relationship between the complainant and the plaintiff. What would be there, in their relationship, to drive or motivate or animate the complainant to bring baseless proceedings against the plaintiff. I have looked at the testimony of the 2nd respondent, at the civil trial, and in his witness statement, and I have not found anything which demonstrates that either the appellant or its officers, or the 1st respondent, were motivated by malice or ill-will.
23. I have gone through the judgment of the trial court, to establish if the court found malice, in the conduct of the prosecution. The trial court did not look at the background, to the making of the complaint and its processes. It focussed more on how the case was prosecuted, in court, to find malice. It highlighted the fact that only 2 witnesses were presented, that evidence was not led on how the decision to charge was arrived at, that no investigations were carried out, and the fact that the 2nd respondent was charged just a day after his arrest. That was what was highlighted, to find lack of reasonable or probable cause, and malice.
24. It was also considered that the trial lasted for 3 years, and was adjourned many times, because the police file was not availed, and witnesses were not available. Yet, the prosecution did not get the chance to present all its witnesses. The case terminated prematurely, before all the witnesses could testify. The fact of premature termination meant that the opportunity to provide evidence, on how the decision to investigate, charge and prosecute, was taken, was not adduced, for the investigators did not testify. The fact that they did not testify did not mean that there was no evidence on those areas. It did not mean that there was no probable or reasonable cause. It did not mean there was malice. Malice and probable cause are not to be gauged only from what happened at trial, for the case, in the possession of the prosecution, is not is not limited to what was presented in court, but also that which was not presented. The trial record is clear, that other witnesses, besides the 2 who testified, were lined up, but did not testify, for one reason or other. They were said to be Joel Maingi, Daniel Kabui and Corporal Kanyuthia. There was a case beyond that presented by Winnie Chebet Cheboi and Mercy Mutuku, upon which the issues, as to whether there was malice or lack of probable cause, could be gauged. The statements, recorded with the police, by those witnesses, were on record, but they were not adverted to, by the 2nd respondent and the trial court, to demonstrate existence of malice and lack of a probable cause.
25. The judgement of the trial court appears to blame the appellant and the 1st respondent for the prosecution for the delay in the prosecution, of the criminal matter in court, yet there were times the matter was adjourned for reasons that had nothing to do with the prosecution, as discussed elsewhere



here above. It was put off severally, for the 2nd respondent was said to be unwell or had travelled. There were also adjournments because his Advocate was not present. The trial court also occasioned delays. The initial trial magistrate went on transfer, and another took over. There was a prolonged delay, for the proceedings to be typed. Consequently, the prosecution was not the sole cause of the delay, hence the fact that the trial took 3 years cannot, on that account alone, be basis to infer malice or lack of probable cause. In any event, I reiterate, that that cannot be a basis to conclude that the prosecution was actuated by malice or there was no probable or reasonable cause for it.

26. The appellant raises the issue of apportionment of liability as between it and the 1st respondent. Apportionment of liability does not arise in malicious prosecution, for the complainant, the police and the Office of the Director of Public Prosecutions jointly conduct the matter, as discussed above. The complaint is from the complainant. It triggers everything. It cannot be argued, therefore, that the responsibility or liability of the complainant is lesser than that of the rest, yet it was its complaint that provoked the prosecution, which was conducted at its behest. The police and the Office of the Director of Public Prosecutions have no interest in these cases, until they are brought to them by the complainants.
27. Overall, I find merit in the appeal herein. The case, presented by the 2nd respondent, did not reach the threshold, for establishing malicious prosecution and false imprisonment. The trial court should have dismissed the case as presented. Consequently, I do hereby set aside the judgment of the trial court, and substitute it with an order dismissing the suit. Each party shall bear its own costs.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA ON THIS 10TH DAY OF FEBRUARY 2026.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Maurice Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Mwaura, instructed by Ashitiva Advocates LLP, for the appellant.

Ms. Komu, instructed by the Attorney General, for the 1st respondent

Messrs. Ng'ang'a Kimani & Associates, Advocates for the 2nd respondent.

