



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CIVIL APPEAL NO. 98 OF 2010

BETWEEN

DANIEL KARUGI MAINA APPELLANT

AND

THE HON. ATTORNEY GENERAL RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Sergon, J.)

dated 5th March, 2010

in

H.C.C.A NO. 83 OF 2009)

JUDGMENT OF THE COURT

1. **Daniel Karugi Maina**, the appellant herein was arrested on two occasions in the year 1998 and 1999 for allegedly being in possession of cannabis sativa ('bhang'). On the first occasion, the appellant was arraigned and charged before the Senior Magistrate's Court at Muranga in Criminal Case No. 1042 of 1998. However, the appellant was acquitted under section 210 of the Criminal Procedure Code, Chapter 75 Laws of Kenya, for lack of evidence. On the second occasion, the appellant was arraigned and charged before the Senior Resident's Magistrate's at Kangema in Criminal Case No. 439 of 1999. The appellant was yet again acquitted.
2. Based on the said acquittal, the appellant filed a suit on 7th May, 2008 in the Senior Principal Magistrate's Court at Muranga (trial court), against the Government seeking *inter alia* damages for unlawful and malicious arrest and prosecution; and refund of Kshs. 4,600/= that was allegedly taken by the police officers who arrested him. In its defence, the respondent raised a preliminary objection to the effect that the appellant's suit was fatally defective and that the same ought to be struck out. According to the respondent, the suit was filed out of the prescribed period under the **Public Authorities Limitation Act, Chapter 39, Laws of Kenya**.
3. The suit proceeded for hearing *ex parte* due to non attendance by the respondent. The trial court in its judgment dismissed the appellant's suit on the grounds that, the suit had been filed out of time contrary to the provisions of **Section 3(1) of the Public Authorities Limitation Act** and that the failure by the appellant to enjoin the two police officers who had arrested him rendered the suit

- fatally defective.
4. Aggrieved by the trial court's decision, the appellant appealed to the High Court. It was the appellant's contention in the High Court, that the trial court erred by failing to invoke **Section 95 of the Civil Procedure Act, Chapter 21, Laws of Kenya** and extend the time within which the suit could be instituted. He contended that by virtue of **Section 12 of the Government Proceedings Act, Chapter 40, Laws of Kenya**, all suits against the Government are instituted against the respondent. He maintained that the failure to join the two police officers in the suit was not fatal. The appellant further contended that the trial court did not give serious consideration to his claim of refund of Kshs. 4,600/= which had been confiscated by the police officers during his arrest.
 5. The High Court (Sergon, J.), in the judgment dated 5th March, 2010 found that, the appellant's suit had been filed out of time contrary to the provisions of the Public Authorities Limitation Act and that, the time within which the suit could be filed could only be extended under the provisions of the said Act. According to the learned judge, **Section 95 of the Civil Procedure Act**, only gives the court discretion to enlarge time that has been fixed or granted by the court and not time fixed by statute. He held that the failure by the appellant to join the police officers who arrested him was not fatal by virtue of section 12 of the Government Proceedings Act. He further found that even if the appellant's claim was properly suited he still failed to prove his claim of refund of Kshs. 4,600/= that was confiscated during his arrest.
 6. The appellant was aggrieved with the said decision hence this current appeal. At the hearing of this appeal the appellant appeared in person while there was no appearance on the part of the respondent. In support of his appeal, the appellant relied on his written submissions that were filed in the High Court on 27th January, 2010.
 7. This being a second appeal, we are confined to consider only matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See ***Kenya Breweries Ltd. –vs- Godfrey Odoyo- Civil Appeal No. 127 of 2007.***
 8. We have examined the Record of Appeal, the grounds of appeal, the appellant's submissions and the law. We are of the view that the only points of law that falls for our consideration are, whether the appellant's suit was time barred; and if so, whether the trial court could exercise its discretion under **Section 95 of the Civil Procedure Act** and extend the prescribed time for filing the same.
 9. From the record, it is clear that the appellant was arrested on two occasions, that is in 1998 and 1999 and charged with the offence of being in possession of 'bhang'. Therefore, at most, the appellant's cause of action of the alleged malicious prosecution arose in 1999. **Section 3(1)** of the Public Authorities Limitation Act provides,

'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.'

The appellant filed the suit in the trial court on 7th May, 2008, clearly out of the prescribed time frame of filing the same. We find that both the trial court and High Court were correct in holding that the appellant's suit was time barred.

10. We do not agree with the appellant's argument that the trial court ought to have exercised its discretion under **Section 95 of the Civil Procedure Act**, to extend the time within which the suit could be instituted. **Section 95 of the Civil Procedure Act** provides,

'where any period is fixed or granted by the court for doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired.'

We agree with the learned Judge that **Section 95 of the Civil Procedure Act**, only gives the court

discretion to enlarge time for doing an act that has been fixed or granted by the court under the Civil Procedure Act. Time for filing the appellant's suit could only have been extended under **Section 5 of the Public**

Authorities Limitation Act. Having found as above we see no reason to consider the other grounds of appeal.

11.The upshot of the foregoing is that the appeal herein has no merit. Accordingly, the appeal is dismissed with no order as to costs.

Dated and delivered at Nyeri this 11th day of July, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J.OTIENO-ODEK

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR