



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 199 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PETER KIPYEGON KIRUI.....CLAIMANT

-Versus-

AGRICULTURAL DEVELOPMENT CO-OPERATION.....1ST RESPONDENT

JOHNSTONE MISOI.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

R U L I N G

Before me for determination is a Preliminary Objection filed by the 3rd Respondent herein, the Attorney General on grounds that the claim against it is time barred by virtue of the Public Authorities Limitation Act. It is the 3rd Respondents position that the cause of action for which it has been joined in this suit arose on 10th March, 1999 and should have been filed by 9th March, 2000 that the claim herein was filed vide plaint in KITALE HCC. No.117 of 2000 on 24th August, 2000. It is further the 3rd Respondent's contention that this court does not have jurisdiction to hear the claim under its jurisdiction conferred by article 162(2) of the Constitution and Section 12(1) of the Employment and Labour Relations Court Act.

The 3rd Respondent argues that the Claimant was not its employee, that the claim against it is a malicious prosecution claim which is a tort and the court should therefore dismiss the same as against the 3rd Respondent.

The 1st and 2nd Respondents did not participate in the application.

The Claimant submitted that his claim is in respect of wrongful termination by the 1st Respondent and that he also seeks damages for malicious prosecution, that this court has jurisdiction to hear the claim as all the claims arise from the termination of the claimant and the Attorney General contributed to the termination.

Determination

The issues for determination are whether this court can hear a claim for malicious prosecution brought against a former employer jointly with the Attorney General where the latter is not his employer and secondly when limitation period in respect of malicious prosecution begins to run.

On the issue of malicious prosecution, the Claim is joint. The Claimant's case is contained in paragraph 8, 9, 10, 11 of the Amended plaint where he pleads as follows:-

8. On or about the 27th day of August 1998 the police at Endebess police station at the instance of the first 1st and 2nd Defendant and/or the 1st Defendant's agents and/or servants maliciously, unlawfully and without reasonable and/or probable cause arrested and detained the plaintiff for no reason or reasonable cause subsequently maliciously charged the plaintiff with the criminal offence of stealing by a person employed in the public service contrary to section 280 of penal code in court (vide Kitale SPMC Cri. No.2628 of 1998) and prosecuted him maliciously.

9. In the consequence of the matters aforesaid, the plaintiff was arrested, detained and placed in cells when the plaintiff was released on bail.

10. While the criminal case was pending in court the plaintiff discharged his duties diligently until 1/9/98 when he was suspended from his duties later on 15/3/99 when the 1st Defendant by its letter dated plaintiff's services with immediate effect and refused to pay the plaintiff's terminal dues.

11. On various dates the defendants jointly and severally caused the plaintiff to appear before the aforesaid court in further continuance of the said prosecution and the said court heard the case and on 7/10/98 the accused was discharged under section 87A of the CPC. The plaintiff was later re-arrested and charged with the aforesaid offence on 10/3/99 the charge levelled against the plaintiff was dismissed and the plaintiff found not guilty and acquitted of the charge and was immediately released where upon the said prosecution determined (vide Kitale SPM Crc No.3261 of 1998).

It is my opinion that the claim for malicious prosecution in the nature of the plaintiff's suit cannot be prosecuted piecemeal. The claimant cannot be expected to file the suit on malicious prosecution in one court and for unlawful termination in another court on grounds that one court does not have jurisdiction to hear a portion of the claim. It is my opinion that this court has jurisdiction to hear all matters arising out of an employment relationship, and the charges the plaintiff alleges were the cause of the malicious prosecution claim arose out of an employment relationship. Joining the Attorney General in a suit does not oust the jurisdiction of this court merely because there is no employment relationship between the plaintiff and the Attorney General.

Section 12 (1) (a) of the Employment and Labour Relations Court Act gives jurisdiction to hear "**disputes relating to or arising out of employment between an employer and an employee**" and the prosecution complained of in this suit arose out of a charge of stealing by a person employed in the public service contrary to section 280 of the Penal Code.

I therefore find that this court has jurisdiction to hear the claim filed by the plaintiff.

The second ground of objection raised by the 3rd Respondent is that the claim is statute barred under section 3(1) as read with 2(2) (a) of the Public Authorities Limitation Act which provides as follows -

2) For the purposes of this Act-

(a) proceedings against the Government includes proceedings against the Attorney General or any Government department or any public officer as such;

3 (1) 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.

In the case of **Murunga v Attorney General**, Cotran J set out the threshold for malicious prosecution as follows -

a) The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;

b) That the prosecution terminated in the plaintiff's favour

c) *That the prosecution was instituted without reasonable and probable cause;*

d) *That the prosecution was actuated by malice*

In the case of **Mbowa v East Mengo District Administration the East African Court of Appeal** stated that -

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.

This means that a claim of malicious prosecution does not crystallise until a person has been acquitted in the criminal case he alleges was maliciously instituted. The Plaintiff herein was acquitted on 10th March, 1999. The plaint was therefore out of time by some five (5) months.

The provisions of section 3(1) as read with 2(2) (a) of the Public Authorities Limitation Act are couched in mandatory terms. The plaintiff has not denied that the suit was filed after the lapse of 12 months from the date of accrual of the cause of action.

For this reason the Preliminary Objection on the ground that the limb of the suit on malicious prosecution against the 3rd Respondent is time barred succeeds. I consequently dismiss the suit against the 3rd Respondent with no orders for costs. The suit against the 1st and 2nd Respondent will however proceed with the claim on unlawful termination.

Dated, Signed and Delivered this 3rd day of November, 2016

MAUREEN ONYANGO

JUDGE