Okesa v Deposit Protection Fund Board (Civil Case E001 of 2021)
[2024] KEHC 1915 (KLR) (Civ) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1915 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E001 OF 2021

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

JOACKIM MWANDALE OKESA ..... PLAINTIFF

AND

THE DEPOSIT PROTECTION FUND BOARD ..... DEFENDANT

RULING

1. The Deposit Protection Fund Board (hereafter the Applicant) brought the Notice of Motion dated 26th June, 2023 (the Motion) supported by the grounds laid out on its face and the depositions in the affidavit of Dr. Peter Kitonyo, an employee of the Kenya Deposit Insurance Corporation, a successor of the Applicant herein. The motion seeking an order for review the ruling delivered by the court on 25th May 2023 and consequently, an order striking out the suit against the Applicant, with costs.

2. In his supporting affidavit which largely echoed the grounds, the deponent stated that previously, the Applicant had filed a Chamber Summons dated 26th March 2021 (the Chamber Summons) whereas the Attorney General (formerly the 2nd Defendant) had filed a notice of preliminary objection dated 5th September 2022 to the suit. Upon hearing the parties on the same, the court by the ruling delivered on 25th May, 2023 dismissed the Chamber Summons but allowed the preliminary objection. Consequently, striking out the suit solely as against the 2nd Defendant. The deponent further stated that the success of the preliminary objection essentially compromised the entire suit which constitutes a malicious prosecution claim, and hence the Applicant cannot be retained as a defendant therein.

3. Joackim Mwandale Okesa (hereafter the Respondent) opposed the Motion by his replying affidavit of 26th October, 2023. Therein averring inter alia, the court struck out the suit against the 2nd Defendant on the ground of limitation, the suit having been filed outside the statutory timelines. He also averred that the Applicant's Chamber Summons was properly considered by the court in its ruling.

4. He asserts that the Applicant has not mustered the threshold for review and dismisses the Motion as a mere afterthought. Pointing out that the 2nd Defendant, sued independently from the Applicant, is not a necessary party to the malicious prosecution claim. Thus, the Applicant cannot escape liability merely on the basis that the 2nd Defendant was struck out of the suit. Based on those averments, the Respondent urged that the Motion be dismissed with costs to enable the suit to proceed on merit.

5. The Motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the on the ground of 'sufficient reason' in Order 45, Rule 1 of the *Civil Procedure Rules* (CPR). He proceeded to reiterate the earlier averments that the 2nd Defendant is a necessary party to the present suit and in its absence, the Respondent's suit against the Applicant cannot be sustained. Reliance was placed on the decisions in *Susan Mutheu Muia v Joseph Makau Mutua* [2018] eKLR; *Douglas Odhiambo Apel & another v Telkom Kenya Limited*- HCCC No 2547 of 1998 and *Music Copyright Society of Kenya v Tom Odhiambo Ogowl* [2014] eKLR regarding the ingredients to be proved in a suit founded on malicious prosecution. On those grounds, the court was urged to allow the Motion as prayed.

6. For his part, the Respondent submitted through his counsel that the Applicant is a proper defendant in the suit because the complaint which resulted in the prosecution of the Respondent originated from the Applicant's employees/agents. Here citing the decisions in *Mbowa v East Mengo District Administration* [1972] EA 352 and *Gitau v Attorney General* [1982] eKLR setting out the ingredients of the tort of malicious prosecution. Counsel advanced the argument that no error or sufficient reasons have been shown to warrant review of the court's ruling/order.

7. Counsel further argued that the Respondent's suit cannot be determined on its merits at this interlocutory stage. Reliance being placed on the decision in *Captain (Rtd) Charles K.W. Masinde v Director of Public Prosecutions & 2 others* [2021] eKLR on the question whether a malicious prosecution suit can be rendered fatally defective at the interlocutory stage, for failure to enjoin the Director of Public Prosecutions (DPP) or the Attorney General.

8. In the end, counsel submitted that no reasonable circumstances have been demonstrated by the Applicant to warrant the striking out of the suit against it. He cited the case of *D.T. Dobie & Company (Kenya) Ltd. v Muchina* (1982) KLR 1 regarding the general legal principle that suits ought not to be summarily dismissed or struck out, save in exceptional circumstances. On that basis, the Respondent's counsel argued that the Motion ought to be dismissed with costs.

9. The court has considered the rival affidavit material and submissions in respect of the Motion. The prayer in the Motion is seeking review of the ruling delivered on 25th May, 2023.Order 45 Rule 1 of the *CPR* of the *Civil Procedure Act* provides as follows:

> " Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for

a review of judgment to the court which passed the decree or made the order without unreasonable delay."

10. From the provision above, the court can review its decision upon an applicant demonstrating:

    a. the discovery of new and important matter or evidence, or

    b. some mistake or error apparent on the face of the record, or

    c. any other sufficient reason.

11. The Motion herein is based on the ground of 'sufficient reason'. The limb providing for review on the ground "any other sufficient reason" is to be read disjunctively from other expressly stipulated grounds for review under Order 45 Rule 1. The Court of Appeal in *Wangechi Kimita & another v Mutahi Wakibiru* (1982-88) 1 KAR 977 stated regarding the words "for any other sufficient reason" (per Nyarangi JA) as follows: -

> " ... I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly S.80 of the *Civil Procedure Act* confers unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the Order: See Sadar *Mohamed v Charan Singh* (1959) E.A. 793".

12. Hancox JA (as he then was) in agreeing with Nyarangi JA stated that ;

> " I would add that I also agree with the reasoning of Nyarangi J.A that the third head under Ord 44 r. 1(1), enabling a party to apply for a review namely "or for any other sufficient reason" is not necessarily confined to the kind of reason stated in the two proceeding heads in that sub-rule, which do not themselves form a "genus or class of things with which the third general head could be said to be analogous".

13. Later, Gicheru JA in *The Official Receiver and Liquidator v Freight Forwarders Kenya Limited* [2000] eKLR while reiterating the dicta in *Wangechi Kimita* (*supra*) stated that: -

> " These words ("for any other sufficient reason") only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot, without at times running counter to the interests of justice, be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record."
>
> See also *Tokesi Mambili & others v Simion Litsanga Sabwa*, Civil Appeal 90 of 2001.

14. The record shows that the Applicant through the Chamber Summons which was also the subject of the ruling of 25th May, 2023, sought to have its name struck out of the suit. The Chamber Summons was opposed by both the Respondent and the 2nd Defendant. Soon thereafter, the 2nd Defendant filed the preliminary objection on the basis that the suit was statutorily time barred by dint of Section 3(1) of the *Public Authorities Limitation Act*. Upon hearing the Chamber Summons and preliminary objection contemporaneously, the court agreed with the 2nd Defendant's assertion that the suit against the 2nd Defendant was time barred and upheld the preliminary objection. This meant that the Applicant remained the sole defendant in the suit.

15. Concerning the Chamber Summons, the court determined that the Applicant was a necessary party to the suit, declining to grant the orders sought in the Chamber Summons which was dismissed it with costs. In that application, the Applicant had inter alia asserted that it was non- suited, having acted as

a liquidator of the company that filed a complaint with police, the latter who arrested and charged the Respondent, and whose actions the Applicant was not liable for. In addition, it was stated that the said officers had not been enjoined in the suit. At the time of filing the Chamber Summons, the Attorney General was a Defendant in the suit and hence there was no merit in the latter argument.

16. The court confined its ruling primarily to the objection in respect of the joinder of the Applicant, stating in the pertinent part of its decision that:

> " Now to the Summons which sought for the striking out the 1st Defendant as a party to the suit, it is not in dispute that the 1st Defendant has at all material times been the liquidator of the Company, effective 23rd December, 1994 upon issuance of a Gazette Notice. It is also not in dispute that the subject matter of the dispute here arose in the Company and during the period of liquidation. Without delving into the merits of the suit at this premature stage, the pertinent question is whether the 1st Defendant is a proper party to the suit. The principles offering guidance to the court in determining whether to strike out and/or substitute the name of a party are encapsulated under Order 1, Rule 10 (2) of the *Civil Procedure Rules* as hereunder:
>
> a. "Whether or not the party to be substituted or struck out is a necessary party to the suit; and
>
> b. Whether or not the presence of such party will assist the court in effectively adjudicating upon and settling all questions arising out of the suit."
>
> Upon consideration of the pleadings and circumstances pertaining to the role of the 1st Defendant as the liquidator of the Company, the court is convinced that the 1st Defendant is a necessary party to the suit and whose presence may prove helpful in determining the matter. To add on, the court has not come across anything in the law precluding the 1st Defendant from suing or being sued in its own name and capacity, notwithstanding its position as liquidator of the Company, pursuant to Section 36 (1) of the repealed Banking Act which stipulated that the Deposit Protection Fund Board is a legal entity with corporate powers and therefore capable of suing and being sued."

17. The present application echoes a related contention, raised albeit inchoately in the Applicant's earlier application. To the effect that, the role of the Applicant was limited to making a complaint to police who investigated the case and preferred charges against the Respondent and thus a case for malicious prosecution by the police could not lie against the Applicant. In the present application the Applicant has added assertions which I understand to convey that, pursuant to the striking out of the suit against the Attorney General, and based on cited case law, the entire case for malicious prosecution had been essentially compromised or rendered moot. The Respondent protested that the case is yet to be heard and cannot be determined at interlocutory stages. The court has considered the rival arguments on this point, including authorities cited.

18. From the affidavits and material before the court, it is not disputed that pursuant to a report by police, the Respondent was arrested, and a decision to prefer criminal charges made by the police. The case law cited on both sides appears to support the Applicant's position. In a similar situation where a complainant had been sued for malicious prosecution, the Court of Appeal in *Wambua v Mbuthi & 2 others* (Civil Appeal 231 of 2016) [2022] KECA 84 (KLR) stated that; -

> " 19 ..... In our view, the 1st and 2nd respondents having been found harboring the donkeys was sufficient to establish probable cause. As to what would

transpire thereafter is a matter that would be left to the police and the prosecution to determine whether or not to mount a prosecution. Clearly, the course of action to be taken after she (complainant) lodged a complaint was beyond her control.

20. In the case of *Jedel Nyaga v Silas Mucheke*, CA No 59 of 1987 this Court stated thus;

> "The appellant had made a complaint to the police and nothing more and what followed had nothing to do with him. The decision to arrest the respondent was made by the police who must have found some merit in the report". Consequently, the Court found that; "the appellant who had made the report to the police was not responsible for the arrest of the respondent and the mere fact that he was a probable prosecution witness did not render him responsible for the arrest of the subsequent prosecution of the respondent by the police."

21. Similar findings were made in *Koech v African Highlands & Produce Company Limited & another* [2006] eKLR 148 thus;

> " The police carried out their own investigation and were satisfied that there were sufficient grounds upon which a charge of theft by servant could be preferred against the plaintiff. The first defendant carried out its own investigation regarding the disappearance of its property, just like any prudent person or company would in the circumstances but those investigations had nothing to do with the investigations by the second defendant through the police and the resultant decision to charge the plaintiff with the said offence."

22. So that, in as much as the appellant lodged a complaint with the police, she clearly had no control over its outcome. In other words, whether or not the police would prosecute the two respondents was a decision that rested entirely with the prosecution".

19. The foregoing position accords with the long line of decisions on the subject by superior courts, including those cited here by the parties herein, since the court delineated the ingredients of malicious prosecution in the celebrated case of Mbowa (supra). In a word, a claim based on malicious prosecution cannot be sustained or succeed where the Attorney General has not been enjoined as a defendant in the suit or ceases to be a defendant. A complainant, such as the Applicant herein, sued alongside the Attorney General is merely a necessary party and who, upon the exit of the said co-defendant, could not legally be made to bear any liability for a prosecution instituted by agents of the Attorney General.

20. The next logical question to be considered is whether with the exit of the Attorney General, the suit herein became moot, or in the Applicant's words, was entirely compromised. According to *Black's Law Dictionary*, Tenth Edition, a matter is moot when it has no practical significance, is hypothetical or academic. A moot case is similarly defined therein as "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights".

21. In discussing the rationale and relevance of the doctrine of mootness in the administration of justice, the High Court in *National Assembly of Kenya & another v Institute of Social Accountability & 6 others* [2017] eKLR held as follows:

> " ...it is clear that the mootness doctrine is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of Judicial economy and functional competence of the courts and the integrity of the Judicial System... the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly *the constitution* law and public interest."

22. In *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] , the Court of Appeal adverting to the foregoing cited with approval the High Court decision in *Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) v County Government of Nairobi* [2019] eKLR. To the effect that:

> " A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact....
>
> No court of law will knowingly act in vain ... a suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity."

23. This court is alive to the right of every party to be heard in his case and the exhortation in *D.T Dobie* (*supra*) to courts to eschew the summary dismissal of suits. However, upon reviewing the existing facts in the Respondent's suit the court is persuaded by the Applicant's argument that to proceed further with the suit after the exit of the Attorney General would be contrary to clear legal principles. Additionally, in the court's view, such a course of action would amount to an exercise in futility. The moment the Attorney General exited the suit, the ground shifted beneath the Respondent 's feet. His suit was rendered compromised and moot. A court of law cannot act in vain. Does this constitute sufficient reason for the court to review its ruling?

24. In *Wachira Karani v Bildad Wachira* [2016] eKLR, Mativo J (as he then was) grappled with the essence of the term "sufficient cause/ reason" as follows:

> Also relevant is the case of *Ongom v Owota*[8] where the court held inter alia that the court must be satisfied about one of the two things namely:-
>
> (a) .....
>
> (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.
>
> It's important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-
>
> .....

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean? The Court of Appeal of Tanzania in the case of The Registered Trustees of the *Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others*[9] discussing what constitutes sufficient cause had this to say:-

> "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."

In *Daphene Parry v Murray Alexander Carson*[10] the court had the following to say:-

> 'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles)"

25. The court (Mativo J, as he then was) concluded by stating that:

> ".....I again repeat the question what does the phrase "Sufficient cause" mean. The Supreme Court of India in the case of *Parimal v Veena* observed that:-
>
> > "Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a curious man...."

26. Applying the foregoing dicta to the events in the matter at hand, considering the law applicable in malicious prosecution suits, the principle that courts do not act in vain, the age of the suit (almost 24 years since filing), the need for judicious and prudent use of judicial time and resources , the overriding objective encapsulated in Section 1A of the *Civil Procedure Act*, and the fact that the Applicant is a public body funded from the exchequer, this court is persuaded that the Applicant has demonstrated sufficient reason for the Court to review its ruling of 25th May 2023. The court will therefore vary its said ruling by way of an order to the effect that although the Applicant had been found to be a necessary party in the suit, the suit stood compromised or rendered moot as a consequence of the court striking out the case against the Attorney General. To that extent the Applicant's motion has succeeded.

27. In view of the circumstances giving rise to this ruling the court will direct that the parties herein will bear their own costs in the motion dated 26th June 2023 and in the suit.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Defendant / Applicant: Mr. Kipchirchir

For the Plaintiff/Respondent: N/A

C/A: Carol