

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 397 OF 2014

ERIEZA KAGGWA

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PLAINTIFF

VERSUS

1. CHRISTINE KAGOYA

2. ATTORNEY GENERAL

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DEFENDANTS

BEFORE HON. MR. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The Plaintiff brought this suit against the Defendants for General damages of Shs. 600,000,000/= for wrongful arrest, imprisonment, malicious prosecution and intentionally causing emotional distress to him. The suit was initially brought against the 1st Defendant however an application was later made to add the 2nd Defendant.

The facts of this case are that the Plaintiff alleges that the 1st Defendant on 20th November, 2006, made a false report at Kasangati Police Station against the Plaintiff that the Plaintiff had forged and uttered false documents of the transfer

from and sale of land agreements of land which belonged to the Defendant's deceased husband. That it was on the basis of this report that the 2nd Defendant's agents arrested the Plaintiff on 27th November 2006 and produced in Court.

The Plaintiff was charged with five counts of forgery and five counts of uttering false documents and he was arraigned before Grade One Magistrate and was later acquitted on all counts, however on 24th June 2009, the Director of Public Prosecution preferred an Appeal against the Plaintiff which was dismissed on 10th March 2010.

The Plaintiff avers that he was arrested unlawfully and without reasonable cause that he had committed a criminal offence and he contends that he was unlawfully imprisoned.

On the other hand the 1st Defendant admitted made the report to the Police because she had suspected fraud. The 2nd Defendant denies all allegations of malicious prosecution and states that this suit is barred by law. The suit was filed in 2014 and the 2nd Defendant was brought as a party to the suit by an Amended Plaintiff that was filed on the 5th January, 2017 and served on the 2nd Defendant on the 11th January, 2017.

The Plaintiff was represented by Counsel Albert Mukasa of M&K Advocates whereas the 1st Defendant was represented by Counsel John Mike Musisi of JM Musisi Advocates & Legal Consultants.

At the scheduling conference the following issues were raised:

1. *Whether the Plaintiff was maliciously prosecuted by the Defendants?*

2. *What remedies are available to the parties?*

DETERMINATION

The parties filed written submissions which were considered by this court.

ISSUE 1

Whether the Plaintiff was maliciously prosecuted by the Defendants?

In his submissions, counsel for the Plaintiff stated that he entered into a sale agreement with the 1st Defendant's late husband, Moses Nsubuga for land comprised on Block 122, Plot 32 measuring 30 Acres and that the 1st Defendant's late husband signed transfer and mutation forms in the names of the Plaintiff. That after the signing, the latter notified the LC1 Executive of Mawule village about the sale. That the 1st Defendant being among of the LC1 Executive Committee as the time working as the Finance, had full knowledge about the said land.

Plaintiff's counsel also submitted that the Defendants set the law in motion by instituting criminal charges against the Plaintiff which were terminated in his favor as evidenced by Judgments marked P.Ex1 and P.Ex2 and that the proceedings were brought without reasonable or probable cause.

The Plaintiff was one of the witness and at the trial to prove his case he testified that upon his arrest, detention and subsequent prosecution, the 1st Defendant used it as an opportunity to procure a special certificate of title to the land and that the Plaintiff wrote several letters to the Directorate of Public Prosecutions

contesting the charges and requesting a review of the files to determine the truth and proof of the matter however the DPP replied with a letter advising the lawyers to go ahead and defend the Plaintiff in Court. The Plaintiff testified that in the event of the malicious prosecution, he was deprived of his land, that his image as a person of repute and integrity was tainted as many people begun shunning him as had been labelled a fraudster and a and grabber.

1st Defendant's counsel in response submitted that the late Nsubuga gave the title to two individuals a one Sam Kamyia and Evaristo Kayiira who used it to borrow money in the defunct Co-operative Bank, that the 1st Defendant was not aware of the transaction not until the death of her husband when she learnt from Sam Kamyia who informed her that Evaristo Kayiira gave up the title as security in Co-operative Bank.

The 1st Defendant also learnt from the letter Ex.D2 that the said Evaristo Kayiira had failed to pay the loan and was led to Bank of Uganda which was now handling the affairs of the defunct Co-operative Bank.

The 1st Defendant further testified at trial that she learnt from Bank of Uganda that a total sum of 4,394,778/= was owing to the bank and she was advised to obtain letters of administration for the estate of her deceased husband to be able to pay the loan and recover the title. She thereafter paid off the loan and requested for the duplicate certificate of title from bank officials who failed to find it and through M/s Adriko & Karugaba Advocates she processed a special title. She further testified that she learnt about the Plaintiff during the time when she was trying to retrieve the title from the bank that the Plaintiff was claiming to

have purchased the land from the late Nsubuga. Counsel submitted that from then the 1st Defendant started getting disturbance from the Plaintiff's agents who were encroaching on the land. M/s Adriko & Karugaba wrote (ExD8) to the LC1 chairman of Mawule village asking for protection of the 1st Defendant, however they were informed (Ex.D9) that the land had been subdivided into plots 82 & 83 and that plot 82 was sold to the Plaintiff. The bank responded (Ex.D10) to the LC1 chairman that there could not have been such a sale when the title was already mortgaged to the bank. Counsel further submitted that the 1st Defendant through M/s Zaabwe & Co. Advocates requested for evidence of any sale from the Plaintiff who produced two (2) sale agreements ExD11 and ExD12. The 1st Defendant suspected fraud and reported the matter to the Police.

The 2nd Defendant submitted that the criminal matter emanated from the land wrangle that the Plaintiff and the 1st Defendant had which was indicated in their testimonies. And that the Plaintiff's character pointed out that he knew he was wrong in the criminal case that is why he did not file this suit until the criminal case was long disposed of and that the Defendant filed an appeal because they knew they had a good case and that they should have won. If at all there was malicious prosecution, they would not have gone to the appeal.

Counsel for the 2nd Defendant further submitted that the matter was brought against the 2nd Defendant over 7 years from the time the cause of action arose without an application for extension of time or even a reasonable cause for doing so, therefore the matter is barred by law.

The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice.

According to Odunga's Digest on Civil Case Law and Procedure page 5276, the essential ingredients to prove malicious prosecution are as follows:

1. The criminal proceedings must have been instituted by the defendant
2. The defendant must have acted without reasonable or probable cause
3. The defendant must have acted maliciously
4. The criminal proceedings must have been terminated in the plaintiff's favor.

In this case, there is no doubt that the defendant instituted criminal proceedings against the plaintiff which proceedings were terminated in the plaintiff's favor hence proving two of the essential ingredients of malicious prosecution.

The court should now determine whether the defendant acted without reasonable or probable cause.

According to **Dr. Willy Kaberuka V Attorney General Civil Suit No. 160 of 1993 [1994] II KALR 64**, Byamugisha J stated that

" The question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test and that is to say, to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consists of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary prudent and cautious man to the extent of believing that the accused is probably guilty."

In the present case, the 1st Defendant adduced evidence that the Certificate of Title was used as security to acquire a loan by Evaristo Kayiira from the defunct

Co-operative bank and at all times the title remained in their custody and after handed it to Bank of Uganda where she repaid the loan and later procured a Special Certificate of Title

Counsel for the 1st Defendant submitted that the prosecution of the plaintiff was done basing on the fact that the certificate of title had at all material time been in the Co-operative bank and later Bank of Uganda possession yet the Plaintiff claimed to having bought the land from the Late Nsubuga.

The 2nd Defendant submitted that there was reasonable and probable cause to have the Plaintiff prosecuted because there existed a land wrangle between the Plaintiff and the 1st Defendant and that the Defendant filed an appeal because they knew they had a good case and that they should have won.

On that basis I find that the Defendants acted with reasonable or probable cause. The 2nd Defendant's officials acted within the law when they arrested the Plaintiff upon a report made by the 1st Plaintiff.

With regard to the Defendants having acted maliciously, counsel for the Plaintiff failed to submit that malice had been established as inferred from the failure of the Defendants to consult the law and or act prudently and cautiously as not to arrest detain and charge the Plaintiff who had no case.

Counsel for the 1st Defendant on the other hand submitted that it was held in the case of *Kindi Eria. Zizinga Albert -vs- Makerere University Kampala (1977) HCB 180*, that;

“In any event, where prosecution is instituted by the Police or other investigative or prosecutorial agency after investigations, the person giving information is not liable for malicious prosecution unless the information was given with malice.”

The 2nd Defendant cited **Section 23 of the Police Act Cap 303** which provides that;

“a police officer may without a Court Order and without a warrant arrest a person if he or she has a reasonable cause to suspect that the person has committed or is about to commit and arrest able offence .”

It was further submitted that the police’s duty is to ensure that they arrest where there is sufficient suspicion to and submit the file for sanctioning by the Director Public Prosecutions under **Article 120 of the Constitution of Uganda of 1995** to court and tries the matter hence the verdict.

The 2nd Defendant invited court to find that the Director of Public Prosecution did not act with malice because the sanction of a file for prosecution is based on the evidence in the file.

According to **Gwagilo V Attorney General [2002] 2 EA 381 (CAT)**, malice in the context of malicious prosecution is an intent to use the legal process for some other purpose than its legally appointed and appropriate purpose and the appellant could prove malice by showing for instance that the prosecution did not honestly believe in the case which they were making that there was no evidence at all upon which a reasonable tribunal could convict that the prosecution was mounted a wrong motive and show that motive.

Hon. Mr. Justice Bashaija K. Andrew in **Mugabi v Attorney General Civil Suit No. 133 of 2002** held that

“It is my view that malice has been established as can be inferred from the Police’ failure to consult the law and/ or to act as a prudent and cautious person would do, and also in acting without reasonable cause. The Police officers at Lugazi Police Station failed even in the simplest of the investigative tasks of retaining copies of the sale agreement Exhibit P III, which would have helped in ascertaining from the witnesses thereto the ownership of the motorcycle. Instead, they kept the Plaintiff reporting to Police for over twelve times without bothering to investigate until when they eventually arrested, detained and subsequently had him prosecuted. This is a manifestation of malice as it was a reckless disregard of the law and the Plaintiff’s legal rights.”

Relating that to the present circumstances, the 1st Defendant adduced evidence showing the basis of the report made to the Police and the 2nd Defendant acted in conformity of the law to arrest, imprison and prosecute the Plaintiff.

The 2nd Defendant submitted on an aspect of dismissal that the 1st Defendant made the report on the 20th November, 2006 and on 5th January, 2017 the Plaintiff amended the plaint to add the 2nd Defendant this made the suit barred by law since it was brought against the 2nd Defendant over seven (7) years from the time the cause of action arose without an application for extension of time or even a reasonable cause for doing so.

The 2nd Defendant cited **Section 3(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72** which stipulates that;

“No action founded on tort shall be brought against the Government or a local authority or ... after the expiration of two years from the date on which the cause of action arose.”

And also cited the case of *Picfare Industries Ltd vs Attorney General & Anor M.C No. 258/2013* that Justice Musota while dismissing a suit for being time barred held at pg. 4 that;

“Statutes of Limitation are in their nature strict and inflexible enactments. Their overriding purpose is ‘interest reipublicalut sit finis litum’, meaning litigation shall be automatically stifled after a fixed length of time irrespective of merits of the case.”

Basing on all the above, the plaintiff has failed to clearly fulfil all the essential ingredients to prove malicious prosecution and the 2nd Defendant proved that the suit is barred by law and should be dismissed.

I therefore find that the Plaintiff brought an action against the 2nd Defendant out of time

Issue 2

What are the remedies available to both parties?

The Plaintiff pleaded for general damages of Ugx. 600,000,000/= and costs for wrongful arrest, imprisonment, malicious prosecution and intentionally causing emotional distress.

The Defendants opposed the same in their written submissions citing inconsistencies in the plaintiff's evidence and prayed for the same to be dismissed with costs.

Since I have ruled on issue one in the negative, the plaintiff is not entitled to general damages.

Counsel for the plaintiff failed to submit on how he suffered damages however only stated that the prosecution affected his work because he was no longer active and lost clients as a result however there was failure to elucidate how the loss of clients was as a result of the arrest, imprisonment and prosecution.

With regard to general damages, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Respondent. This was further discussed in the case of *Muhammed Tumusiime vs Uganda Revenue Authority Civil Suit No. 480 of 2016*.

Clearly the plaintiff failed to prove that he was inconvenienced by the malicious prosecution by the Defendants hence I will not allow the prayer for general damages pleaded by the plaintiff.

As to the prayer for costs, **Section 27 of the Civil Procedure Act** provides that costs shall be in the discretion of the court and that costs shall follow the events unless the court has some good reasons otherwise to order. In **UDR vs Muganga (1981) HCB 35 Manyindo J** (as he then was) held that costs should follow the events unless the court orders otherwise.

I therefore dismiss the suit with costs to the Defendants.

I so order.

SSEKAANA MUSA

JUDGE

01st November 2019