

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT ELDORET  
CIVIL CASE NO. 20 OF 2021

JEREMIAH KIGORO NDUNGU.....PLAINTIFF/RESPONDENT

VERSUS

CROWN PAINTS KENYA LTD.....1<sup>ST</sup> DEFENDANT

ANTI-COUNTERFEIT AGENCY.....2<sup>ND</sup> DEFENDANT/APPLICANT

THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT

RULING

1. The Application before Court basically seeks the striking out of this suit on various grounds.
2. By the Plaint dated 28/07/2021, the Plaintiff filed this suit on 2/08/2021 through Messrs **Mathai Maina & Co. Advocates**. The Plaintiff alleged that on 22/04/2013, the police from Eldoret Police station arrested and detained him following a complaint by the 1<sup>st</sup> Defendant made to the 2<sup>nd</sup> Defendant that the Plaintiff was engaged in trade of counterfeit products bearing its brand, Crown, at his Eldoret Hardware along Moi Street, Eldoret town, the Plaintiff was subsequently charged at the **Eldoret Chief Magistrates Court** vide **Criminal Case No. 1831 of 2013** with a total of 12 counts of having in possession counterfeit goods, the trial lasted from 2013 up to 27/07/2020 when the Plaintiff was cleared of all the counts and set at liberty.
3. He pleaded further that he was arrested and detained in the cells before being released later on bond, he procured the services of an Advocate to defend him, the charges were preferred by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants upon instigation by the 1<sup>st</sup> Defendant while fully aware that the Plaintiff only dealt with goods procured from reputable manufacturers, his business was disrupted when a total of 138 containers were seized, detained and transported to Nairobi for testing, he lost the value of the containers of paints valued at Kshs 350,000/- plus profits that would have been earned, on various dates he was to attend Court for trial, he was later put on his defence having been found to have a case to answer, on all these occasions, he had to close his shop and drive himself to Court at great cost, the arrest and prosecution were malicious, wrongful, arbitrary and unjustified, as a result he has been exposed to unwarranted scorn, odium, ridicule and contempt and has been injured in his reputation, character and shunned by friends and family members.

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 HIGH COURT OF KENYA - ELDORET

4. In view of the foregoing, the Plaintiff prayed for damages for poor health developed as a result of the prosecution, damages for defamation, special damages, costs of the suit and interest.
5. The Defendants filed their Statements of Defence denying the Plaintiff's claims. The 1<sup>st</sup> Defendant filed on 29/09/2021 through Messrs **Kiingati Ndirangu & Associates**, 2<sup>nd</sup> Defendant on 2/09/2021 through Messrs **J.O. Adera & Co.** and the 3<sup>rd</sup> Defendant on 14/06/2022 through the office of the **Hon. Attorney General**.
6. On 24/01/2022, the 2<sup>nd</sup> Defendant filed the present Application by way of the Notice of Motion of the same date wherein it sought the following orders:
  - b) The Plaintiff and Reply to Defence herein dated 28<sup>th</sup> July 2021 and 6<sup>th</sup> October 2021 respectively, be struck out.
  - c) The 2<sup>nd</sup> Defendant be awarded costs.
7. The Application is premised on the grounds set out on the face thereof and supported by Affidavit sworn by one **Elina Mrari** who described herself as an Inspector with the 2<sup>nd</sup> Defendant in charge of its Eldoret regional office. It is brought under the provisions of "**Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Section 3(1) of the Public Authorities Limitation Act, Chapter 39 of the Laws of Kenya, Sections 2 & 4 of the Government Proceedings Act, Chapter 40 of the Laws of Kenya and all other enabling provisions of the law**".
8. In the Affidavit, the deponent stated that on 15/04/2013 a search was conducted at the Plaintiff's business premises and seized 138 tins labelled "Crown Paints" valued at Kshs 255,795/-, on 20/05/2013 the 1<sup>st</sup> Defendant through their Laboratory Analyst conducted analysis and testing on all the seized paints, the resultant Report revealed that 33 tins of the "Crown paints" were genuine and 105 tins were counterfeit, the Plaintiff was then charged in Court on 24/05/2013 in **Eldoret Criminal Case No. 1831 of 2013**, the prosecution adduced its evidence and the Plaintiff was placed on his defence, on 23/12/2019 Judgement was delivered acquitting the Plaintiff of all charges.
9. The deponent then stated that the cause of action for malicious prosecution arose on 23/12/2019 following the acquittal, time began to run as from that date, a claim in malicious prosecution should be instituted within 12 months from the date that the cause of action arose, the Plaintiff filed the suit on 2/08/2021 well beyond the statutory 12 months' **Eldoret High Court Civil Case E020 of 2021**

timeframe, the law does not provide for extension of time in respect of claims on malicious prosecution, the claim is therefore incompetent and cannot stand. He added that the 2<sup>nd</sup> Defendant is a State Corporation and a claim in tort against the Government must be brought before the end of 12 months from the date on which the cause of action accrued.

### Plaintiff's Response

10. In opposition to the Application, the Plaintiff relied on the Replying Affidavit sworn by himself and filed on 13/07/2022. He deponed that upon delivery of the Judgment in the criminal case Court file he requested for copies of the typed proceedings for purposes of filing the suit on 20/07/2020, however, the Court file disappeared and has never been found to date, he delivered several letters to the Chief Magistrate in regard to the issue but the same did not bear fruit, the disappearance appears to be a well calculated move to bar him from achieving justice since the file disappeared after he requested for the proceedings, pursuant to **Article 165 of the Constitution**, the Court has powers to make the ends of justice meet, it is difficult to prosecute this matter in the absence of the proceedings and Judgment of the criminal Court case and that he has a legitimate case before the Court. Finally, he added that the copy of the Judgment exhibited by the 2<sup>nd</sup> Defendant is not certified and hence its authenticity cannot be verified.

### Hearing of the Application

11. It was then directed that the Application be canvassed by way of written Submissions. Pursuant thereto, the 2<sup>nd</sup> Defendant (Applicant) filed its Submissions on 18/11/2022 while the Plaintiff filed earlier on 14/07/2022. The 1<sup>st</sup> Defendant's Submissions and "Grounds in Support" of the Application do not bear the Court stamp to indicate when they were filed but the same are both dated 28/11/2022.

### 2<sup>nd</sup> Defendant's Submissions

12. Counsel for the 2<sup>nd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant is not the **Director of Public Prosecutions (DPP)** who has the Constitutional preserve and independence under **Article 157(10) of the Constitution** to initiate and undertake criminal prosecutions, consequently the 2<sup>nd</sup> Defendant cannot be accused of malicious prosecution, the law on malicious prosecution is fairly well settled, the essential ingredients have been restated by the Courts on several occasions over time. He cited the Court of Appeal case of **Abubaker Simba v. Stephen N. Wambari, Civil Appeal No. 131 of 1991** and submitted that in that case, the Court stated the ingredients of the tort of malicious prosecution, the institution and continuation of criminal proceedings is the preserve of the **DPP** under **Article 157(6)(a)** of

the **Constitution**, the **DPP** is an independent constitutional office holder that can sue and be sued in his own name, has not been sued in these proceedings, the omission to include the **DPP** is fatal to the suit, the first essential element to sustain a claim for malicious prosecution is non-existent and has not been proved, under **Article 157(10)** of the **Constitution**, the **DPP** acts independently. He cited the cases of **William Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 4 Others**, **Court of Appeal at Nairobi Civil Appeal No. 102 of 2016**, **Republic v. William Macharia Murathe**, **High Court of Kenya Miscellaneous Criminal Application No. 15 of 2015** and various others. He therefore submitted that the 2<sup>nd</sup> Defendant had no influence or role to play in the decision to initiate and undertake the prosecution of the Plaintiff and thus the 2<sup>nd</sup> cannot be held liable for such a decision.

13. Counsel submitted further that the 2<sup>nd</sup> Defendant acted reasonably and with probable cause, the evidence in the criminal trial demonstrates that the Plaintiff was placed on his defence and gave sworn testimony, the trial Court having found that the Plaintiff had a case to answer decimated the second ingredient for the tort of malicious prosecution, namely, absence of reasonable and probable cause, which connotes factual basis to prosecute, to allow this suit would mean that this Court will be revisiting the issue of the evidentiary standard of reasonable and probable cause, a situation that is untenable and potentially without jurisdiction. He cited the case of **Mbowa v. East Mengo District Administration [1972] 1 EA 352**, **Senator Johnstone Muthama v. Director of Public Prosecutions & 3 Others**, **High Court of Kenya at Nairobi, Petition No. 430 of 2015** and several others.
14. According to Counsel, the third essential ingredient, namely, that the 2<sup>nd</sup> Defendant acted maliciously has not and cannot be met stemming from the above submission that the initiation and of prosecution is the independent preserve of the **DPP**. He cited the case of **Nzoia Sugar Company Limited v. Fungututi**, **Court of Appeal at Kisumu Civil Appeal No. 7 of 1987** and added that the 2<sup>nd</sup> Defendant is an investigative agency that proceeds on formal complaints laid and paid for under **Section 33** of the **Anti-Counterfeit Act** and **Regulation 13** of the **Anti-Counterfeit Regulations, 2010**, in the instant case, it never acted in carrying out the investigations on its own motion, it was moved, no evidence was led before the criminal Court to demonstrate that the complainant, 1<sup>st</sup> Defendant, knew the Plaintiff or had a prior ill-will against him, no evidence was led to demonstrate that the 2<sup>nd</sup> Defendant had any prior contact with the Plaintiff that could give rise to an inference of malice, it would be harsh and unconscionable to drag the 2<sup>nd</sup> Defendant through a trial that at a cursory glance establishes no cause of action in malicious prosecution

15. On the issue of the suit being time-barred, Counsel reiterated the matters set out in the 2<sup>nd</sup> Defendant's Supporting Affidavit and added that the 2<sup>nd</sup> Defendant is "government" and consequently, any suit against it for malicious prosecution, must be brought within a period of 12 months as provided under **Section 3(1) of the Public Authorities Limitation Act**. Apart from the said Act, Counsel reiterated that the suit is also barred under **Section 4(2) of the Limitation of Actions Act** and **Section 20 of the Defamation Act**. He cited the case of **Association of Retirement Benefits Scheme v Attorney General & 3 Others, High Court of Kenya at Nairobi, Petition No. 170 of 2016** and submitted that the 2<sup>nd</sup> Defendant is a civilian law enforcement agency performing public duties on behalf or as part of the national government, the 2<sup>nd</sup> Defendant is a creature of **Section 3 of the Anti-Counterfeit Act** has the responsibility of protection of intellectual property rights, the 2<sup>nd</sup> Defendant performs a public function as an agent or instrument of the national government, it is a public body financed by the national government and is therefore "government" or "state", it comes within the ambit of **Section 3(1) of the Public Authorities Limitation Act**.
16. On the argument that suits premised on tort such as malicious prosecution cannot be brought after the expiry of 12 months, Counsel cited the case of **Jacob Juma & Another v. Commissioner of Police & Another, High Court at Nairobi, Civil Suit No. 661 of 2007, Jared Kerongo Bosire v. Kenya Railways Corporation & Another, Employment and Labour Relations Court at Nairobi, Cause No. 551 of 2015** and several others. He also submitted that the 3<sup>rd</sup> Defendant, **Hon. Attorney General**, too is "government".
17. Regarding the claim that the suit is time-barred under the provisions of **Section 4(2) of the Limitation of Actions Act**, Counsel cited the case of **Harrison Kariuki Muru v. National Bank of Kenya Limited & Another, High Court of Kenya at Nyeri Civil Case No. 97 of 2012**.
18. In respect to the claim that the suit is time-barred under the provisions of **Section 20 of the Defamation Act**, Counsel cited the case of **Nzoia Sugar Company Limited v. Collins Fungututi, Court of Appeal at Kisumu, Civil Appeal No. 7 of 1987**.
19. Counsel submitted further that the suit as framed and presented discloses no cause of action in two substantive and distinctive respects, first that the Plaintiff was placed on his defence and consequently it follows that there is a finding of a Court of competent jurisdiction that there was a case put forward by that prosecution that had factual basis, secondly, the Plaintiff has attempted to mount a cause of action on defamation but the same must equally fail as there are no words that have been set out in the Plaint contrary to the provisions of **Order 2**

Rules 7(1) of the Civil Procedure Rules. He again cited the case of **Harrison Kariuki Muru v. National Bank of Kenya Limited (supra)**, **Edward Shakala v. Rosemary Halubwa Shakala & Another, High Court of Kenya at Nakuru, Civil Appeal No. 49 of 2011** and **Hon. Kennedy Nyakundi v. Jackson Ongubo & Another, High Court of Kenya at Kisii, Civil Case No. 10 of 2015**.

20. Counsel further submitted that Plaintiff is guilty of laches in that Judgment in the criminal case was delivered on 23/12/2019 but the Plaintiff first applied for certified proceedings on 2/07/2020, over 7 months after delivery of the Judgment, the Plaintiff waited for another 1 year to send a follow-up letter dated 3/06/2021, close to 1 year later, the Plaintiff has therefore solely contributed to the suit being time barred and he is the author of his own misfortune, he should suffer the consequences being the striking out of the instant suit. Counsel cited the cases of **Chief Land Registrar & 4 Others v. Nathan Tirop Koech & 4 Others, Civil Appeal Nos. 51 & 58 of 2016 {Consolidated}** and **Ephraim Kanuthu Mwangi v. Muthirithia Farmers Co. Limited & Another, Court of Appeal at Nakuru, Civil Application NAI 333 of 2005 {NAK. 17/2005}**.
21. Further, Counsel urged that the Plaintiff has not been candid with the Court and has suppressed or failed to disclose material and relevant facts in that the Plaintiff has not explained the delays referred to above, the Plaintiff has attached a letter that is neither signed or stamped and did not even supply a copy of the proceedings and Judgment of the criminal case although the same is indicated in his List of documents. He cited the case of **re Estate of Julius Ndubi Javan (Deceased), High Court of Kenya at Meru, Succession Cause No. 720 of 2013**.
22. Counsel then distinguished the authorities cited in the Plaintiff's Submissions and termed them as inapplicable and irrelevant to the circumstances of this case.

#### Plaintiff's Submissions

23. Counsel for the Plaintiff cited **Section 3 and 5 of the Anti-Counterfeit Act** and submitted that the 2<sup>nd</sup> Defendant is a body corporate with perpetual succession and a common seal and is capable of suing and being sued, pursuant thereto, **Section 3(1) of the Public Authorities Act** does not apply to this suit. He cited the case of **Gurdoba Enterprises vs Kenya Revenue Authority, HCCC No. 676 of 1998**, **Menginya Salim Murgani vs Kenya Revenue Authority, HCCC No. 1139 of 2002** and **Kenya Revenue Authority vs Habinana Sued Hemed & Another [2015] eKLR**.

24. Counsel then reiterated the statements made in the Plaintiff's Replying Affidavit that the Criminal Court case file went missing upon the Court delivering Judgment which file, to date, has not been recovered. He termed this a clear indication that there was foul play.

**1<sup>st</sup> Defendant's Submissions and Grounds in Support of the Application**

25. As already stated, there are in the Court file, 1<sup>st</sup> Defendant Submissions and "Grounds in Support" of the Application which however do not bear the Court stamp to indicate when they were filed. They are however both dated 28/11/2022.

26. In the 1<sup>st</sup> Defendant's said Grounds, it is stated that the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is time barred and the suit against the 3<sup>rd</sup> Defendant cannot stand in the absence of the 3<sup>rd</sup> Defendant.

27. In the Submissions, Counsel for the 1<sup>st</sup> Defendant cited **Section 3(1)** of the **Public Authorities Limitation Act** which bars proceedings founded on tort being brought against the government after the end of 12 months from the date on which the cause of action accrued, this suit was filed after 12 months from the date when the Plaintiff was acquitted, although the Plaintiff contends that the Act does not envisage the 2<sup>nd</sup> Defendant as being part of "government", there is no such contention about the 3<sup>rd</sup> Defendant, as such, the suit against the Attorney General was filed out of time and should be struck out. He cited the case of **YH Wholesalers Limited v Kenya Revenue Authority [2021] eKLR**.

28. Counsel elaborated that the suit against the 1<sup>st</sup> Defendant cannot stand if the suit against the 3<sup>rd</sup> Defendant is struck out for the reason that the proper party in a claim for malicious prosecution is the Attorney General. He cited the case of **Douglas Odhiambo Apel & Another v Telkom Kenya Limited [2014] eKLR**.

29. Counsel also submitted that the suit is fatal for failure to enjoin the **DPP** who has the constitutional mandate under **Article 157** of the **Constitution** to prosecute criminal cases on behalf of the State. He cited the case of **Johnson Kobia M'Mpwi v Kenya Revenue Authority & Another [2008] eKLR** and submitted that the functions of the Attorney General to prosecute were conferred upon the **DPP**. He cited the case of **Susan Mutheu Muia v Joseph Makau Mutua [2018] eKLR**.

**Analysis & Determination**

30. I have considered the Affidavits, Submissions, authorities and the pleadings presented. In my view, the issues that arise for determination are the following:

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- i) Whether the claim for malicious prosecution discloses a reasonable and probable cause of action.
- ii) Whether the claims for malicious prosecution and for defamation against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant are time barred under the **Public Authorities Limitation Act**.
- iii) Whether the claim for defamation is time barred under the **Limitation of Actions Act** and also the **Defamation Act**.
- iv) Whether the collapse of the suit against the Attorney General renders fatal the claim for malicious prosecution as against the 1<sup>st</sup> Defendant.
- v) Whether the omission to plead particulars of the alleged defamatory words in the Plaint renders the claim for defamation fatal.
- vi) Whether the suit is therefore fatally defective.

31. I now proceed to analyze the said Issues

- i) Whether the claim for malicious prosecution discloses a cause of action

32. The 2<sup>nd</sup> Defendant correctly contended that the elements that must be satisfied for a claim for malicious prosecution to succeed were laid out in the celebrated case of **Murunga v The Attorney General {1997} KLR 138** as follows.

- a. **That the prosecution was instituted by the Defendant or by someone for whose acts he is responsible.**
- b. **That the prosecution was instituted without reasonable and probable cause.**
- c. **That the prosecution was actuated by malice.**
- d. **That the prosecution was terminated in the Plaintiffs' favour.**

33. However, while no doubt, the above is a correct statement of the law, the said elements set out cannot be determined at interlocutory stage since they are matters of fact and therefore only determinable after a full trial. Determination of whether a suit discloses a cause of action is a preliminary exercise that is conducted by simply interrogating the Plaint as framed, without considering the evidence to support the claim. The moment a Court has to go further



and examine the supporting evidence then that cannot be an exercise of determining whether a cause of action is disclosed.

34. In the *locus classicus* case of *DT Dobie & Co (K) Ltd v Muchina*, [1982] KLR, the Court of Appeal defined the term “reasonable cause of action” to mean the following:

“an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ...”.

35. The Court went further and held that “a cause of action” refers to an act on the part of the Defendant which gives the Plaintiff a cause of complaint. **Madan JA** then expressed himself as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ....”

36. Contrary to the above guidelines, what the 2<sup>nd</sup> Defendant is inviting the Court to do is to reach a finding that the Plaintiff has not proved his malicious prosecution case to the standard required. This therefore means that the Court is being asked to painstakingly, at this preliminary stage, examine and dissect the supporting evidence. As enunciated in the case of **D.T Dobie (supra)**, such exercise cannot be undertaken by the Court at this stage before witnesses testify. This ground therefore fails.

ii) **Whether the claims for malicious prosecution and for defamation against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant are time barred under the Public Authorities Limitation Act**

37. The cause of action in this suit is premised on malicious prosecution and defamation. It is not in dispute that these are claims in tort. The 3<sup>rd</sup> Defendant, the **Hon. Attorney General**

has not participated in the Application but there is no doubt that the issue of limitation of time raised equally touches on that office. On its part, the 2<sup>nd</sup> Defendant contends that it is “government” and therefore, by virtue of the **Public Authorities Limitations Act**, the claim against it ought to have been brought before the expiry of 12 months after accrual of the cause of action.

38. Section 3(1) of the **Public Authorities Limitation Act** provides as follows;

“(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.”

39. Does the 2<sup>nd</sup> Defendant qualify to be deemed “government” within the meaning contemplated above?

40. In the Indian Supreme Court case of **International Airport Authority (R.D Shetty) vs The International Airport Authority of Indian & Ors, {1979} 1 S.C.R. 1042**, which was cited with approval by **Hon. John M. Mativo** (as he then was) in the case of **Association of Retirement Benefits Schemes v Attorney General & 3 others [2017] eKLR**, the Court set the test for determining whether an entity is a government body as follows:

“(a) consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government;

(b) where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;

(c) it may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State

(d) whether the body has deep and pervasive State control,

(e) whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and

(f) if a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.

The Court went on to state that if after the consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would be an 'authority' and therefore, part of the definition of 'State' within the meaning of the expression used in the Constitution.”

.....

I adopt the above reasoning and would add that based on criteria numbers (c), (d) and (e), the interested party fits the bill as an agency of the State or public body as it performs functions of a public nature and enjoy monopoly with regard to the services they provide. Secondly, the definition of a public body by Section 3(1) of the Interpretation and General Provisions Act points out the public nature of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents “Public body” has been defined therein as:

“any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature”.

41. In respect to the 2<sup>nd</sup> Defendant, in determining whether it is a State entity or “government”, I consider its functions as set out in Section 5 of the Anti-Counterfeit Authority Act as follows;

The functions of the Authority shall be to—

- (a) enlighten and inform the public on matters relating to counterfeiting;
- (b) combat counterfeiting, trade and other dealings in counterfeit goods in Kenya in accordance with this Act;
- (c) devise and promote training programmes on combating counterfeiting;
- (d) co-ordinate with national, regional or international organizations involved in combating counterfeiting;
- (da) advise the government through the Cabinet Secretary on policies and measures concerning the necessary support, promotion and protection of intellectual property rights as well as the extent of counterfeiting;

(db) to carry out inquiries, studies and research into matters relating to counterfeiting and the protection of intellectual property rights.

(e) carry out any other functions prescribed for it under any of the provisions of this Act or under any other written law; and

(f) perform any other duty that may directly or indirectly contribute to the attainment of the foregoing.

42. From the functions above, it is evident that the 2<sup>nd</sup> Defendant performs functions of a public nature. Further, it enjoys a monopoly with regard to the services it provides. It is therefore my finding that the 2<sup>nd</sup> Defendant meets the threshold to be considered as 'government' and therefore falls within the meaning of "government" contemplated at **Section 3(1)** of the **Public Limitation Authorities Act** and therefore the Section applies to it.

43. As regards the 3<sup>rd</sup> Defendant, it is the Office of the Honourable Attorney General and draws its mandate from **Article 156** of the **2010 Constitution of Kenya**. That **Article** vests in the 3<sup>rd</sup> Defendant the duty of the principal legal advisor to the government. The **Office of the Attorney General Act No. 49 of 2012** spells out the functions of the office, which include:

- a) advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;
- b) advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;
- c) negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies;
- d) coordinating reporting obligations to international human rights treaty bodies to which Kenya is a member or on any matter which member States are required to report;
- e) drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters;

- f) reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire purchase and coat of arms;
- g) reviewing and overseeing legal matters pertaining to the administration of estates and trusts;
- h) in consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;
- i) representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act (Cap. 40.);
- j) representing the Government in matters before foreign Courts and tribunals; and
- k) performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General.

44. Subjecting the 3<sup>rd</sup> Defendant to the test set out in the case of **Association of Retirement Benefits Schemes v Attorney General & 3 others (supra)**, it is evident that by virtue of its functions, the 3<sup>rd</sup> Defendant is indeed “government” within the meaning attributed in **Section 3(1) of the Public Authorities Limitation Act**.

45. It therefore follows that both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are “government” or “state entities” and therefore, the provisions of the **Public Limitation Authorities Act** apply to both of them. Having found as such, I now proceed to determine whether the claims for malicious prosecution and defamation were filed within the limitation period of 12 months prescribed for suing government bodies in claims for torts.

46. According to the Plaintiff, the criminal case lasted up to 27/07/2020 when he was cleared of the charges and set at liberty. On its part, the 2<sup>nd</sup> Defendant submitted that the acquittal was in fact on 23/12/2019. In an attempt to prove the correctness of this date, the Plaintiff exhibited a copy of the Judgment. On his part, the Plaintiff submitted that the criminal case file disappeared and as such, he was unable to obtain a copy of the Judgment to supply to this Court. He then pointed out that the copy exhibited by the 2<sup>nd</sup> Defendant is not certified and cannot therefore be relied upon.

47. Be that as it may, the suit having been filed on 2/8/2021, both respective dates alluded to by the parties (27/07/2020 as stated by the 2<sup>nd</sup> Defendant, and 23/12/2019 as stated by the Plaintiff) are well outside the 12 months' limitation timeline since time began to run as from the date of acquittal. In the circumstances, I have little difficulty in reaching the finding that the Plaintiff's claims against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant for malicious prosecution and for defamation, being torts, are both time-barred under **Section 3(1) of the Public Authorities Limitation Act**, having been filed outside the prescribed 12 months limitation period.

**iii) Whether the claim for defamation against all the Defendants is time barred under the Limitation of Actions Act and Defamation Act**

48. Section 4(2) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides as follows;

**“(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”**

49. On its part, Section 20 of the Defamation Act, Cap. 36 provides as follows;

**“Subsection (2) of section 4 of the Limitation of Actions Act (Cap. 22) is hereby amended by the addition thereto of the following:**

**Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”**

50. The Plaintiff herein does not disclose when the claim for defamation is said to have accrued. However, logically, the very last date that the same could have accrued can only be, like in the malicious prosecution, at the date when the Plaintiff was acquitted in the criminal case. In regard thereto, I have already found that this suit was filed more than 12 months after the date of the acquittal.

51. In the circumstances, I again have little difficulty in finding that the claim for defamation against all the Defendants is also time barred under both the **Limitation of Actions Act** and **Defamation Act**.

iv) Whether the collapse of the suit against the Attorney General renders fatal the claim for malicious prosecution as against the 1<sup>st</sup> Defendant

52. The 1<sup>st</sup> Defendant has argued that the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants being time-barred, the suit against the 1<sup>st</sup> Defendant cannot stand in the absence of the 3<sup>rd</sup> Defendant. Counsel elaborated that this is for the reason that the proper party in a claim for malicious prosecution is the Attorney General.

53. In respect to this argument, in the case of **Douglas Odhiambo Apel & another v Telkom Kenya Limited Civil Appeal no 115 of 2006**, the Court of Appeal held as follows:

“The learned judge also found difficulty in having to assess damages for wrongful confinement and malicious prosecution yet, by the earlier consent alluded to, the claim against the Commissioner of Police and the Attorney-General had been withdrawn. The learned judge explained the difficulty as follows;

“The plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney-General as public Prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police, it was left to police to investigate the complaint and decide whether or not to charge the plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General.”

.....

Arguing the appeal, Mr. Nyamogo, the appellant’s learned counsel submitted that the learned judge ought simply to have assessed damages on the basis, not of the pleadings or submissions as he said he could not, but on the fact of liability having been settled by consent. He was emphatic that the removal of the Attorney-General from the suit ought not to have troubled the judge nor inhibited the suit as the respondent had voluntarily taken up the responsibility of the Attorney General and the Commissioner of Police.

.....

On the law of malicious prosecution, we do not doubt that the judge directed himself properly in holding that the claim lay as against the Attorney General

alone. He was also correct in holding that the withdrawal of the suit against the Commissioner of Police and the Attorney-General meant that that claim was essentially non-suited. In the case before us, however, that was not the end of the matter.”

54. My understanding of the statements above is that for a malicious prosecution suit without the **Director of Public Prosecution (formerly Attorney General)** being joined as a co-Defendant to succeed would be a herculean task. However, in my view, non-joinder of the **Director of Public Prosecutor (DPP)** cannot *per se*, render such suit fatal nor can it be deemed that such a suit does not at all disclose a cause of action. I see no reason why such a suit should not succeed where sufficient evidence is tendered against a Defendant, even where the **DPP** has not been joined as a co-Defendant. Granted, it will be very difficult to prove such a case to the required standards in the absence of the **DPP** being joined as a co-Defendant since it is the **DPP** who makes the decision to charge and prosecute. However, I do not believe that it is proper to strike out such suit at a preliminary stage before receiving evidence for the mere reason that such suit does not disclose a cause of action.

55. In the circumstances, I do not find that the collapse of the suit against the Attorney General and the 2<sup>nd</sup> Defendant renders fatal the claim for malicious prosecution as against the 1<sup>st</sup> Defendant.

v) **Whether the omission to plead particulars of the alleged defamatory words in the Plaintiff renders the claim for defamation fatal**

56. The 2<sup>nd</sup> Defendant has submitted that the claim for defamation must fail as there are no words that have been set out in the Plaintiff contrary to the provisions of **Order 2 Rules 7(1)** of the **Civil Procedure Rules** which provides as follows:

“Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.”

57. In respect to the above provision, I cite the decision of **Hon. Justice Mativo (as he then was) in Veronica Wambui v Michael Wanjohi Mathenge [2015] eKLR** where he held as follows:



“I find that in jurisdictions similar to ours, there is general unanimity that alleged defamatory words must be pleaded in the original language they were uttered. This position was ably stated in the case of Muir vs January [15] where it was held:-

“In an action for defamation the actual words used are the material facts. It is an elementary rule of pleading that all material facts must be pleaded. Therefore, in an action for defamation the actual words, or the part complained of, must be pleaded by setting them out in the declaration. It is not enough to describe their substance, purpose or effect. If the words are in a foreign language, the actual words used must be set out in the foreign language, followed by a literal translation. Failure to comply with this rule of pleading rendered the pleading defective, and in the absence of an amendment to cure the defect, the plaintiff could not obtain judgement on the basis of the pleading” [16]

The importance of the actual words uttered or published in pleadings has always been a recurrent reminder, since in libel or slander; the words used are the material facts and must therefore be set out in the statement of claim. The High Court of Uganda in Capt. Kibuika Mukasa vs The New Vision Publishing Co. Ltd [17] citing Nkalubo Vs Kibiringe [18] reiterated the above position and added:-

“In the instant case, it was not good to merely describe the substance of the articles complained of in one paragraph. The law requires the very words in the libel to be set out in order that the court may judge whether they constitute a ground of action. The plaintiff has not done this. For example, the Luganda words complained of ought to have been quoted verbatim and translated into English the official court language to make part of the pleadings.”

The purpose of pleadings is to enable the defendant to know the case he had to meet so that he could properly plead his defence with the result that the issues would be sufficiently defined to facilitate the appropriate questions for decision to be resolved. In a defamation case this purpose cannot be achieved unless the words are pleaded with sufficient particularity. Pleadings do not only define the issues between the parties for the final decision of the court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars or the allegations of which further and better

particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making. They act as a measure for comparing the evidence of a party with which he has pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial.

.....“

58. Similarly, in *Harrison Kariuki Muru v National Bank of Kenya Limited & Another* [2019] eKLR, Hon. Justice J. Ngaah reiterated the holding in the case of *Collins v Jones* (1955) All ER 145 in the following terms:

“The particulars of the facts and matters referred to in this rule would ordinarily constitute the words concerning the plaintiff which in his view, are calculated to lower him in the estimation of the right thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an amputation on him disparaging or injurious to him in his office, profession, calling trade or business”

.....

“A plaintiff in a libel action not only must set out with reasonable certainty in his pleading the words complained of, but also must be prepared to give such particulars as to ensure that he had a proper case to put before the court and is not merely fishing for one...”

59. Guided by the existing authorities on this issue, like the Judges in the cases above, I too, find that the omission to plead the alleged defamatory words in the Plaintiff is fatal to the claim for defamation. In short, the Plaintiff does not disclose a cause of action on defamation.

**vi) Whether the suit is therefore fatally defective**

60. In light of the above findings, it is clear that this suit has too many defects. Although some, such as the omission to properly plead the claim for defamation may be rectified through amendments, it will be pointless to grant the Plaintiff such remedy since I have already found that both the claims for malicious prosecution and for defamation are time-barred. Secondly, I have already found that as regards the malicious prosecution claim, the same will mostly obvious fail as against only the 1<sup>st</sup> Defendant when the claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been found to be incompetent. The suit cannot therefore be salvaged.

Conclusion

61. The upshot of the above findings is that this suit is incompetent and cannot be sustained. Accordingly, and since the 3<sup>rd</sup> Defendant did not participate in the Application giving rise to the orders now made herein, the suit is hereby struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6<sup>TH</sup> DAY OF OCTOBER 2023



.....

WANANDA J.R. ANURO

JUDGE