

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**HCT-00-CV-CS-0836 OF 2006**

**CHARLES HARRY TWAGIRA:.....PLAINTIFF**

**VERSUS**

**1. THE ATTORNEY GENERAL }  
2. SAMUEL KYOMUKAMA } :.....DEFENDANT**

**BEFORE:            HON. LADY JUSTICE ELIZABETH MUSOKE**

**RULING**

The plaintiff Charles Harry Twagira, brought this action seeking to recover jointly and severally from the defendants, Attorney General and Samuel Kyomukama general damages, punitive damages, special damages, interest and costs to the suit.

The plaintiff contends that the prosecution by the defendants was malicious and was without reasonable and probable cause in that no statements were recorded from the complainants before the plaintiff's arrest and the start of prosecution. He further contends

that no investigation relating to the preferred charges were carried out before the plaintiff's arrest and prosecution and that before the arrest and prosecution there was no evidence whatsoever to support the charges of embezzlement and theft.

The plaintiff alleges that the arrest and malicious prosecution by the defendants has occasioned embarrassment, ridicule, disgrace, emotional trauma, torture and loss of liberty to the plaintiff and his credit as a businessman, family man and respected member of the society and occasioned financial loss to the plaintiff.

The 1<sup>st</sup> defendant in his written statement of defence raised various defences, that the proceedings were legally and properly instituted and denies that he was vicariously liable for any loss, damage, suffering and or inconvenience experienced by the plaintiff as alleged among others.

The 2<sup>nd</sup> defendant in his written statement of defence also raised various defences.

At the commencement of the hearing of the suit, the 2<sup>nd</sup> defendant raised some points of law as follows:

- a) The suit is res judicata in so far as that the plaintiff had filed in the same court Civil Suit No. 0013 of 2002 and the subsequent appeals, which the 1<sup>st</sup> defendant later associated himself too.
- b) That the suit does not disclose the cause of action.

In his written submissions, Counsel for the 2<sup>nd</sup> defendant stated that the plaintiff in this suit in 2002 filed an application before this court vide Case No. 0013 of 2002, brought under Article 50 (1) of the Constitution and Rule 3 (1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules and Order 2 rule 7 and Order 48 rule1 (now Order 50).

He submitted that the suit was barred by the principle of res judicata, and should be dismissed. He submitted that the suit is brought jointly and severally against the defendants seeking for general, special and punitive damages for malicious prosecution, interest and costs of the suit. That these were the similar prayers sought in High Court case No. 0013 of 2002 and that both were heard and tried by the trial court and the appellate Courts.

Citing Section 7 of the Civil Procedure Act, Cap. 71, Counsel submitted that the issues in the former suit/application, that is, High Court Case No. 0013 of 2002 and the issues before this honourable court in this suit are similar and the same issues that were adjudicate upon to their finality.

He relied on the case of *Posiyano Semakula Vs Susane Magala [1979] HCB 90*, where the Court of Appeal held that;

***“In determining whether or not the suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the same court in another way, in form of a new cause of action a transaction which has already been presented before the court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of res judicata will then not only apply to all issues upon which the 1<sup>st</sup> court was called to adjudicate but also to all every issue which properly belonged to the subject of litigation and which might have been raised at the time through the exercise of due diligence by the parties”.***

In reply, Mr. Walubiri Peter, Counsel for the plaintiff did not agree. He argued that although the plaintiff had earlier filed Civil Suit No. 0013 of 2002 which led to subsequent unsuccessful appeals in the

Court of Appeal and in the Supreme Court, this alone did not make the present suit res judicata.

Counsel relied on Mulenga J.A.'s judgment in *Charles Harry Twagira Vs Ag. DPP and Kyomukama Civil Appeal No. 4 of 2007* to state that the cause of action in Civil Suit No. 0013 of 2002 was only premature at the time. That the cause of action in malicious prosecution was not heard and determined by all the courts of law.

I have considered the submissions of both learned Counsel and the law and authorities relied on. Section 7 of the Civil Procedure Act Cap. 71 states:

***7. Res judicata.***

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.”***

In SCCA No. 4 of 2007, Justice Mulenga had this to say on page 3:

***“It follows that the time for taking out such suit is after conclusion of the prosecution, when the decision could be taken whether the prosecution was malicious or wrongful.”***

The suit was premature at the time as far as the claim for malicious prosecution was concerned. The DPP later discontinued the criminal proceedings against the plaintiff in the Magistrate Court at which point the cause of action arose, hence the fresh suit now instituted.

I now turn to the issue of lack of a cause of action.

Counsel for the second defendant submitted that the suit did not disclose a cause of action as the actions complained against by the plaintiff were actions done by the defendant in his official capacity as a police officer and an employee of the Government of the Republic of Uganda.

He relied on the case of *Muwonge Vs Attorney General [1977] EA 17* for the proposition that an act may be done in the course of the servants employment so as to make his master liable even though

it was done contrary to the orders of the master and even if the servant was acting deliberately, wantonly, negligently or criminally or for his own benefit . Nevertheless if what he did is a manner of merely carrying out what he was employed to carry out, then his master was liable.

In reply, Mr. Walubiri, Counsel for the plaintiff submitted that the suit disclosed a cause of action against the second defendant in so far as although he was an officer of the Uganda Police Force, he acted beyond his capacity in preferring criminal charges against the plaintiff; and that the second defendant's high handed conduct was certainly actionable.

Counsel relied on Tsekoko's ruling in *Charles Harry Twagira Vs Attorney General and Others CA No. 4 of 2007*, where it was held that:

*"Therefore a civil suit against the Director of Public Prosecution cannot be sustained and it is incompetent. The same equally applies to the case against the 3<sup>rd</sup> respondent he is a police officer who was sent to London to re- arrest the appellant and escort him to Uganda. He is the one who made the investigations and applications under the law that led to the freezing of the appellant's accounts... I am of course aware that he could be*

***sued in his personal capacity if there is a possibility that he acted beyond the scope of his duties.”***

He maintained that the 2<sup>nd</sup> defendant could be sued in his personal capacity as he exceeded the scope of his duties in the acts complained of. I do agree with counsel for the plaintiff that the suit discloses a cause of action against the 2<sup>nd</sup> defendant in as far as it is alleged that the 2<sup>nd</sup> defendant exceeded the scope of his duties to the detriment of the plaintiff. The plaint clearly sets out the rights of the plaintiff that were allegedly violated by the 2<sup>nd</sup> defendant causing loss to the plaintiff; elements of which make up a cause of action as defined in ***Auto Garage Vs Motokov 1971 (EA) 514.***

It is only fair that the plaintiff is given a chance to lead evidence to prove that the 2<sup>nd</sup> defendant acted beyond the scope of his duties or maliciously.



In conclusion, I will disallow the preliminary objections, with costs in the cause. Orders accordingly.

**Elizabeth Musoke**

**JUDGE**

**19/04/2012**