

## **CAN MALICIOUS PROSECUTION IN NIGERIA ARISE FROM A CIVIL ACTION? \***

### **Abstract**

*Malicious prosecution was invented by common law to address and compensate victims of groundless litigation brought maliciously without reasonable and probable cause; and it has been predominantly applied as a cause of action in unsuccessful criminal prosecution. This article examined the scope of applicability of this tort in Nigeria – whether it extends to civil proceedings. The doctrinal research method was used. As a result, this article examined the law in the area as it is by reviewing the case law starting from 16<sup>th</sup> Century through to the 21<sup>st</sup> Century and where appropriate provided an explanation of the law by placing it in a useful theoretical context. Primary sources as well as secondary literature in the area were studied in the theoretical and or conceptual dimensions of the article. It was discovered that in Nigeria, the tort applies to unsuccessful civil proceedings by virtue of common law but was never resorted to and was over the years overlooked due to its definition by case law, statute, academics and authors. This article proffered a redefinition or re-description of the tort and its scope of applicability to case law and offered a solution as well. The author was not aware of any previous studies in this area.*

**Keywords:** Malicious Prosecution, Civil Action, Common Law, Nigeria

### **1. Introduction**

Law as the bedrock of orderliness which at all times is at the root of civility in every society is subdivided into criminal and civil law. Whilst criminal law is the law of crime, a crime being an act or omission punishable by the state,<sup>1</sup> civil law is the law governing civil wrong – a conduct which is not punished by the state but rather would, at the instance of the injured party, result in an action for damages or compensation. To ventilate a civil wrong, the injured party must institute a proceeding known as civil proceedings while to determine criminal liability and punish a party who committed a crime in the eyes of the law criminal proceeding must be instituted by the state although a private person may under certain circumstances institute criminal proceedings.<sup>2</sup> There is a public policy in safeguarding persons from being harassed, humiliated or damaged by unjustifiable litigation. The law seeks to hold a balance between this policy and interest in encouraging citizens to assist in law enforcement by bringing offenders to justice.<sup>3</sup> The right to institute proceedings may be abused through proceedings that are outright abuse of process, or instituted maliciously and without reasonable and probable cause. Abuse of right to institute proceedings is often injurious occasioning damage to character, person, liberty, property or finance. In the circumstance, the Plaintiff would have illegitimately used the coercive powers of the state to cause harm to another – the Defendant – and the coercive powers of the state are, thus, also abused. An aggrieved Defendant in such action was originally left without a remedy since the Plaintiff is immune from liability given litigation privilege which protects litigants, counsel and witnesses from any suit arising from a previous one. In order to address the injustice, common law created the tort of malicious prosecution. The applicability of this tort seemed to be limited, in Nigeria, to unsuccessful criminal proceedings regardless of the fact that there are, in some instances, manifest injustice inflicted as a result of groundless and damaging civil proceedings brought maliciously. Some civil proceedings - particularly but not exclusively civil proceedings alleging fraud or crime, inability to repay a debt or winding up proceedings - are in this day and age given damaging publicity to the extent that they may harm both individual and corporate reputation and may cause financial harm as well. Malicious prosecution could be defined as a tort arising from unsuccessful criminal or civil proceedings instituted against another party with malice and without probable or reasonable cause. It is also defined as the tort of initiating criminal prosecution or civil suit against another party with malice and without probable cause; an action for damages based on this tort after termination of the proceedings in favour of the party seeking damages.<sup>4</sup>

This article traces the development of this tort and empirically reviews the case laws therein with a view of establishing whether the tort could arise from or extends to civil proceedings; whether its form and scope as developed by common law is applicable to Nigeria and if not, the reason.

### **2. Common Law and United Kingdom**

Under common law, the position whether malicious prosecution could arise from unsuccessful civil proceedings could be found from decided cases. Consequently, both ancient and modern legal history of development of this

---

\*By **Joseph N. MBADUGHA, LL.M (Wales), B.L.** Principal, McCarthy Mbadugha & Co, Lagos, Nigeria, Visiting Professor of International Arbitration, Lazarski University, Warsaw, Poland.

<sup>1</sup>Criminal Code Act, Laws of the Federation of Nigeria, 1990, CAP77, S.2; Obilade, A.O [2007, Reprint] *The Nigeria Legal system*, Ibadan: Spectrum Books Limited, P.5

<sup>2</sup> *Fawehinmi v Akilu* [1987] 4 NWLR (Pt.67) 777

<sup>3</sup> Kodilinye, G and Aluko, O [1999] *The Nigeria Law of Torts* (2<sup>nd</sup> Edition). Ibadan: Spectrum Law Publishing P. 26

<sup>4</sup> *Merriam - Webster.com Legal Dictionary*, Merriam – Webster, [https://www.merriam-](https://www.merriam- on 20th June 2020)

tort, starting from the 16th Century, will be reviewed. That said, in *Bulwer v Smith*<sup>5</sup>, D knowing that C owed H \$20 under a Judgment debt and that H has died unlawfully arrogated H's name to himself and thereby maliciously caused C to be outlawed for non-payment of the debt, and as a result C was imprisoned for two months and suffered forfeiture of his goods. However, C successfully sued D for compensation for the loss and damage sustained as a result of the outlawry. In *Gray v Dighton*<sup>6</sup>, C's action of malicious prosecution against D for having maliciously prosecuted him in the ecclesiastical court, as a result of which he was excommunicated, succeeded. Though it could be argued that in *Bulwer v Smith* there were some elements of criminal proceedings resulting in C's imprisonment for two months same cannot be argued in respect of *Gray v Dighton*. In *Gray v Dighton* an action for malicious prosecution succeeded though the only thing that happened was excommunication of C; there was no arrest of C nor express damage laid.

Similarly, in *Waterer v Freeman*<sup>7</sup> an action for maliciously issuing a second writ of *fifa*, Hobart CJ held thus:

now to the principal case, if a man sues me in a proper court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice, though the suit itself be legal and I cannot complain of it.

Again, in *Atwood v Monger*,<sup>8</sup> being a suit which arose from proceedings brought against the Plaintiff before the conservators of the River Thames who had a statutory responsibility for management of the River for allegedly allowing earth to fall into the River, Rolie CJ stated the principle thus:

An action upon the case lies for bringing an appeal against one in the Common Pleas, though it be *coram non iudice*, by reason of the vexation of the party, and so it is all one whether here were any jurisdiction or no, for the Plaintiff is prejudiced by the vexation and the conservators took upon them to have authority to take the presentment. And I hold that an action upon the case will lye,' (sic) 'for maliciously bringing an action against him where he had no probable cause, and if such actions were used to be brought, it would deter men from such malitious' (sic)' courses as are to (sic) often put in practice.

Neither *Waterer v Freeman* nor *Atwood v Monger* arose from criminal proceedings yet the common law *qua* English Courts established in both cases as far back as 17<sup>th</sup> Century the principles under which malicious prosecution could and did arise from an unsuccessful civil action therein. In *Savile v Robert*,<sup>9</sup> the Defendant on two occasions caused the Plaintiff to be prosecuted on an indictment, charging him with riot. After being acquitted on both occasions, the Plaintiff sued the Defendant for malicious prosecution. The action succeeded and damages were awarded to him. Subsequently, the Defendant instituted an action to set aside the Judgment on the malicious prosecution but this failed and the Judgment was upheld. In an action filed by Savile for malicious prosecution the Defendant objected on the ground that to allow such action 'will be of mischievous consequence, by stopping all prosecutions of this kind; and there is no more reason in this case of malicious indictment, than a malicious action and no man shall be responsible for any damages whatsoever for suing a writ or prosecuting in king's court.' With respect to the objection, Holt CJ held thus: 'There is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a right, he may sue an action ...' Whilst with respect to damage, Holt CJ identified in that case – *Savile v Roberts* - three types of damages that could support the claim, malicious prosecution, and thus said that the nature of injury for which damages might be recoverable:

has been much unsettled in Westminster-Hall, and therefore to set it at rest is at this time very necessary. ... there are three sorts of damages, any of which would be sufficient ground to support this action. 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous ... 2. The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty...the third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses is without doubt, which is an injury to his property; and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself<sup>10</sup>

<sup>5</sup>(1583) Leon 52, 74 ER 7724 cited by Sir Percy Winfield (1921). *The Present Law of Abuse of Legal Procedure*. Cambridge University Press. Pages 199 & 202

<sup>6</sup>[1677] 2 Shows KB 144, 89 El 848 – also cited by Sir Percy Winfield (1921). *The Present Law of Abuse of Legal Procedure*. Cambridge University Press pages. 199 & 202

<sup>7</sup> (1638) Hobart 266

<sup>8</sup> (1653) Style 378

<sup>9</sup> (1698) 1 Ld Raym 374

<sup>10</sup> *Savile v Robert* (1698) 1 Lord Raymond 374 at 378

In support of his assertion that an action could lie for the malicious prosecution of civil proceedings Holt CJ cited and relied on *Daw v Swain*<sup>11</sup>. There, in order to cause C to be imprisoned for inability to lodge the sum claimed as bail, D had maliciously sued C for \$5000 rather than for \$40 which was the amount of C's debt to him. C's action for malicious prosecution succeeded. Also, Holt CJ cited with approval two further examples of recovery for malicious prosecution of civil proceedings, viz: *Waterer v Freeman*<sup>12</sup> and *Skinner v Gunton*.<sup>13</sup> The ability to sue for malicious prosecution seems therefore to have depended, according to Holt CJ, essentially on the nature of the damage suffered rather than the form which the proceedings took, although the two were likely to be interrelated. Before the judgment of Holt CJ in *Savile v Roberts*,<sup>14</sup> there was no authority that excluded the application of the tort of malicious prosecution to civil proceedings but rather there are some indications that it was capable of applying.<sup>15</sup> Neither Savile's case nor the ones after it excluded its application to civil proceedings but rather they applied it. The decision in Savile's case was enthusiastically applied by Parker CJ in *Jones v Givin*<sup>16</sup> and there Parker CJ reiterated that an action would lie for malicious prosecution of civil proceedings if the claimant could show special matter which shows malice. In *Grainger v Hill*,<sup>17</sup> the Plaintiff as a security for a loan of 12 months period mortgaged his ship to the Defendant. The Plaintiff retained the vessel's register in order to make voyages. Subsequently, on the second month of the loan, the Defendant became concerned about the adequacy of the security, swore an affidavit of debt and issued a writ to arrest the Plaintiff in support of a claim of assumpsit. Under the threat of arrest the Plaintiff handed over the register to the Defendant and as well repaid the debt even though the contractual period had not expired. Consequently, the Plaintiff sued the Defendant for malicious issue of civil proceedings and succeeded.

On appeal, the Defendant contended that the Plaintiff should be nonsuited for, *inter alia*, failure to aver that the action had been commenced without reasonable or probable cause. The Plaintiff in response argued that he has proved that the suit was without reasonable or probable cause; that this was in any event unnecessary in a case where the action was brought for an improper purpose – as a means of forcing him into giving up the register to which the Defendant had no right. The court in accepting the Plaintiff's argument held, per Tindal CJ, that:

If the course pursued by the Defendants is such that there is no precedent of a similar transaction, the Plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced had been determined or not, or whether or not it was founded on reasonable and probable cause.<sup>18</sup>

Similarly, Parker J stated thus:

... this is a case *prima facie* impressions, in which the Defendants are charged with having abused the process of the law, in order to obtain property to which they had no colour of title; and, if an action on the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances.<sup>19</sup>

*Grainger v Hill* has been held to 'illustrate the willingness of the court to grant a remedy, in what it regarded as novel circumstances, where the Plaintiff had suffered provable loss as a result of civil proceedings brought against him maliciously and without any proper justification'<sup>20</sup> In *Grainger v Hill* and other mid-19<sup>th</sup> Century cases the Courts recognized a broad principle underlying the cause of action in malicious prosecution. Thus, in *De Medina v Grove*,<sup>21</sup> where the Defendant executed a writ of *capias*, issued in a civil suit, which the Plaintiff claimed was issued for an excessive sum and as a result instituted the suit for malicious prosecution, the judgment of Wilde CJ (with whom Maule J, Cresswell J, Williams J, Parke B and Rolfe B agreed) began: 'The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts

---

<sup>11</sup> (1668) 1 Sid 424, 82 ER 1195

<sup>12</sup> (1617) Hobart 205, 80 ER 352

<sup>13</sup> (1669) 1 Saund 228, 85 ER 249

<sup>14</sup> (1698) 1 Ld Raymond 374

<sup>15</sup> *Willers v Joyce* [2016] UK SC 43 at 17

<sup>16</sup> (1713) Gillb Cas 185, 93 ER 300 (also reported as *Jones v Gwynn* 10 Mod 147, 214)

<sup>17</sup> (1838) 4 Bing (Nc) 212

<sup>18</sup> *Grainger v Hill* (1838) 4 Bing (MC) 212 at 221

<sup>19</sup> (*Supra*) at 222. See the *Walter D. Waller* (1893) P 202

<sup>20</sup> Per Lord Toulson (with whom Lady Hale, Lord Kerr and Lord Willson, Lord Clerk agree) in *Willers v Joyce* [2016] UKSSC 43 at 10 para 25

<sup>21</sup> (1847) 10 QB 172

maliciously and without probable cause' Also, in *Churchhill v Siggers*,<sup>22</sup> the Defendant executed a writ of *capias*, issued in a civil suit, which the Plaintiff claimed was issued for an excessive sum. Consequently, the Plaintiff instituted the suit for malicious prosecution; and the judgment of the court (Lord Campbell CJ, Erle J and Crompton) began thus: 'To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case.'

The subject was, again, considered in *Wren v Weild*.<sup>23</sup> The claim was in substance a patent dispute. The Plaintiffs were manufacturers of machinery. They sued the Defendant for falsely and maliciously telling their customers that their machines infringed the Defendant's patents and threatened legal actions if the customers used the machines without paying royalties to the defendant. There was no allegation on the pleading that the Defendant acted without reasonable and probable cause. Lush J. non-suited the Plaintiff, who applied to set aside the nonsuit. The judgment of the court (consisting of Blackburn, Lush and Hayes JJ) was delivered by Blackburn J. He considered whether 'the circumstances were such as to make the bringing of an action (against the customers) altogether wrongful'.

In that context Blackburn J considered the statement of principle by Hobart CJ in *Waterer v Freeman*, and the effect of *Savile v Robers* thus:

In *Waterer v Freeman* (1618) Hobart 266, 267, which was an action maliciously and vexatiously issuing a second *fifa*, whilst the first was unreturned, the Chief Justice says: 'if a man sue me in a proper court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice'. This was not necessary for the decision of the case before the court, but it was by no means irrelevant, and it is therefore an authority entitled to weight. On the other hand, in *Savile v Roberts* 1 Ld Raym 374, Lord Holt, in delivering the judgment of the Exchequer Chamber, expresses an opinion that no such action would lie without alleging and proving some collateral wrong, such as that he was maliciously held to bail, or the like. For this he gives two reasons, first that a man is entitled to bring an action if he fancies he has right, which is in accordance with Lord Ellenborough's reasoning in *Pitt v Donovan* (1813) 1M & S 639. But this reason is quite consistent with Lord Hobart's position that the action will lie where it was certainly known to him that the action was utterly without ground. His second reason is, that the law considers that the party grieved has an adequate remedy in his judgment for costs' and on this the Court of Common Pleas acted in *Purton v Honnor* (1798) 1 B & P 205. But this artificial reason does not apply in the present case...'<sup>24</sup>

Further, in *Quartz Hill Consolidated Mining Co. v Eyr*,<sup>25</sup> the Defendant filed a petition to wind up the Plaintiff and advertised the petition in several papers. The petition was never served on the Plaintiff before it was withdrawn and dismissed. Consequently, the Plaintiff sued the Defendant for maliciously presenting the petition without reasonable or probable cause. At the close of its case, the trial court non suited the Plaintiff as it did not adduce evidence of special damage. Upon the Divisional Court upholding the decision, the Plaintiff appealed to the Court of Appeal. At the Court of Appeal, the Defendant argued, inter alia, that there was no evidence of special damage necessary to maintain the action. In rejecting this argument on the ground that the publication of the petition in the Newspaper was destructive of the Plaintiff's – company's – reputation and that this amounted to damage within Holt CJ's category; and in reversing the trial court's Judgment the Court of Appeal held that:

The proposition is that an action cannot be maintained because the petitioning creditor merely asks the court to act judicially, and because it was to be assumed that the court would decide rightly. If that proposition were well founded, it would be an answer to malicious prosecution on a criminal charge, because even in that case the prosecutor merely asks the tribunal to decide upon the guilt of the person whom he charges. If a man is summoned before a Justice of the Peace falsely and maliciously and without reasonable or probable cause, he will be put to expense in defending himself, and his fame may suffer from the accusation; nevertheless, the prosecutor only asks the justice to adjudicate upon the charge. Therefore, it is not a good answer to an action for maliciously procuring an adjudication in bankruptcy to say, that the alleged creditor has only asked for a judicial decision. It seems

<sup>22</sup> (1854) 3 E & B 929

<sup>23</sup> (1869) LR 4QB 730

<sup>24</sup> *Wren v Weild* (1869) LR 4QB 730 at 736

<sup>25</sup> (1883) 11 QBD 764

to me that an action can be maintained for maliciously procuring an adjudication under the Bankruptcy Act, 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can shew that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer a pecuniary loss.<sup>26</sup>

It follows that the common law position from the 16<sup>th</sup> Century through to the 20<sup>th</sup> Century remains that malicious prosecution could arise from unsuccessful civil proceedings brought maliciously and without reasonable or proper or probable cause. In the Mid – 20<sup>th</sup> Century case of *Berry v British Transport Commission*, Diplock J held that the action on the case for malicious prosecution could be founded upon any form of legal proceedings, civil or criminal, brought maliciously and without any reasonable or proper cause by the Plaintiff against the Defendant.<sup>27</sup> On appeal, the English Court of Appeal, per Danckwerts LJ, affirmed and repeated Diplock’s dictum that ‘Malicious prosecution lies for wrongful and malicious civil proceedings as well as criminal proceeding’<sup>28</sup>

The United Kingdom’s Supreme Court’s decision in *Willers v Joyce*,<sup>29</sup> Represents both the common law and UK’s 21<sup>st</sup> Century position on the point. There, Mr. Willers was a director of Langstone Leisure Ltd (Langstone). Prior to Mr. Willers dismissal, Langstone instituted an action for wrongful trading against the directors of Aqua Design and Play Ltd (Aqua) which had gone into liquidation. That action was subsequently abandoned. Later, Langstone sued Mr. Willers for alleged breach of contractual and fiduciary duties in causing it to incur costs in pursuing the Aqua Directors. Mr. Willers filed his statement of defence (defended the action), and issued a third-party claim. However, before trial could commence, Langstone discontinued the suit and the trial judge ordered it to pay Mr. Willer’s costs on standard basis. Subsequently, Mr. Willers commenced the present suit against Mr. Gabay’s executor for malicious prosecution. The facts include all the necessary ingredients of malicious prosecution of civil proceedings. In particular, it sufficiently alleged that: Mr. Gubay was responsible for having caused the claim to be brought; the claim was determined in Mr. Willers’ favour; it was brought without reasonable cause; Mr. Gubay was actuated by malice in causing Langstone to sue Mr. Willers; and that Mr. Willers suffered damage. The heads of damage claimed were damage to his reputation, damage to health and loss of earnings. The suit was struck out for disclosing no cause of action known to the English Law. Upon an appeal to the Supreme Court of United Kingdom, the question was whether the tort of malicious prosecution includes or could arise from prosecution of civil proceedings. The UK Supreme Court, per Lord Toulson delivering the lead Judgment, after reviewing the earlier cases, held that:

‘In the early case law Hobart CJ stated the requirements succinctly in the passage from his judgment in *Waterer v Freeman* cited at para 17 above’ ... if a man sue me in a proper court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him’. This formulation was adopted by Blackburn J in 1869 in *Wren v Weild*. It accords with Lord Mance’s suggestion (para 139) that he would be readier to accept a concept of malicious prosecution ‘which depended on actual appreciation that the original claim was unfounded’. Hobart CJ’s statement remains a helpful starting point and, speaking in general terms, it has in my view much to commend it. It is well established that the requirements of absence of reasonable and probable cause and malice are separate requirements although they may be entwined: see, for example, *Glinski v Mclver* [1962] AC 726, 765, (‘it is a commonplace that in order to succeed in an action for malicious prosecution the plaintiff must prove both that the defendant was actuated by malice and that he had no reasonable and probable cause for prosecuting’, per Lord Delvin). In order to have reasonable and probable cause, the defendant does not have to believe that the proceedings will succeed. It is enough that, on the material on which he acted, there was proper case to lay before the court: *Glinski v Mclver*, per Lord Denning at 758-759. (Compare and contrast a suit which is ‘utterly without ground of truth’ per Hobart CJ) ... For these reasons ..., I would allow the appeal and hold that the entirety of Mr. Willers’ claim be permitted to go to trial’<sup>30</sup>

Finally, in the Privy Council’s case of *Crawford Adjusters (Cayman) Ltd v Sagikor General Insurance (Cayman) Ltd*<sup>31</sup> the question, also, was whether there should be a cause of action in malicious prosecution in respect of civil

---

<sup>26</sup> *Quartz Hills Consolidated Gold Mining Co. v Eyre* (1883)11 QBD 674 at 684

<sup>27</sup> [1961] 1 QBD 149 at 159

<sup>28</sup> *Berry v British Transport Commission* [1962] 1 QB 306 at 334

<sup>29</sup> [2016] UKS C 43

<sup>30</sup> *Willers v Joyce* [2016] UKSC 43 at paras 53-4 and 59

<sup>31</sup> [2014] AC 366; [2013]UKPC17

proceedings and the Privy Council held in or answered the question in the affirmative.<sup>32</sup> Consequently, as could be seen, from both ancient and modern legal history, it is beyond dispute, that action for malicious prosecution of civil proceeding has been a part of both the common law tort and that of England.

### 3. Nigeria's Perspective

Consequently, the question is, is the same common law tort of malicious prosecution of civil proceedings applicable in Nigeria or put differently, is malicious prosecution of civil proceedings a cause of action known to Nigerian law? Nigeria's Interpretation Act provides in its section 37 that except in so far as other provision is made by any Federal Law, the Common Law of England and the doctrine of equity, together with the statute of general application that were in force in England on the 1<sup>st</sup> day of January, 1900, shall, in so far as they relate to any matter within the Legislative competence of the Federal Legislature, be in force in Nigeria'.<sup>33</sup> There is no known law made by the Federal Legislature or any law in Nigeria, whether of a state, for the applicability or exclusion of action for malicious prosecution from unsuccessful civil proceedings. This said, we submit that having traced the principle from the 16<sup>th</sup> century till date, it means that it was in force as at 1<sup>st</sup> January 1900 in England in consequence whereof it is part of Nigeria's received common law by reason of Ordinance No.3 of 1863 and section 32 of the Interpretation Act. It follows, therefore, that it is part of Nigeria's Law that action for malicious prosecution could lie or arise from a civil action or proceedings.

#### Earlier Position of the Tort in Nigeria

Given the state of the law under common law which by reason of section 32 of the Interpretation Act is part of Nigeria's law, one would have thought that the position will be the same in Nigeria, that is, a claim for malicious prosecution of civil proceedings would be a cause of action known to Nigeria's jurisprudence and obtainable in Nigeria. However, in Nigeria, there is a presumption that malicious prosecution could only arise from criminal proceedings and not from civil proceedings. This is despite the fact that several Defendants would have suffered manifest injustice as a result of groundless and damaging civil proceedings brought maliciously; and also that wrongfully instituting civil suit, alleging for example fraud, commission of crime, indebtedness without reasonable and probable cause could inflict harm on individual or corporate reputation as a result of damaging publicity and cause financial loss to the Defendant. This presumption may be attributable to the description of the tort as well as to the impression created by academics, authors, case laws and statutes. While academics and text writers defined the tort as arising from criminal proceedings, thus excluding civil proceedings, case laws defined it in the context of cases from which it arose – these cases being criminal cases – and hence defined it as arising from criminal prosecution. That said, according to Kodilinye and Aluko, tort of malicious prosecution is committed when the Defendant maliciously and without reasonable and probable cause initiates against the Plaintiff a criminal prosecution which terminates in the Plaintiff's favour, and which results in damage to the Plaintiff's reputation, person or property.<sup>34</sup> Similarly, Ese Malemi, defined it as bringing of criminal proceedings against a person without reasonable and probable cause and which proceedings end in favour of the accused.<sup>35</sup>

Nigerian authors or authors on Nigerian law are not alone in defining or in describing malicious prosecution as arising from criminal proceedings. Common Law and English Law text writers are also involved. Consequently, whilst, according to Bullen, Leake and Jacob's to establish a claim for damages for malicious prosecution the claimant must plead and establish, *inter alia*, that he was prosecuted by the Defendant, i.e the proceedings on criminal charge were instituted or continued by the Defendant against him,<sup>36</sup> Clerk and Lindsell state that it is the malicious preferring of an unreasonable criminal charge that is the usual foundation of the form of action ordinarily understood by the familiar title of an action of malicious prosecution.<sup>37</sup> In the same vein, according to Streets on Torts 'the delicate balance of public interest involved in malicious prosecution must not be underestimated: on the one hand, there is the freedom that everyone should enjoy to engage the legal process in order to prosecute crime, while on the other there is the need to discharge untruthful accusation made about innocent individuals.'<sup>38</sup> No doubt, the authors of Street on Torts by this statement show no pretence that the tort

<sup>32</sup>In 1963 Nigeria attained Republican status and the Supreme Court of Nigeria supplanted the Judicial Committee of Privy Council as the Court of Last Resort; and English Court's decisions ceased to be binding on Nigerian Courts but are of persuasive authority only and so is Privy Council's decision.

<sup>33</sup> Interpretation Act, CAP 123 Laws of the Federation of Nigeria, S. 32

<sup>34</sup>Kodilinye C and Oluwole A [1999] Kodilinye and Aluko: *The Nigerian Law of Torts* 2<sup>nd</sup> Edition, Spectrum Books Limited, Ibadan page 26

<sup>35</sup> Malemi, E.O [2008] *Law of Tort* (1<sup>st</sup> Edition), Lagos

<sup>36</sup>Lord Brennan QC and Blair, W. QC et al [2004] *Bullen & Leake & Jacob's Precedents of Pleadings*, London: Sweet & Maxwell. Page 39

<sup>37</sup>Dugdale, A.M and Jones, A.M. et al [2006] *Clerk and Lindsell on Torts* (19<sup>th</sup> Edition) London: Sweet & Maxwell page 971 para 16 - 04

<sup>38</sup> Murphy M. [2003] *Street on Torts* (11<sup>th</sup> Edition). Oxford. Oxford University Press, Page 539

arises from unsuccessful criminal prosecution only. Winfield and Jolowicz on Torts also re-echoed the same principle – public interest – almost in identical or similar terms with Streets on Torts.<sup>39</sup> Fleming J.G is not left on this. On his part, while stating the public interest as Streets on Torts and Winfield and Jolowicz did, as two countervailing interest of high social importance that need to be balanced in application of the tort, he went further to state that the element of cause of action of malicious prosecution is, inter alia, institution of criminal proceedings by the Defendant.<sup>40</sup>

Turning to case law, the Supreme Court of Nigeria in *Balogun v Amubikahun*,<sup>41</sup> held that in an action for malicious prosecution the Plaintiff has to establish, *inter alia*, that he was tried in a court of competent jurisdiction of criminal charge and that the criminal case ended in his favour.<sup>42</sup> While in *Ogbonna v Ogbonna*,<sup>43</sup> the Court of Appeal held that to establish a claim of malicious prosecution the Plaintiff has a duty to plead and establish, *inter alia*, that he was prosecuted in a criminal charge at the instance of the Defendant.<sup>44</sup> Again, in *Bayol v Ahemba*,<sup>45</sup> the Supreme Court characterized or set out the ingredients of malicious prosecution from the perspective of criminal proceedings.

Statutorily, Anambra State Torts Laws provides that a private person who initiates or procures criminal proceedings against another person who is not guilty of the offence charged shall be liable to such other person in an action for malicious prosecution.<sup>46</sup> The preceding statutory and judicial authorities, opinion, description and definition by academics and legal text writers presuppose that malicious prosecution can only arise from criminal proceedings or prosecution. Thus, that whatever is the extent of malicious prosecution, its paradigm was prosecution, of criminal proceedings. Given this, it is doubtful whether any university or academic curriculum in Nigeria on the subject would have included or extended it to civil proceedings, that is, malicious prosecution arising from civil proceedings or prosecution. Nigeria's legal system or jurisprudence' exclusion of malicious prosecution of civil proceeding tend to override the need for law to be true to the reason for its very existence – 'the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied'<sup>47</sup> By the exclusion, Plaintiffs who are responsible for injustice to the Defendants are immune from liability given litigation privilege which litigants, counsel and witnesses enjoy. Malicious prosecution of civil proceedings is, without doubt, an exception to litigation privilege or immunity. Therefore, excluding it from unsuccessful civil proceedings leaves those on whom injustice is inflicted by groundless malicious litigation without a remedy and thus negates the maxim '*ubi jus ubi remedium*'

In the circumstance, particularly given the exposition herein, it follows that a redefinition or re-description of the tort – malicious prosecution - is necessary to include or reflect its applicability to or arising from civil proceedings. This said, it is submitted that the tort of malicious prosecution could be founded upon any form of unsuccessful legal proceedings, whether civil or criminal, brought maliciously and without any reasonable and probable cause against the Plaintiff by the Defendant; it is an action to compensate the Plaintiff for the manifest injustice he suffered as a result of groundless and damaging civil proceedings brought malicious against him by the Defendant. Consequently, a more acceptable definition is that which posits that it denotes the institution of a criminal or a civil proceeding for an improper purpose and without probable or just cause.<sup>48</sup> The essentials of malicious prosecution of criminal proceedings – that the Defendant prosecuted the Plaintiff, the prosecution terminated in favour of the Plaintiff, the prosecution was without reasonable and probable cause, and that the prosecution was malicious – are the same as in, or applies to malicious prosecution of civil proceedings. Just like malicious prosecution of criminal proceedings, it is actionable upon proof of damages. Therefore, damage is its essential ingredients,<sup>49</sup> and according to the seminal Judgment of Holt CJ in *Savile v Robert*,<sup>50</sup> there are three sorts of

---

<sup>39</sup> Peel, W.E and Goundkamp, J [2014] *Winfield and Jolowicz on Torts* (11<sup>th</sup> Edition) London. Thomson Renders, page 623

<sup>40</sup> Fleming J.G [1992] *The Law of Torts* (8<sup>th</sup> Edition) Queenlands. The Law Book Company Ltd P.609 to 610

<sup>41</sup> *Balogun v Ambuikahun* [1989] LPELR – 725(SC)

<sup>42</sup> *Balogun v Ambuikahun* [1989] LPELR – 725(SC) at 12 paras A-B and at 22 – 23 paras F-A

<sup>43</sup> [2014] LPELR – 22308 (CA)

<sup>44</sup> *Ogbonna v Ogbonna* [2014] LPELR – 22308 (CA) at 45 – 46 paras F-C

<sup>45</sup> [1990] 10 NWLR (Pt.623) 381

<sup>46</sup> Anambra State Tort Laws, CAP 135, Laws of Anambra State of Nigeria (Revised Edition) 1986, S.309

<sup>47</sup> [*Minor*] v *Bedfordshire County* [1995] 2 AC 663 per Sir Thomas Bingham MR

<sup>48</sup> *Bayam v Job Agana* [2010] LPELR – 9159 (CA) 21-22 paras E-D. Though this case arose from a criminal prosecution and the Court of Appeal's inclusion of civil proceedings in its definition or characterization of malicious prosecution could be criticized as being per incuriam or obiter since that point did not arise in that case, it is apt in the present circumstance since it is now established in this article that malicious prosecution could and do arise from civil proceedings or prosecution.

<sup>49</sup> *Willers v Joyce* [2016] UKSC 43 at para 40

<sup>50</sup> [1583] Leon 52, 74 ER 724 cited by Sir Percy Winfield [1921] *Abuse of Legal Procedure*. Cambridge University Press. Page 199 & 202

damages any one of which is sufficient to support an action of malicious prosecution, viz: damage to fame or reputation; person and property.

#### 4. Current Position of the Tort in Nigeria

Tort of malicious prosecution of civil proceedings is a creature of common law which at all material time remains part of Nigeria's law by reason of Nigeria being a legatee of the English Common Law. However, this remedy was never resorted to and was over-looked by lawyers, academics and litigants and there is no known case in Nigeria in which it was claimed or pursued until the case of *Inmoson Nig Ltd v Guaranty Trust Bank Plc*.<sup>51</sup> His Lordship, Hon. Justice Peter O. Affen, gave credence to this point, in that case, when he observed that his 'admittedly limited research did not also yield any such Nigerian authority on that point. It is therefore safe to assume that this is a novel point of law; uncharted territories, as it were.'<sup>52</sup> In resolving, in that case, the issue of whether a cause of action in malicious prosecution can arise from a civil action in Nigeria, his Lordship stated that depending, of course, on the peculiar facts and circumstances of each case, wrongfully instituting and prosecuting a civil suit (alleging the commission of crime, for instance) without reasonable and probable cause could inflict harm on individual or corporate reputation as a result of damaging publicity and cause financial loss as much as wrongfully instigating and prosecuting a criminal charge; and the mere fact alone that there is no known case in Nigeria where a cause of action in malicious prosecution has been founded on the wrongful prosecution of such civil action is certainly not a good enough or valid basis for the sustenance of the *status quo* of legal judicial – decision making'.<sup>53</sup> Consequently, applying the above reasoning, his Lordship Hon, Justice Peter O. Affen, held that:

... the common law as a prominent source of Nigeria law is not static or ossified, but an organic and dynamic body of rules that continues to grow, evolve and adapt to social change. This being so, guided as I am by Philip A. Landon's observation [in the 15<sup>th</sup> edition to Pollock, Torts] that 'the categories of particular torts are not closed' [see Peter Ward, The Torts Cause of Action, 42 C Cornell L. Rev. 28 [1956], P.1] as well as taking a cue from the trend set by the UK Supreme Court in *Willers v Joyce supra*, it does not seem to me that there is any justifiable legal basis why a cause of action in malicious prosecution should not in principle be founded on the prosecution of outrageous or unfounded civil proceedings in Nigeria. I therefore affirm my agreement with Prof. J.N Mbadugha of Counsel for the Plaintiffs that a cause of action in malicious prosecution could in an appropriate case arise from civil proceedings in Nigeria.<sup>54</sup>

#### 5. Semblance with Defamation and may be Mistaken As Defamation

In an action for malicious prosecution, the Plaintiff must plead that the Defendant set the law in motion against him or that the Defendant prosecuted him; the prosecution terminated in his favour; the prosecution or action was without reasonable and probable cause; and that the prosecution was malicious.<sup>55</sup> Pleading and proving these ingredients are, however, not enough for an action in malicious prosecution to succeed. The action cannot be sustained without proof of one of the following heads of damages: damage to character or reputation or fame if the matter is scandalous; damage to the person including mental pain or injury; damage to his property or injury to his property.<sup>56</sup> Once one of these heads of damage is proved, damages are at large and may include compensation for loss of reputation and mental pain or injury to feelings,<sup>57</sup> aggravated and exemplary damages.<sup>58</sup> In Nigeria, writ of summons, for actions commenced through a writ, precede pleadings. Consequently, the heads of damages and the money claimed in respect of each will be stated in the writ of summons whilst the facts constituting the damage and its particulars will be pleaded in the statement of claim. However, in some instances, statement of claim supersedes the writ. Where this is the case the heads of damage and monetary claim in respect thereof will be pleaded in the statement of claim. Where a claim in malicious prosecution is for or includes damage to reputation or fame or character, that is, the action is for vindication of character, it bears some resemblance

<sup>51</sup> Suit No: FCT/HC/CV/2448/2017. The author was counsel to the Plaintiff in that case

<sup>52</sup> (Supra) at para 21

<sup>57</sup> (Supra) at para 22

<sup>58</sup> (Supra) at para 23

<sup>59</sup> These are the ingredients of the tort of malicious prosecution. See *Adegbenro v A.G. Federation* [1962] All NLR 423; *Balogun v Amubikahun* [1989] 3 NWLR (Pt.107) 18; *Bayol v Ahamba* [1992] 8 NWLR (Pt.257) 104.

<sup>60</sup> *Savile v Robert* (1998) 1 LD Raymond 374 at 378; *Berry v British Transport Commission* [1961] 1 All ER 65 at 69 para G, Dugdale A.M [2006] *Clerk & Lindsell on Torts* (19<sup>th</sup> Edition London: Sweet & Maxwell. Page 970 para 16 - 02

<sup>61</sup> Lord Mackay of Clashfem (Ed) (2010) *Halsbury Laws of England* 5<sup>th</sup> Edition Volume 97 London: Lexis Nexis para 644  
<sup>62</sup> Lord Brennan QC and Blauf, W.QC et al (Ed) (2004) *Brullen & Leake & Jacobs: Precedents of Pleading* (15<sup>th</sup> Edition) London: Sweet & Maxwell. Page 970 para 62 - 63



with and analogy to an action for defamation.<sup>59</sup> Reputational harm can be caused by pre-trial publicity,<sup>60</sup> which may include publicity given to Court process or even to trial proceedings. Put differently, wrongfully instituting and prosecuting a civil suit could inflict harm on individual or corporate reputation as a result of damaging publicity and cause financial loss as much as wrongfully instigating and prosecuting a criminal charge. In an action for malicious prosecution of criminal proceedings damage will be presumed once the ingredients of malicious prosecution are proved<sup>61</sup> and the Plaintiff is automatically entitled to damages<sup>62</sup> unlike in malicious prosecution of civil proceedings in which the Plaintiff is required to plead and establish the damage suffered. In such circumstance, if the head of damage includes or is reputational damage from publication of the processes, pre-trial and or trial proceedings the Plaintiff, in order to succeed, must plead the publication as well as their particulars. This is akin to what a Plaintiff in an action for defamation will plead and so it is in respect of a claim for aggravated or exemplary damage and or reputational damage or damage to character or fame,<sup>63</sup> arising from defamation. Reputation is often based on character. Thus, in malicious prosecution of civil proceedings a Plaintiff who has notice that evidence of bad character will be adduced against him, will have no difficulty, if he is a man of good character, in coming prepared with friends who have known him to prove that his reputation has been good.<sup>64</sup> This is as well applicable in Defamation.<sup>65</sup>

It follows that malicious prosecution of civil proceedings bears some resemblance and analogy with defamation inasmuch as it is an action for vindication of character. Therefore, if care is not taken, such an action may be mistaken by the court to be an action for defamation to the detriment of the Plaintiff. Hobart's CJ's characterisation in *Savile v Robert* of the first head of damage – damage to fame – will only apply if the matter of which the Plaintiff is accused of is scandalous. Scandalous has been judicially interpreted as a synonym for slanderous and as the sense in which Hobart C.J used it in the *Savile's* case. Thus, in *Berry v British Transport Commission* the Court stated that:

An examination of the other reports of *Savile v Roberts* (6) and of contemporaneous cases of false imprisonment and slander, however, shows (i) as regards the first head of damages, that the expression 'scandalous' was used as a synonym of 'slanderous' in the sense of the kind of imputation which, if spoken, was at that date slander actionable per se<sup>66</sup>

Scandalous matter in the context of the first sort of damage stated by Holt CJ in *Savile v Robert* meant an oral accusation which would amount to slander per se. Later authority, however, appears to have understood scandal in the context as including any defamatory accusation.<sup>67</sup> This however does not mean that the pleadings or a claim must be crafted in technical terms. The age of technical pleadings has gone. A party cannot be denied his entitlement merely because his pleadings were not couched in technical terms.<sup>68</sup> It is enough if the facts in the pleading and or writ of summons support a case of malicious prosecution. The pleading and or writ of summons need not use the word 'malicious prosecution'.

## **6. Conclusion and Recommendations**

Law as the substratum of orderliness and civility in every society cannot achieve that independently without it being set in motion, by a person, upon infraction. Thus, the right to set the law in motion which includes the right to institute proceedings is a *sine qua non* for enforcing compliance with the law and civil rights and obligation of citizens or for punishment for breach of same. The right to institute proceedings may be abused. A party who has been subjected to legal proceedings which is an abuse of process or that was maliciously and without reasonable and probable cause will naturally be aggrieved by the institution of the proceedings. The proceedings may injure or damage his character or reputation as a result of damaging publicity; the trauma of litigation may affect his

---

<sup>59</sup> *Quartz Hill Consolidated Gold Mining Co Ltd v Eyre* (1883) LR 11 QBD 674 Per Bowen LJ

<sup>60</sup> *Willer v Joyce* (Supra) at para 7

<sup>61</sup> *Mohammed v Bannerjee* [1947] AC 322 at 331; Lord Brennan QC and Blair, W QC [2004] *Bullen & Leake & Jacobs – Precedents of Pleading* (15<sup>th</sup> Edition) London: Sweet & Maxwell. Page 970 para 16 - 02

<sup>62</sup> *Musa v Yusuf* [2006] LPELR – 7586 (CA)

<sup>63</sup> Lord Brennan QC and Blair, W QC (Ed) [2004] *Bullen & Leake & Jacobs Precedent of Pleadings* (supra) pages 509 – 510 and 524 – 525. See also *Iroegbu v Okeke* [2016] LPELR – 40620 (CA) 20 – 22 paras D-A; *Iloabachi v Iloabachi* [2005] 13 NWLR (Pt.943) 695 at 714 A-D; McGregor, H.QC [2003] *McGregor on Damages*. (17<sup>th</sup> Edition). London: Sweet & Maxwell. Page 1411 – 1412 paras 38-011 to 38-014

<sup>64</sup> Prof J. Mullis, A et el (Ed) [2013] *Gatley on Libel & Slander* (12<sup>th</sup> Edition) London: Sweet & Maxwell. Page 970 para 1289 para 3.30 – 33.31

<sup>65</sup> *Din v African Newspapers Ltd* [1990] 3 NWLR (Pt.139) SC 392 at 409 – 410 paras G – F; *A.C.B v Apugo* [2001] 5 NWLR (Pt.707) SC 483 at 496 paras C-E; Peel, E & Goundkamp [2014] *Winfield and Jolowicz on Torts*, 19<sup>th</sup> Edition, London. Sweet & Maxwell page 412 para 13-122

<sup>66</sup> *Berry v British Transportation Commission* [1960] 3 All ER 322 at 325 para 1

<sup>67</sup> *Willers v Joyce* (supra) at para 104

<sup>68</sup> *CBN v Okojie* [2015] LPELR – 24740 (SC) at 42 – 43 para D-A

health and cause him further financial loss; and he may be put to the expenses of defending himself. Thus, groundless and damaging proceeding brought maliciously inflicts injustice on the Defendant. Originally those responsible for inflicting injustice on others through such litigation have been held to be immune from liability on grounds of litigation privilege<sup>69</sup>; the public policy that there must be an end to litigation - the need to preserve intact the inviolability of legal proceedings from satellite or subsequent challenge; and the demands of overall legal policy that the right to invoke the jurisdiction of the court should remain unfettered - those contemplating legal proceedings should not be deterred by the prospect of subsequent litigation challenging the propriety of their having invoked the jurisdiction of the court.<sup>70</sup> Subsequently, common law created the tort of malicious prosecution as a means of remedying established injustice resulting from groundless and damaging litigation brought maliciously. The common law recognized that the tort of malicious prosecution extends as much to that of civil as to that of criminal proceedings. That is, a cause of action in malicious prosecution could arise from unsuccessful criminal or civil proceedings brought maliciously and without reasonable and probable cause.

In Nigeria the scope of this tort extends, by the doctrine of received English Common Law, to both criminal and civil proceedings but its inclusion of civil proceedings was overlooked and abandoned. By this, the Nigerian legal system denies justice to those who suffered injustice or damage by unsuccessful groundless and damaging civil proceedings brought maliciously. The Nigeria's legal system or jurisprudence inadvertent exclusion of malicious prosecution of civil proceedings overrides the need for the law to be true to its very existence – the 'rule of public policy which has first claim on the loyalty of the law that wrongs be remedied'<sup>71</sup> and its expression in the words of Holt CJ in *Savile v Roberts*,<sup>72</sup> if this injury be occasioned by malicious prosecution, it is reason and justice that he should have an action to repair him the injury' Nigeria's jurisprudence' exclusion of tort of malicious prosecution of civil proceeding as a part of the tort – it is found, as shown above, - stemmed from its definition and description by academics, authors, cases, statutes and university curriculum on the subject in the perspective or stand point of arising from criminal proceeding to the exclusion of civil proceedings. In the circumstance a redefinition of the tort is recommended, thus: it could be defined or described as denoting the institution of a criminal or a civil proceedings for an improper purpose and without reasonable or probable cause; and its essentials are the same with that of malicious criminal prosecution provided that the groundless civil prosecution gives rise to any of the following heads of damage to: reputation, person, liberty or finances.<sup>73</sup> It is further recommended that Nigeria courts recognize and accept that an action could be founded upon civil proceedings brought maliciously without reasonable or probable cause. The court in *Innoson Nigeria Ltd v Guaranty Trust Bank Plc*, per Peter O. Affen, found and held that in appropriate circumstance that a cause of action on malicious prosecution could arise from civil proceedings.<sup>74</sup> This is a welcome development and it is further recommended that other Nigerian Courts take a cue from this case. It is through this that the essence of justice – *ubi jus ubi remedium* – will be observed in such situation. The general rule that where there is a wrong there should be a remedy is the cornerstone of any system of justice and Nigeria should not be an exception. It will be unjust for a person to suffer injury as a result of malicious prosecution of civil proceedings for which there is no reasonable ground, and yet not to be entitled to compensation for the injury caused by the malicious and groundless action.

<sup>69</sup> Prof J. Mullis, A and Parkers R. QC [2013] *Libel and Slander* (13<sup>th</sup> Edition) London: Sweet & Maxwell. Page 485 para 13.16; *Dawkins v Rokeby* (1873) LR8QB 255; *Watson v M' Ewan* [1905] AC 480

<sup>70</sup> *Crawford Adjusters and other (Cayman) Gagicor General Insurance (Cayman) Ltd* [2013] UKPC17 at paras 96 – 100

<sup>71</sup> (*Minors*) v *Bedfordshire County Council* [1995]2 AC 633 at 663

<sup>72</sup> (1698) 1 lord Raymond 374

<sup>73</sup> Being the kind of damages specified by Holt CJ in *Savile v Roberts* (1698) 1 Lord Raymond 374

<sup>74</sup> *Innoson Nig Ltd v Guaranty Trust Bank Plc*. FCT/HC/CV/2448/2017. Judgment of 1<sup>st</sup> October 2019