



**Okwata & 2 others v Odenyo & 2 others (Civil Suit E003 of 2023)
[2024] KEHC 16103 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL SUIT E003 OF 2023
DK KEMEL, J
DECEMBER 20, 2024**

BETWEEN

**PHEOBE OKWATA 1ST PLAINTIFF
DOROTHY OKWATA 2ND PLAINTIFF
TIMOTHY PEACE OTIENO 3RD PLAINTIFF**

AND

**MARTIN ODERA ODENYO 1ST DEFENDANT
BOOKER ODENYO 2ND DEFENDANT
SPEAR & SHIELD PUBLISHING 3RD DEFENDANT**

RULING

1. The 1st and 2nd Defendants herein have filed a Notice of Preliminary Objection dated 3/1/2024 brought under section 4(2) of the [Limitation of Action act](#) and section 57 of the [Interpretation and General Provisions Act](#), cap 2 laws of Kenya. The Defendants/applicants contend that the Plaintiffs suit is time barred by the said law provisions from filing a lawsuit premised on libel or slander after twelve months from the date on which the cause of action accrued.
2. The said Preliminary Objection was canvassed by way of written submissions. Both parties duly filed and exchanged their submissions.
3. Learned counsel for the 1st and 2nd Defendants submitted that the preliminary objection has been validly raised and that the same is in tandem with the principles enunciated in the case of *Mukhisa Biscuits Manufacturing Co. ltd Vs. West End Distributors ltd* (1969) E.A 696 where the court stated that “...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.



Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

4. The Defendants /Applicants submitted that their Notice of preliminary objection meets the criteria in the Mukhisa Biscuit case (supra) as it raises a pure point of law which if determined will dispose of the suit.
5. It was the submissions of the 1st and 2nd defendants that the book subject matter of the suit namely “Starring at Nyanza Sun: An American Memoir” was first published on September 16 2010(see www.nyanzasun.com). The suit by the Plaintiffs was filed on 16th November 2023, over 13 years after publication. It was submitted that section 4(2) of the limitation of Actions Act provides thus:

‘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.”

6. Based on the foregoing provision, it was submitted that the suit filed by the Plaintiffs is bad in law as the same was filed outside the limitation period. It was further submitted that the Plaintiffs did not seek leave of court to lodge the suit out of time and hence the same ought to be dismissed.
7. In rebuttal, learned counsel for the plaintiffs submitted that the Preliminary objection before court does not meet the threshold established in the case of *Oraro vs. Mbaja* (2005)1 KLR 141 where the court held:

“Anything that purports to be a Preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

In the instant application, the applicants submitted that the said book was published on 16 September 2010.referring the court to (www.nyanzasun.com). The respondents submitted that this information is not anywhere in the pleadings and thus it is subject to be tested in evidence. Further, it was submitted that the objection raised requires facts to be ascertained and that there is need for the court to ensure that the rights of the plaintiffs are protected under the constitution.

8. Finally, learned counsel for the Plaintiffs submitted that the Preliminary objection lacks merit and that the same be dismissed with costs to the Plaintiffs.
9. I have given due consideration to the Preliminary objection, the rival submissions and the authorities cited. I find the only issue for determination is whether the Preliminary Objection raised by the 1st and 2nd Defendants has merit.
10. The issue of a preliminary objection was succinctly stated in the celebrated case of *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Co. Ltd* [1969] E.A 696 as follows:

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.



A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts as pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion. The improper raising of points of by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The improper practice should stop....”

11. The 1st and 2nd Defendants have maintained that the suit offends the provisions of section 4(2) of the [Limitation of Actions Act](#) which provides as follows:

“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.”

It is noted that the same [Limitation of Actions Act](#) allows a party who is late in lodging a suit to file a suit out of time if he/she seeks leave from the court. This is found in section 27 of the said Act which provides as follows:

“Section 4(2) does not afford a defence to an action founded on tort where:

- a. The action is for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or of written law independently of contract or written law; and
- b. The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries or any person; and
- c. The court has , whether before or after the commencement of the action, granted leave for the purposes of this section; and
- d. The requirements of Subsection (2) are fulfilled in relation to the cause of action.”

12. It is noted from the averments and pleadings by the Plaintiffs that the issue of the Publishing of the defamatory book took place sometimes in the year 2010. That being the position, then the Plaintiffs ought to have sought leave from the court so as to file the suit out of time. There is no evidence that such a leave was obtained as the Plaintiffs have not averred that they did so prior to the filing of this suit. In the case of [Willis Onditi Odhiambo Vs Gateway Insurance Co. Ltd](#) [2013] eKLR the Court of Appeal held as follows;

“Under section 27(1) of the [Limitation of Actions Act](#), time to file suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages awarded should be in respect of personal injury to the plaintiff as a result of the tort.”

13. The Plaintiffs on the other hand have maintained that the preliminary objection raised herein requires facts to be ascertained and further seeks the exercise of judicial discretion. Indeed, as was held in the case of [Oraro Vs Mbaja](#) [200] KLR 141 the objection should not deal with disputed facts that must be tested by rules of evidence.



14. Even though the foregoing is the position, I find that it is appropriate to look at the pleadings and averments and ensure that the facts as pleaded by the opposite side are correct or that they have the agreed facts. I have looked at the plaint dated 16/11/2023 and that there are averments by the Plaintiffs herein through their witness statements dated 16/11/2023 wherein they have stated inter alia; that the defamatory book was published in 2010 and that the defendants hold the copyrights; that they wrote a protest letter to the 1st Defendant concerning the offending accounts in the book to which the said 1st Defendant acknowledged and admitted the wrongdoing; that they wrote a second protest letter seeking that the 1st Defendant withdraws the offending book and or reviews the book and remove the characters and that the said 1st Defendant agreed and undertook to rectify the anomaly.
15. The 1st and 2nd Defendants in their statement of defence dated 2/1/2024 have admitted certain paragraphs of the plaint as well as denied others. It is not in dispute that a careful perusal of the Plaint as well as the defence leaves no doubt that the facts as pleaded by the other side are correct. This then, bolsters any of the parties to raise a Preliminary Objection on point of law at any stage of the proceedings.
16. Looking at the facts as pleaded by each side, it is clear that the issues are as clear as the blue sky. It is not in dispute that the Plaintiffs are agreed that the offending book was published in the year 2010. The Plaintiffs have moved this court thirteen years after the alleged defamation. The Plaintiffs have not presented evidence to the effect that they sought leave from the court for extension of time to lodge the suit as the tort of defamation requires an aggrieved party to file suit within twelve months as provided for under the Limitation of Actions Act. I find the over ten years period of inaction to be inexcusable in the circumstances. Consequently, I am inclined to agree with the Defendants' claim that the suit is time barred.
17. In view of the foregoing observations, it is my finding that the 1st and 2nd Defendants' preliminary objection dated 2nd January 2024 has merit. The same is allowed as prayed with the consequence that the Plaintiffs' Notice of Motion dated 16th November 2023 as well as the Plaint dated 16th November 2023 are hereby struck out with costs to the 1st and 2nd Defendants.

DATED AND DELIVERED AT SIAYA THIS 20TH DAY OF DECEMBER, 2024

D. KEMEI

JUDGE

In the presence

Ngara.....for Plaintiffs

Ogada.....for 1st & 2nd Defendants

N/A.....3rd Defendant

OgendoCourt Assistant

