



REPUBLIC OF KENYA



**Maina v Synthecon Kenya Ltd & another (Miscellaneous Civil Application E538 of 2021) [2023] KEHC 19660 (KLR) (Civ) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19660 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E538 OF 2021**

**CW MEOLI, J**

**JUNE 29, 2023**

**BETWEEN**

**MARGARET KAMUYU MAINA ..... APPLICANT**

**AND**

**SYNTHECON KENYA LTD ..... 1<sup>ST</sup> RESPONDENT**

**SYNTHECON STRUCTURES MANUFACTURING SA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Originating Summons (the Summons) brought by Margaret Kamuyu Maina (hereafter the Applicant) dated October 29, 2021 and expressed to be brought *inter alia* under Section 27 and 28 of the [Limitation of Actions Act](#) seeks the orders hereinbelow:
  - 1) Spent.
  - 2) That the Applicant be granted leave to file suit against the Respondent out of time.
  - 3) That the draft Complaint annexed hereto be deemed as duly filed within time and be admitted as a Complaint for purposes of the intended suit.
  - 4) That costs of this application be provided for. (sic).
2. The Summons is supported by the affidavit of the Applicant and which affidavit echoed the grounds present on the face thereof. The gist of her affidavit is that on the respective dates of April 5, 2019 and April 9, 2019 Synthecon Kenya Ltd and Synthecon Structures Manufacturing SA (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) caused to be published in the Kenyan Standard Newspaper and the Daily Nation Newspaper, respectively, defamatory (allegedly) material concerning the Applicant.



3. That being aggrieved, the Applicant instructed the firm of Gatonye, Jay & Co Advocates (the erstwhile advocates) to file a defamation suit against the Respondents sometime on or about July 1, 2019. It was stated that at all material times, the Applicant believed that the erstwhile advocates had instituted the suit on her behalf only to later learn that no such suit had been filed. The Applicant averred that the firm of M/S Wanyonyi & Muhia Advocates (the current advocates) has therefore brought the present Summons in light of the foregoing circumstances and without undue delay, containing sufficient reasons to support the orders sought.
4. By way of the lengthy replying affidavit sworn by Peter Kamuyu Karungu a director of the Respondents herein on November 26, 2021 the Summons was opposed. The deponent stated that pursuant to the provisions of Section 4(2) of the *Limitation of Actions Act*, claims of a defamatory nature shall be brought within a period of 12 months from the date of the cause of action and hence the Applicant's claim is time barred. The deponent further stated that there has been inordinate delay on the part of the Applicant in filing the instant Summons and that no sufficient reasons have been given or material tendered to support the averments made in the Summons. It was similarly deposed that the conditions set out under Sections 27 and 28 of the *Limitation of Actions Act* under which the Summons has been brought, have not been satisfied and moreover, that the Applicant has no reasonable cause of action against the Respondents.
5. In rejoinder, the Applicant by way of her supplementary affidavit sworn on February 14, 2022 averred that contrary to the averments made in the replying affidavit, the delay in bringing her claim was solely occasioned by inadvertence on the part of the erstwhile advocates. That she had annexed copies of phone message conversations between herself and the erstwhile advocates to support her assertions in her supporting affidavit. The Applicant reiterated that as soon as the current advocates discovered that no suit had been instituted, they moved swiftly to bring the instant Summons which satisfies the conditions warranting an extension of time for filing of the defamation claim. The Applicant further deposed that she has a reasonable cause of action against the Respondents as seen in the draft Plaintiff annexed to the Summons.
6. On the record is also an affidavit sworn by an advocate, one Joseph Gatore Shadrack on behalf of the Applicant's erstwhile advocates, disputing the averments made by the Applicant as mere falsehoods as no instructions were ever given to the erstwhile advocates to institute a defamatory claim against the Respondents. The deponent stated that the only instructions received from the Applicant were in respect to the filing of a claim before the Employment and Labour Relations Court (ELRC) which instructions were effected when the deponent filed ELRC No 472 of 2019 on her behalf. It was averred that the alleged text message communications referenced in the supporting affidavit did not relate to any defamation claim, but rather, they were in respect to the above-cited claim before the ELRC.
7. On February 13, 2023 the court directed that the Summons be canvassed by way of written submissions. On her part, the Applicant's submissions are to the effect that while the provisions to Section 4(2) of the *Limitation of Actions Act* prescribe that an action for libel or slander may not be brought after the end of twelve months since the date of the cause of action accruing. However, the courts have on previous occasions exercised their discretion in granting an extension of time for a party to institute a suit, citing the decisions in *Nation Media Group Limited & 2 Others v Margaret Kamene Wambua* [2021] eKLR and *Royal Media Services Ltd v Valentine Mugure Maina & Another* [2019] eKLR.
8. The Applicant further submitted that the delay in instituting the suit within the statutory timelines was caused by the erstwhile advocates and that she should not be punished for their inadvertence, relying on the decisions in *Alnoor Al Mustaqeen v officer Commanding Police Station Garbatulla*



¶ 2 others [2014] eKLR and In Re Joyce Wamubu Gitau [2015] eKLR. It was submitted that even without delving into the merits of the suit, it is clear that the Applicant has a valid claim against the Respondents. The court was urged, on those grounds, to allow the Summons.

9. The Respondents' counsel while citing Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission ¶ 7 others [2014] eKLR argued that the extension of time is not an automatic right and hence the burden rests with a party to demonstrate by way of sufficient evidence and to the satisfaction of the court, that he or she is deserving of an extension of time within which to bring an action.
10. Counsel also argued that the discretion of a court in extending time is applied on a case-to-case basis based on the facts presented before it, quoting YH Wholsalers Limited v Kenya Revenue Authority [2021] eKLR. Counsel echoed the averments in the replying affidavit that the explanation given by the Applicant for the inordinate delay in filing a timely suit has not been supported by any evidence and hence the court ought not to exercise its discretion in her favour. Further, it was submitted that the Applicant has not satisfied the conditions for an extension of time set out under Sections 27 and 28 of the Limitation of Actions Act. Resultantly, the court was urged to dismiss the Summons with costs.
11. The court has considered the material canvassed in respect of the Summons. Section 4(2) of the Limitation of Actions Act provides that:

“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”.

12. The cause of action in the present instance allegedly accrued on or about April 5, 2019 when the first alleged publication was made, and subsequently on April 9, 2019, and hence the Applicant ought to have filed her suit for defamation by April 5, 2020. Her application for extension of time and/or leave to file the suit out of time is anchored primarily on Sections 27 and 28 of the Limitation of Actions Act, the former which provides as follows:

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

1.

- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of 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.

2. ....

3. ....”



13. The above provision has been the subject of interpretation in different superior courts. In the case of *Mary Osundwa v Nzoia Sugar Company Limited* Civil Appeal No 244 of 2000 [2002] eKLR the Appellant had successfully sought leave (granted by consent in the High Court) to file a cause for alleged breach of contract, 7 years since the cause of action accrued. The Court of Appeal having set out the provisions of Section 27 (1) of the *Limitation of Actions Act* stated that:

“The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiero J. had no jurisdiction to extend time as he purported to do on 28<sup>th</sup> May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”.

14. Similarly, in *Bosire Ogero v Royal Media Services* [2015] eKLR and *Dr. Lucas Ndung'u Munyua v Royal Media Services Ltd & Another* [2014] eKLR, the court held that Section 27 (1) does not provide for the extension of time to file a suit for defamation. No doubt echoing the holdings in *Wycliffe A. Swanya v Toyota East Africa Limited and Another* [2009] eKLR; *Rawal v Rawal* (1990) KLR 275 and *Dhanesvar V. Mehta v Manilal M. Shab* [1965] EA 321, Aburili J restated the rationale behind the *Limitation of Actions Act*, in Bosire Ogero's case as follows:

“The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.

15. The court therefore finds that, from a plain reading of Section 27(1) of the *Limitation of Actions Act* and based on precedent, there is no jurisdiction to extend time for the filing of a defamation cause. The Applicant's reliance on the decisions in *Nation Media Group Limited & 2 Others v Margaret Kamene Wambua* (*supra*) and *Royal Media Services Ltd v Valentine Mugure Maina & Another* (*supra*) are to no avail. The learned Judge's comments at the conclusion of his judgment in the *Royal Media Services Ltd* case considered only the provisions of Section 4(2) and not Section 27(1) of the *Limitation of Actions Act* and appear to be obiter dictum in nature.

16. The Originating Summons dated October 29, 2021 must therefore fail and it is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

