REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL SUIT NO 2 OF 1988

GEORGE FRANCIS SIMYU.....PLAINTIFF

VERSUS

THE HON ATTORNEY GENERAL OF KENYA.....1ST DEFENDANT

THE DIRECTOPR OF PUBLIC PROSECUTIONS ……. 2ND DEFENDANT

THE INSPECTOR GENERAL OF NATIONAL

POLICE SERVICE……3RD DEFENDANT

CHRISTOPHER WANJALA ……...……..…… 4TH DEFENDANT

THE PROTESTANT CHURCHES MEDICAL ASSOCIATION

CHRISTIAN HEALTH ASSOCIATION OF KENYA ……..…. 5TH DEFENDANT

RULING

Preamble:

I wish to apologise to the advocates and parties in this matter over the delay in delivering this ruling in a timely fashion. I recognise that this is an old matter, and the delay must have caused anxiety and distress to all involved. I am very sorry. Over the past month, I have been overwhelmed with the volume of work and bulky judgements and rulings, which made it difficult for me to honour the projected time lines, resulting in rescheduling this matter more than once

1. The background to this matter is that the plaintiff (**GEORGE FRANCIS SIMIYU)** on 7th January, 1988 filed suit seeking damages for malicious prosecution against the Attorney General, the Court of Appeal having quashed his conviction on 8th January, 1987 in **CRIMINAL CAUSE NO. 1578 OF 1982**. The Plaintiff had equally filed a separate suit being **NAIROBI HCC 122 of 1987** seeking damages for unlawful termination and conversion of property against the trustees of the 5th Defendant which suit was consolidated with the instant suit vide an order of the court issued on 8th August, 2007.

2. The said Orders were set aside vide ruling dated 13th April, 2013which consequently deconsolidated this suit with **NAIROBI HCC 122 of 1987**. By a Further Amended Plaint dated 29th January, 2020, the Plaintiff enjoined the 4th and 5th Defendants in this suit and further included a prayer for wrongful and unlawful conversion of property (which is among the issues yet to be determined in **NAIROBI HCC 122 of 1987).**

3. This court cannot therefore be urged to find that to entertain the same. This court is urged to note that upon deconsolidation of this suit and **NAIROBI HCC 122 of 1987**, the real question in controversy in this suit is whether the 1st, 2nd and 3rd Defendants herein in performing their duties, wrongfully arrested, and maliciously prosecuted the Plaintiff for tortortious claims arising out of malicious prosecution, the same should be brought within three (3) years from the time the cause of action arose.

4. By a further further amended paint dated 29/01/2020 the plaintiff sued the defendants including the two objectors seeking restoration of his two vehicles, and profits and income from the vehicles and tractors. He seeks a declaration that he is entitled to land parcel **No. LR 209/3999/6**, and that the 7th defendant is registered as a trustee for his benefit, and that the 7th defendant be ordered to transfer the said parcel to him. He also seeks damages for wrongful conversion of his properties, and damages for malicious prosecution.

5. These prayers stem from the events which begun in 1979, wherein the plaintiff alleges that **THE PROTESTANT CHURCHES MEDICAL ASSOCIATION now known as CHRISTIAN HEALTH ASSOCIATION OF KENYA,** without reasonable cause, reported to police, that while working for the association as secretary general, he stole therefrom. As a result, he was charged in **Nrb Criminal Case No 1578 of 1982** with 46 counts for the offence of stealing by servant. He was consequently tried and acquitted.

6. In the course of his employment he acquired motor vehicles, and tractors, and he engaged in a thriving transport business, and he also carried on farming activities. Between January 1984 – April 1984, while the plaintiff was still incarcerated, the association and the 4th defendant took away his properties, and converted the same to their own use, in some instances fronting other beneficiaries who masqueraded as innocent purchases for value.

7. The defendants have filed their respective defences. However, **CHRISTOPHER WANJALA (4th Defendant) and CHRISTIAN HEALTH ASSOCIATION OF KENYA** (5th Defendant) have filed a notice of preliminary objection to the plaintiff's suit filed vide a further further amended plaint 29/01/2020 on grounds that:

a) The suit herein is statute barred as against them pursuant to section 4 (2) of the Limitation of Actions Act

b) This court lacks jurisdiction to entertain the suit against the two named parties

8. When the matter came up for hearing of the main application, this court directed that the preliminary objection be canvassed heard and determined first through written submissions. However, I only received submissions from the 4th and 5th defendants 'counsel

From the court record, it is evident that the 4th and 5th Defendants were enjoined in this suit on 5th February, 2020 when the Plaintiff filed its Further Further Amended Plaint, being over thirty (30) years from the time the cause of action arose. The main issues for determination are identified as follows:

1. Whether this suit is time barred against the 4th and 5th Defendants by virtue of Section 4 (2) of the Limitation of Actions Act.

2.Whether the Court has jurisdiction to entertain this suit against the 4th and 5th Defendants

In addition to this, I think there are issues raised regarding joinder and misjoinder of parties, as well as the claim that there is another suit pending hearing and determination in Nairobi HCCC No 122 of 1987.

9. A. WHETHER THIS SUIT IS TIME BARRED AGAINST THE 4TH AND 5TH DEFENDANTS BY VIRTUE OF SECTION 4 (2) OF THE LIMITATION OF ACTIONS ACT10.

A cause of action for a claim of damages malicious prosecution arises when a Plaintiff is acquitted or upon quashing of his conviction by a superior court. This was held in **JACOB JUMA & ANOTHER V COMMISSIONER OF POLICE & ANOTHER CIVIL SUIT 661 OF 2007 [2013]** eKLR where Odunga J opined as follows:

> ***"The first issue for determination is whether the claim herein is time barred. As was held in Mbowa vs East Mengo District Administration (supra) the damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside."***

10. It is submitted that in this case, the Plaintiff's conviction in **CRIMINAL APPEAL NO. 5 OF 1986** was quashed vide judgment of the Court of Appeal delivered on 8thJanuary, 1987. That this therefore means time to institute this suit against the 4th and 5th Defendants started running from 8th January, 1987 when the Court of Appeal quashed the Plaintiff's conviction, reference is made to **Section 4 (2) of the Limitation of Actions Act**

11. It is contended that evidently from the court record, by a Further Further Amended Plaint dated 29th January, 2020, the Plaintiff enjoined the 4th and 5th Defendants, being over thirty (30) years since the cause of action arose. That the Plaintiff ought to have brought this suit against the 4thand 5thDefendants within three (3) years from the time the cause of action arose and not after thirty (30) years. That the same is subsequently time barred and should be dismissed with costs to the 4th and 5th Defendants.

It is further pointed out that the prayer for damages for wrongful and unlawful conversion is an issue to be determined in **NAIROBI HCC 122 of 1987**and therefore this court has no jurisdiction to entertain the same as it shall be going against the principles of subjudice pursuant to **Section 6 of the Civil Procedure Act**.

12. Further, that in an action founded on a tort of malicious prosecution, the proper party to be sued is the Attorney General as the 4th and 5th Defendants are only complainants. That the decision to charge and prosecute the Plaintiff was taken by the Police and the then office of the Attorney-General, so the 4th and 5th Defendants cannot be held liable. In support of these submissions the court is referred to on the case of **JOSEPH WAMOTO KARANI V C. DORMAN LIMITED & ANOTHER [2018] eKLR** where Aburili (J) in holding that cited with authority the case of **Douglas Odhiambo Apel & another vs. Telkom Kenya Limited, the Commissioner of Police and the Attorney General where JusticeKihara Kariuki** (as he then was) rendered himself as follows:

> **"The second difficulty is that by the time the case came before me for Judgment, the claim against the Commissioner of Police and the Attorney General had already been withdrawn leaving Telkom Kenya as the sole Defendant in the Suit. The**

Plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney General 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."

In light of the advanced arguments, statutory provisions and cited authorities, it is submitted that the Plaintiff's suit against the 4th and 5thDefendants is statute barred by dint of **Section 4 (2) of the Limitation of Actions Act** having been brought after three (3) years from the date the cause of action arose. The same is therefore not maintainable and the court is urged to have it dismissed with costs to the 4th and 5th Defendants.

What is the cause of action in this matter? This is a matter where the plaintiff alleges malicious prosecution and is seeking damages. The next question to consider is when did the cause of action complained of arise?

I do not think I can purport to re-invent the wheel and hasten to point out that judicial precedents are replete with views on the question as to when time begins to run in such a cause of action. I refer to the decision in **Mbowa vs. East Mengo District Administration [1972] EA 352, the East African Court of Appeal** expressed itself as follows:

"The action for damages for malicious prosecution ... essential ingredients are:

(1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;

(4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge .... The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

13. It therefore means that the cause of action accrued at the termination of the criminal case, and not at the point when the plaintiff was arrested and charged. From the pleadings the Plaintiff's conviction in **CRIMINAL APPEAL NO. 5 OF 1986** was quashed vide judgment of the Court of Appeal delivered on 8th January, 1987. This therefore means time to institute this suit against the 4th and 5th Defendants started running from 8th January, 1987 when the Court of Appeal quashed the Plaintiff's conviction.

Section 4 (2) of the Limitation of Actions Act 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

Consequently, the cause of action ought to have been filed at least by January 1990, and the record shows that the plaintiff was ahead of his time and filed the suit in 1988. However, the problem arose when by a Further Further Amended Plaint dated 29th January, 2020, he enjoined the 4th and 5th Defendants, more than thirty years later. Did he obtain leave to enjoin them out of time?

I have perused the record and find that by a ruling dated 23rd January 2020, Sewe J granted the plaintiff leave to file a further further amended plaint. My understanding is that in granting that leave, the court was fully minded of the lapse of time, but nonetheless deemed that the amendment was necessary so as to add other parties for the fair determination of the suit. I therefore find that the cause of action is properly before this court and the issue of it being time barred has been overtaken by virtue of those orders.

WHETHER THE COURT HAS JURISDICTION TO ENTERTAIN THE SUIT AGAINST THE 4TH AND 5TH DEFENDANTS

Drawing from the case of **THURANIRA KARAURI VS. AGNES NGECHE CIVIL APPEAL AT NYERI 192 OF 1996 [1997] eKLR** where the Court of Appeal in finding that the court lacked jurisdiction to entertain a time barred suit, held that:

"We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction" and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently court has no jurisdiction to entertain the such suits.

It is argued that if the order for extension, if indeed obtained, as alleged existed, should have been served on the defendant with the plaint, and since it was not, then the plaintiff's Advocate was under a duty to prove its existence as part of the plaintiff's case at the trial. That having failed to do so, the defence of limitation, the plaintiff's suit was incompetent and should have been struck out.

14. It is further contended that even if the Plaintiff was to seek leave to bring this suit against the 4th and 5th Defendants out of time pursuant to **Section 27 and 28 of the Limitation of Actions Act** does not provide for the same and this court has no jurisdiction even by dint of **Section 3and 3A of the Civil Procedure Act** to grant what is not allowed or provided by Limitation of Actions Act.

I think if the defendants were unhappy with the ruling made by Sewe (J) on grounds that it had no jurisdiction to allow the amendment which in effect extended time within which to file the suit against the 4th and 5th defendants, the legal procedural avenue available to them was to either seek review of those orders or appeal against the same. I am of the view that it is totally misplaced to now argue that the court had no jurisdiction to extend time within which to file the suit against the two, by virtue of the said amendment. It is actually this court which has no jurisdiction to review the orders made by a judge of equal jurisdiction, and who is still serving in this station. In any event, there is no application for review of those orders.

15. On the other limb as to whether the 4th and 5th defendants are properly joined in this suit, or whether they were simply complainants of a wrong committed, and that the final decision to charge lay with other organs, bearing in mind that the court had already made a ruling on the issue of joinder, then the issue in my view now touches on liability which forms the substratum of this suit, is a matter of evidence and in my view cannot be determined at this preliminary stage without hearing the evidence to be presented.

SUB-JUDICE

16. Is this matter offending the sub-judice rule on grounds that there is another case in Nairobi HCC of 1987 pending hearing? Unfortunately, the pleadings in the Nairobi matter were not presented to this court so as to confirm that the matter is replicate of this one. In any event if only one prayer is shared (i.e on the issue of conversion and prayer for damages), there is the option of seeking striking off that prayer. I cannot tell whether the Nairobi matter has other prayers, nor is the stage at which it has reached been disclosed.

The upshot is that the preliminary objection lacks merit and is dismissed with costs to the plaintiff.

Virtually delivered and dated this 28th day of May 2021 at Eldoret

H. A. OMONDI

JUDGE

Amukhale hbf Mr Lutta for 4th and 5th Defts

N/A for Ptff at 2.34pm