



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
MISC. CIVIL APPLICATION NO. 235 OF 2020
HON. JAYENDRA MALDE.....APPLICANT
VERSUS
IRSHAD ALI SUMRA.....RESPONDENT
RULING

1. The notice of motion of motion by **Hon. Jayendra Malde** (Applicant) dated 6th July, 2020 and expressed to be brought inter alia under Section 27 and 28 of the Limitation of Actions Act contains two key prayers: -

“2. THAT the Applicant be granted leave to file a civil suit against the Respondent out of time.

3. THAT the intended suit annexed herein be deemed to have been filed within the time specified”. (sic).

2. The motion is supported by the affidavit of **Joseph Njenga Maina** the Applicant’s advocate. The gist thereof is that the Applicant was in 2018 an elected Member of the County Assembly (MCA) for Parklands/Highridge Ward and the Chairman of the Justice and Legal Affairs Committee of the County Assembly of Nairobi; that on 24th August, 2018 he was arrested by officers attached to the **Ethics and Anti-Corruption Commission** (EACC) at the instigation of **Irshad Ali Sumra** (hereafter the Respondent) who had claimed that the Applicant had solicited for and received a bribe from one **Rahim Chatur** and that the Respondent had caused photographs to be taken during his arrest and circulated to several media houses.

3. It was deposed further that the matter was subsequently investigated by the EACC and by the Select Committee on Powers and Privileges of the Nairobi County Assembly; that ultimately the EACC dropped the investigation as the select committee also exonerated the Applicant in November and February 2019 respectively; that the Applicant had proposed to file a suit for defamation against the Respondent but due to the time taken by the two processes could not file the suit in the prescribed period; and that he desires to redeem his name which has been unfairly tarnished through the Respondent’s alleged scandalous, false and malicious complaint that caused the Applicant great loss and anxiety. He pleads that his application be allowed in the interest of justice, or else he will suffer irreparable loss/damage.

4. The Respondent’s lengthy affidavit in opposition to the motion contains argumentation that is not suited to an affidavit, in addition to other depositions. The Respondent deposes inter alia that the pendency of investigations cited by the Applicant as the reason for delay did not operate as a bar to the timely filing of his suit for alleged defamation and that there is no merit in the motion. Besides the Respondent disputes that he personally made a complaint against the Applicant to authorities and in the alternative asserts that if he did so, it was borne out of civic duty rather than malice, and he denies that he was responsible for the Applicant’s arrest and the photographs taken and published in respect of the Applicant’s arrest. He deposes that the Applicant was duty bound under the Limitation of Actions Act to exercise diligence and to take reasonable steps in connection with his alleged grievance but was indolent and does not therefore deserve the discretion of the court.

5. On 21/01/2021 the court directed that the motion be canvassed by way of written submissions. Although the Applicant had duly complied by the next mention date, (1/02/2021) the Respondent had not, counsel for the Respondent promising to do so on the next day. A ruling date was set. Even so, the record does not contain any submissions by the Respondent. In the circumstances, and in the interest of justice, the court will consider the argumentative paragraphs in the Respondent’s replying affidavit in lieu of written submissions.

6. The Applicant’s submissions are to the following effect. 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. Reiterating the Applicant’s explanation for the delay in filing his suit in respect of the cause of action that accrued on 27th August, 2018, the Applicant

asserts that the court has discretion under Section 28 of the Limitation of Actions Act to extend time for filing of the suit for libel or slander where circumstances justify such extension. The Applicant called to his aid the decision of **Ngaah J. in Royal Media Services Ltd. Valentine Mugure Maina & Another (2019) eKLR** on the point. He posited that the absence of a specific provision on the extension of time for the filing of a defamation suit should not defeat the otherwise deserving application.

7. The latter submission is the subject of the first and fervent argument raised by the Respondent; that there is no provision in law allowing the court to extend time for filing a suit in respect of defamation and the application is therefore misconceived. Citing the cases of **David Githumbi Thande V. Daily Farmers' Co-Operative Society and 9 Others [2010] eKLR**, **Dr. Lucas Ndung'u Munyua v. Royal Media Services Ltd & Another [2014] eKLR**; **Mary Osundwa V. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 [2002] eKLR** and **Republic V. Principal Magistrate P. Ngare Gesire & 3 Others Exparte Nation Media Group Ltd [2013] eKLR**, the Respondent asserted that Section 27 and 28 of the Limitation of Actions Act does not envisage extension of time to file defamation causes, and that even concerning actions founded on tort the sections only apply to claims in respect of personal injuries arising from negligence, nuisance or breach of duty.

8. Further, the Respondent argued that as stated in **Rawal vRawal (1990) KLR 275 and Dhanesvar V. Mehta vs Manilal M. Shah [1965] EA 321** the object of the limitation law is to prevent claimants from prosecuting stale claims and for protecting the adverse party after he had lost evidence from being disturbed after a long lapse of time, the effect being to remove remedies that otherwise would have been available to the late claimant, irrespective of the merits of his case.

9. The court has considered the material canvassed in respect of the motion. 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 form such date”.

10. The cause of action in this instance allegedly accrued on or about 24th August, 2018 and the Applicant ought to have filed his suit for defamation by 24th August, 2019. He has anchored his motion for leave 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)

11. The above provision has been the subject of interpretation in different superior courts. In the case of **Mary Osundwa** (supra) the Appellant had successfully sought leave (granted by consent in the High Court) to file a cause for alleged breach of contract, some 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, Osiemo J. had no jurisdiction to extend time as he purported to do on 28th 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”.

12. 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 and Dhanesvar V. Mehta's Case, Aburili J.** restated the rationale behind the Limitation of Actions Act, in **Bosire Ogeto'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”.

13. This court therefore finds that, on 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 decision of **Ngaah J**’s decision in **Royal Media Services Ltd. vs Valentine Mugure and Another** is to no avail. The learned Judge’s comments at the conclusion of his judgment 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.

14. The motion dated 6th July, 2020 must therefore fail and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 25TH DAY OF JUNE 2021.

C. MEOLI

JUDGE

In the Presence of:

For the Applicant: Miss Kimaru h/b for Mr. Maina

For the Respondent: N/A.

Court Assistant: Carol