



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 6 OF 2015

SWINSTONE WASIKE.....1ST PLAINTIFF

SAMUEL KIPKURUI.....2ND PLAINTIFF

VERSUS

GENERAL MOTORS EAST AFRICA LIMITED.....1ST DEFENDANT

THE INSPECTOR GENERAL OF POLICE.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The 1st and 2nd plaintiffs herein lodged a suit against the 1st, 2nd and 3rd defendants vide the plaint filed on 13th January, 2015 and sought for general, pecuniary and special damages arising out of a claim in the nature of malicious prosecution.
2. Upon service of summons, the 1st defendant filed a statement of defence to deny the plaintiff's claim.
3. Subsequently, the 2nd and 3rd defendants filed the notice of preliminary objection dated 1st July, 2021 to challenge the competency of the suit for being time barred and for offending the mandatory provisions of Section 3 of the Public Authorities Limitation Act, Chapter 39, Laws of Kenya ("the Act").
4. To oppose the preliminary objection, the plaintiffs filed the objection dated 17th July, 2021.
5. The parties dispensed with the preliminary objection through oral arguments.
6. I have considered the grounds laid out in the notice of preliminary objection; the objection in opposition thereto and the rival oral arguments and authorities relied upon.
7. It is clear that the preliminary objection is fundamentally challenging the validity of the suit for being time barred.
8. On her part, *Miss Mutsoli* counsel for the 2nd and 3rd defendants argues that the instant suit offends the provisions of Section 3 of the Act and that the same was filed out of time and without leave of the court.
9. The above sentiments were echoed by *Mrs. Okina* advocate for the 1st defendant, who submits that the suit should be struck out.
10. In reply, the plaintiffs argue in their objection that the suit was filed within the stipulated statutory timelines and that the issue touching on when the cause of action accrued is a matter requiring the tendering of evidence and hence cannot be adequately determined at this stage. In summary, the plaintiffs are of the view that the preliminary objection is not founded on a point of law and therefore ought to fail.
11. In restating the above, *Rana* learned counsel for the plaintiffs contends that the plaintiffs were acquitted on 13th September, 2013 whereas the suit was filed on 15th December, 2014 and that the delay in filing the same was the result of the time taken in obtaining the criminal proceedings from Makadara Law Courts.
12. Upon considering the above, I turn to the renowned case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** where the court analyzed the definition of a preliminary objection in the following manner:

“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 pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

13. The above definition was further advanced in the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

14. Contrary to the averments being put forward by the plaintiffs, I find that the issue touching on when a cause of action accrues is a point of law since it will determine whether the suit is valid or time barred, which will in turn determine whether the court has jurisdiction to entertain the same.

15. Upon my perusal of the record, I observed that the plaintiffs were charged with the offence of stealing motor vehicle parts contrary to Section 279(a) of the Penal Code in Makadara Criminal Case No. 5107 of 2012 and were eventually acquitted under the provisions of Section 202 of the Criminal Procedure Code on 13th September, 2013.

16. I note that the instant suit is founded on the tort of malicious prosecution. Consequently, the cause of action would in my view accrue as at the date of acquittal mentioned hereinabove.

17. This brings me to the provisions of **Section 3(1) of the Act** which stipulate that:

“(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

18. Upon my perusal of the plaintiffs’ pleadings, I note that the 2nd and 3rd defendants are sued on behalf of the Government and hence the provisions of the Act would apply to them.

19. Furthermore, I note that the plaint was filed on 13th January, 2015 which falls outside of the stipulated timelines thereby making the suit time barred.

20. There is also nothing to indicate that the plaintiffs sought and obtained leave of the court prior or subsequent to instituting the claim against the 2nd and 3rd defendants out of time as they should have done.

21. For the foregoing reasons, I am satisfied that the instant suit is incompetent before this court.

22. Consequently, I find merit in the 2nd and 3rd defendants’ notice of preliminary objection dated 1st July, 2021 and I will allow the same. The plaintiffs’ suit against the 2nd and 3rd defendants is hereby struck out for being time barred, with costs to the said defendants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd and 3rd Defendants