



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 281 OF 2015

FRANCIS GICHURU MUGUNU.....PLAINTIFF

VERSUS

HENRY KAMAU NJOROGE.....1ST DEFENDANT

FELISER WANJIRU KAMAU.....2ND DEFENDANT

RULING

This ruling relates to a preliminary objection dated the 14th day of December, 2017 brought by the defendants/applicants. The same is brought on the grounds that:

1. The suit is statute time barred having been filed after the expiry of twelve(12) months from the date of the alleged cause of action contrary to Section 4(2) of the Limitation of Actions Act Cap 22 laws of Kenya.
2. The Honourable court has no jurisdiction to entertain this instant suit given that it is statute barred.

The preliminary objection came up for hearing on the 12th day of February, 2020 when it proceeded exparte as counsel for the plaintiff failed to attend court despite having been served with a hearing notice and an affidavit of service filed to that effect.

On the said date, counsel for the applicants submitted that the plaintiff's suit is time barred as the same is based on an affidavit sworn on the 7th day of February, 2011 and filed on the 8th day of February, the same year. Counsel submitted that, in that regard, time started running from the 8th day of February, 2011 yet the plaintiff sought damages on 17th August, 2015 which was four (4) years down the line and no leave of the court was sought to file suit out of time.

She urged the court to strike out the suit with costs.

The essence of a preliminary objection was given by law J.A Sir Charles Newbold P, in the case of **Mukisa Biscuits Manufacturing Co. Limited vs. West End Distributors (1969)EA 696 at page 700** where the court stated;

“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 off, 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”

Sir Charles Newbold P. added as follows on page 701;

“a preliminary objection is in the nature of what used to be a demurer. 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 if any facts are to be ascertained or if what is sought is the exercise of judicial discretion”

The court has considered the preliminary objection and the submissions made by the counsel for the defendants/applicants. I have also perused the pleadings filed herein. Upon perusal of the same, it is clear that the plaint was filed on the 17th day of August, 2015 and the same is premised on an affidavit which was sworn on the 7th day of February, 2011 and filed on 8th day of February, 2011 in Nairobi High Court succession cause number 3458/ 2004. (In the matter of Estate of Francis Mwaura Waruingi, deceased) in which, the plaintiff avers that the 1st defendant made false and defamatory statement against him. He has sought general damages for libel, costs of the suit and interest.

The defendants filed a joint statement of defence on the 29th September, 2015 in which they have denied the plaintiffs claim contending that the averments made in Nairobi High Court succession cause no. 3458 of 2004 were factually correct.

On the 19th December, 2017, the defendants filed the preliminary objection herein which is premised on section 4(2) of the Limitation of Actions Act Cap 22 which provides;

“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.”

Looking at the plaint filed herein and as rightly submitted by counsel for the defendants/applicants, the cause of action arose on 7th February, 2011 when the affidavit was sworn.

This being a suit based on libel, it ought to have been filed within one year; that is to say, on or before the 7th February, 2012 but instead it was filed on the 17th August, 2015 which is almost four(4) years down the line. It goes without saying that it was filed out of time.

In the premises, the court has no alternative but to strike out the suit with costs to the plaintiff. The preliminary objection therefore succeeds.

It is so ordered.

Dated, signed and delivered at NAIROBI this 20th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**