



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL & ADMIRALTY DIVISION

HIGH COURT CIVIL SUIT NO. 42 OF 2018

MOET HENNESSY LatAMEC.....PLAINTIFF

-VERSUS-

ONDIEKI MOSE NYAMBEGA t/a OLSEN PARTNERS.....DEFENDANT

RULING

PRELIMINARY OBJECTION

BACKGROUND OF THE APPLICATION

The Plaintiff/Applicant raised a Preliminary Objection to the Defendant/Respondent's Notice of Motion application dated 14th August 2019. In the application, the Defendant was seeking leave to amend their statement of defence and counterclaim dated 26th February 2018 to include a new claim of defamation against the Plaintiff in the original suit.

NOTICE OF MOTION APPLICATION

The Defendant sought leave of court to amend their statement of defence and counterclaim to include a new claim of defamation on the following grounds:

1. The Plaintiff had caused the name of the defendant to be listed by the **Institute of Certified Public Accountants of Kenya (ICPAK)** as being among the disciplinary cases pending under inquiry.
2. The above action by the Plaintiff was defamatory and occasioned loss to the Defendant's professional standing and business.
3. The intended amendments would not in any way prejudice the Plaintiff but rather enable court to determine the real question or issues raised.

PLAINTIFF/APPLICANT'S NOTICE OF PRELIMINARY OBJECTION

The Plaintiff/Applicant raised a Notice of Preliminary objection against the Notice of Motion application filed by the Defendant seeking leave to amend their statement of defence and counterclaim.

In raising the P.O, the Plaintiff/Applicant relied on the grounds:

1. The intended amendments were time barred as per **Section 4(2)** of the **Limitation of Actions Act**.
2. The Notice of Motion application seeking leave to amend the Defence was misconceived, grossly incompetent and a blatant abuse of the process of court.

THE DEFENDANT/RESPONDENT'S REPLY TO THE NOTICE OF PRELIMINARY OBJECTION

In the Respondents' written submissions dated 19th November 2019, they argued that the provision of the **Limitation of Actions Act (Section 4)** had been amended by **Section 20 of the Defamation Act, Cap 36 Laws of Kenya** as follows:

“20. (2) of section 4 of the Limitation of Actions Act is hereby amended by the addition thereto of the following;-

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

Additionally, the Defendant/Respondents argued that the Plaintiff/ Applicant’s move to have them blacklisted by **ICPAK** had put them within the allowed timelines for bringing a tort of defamation. By computation of time, the defendants argued that they were well within the two year grace period. This is so because the posting of the defendants name on the **ICPAK** blacklist had been re-published as late as January 30th, 2019 therefore resetting the Limitation of Action in defamation to the date mentioned.

The Defendant/Respondent also argued that by dint of **Order 8, Rule 3** of the **Civil Procedure Rules, 2010**, an amendment such as the one intended ought to be allowed on such terms as to costs or otherwise as may be just and in such manner as the Court would direct.

DETERMINATION

From the pleadings filed by both parties and submissions; the following are the issues to be determined by the Court: -

- 1. Whether court should exercise discretion and grant leave to amend the Defence and Counterclaim*
- 2. Whether the defamation claim by the Defendant/Respondent was time barred under the Limitation Act*

Section 100 CPA- General Power to amend

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

Order 8 Rule 5 CPR 2010- General power to amend provides;

(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order

The Plaintiff filed Plaintiff on 30th January 2018. The Defendant filed defence and Counterclaim on 26th February 2018 and claimed remuneration for professional services rendered between September 2014 and January 2017. The total claim amounted to Ksh 36, 206,581/- with interest at commercial rates and costs. The Defendant sought that the Plaintiff’s suit against the Defendant be struck off.

The Defendant sought leave to file Amended Defence and Counterclaim on 19th August 2019 and introduced a defamation claim based on libel by the letter of 7th September 2017 written by Plaintiff’s Counsel on record Walker Kontos Advocates.

The Statute of Limitations prevents a claim of tort introduced after a period is barred by the timelines.

Section 4(2) of Limitations of Actions Act prescribes;

“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.”

The Plaintiff claims that the alleged action of libel if at all could have occurred by virtue of the letter of 7th September 2017, the proposed amendment is of 19th August 2019, which is over the prescribed 12 months and lapsed after 7th September 2018.

The Defendant relied on **Section 100 CPA and Order 8 Rule 5 CPR 2010** that allows amendments to pleadings. The amendments envisaged by these provisions are defects, errors or any material disclosure of a matter that is crucial for determination of the substantive suit.

With respect, the right to amend pleadings does not include lodging a whole new cause of action which is prohibited by the statutory timelines under the **Limitations of Actions Act**. Secondly, the introduction of a new cause of action prejudices the other party as they are ambushed with a totally different case from the one in the Plaintiff and Defence and Counterclaim earlier filed.

DISPOSITION

- 1. For these reasons I find that the Preliminary Objection raised by the Plaintiff is upheld and the Amended Defence and Counterclaim is allowed only to the extent of amending any errors and/or defects or including necessary and/or crucial material for determination of the suit. The defamation claim based on libel is expunged from the record forthwith.**

2. The Plaintiff's Preliminary Objection is upheld with Costs.

DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 13TH DAY OF MARCH 2020.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

WAFULA FOR THE PLAINTIFF

KISAKA FOR THE DEFENDANT/APPLICANT

COURT ASSISTANT – TUPET

Mr. Wafula: We are applying for Case Management during the vacation and thereafter obtain a date for mention from the registry.

Mr. Kisaka: We are applying for certified copy of the Ruling and leave to appeal.

Court: The Defendant is granted leave to appeal and to have the certified copy of the Ruling upon payment of requisite fees.

M. W. MUIGAI

JUDGE