



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO. 484 OF 2018**

**BETH WAMBUI MUGO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**CHARLES HORNSBY.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**I.B. TAIRUS & CO. LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**BETHWEL KIPLAGAT**

**MARGARET SHAVA**

**TECLA NAMACHANJA**

**AHMED SHEIKH**

**GETRUDE CHAWATAMA**

**PROF. RONALD SYLE**

**PROF. TOM OJIENDA (All being sued as former commissioners to the**

**Truth, Justice and Reconciliation Commission-TJRC)...3<sup>RD</sup> DEFENDANTS/RESPONDENTS**

**PRESTIGE BOOKSHOP.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff/application has filed an Originating Summons dated 10th August, 2018. The application is supported by the grounds set out on the face thereof and the facts as deponed in the affidavit sworn by the plaintiff. The applicant is seeking the orders hereunder:

- i. Spent.*
- ii. THAT the plaintiff be granted leave to commence legal action on defamation against the defendants out of time.*
- iii. THAT the plaintiff be granted leave to file and served the pleadings out of time.*
- iv. THAT costs of the application be in the cause.*

2. The applicant avers in her affidavit that she came to learn of the existence of a book authored by the 1st defendant and titled “Kenya: A History since Independence” through her advocate on 5th August, 2013.

3. It is the applicant’s assertion that upon perusal of the said book, she discovered that some defamatory content had been published against her and that such content was applied by the 3rd respondent in submitting a report.

4. The applicant deponed that she moved to challenge the findings by the 3rd respondent by way of a judicial review and a decision was entered in her favour on 17th February, 2016.
5. That thereafter, she filed a defamation suit on 4<sup>th</sup> August, 2014 and to which the respondents filed their respective statements of defence. The applicant stated that the suit was later struck out for being time-barred and the applicant believes that a reasonable cause of action exists and if denied the opportunity of pursuing her case, she stands to suffer grave injustice.
6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have responded by way of Grounds of Opposition arguing that the application is an abuse of the court process since the cause of action was heard and determined by a competent court.
7. The 3<sup>rd</sup> respondents similarly filed Grounds of Opposition together with a replying affidavit sworn by Prof. Tom Ojienda to the effect that this court lacks the jurisdiction to extend time or grant leave to file a suit out of time since a suit premised on the same cause of action was struck out and the matter is *res judicata*.
8. In his replying affidavit on behalf of the 4<sup>th</sup> respondent, *Ahmed Mohsin* recapped the averments made by the 3rd respondents.
9. Parties were allowed to written submissions to dispose of the application. In her submissions, the applicant heavily relied on Sections 27 and 28 of the Limitation of Actions Act in seeking an extension of time on the basis that she only came to learn about the existence of the book containing the defamatory content at a later date.
10. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in resistance thereto submitted that Sections 27 and 28 relied upon by the applicant cannot apply since the claim is not premised on either of the causes of action stipulated therein; reference was made to various judicial authorities. The said respondents emphatically submitted that a previous suit constituting the same subject matter was struck out for being time barred hence the applicant has no basis on which to file a similar suit.
11. On their part, the 3<sup>rd</sup> respondents contended that the court's power to extend time under Section 28 of the Limitation of Actions Act is a jurisdictional rather than a discretionary power, reiterating that the application is an abuse of the court process since it is aimed at initiating litigation based on a cause of action which was determined.
12. The 4<sup>th</sup> respondent's submissions by and large echoed the sentiments of its counterparts.
13. I have considered the grounds set out on the face of the application and the facts deponed in the affidavits filed in support and against the originating summons plus the rival submissions and the authorities cited. The dispute is premised on the content published in a book authored by the 1st respondent and titled "**Kenya: A History since Independence.**" Therein, reference is made to the applicant's close ties to the renowned Kenyatta family and her involvement in a gemstone business in addition to other alleged benefits during the reign of the late President Jomo Kenyatta. The applicant has claimed that the words therein were applied in a defamatory manner.
14. In returning to the Originating Summons, I wish to first address the applicability of Sections 27 and 28 of the Limitation of Actions Act. A keen reading of the said provisions reveals that an extension of time to file an action out of time can only be sought in strict instances of tort and more specifically, in an action for negligence, nuisance or a breach of duty.
15. The action herein is defamatory in nature, meaning that whereas it is a tort, it does not fall in either of the categories stipulated hereinabove. In the premises, I am persuaded by the arguments articulated by the respondents that Sections 27 and 28 of the Limitation of Actions Act do not incorporate the extension of time in defamation claims. This court in case of *Dr. Lucas Ndungu Munyua v Royal Media Services Limited & another [2014] eKLR* inter alia that an application seeking for extension of time on the premise of a defamatory claim cannot be brought under Sections 27 and 28 of the Limitation of Actions Act.

16. It therefore follows that whereas in ordinary circumstances, a court is bestowed with the discretion to allow or deny an extension of time, the case is different when it comes to claims of a defamatory nature as these are strictly statutorily barred and offer no room for extension.

17. Having established the above, I now turn to address the question as to whether or not the *res judicata* rule would apply by virtue of the fact that the suit was struck out and not dismissed.

18. In answer thereto, one must seek to determine whether or not the issues raised before the court were raised previously and determined exhaustively. In answer thereto, I make reference to the ruling delivered by my sister, Honourable Lady Justice Njuguna on 31st July, 2017 wherein she struck out the suit for being time barred.

19. I also observed that whereas the applicant had previously filed a similar defamatory claim, the issues before the Honourable Judge were brought out vide applications filed by the respective respondents seeking to have the suit struck out against them for being statute barred. At no point did the said judge address the merits of the suit but limited herself to the issue raised by the parties. In my view, the application currently before this court is for leave to file the suit out of time and though related to the facts articulated by the parties in the earlier instance, the issues arising therefrom are not substantially one and the same.

20. The upshot is that the Originating Summons is hereby dismissed for being without merit. The respondents shall have the costs of the originating summons.

**Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of March, 2019.**

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**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents

..... for the 3<sup>rd</sup> Defendant/Respondent

..... for the 4<sup>th</sup> Defendant/Respondent