



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 978 OF 2002**

**PIPEPLASTIC SAMKOLIT KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**AFRICAN BROADCASTING LIMITED.....DEFENDANT**

**RULING**

1. The applications dated 16<sup>th</sup> September, 2005 and 15<sup>th</sup> February, 2007 and the Preliminary Objection dated 1<sup>ST</sup> February, 2006 were argued simultaneously.
2. The application dated 16<sup>th</sup> September, 2005 seeks orders that this honourable court be pleased to grant leave to the Defendant herein to amend its defence as per the draft amended defence.
3. Secondly, that the amended defence be deemed as duly filed.
4. It is stated in the grounds and the affidavit in support of the application that the Defendant/Applicant after perusing the statement of defence again has discovered that the wrong party has been sued. That the Defendant has been sued as Africa Broadcasting Limited and described as the proprietors of Nation Television Station, yet Nation Television Station is not owned or operated by the Defendant. That it is therefore necessary for the Defendant to amend its statement of defence as per the annexed draft statement of defence in order to determine the real issues in controversy and rectify typographical errors in the defence. It is further stated that the Plaintiff will not suffer great prejudice if the amendment is carried out.
5. The application is opposed. It is stated in the replying affidavit that the amendments sought are not typographical errors but a fundamental change of the defence which seeks to deny previously admitted matters. That the deponent of the Defendant's supporting affidavit in the application at hand had in a previous affidavit sworn on 14<sup>th</sup> September, 2005 admitted in his capacity as the company secretary of the Defendant that the words complained of were published for the benefit of the public and were true in substance and published without malice. That the postal and physical location of the Defendant's herein is the same as that of Nation Television Studios and the Nation Media Group Ltd.
6. The Plaintiff filed a Preliminary Objection dated 1<sup>st</sup> February, 2006 seeking the striking out of the application dated 16<sup>th</sup> September, 2005 on the grounds that the application is incompetent as the proposed amendment to the defence offends the provisions of Order VI rule 6(1) of the then Civil Procedure Rules.
7. The application dated 15<sup>th</sup> February, 2007 seeks orders that the court be pleased to grant the Plaintiff leave to amend its plaint in terms of the draft amended plaint.
8. It is averred in the affidavit in support that the Defendant is a subsidiary/holding/sister company of Nation Media Group Ltd with their registered offices at Nation Centre, Nairobi. That it is therefore prudent to enjoin Nation Media Group in this suit.
9. The Defendant filed grounds of objection. It is stated that the affidavit in support sworn on 15<sup>th</sup> February, 2007 in support of the application of the same date is defective and should be struck out. That the orders being sought are statute barred under the Limitation of Actions Act Cap 22 Laws of Kenya. That the effect of the Plaintiff's application dated 15<sup>th</sup> February, 2007 in essence concedes to the Defendant's application dated 16<sup>th</sup> September, 2005.
10. In a supplementary affidavit filed by the Plaintiff on 5<sup>th</sup> April, 2007, it is averred that following the alleged defamatory publication, the Plaintiff wrote to the Defendant and addressed the letter to Nation Centre Nairobi and the letter was received by Mr. Bernard Chege, the

Editorial Manager of Nation Newspapers Ltd. That a response was received vide letter dated 20<sup>th</sup> August, 2007 from one J.C. Kinyua, the Company Secretary of Nation Media Group Ltd which was also the name on the letterhead of the said letter. That James Kinyua swore a replying affidavit on 15<sup>th</sup> September, 2005 in response to an application made for the striking out of the defence as the Company Secretary of the Defendant.

11. It is further deponed that the Nation Media Group has divisions such as Nation Newspapers and Nation Broadcasting, which operates Nation Television Station which aired the feature complained of and was produced by African Broadcasting Corporation. That although the letters herein were directed to the Defendant herein, same were received by and responded to by the Nation Media Group, specifically by Mr. James Kinyua the Company Secretary who is also the Defendant's Company Secretary. That therefore the Plaintiff inferred that Nation Media Group and African Broadcasting Corporation were one and the same.

12. The two applications and the Preliminary Objection were canvassed by way of written submissions which I have considered.

13. Both parties herein seek to amend their pleadings on grounds that the amendments will determine the real issues in controversy. On the court's power to amend, the Court of Appeal in the case of **Central Kenya Limited v Trust Bank Limited [2000] 2EA 365** enumerated the prerequisites that ought to be fulfilled before a court can exercise its discretion on applications for amendment as follows:

**“...a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested, interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”**

14. On the issue of amendment of the statement of defence, the discoveries and typographical errors alluded to, I agree that the same amount to a complete turnaround with denial of previously admitted matters. This comes in after about over three years from the date of filing the statement of defence and several applications down the line, some of which have been ruled upon on the basis of the pleadings and affidavit evidence presented so far. Generally the power to amend pleadings can be exercised at any stage but upon terms that are just. However, a complete turnaround to deny previously admitted matters is not correcting typographical errors but would amount to substantially reframing the Defendant's case to the Defendant's detriment (See for example **Joseph Ochieng & 2 others T/a Aquiline Agencies v Frist National Bank of Chicago [1995] eKLR**).

15. On the other hand, the amendment sought by the Plaintiff seeks to enjoin a 2<sup>nd</sup> Defendant after a period of over 5 years from the date of the cause of action. This would amount to defeating the provisions of Section 4 of the Limitation of Actions Act which provides for the filing of suits based on defamation within a period of one year.

16. The fact that Nation Media Group is said to have been aware of the suit herein and the Defendant Company is stated to be a subsidiary company/ sister company/holding company or wholly owned by Nation Media Group does not make the two companies the same Legal entity. The correspondence directed to the Defendant said to have been received and responded to by Nation Media Group does not help matters either.

17. The proposed 2<sup>nd</sup> Defendant, Nation media Group, is intended to be sued as a different and distinct legal entity. Nation Media House can therefore not be said to have been aware of the suit and cannot be enjoined herein at this stage as the intended suit is statutorily time barred.

18. With the foregoing, I dismiss both applications and allow the Preliminary Objection. Costs in cause.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of June, 2019**

**B.THURANIRA JADEN**

**JUDGE**