



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 101 OF 2017

RICHARD MURIGU WAMAI T/A GRAW ENTERPRISES.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND DEFENDANT

RULING

1. By a notice of preliminary objection filed by the 1st Defendant dated 13th February 2018, and a similar notice of preliminary objection filed by the 2nd Defendant dated 3rd July 2017, the Defendants (herein the Applicants) are seeking for orders that the Plaintiff's (herein "the Respondent's") suit be struck out on the ground that it is statute barred.
2. The Respondent has opposed the objection on the ground that, the suit was filed within the statutory period set. To place the matter in perspective, it suffices to note that, by a plaint dated 9th March 2017, the Plaintiff seeks for orders that;
 - a. A sum of Kshs. 30,600,000 together with interest be awarded with effect from 28th October 2019;
 - b. An order for general damages be issued in respect to malicious prosecution and defamation plus interest at court rates;
 - c. Costs plus interest at court rates.
3. The Plaintiff's case in a nutshell is that, he won a tender to supply bitumen products to the Ministry of Roads and Public Works as it then was. He supplied the products and was paid a sum of Kshs. 77,400,000 leaving the balance of Kshs. 30,600,000. However on 31st October 2009, he was arraigned in court vide Anti-Corruption case No. 31 of 2009 for inter alia fraudulent acquisition of public property and failure to supply the bitumen contracted. He was acquitted of all the criminal charges on 25th July 2012. He then filed this suit on 10th March 2017.
4. The 2nd Defendant filed a defence dated 6th February 2018 after filing the preliminary objection herein and set down the matter for hearing of the preliminary objection. The 1st Defendant did not pursue its preliminary objection. The 2nd Applicant submitted that the defamation claim arose on 31st October 2009, when the matter was published in the newspaper. That an action for libel and/or slander cannot be brought after twelve (12) months from the date of occurrence, or on which the cause of action accrued. Therefore, the Respondent's claim is statute barred as it was filed seven (7) years after the action in 2009. The cases of; *Patrick Oduma vs Regina Sabina Mutuku trading as Figure Eight Health Club & Another 2017* and *Wycliffe A. Swanya vs Toyota East Africa Ltd & Another 2009 eKLR*, were relied on.
5. It was argued that, similarly, as regards the claim of false imprisonment, it occurred on 31st October 2009 and was filed in 2017, a period of seven (7) years later and statute barred. Further on the claim of malicious prosecution, it was argued that the Judgment of the criminal case was delivered on 25th July 2012. The case herein was filed on 25th April 2017. A period of four (4) years had lapsed before the claim was lodged. Therefore, it is statute barred. Finally, as regards the claim for special damages, it was submitted that the claim is founded on a contract entered into on 1st November 2006, and the suit was filed eight (8) years later, therefore the claim is time bound. Reliance was placed on the cases of; *Thuranira Karauri vs Agnes Ncheche (1997) eKLR* and *Jane M. Musau vs Kenya Hospital Association & Another (2017) eKLR*.
6. However, the Respondent opposed the preliminary objection and argued that a cause of action arises from the date of breach of the contract, therefore, the operative date in this matter is 25th July 2012 when the Judgment in the criminal case was delivered and not the year

2009. That the cause of action arose from the date of the Respondent's acquittal. That had the Respondent been convicted on the criminal charges, he would have no basis to file the suit herein. Reference was made to the cases of; *Mboya vs East Mengo Administration (1972) EA 352* and *Hon. Attorney General & Another vs Andrew Maina Githinji & Another (2016) eKLR*. Finally, the Respondent submitted that, the prayers sought for in the plaint are both in tort and contract.

7. I have considered arguments advanced and the submissions filed and I find that a cause of action is defined under the legal dictionary by Fawtlex, as "the fact or combination of facts that gives a person the right to seek judicial redress or relief against another. Also the legal theory forming the basis of a lawsuit". Thus a party cannot institute a law suit if the right does not exist.

8. However, even where such a cause of action exists, it must be filed within the statutory period set. Limitation period generally begins to run from the date when the claimant's cause of action accrued. In torts requiring damages, the cause of action accrues when the damage is first sustained or starts to occur; and there will be no new cause of action unless a fresh causative factor is involved or a different kind of damage is sustained. The period of cause of action for a claim in contract starts to run from the date of breach thereof.

9. The limitation periods for simple contracts is six (6) years from the date of the cause of action. For torts excluding personal injury, libel and slander, the period is three (3) years. There are however four principal options in regard to the date from which the limitation period should run. These are:-

a. *The date of the event(s) that resulted in the personal injury or death;*

b. *The date of the accrual of the cause of action;*

c. *The date when damage occurred; and*

d. *The date of discoverability.*

Thus, the date from which the limitation period commences should deal fairly with all these kind of damage.

10. The Limitation of Actions Act (Cap 22) Laws of Kenya provides under Section 4 that actions founded on contract may be brought after the end of six (6) years from the date on which the cause of action accrued and an action founded on tort may be brought after the end of three (3) years from the date on which the action accrued; provided that actions for libel or slander may not be brought after the end of twelve (12) months from such date.

11. The Plaintiff herein prays under paragraph 18(a) for Judgment in the sum of Kshs. 30,600,000 together with interest from 28th October 2009. This claim is based on the averments at paragraph 8 of the plaint where it is averred that, this sum of money is the balance of the price of the bitumen supplied. If interest is claimed from 28th October 2009, it means that, it is the date when the claim for payment was due. Applying the six (6) years period, then contractual claim should have been filed by 28th October 2015. It was filed in the year 2017.

12. As regards the claim for defamation, the Plaintiff alleges under paragraph 10 of the Plaint that his arrest and charging was widely publicized in the national print and electronic media. I have looked at the newspaper advertisement provided in the Plaintiff's bundle of documents and I find the date thereof is illegible and neither is the date stated under paragraph 10 of the plaint.

13. However, I have gathered from the 2nd Defendant's submissions that the defamation claim occurred on or around 31st October 2009. Thus the claim in relation to the same should have been filed on or before the 31st October 2010. It was filed on 25th April 2017, at least seven (7) years later. Finally, the tort of false imprisonment and malicious prosecution is alleged to have occurred upon the arrest of the Plaintiff on 31st October 2009, therefore the same should have been filed within a period of three (3) years of the occurrence of the event that is on or before the 31st October 2012.

14. It is therefore clear none of the claims herein were brought within the stated statutory limits. The Plaintiff argues that, the period for all the claims flow from 25th July 2012, when the Plaintiff was acquitted of the criminal charges. If that argument is correct, then the contractual claim should have been filed on or before 25th July 2018, the defamation claim on or before the 25th July 2013, the tort of false imprisonment and malicious prosecution on or before 25th July 2016. Therefore all the tortious claims would still be time barred as the plaint was filed on 9th March 2017. Even then, the contractual claim is not subject to the date of 25th July 2012 as it has no bearing with the arrest and prosecution of the Plaintiff as the institution of criminal charges is not a legal bar to the institution of civil litigation. Thus nothing barred the Plaintiff from instituting a suit to enforce the payment of the contractual sum claimed herein from the date of demand and default to honour the same.

15. The case of; *Mbowa vs East Mengo Administration (supra)* relied on was in relation to malicious prosecution not contractual claims. The rationale is easy to appreciate, if one alleges malice in prosecution, the same can only be determined when the charges are dismissed successful in favour of the suspect. If on the other hand the charges are proved and the suspect is eventually convicted and no successful appeal arises, the Appellant would be hard pressed to prove inter alia defamation, false imprisonment, and/or malicious prosecution.

16. In view of all the aforesaid, I find that the preliminary objection filed by the 2nd Defendant has merit and therefore hold that, the suit as against the 2nd Defendant is statute barred. I strike it out with costs to the 2nd Defendant. I note that, the 1st Defendant did not pursue its preliminary objection. However, having struck out the suit against the 2nd Defendant, the Plaintiff is thrown back to the drawing board on the sustenance of the suit against the 1st Defendant. I so hold.

Dated, delivered and signed in an open court this 25th day of September 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Ms. Njoroge holding brief for Mr. Mutiso for the Respondent

Mr. Munene holding brief for Ms. Nthiga for the 1st Applicant

Mr. Mbithi holding brief for Mr. Lunyolo for the 2nd Defendant/Applicant

Dennis -----Court Assistant