



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 42 OF 2014

EUNICE JACQUILINE CHEBUKWA WANJALA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

RULING

The plaintiff filed this case against both defendants claiming damages following her dismissal from employment of the 1st defendant, and prosecution initiated against her on several criminal charges which however ended with an acquittal on appeal. She blamed both the 1st and 2nd defendants for the punitive and alleged malicious prosecution which caused her mental anguish and other damages.

The plaint is dated 23rd January, 2014 but filed on 5th March, 2014. The defendants filed defences to the plaintiff's claim denying liability. Long after the closure of pleadings, the 2nd defendant filed a Notice of Preliminary Objection dated 15th and filed on 17th November, 2016. The said notice states that the plaintiff's suit is time barred in that it offends Section 3 (1) of the Public Authorities Limitations Act, Cap 39 Laws of Kenya and therefore it should be struck out with costs.

Following that notice, the plaintiff filed an application by way of Notice of Motion dated 1st and filed on 2nd December, 2016 seeking an order that, the court extends the time limited for the filing of the plaint which was filed on 5th March, 2014 and the same be deemed as duly filed and served. The grounds relied upon by the plaintiff are that the delay in filing the plaint is not inordinate and therefore excusable. Further, the parties will not be prejudiced in any way whatsoever by the extension of time. There is a supporting affidavit sworn by the plaintiff.

The application was opposed by the defendants and there is a replying affidavit sworn by the Head of Legal Services of the 1st defendant and grounds of opposition filed on behalf of the 2nd defendant. The plaintiff also filed a replying affidavit to the preliminary objection. Counsel on record have filed submissions to address the preliminary objection and also the plaintiff's application for extension of time.

It would appear the plaintiff's application was prompted by the Notice of Preliminary Objection raised by the 2nd defendant which was supported by the 1st defendant. Section 3 (1) of the Public Authorities Limitation Act provides as follows,

“No proceedings founded on tort shall be brought against the Government or a Local

Authority after the end of twelve months from the date on which the cause of action accrued.”

The plaintiff's services with the 1st defendant were terminated on 12th June 2004. As at that time several criminal charges dated April, 2002 had been laid against her which led to her prosecution and subsequent conviction. She lodged an appeal which was heard and determined in her favour on 21st February, 2013.

The plaintiff's cause of action is based on tort of malicious prosecution. That being the case, her contract having been terminated on 12th June, 2004 she ought to have filed her action against the 1st defendant by 11th June, 2010. As against the 2nd defendant she ought to have filed her action by 11th June 2005.

It cannot be forgotten however, that her cause of action matured when she was acquitted on appeal, that is 21st February, 2013. If that be the case, and I believe it is, then as against the 1st defendant her plaint filed on 5th March, 2014 was within the limitation period. However, as against the 2nd defendant she ought to have filed her plaint by 20th February, 2014. Although the plaint is dated 23rd January, 2014 which would bring it within the time allowed, it was not filed until 5th March, 2014 thereby exceeding the period by 14 days.

The extension of time sought by the plaintiff is discretionary on the part of the court, which discretion has to be exercised judicially. I know there are authorities that have stated that the plaint which is barred by limitation is a plaint barred by law – see **IGA vs. Makerere University (1972) EA 65**. In the case of **Mehta vs. Shah (1965) EA 321 Crabee J** stated as follows,

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case”. – see Rawal vs. Rawal (1990) KLR 275.

There are circumstances that may lead a party to miss the deadlines set by law and that is why the courts should keep an open mind when dealing with applications and objections of this nature. In the case of **Aviation Cargo Support Limited vs. St Mark Freight Services Limited (2014) e KLR** the Court of Appeal in an application to file and serve a record of appeal out of time stated *inter alia*,

“In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time.”

I have looked at the defences raised by the defendants and it is instructive that both admitted the jurisdiction of this court to determine the dispute. I have also looked at the statements of issues filed by the parties herein. None of those issues relates to limitation which has now been raised by the 2nd defendant. Above all, no prejudice has been alleged shall befall any of the parties if the plaintiff is allowed to prosecute her cause of action.

On my part, I do not consider a delay of 15 days to be prejudicial to the 2nd defendant and in any case, the courts exist to do justice to the parties rather than driving them out of the seat of justice. More injustice will be occasioned to the plaintiff if I were to be decided otherwise. The end result is that, the Notice of Preliminary Objection is dismissed while the plaintiff's application for extension of time is allowed. I find in the circumstances that, the plaintiff's suit is now considered to be properly on the record and deemed as filed.

I note that pleadings have been closed herein as issues have been drawn in compliance with Order 11 of the Civil Procedure Rules. I accordingly certify this case ready for hearing and the parties shall now take a hearing date in the registry. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 22nd Day of February, 2018.

A. MBOGHOLI MSAGHA

JUDGE