



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO 147 OF 2017

JAMES MURUTHI KIHARA PLAINTIFF/APPLICANT

VERSUS

JACKLINE CHEPKEMOI KIMETO DEFENDANT/RESPONDENT

RULING

1. The Notice of motion application filed on the 27th September 2017 is brought under Section 4(2) and 35 of the Limitation of Action Act Cap 22 Laws of Kenya; Section 3A Order 2 rule 15(1)(c)(d) of the Civil Procedure Act Cap 21 Laws of Kenya; and Order 51 rule 1 of the Civil Procedure Rules. The Applicant seeks the following orders:

- 1. The Defendants counterclaim be struck out with costs as the same is statutorily time barred**
- 2. The costs of this application be provided for**

2. The application is premised on the grounds that the counterclaim is based on a cause of action that is statutorily time barred; the defendant has not sought the leave of the court to file the suit out of time; that the cause of action arose on 12th July 2016 while the counterclaim was filed on 2nd August 2017 and that the statutorily provided period of twelve months had already lapsed thereby making the counterclaim bad in law.

3. The application is supported by the affidavit of James Muruthi Kihara sworn on the 25th September. It is deposed that the suit was filed against the defendant on 5th July 2017 pursuant to a cause of action that arose on 14th July 2016. That thereafter the defendant filed her counterclaim on 2nd August 2017 alleging a cause of action that arose on the 12th July 2016. It is contended that the case was filed after the period of twelve months provided by the law had already lapsed, thereby rendering the counterclaim bad in law. That the defendant has not availed evidence that leave was granted to lodge her claim out of time and that precious judicial time should not be expended on a claim that is otherwise an abuse of the court process and a non-starter. It is further deposed that it is in the interest of justice, fairness and equity for the counterclaim to be struck out with costs being awarded to the plaintiff as the same may otherwise prejudice, embarrass or delay the fair trial of the suit.

4. The application is opposed. It is stated in the replying affidavit that the counterclaim is not time barred as the Respondent only managed to obtain material facts relating to the cause of action on 2nd June, 2017 when she became aware of a letter dated 12th July 2016 which is the subject matter of the Plaintiff's suit. It is deposed that the Respondent was making a follow up on the official publication through the making of a internal formal complaint by way of a letter addressed to their Permanent Secretary, National Treasury and their Chief Executive Officer of Public Private Partnerships (hereinafter PPP) petitions committee.

5. The Respondent has contended that the service of the plaint on 5th July, 2017 constitutes a continuation of the publication of the offensive contents of the letter dated 12th July, 2017. According to the Respondent, she was still trying to seek redress of her grievance through the internal mechanism within the National Treasury which is the parent Ministry of PPP Petitions Committee when the plaintiff filed the case herein.

6. The Respondent referred the court to the provisions of 26(b)(c) & Section 27 of the Limitation of Actions Act which preclude respectively the defences of *laches* and providers for extension of time. The Respondent also referred to Article 25,48 and 50(1) of the Constitution which provide *inter alia* for access to justice and the right to a fair trial.

7. The application was canvassed by way of written submissions which I have considered.

8. Paragraphs No. 7 of the statement of Defence reflects that on 14th July, 2016 the Respondent responded to the Plaintiff's letter dated 12th July, 2016. It is the letter dated 12th July 2016 which constitutes the Respondent's cause of action as per the counterclaim. The statement of defence and the defence to court claim was filed on 2nd August, 2017.

9. From the examination of the pleadings in court the Respondent's cause of action as against the Applicant was time barred on the 12th of July 2017. Section 35 of the Limitation of Actions Act provides as follows:

“For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.”

10. The Respondent's explanation that she was not indolent and that she was looking for further particulars does not hold. She responded to the said letter on the 14th July, 2016 in the disciplinary proceeding against her meaning she had read the letter. The time started running when the cause of action accrued on the 12th June 2016. From the plain reading of Section 35 of the Limitation of Actions Act, the Respondents' counterclaim is a separate cause of action independent of the main suit. The defendant ought to have been cognisant of the legal timelines with regard to a suit of defamation. Pursuing internal remedies cannot provide protection for failure to file the defamation action within the stipulated time period.

11. The Respondent has also argued that section 4(2) of the Limitations of Actions Act does not lend the defence of *laches* where the material facts relating to a cause of action are not immediately available. The Court of Appeal in the case of **Mary Osundwa v Nzoia Sugar Company Limited [2002] eKLR** observed as follows with regard to the section:

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.”

12. In the case of **Nzoia Sugar Company Limited v Collins Fungututi Civil Appeal No. 7 of 1988 [1988] KLR 399** the Court of Appeal held as follows:

“A Judge cannot lawfully award damages for defamation in an action barred 12 months after the cause of action arose...”

13. From the foregoing, it is clear that Section 27 of the Limitation of Actions Act does not cover the action for damages in respect of the tort of defamation. Consequently, the remedy of seeking extension of time is not available to the Respondent. In any event, the Respondent has not sought for the extension of time. An application for extension of time would have been an exercise in futility in the circumstances of this case.

14. With the foregoing, the application is allowed. The Respondent's counterclaim is struck out. Costs of the application and the counterclaim to the Plaintiff/Applicant

Dated, signed and delivered at Nairobi this 21st day of June, 2018

B. THURANIRA JADEN

JUDGE