



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 182 OF 2017

MWANIKI GACHUBA.....PLAINTIFF

VERSUS

THE SPEAKER OF THE COUNTY

ASSEMBLY OF KAJIADO.....1ST DEFENDANT

DAVID OWINO KONYANGO.....2ND DEFENDANT

RULING

1. The plaintiff, *Mwaniki Gachuba*, is an Advocate of the High Court of Kenya practicing in the firm of *Ms Onyoni Opini & Gachuba Advocates*. In a plaint dated 28th August, 2017 and filed in court on the following day, the plaintiff sued the defendants seeking *inter alia*, general, exemplary and aggravated damages for defamation. It is alleged in the plaint that the 2nd defendant who was the Clerk of the County Assembly of Kajiado authored a letter dated 25th August, 2016 containing false and malicious allegations which were defamatory to the plaintiff; that the 1st defendant, the Speaker of the County Assembly of Kajiado published the same to the Secretary and Chief Executive Officer of the Law Society of Kenya and the Deputy Registrar of the Employment and Labour Relations Court at Nairobi.

2. In their joint statement of defence dated 5th October 2017, the defendants denied liability and challenged the competence of the plaintiff's suit. In paragraph 3 of the statement of defence, the defendants claimed that the suit was time barred having been filed outside the prescribed limitation period allowed for actions in defamation and was thus fatally defective.

3. The statement of defence was filed contemporaneously with a notice of preliminary objection which besides reiterating paragraph 3 of the defence challenged the validity of the suit on three other grounds namely:

i. That the suit was fatally defective as there was no publication of the impugned letter save to the extent permitted by law as publication was only to the Law Society of Kenya and to the plaintiff's clerk who was his authorized agent;

ii. That the impugned letter was a complaint requesting the Law Society of Kenya to investigate the plaintiff for professional misconduct in his handling of Petition No. 110 of 2016 which is expressly permitted by the law;

iii. That the cause of action as instituted violates the well laid equitable principles of law on the doctrine of absolute privilege.

4. The preliminary objection is opposed through grounds of opposition dated 13th November, 2017 in which the plaintiff asserted that the plaint was filed within twelve months of publication of the alleged defamatory letter and that the notice of preliminary objection was based on facts and not pure points of law.

5. At the hearing of the preliminary objection on 3rd May 2018, learned counsel *Mr Situma* represented the defendants while learned counsel *Ms Chichi* appeared for the plaintiff. Both learned counsel made oral submissions buttressing the positions taken by their respective clients in respect of the issues raised in the preliminary objection.

6. I have given due consideration to the preliminary objection, the parties' rival submissions and the authorities cited. Having done so, I find that two key issues emerge for my determination, namely:

i. Whether the plaintiff's suit is defective for being statutorily time barred.

ii. If the answer to issue (i) above is in the negative, whether the other grounds taken in the objection meets the threshold of a preliminary objection.

7. The plaintiff's suit is founded on the tort of defamation.

Section 4 (2) of the *Limitation of Actions Act* clearly provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued **"provided that an action for libel or slander may not be brought after the end of twelve months from such date"**.

The proviso to section 4 (2) aforesaid is replicated in Section 20 of the *Defamation Act*. This means that an action for defamation whether in the form of libel or slander must be commenced within one year from the date the cause of action accrued. In order to establish whether the suit was filed within or outside the statutory limitation period, it is important to determine when the cause of action arose in this case.

8. As a general rule, in actions for defamation, the cause of action arises when the alleged defamatory statement is published to 3rd parties. See: ***Wycliffe A Swanya V Toyota EA Ltd & Another, Civil Appeal No. 70 of 2008 [2009] eKLR***. This is why defamation is defined in *Blacks Law Dictionary 8th Edition* at page 448 as **"the act of harming the reputation of another by making a false statement to a third person"**.

In this case, the defendants through their learned counsel submitted that the impugned letter was published on 26th August 2016 as stated in the plaintiff's demand letter dated 21st October, 2016; that because the suit was filed on 29th August, 2017, it was time barred.

9. In her riposte, *Ms Chichi* maintained that the suit was filed within time since the letter containing the alleged defamatory statements was published to the Law Society of Kenya on 31st August, 2016; to the Employment and Labour Relations registry on 1st September, 2016 and to the plaintiff's office on 5th September, 2016.

10. I have perused the court record. I have noted that although it is true that the plaintiff alleged in the demand letter to the defendants that they published the alleged defamatory letter on 26th August, 2016, it is not clear where the plaintiff plucked that date from because according to the stamp endorsed on the face of the letter annexed to the statement of defence, the letter was received by the Law Society of Kenya on 31st August, 2016 meaning that this was the date of its publication to the Law Society of Kenya. There is evidence on the letter from the Law Society of Kenya forwarding the impugned letter to the plaintiff's firm that the letter was received by the firm on 21st October, 2016 which must be taken to be the date of publication of the letter to the staff working in the plaintiff's office.

11. From the documentation in the court file, it is not clear when the alleged defamatory letter was published to the Deputy Registrar in the Employment and Labour Relations Court but the date stated in the reply to the statement of defence filed on 15th November, 2017 is 1st September, 2016. This date was restated by *Ms Chichi* in her submissions and was not disputed by the defendants. It is trite law that what is not disputed is deemed to be admitted.

12. Given my foregoing findings on the dates on which the alleged defamatory letter was published to the third parties in question and considering that the suit was instituted on 29th August 2017, and though publication is a factual issue, I find that there is *prima facie* evidence to establish that the suit was filed within the timeframe prescribed by the law. Nothing therefore turns on the submission that the suit is fatally defective for being time barred.

13. Turning to the second issue, the law regarding what qualifies to be a preliminary objection is well settled.

In the celebrated case of ***Mukhisa Biscuit Manufacturing Company Limited V West End Distributors Company Limited, (1969) E.A. 696, Sir Charles Newbold P*** at page 701 defined a preliminary objection when he expressed himself as follows;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. ..."

14. The above definition was simplified and made clearer by *Ojwang, J (as he then was)* in ***George Oraro V Barak Eston Mbaja, Civil Suit No. 85 Of 1992 [2005] eKLR*** when he opined that:

"A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."

15. Applying the above principles to the present case, I find that the other grounds of objection relate to how or to whom the offending letter was published. As noted earlier, publication is a factual issue. Unless it is admitted, it is a matter which must be proved through the process of adducing evidence. And whether or not the alleged publication was permitted by the law or enjoyed absolute privilege depends on the context of the said publication which context can only be determined on the basis of evidence to be adduced at the trial. Consequently, my answer to the second issue is that the other grounds anchoring the defendants' objection are not pure points of law and do not meet the threshold of what should constitute a preliminary objection.

16. For all the foregoing reasons, I am satisfied that the preliminary objection dated 5th October, 2017 is devoid of merit and it is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, DELIVERED and SIGNED at **NAIROBI** this 14th day of June, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Chichi: for the Plaintiff

Ms Arunga: for the Defendants

Mr Fidel Salach: Court Clerk