



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 20 OF 2017(O.S)

MARY NYAMBURA KIMANI.....APPLICANT

VERSUS

- 1. ROYAL MEDIA SERVICES LTD**
- 2. EDITOR-IN CHIEF, CITIZEN NEWS**
- 3. STANDARD MEDIA GROUP**
- 4. EDITOR-IN CHIEF, KTN NEWS**
- 5. NATION MEDIA GROUP**
- 6. DAILY NATION NEWSPAPER**
- 7. SUNDAY NATION NEWSPAPER**
- 8. EDITOR-IN CHIEF, NATION NEWSPAPER**
- 9. EDITOR-IN CHIEF, NATION NEWSPAPER**
- 10. MEDIA MAX NETWORKS LTD**
- 11. EDITOR-IN CHIEF, K24 NEWS.....RESPONDENTS**

R U L I N G

1. Some six applicants filed six different applications all seeking leave to file suits out of time. All the six applications exhibited proposed plaints to be filed if the leave sought was to be granted.
2. From the proposed plaint, all the applicant seek to file suits for defamation having been aggrieved by a what all call a news bulletin said to have been published and broadcasted by the defendants on the 14/5/2013 again on 19/5/2013 and other dates proximate thereto. The applications are all identical in all critical and material aspects save for the names of the applicants and residential addresses.
3. The reason advanced for delay in bringing the suits is chorused at grounds 5 & 6 of the applications is to the effect that the applicants went under psychological trauma for fear of being lynched by members of the public and were immobilized due to insults directed at them by same members of the public. It is added that the suits have been necessitated by the continued publication of the materials on the Respondents websites which has perpetuated the hostilities against the Applicants. In support of those grounds of the applications the Applicants exhibited and annexed to their affidavits copies of the offending articles as well as medical reports alleging psychological trauma.
4. There were also the said proposed plaints, as well as newspaper cuttings of various dates between May 2013 and April 2014 and printed online materials downloaded and printed allegedly published by the defendants.
5. The Applications, though anchored upon the provisions of section 27 & 28 of the Limitation of Actions Act, the reasons given are those provided under Section 22. To this court, sections 27 & 28, cap 22, do not apply for being at variance with the reasons advanced to underpin the applications. I would therefore invoke the courts inherent powers to do justice devoid of undue regard to technicalities as well as Order

50 Rule 10 to the effect that failure to cite the provision of the law is not a basis for a court of law to deny a party a deserved order.

6. In *Kwanza Estates Limited v Dubai Bank of Kenya limited (in liquidation) & another [2016] eKLR* the court of Appeal stressed the fact that a court of law is not confirmed to decide a matter based on only the law cited by parties but is bound to consider every law whether cited to it by parties or not. The court said:-

“The learned Judge, in our considered opinion properly relied on the provisions of sub-section 3. A Judge in determining a dispute is not restricted only to the provisions of the law cited by a party. Subsection (2) which the appellant relied on cannot be read in isolation from the rest of the section.”

7. In this matter the applicants, as said before seek extension and give the reason for delay to be the psychological trauma and threat to life occasioned by the continued publication of the offending words in the defendants online websites.

8. The test for extension of time under Section 22 is that the person must be under disability at the time the cause of action arose and that he was not in custody of the parents. In these matters the applicants have all exhibited medical report by one DR MH Mohammed which to me would qualify to make them disabled by virtue of what the doctor calls *post-traumatic stress disorder* which I consider to incapacitate them from bringing their actions in time.

9. For a disability to surface under Section 22, of the Act, the nature must be in the kind of mental unsoundness and not just physical disability. In *Gathoni vs Kenya Co-operative Creameries Ltd [1982] KLR*, the Court of Appeal said:-

“The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability ... Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action.”

10. Here is the applications, the medical reports exhibited in Applications No. 18, 19, 20 & 22 all of 2017 are to the effect that the mental illness continues. If that be the case, then the time has not started running and the applicants still have a chance to bring their suits.

11. However, there are two requirements under the law; disability and being not in custody of the parents. Section 22 , proviso Va, provides:-

“(V) In action for damages for tort:-

a) this section does not apply unless the plaintiff proves that the person under disability was not, at the time that the right of action accrued to him, in custody of his parents.”

12. Clearly, the applicant intend to pursue causes of action in tort hence by dint of Section 22 , as aforesaid, one has to demonstrate that he was not under the custody of a parent to act as guardian *ad litem*. Here the four applicants who have exhibited evidence of disability all say, unequivocally, that as a result of the reports complained about, the applicants lost parents’ and relatives’ love. That suggest that all have parents hence have not met the second requirement that they prove being not under the custody of parents. That is the second reason the application must fail.

13. The third reason why there cannot be justification for extension of time, in all the applications, is that, it is said, in the Affidavits that the publications continue in the Respondents’ online websites. If that be the truth, and I have nothing at all to doubt the applicants, then time has not stopped running since the tort continues, and time will only stop the moment the said publication are pulled down from the said websites.

14. For the above reasons, there is absolutely no reason nor justification to grant leave to the Applicants to file suits out of time unless one was to do it gratuitously and superfluously as time has not run out for them to bring their intended suit.

15. I therefore find no merit in the applications which I order dismissed.

Since the same proceeded *ex parte*, I make no orders as to costs.

16. During the hearing Ms Mwaka indicated that there were other related files she wished that this ruling would apply to those other matters without giving specifics. I grant to her that request and direct that any application related to the six (6) consolidated and affected by this ruling, shall equally be affected and bound by this ruling unless there be shown different set of facts from those which have informed this decision.

Dated and at Mombasa this 31st day of August 2018.

P.J.O. OTIENO

JUDGE

Read and delivered this 31st day of August 2018.

JUDGE