



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS SUIT NO.259 OF 2018

PETER GICHUKI MWANGI.....PLAINTIFF

VERSUS

THE KENYA COPYRIGHT BOARD.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL OF KENYA.....2ND DEFENDANT

ANTHONY GITHIACA KIAL.....3RD DEFENDANT

HIGH FLYER SERVICES AND PUBLISHERS LTD.....4TH DEFENDANT

RULING

1. Before me is a Notice of Motion dated 4th June 2018 by **PETER GICHUKI MWANGI** brought pursuant to section 27 and 28 of the Limitations of Actions Act (Cap 22) Laws of Kenya and section 3 and 3A of the Civil Procedure Rules. The application seeks the following order:-

- a) **THAT this Application be certified as urgent.**
- b) **THAT the Applicant be granted leave to file suit against the Respondents out of time.**
- c) **THAT the intended Application and suit annexed herein be deemed to have been filed within the time specified.**
- d) **THAT the cost of this Application be provided for.**

2. The application is premised on the ground on the face of the application thus; the application has been made without delay, that the intended application and suit has arguable grounds and case; that the honourable court has proven to exercise its discretion conferred to it and extend time for the intended application and suit.

3. The Applicant relies on the supporting affidavit dated 4th June 2018 in which the applicant has deponed thus; that the time lapse was not due to his mistake or error as he was unwell annexing medical documents as "**Pam-1**"; that he has also been financially been unstable leading to failure to file the suit, annexing "**Pam-2**", bank statements in respect of his account; that the application has been filed without undue delay; that he seeks to be allowed to file the draft plaint annexed and marked "**Pam-3**" and that no prejudice will be occasioned to the Respondents if the application is allowed.

4. This application ought to have been heard *ex parte* by its very nature, however the Applicant on his own volition proceeded to serve the 3rd Defendant/Respondent, thus bringing the 3rd Defendant/Respondent on board who insisted as he was duly served he had every right to be heard, which this court by virtue of the Applicant having brought him on board could not be declined, hence the application become a contested one. The 3rd Defendant/Respondent subsequently filed Notice of Appointment of Advocates and grounds of opposition.

5. The 3rd Defendant/Respondent grounds of opposition are briefly as follows:-

- 1) **THAT the application is incompetent, misconceived and a gross abuse of the court process.**
- 2) **THAT this Honourable Court has no jurisdiction to grant the orders sought in the application because:-**

a) Section 27 and 28 of the Limitation of Actions Act, Cap. 22 does not provide for extension of time in malicious prosecution claims. It only limits extension of time to tortious claims where there are claims for personal injuries arising from negligence, nuisance or breach of duty.

b) The Plaintiff cannot rely on Section 3A of the Civil Procedure Rules to get the orders sought in the application as it is trite law that Equity follows the Law and Equity aids the vigilant and not the indolent.

3) THAT the Plaintiff has failed to demonstrate that the material facts giving rise to his alleged claim were not within his knowledge within the limitation period of three years as provided for under Section 27(2) of the Limitation of Actions Act.

4) THAT the arguments advanced by the Plaintiff, that he was unable to file the suit within the statutory and mandatory timelines are untenable as:-

a) On the issue of alleged sickness, the documentary evidence annexed by the Plaintiff shows that he was only ailing between the months of August to September, 2016. It cannot therefore mean that the Plaintiff was sick for the entire period in which he was, in law, supposed to file a claim.

b) On the issue of alleged financial instability, the Plaintiff has not demonstrated any attempts to enforce his alleged action as a pauper under Order 33 of Civil Procedure Rules, 2010.

c) In any case, section 27 and 28 of the Limitation of Actions Act do not provide sickness or financial instability as grounds for extension of time to institute a statutory barred claim.

5) THAT the application does not give legally valid reasons which prevented the filing of the suit on time as required by Limitation of Actions Act.

6. At the hearing the Applicant appeared in person whereas Mr. Kamau Muturi, learned Advocate, appeared for the 3rd Defendant/Respondent. The Applicant urged the application relying on the grounds on the face of his application and supporting affidavit whereas Mr. Kamau Muturi, learned Advocate, relied on the ground of opposition and attached list of authorities.

7. As per attached draft plaint annexure PGM-3 the Plaintiff's/Applicant's intended suit is for claim of damages for malicious prosecution in criminal case No. 224, 225 and 295 all of 2015. The Applicant stated the said cases were withdrawn on 7th March 2017. The cause of action thereon arose in 2013 and by the time of filing this application on 4/6/2018 is a period of about 5 years.

8. Section 4 (2) of the Limitation of Actions Act (Cap 22) Laws of Kenya provides:-

"4 (2) An action founded on tort may not be brought after the end three years from the date on which the cause of action occurred.

Provided that an action for libel or slander may not be brought after the end of timeline months from such date."

9. Extension of limitation period is provided for in case of ignorance of material facts in action founded on negligence. Section 27 (1) (b)-(d) and (2) of the Limitation of Actions Act provides:-

"(b) The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(d) The requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) In either case, was a date not earlier than one year before the date on which the action was brought?"

10. Further section 28 (1) (2) (a) and (b) of the Limitation of Actions Act provides:-

"(1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that

evidence would in the absence of any evidence to the contrary, be sufficient—

(a) To establish that cause of action, apart from any defence under section 4(2) of this Act; and

(b) To fulfil the requirements of section 27(2) of this Act in relation to that cause of action."

11. For application for leave to file a suit out of time to be granted the requirements set out under section 27 and 28 of the Limitation of Actions Act has got to be satisfied by the Applicant. The 3rd Respondent has in his grounds of opposition urged that the Applicant do not deserve the orders sought as the application is incompetent, misconceived and is a gross abuse of the court process.

12. In the instant application the same is based on section 27 and 28 of the Limitation of Actions Act (Cap 22) Laws of Kenya. The aforesaid sections are clear that for an Applicant to benefit or qualify for an extension for limitation period the torts claim should be for damages for negligence, nuisance or breach of duty; damages claimed in respect of personal injuries of any person and that the requirement of section 4 (2) are fulfilled in relation to cause of action, if it is proved that material facts relating to the cause of action were or included facts of a decisive character, were at all times outside the knowledge of the applicant until the date either after 3 years period of limitation prescribed for the cause of action was not earlier than one year before the end of that period and either case was a date not earlier than one year before the date on which the action was brought.

13. In the instant application, the Applicant's claim would be seeking damages for malicious prosecution for which section 27 and 28 of the Limitation of Actions Act (Cap 22) Laws of Kenya, a claim for damages based on malicious prosecution is not included. The extension of time is limited to the nature of claims for damages limited under section 27 of the Limitation of Action Act and no other. This court cannot act beyond the express provisions of the law and extend the period of filing suit out of time for which the law do not allow or where the requirements which are specifically set out have not been satisfied. The reliance under section 3 and 3A of the Civil Procedure Act cannot in my view be used to grant what is not allowed by the relevant statute, in this case the Law of Limitation of Action Act. It is trite law that Equity follows the Law and Equity aids the vigilant and not the indolent. I find that the Applicant has failed to show or demonstrate that the material facts giving rise to his alleged claim were not within his knowledge within the Limitation period of three years as provided for under section 27 (2) of the Limitations of Action Act.

14. It is urged by the Applicant that he had been unwell as per annexure "PMG 1" which reveals that he was in hospital from 22nd August 2016 up to 25th August 2016, a period that occurred after 3 years limitation period of bringing up a suit for damages for malicious prosecution, and "PMG 2" being Bank statements for the period running from 31/10/2017 to 25th April 2018, a period over 3 years since the cause of action arose. I have carefully considered the annexures "PMG 1" and "PMG 2" relied upon by the Applicant in support of this application. The two annexures do not show that the Applicant was sick since 2013 and that he was not financially capable of instituting the suit claiming damages for malicious prosecution the entire period. He further failed to show that, if he was financially crippled, what attempts were made to enforce his alleged claim as a pauper under order 33 of the Civil Procedure Rules, 2010. Further it should be noted that the section relied upon by the Applicant thus section 27 and 28 of the Limitation of Actions Act, do not recognize sickness or financial inability as grounds for extension of time to institute a statutory barred claim. The said sections are so specific as to the requirement and cannot be construed in any other manner than drawn.

15. Having said that much, I note the Applicant has not satisfied the requirements of the relevant sections of the Law of Limitation of Actions Act nor has he given valid reasons which prevented him from filing of the suit on time as required by the Law of Limitation of Actions Act.

16. This application should as per section 28 (1) of the Limitation of Actions Act have proceeded *ex-parte*, a fact that court drew attention to the 3rd Defendant/Respondent's Advocate, who adamantly insisted to take part in the matter in spite of the court drawing his attention to the relevant section of the Law, and in view of that fact, in whatever conclusion this court will come to, that will be reflected on the issue of cost.

17. The upshot is that the Applicant's application dated 4th June 2018 is without merit and the same is dismissed.

No order as to cost.

Dated, signed and delivered at Nairobi this 27th day of September, 2018.

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J .A. MAKAU

JUDGE