



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 88 OF 2012

WILSON KIARIE NJOROGI PLAINTIFF

VERSUS

FAMILY BANK LTD 1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LTD ... 2ND DEFENDANT

RULING

The ruling herein relates to two separate preliminary objections by the 1st and 2nd defendants. The first defendant's preliminary objection is dated 23rd January, 2017 and is based on the following grounds:

1. That the plaintiff's suit herein is statute time barred by dint of section 4 (2) of the Limitations of Actions Act Cap 22 Laws of Kenya and section 20 of the Defamation Act Cap 36 Laws of Kenya and therefore bad in law.

2. That the plaint dated the 17th February, 2012 is incurably defective as it does not disclose any course of action, reasonable or otherwise and the same ought to be struck out with costs to the first defendant.

The 2nd defendant's preliminary objection is dated 10th day of February, 2017 and it's based on the ground that:

“The plaintiff's suit is statute time barred under section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya and section 20 of the Defamation Act Cap 36 Laws of Kenya.”

In his submissions, counsel for the first defendant submitted that the course of action herein is based on the tort of defamation and it occurred on 22nd October, 2010. That it was filed in the year 2012 a period of more than one year which is against the provisions of Limitation of Actions Act. He submitted that the said words are alleged to have been published on 26th April, 2011 by the 1st defendant while the 2nd defendant is alleged to have published the 2nd publication on 26th April, 2011.

It was further submitted that the plaintiff cannot rely on the publication of 26th April, 2011 as a re-publication. He further told the court that the law requires that the plaintiff do plead all the defamatory words verbatim and the meaning attributed to the alleged defamatory words and that contrary to the law, the plaintiff herein has not attached any meaning to the words so as to make the plaintiff to be ridiculed. That, the plaint has not stated the loss the plaintiff has suffered if at all and that the loss is merely speculative because there was no defamation to him in person.

The 2nd defendant in his submissions supported the preliminary objection by the 1st defendant. In addition, counsel for the 2nd defendant submitted on their preliminary objection as well. He told the court that the plaintiff's suit against the 2nd defendant is statute time barred in view of **section 4 (2) of the Limitations of Actions Act** and the provisions of the Defamation Act. He stated that the credit report, the subject matter of the alleged defamation, is indicated as dated 22nd December, 2010. According to him, the last date for filing of the plaint was 21st December, 2011. He relied on the case of **WYCLIFFE SWANYA V TOYOTA EAST AFRICA LTD & ANOTHER, (2009) eKLR** where the court of appeal stated that the cause of action in defamation arises when the defamatory article was published and not when the plaintiff starts feeling the effect. It was further submitted that in paragraph 6 of the plaint, there was a misconception that the information submitted in the data base is kept in a public place which is not true and therefore, the allegation that there was a republication was erroneous.

On his part, counsel for the plaintiff opposed the two preliminary objections. He submitted that the suit is not time barred for the reason that it raises two causes of actions, one in defamation which he admitted ought to be filed within one year and given that there are two publications one on 22nd December, 2011 and the other on 26th April, 2011 as set out in paragraph 6 of the plaint. That it is the second listing by the plaintiff that prompted it to come to court.

The court was told that the plaint also raises a cause of action in tort as set out in paragraph 20 whose limitation period is three [3] years which is based on the duty of confidentiality. Submitting on the 2nd limb of the preliminary objection by the 1st defendant, the court was told that the same ought to have been raised by way of an application. That a preliminary objection ought to raise issues of law and not facts. To support this contention, the case of **MUKHISA BISCUITS MANUFACTURING CO LTD V WESTEND DISTRIBUTORS CO LTD** was cited. She relied on the contents of paragraph 6 of the plaint in support of her submission that the words in the article were not quoted verbatim.

In his reply, counsel for the 1st defendant contended that the plaintiff's cause of action is based on defamation whose limitation period is 12 months. Counsel for the 2nd defendant submitted that the plaintiff's counsel having admitted that the cause of action in defamation arose on 22nd December, 2010, the court has power to strike out any part of the claim that may have been filed out of time or any of the claim especially where a party has two causes of action.

The court has considered the preliminary objections and the arguments advanced by all the counsels.

The essence of a preliminary objection was discussed in the case of **MUKHISA BISCUITS MANUFACTURING CO LTD V WESTEND DISTRIBUTORS CO LTD, (1969) EA 696** at page 900 as follows:

“... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, on which if argued as a preliminary point may dispose of the suit. Examples are on objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P added as follows at page 701:

“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.” [Emphasis mine]

The two preliminary objections raised in this matter are mainly based on **section 4 (2) of the Limitations of Actions Act** and **section 20 of the Defamation Act Cap 36 Laws of Kenya**, both of which provide that an action for libel or slander may not be brought after the end of twelve months from the date the cause of

action occurred. The 1st defendant is alleged to have published to the 2nd defendant a defamatory and/or report about the plaintiff to the effect that he could not discharge his contractual obligations to the lenders in Kenya and consequently was not a fit person to be lent money by any bank and/or financial institution.

With regard to the 2nd defendant, the plaintiff pleaded that it, the 2nd defendant recklessly and negligently without proper cause or confirmation went on to disseminate and publish the said defamatory words and/or report to other banks and financial institutions. The said report was published on 26th April, 2011 in what is referred to as a “*CONSUMER CREDIT REPORT*”.

The plaintiff’s counsel in her submissions admitted that the cause of action in defamation is time barred as it was brought outside the twelve months period provided for by the law. Though she argued that the 2nd listing is what prompted the plaintiff to come to court, am of the view that time started to run on the date when the slanderous remarks were made and not when the plaintiff started feeling the effect of the slander.

This was well articulated in the case of *WYCLIFFE A. SWANYA V TOYOTA EAST AFRICA & ANOTHER, 2009*. Going by the plaintiff’s submissions that it is the listing by the 2nd defendant that prompted him to come to court and not the publication by the 1st defendant, that means that it was then that he felt the effect of the slander/libel.

On the plaintiff’s contention that his claim raises another cause of action in tort and contract, this court has perused the plaint and in paragraph 20, a mere mention is made of the 1st defendant’s breach of the plaintiff’s contractual duty to confidentiality not only by its sharing of confidential information in its possession without the plaintiff’s consent, but by also having the information wrong when it shared it.

On the basis of the aforesaid, he has claimed general damages for breach of confidentiality. I am persuaded by the submissions by the counsel for the plaintiff that, the plaintiff has pleaded a cause of action in tort but as to whether he has a reasonable cause of action in tort, the court has to be properly moved by way of a formal application and not by a preliminary objection.

In the result, I find and hold that the 2nd defendant’s preliminary objection has merits and the plaintiff’s case against the 2nd defendant is hereby struck out with costs.

As for the 1st defendant’s preliminary objection, the 1st limb of the same is hereby allowed. The plaintiff’s cause of action in tort against the 2nd defendant was filed within the statutory limitation period. The 2nd limb of the preliminary objection is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 20th day of April, 2017.

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendants**