



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI CIVIL DIVISION
CIVIL SUIT NO. 234 OF 2014

BETH WAMBUI MUGO..... PLAINTIFF

VERSUS

CHARLES HORNSBY.....1ST DEFENDANT

I.B TAURIS & CO. LTD.....2ND DEFENDANT

BETHWELL KIPLAGAT

MARGARET SHAVA

TECLA NAMACHANJA

AHMED SHEIKH

GETRUDE CHAWATAMA

PROF. TOM OJIENDA

(ALL BEING SUED AS FORMER COMMISSIONERS OF THE TRUTH

JUSTICE & RECONCILIATION COMMISSION (TJRC)...3RD DEFENDANT

PRESTIGE BOOKSHOP LIMITED4TH DEFENDANT

RULING

1. This Ruling seeks to determine the following four (4) applications which have been filed before this Court: -

a. A Notice of Motion application dated 20.12.2014 filed by the 3rd Defendant and seeking to have the Plaintiff's suit struck off on the grounds that;

i. The Suit is statute barred under section 4(2) of the Limitation of Actions Act as read together with section 20 of the Defamation Act;

ii. The suit is sub judice being similar to that filed in the judicial review Miscellaneous

Application No. 284 of 2013; and

iii. The Plaintiff improperly sued the 3rd Defendants as they were acting in good faith and on behalf of the Truth Justice and Reconciliation Commission (TJRC) and any claim for damages should lie against the Commission.

iv. And further grounds in the Supporting Affidavit of Prof. Tom Ojienda sworn by him on behalf of all the 3rd Defendants.

b. A Notice of motion Application dated 6th July, 2015 filed by the 1st Defendant and seeking orders that The Plaintiff's action against the 1st, 2nd and 4th Defendants be struck out with costs for failing to disclose any cause of action against them. The application is premised on the grounds that:

i. The offending words that the plaintiff, '**benefited from irregular land deals during Kenyatta's administration**' is a direct quote from the Truth Justice & Reconciliation Report published in 2013 by the 3rd Defendants; and

ii. That the Plaintiff's case against the 1st Defendant is that he is liable in libel for phrase authored and published by the 3rd Defendant

c. A Notice of motion Application by the 4th Defendant seeking orders that the Plaintiff's suit be struck out for being filed out of time or in the alternative be struck out for disclosing no reasonable cause of action. This application is supported by the grounds that;

i. The Plaintiffs' Suit is statute barred;

ii. The words contained in the book complained of were published way before 1st August 2012 by a renowned journalist David Ohito and later on by the TJRC; and

iii. That the 4th Defendant is a bookseller who innocently sold the book in the ordinary course of business without knowing or negligence in knowing that the book contained defamatory matter.

d. A Notice of Motion Application dated 25th April, 2016 by the 2nd Defendant seeking orders similar to that of 1st Defendant's application.

2. In response, the Plaintiff filed Replying Affidavits to all the Applications and argued among other grounds that she filed the suit when she became aware of the defamatory statements after purchasing the book and that the cause of action ought to have arisen at the time when she became aware of the defamatory words.

3. The Applications were canvassed by way of written submissions which were highlighted before court on 13th March, 2017. I have read through all the Submissions and noted the authorities quoted therein. I have also perused the Replying Affidavits of the Plaintiff and her supplementary submissions as well. In essence all the four application are seeking to have the Plaintiff's suit struck out either for being time barred or failure to disclose a reasonable cause of action under **section 4(2) of the Limitation of Actions Act** read together with **section 20 of the Defamation Act** which provide 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***".

4. The subject suit was filed on 4th August, 2014 whilst the words complained were published by the 3rd Defendant on 28th June, 2013 and had been earlier on published by a renowned journalist David Ohito in

the year 2012. The Plaintiff's argument on the timelines is that she filed the suit when she bought the book and became aware of the defamatory publications. Therefore the question herein for determination is, when did the cause of action arise? This is a question which was well settled in the case of **Wycliffe A. Swanya Vs. Toyota East Africa Limited & Another (2020) eKLR** where the Court of Appeal stated that, **"...it (read the Limitation of Action Act) says in case of libel or slander no action may be filed after the end of 12 months from the date the cause of action accrued and I understand this to mean from the date the slanderous remarks are made...It would be absurd for slanderous remarks to be made about a person and then he/she waits until he/she feels the effects thereof to file an action in court. If this be the case then there would be no need for any limitation period to be specified... "**. Therefore, the cause of action arose from the time the statements were published/ made and not when the Plaintiff became aware of the same. Looking at the timelines and the law, the suit is time barred.

5. Another issue for determination in this ruling is whether the suit discloses a reasonable cause of action against the Defendants. The Defendants named as the 3rd defendant herein have been sued in their capacities as former Commissioners of the TJRC and they submit that the Plaintiff had improperly sued them despite the express provisions of section 24 and 32 of the Truth Justice and Reconciliation Commission and they argue that they are not personally liable for acts done in good faith and in their capacities as Commissioners. I have had interest in perusing the said Act and **section 32** is clear that. **"no matter or thing done by any officer, employee or agent of the commission shall if the matter or thing is done in good faith in executing the functions, powers or duties of the commission render the officer, employee or agent personally liable to any action, claim or demand whatsoever"**. Section 33 of the same Act empowers the commission to compensate the injured persons for acts under section 32. From the face of the Plaint, 3rd Defendants are **"all being sued as former Commissioners of the Truth, Justice and reconciliation Commission"**

6. Section 32 of the Act protects the commissioners from any matter or anything done in good faith or while executing their powers or duty. In which case, the court would have to take evidence and determine whether whatever the commissioners are accused of doing was done in good faith or otherwise. But for the reason that the suit is statutory time barred, the same cannot see the light of the day.

7. The 1st, 2nd and 4th Defendants herein are author, publisher and distributor of a book containing the statements in contention. It's been argued that the offending words that the plaintiff, **'benefited from irregular land deals during Kenyatta's administration'** is a direct quote from the Truth Justice & Reconciliation Report published in 2013 by the 3rd Defendants. The 4th Defendant further argues that it's an innocent seller. I am of the considered view that 1st, 2nd and 4th defendants are properly enjoined as parties to the suit. The reasons that they have advanced in support of their application would form part of their defence and more particularly that of privilege which is an absolute defence but they have to prove the same at the hearing. It would be premature for the court to strike out the suit as against them at this stage as disclosing no cause of action against them but as the court has already found, the suit is statutory time barred.

8. On the question whether the Plaint is *sub judice*, I find that the instant suit is a defamation suit whereas the former was a Judicial Review Miscellaneous Application no. 284 of 2013 seeking prerogative rights which are different from the orders sought herein. Therefore, this suit is not *sub judice*.

9. In conclusion, I find that the Plaintiff's suit is time barred and it is struck out with costs to the defendants.

Dated, signed and delivered at Nairobi this 31st day of July, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... *for the Plaintiff.*

..... *For the 1st Defendant.*

..... *For the 2nd Defendant.*