



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 233 OF 2015

HON. CHIEF JUSTICE DR. WILLY MUTUNGA1ST PLAINTIFF
HON. LADY JUSTICE KALPANA H. RAWAL.....2ND PLAINTIFF
HON. JUSTICE (PROF) JACKTON B. OJWANG..... 3RD PLAINTIFF
HON. JUSTICE (DR) PHILIP K. TUNOI.....4TH PLAINTIFF
HON. JUSTICE MOHAMMED K. IBRAHIM..... 5TH PLAINTIFF
HON. JUSTICE (DR) SMOKIN WANJALA 6TH PLAINTIFF
HON. LADY JUSTICE NJOKI S. NDUNG’U 7TH PLAINTIFF

V E R S U S –

RADIO AFRICA LIMITED T/A WEEKED STAR.....1ST DEFENDANT
THE STAR PUBLICATIONS LIMITED T/A WEEKEND STAR..... 2ND DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 27th January 2016 and taken out by the **Star Publications Ltd T/A Weekend Star**, the 2nd Defendant therein. In the aforesaid motion, the 2nd Defendant applied for the Plaintiffs’ suit against it instituted through the amended plaint dated 10th August 2015 and filed on 11.08.2015 to be struck out for disclosing no reasonable cause of action with costs. The motion sets out the grounds it is based. When served, the Plaintiff filed the replying affidavit of Andre Mukite Musangi to oppose the same.

2. When the motion came up for inter partes hearing, learned counsels appearing in the matter recorded a consent order to have the same disposed of by written submission. I have considered the grounds stated on the face of the motion plus the facts deponed in the replying affidavit plus the rival written submissions together with the authorities cited. It is the submission of the 2nd Defendant that the suit against it was filed over twelve (12) months from the date when the alleged cause of action arose contrary to the express provisions of Section 4(2) of the Limitation of Actions Act (Cap 22 L. O. K) as read with Section 20 of the Defamation Act (Cap 36 L. O. K). It is argued that the law does not provide for extension of the limitation period in libel matters. For the above reason this court was beseeched to find that the suit against the 2nd Defendant discloses no reasonable cause of action hence it should be ordered

struck out.

3. The Plaintiffs are of the view that the motion lacks merit and should instead be dismissed. It was pointed out that this suit was filed on 25.6.2015 which was well within the time stipulated under Section 4(2) of the Limitation of Actions Act (Cap 22 L.O.K). The Plaintiffs further argued that the 2nd Defendant's motion was filed in bad faith. The 2nd Defendant has urged this court to strike out the replying affidavit of Andrew Mukite Musangi because the learned advocate deponed on contested matters. The 2nd Defendant urged this court to strike out paragraphs 4, 7 and 8 as the averments therein are contentious matters.

4. I wish to begin by considering the preliminary objection raised against the replying affidavit. There are ample authorities which have been cited by the parties in which the court has expressed itself on the competency of affidavits deponed by advocates in respect of contentious matters. It suffices to cite the case of **Oyugi vs= Law Society of Kenya & Another (2005) 1 K.L.R 463** in which Ojwang J. (as the then was) expressed himself as follows:

“It is not competent for a party’s advocate to depone (sic) to evidentiary facts at any state of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible an unseemly for an advocate to discharge this duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel’s affidavit is defective for the reason that it offends the provision to Order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs.”

5. I have examined paragraphs 4, 7 and 8 of the replying affidavit of Andrew Mukite Musangi and I am convinced that the learned advocate deponed on contentious matters which should have been left to the client to do. With respect, I find the 2nd Defendant's objection to be well founded. Consequently I strike out paragraphs 4, 7 and 8 of the replying affidavit of Andrew Mukite Musangi.

6. Having determined the preliminary issue, I now wish to address my mind on the merits of the motion. The question which has been left to this court to answer is whether or not the suit against the 2nd Defendant is incurably defective. It is said that the same was filed outside of the statutory period. In paragraph 5 of the replying affidavit of Andrew Musangi, it is deponed that the suit was filed on 25.06.2015 within the statutory period. There is no doubt that the suit as against the 1st Defendant was filed on 25th June 2015. The same was therefore filed within the twelve (12) months period prescribed by section 4(2) of the Limitation of Actions Act. There is no dispute that the 2nd Defendant and the cause of action against it were introduced to this suit via an amendment of the initial plaint dated 25.06.2015. With respect, it cannot be correct to state that the suit as against the 2nd Defendant was filed out of time. This court has in many occasions expressly stated that the date when the initial suit was filed apply to other subsequent causes of action and parties introduced by amendment.

7. In **Faulkner vs= Agricultural Development Corporation (1976-80)1 K.L.R 762**, the Court of Appeal held inter alia:

“That an amendment to a plaint might be made after a period of limitation had expired if the court thought it just and no prejudice or injustice would be involved.”

8. In the final analysis, I find the motion dated 27.1.2016 to be without merit. It is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent