



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. 145 OF 2015

JAMES MUGAMBI.....PLAINTIFF

VERSUS

1. AMANI Y. KOMORA.....1ST DEFENDANT

2. KENYA PORTS AUTHORITY LTD.....2ND DEFENDANT

R U L I N G

1. This suit was filed by the plaintiff on 29/10/2015 vide a plaint dated 1/8/2015. In the suit the plaintiff sought general exemplary and special damages on account of a letter dated 28/9/201 written by the 1st defendant as the Human Resources Manager of the 2nd defendant and addressed to the plaintiff. The Plaintiff contention is that the letter was defamatory of him and hence the suit.

Upon service the defendant filed a Notice of Preliminary objection dated 27/01/2016 which is worded as follows:-

i. This suit as against the defendants is time barred by limitation in accordance with the Provisions of section 4(2) of the limitation of Actions Act, Cap 22 Laws of Kenya and

ii. This Honorable court is divected of jurisdiction to hear and/or issue determinations on the plaintiff's suit instituted against the defendants.

2. On those two grounds the defendants have sought that the plaint be struck out with costs.

3. It is of note that the defendant is yet to file a statement of defence hence the plaintiff on 5/7/2016 filed an amended plaint dated 16/6/2016. The amended plaint on its face reveal that having been interdicted on the 28/9/2012, the plaintiff subsequently retired on 10/5/2014 having attained the mandatory retirement age. The plaintiff further pleads that a second letter was again written to him on 9/5/2014 which he also deems defamatory. Critically, and of importance is the fact that the amended plaint seek the recovery of employment related benefits as a result of the interdiction. However, the particulars of pecuniary claims are not disclosed in the plaint.

4. As crafted and filed, the Notice of Preliminary objection alleges that the suit being grounded on the tort of defamation is statute barred by operation of section 4(2) of the limitation of Actions Act. That provision reads:-

“4(2) 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”

5. Parties chose to canvass the objection by way of written submission and the defendant did file submissions on 19/4/2016 while the plaintiff filed his submissions on 19/7/2016 together with a list of authorities.

6. The parties then appeared before court on the 21/7/2016 to highlight the submissions in canvassing the preliminary objection.

Submissions by the Parties

7. The defendant represented by Mr Obinju put forth short and brief submissions to the effect that being a cause of action founded on the tort of libel, alleged to have accrued on 28/9/2012 and again on 9/5/2014 when the plaint was filed on 29/10/2015, it was filed after the expiry of twelve months and it was thus statute barred.

8. On her part Mrs Kibe for the plaintiff opposed the objection on the grounds that it could not be determined without looking at the facts of the case. She stressed the fact that after the letter of 29/4/2012 there were disciplinary proceedings whose outcome were not commanded to the plaintiff till May 2004. In her submissions, the cause of action did not arise on the date the letter was written without the conclusion of the disciplinary proceedings. The counsel then referred the court to the decisions by the Employment and Labour Relations Court being *Rose Lunari Lukurito vs Teachers Service Commission (2014) eKLR*.

9. In his rejoinder Mr. Obinju pointed out the cases cited by the plaintiff were employment related case and therefore distinguishable as not been founded on the tort of libel.

Analysis and determination

10. To the court there is no doubt that the claim pleaded is that of libel and founded on two letters by the 1st defendant to the plaintiffs. The letters are dated 29/4/2012 and 9/5/2014. Even if it is taken that the letter of 9/5/2015 was a continuation and in furtherance of the contents of that of 29/9/2012 the fact still remain that any cause of action founded on their dates go back to the dates of their publication the last of which being 9/5/2014.

11. In my calculation, even if I take it that the cause of action accrued on 9/5/2014, this suit ought to have been filed not later than the 8/5/2015. It was not so filed till the 29/10/2015 some five (5) months later. It was filed out of time and there being no jurisdiction on the court under section 27 of the limitation of Actions Act to extend time for filling a suit grounded on libel, the suit herein is barred by limitation and bad in law in such a way that cannot be resuscitated.

12. Having found so, I proceed and strike out the suit for being time barred. I award the costs of the suit as the preliminary objection to the defendant.

HON P.J.O. OTIENO

JUDGE

2/8/2016

Dated and delivered this 2nd day of **August 2016** in the presence of:-

Mr Were for Mrs. Kibe for the Plaintiff

Mr Obinju for the Defendant

MR WERE

I am intended to apply for certified copies of the proceedings and ruling and also an order of temporary stay pending appeal. We also pray for leave to appeal.

MR OBINJA

No objection to copies of proceedings and ruling but oppose an order for stay for the striking out is a negative order. I don't have objection to leave being granted.

MR WERE

I agree that there would be no need for stay.

COURT

1. Let the parties be availed copies of proceedings and ruling upon payment of requisite court fees.

2. Leave is granted to the plaintiff to agree against the ruling of this court.

HON P.J.O. OTIENO

JUDGE

2/8/2016