



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA T NAIROBI**  
**CIVIL SUIT NO.292 of 2013**

**BOSIRE OGERO.....PLAINTIFF**

**VERSUS**

**ROYAL MEDIA SERVICES.....DEFENDANT**

**R U L I N G**

The plaintiff herein, Bosire Ogero, vide a plaint dated 24/07/2013 and filed in court on the same day sued the defendant Royal Media Services seeking general damages, aggravated damages and punitive damages against the defendant media house for publishing a video clip on the defendant's You Tube platform titled "*Shitanda Now Axes NHC Board members.*"The plaintiff claims that the publication is defamatory of him. The defendant filed their statement of defence dated 30/08/2013 on 2<sup>nd</sup> September 2013 denying ever having published the said clip but in the alternative pleading that if the said clip was aired, the same was aired in good faith, without malice, in the public interest and not intended to injure the character of the plaintiff.

In their paragraph 8 of the said statement of defence, the defendant pleaded that the cause of action against it is barred by limitation. The plaintiff was therefore put on notice that the defendant would be raising a preliminary objection to that effect.

By a Notice of preliminary objection dated 19/05/2014 and filed in court on 20<sup>th</sup> May 2014 the defendant contended that the suit is barred by limitation having been filed over 12 months after the impugned broadcast. The defendant urged this court to dismiss the suit with costs.

In response to the defendant's preliminary objection, the plaintiff filed a Notice of motion dated 6<sup>th</sup> October 2014 seeking leave to amend his plaint dated 24/07/2013 in terms of draft amended plaint. The application is brought under the provisions of Order 8 rule 3 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act. The plaintiff also seeks for costs of the application to be provided for. The application is based on the ground that the plaint erroneously referred to 24/4/ 2012 as the date when the alleged You tube video clip "*Shitanda Now Axes NHC Board members*" subject matter of this suit was allegedly published by the defendant on its online channel Kenya citizen TV.

The plaintiff's application is supported by the affidavit of Bosire Ogero sworn on 6<sup>th</sup> October 2014. Mr. Ogero deposes that the plaint inadvertently referred to the date when the cause of action arose as 24/4/2012 instead of 24/7/2012 as confirmed by the online posting published by the defendant. The plaintiff believes that the proposed amendments will assist the court to determine the real issues before it and arrive at a just conclusion. The plaintiff also claims that the amendments will not prejudice the defendant as the proposed amendments and the video clip in his possession will confirm the correct date when the cause of action arose.

The defendant opposed the plaintiff's application for amendment of the plaint by filing grounds of opposition dated 27/10/2014 on 28<sup>th</sup> October, 2014. The defendant contends that the application by the plaintiff is a gross abuse of the court process and is not brought in good faith since it is meant to defeat the defense of limitation of time already accrued to the defendant and contained in the preliminary objection dated 19<sup>th</sup> May, 2014. The defendant also claims that the proposed amended plaint does not accord with the original plaint, the plaintiff's witness statement and the reply to the defence which documents have not been recalled for amendment on the date when the cause of action allegedly accrued.

On 9/12/2014, Miss Wangombe, who was holding brief for Anzala, counsel for the plaintiff, and Mr. Gacheru, counsel for the defendant agreed that the defendant's preliminary objection and the plaintiffs application for leave to amend the plaint be heard together and this court gave directions to that effect.

Miss Wangombe submitted that the plaintiff's prayer was for leave to amend paragraph 5 of the plaint to indicate the correct date when the cause of action arose. She told the court that the plaint erroneously stated that the cause of action arose on 24/4/2012 instead of 24/7/2012. She stated that they were in possession of a **YouTube** video clip published on 24/7/2012. Miss Wangombe further submitted that the amendments sought were necessary under Order 8 rule 3(1) of the Civil Procedure Rules and that the same would not occasion any injustice to the defendant.

Counsel for the plaintiff submitted that to date the publication is still on the defendant's **YouTube** platform with 390 viewers and it continues to be viewed. The plaintiff relied on the following cases in support of his application, calling upon the court to invoke its discretionary power to correct an inadvertent error: **Eastern Bakery vsCastelino (1958) EA 461, Barclays Bank D.C.O vsShamsudin(1973) EA 451, Jimna Mwangi Gichanga vs The Attorney General (2008)eKLR, Cyrus Mwandao Macharo & Another vs PriviaMalasi& Another (2010) eKLR,Diamond Trust Bank Kenya Limited vs John Wakaba Joseph & Another (2013)eKLR, Hiram Bere Kinuthia & 2 others vs Edick Omondi & 3 others (2014)eKLR** and an article titled **Internet Publication and Defamation: Why the Single Publication Rule Should not Apply. By Odelia Brown [2010].**

In response to the plaintiff's counsel's submissions, Mr Gacheru opposed the application by the plaintiff seeking to amend his plaint and submitted that this court has the discretion to allow amendments at any stage of the suit but that the discretion must be exercised judicially, as enunciated in the case of **Eastern Bakery vs Castellino (supra)** page 3 paragraph E. Counsel also submitted that each case must be considered on its own facts. According to Mr. Gacheru, the original plaint stated that the cause of action arose on 24/4/2012 and all other supporting documents including the witness statement stated the same date. He contended that the proposed amendments are not shown in the plaint. And that in the reply to defence filed on 16<sup>th</sup> September, 2013 the plaintiff at paragraph 7 alleges that the impugned online publication was first broadcast on 24<sup>th</sup> June, 2012. Mr Gacheru submitted that under paragraph 5 in the original plaint, the plaintiff complained about the TV but in the proposed amendments he did not show the content of the former plaint and as the proposed amendments are not shown, it was confusing. The defendant's counsel urged this court to decline the amendments and allow the preliminary objection striking out the plaint.

In a brief rejoinder to Mr. Gacheru's submissions, Miss Wangombe responded that paragraph 2 of the plaint was split in the proposed amendments and that there was no more information. Counsel also stated that the Barclays Bank (supra) case was relevant to this case on the issue of amendments defeating the defence of limitation. She further stated that the special circumstances of this case were that the cause of action arose on 24/7/2012and not 24<sup>th</sup> April, 2012 as erroneously pleaded. She claims that there was an inadvertent error which should be excused.

Having set out the respective parties' positions as above, the emerging issues for determination are:

1. ***Whether the plaintiff's suit as filed is barred by limitation of time.***
2. ***Whether on the facts and circumstances of this case the plaint should be amended.***

I will discuss and determine the two issues together.

The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case **of Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998**. It is for that reason that the issue of jurisdiction must be raised at the earliest opportunity. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (see **Owners of Motor Vessel “Lillian S” vs Caltex Oil (k) Ltd (1989) KLR 1** Per Nyarangi JA. See also the Court of Appeal decision in **Owners and Masters of Motor Vessel “Joey” VS Owners and Masters of the Motor Tugs “Barbara” and “Steve B.” [2008]1 EA 367** where, echoing the decision in the case of **Owners of Motor Vessel “Lillian S”**, the Court of Appeal held, inter alia:

*“The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step.....”*

Further, jurisdiction cannot be conferred by parties to a dispute. It is the Constitution or other written laws that confer jurisdiction on courts. Jurisdiction cannot be decided by an erroneous decision. See **Carmella Wathugu Karigaca vs Mary Nyokabi Karigaca CA 30 of 1995**.

In **Dhanesvar V. Mehta vs Manilal M. Shah (1965) EA 321**, the court was categorical that the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case, but it is not meant to extinguish claims.

The Limitation of Actions Act Chapter 22 Laws of Kenya is the primary substantive legislative enactment which statute expects the intending plaintiffs to exercise reasonable diligence and to take reasonable steps in their own interest, as not all causes of action once barred by statutory limitations are capable of being revived. See **Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR** where K.D.Porter JA held that:

*“The Act does not help persons who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”*

In the instant case, the defendant’s contention is that the suit is time barred since the plaintiff in his plaint pleaded that the cause of action arose on 24/4/2012 and the suit herein was filed on 24/7/2013. According to the plaintiff the suit was filed after the mandatory statutory time limit for filling claims based on defamation, whether premised on slander or libel.

Time to file a suit founded on defamation is limited to twelve months under **section 4** of the **Limitation of Actions Act, Cap 22**Laws of Kenya which provides –

**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 month from such date.”**

**The same law under Section 27 of the limitation Actions provides for extension time, it provides:**

**1) Section 4 (2) does not afford a defence to an action founded on tort where -**

**(a) The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and**

**(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**

**(c) The court has, whether before or after the commencement of the action, granted leave for the purposes of this section; 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.**

**(3) This section does not exclude or otherwise affect -**

**(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or**

**(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.**

A reading of the this section shows that extension of time only applies to claims made in tort and even in tort the claim must be in respect of claims for personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law).

The said provision does not provide for extension of time in defamation cases. In the case of **Dr Lucas Ndungu Munyua vs Royal Media Services Limited & another [2014] eKLR**, Odunga J stated that :

***From the foregoing extension of time only applies to claims made in tort and even in tort the claims must be in respect of claims for personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law). Therefore section 27 aforesaid does not provide for extension of time in defamatory matter. This was confirmed in Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 where the Court of Appeal held:***

***“Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort”.***

**52. It is therefore clear as was held by this Court in Republic vs. Principal Magistrate P. Ngare Gesora Principal Magistrate's Court & 2 others Ex-parte Nation Media Group Ltd [2013] eKLR, a claim for damages for defamation cannot lend itself to the remedy of extension of time under section 27 aforesaid.**

From the foregoing, I am in agreement with the defendant that going by the plaint as filed, the plaintiff's suit is statutorily time barred having been filed outside the required time.

The question that begs, however, is whether the suit should be struck out? The plaintiff in the instant case, upon being notified of the incompetency of the claim as per his plaint, did not seek to extend the time; he instead sought to amend the said plaint to the effect that the cause of action in this case arose 24/7/2013 and not on 24<sup>th</sup> April, 2012. He explains that the date of 24/4/2012 was erroneously stated in the plaint.

This leads me to answer the second issue of whether the court as has been called upon should endeavor to sustain the suit by allowing an amendment or deny leave to amend and strike it out altogether.

The Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. The general power to amend pleadings is donated by **section 100** of the *Civil Procedure Act* which is the substantive law and its handmaiden **Order 8 Rule 5 of the Civil Procedure Rules**. That Rule reads as follows:

**“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.**

**(2) This rule shall not have effect in relation to a judgment or order.”**

The above provision of the law expressly provides that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by parties. That discretionary power is exercised so as to do justice to the case. However, the said discretion must be exercised judiciously and not whimsically as correctly submitted by Mr Gacheru counsel for the defendant.

In **Bullen Leak and Jacobs Precedents of Pleadings, 12<sup>th</sup> Edition page 127** titled **“amendment with leave-time to amend”** it is stated that **the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise.”**

In **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR**, Lenaola, Mumbi and Majanja J while determining whether to allow the petitioner to amend their consolidated petitions the court observed that:

**“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”**

In the instant case, the plaintiff submits that there was an inadvertent clerical error in indicating in his pleadings that the cause of action arose on 24<sup>th</sup> April 2012 as opposed to 24<sup>th</sup> July, 2012 and that there will be no prejudice occasioned to the defendant if an amendment is allowed. Further, that the error is excusable and that all along the plaintiff relied on the You Tube platform of the defendant's online Citizen Television. The defendant on the other hand vigorously opposed the application contending that the amendments sought are intended to scuttle the preliminary objection by attempting to revive a dead suit. Further, that the amendments sought are not reflected in the draft amended plaint which is confusing. That may be so. However, I have perused the plaintiff's pleadings, statements and the list of documents filed simultaneous with the plaint on 24<sup>th</sup> July, 2013 and I am in agreement that the date 24<sup>th</sup> April, 2012 as shown is likely to be a mistake on the part of the advocate who prepared the claim and recorded the client's statement. This mistake is apparent in the sense that in the plaintiff's list of documents, the plaintiff cites "a copy of You Tube clip entitled: ***"Shitanda Now Axes NHC Board Members"*** at <http://www.youtube.com/watch?v=T22FBESTkFI> published on 24<sup>th</sup> July, 2012." Such that albeit the plaint and reply to defence states 24<sup>th</sup> April, 2012, which is conceded to be an inadvertent error, this court finds that the intended amendment though poorly drafted, which is a mere issue of form and not substance and therefore capable of being cured by an appropriate amendment once leave to amend is granted, will advance the cause of justice in this matter. The plaintiff's suit is a defamation case and therefore the date the cause of action arose is very important in determination of the real question before the court. The evidence in support of the plaintiff's case is a copy of the **You Tube** clip which was published on 24/7/2012, which is listed in the plaintiff list of documents. The plaintiff has indicated that the said clip was published on 24/7/2012 and not 24<sup>th</sup> April, 2012. That leaves no doubt that the averments in the plaint and reply to defence as well as in the statement of the plaintiff, that the cause of action arose on 24/4/2012 is a mere error which I believe is inadvertent. The amendment sought will remove the inadvertent error; reconcile the pleadings and the evidence without introducing any new or inconsistent cause of action. The amendment is not, therefore, an abuse of the court process and neither is it made in bad faith as alleged by the defendant. It is for that reason that the case of **Barclays Bank DCO vs Shamsudin** (supra) is clear that:

***"in special circumstances, amendment of a plaint will be allowed, notwithstanding that the effect will be to defeat a defence of limitation."***

In my view, such special circumstances exist in this case. The error is apparent on the record and is easily discernible as such error, which, unless it is removed by way of amendment, may become a source of multiplicity of suits and unnecessary costs on the parties as the plaintiff cannot in the circumstances of this case file a fresh suit on the same cause of action. I hasten to add that even statements of witnesses are amenable to amendments with leave of court once they are on record, to correct an apparent error on the date of the cause of action.

In the case of **EASTERN BAKERY v. CASTELINO** [1958] E.A. 461, Sir Kenneth O'Conner, President of the then Court of Appeal for Eastern Africa, said at p. 462 –

***"It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs."***

The learned Judge concluded by observing, on the same page, that –

***"The main principle is that an amendment should not be allowed if it causes injustice to the other side."***

In the instant matter, the respondent has not demonstrated what injustice, if any; it will suffer if the applicant is granted leave to amend. On the contrary, if such leave is granted, not only will the respondent be granted leave to amend its defence, if it so wishes, but it will also be entitled to costs.

This court employs the principle that no party who avails himself before the court seeking to ventilate their grievances should be ousted from the seat of justice by reason of a mere typographical error which

can be rectified without occasioning the opposite party any prejudice that cannot be adequately be compensated by an award of costs. The right to be accorded a hearing and a fair one at that is embedded in the Constitution, Article 50(1) which right cannot be limited, by virtue of Article 25. In the end, the plaintiff will have been guaranteed the right to access justice as enshrined and guaranteed in Article 48 of the Constitution.

**Madan JA** (as he then was) in the **DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR** held, as to the matter with striking out of suits:

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.”***

In this case, my view is that costs can adequately compensate the defendants for the delayed filing of the application for amendment until it had to argue its preliminary objection and whose incessant quest and vigilance to dismiss the plaintiff's suit awakened him to notice the error after some considerable period of delay of one year and three months after filing of suit, and which delay is not inordinate as the suit had not even been set certified as ready for trial furthermore, as I have stated above, it has not been demonstrated as to what prejudice the defendant will suffer if the plaintiff is allowed to amend his pleadings to correct a date when the cause of action is alleged to have arisen. It has also not been shown that the plaintiff's suit is so hopeless that no amount of amendment would cure the defect detected.

The upshot of all the above is that I exercise my discretion and dismiss the defendants' preliminary objection. I allow the plaintiff's application and grant him leave of 14 days from the date of this ruling to file a properly amended plaint. I also grant him leave, on the court's own motion, to file amended witness statements.

The defendant will have leave to file an amended defence within 14 days from the date of service upon its counsel of an amended plaint if need be. The defendant shall have costs of the preliminary objection, having raised it much earlier in their defence; it was incumbent upon the plaintiff to seek to amend their plaint at the earliest opportunity and especially when they filed their reply to defence. The defendant shall also have costs of the application for leave to amend the plaint.

**Dated, signed and delivered at NAIROBI this 26<sup>th</sup> day of May, 2015.**

**R.E.ABURILI**

**JUDGE**