



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT KAKAMEGA.
CIVIL CASE NO. 24 OF 2013.

JOSPAT LIBAJA MUHANI ::::::::::::::::::::::::::::::::::::::: PLAINTIFF.

VERSUS

ROYAL MEDIA SERVICES LIMITED)

NEWS ANCHOR, MULEMBE FM)

EDITOR-IN-CHIEF, MULEMBE FM)::::::::::::::::::::::::::::: DEFENDANTS.

R U L I N G.

1. In an application brought by way of Notice of Motion dated 12th May, 2015, the applicant who is the 1st defendant in the above matter, sought the following orders:-

- (1) That this suit be struck out;***
- (2) That in the alternative to (1) above, this suit be dismissed for want of prosecution;***
- (3) That the 1st defendant/applicant do have the costs of this application and the suit.***

2. The application was premised on grounds that:-

- (a) The suit is barred by limitation so far as it is based on (sic) tort of defamation;***
- (b) The plaintiff has not taken any step in the matter for over 1 year.***
- (c) The pleadings were closed on or about 10th May, 2014, the reply to the 1st defendant's defence having been served on 25th April, 2014.***
- (d) The plaintiff has clearly lost interest in the matter.***
- (e) The plaintiff has breached his duty under sections 1A and 1B of the Civil Procedure Act to ensure that the overriding objective of Civil Litigation to facilitate inter-alia, expeditious disposal of the case is achieved.***
- (f) The 1st defendant continues to suffer prejudice in view of the case hanging over its head and there is real risk that the evidence will be prejudiced due to (sic) age of the matter.***

3. The application is supported by the affidavit of Gacheru Ng'ang'a Advocate sworn on 9th June, 2015. Mr. Gacheru, learned counsel for the applicant has brought the application under the provisions of sections 1A and 1B of the Civil Procedure Act, Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

4. At the hearing of the application on 15/9/2015, Mr. Gacheru submitted that the suit is barred by statute as the plaint was filed on 20/7/2013 whereas the cause of action arose on 16/7/2012. The suit was therefore filed 2 days after the statutory period of 12 months had elapsed. He submitted that time to file a defamation case cannot be extended. He sought for dismissal of the case based on the said ground.

To augment his submissions, Mr. Gacheru relied on the case of **Dr. Lukas Ndung'u Munyua vs. Royal Media Services & Another, HCCC No. 52 of 2008.**

5. Mr. Gacheru further submitted that one year had elapsed since the pleadings were closed on 10/5/2014 and as of 10/6/2015, no action had been taken to prosecute this suit. He prayed for dismissal of the suit under order 17 rule 2 (3) of the Civil Procedure Rules. He submitted that the duty is upon the respondent (plaintiff) to show cause why the suit should not be dismissed. In so submitting, he relied on the case of **Jeremiah Ng'ayu vs. The Standard Group Limited & others [2015] KLR.**

6. Mr. Gacheru submitted that although the respondent filed his grounds of opposition on 2/9/2015, no affidavit was filed to explain why he had not taken any action to prosecute his case.

7. Mr. Ibenzi, learned counsel for the respondent, submitted that the prayers sought are drastic in nature and that the respondent will be seriously prejudiced if the suit is struck out. He submitted that the applicant has to show that a suit is so defective and incurable by any law. Mr. Ibenzi further submitted that 2 days delay in filing the suit was not inordinate. He prayed for the suit not to be struck out.

8. This court will address itself on the two substantive issues raised on limitation of time and want of prosecution of the case.

Limitation of time by Statute.

Section 4 (2) of the Limitation of Actions Act, Cap 22, provides 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.”

9. The cause of action in this cause arose on 6th of July, 2012 as averred in paragraph 6 of the respondent's plaint. The plaint was filed on 9th July, 2013. This was 2 days after the statutory period of 12 months provided in law for filing of defamation cases. Section 27 (1) of the Limitation of Actions Act does not donate jurisdiction to the court to extend the statutory period of Limitation for suits founded on defamation.

10. In the case of **Mary Osundwa vs. Nzoia Sugar Company Limited, Civil Appeal No. 244 of 2000,** the Court of Appeal held:-

“Section 27 (1) of the Limitation of Actions Act clearly lays down that an 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.”

11. Learned counsel for the respondent is urging this court to overlook the fact that the respondent filed his suit 2 days after the statutory period of filing suits based on the tort of defamation. This court would

be contravening the law by entertaining the continuation of this suit.

Want of prosecution.

12. The provisions of order 2 rule 13 of the Civil Procedure Rules state that

“the pleadings in a suit shall be closed fourteen days after service of the reply or defence to counter-claim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”

13. In paragraph 4 of the applicant’s supporting affidavit, Mr. Gacheru depones that the respondent served his reply to the applicant’s defence on 25th April, 2014 and therefore the pleadings closed on 10th May, 2014. This court finds that the pleadings closed on 16th May, 2014 which is 14 working days from the date of service of the reply to the applicant’s defence. The court takes judicial Notice of the fact that 1st of May, 2014 was labour day and weekends and public holidays do not count with regard to calculation of the time on when the pleadings closed.

14. As at the time the applicant filed its Notice of Motion on 10th June, 2015, the respondent had not taken any step to prosecute the suit. A period of over 12 months had elapsed between 16th May, 2014 and 10th of June, 2015.

15. Order 17 rule 2 (3) of the Civil Procedure Rules, 2010, provides that ***“any party to the suit may apply for its dismissal as provided in sub-rule 1”***. The applicant has cited the above provisions in seeking for the dismissal of the suit.

16. The respondent did not swear an affidavit to explain the efforts he had made to prosecute the suit or to explain the delay in prosecuting the suit. All that he has stated in ground 5 of his grounds of opposition is that ***“there is a cause of action and that the applicant has placed no evidence before this honourable court to prove there is no semblance of a cause of action in this matter hence warranting dismissal as prayed by the applicant.”***

17. The principles applicable for dismissal of a suit for want of prosecution were set out by the Court of Appeal in the case of **Ivita vs. Kyumbu (1984) KLR 441**, which held that **the test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of discretion of the court.**

18. Although section 1B (1) (b) of the Civil Procedure Act provides for the efficient disposal of the business of the court, section 1 B (1) (a) of the Civil Procedure Act on the other hand provides for ***“the just determination of the proceedings”***. Parties are therefore supposed to be given an opportunity to ventilate their cases in court unless there has been inordinate delay in prosecuting a case.

19. In my view, the period of 12 months is not overly long for this court to dismiss the case at hand on that basis alone.

20. However, as indicated earlier in this ruling, this court has found that the suit herein is statutorily time barred and being an action based on the tort of defamation, time cannot be extended in favour of the respondent.

21. The suit herein is therefore dismissed for the foregoing reason. Costs to the applicant.

DELIVERED, DATED and SIGNED at KAKAMEGA on this 27th day of October, 2015.

NJOKI MWANGI

JUDGE.

In the presence of:-

Mr. Muriithi for Mr. Gacheru for the Applicant.

No appearance for the Respondents.

Ms. Selpha Imbili for Court Assistant.