



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO.340 OF 2010 (O.S.)

IN THE MATTER OF APPLICATION FOR EXTENSION OF LIMITATION

PERIOD UNDER LIMITATION OF ACTIONS ACT (CAP 220 LAWS OF KENYA

BETWEEN

BOAZ RICHARD MAMBA.....APPLICANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

RULING

1. The Ex Parte Originating Summons herein dated 26th November 2010 seeks extension of time by the applicant to file a defamation suit against respondent whose cause of action arose on 21st July 1999. It is brought pursuant to the provisions of **Order XXXVI rules 3 (c)** of the **repealed Civil Procedure Rules** and **Section 27 of Cap 22 Laws of Kenya** together with **Article 159** of the **Constitution of Kenya 2010**. The applicant also prays that costs of the summons to be provided for.
2. The applicant brings the application on the grounds that the failure to file suit on time was occasioned by genuine mistake; that it was the mistake of counsel duly instructed by applicant who failed to file the suit in time and also failed to inform him (the applicant) of the failure.
3. The summons is supported by the affidavit of Boaz Richard Mamba sworn on 26th November 2010 where he briefly states that on 21st July 1999 the respondent herein made a defamatory newspaper publication concerning the applicant; that thereafter, he instructed counsel to file a suit for compensation among other prayers but counsel filed the suit after the expiry of the limitation period and the suit being Kisumu HCCC NO.111 of 2006.was thus dismissed for being time barred.
4. He (the applicant) depones that he is desirous of having his claim against the defendant fully heard and determined on merit because it was not his fault but that of his counsel who he (the applicant) blames for filing the suit out of time. He adds that judgment in Kisumu HCCC No.111 of 2006 was delivered on 28th June 2010 and thus he has brought this application timeously. He depones further that he is likely to suffer extensive irreparable loss and damage if the limitation period is not extended and that such extension will not prejudice the respondent.
5. The application is opposed. There is a replying affidavit sworn by Rose Ochanda the corporation Secretary of the Agricultural Finance Corporation dated 27th April 2011. There are also grounds of opposition filed on 27th April 2011 by Rashid Ngaira Advocate for the respondent and a Notice of

Preliminary objection filed by counsel for the respondent dated 27th April 2011.

6. The deponent of the Replying Affidavit contends that having published information about the applicant, the same was fair comment, and not defamatory in any way whatsoever. She also avers that the applicant filed **Kisumu HCCC No.111 of 2006 Boza Owino Mamba -vs- Agricultural Finance Corporation** which was heard and determined after full hearing where both parties adduced viva voce and documentary evidence before the trial court and judgment thereof delivered on 28th June 2011 by the Honourable Lady Justice Ali Aroni. That in the circumstances, and on the advice of counsel she depones that the applicant is seeking to re-litigate a matter that has already been determined and is *res judicata* and that the instant application is without merit, is vexatious and a gross abuse of the process of this honourable court.

7. Rose Ochanda concludes her averments by deponing that the applicant herein has no recourse against the respondent and it is only just and fair that the applicant's application be dismissed with costs as it does not satisfy the requirements of procuring and enjoying the order sought.

8. Parties herein canvassed the application herein by way of written submission which were supported by lists of authorities filed together with the submissions. The court has had opportunity to read through the contents in the submissions by both parties herein.

9. The cause of action in the intended suit is in defamation. Time to file a suit founded on defamation is limited to twelve months under **Section 4 (2) of the Limitation of Actions Act Cap 22** which provides:-

“4(2) An action founded on tort may not be brought after the end of three (3) 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 (12) months from such date.”

10. **Section 27 of Cap 22** makes provision for extension of the limitation period in case of ignorance of material facts in actions for negligence. Needless to say such extension is not available in actions for libel and slander (defamation).

11. It is clear that the issue of statutory limitation over the applicants claim has been heard and adjudicated upon by the court of first instance in Kisumu in HCCC No.111 of 2006 and thus this court finds that the applicant's application is *res judicata*.

12. This court is alive to the provisions **Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya** which states that: *“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”*

13. This court finds that the issues raised in the applicant's application namely to file a defamation suit against the respondent have been substantially in issue in Kisumu HCCC No.111 of 2006 which was determined by the High Court at Kisumu after evidence was taken as required. In any event, even if the applicant had not filed any other suit before, I find that there was inordinate delay in bringing this application. Further, the applicant has not come to court with clean hands because at paragraph 4 of his affidavit, he wanted this court to believe that Kisumu HCCC No.111 of 2006 was dismissed on technical grounds when in fact the case was fully heard and determined. Equity demands that he who seeks equity must do equity. Misrepresenting facts by the applicant is not doing equity.

14. Having come to the above conclusion, the applicant's Ex parte Originating Summons dated 26th November 2010 is hereby dismissed with costs to the Respondent.

Delivered, dated and signed at Kisii this 23rd day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Nyasimi (present) for Applicant

M/s Rashid Ngaira (absent) for Respondent

Mr. Bibu - Court Assistant