



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 321 OF 2011

IN THE MATTER OF: AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT, CHAPTER 22 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE PRINCIPAL MAGISTRATE'S COURT AT CHUKA MISCELLANEOUS APPLICATION NO. 14 OF 2011 (OS) BETWEEN JACKSON MUTIRIA M'IRITI AND NATION MEDIA GROUP LTD AND THE STANDARD LTD

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE P. NGARE GESORA

PRINCIPAL MAGISTRATE'S COURT.....RESPONDENT

Ex-PARTE

NATION MEDIA GROUP LTD

AND

JACKSON MUTIRIA M'IRITI.....FIRST INTERESTED PARTY

THE STANDARD LTD.....SECOND INTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion dated 13th December 2011 filed the same day, the ex parte applicant herein, Nation Media Group Ltd, seeks the following orders:

1. An Order of Certiorari to remove to the High Court of Kenya for quashing the orders made by the Respondent on the 13th of June 2011 in Chuka Miscellaneous Application No. 14 of 2011 (OS) between Jackson Mutiria M'iriti and Nation Media Group Limited and the Standard Ltd.

2. The Costs of this suit.

2. The Motion is based on the grounds set out in the Statutory Statement and verifying affidavit sworn by filed herein on the 9th day of December 2011 by **Sekou Owino**, the Applicant's legal Officer on 8th December 2011.

3. According to the applicant, on the 10th September (sic) the applicant company published an article entitled "Arrest of Clerk who burnt Girl

over Pancakes Sought". On 19th day of July 2011, the Applicant Company was served with Court Summons in Meru RMCC 208 of 208 of 2011 **Jackson Mutiria M'iriti versus Nation Media Group Ltd & The Standard Ltd** together with pleadings claiming damages for defamation arising from the aforementioned article.

4. According to the deponent the said case was said to have been instituted pursuant to an order issued by Chuka Principal Magistrate's Court on the 13th day of June 2011 in Chuka Misc. Application No. 14 of 2011 (OS) between **Jackson Mutiria M'iriti and Nation Media Group Ltd and the Standard Ltd** extending the one-year limitation period for instituting claims in libel and slander.

5. However, according to legal advice obtained from his legal advisers, the period of limitation for institution of claims in libel and slander is not amenable to extension hence the Respondent did not have the jurisdiction to issue the order of the 13th of June 2011 and that the action was therefore ultra vires and a nullity.

6. It is contended by the applicant that as it is the said order that has been used to institute the said Meru RMCC 208 of 2011, the Applicant stands to be further prejudiced in the event that judgement is entered against it.

7. In opposition to the application the 1st Interested Party filed the following grounds of opposition:

i. This Honourable court does not have jurisdiction to hear and determine this application, as the cause of action arose outside the territorial jurisdiction of this court.

ii. THAT the application offends the provisions of Article 159(d) (sic) of the Constitution of Kenya.

iii. THAT in the circumstances, it is meet and just that the applicant's application be disallowed.

8. The application was prosecuted by way of written submissions. According to the applicant the applicant has satisfied the requirements of Order 53 Rule 2 of the Civil Rules in that whereas the decision sought to be quashed was made on 13th June 2011, the application for leave was instituted on 9th December 2011 which was within the time prescribed by the said rule. It is further submitted that the respondent did not act in accordance with the law as there is no provision for entertaining an application for extension of time to institute a claim for defamation after 12 months period stipulated in the Limitation of Actions Act. Since the alleged defamatory article was published on the 10th September 2009, the latest date for filing a suit was defamation would have been 9th September 2010 after which no action could be brought in respect thereof and no extension of time could be granted. Citing **David Githumbi Thande vs. Daily Farmers Co-operative Society and 9 Others HCCC No. 2004 [2010] eKLR**, it is submitted that extension of time to sue in tort is limited to negligence, nuisance and breach of duty where damages are confined to personal injuries of a personal nature. Hence extension orders given on claims for defamation are manifestly erroneous and not provided in law. The applicant further relies on **Wycliffe A. Swanya vs. Toyota East Africa Limited and Francis Massai Civil Appeal No. 70 of 2008 [2009] eKLR** and submits that the extension order issued by the Respondent herein is null and void as the lower court could not, in law, have issued the said and/or any extension orders. The said leave being null and void, it is submitted that it is of no effect hence there is no valid suit against the ex parte applicant and the 2nd interested party by the 1st interested party. It is therefore sought that an order of certiorari do issue to quash the decision of the Respondent granting the said leave as the same was void *ab initio* and the suit cannot stand.

9. On behalf of the 2nd Interested Party, it was sought to rely on the overriding objective of the Civil Procedure Act as stipulated in sections 1A and 1B of the Civil Procedure Act as well as Section 159(d) (sic) of the Constitution. According to the Interested Party the Constitution overrides all other laws including the provisions of the Defamation Act and Limitation of Actions Act and the grant of leave to file the suit out of time did not infringe any of the rights of the applicant. To lock out the applicant simply because of his delay in bringing the suit, it is submitted, will be a gross violation of the Constitution because it would amount to him being denied justice due to procedural technicalities.

10. On behalf of the 2nd Interested Party, it was submitted, while supporting the Motion that without jurisdiction, the Court has no power to take one more step based on **Owners of Motor Vessel Lilian "S" vs. Caltex Oil (K) Ltd [1989] KLR 1**. Pursuant to section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya, it is submitted that after a period of twelve months a cause of action for libel is time barred and that there is no provision of law that allows a court to extend the time within which to file an action for libel hence the magistrate's order granting leave to file suit out of time was done in blatant ignorance of the law or at worse in complete disregard of it. Similarly the case of **David Githumbi Thande vs. Daily Farmers Co-operative Society and 9 Others** (supra) is relied upon as authority for this contention. Therefore sine the said order was issued without any legal backing the same ought to be quashed on account of want of jurisdiction.

11. I have considered the foregoing. It has been argued on behalf of the 1st Interested Party that limitation is a procedural technicality which ought not to defeat the justice of the case. In my view, limitation statute is not a procedural law. Rather it is a substantive law. Accordingly, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

12. It follows that where there is a procedure provided by an Act of Parliament other than the Civil Procedure Act the said procedure takes precedence over the Civil Procedure Act. I do not therefore agree with the 1st Interested Party that the Court can invoke the provisions of sections 1A and 1B of the Civil Procedure Act or Article 159(2)(d) of the Constitution to revive a claim which is expressly extinguished by statute. In my view the advent of the said provisions are not meant to destroy the law but to fulfil them. The said provisions are meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the

law, the issues of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law.

13. It must however be remembered that what The Limitation of Actions Act provides is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation. The Act does not extinguish causes of action. In **Rawal vs. Rawal [1990] KLR 275, Bosire, J** (as he then was) stated:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims”.

14. This decision cited Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321 where it was stated:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case”.

15. The same position was taken in Iga vs. Makerere University [1972] EA 65 in which it was held:

“A plaint which is barred by limitation is a plaint “barred by law”. A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “shall reject” his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief”.

16. Since the Act does not extinguish a claim but only bars the bringing of the same, where the barrier is lifted by extension of time the claim may still be sustained.

17. The provision which provides for extension of time is section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya which provides as follows:

(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.

18. That section was the subject of the decision by **Mbito, J** in **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989** in which the learned Judge expressed himself as follows:

“When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course.

He should carefully scrutinise the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinised, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the *ex parte* application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given *ex parte* on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done him by obtaining an order for the trial of a preliminary issue...Section 27 of the Limitation of Actions Act...provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant's ignorance of material facts relating to the cause of action which were of decisive character...Although what amounts to "ignorance of material facts of decisive character" is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action".

19. 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). In this case it is not disputed that the cause of action arises from an alleged publication of a defamatory matter. In 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 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".

20. Even in cases where the claim falls under the aforesaid provisions time will not be extended unless the applicant proves 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. In order to prove this, the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances. In section 30(5) "appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be".

21. The third condition is that leave must then have been sought and obtained while the last requirement is the fulfilment of the provisions of subsection (2) of section 27 of the said Act. Under this subsection the applicant is expected to prove that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the applicant's knowledge and that he became aware of these facts after the limitation period or within one year before the expiry of the limitation period. In either case, the action must be brought within one year of such discovery.

22. It is therefore clear that a claim for damages for defamation cannot lend itself to the remedy of extension of time under section 27 aforesaid.

23. What then is the remedy available to a party aggrieved by a decision extending time to file a suit where the circumstances do not warrant such extension? In Mary Wambui Kabugu vs. Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995 Shah, JA expressed himself as follows:

"By virtue of section 28(1) of the Limitation of Actions Act, Cap 22, Laws of Kenya (the Act) an application for leave of the superior court (for that matter of the subordinate court) has to be made *ex parte*. The proposed defendant is not a party to that application. Indeed he cannot be for the simple reason that section 28(1) mandated that such application "shall be made *ex parte*. This situation is reinforced by the provision of Order 36 rule 3C of the Civil Procedure Rules... In a situation such as outlined above the defendant only becomes aware of the order extending time when he is served with the summons, plaint and the order extending time. There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In the Court's view, the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is a dispute as to facts. It will be up to the judge presiding at the trial to decide the issue but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act particularly where leave to file an action against the defendant has been granted *ex parte*... Although it was a general principle in regard to *ex parte* orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intentions of the Limitation Act 1963 to allow a defendant to apply, before the trial of the action, to set aside an *ex parte* order obtained giving leave for the purpose of the section... The respondent having obtained leave to file action as required by the law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order *ex parte* will be rendered nugatory. It would appear that notwithstanding the provisions of section 27 of the Act, the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of

the exceptions to the general rule that a party against whom an ex parte order has been made, can apply to the court which made the order to set aside... The judge who heard the application for extension of time must first hear it (in case of an application filed before filing suit) ex parte. He has no discretion in the matter. He is bound by the requirements of the Act. If the evidence shows prima facie that the requirements of the Act are satisfied, leave should be given. It is in the action only that the defendant can challenge the facts in due course. This is, because the requirements of section 27 are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy, or because the applicant did not know the law etc. If evidence showing prima facie that the requirements of the Act are satisfied, leave should be given leaving the defendant to challenge the facts in the action in due course. The statute does not seem by its language to confer a discretion but merely a jurisdiction to decide whether the requirements of the statute are or are not fulfilled. That decision of course involves points on which judicial mind may differ... The trial judge will not be sitting in appeal on findings of the judge who granted leave in the first instance. His job would primarily be to decide if the leave was actually and legally properly obtained. There may be cases where medical evidence may be misleading enough to enable one judge to grant such leave but when correct medical data may be brought forward by the defendant, the picture may drastically change. There may be clear cases where the applicant may swear to facts which are not true, which can only be challenged at the trial. There may even be cases where a Judge, because of work-load in the superior court, may not have time to apply his mind to the requirements of the Act which Act of course limits the granting of such leave in respect of personal injury, Fatal Accidents Act, and the Law Reform Act claims only. Often the interpretation of section 27, 28 and 29 of the Act, as explained in section 30 of the Act may not have been brought to the attention of the judge. It follows that the order granting an extension stands and is binding on the parties. But that means that the order stands until it has been effectively set aside. And such an order, where the objection to it is of the character here set up by the appellants, can only be so directed to that special end... The trial judge is entitled to hear the challenges hurled at the ex parte order and decide whether or not the ex parte order was correctly obtained by the applicant. The issue as to whether or not leave to file suit out of time was granted properly or not is a matter to be challenged at the trial stage and not by a review application.”

24. On his part, Akiwumi, JA held:

“When the judge of the superior court grants leave ex parte, under the Limitation Act to institute proceedings which can be challenged at the trial, he in a way, does no more than a judge does when he for instance, grants an ex parte injunction, which can also be successfully challenged before another judge at its inter partes hearing. Furthermore the question of a judge of the superior court sitting on appeal on the granting of an ex parte order under the Limitation Act by another judge of the superior court, does not in the particular circumstances, arise. In general a party affected by an ex parte order can apply to discharge it but the procedure under the Limitation Act is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the Judge is to decide the application on hearing one side only. No provision is made for the defendant being heard. It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave. Statute can take away or limit fundamental rights or those given by the general rule of law which can also be described as the common law. It therefore cannot be said that the common law has an unassailable status. If this is so, even where statute law and the common law are held to be of equal standing, then a fortiori, on the assumption that in Kenya, the common law is of a lower standing than the statute law, statute law can make greater inroads into the common law.”

25. The same position was re-affirmed in Yunes K Oruta & Another vs. Samwel Mose Nyamato Civil Appeal No. 96 of 1984.

26. What the foregoing decisions establish is that where an order has been made extending time, such order is not final but is merely provisional and that the defendant will have every opportunity of challenging the facts and the law afterwards at the trial. It is the trial judge who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar and he is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.

27. Should the Court grant the orders sought herein? The only order that this Court is competent to make in these proceedings is to quash the decision extending the time for filing the suit in question. This Court cannot in these proceedings terminate the suit filed pursuant to the said leave in these proceedings and the decision to terminate the same would have to be made in the suit itself. Since the applicant's apprehension that it stands to be further prejudiced in the event that judgement is entered against it, will not necessarily be cured by the award of the orders sought herein, the Court must proceed to deal with the efficacy of the orders sought herein. However, the decision whether or not to grant judicial review orders is an exercise of discretion. As stated in *Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508*, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. See Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203.

28. Sound legal principles, in view, dictate that where to grant the orders sought would not lead to a realisation of the ultimate goals targeted by the applicant but that there is availability of another remedy through which that goal may be achieved without a multiplicity of proceedings, the court ought to exercise its discretion by disallowing the orders sought in the judicial review proceedings and let the parties to pursue the said remedy in order to save valuable judicial time from being spent on one case to the detriment of other cases.

29. Accordingly, I decline to grant the orders sought in this Motion since the remedy sought herein can effectively be granted by the trial Court when the challenge to the grant of the order extending time is taken in the suit seeking damages for defamation. There will be no order as to costs.

Dated at Nairobi this 27th day of March 2013

G V ODUNGA

JUDGE

Delivered in the presence of Miss Nyaidho for the Applicant