



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 490 OF 2010**

**JOSHUA KULEI .....**  
**.....PLAINTIFF**

**VERSUS**

**RADIO AFRICA (KENYA) LIMITED (t/a The  
Star).....DEFENDANT**

**R U L I N G**

1. This suit is based on the tort of defamation. It was filed by the Plaintiff against a defendant called **RADIO AFRICA (KENYA) LIMITED (t/a The Star)**.
2. The Defendant entered appearance and filed defence dated 15<sup>th</sup> December 2010. It pleaded, *inter alia*, that it was not the printer and publisher of any daily newspaper **The Star**, and that it does not trade as **The Star**. It gave notice that it would apply for the suit to be struck out for disclosing no reasonable cause of action against it.
3. The cause of action was founded upon words **published on 25<sup>th</sup> January 2010** in **The Star** newspaper which were alleged to be defamatory of the Plaintiff.
4. The Defendant then applied by notice of motion dated 10<sup>th</sup> October 2011 for the suit to be struck out, principally for mis-joinder of a party (the Defendant). The Plaintiff then applied **by notice of motion dated 16<sup>th</sup> November 2011** for leave to amend the plaint. The amendment sought was to substitute **The Nairobi Star Publications Limited** as defendant in place of **Radio Africa (Kenya) Limited (t/a The Star)**.
5. When the Defendant's application to strike out the suit came up for hearing on 24<sup>th</sup> January 2012, the Plaintiff conceded that the Defendant was mis-joined and the following consent order was entered –  
  
**“By consent the present Defendant, RADIO AFRICA (KENYA) LIMITED be and is hereby struck out from this suit with costs to the Defendant.”**
6. The Plaintiff's application for amendment of the plaint came up for hearing on 13<sup>th</sup> March 2012. It is the subject of this ruling.
7. **The Nairobi Star Publications Limited** was duly served with the application. It did not file any

papers in response to the same. Nor was there any appearance for it at the hearing.

8. That notwithstanding, as already noted, the only amendment sought is to substitute another person in place of the original Defendant who was non-suited. No particular leave to substitute the party has been sought under **Order 1, rule 10 (2) and (4) of the Rules**, as should have been done. Those sub-rules provide –

**“10. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

**(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”**

9. An order for amendment of a pleading is thus not sufficient to substitute a party. Leave to amend is not leave to substitute a party! Amendment of the plaint is consequential upon leave to add or substitute a defendant being made.

10. There is another problem. Suits founded on defamation are barred by statute after 12 months from the date when the cause of action arose. See **section 4(2) of the Limitation of Actions Act, Cap 22**. I cannot find in that statute any jurisdiction donated to court to extend this period of limitation for suits founded on defamation.

12. The cause of action as pleaded in the plaint arose on 25<sup>th</sup> January 2010. Permitting substitution of **The Nairobi Star Publications Limited** as defendant would be to permit that person to be sued for defamation outside the statutory period of limitation. The court has no jurisdiction or discretion to ignore the law.

13. In the circumstances I must refuse the application by notice of motion dated 16<sup>th</sup> November 2011. It is hereby dismissed with no order as to costs.

14. As no proper suit can be in place without a defendant, the suit is struck out. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH 2012**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MARCH 2012**