



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 1346 of 1993**

JAMES WAMBUGU MWANGI..... PLAINTIFF

VERSUS

CHURCH OF PROVINCE OF KENYA (DIOCESE OF MT. KENYA CENTRAL)

JOHN MAHIANINI..... DEFENDANTS

RULING

This suit was filed way back on 22nd March 1993. In it the Plaintiff seeks relief against the Defendants arising out of the termination of employment with the 1st Defendant on 20th March 1990 vide a letter of that date written by the 2nd Defendant. He prays for judgment as follows:

- (a) General damages against the 1st Defendant for wrongful dismissal and payment of provident fund contributions.**
- (b) General damages against the 2nd Defendant for defamation**
- (c) Costs of the suit**
- (d) Interest on (a) (b) and (c) at Court rates.**

The hearing of the suit aborted severally but on 20th September 2004 the same was fixed before me and a time for its hearing allocated in the absence of the Plaintiff's Counsel. He appeared as the Court was rising to hear the matter and applied for an adjournment which was refused. Counsel for the Defendant then brought to the attention of the Court the Notice of Preliminary Objection filed on the same date. The same was partly heard on 20th September and concluded on 4th July 2005, having been stood over generally for non attendance by the Plaintiffs on 13th October 2004 and earlier dates not being available thereafter.

Basically the Preliminary Objection is that the cause of action relating to defamation is statute barred in that it was not prosecuted within 12 months from the date the defamatory statement was published. The defendant prays that that portion of the Plaint be struck out and suit dismissed as relates to defamation.

The Plaintiff has argued and in my considered opinion, rightly so, that what the Defendant seeks to do is to obtain an order for the striking out of a part of pleading when he has not invoked Order VI Rule 13 by a formal application. Counsel for the Plaintiff also submitted that the Defendant having not specifically pleaded defamation in his defence, as required by Order VI Rule 4(1) he must be taken to have waived the defence of limitation.

Much as the arguments in opposition to this Preliminary Objection are sound and cannot be carped, the other and most crucial element which a court must take into consideration in dealing with a preliminary point is that it must be capable of disposing of the whole suit. This is the position as established in the leading

Court of Appeal decision of MUKISA BISQUIT COMPANY –vs- WESTEND DISTRIBUTORS [1969] 696 where at page 700 the Learned Justice LAW J.A. clearly stated inter alia as follows:

“.....a preliminary objection consists of a point of law which has been pleaded or which raises clear implication out of pleadings, and if argued as a preliminary point may dispose of the suit.”

The Preliminary Objection herein, having not been pleaded, and relating only to the claim in defamation and not the entire suit does not qualify to be referred to as such and must fail. The same is hereby overruled accordingly.

Parties will proceed to fix the suit for hearing on a date to be taken at the registry on priority basis.

Dated and Delivered at Nairobi this 7th day of October 2005

M.G. Mugo

Judge

In the presence of :

Ms. Kimiti h/b for Mwangi Chege for the Plaintiff

Mr. Kinyanjui h/b for Kantai for the Defendants