



**Beijing Holley-Cotec Pharmaceuticals Co. Ltd & 2 others v Nation Media Group Limited
(Civil Suit 3 of 2019) [2024] KEHC 201 (KLR) (Civ) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 3 OF 2019**

**CW MEOLI, J
JANUARY 19, 2024**

BETWEEN

**BEIJING HOLLEY-COTEC PHARMACEUTICALS CO. LTD 1ST PLAINTIFF
ZHEJIANG HOLLEY NANHU PHARMACEUTICALS CO. LTD . 2ND PLAINTIFF
HOLLEY-COTEC CO. (EA) LTD 3RD PLAINTIFF**

AND

NATION MEDIA GROUP LIMITED DEFENDANT

RULING

1. On 08.01.2019 Beijing Holley-Cotec Pharmaceuticals Co. Ltd, Zhejiang Holley Nanhu Pharmaceuticals Co. Ltd and Holley - Cotec Co. (EA) Ltd, (hereafter the 1st, 2nd and 3rd Plaintiff/ Plaintiffs) filed a suit founded on the tort of defamation against Nation Media Group Ltd, (hereafter the Defendant) seeking inter alia a mandatory injunction compelling the Defendant to recall alleged offending publications from the market and to publish, in similar manner and prominence, an apology to the Plaintiffs; special damages of Kshs. 70,000,000/-; general damages for reputational damage; and costs of the suit.
2. The Plaintiffs averred that on 14.12.2017 and 09.01.2018, the Defendant published both in print and on its website material, which, in their natural and ordinary meaning as well as through innuendo and insinuation, defamed the Plaintiffs. That the statements were published falsely, unjustly, recklessly without color of right, excuse and or basis in permanent form and were maliciously intended by the Defendant to harm, or due to the Defendant’s recklessness, resulted in the harming of the reputation and eminence of the Plaintiffs and their product, “Duo-Cotecxin”, one of the most used anti-malarial drugs in Kenya. The Plaintiffs further averred that the Defendant is liable for the loss, suffering and damages occasioned resulting from the said publication.



3. The Defendant on its part filed a statement of defence dated 18.02.2019 denying the key averments in the plaint and in the alternative averred that the articles complained of were true in substance, were not libelous and were incapable of conveying the meaning ascribed to them either by way of the natural meaning, innuendo, insinuations or otherwise. That the publications consisted of fair comment on a matter of profound public interest and were thus justified under the ambit of qualified privilege.
4. Alongside the statement of defence, the Defendant filed a notice of Preliminary Objection (P.O) of even date, premised on the twin grounds that the Plaintiff's suit herein is time barred by dint of Section 4(2) of the Limitations of Actions Act and Section 20 of the *Defamation Act*, therefore the suit is bad in law; and that the plaint dated 31.12.2018 is incurably defective as it does not disclose any cause of action, reasonable or otherwise with respect to the publications made by the Defendant of 14.12.2017.
5. The Plaintiffs thereafter filed their reply to the Defendant's statement of defence together with Grounds of Opposition dated 04.04.2019 in response to the Defendant's P.O. The grounds were to the effect that the plaint was filed well within time since the cause of action arose following a series of continuous publications culminating in the last publication done on 09.01.2018 in the Defendant's Healthy Nation Publication, a pull out in the Daily Nation published both in print and on its website; that the publications were continuous, over the same subject, touching on the same party, the Plaintiffs herein, and therefore cannot be taken in isolation but as a whole, with the last publication on 09.01.2018 giving rise to the cause of action; that there is a reasonable cause of action by the Plaintiffs as against the Defendant since the Defendant relied on a purported whistleblower's material, culminating in the reaction by the Pharmacy & Poisons Board, which later gave the recalled antimalarial drug a clean bill of health; and that as a consequence of the purported whistleblowing, the Plaintiffs suffered damage and their image was brought to disrepute, due to the Defendant's lack of diligence in their reporting.
6. The P.O was canvassed by way of written submissions. On the part of the Defendant, its submissions were specific to two (2) issues. Addressing the court on whether the suit is time barred, counsel anchored his arguments on the provisions of Section 4(2) of the *Limitation of Actions Act* and Section 20 of the *Defamation Act* to submit that the Plaintiffs instituted a suit on 08.01.2019 on allegations that on 14.12.2017 and 09.01.2018 the Defendant published the alleged defamatory articles. That on account of the foregoing, any claim by the Plaintiffs in respect of the former publication ought to have been filed by 14.12.2018, hence to the extent that the suit was filed on 08.01.2019, the claim is time barred and the court lacks jurisdiction to entertain the same.
7. The decisions in *Bosire Ongero v Royal Media Services* [2015] eKLR, *Kenya Civil Aviation Authority v WK & 2 Others* [2019] eKLR, *IGA v Makerere University* (1972) EA 65 as cited in *Haron Onyancha v National Police Service Commission & Another* [2017] eKLR were called to aid in the foregoing regard. In respect of the latter publication, counsel relied on the decision in *Royal Media Services Ltd v Valentine Mugure Maina & Another* [2019] eKLR to argue that the rule of multiple publication is not applicable in Kenya and without prejudice to the foregoing, asserted that the same would only be applicable in cases of republication of the same article. That the Defendant having published different articles on diverse dates, a cause of action arose in respect of each publication. Counsel thus asserted that the part of the claim relating to the article published on 14.12.2017 was filed out of time and statute barred as such the court lacks jurisdiction to hear the same.
8. Concerning whether the suit discloses a reasonable cause of action, the decision in *DT Dobie & Co. (K) Ltd v Muchina* [1982] KLR was cited to contend that, the plaint is incurably defective as it does not disclose any cause of action, reasonable or otherwise with respect to the publications made by the Defendant on 14.12.2017. That the court ought to strike out the sections of the plaint which relate to



the said publication for want of disclosing a reasonable cause of action. In summation, the court was urged to allow the P.O with costs.

9. The Plaintiffs' counsel, in response to the Defendant's submissions, reiterated that the Defendant had published defamatory articles on diverse dates of 14.12.2017 and 09.01.2018 and that the action is not statute barred as it arose from multiple publications that were connected. That the defamatory publications were against the Plaintiff and published on the Defendant's website with no evidence of the same having been pulled down and or deleted hence accessible to readers. He asserted that a cause of action arose each time a person accessed the Defendant's website or published articles. In conclusion the court was urged to dismiss the P.O with costs.

10. The court has considered the rival submissions by the parties and the record herein. The Defendant's P.O is fundamentally premised on Section 4(2) of the *Limitation of Actions Act* as read together with Section 20 of the *Defamation Act* Cap 36 Laws of Kenya. The former provision states that; -

“(2) 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...”

11. The latter section provides that; -

“Subsection (2) of Section 4 of the *Limitation of Actions Act* (Cap. 22) is hereby amended by the addition thereto of the following:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

12. As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, Law J. A. stated:”

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

13. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce



evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

See also *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR.

14. In *Mulemi v Angwenye & Another* (Civil Appeal 170 of 2016) [2021] KECA 214 the same court further distilled the definition of a preliminary objection as elucidated in *Mukisa Biscuits* (supra) by stating as follows: -

- “i) It must be a pure point of law;
- ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
- iii) If argued as a pure point of law, it may dispose of the suit;
- iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court’s discretion”.

15. The key objection raised by the Defendant relates to the jurisdiction of this court to entertain the suit on account of non-compliance with statutory limitation. It is true that a court has no jurisdiction to hear a claim that is time-barred. The Court of Appeal in *Thuranira Karauri v Agnes Ncheche* [1997] eKLR held that:

“We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit”.

16. The locus classicus on the question of jurisdiction is the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. As noted earlier, the suit herein is premised on the tort of defamation. The purported defamatory articles complained about were published by the Defendant on 14.12.2017 and 09.01.2018 respectively, both in print and on its website. It is averred that the former article was published by the Defendant on page 10 of the Daily Nation Newspaper, and prominently headlined “Malaria drug in Kenyan market set to be recalled” and on the same date published on its website as an article entitled “Malaria drug Cuo-Cotecxin to be recalled from Kenyan market”. Whereas the latter article



was published in the Defendant's Daily Nation newspaper in a pullout dubbed "Healthy Nation" and similarly on its website on even date as an article entitled "Why you should think twice before you pop that pill".

18. It appears that the Plaintiff in deflecting the P.O is asserting the application of the 'multiple-publication rule', which was vehemently rebuffed by the Defendant. Does the 'multiple-publication rule' apply herein and how does it affect the computation of time in respect of the publications herein under Section 4(2) of the Limitations of Actions Act and Section 20 of the *Defamation Act*?
19. In addressing the former, this court agrees with the Defendant's submissions and finds the decision of Ngaah. J in *Royal Media Services Ltd (supra)* quite persuasive on the issue. The learned Judge stated therein as follows; -

"The 1st respondent successfully introduced a new angle to Section 4(2), at least as far as the decision of the learned magistrate goes, that the cause of action against the appellant is not subject to any limitation period as long as the offensive post remains on the appellant's website; every visit to that site, so it was argued on her behalf, constitutes a fresh publication so that the clock did not start ticking when the post was first published but it begins at every time one accesses the site and reads the post.

As earlier noted, the learned magistrate accepted this argument and in doing so he followed the English decisions of *Duke of Brunswick and Lunebreg versus Harman (1849) 14 QB 154* and *Godfrey versus Demon Internet (1997) ALL ER 342*; in this latter decision it was held by Morland, J. that;

In my judgment the defendants, whenever it transmits and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to its ISP who accesses the news group containing that posting.

The concept postulated here is what is commonly referred to as the 'multiple-publication rule' which, as its name suggests, allows for a new and separate cause of action each time a defamatory statement is published. In the off-line world this means that each copy of a book or a newspaper is a separate, actionable case of defamation with its own limitation period. It does not necessarily follow that the same litigant can take multiple actions arising from the same defamatory statement; it only means that in the case where the rule applies, any limitation period will run from the date of the last publication as opposed to the first. (See Ursula Connolly, *Multiple Publication and On-Line Defamation- Recent reforms in Ireland and the United Kingdom*, Masaryk University Journal of Law and Technology, Vol.6:1)

20. The court proceeded to state that; -

"The English legislature has also followed suit and has, in its *Defamation Act 2013*, deviated from the decisions of the English courts which have hitherto embraced the multiple publication rule and instead introduced the single publication rule; this rule is expressly provided for in section 8 of that Act.

Now, the 1st respondent has not demonstrated that the multiple publication rule is applicable to this country. The English court decisions which the learned counsel for the 1st respondent cited are of persuasive authority and not binding on our courts; but more importantly, the English themselves have abandoned the multiple publication rule upon which those decisions were based. It will be foolhardy for us in this country to follow those



decisions when their very basis has been found wanting to such an extent that a legislative intervention in the form of section 8 of the *Defamation Act* 2013 has been found necessary.

In any event, however persuasive the English decisions on any particular subject are, they can never be an alternative to the statutory instruments from our own legislature. Express statutory provisions, even in England itself, are never supplanted by judicial precedents unless, of course, those precedents have unequivocally invalidated the provisions in question.

I am of course minded that there are technological achievements in media communication the prominent of which is, invariably, the internet, and which by their very nature have some bearing on such torts as slander and libel in a way that may not have been foreseen. No doubt it is necessary that the law should be equally dynamic and keep pace with these advancements as need arises. I should suppose that it is the policy makers that need to take the initiative and act; accordingly, all the most courts can do is to point out the deficiencies in the law hoping that the legislative arm of the government will rise to occasion and take appropriate steps to mitigate those deficiencies. In the absence of legislative acts, courts can do nothing more than apply the law as it is.

It is in this light that I have to remind the 1st respondent that our *Limitation of Actions Act*, in particular section 4(2) thereof, has never been amended as to vary the point in time when a cause of action from libel or slander accrues. As far as libel is concerned, the cause of action accrues when the defamatory material is published and in the present case the alleged defamatory was published more than a year before she filed her suit. In short, her suit was filed out of time and the learned magistrate ought to have held so and struck it out.” (sic)

21. The relevant articles in this case were respectively published on the diverse dates of 14.12.2017 and 09.01.2018 in print and online. A perfunctory review of the subject of the respective articles, reveals that they were published as separate content in as much as they all related to the Plaintiffs herein. This court is persuaded by the reasoning and adopts the finding of Ngaah J, namely, that the “multiple publication rule” has no application in this country and cannot trump the clear provisions of section 4 (2) of the *Limitation of Actions Act*, as proposed by the Plaintiffs. Consequently, each publication herein was a cause of action unto itself and could not be construed as a continuation of any earlier publication
22. Moving on to the issue of computation of time under section 4 (2) of the *Limitation of Actions Act*, the Court of Appeal in *Wycliffe A Swanya v Toyota East Africa Ltd & another* [2009] eKLR addressed the question of when time starts to run as follows; -

“Moreover, under Section 4(2) of the *Limitation of Actions Act* an action founded on tort may not be brought after the end of 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 months from such date.”

When does the cause of action in the case of slander accrue? The appellant submitted through counsel that, in his view, it accrued after he started feeling the impact of the respondents’ remarks at his place of work in May 2006; then he filed the suit the subject to this appeal. The pleadings did not disclose where his place of work was apart from what was disclosed in paragraph 4 of the plaint. The counsel submitted further that this was within the limitation period. Unfortunately, the *Limitation of Actions Act* (Chapter 22 Laws of



Kenya) does not say so. It says in case of libel or slander no action may be filed“after the end of 12 months from the date the cause of action accrued”

And we understand this to mean from the date the slanderous remarks are made. (see proviso to section 4 (2) – of the *Limitation of Actions Act* and section 20 of the *Defamation Act*). It would be absurd for slanderous remarks to be made about a person and then he/she waits until he/she feels the effects thereof to file an action in court. If this be the case then there would be no need for any limitation period to be specified. In the appeal before us the slanderous remarks were made on 12th November, 2005 and the latest the suit should have been filed would have been 11th or 12th November, 2006.” (sic)

23. Applying the foregoing dicta as read with the provision of Section 4(2) of the Limitations of Actions Act and Section 20 of the *Defamation Act* on the question of computation of time, it is evident that the claim in respect of the publication done on 14.12.2017 ought to have been filed on or before 14.12.2018 whereas the claim in respect of the publication done on 09.01.2018 ought to have been filed on or before 09.01.2019. The instant suit was filed on 08.01.2019 in respect of both publications.
24. Having earlier found that each publication was a distinct cause of action rather than part of a series under the “multiple publication rule”, the court upon computing time pursuant to section 4(2) of the *Limitation of Actions Act* finds that the cause of action in respect of the publication done on 14.12.2017 is statute barred. However, the cause of action in respect of the latter publication was lodged well within the statutory period.
25. Consequently, the P.O has partially succeeded. The court strikes out the averments in the plaint that relate to the cause of action in respect of the publication by the Defendant made on 14.12.2017. For the avoidance of doubt the said claim is pleaded in paragraphs 10, 11 and 12 of the plaint. For the sake of good order, the Plaintiffs are directed to amend their plaint accordingly, within 14 days of today’s date. The Defendant has corresponding leave to amend their defence. The costs of the P.O are awarded to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of

For the Plaintiff: N/A

For the Defendant: Ms. Wahinya h/b for Ms. Athman

C/A: Carol

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