



**Ope v Mundiari & another (Civil Suit 13 of 2023)  
[2024] KEHC 8259 (KLR) (Civ) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8259 (KLR)

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

**CIVIL**

**CIVIL SUIT 13 OF 2023**

**CW MEOLI, J**

**JUNE 20, 2024**

**BETWEEN**

**JUSTUS OCHIDO OPE ..... PLAINTIFF**

**AND**

**STEPHEN MUNDIARI ..... 1<sup>ST</sup> DEFENDANT**

**NATION MEDIA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Chamber Summons (the Summons) brought by Justus Ochido Ope (hereafter the Applicant) dated 11<sup>th</sup> January, 2024 is expressed to be brought under Sections 4(2), 27 and 28 of the Limitation of Actions Act; Sections 1A, 1B and 3A of the Civil Procedure Act (CPA) and Article 159(2)(d) of the Constitution. The prayers therein seek that:

- “ 1) The Honourable Court be pleased to enlarge the period within which to file a suit based inter alia on the tort of Defamation and negligence and grant leave to the Applicant to file such suit out of time.
- 2) That the annexed plaint and annexure thereto exhibited on the affidavit of Justis Ope as JO-5 sworn in support hereof be deemed to be duly filed upon granting of prayer 1.
- 3) .....”. (sic).

2. The Summons is supported by the affidavit of the Applicant amplifying the grounds on its face. The gist of his affidavit is that sometime in the year 2013 he was involved in a road traffic accident in which he sustained serious bodily injuries; that later, while searching his name on the Google Scholar platform



on 26<sup>th</sup> April, 2023 he discovered that Stephen Mundiari and Nation Media Limited (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) had caused to be published a false and defamatory article concerning him, to the effect that he was among persons who were killed in the aforementioned road traffic accident; and that upon clicking on the link <https://nation.africa/kenya/news/githurai-bus-accident-toll-rises-to-10-driver-denies-charge-878366/view=htmlamp> the Applicant further discovered that the alleged defamatory article had initially been published on 26<sup>th</sup> July, 2013 and republished on 2<sup>nd</sup> July, 2020, in an alleged bid by the Respondents to monetize the said publication. He deposed that following the alleged defamatory publication, the Applicant has been shunned and subjected to ridicule, by many persons associating him with a dead person; and that he has also lost out on invaluable opportunities and suffered psychological and emotional anguish. That the delay in timeously filing the defamation claim was due to ignorance of material facts, which the Applicant only became aware of on 26<sup>th</sup> April, 2023.

3. The Applicant asserted that being aggrieved, he instructed his current advocates (the firm of Malela Basil Advocates), who then filed Constitutional Petition No. E218 of 2023 (the Petition) in the High Court at Nairobi Constitutional and Human Rights Division, seeking exemplary damages against the Respondents herein, for breach of constitutional rights and fundamental freedoms. He further averred that when the Petition was placed before Thande, J she observed that claim was of a civil nature and therefore directed that the file be transferred to the Civil Division of the High Court for further directions. Whereupon directions were given on 6<sup>th</sup> December, 2023 by this court that the petition be converted into a plaint within a period of 21 days; that the timelines for instituting a claim for defamation and negligence have since lapsed, necessitating the instant Summons. In closing, the Applicant averred that the Respondents do not stand to suffer any prejudice which cannot be adequately compensated by an award of costs.
4. The Respondents opposed the Summons by way of the Grounds of Opposition dated 22<sup>nd</sup> April, 2024 stating the following:

“The Defendants shall object to the Plaintiff’s Application dated the 11<sup>th</sup> day of January 2024 on the following grounds: -

1. The Application offends the mandatory provision of Section 20 the [Defamation Act](#), Section 3 and 4(2) of the Limitation of Action Act (Cap 22).
  2. This being a claim in defamation this Honourable Court lacks the jurisdiction to extend time of filing the suit outside the prescribed one-year period from the date of the original publication.
  3. The Application has no merit.
  4. The Application is scandalous, frivolous, vexatious and an abuse of the process of the court....” sic
5. On 19<sup>th</sup> March 2023 the court directed that the Summons be canvassed by way of written submissions. On the one part, the submissions filed by the Applicant’s counsel are to the effect that while the extension of time does not apply as of right, the court may exercise its discretion by granting such extension, where sufficient cause has been shown. Counsel reiterating his affidavit material submitted that in the present case, the Applicant is relying on the ground of ‘ignorance of material facts’ to explain the delay in filing the present suit which is founded on the torts of defamation and negligence. That the Petition was informed by the decision in *Jimi Richard Wanjigi & another v Stephen Gitagama & 3*



- others [2019] eKLR where the Constitutional Court determined that the claim founded on the tort of negligence, was filed within the statutory period of three (3) years.
6. Counsel asserted that while the provisions to Section 4(2) of the *Limitation of Actions Act* (hereafter the Act) provides that an action for libel or slander may not be brought after the end of twelve months since the date of the cause of action accruing, Section 27 of the said Act outlines the special circumstances under which a court can extend the timelines for filing a claim, including but not limited to actions based on the torts of negligence, nuisance or a breach of duty. That, moreover, Section 4(2) of the Act does not bar the extension of time for claims of a defamatory nature. In so arguing, the counsel cited the decisions rendered in *Wycliffe A Swanya v Toyota East Africa Ltd & another* [2009] eKLR where the Court of Appeal upheld a decision by the High Court to strike out a defamation claim, for being filed out of time; *Stephen Kalonzo Musyoka v Radio Africa*, Nairobi HCCC No. 451 of 2011 where the court allowed an application seeking the extension of time for filing a defamation claim; and *Stomach Clinic Limited v Fina Bank Limited*, Nairobi HCCC Case No. 358 of 2009 [2010] eKLR where the court upheld a preliminary objection challenging a defamation suit which was filed outside the statutory 12-month period, consequently striking out the suit. That in the latter case, the suit was struck out merely because it had been filed out of time and without leave of the court; otherwise, if leave had been sought and granted, the suit would have been sustained.
  7. The Applicant's counsel further contended that nothing in the *Limitation of Actions Act* bars a party from seeking and being granted an extension of time in claims of a defamatory nature. Reliance was placed on the case of *Royal Media Services Ltd v Valentine Mugure Maina & Another* [2019] eKLR in support of the submission that the courts have on previous occasions exercised their discretion in granting an extension of time for a party to institute a suit founded on defamation. The court was urged on those grounds, to allow the Summons.
  8. The Respondents' counsel submitted that by dint of Section 4(2) of the Act (supra) as read with section 20 of the *Defamation Act*, the Applicant ought to have filed his claim within the statutory period of 12 months from the date on which the alleged defamatory publication was made (26<sup>th</sup> July, 2013) and which period lapsed on 26<sup>th</sup> July, 2014. Counsel stating that the extension of time envisaged in Section 27 of the Act referenced, strictly applies to the tort of negligence, nuisance or breach of duty where the damages sought are in respect of personal injuries to a plaintiff, and hence the cited provision in no way extends to claims of a defamatory nature.
  9. In this regard, reference was made to the High Court decision in *Dr Lucas Ndungu Munyua v Royal Media Services Limited & another* [2014] eKLR as well as the decisions in *Mary Osundwa v Sugar Company Limited* [2002] eKLR and *Beth Wambui Mugo v Charles Hornsby & 3 others* [2018] eKLR where the Court of Appeal echoed a similar position. It was therefore counsel's submission that the Applicant has not satisfied the conditions for extension of time set out under Sections 27 and 28 of the *Limitation of Actions Act*. Resultantly, the court was urged to dismiss the Summons with costs.
  10. The court has considered the material canvassed in respect of the Summons. The Summons is premised inter alia, on Section 4(2) of the Act which, pursuant to an amendment made under Section 20 of the *Defamation Act* provides that:

“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 form such date”.



11. On a reading of the above provision, claims founded on tort ought to be brought within a period of three (3) years from the date of the cause of action, but claims specifically founded on the tort of defamation ought to be brought within a timeline of 12 months, equating one (1) year, from the date on which the cause of action arose.
12. In the present instance, the averment made by the Applicant is that his claim is founded on the torts of defamation and negligence, whereas the Respondents maintain that the suit is purely defamatory in nature. Upon perusal of the record and more particularly the draft plaint, it is apparent that the same contains particulars of both defamation and negligence as pertains to the alleged defamatory publications made by the Respondents. The plaint also contains particulars of various allegations of violation of the Applicant's constitutional rights and freedoms by the Respondents. The reliefs sought include general and other damages for defamation; an unqualified apology; injunctive orders; and damages for breach of the Applicant's constitutional rights.
13. Even though the draft plaint includes a variety of particulars and seeks a several reliefs, in the court's view, the claim is primarily founded on defamation. Significantly, the particulars in respect of negligence as set out in the draft plaint are premised on the impugned publications which the Applicant alleged to be defamatory in nature. There is no averment in the draft plaint relating to personal injuries to the Applicant. What is more, during the proceedings of this court on 6<sup>th</sup> December, 2023 counsel for the Applicant confirmed that the Applicant's claim is founded on the tort of defamation, arising out of an alleged defamatory publication made in the year 2013. In the premises, the court is convinced to treat the claim as such.
14. The cause of action allegedly arose on or about 26<sup>th</sup> July, 2013 when the first alleged publication was made, notwithstanding the fact that the impugned article was republished on 2<sup>nd</sup> July, 2020. Consequently, guided by the provisions of Section 4(2) (supra), the Applicant ought to have filed his suit for defamation by 26<sup>th</sup> July, 2014, being 12 months from the date on which the first publication was allegedly made.
15. That said, the Summons is anchored primarily on Sections 27 and 28 of the Limitation of Actions Act, the former which provides as follows:

“Section 4 (2) does not afford a defence to an action founded on tort where—

1.
  - (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. ....



3. ....”

16. Section 28 (supra) on its part states that:

- “(1) An application for the leave of the court for the purposes of section 27 of this Act shall be made *ex parte*, except insofar as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.
- (2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—
- (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
- (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.
- (3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—
- (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
- (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.
- (4) In this section, “relevant action” in relation to an application for the leave of the court, means any action in connexion with which the leave sought by the application is required.
- (5) In this section and in section 27 of this Act “court”, in relation to an action, means the court in which the action has been or is intended to be brought.

17. Section 27 of the Act has been the subject of interpretation in different superior courts. In the case of *Mary Osundwa v Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000* [2002] eKLR the Appellant had successfully sought leave (granted by consent in the High Court) to file a suit for alleged



breach of contract, 7 years since the cause of action accrued. The Court of Appeal having set out the provisions of Section 27 (1) of the *Limitation of Actions Act* stated that:

“The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on 28<sup>th</sup> May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”.

18. Similarly, in *Bosire Ogero v Royal Media Services* [2015] eKLR and *Dr. Lucas Ndung’u Munyua v Royal Media Services Ltd & Another* [2014] eKLR, the court held that Section 27 (1) does not provide for the extension of time to file a suit for defamation. No doubt echoing the holdings by the respective courts in *Wycliffe A. Swanya v Toyota East Africa Limited and Another* [2009] eKLR; *Rawal v Rawal* (1990) KLR 275 and *Dhanesvar V. Mehta v Manilal M. Shah* [1965] EA 321.

19. Earlier in *Wycliffe A. Swanya v Toyota East Africa and Another* [2009] eKLR the Court of Appeal while emphasizing the requirement for parties to comply with the statutory timelines had held that:

“...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 12<sup>th</sup> November, 2005 and the latest the suit should have been filed would have been 11<sup>th</sup> or 12<sup>th</sup> November, 2006.”

20. This court therefore finds that, on a plain reading of Section 27(1) of the *Limitation of Actions Act*, and based on binding precedent, there is no jurisdiction to extend time for the filing of a defamation cause. The Applicant’s reliance on the decision of Ngaah J’s decision in *Royal Media Services Ltd. vs Valentine Mugure and Another* is to no avail. The learned Judge’s comments at the conclusion of his judgment considered only the provisions of Section 4(2) and not Section 27(1) of the *Limitation of Actions Act* and appear to be obiter dictum in nature.

21. The question of limitation touches on the jurisdiction of the court to entertain claims and hence where a matter is deemed to be statute barred, the court has no jurisdiction to entertain it. The Court of Appeal in *Thuranira Karauri Vs. 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”.

22. It is now over a decade since the alleged defamatory publication was first published, and the Applicant’s alleged ‘ignorance of material facts’ regarding the said publication, cannot alter the circumstances. In



the premises, the Chamber Summons dated 11<sup>th</sup> January, 2024 must fail and is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**C. MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Mr. Outa

For the Respondents: Ms. Wanjiku

C/A: Erick

