Musyoka v Standard Group Limited (Civil Suit 43, 44 & 45 of 2018 (Consolidated)) [2023] KEHC 19214 (KLR) (Civ) (22 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 43, 44 & 45 OF 2018 (CONSOLIDATED)

CW MEOLI, J

JUNE 22, 2023

BETWEEN

KENNEDY MUSYOKA ..... PLAINTIFF

AND

THE STANDARD GROUP LIMITED ..... DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT 44 OF 2018

BETWEEN

PAULINE MUSYOKA ..... PLAINTIFF

AND

THE STANDARD GROUP LIMITED ..... DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT 45 OF 2018

BETWEEN

HON. STEPHEN KALONZO MUSYOKA ..... PLAINTIFF

AND

THE STANDARD GROUP LIMITED ..... DEFENDANT

RULING

1. On 05.03.2018 Kennedy Musyoka, the Plaintiff in Nairobi Milimani HC. No. 43 of 2018, Pauline Musyoka, the Plaintiff in Nairobi Milimani HC. No. 44 of 2018 and Hon. Stephen Kalonzo Musyoka, the Plaintiff in Nairobi Milimani HC. No. 45 of 2018 filed their suits (hereafter respective suits) against The Standard Group Ltd, the Defendant in the respective suits. Seeking general damages; aggravated and exemplary damages; and a permanent injunction to restrain the Defendant by itself, its respective servants or agents or howsoever from publishing, printing, circulating or distributing allegations that the Plaintiffs are operating illegal offshore accounts or are being probed for operating illegal offshore accounts.

2. It was averred by the Plaintiffs in the respective suits that in the issue of the said "The Standard" newspaper dated 04.03.2017, the Defendant published, printed and circulated and or caused to be printed, published and circulated words alleging that the Plaintiffs' foundation and the Plaintiffs as directors were facing offshore account probes, which was false. That by reason of the publication of the said words the Plaintiffs have been seriously injured in their character, credit and reputation and have been brought into public scandal, odium and contempt.

3. The Defendant filed statement of defence in the respective suits denying the key averments and averred in the alternative that, in so far as the words consist of allegations of fact, they are true in substance and in fact they constitute a fair comment made in good faith and without malice upon the said facts with respect to the Plaintiffs. On 28.07.2019 Nairobi Milimani HC. No. 43 of 2018 was selected as a test suit on the issue of liability in the respective suits and in the meanwhile, the other respective suits were stayed pending hearing and determination of the test suit.

4. The Defendant thereafter proceeded to file a notice of preliminary objection (P.O) dated 18.05.2022. Based on grounds that the test suit and the respective suits are all statute time barred by dint of Section 4(2) of the *Limitation of Actions Act* Cap 22 as read together with Section 20 of the *Defamation Act* and therefore bad in law having been brought after a lapse of Twelve (12) months.

5. The Plaintiff in response filed grounds of opposition to the Defendant's P.O to the effect that the P.O is misconceived and has no merits; the P.O is an abuse of the court process; and by reason of the above the P.O ought to be dismissed with costs.

6. The P.O was canvassed by way of written submissions with oral highlighting of the same. On the part of the Defendant, counsel anchored his submissions on the decisions in *IGA v Makerere University* (1972) EA 65 and *Gathoni v Kenya Co-operative Cremaries Ltd* [1982] eKLR concerning the purpose and intent of the law on limitation of actions. Addressing the court on computation of time, counsel cited the provision of Section 4(2) of the *Limitation of Actions Act*, Article 27 and 259 (2) of the *Constitution* of Kenya 2010, the decisions in *Royal Media Services Ltd v Valentine Mugure Maina & Another* [2019] eKLR and *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* [2009] eKLR to submit that actions founded on libel and slander should not be brought after the expiry of twelve months from the date of which the cause of action accrued.

7. That it is settled law, that a claim in defamation arises on the day on which the alleged defamatory statement was made. Hence, in the instant matter the alleged defamatory remarks having been published on 04.03.2017, thereby leading to a cause of action, the instant suit ought to have been filed latest on the 04.03.2018. Therefore, the Plaintiff's suit is time barred having been filed on 05.03.2018.

8. Counsel further argued that allowing the test suit to stand would prejudice the Defendant by discriminating against and denying the Defendant's freedom of equality before the law as decreed under Article 27 of the *Constitution* of Kenya; by continuous vexing of the Defendant by the Plaintiff on a suit standing on quick sand; by exposing the Defendant to potential unquantifiable liability on a suit that is clearly time barred; by and continued accrual of costs on a suit that is time barred.

9. Submitting on the jurisdiction, counsel called to aid the decision in *Bosire Ogeto v Royal Media Services* [2015] eKLR and Section 59 of the Interpretation of General Powers Provisions to argue that the moment a matter is filed out of time the court ceases to have jurisdiction. It was further asserted that neither the *Defamation Act* nor the *Limitation of Actions Act* has a provision granting the court authority to extend time to allow the Plaintiff's defamation suit to survive beyond the stipulated time frames. In conclusion the court was urged to allow the objection and dismiss the suits with costs.

10. On the part of the Plaintiff counsel abridged his submissions into two issues for the court's consideration. Submitting on whether the P.O is misconceived and lacks merit, counsel relied on the decision in *Hon. John Matere Keriri v Nation Media Group Limited* [2021] eKLR to contend that the Defendant continues to publish the defamatory article on its website on a daily basis from 04.03.2017 and consequently the P.O lacks merit and is misconceived.

11. Concerning whether the P.O is an abuse of the court process, while citing the provision of Section 1A & 1B of the *Civil Procedure Act* and the provisions of Order 11 Rule 5 of the *Civil Procedure Rules* counsel contended that preliminary objection is an abuse of the court process having been raised by the Defendant after seven (7) years since filing suit, four (4) years after the suit was certified ready for hearing. Hence the intent was the derailing and delay of the trial which had since been scheduled. The court was thus urged to dismiss the objection with costs.

12. By way of rejoinder submissions, the Defendant urged the court not to be bound by decision in Hon. *John Matere Keriri* (*supra*) which was per incuriam and runs afoul of the decision of the Court of Appeal in *Wycliffe A. Swanya* (*supra*). It was further asserted that the Plaintiff's argument on publication was misplaced as a cause of action does not arise every day that the online article is alleged remain on the website.

13. In response to the question of abuse of the court process, counsel cited *Panfield Investment Ltd (New Eldoret Total Service Station Ltd) v Sisibo Luxury Shuttle Ltd* [2018] eKLR and *James Omukhala Otieno & Another (Suing as the personal representative estate of Wilson Okate Omukala) v Lomolo 1962 Limited* [2019] eKLR in support of the assertion that a P.O canvasses issues of law and can be raised at any time.

14. In turn, responding to the Defendant's supplementary submissions, the Plaintiff called to aid the decision in *Okoth v Godwin Wanjiku Wachira* [1978] KLR to submit that the date of publication and date of printing are two (2) different issues. That the limitation period in respect of the printed publication was to expire on 04.03.2018 however the same was on a Sunday and by reason of which the limitation period was due to expire after 05.03.2018. That the respective suits were filed on 05.03.2018 and are therefore not time barred. Concerning the digital publication, it was asserted that the same was done on 03.03.2017 hence the limitation period was to expire on 03.03.2019. Therefore, the Defendant's P.O lacked merit.

15. 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* Cap 22 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.."

16. Whereas, latter on the other hand 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."

17. 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."

18. 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.

19. 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".

20. The key objection raised by the Defendant relates to the jurisdiction of this court to entertain the suit on account non-compliance with statutory limitation. It is true that a court has no jurisdiction to hear a time-barred claim. 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".

21. 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."

22. As earlier noted, the suit herein is premised on the tort of defamation.

The purported defamatory articles complained about were published by the Defendant on 04.03.2017 in the "The Standard" and on 03.03.2017 through the Defendant's online website. In respect of the first issue, the Plaintiff appears to be arguing the 'multiple-publication rule'. This court finds the decision of Ngaah. J in Royal Media Services Ltd v Valentine Mugure Maina & another [2019] eKLR quite persuasive. The court 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)....."

23. The court went on 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; 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)

24. This court adopts the above position with respect to online publication, namely, that the cause of action accrues on first publication and not under the "multiple publication rule" as proposed by the Plaintiff. Further, the statutory provision of section 4(2) of the *Limitation of Actions Act* in respect of libel and slander is in force to date. As to when time begins to run, the Court of Appeal in *Wycliffe A Swanya v Toyota East Africa Ltd & another* [2009] eKLR put the issue to rest when the addressed itself 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)

25. The second issue that the court must address is the computation of time; whether the limitation period was to expire on 05.03.2018 as 04.03.2018 Section 57 of the *Interpretation and General Provisions Act* provides that;-

> " In computing time for the purposes of a written law, unless the contrary intention appears—
>
> a. A period of days from the happening of an event of the doing of an act of things shall be deemed to be exclusive of the day on which the event happens or the act thing is done
>
> b. If the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days) the period shall include the next following day;

c. .....

d. ...."

26. Section 57 of the *Interpretation and General Provisions Act* is echoed inOrder 50 Rule 3 of the Civil Procedure Rules. The cause of action on which the suits herein are premised arose on 04.03.2017. Applying he dicta in Wycliffe A. Swanya (supra) as read with the provision of Section 4(2) of the *Limitation of Actions Act*, the Plaintiffs' suits ought to have been lodged either on 03.03.2018 or 04.03.2018. Having taken the liberty of perusing the calendar for the year 2018, it is evident to the court that 04.03.2018 was a Sunday. Thus, under Section 57 (b) of the *Interpretation and General Provisions Act* the next following working day was 05.03.2018 when the Plaintiff's suit could be properly lodged.

27. Consequently, the Defendant's preliminary objection to the Plaintiff's suit being time barred in not well taken and accordingly the objection must fail. In the end, the P.O is dismissed with costs to the Plaintiffs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF JUNE 2023.

C.MEOLI

JUDGE