



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 563 OF 2017**

NATION MEDIA GROUP LIMITED.....1<sup>ST</sup> APPELLANT

BOB ODIALO.....2<sup>ND</sup> APPELLANT

NICHOLAS NGOLYO.....3<sup>RD</sup> APPELLANT

**-VERSUS-**

MARGARET KAMENE WAMBUA .....RESPONDENT

**JUDGMENT**

The respondent's suit before the trial court was a claim for General damages, Aggravated and Exemplary damages for defamation by the appellants. In its judgment delivered on 19<sup>th</sup> September, 2017, the trial court awarded the respondent Kshs. 200,000 as general damages plus costs and interest. The appellants are dissatisfied with that judgment and preferred this appeal on the following grounds:-

- 1. THAT the Learned magistrate erred in law in finding that the court had discretion to grant an extension of time in a defamation matter.**
- 2. THAT the Learned magistrate erred in law in failing to find that an extension of time in a suit founded on defamation is null and void.**
- 3. THAT the Learned magistrate erred in law and in fact when relying upon Article 33(3) of the Constitution which was inapplicable.**
- 4. THAT the Learned magistrate erred in law in failing to take into account the authorities relating to the issue of extension of time in the High Court and all the other relevant provisions of the Law and thereby finding that the court had jurisdiction to grant an extension of time.**
- 5. THAT the Learned magistrate erred in law by failing to find that the suit herein was barred by limitation as the extension of time was in nullity.**

M/s Archer & Wilcock Advocates appeared for the appellants. Counsel submit that the respondent claim for defamation was filed out of time. The respondent filed the plaint together with a chamber summons seeking extension of the limitation period so as to file the suit out of time. In its ruling of 8<sup>th</sup> July, 2009, the trial court granted the respondent leave to file the suit out of time. The appellants raised a preliminary objection on the fact that the suit was time barred as extension of the limitation of time does not extend to a cause founded on defamation. The objection was heard together with the main suit and the trial court delivered its judgment in favour of the respondent.

It is submitted that for a court to grant an extension of time to file a suit, the cause of action must be founded on tort which relates to tort of negligence, nuisance or breach of duty whereby the damages claimed must be in respect to personal injuries to the plaintiff as a result of the said tort. Counsels referred to the case of **BETH WAMBUI MUGO –V- CHARLES HORNSBY & 3 OTHERS (2019) eKLR** where the court held:-

**“I wish to first address the applicability of Sections 27 and 28 of the Limitation of Actions Act. A keen reading of the said provisions reveals that an extension of time to file an action out of time can only be sought in strict instances of tort and more specifically, in an action for negligence, nuisance or a breach of duty.**

**The action herein is defamatory in nature, meaning that whereas it is a tort, it does not fall in either of the categories stipulated hereinabove. In the premises, I am persuaded by the arguments articulated by the respondents that Sections 27**

**and 28 of the Limitation of Actions Act do not incorporate the extension of time in defamation claims..... It therefore follows that whereas in ordinary circumstances, a court is bestowed with the discretion to allow or deny an extension of time, the case is different when it comes to claims of a defamatory nature as these are strictly statutorily barred and offer no room for extension.”**

Counsel for the appellant contend that the trial court erred in law in failing to find that an extension of time in a suit founded on defamation is null and void. Therefore the trial court lacked jurisdiction to determine the suit as it was barred by limitation. The trial court acted without jurisdiction in upholding the ex-parte application for leave to file a defamation case out of time. The trial court relied on the phrase “May not” under Section 4(2) of the Limitation of Actions Act. Counsel relies on the case of **M’IKIARA M’RINKANKANYA & SEBASTIAN NYAMU –V- GILBERT KABEERE M’MBIJIWE (2007) eKLR** where the High Court dealt with the phrase “May not” as follows:-

**The use of the phrase “may not” does not however give the court absolute discretion whether or not to apply the limitation periods prescribed for various causes of action. If the legislature intended to give absolute discretion to the courts it would have expressly provided so in the Act. The Act should be construed as a whole in order to discover the legal meaning of the phrase. After prescribing limitation periods for various actions, the legislature provided safety mechanism or escape routes from the rigors of the Act in order to avoid injustice by providing for the extension of the limitation periods in the restricted cases specified in part III of the Act.”**

Counsel maintain that the trial court further erred in law and in fact by relying on Article 33(3) of the Constitution of Kenya which was inapplicable the law excludes the filing of suits based on defamation after the expiry of twelve months.

Ms Bikambo & Co. Advocates appeared for the respondent. It is submitted that the basis of the Appeal is whether the trial court had the discretion to extend the time of filing the defamation suit under Section 4(2) of the Limitation of actions Act. The words used under Section 4(2) are “May not” meaning that the said term is not mandatory. Section 4(2) gives the court the discretion to entertain a suit which has exceeded the statutory period if there is sufficient reason to warrant the delay.

Counsel rely on the case of **ROYAL MEDIA SERVICES LTD –V- VALENTINE MUGURE MAINA & ANOTHER (2019) eKLR** where Justice Ngaa Jairus explained Section 4(2) of the Limitation of Actions Act as follows:-

**“before I conclude, I must mention that section 4(2) is couched in such terms that the trial court is left with discretion to extend the time within which a claimant can file suit for damages in defamation claims. It may be that the claimant was under disability of some sort and therefore he could not, for that reason, file the claim within the statutory period.”**

**“where the court is inclined to extend time, it must have regard to all the circumstances of the case and in particular to such circumstances as the length and the reasons for, the delay on the plaintiff..... the court, in making its discretion will consider the date on which any such facts did become known to him and the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action.”**

Counsel for the respondent submit that soon after the defamation act was committed, the respondent became sick, was hospitalized and thus unable to file suit within the prescribed statutory period. The words “May” under Section 4(2) of the Limitation of Actions Act brings in the aspect of being “Optional”. Counsel referred to the case of **M’IKIARA M’RINKANKANYA & SEBASTIAN NYAMU –V- GILBERT KABEERE M’MBIJIWE** (supra) where the court held:-

**“the use of the phrase “may not” does not however give the court discretion whether or not to apply the limitation periods prescribed for various causes of action.....if the legislature intended to give absolute discretion to the courts it would have expressly provide so in the Act..... The Act should be construed as a whole in order to discover the legal meaning of the phrase. After prescribing limitation period of various action the legislature provided safety mechanism or escape routes from the rigours of the Act to avoid injustice by providing for the extension of limitation period in the restricted cases specified in part III of the Act.”**

Counsel for the respondent maintain that Section 27 of the Limitation of Action Act allow a party to seek leave for extension of time in case of ignorance of material facts. The respondent sought the leave of the court before filing the suit and the appellants’ preliminary objection was overruled. The issue of the jurisdiction of the court was dealt by the trial court which dismissed the appellants’ Preliminary Objection.

The appeal is on points of law only. There is no dispute on the evidence or the amount of damages awarded by the trial court.

The appeal raises the following issue:

**Whether the Limitation of Actions Act prohibit the filing of a suit based on defamation after the expiry of twelve months.**

Section 4 of Cap 22 states as follows:-

**Actions of contract and tort and certain other actions**

**(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—**

**a) actions founded on contract;**

b) actions to enforce a recognizance;

c) actions to enforce an award;

d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(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.

(3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued.

(6) This section does not apply to a cause of action within the Admiralty jurisdiction of the court which is enforceable *in rem*, except that subsection (1) of this section applies to an action to recover seamen's wages.

On the other hand Section 27 of the same Act states:-

**Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.**

(1) [Section 4\(2\)](#) does not afford a defence to an action founded on tort where—

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 (emphasis added)

d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—

a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than [section 4\(2\)](#) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

Further, Section 28 of Cap 22 states:-

## Application for leave of court under section 27

(1) An application for the leave of the court for the purposes of [section 27](#) of this Act shall be made *ex parte*, except in so far 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— (emphasis added)

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.

The interpretation of Sections 4, 27 and 28 of the Limitation of Actions Act has resulted into two schools of thought namely:-

i. That a suit based on defamation cannot be filed at all after the expiry of twelve months.

ii. That the court can grant leave to file a suit based on defamation and extend the twelve months' limitation period.

There are several cases which propound the two views. Mwera J, as he then was in the case of **DAVID GITHUMBI THANDE & ANOTHER –V- GITHUNUGRI DAIRY FARMERS CO-OPERATIVE SOCIETY LTD. & 9 OTHERS** held as follows:-

**“The defendants’ position was that the court had no jurisdiction to grant extension of time to sue in defamation because section 4 of the Act states that no action for libel or slander may be brought after the end of twelve months while section 27 of the same Act only envisages extending the time to sue in matters of negligence, nuisance or breach of duty where damages are in respect of personal injuries of any person.**

**Having heard counsel, perused the law applicable and the circumstances of this case, this court is inclined to agree and it agrees with the defendants that the orders of 29.4.05 granting the plaintiffs time beyond the statutory 12 months to sue for damages in defamation be reviewed. Extending time to sue in tort matters is limited to negligence, nuisance, breach of duty where damages are confined to personal injuries of a personal nature. And to succeed in getting the orders to sue out of time, a party has to satisfy the court in accordance with section 28 of the Act. Defamation is not covered here and so the review sought is granted. It was in error to grant the orders of 29.4.05 when the law did not provide for such, i.e suing on account of defamation after the statutory 12 months. The application dated 12.1.05 ought to have been dismissed and the whole suit struck out. (emphasis added)**

The case of Beth Wambui Mugo –v- Charles Hornsby & 3 Others (supra) cited by Counsels for the appellants is of the same view as that of Justice Mwera. Similarly, in the case of **REPUBLIC –V- PRINCIPAL MAGISTRATE P. NGARE GESORA & 2 OTHERS EX-PARTE NATION MEDIA GROUP LTD.(2013)eKLR, OF 2011, NAIROBI JUDICIAL REVIEW APPLICATION NO. 321 OF 2011** Justice Odunga was of the same view that cases of libel and slander cannot be brought after the expiry of twelve months.

On the other hand, in the case of **MWANGI KANYINGI –V- FRANCIS KARIUKI KANYINGI & ANOTHER (2008) eKLR** Justice Makhandia (as he then was) stated as follows:-

**“It is now well settled law that for one to file a suit outside limitation period enshrined in the Limitation of Actions Act, the applicant has to avail himself of the provisions of Section 27 of the Act which provides *inter alia* that Section 4 (2) shall not afford a defence to an action founded on tort where the action is for damages for negligence, nuisance or breach of duty, the damages claimed consist of or include damages in respect of personal injuries of any person, the court gives leave for the purpose of the section, and the requirements of subsection 2 thereof are fulfilled in relation to the cause of action.” (emphasis added)**

In **WYCLIFFE A. SWANYA –V- TOYOTA EAST AFRICA LTD & FRANCIS MASSAI, Nairobi HCCC No 28 of 2007**, Justice Hatari Waweru dismissed a defamation suit that had been filed out of time without leave of the court. The ruling was the subject of appeal before the Court of Appeal, vide Appeal No. 70 of 2008 (same parties), the Court of Appeal referred to Justice Hatari’s ruling and observed as follows:-

**“It is pleaded in paragraph 4 of the plaint that the words alleged to have been scandalous of the plaintiff were uttered on 12<sup>th</sup> November, 2005. The cause of action therefore arose on the said date. Suits for defamation must be brought within 12 months of the cause of action arising. This suit was filed on 17<sup>th</sup> January, 2007 clearly out of time. No leave to bring it was sought or obtained. It is also doubtful that a limited liability company can utter words as pleaded in paragraph 4 of the plaint. In the circumstances, this suit is struck out with costs to the defendant. It is so ordered.” (emphasis added)**

In the case of **STEPHEN KALONZO MUSYOKA –V- RADIO AFRICA, Nairobi HCCC No. 451 of 2011**, an application for extension of time for defamation out of time was filed. Justice Hatari Waweru allowed the application and the suit proceeded to hearing. In the case of **STOMACH CLINIC LIMITED –V- FINA BANK LIMITED, Nairobi HCCC Case No. 358 of 2009 (2010)eKLR** a suit for defamation was filed outside the twelve (12)months period, Justice Koome (as she then was) upheld a Preliminary Objection on Limitation and struck out the suit. The court observed at paragraph 4 of its ruling delivered on 25<sup>th</sup> June, 2010 as follows:-

**“The plaintiff’s claim as stated in the plaint seeks for general damages for libel, breach of contract, injurious falsehood and negligence. It is trite that an action founded on libel or slander should be filed within one year. The applicants had not sought leave before filing the suit. The issue raised by the plaintiff is that the suit cannot be strike out at an interlocutory stage because they can always apply for leave to file the suit out of time. I am not persuaded by the plaintiff’s submission that an application cannot be made under the provisions of Order 6 rule 13 to strike the suit on the grounds that it is time barred. (emphasis added)**

According to Justice Koome, leave to file suit out of time had not been obtained. It therefore follows that had leave been obtained, the court would not have struck out the suit. The same applies to the court of appeal decision in the case of Wycliffe A. Swaya wherein Justice Hatari Waweru had stated that no leave to bring the suit had been obtained. The Court of Appeal did not dwell on the issue as to whether the High Court could have enlarged time. In my view, the difference in option is caused by different interpretation of Section 27 of the Limitation of Actions Act. The marginal notes to Section 27 reads as follows:-

**“Extension of Limitation period in case of ignorance of material facts in actions for negligence etc.”**

Section 27 (1) provides that Section 4(2) of the Act which provides for the specific limitation period to specific causes of actions may not afford a defendant a defence if:-

- a) The action is for damages for negligence, nuisance or breach of duty.
- b) If the damages under (a) above consist of or include damages in respect to personal injuries of any person.
- c) The court has, whether before or after the commencement of the action granted leave for purposes of the action. **(emphasis added)**
- d) The requirements of sub-section (2) of Section 27 are fulfilled in relation to the cause of action.

It can be argued that Section 27 is mainly intended to deal with causes of action based on claims for damages due to negligence, nuisance or breach of duty and allows the court to enlarge time if the provisions of Section 27(2) are fulfilled.

Section 7 of the Limitations of Actions Act states as follows:-

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

If we are to compare Section 4(2) and 7 of the Limitations of actions Act, can it be held that actions based on land and defamation are totally barred from being filed in court after the expiry of twelve years and one year respectively. Why would the law give an opening to allow extension of time for other causes of action while bar the courts from enlarging time in relation to cases of defamation. If that was the intention of the law, nothing would have been easier than to state so. In my view, actions based on the tort of negligence may not be brought after the expiry of three years as provided under Section 4 of the Limitation of Actions Act. However, the court is empowered to enlarge time and allow the filing of a suit after the expiry of the three years’ period. Similarly, actions based on defamation may not be brought after the expiry of twelve months but the court has the power to enlarge time. The same applies to other causes of actions as provided under Chapter 22 laws of Kenya. So long as the court is requested to enlarge time and sufficient reasons are given as to why the case was not filed on time, leave to file the claim out of time can be granted. This does not depend on whether the action is one based on ignorance of material facts for actions based on negligence or not. An avenue to enlarge time is given to the court and in my view this avenue should not be restricted to cases based on tort of negligence, or breach of duty or nuisance but should be available to all causes of actions.

This is in line with Section 28(2) of Cap 22. Section 28(4) explains what is a “relevant action” under Section 28(2), Section 28(4) provides that relevant action means **any** action in connection with the leave sought by the application is required. In my view, Section 27(1) (c) is equally not based on negligence, nuisance or breach of statutory duty. Section 27 (1)(c) is an independent avenue which facilitates the granting of leave for purposes of Section 27. My opinion on Section 27 (1) (c) is that Section 4(2) shall not afford a defence to an action on tort if the same is time barred but the court has granted leave to file the suit out of time either before or after the commencement of the suit. Extension of the Limitation period for all causes of actions are done under Sections 27 and 28 of the Limitation of Actions Act. In my view, the two sections do not exclude cases involving defamation from benefiting from the window available to a party to enlarge time after the twelve months period has lapsed. The wording on limitation in the entire Limitation of Actions Act is “May not”. Whenever the Act provides the limitation period, it uses the words “May not”. My view on this wording is that there is the leeway available to litigants to seek extension of time otherwise the statute could have used other terms like “cannot”, “must not” or “shall not”.

I am in agreement with the sentiments of Justice Jairus Ngaa as expressed in the case of **Royal Media Services Ltd –V- Valentine Mugure Maina & Another** (Supra) that the court has discretion to enlarge time even if the claim is one based on defamation. It would be unusual for the law to allow the filing out of time of other claims such as claim for damages resulting to personal injuries but exclude claims based on defamation which equally results to injury to one’s reputation. I am satisfied that the trial court was correct in granting the respondent leave to file the suit out of time. There is the contention relating to Article 33 of the Constitution on freedom of expression. Once leave was granted to file the suit out of time and the claim was admitted out of time, the issue of Article 33 on respecting other peoples’ reputation became a non-issue. What remained was whether the plaintiff had been defamed.

The respondent was awarded Kshs.200,000 as damages. The appeal is not on quantum. I am satisfied that the trial court properly allowed the application for leave to file suit out of time. The appellant is within the law to challenge the order granting leave within this appeal. (See **Mary Wambui Kabugu –v- Kenya Bus Services Ltd. Civil Appeal No. 196 of 1995**). There was no requirement that the appellant must

have filed an appeal first on the issue of extension of time before the suit was heard.

In the end, I do find that the appeal lacks merit and is hereby dismissed with costs.

**Dated and Signed at Nairobi this 8<sup>th</sup> day of February, 2021**

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**S. CHITEMBWE**

**JUDGE**