



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 136 OF 2017**

**DOMINIC OOKO.....PLAINTIFF/APPLICANT**

**VERSUS**

**STANDARD GROUP LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RADIO AFRICA GROUP LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant filed the Notice of Motion dated 3<sup>rd</sup> November 2020 seeking the following orders:

1. **THAT the Honourable Court be pleased to grant the Applicant leave to enjoin and commence civil proceedings against The Star Publications Limited out of time.**
2. **THAT the Honourable Court be pleased to grant leave to the Plaintiff to amend the Plaintiff and the Amended plaint annexed to this Application be deemed as filed.**
3. **THAT the costs of this Application be provided for.**

2. The application is supported by the grounds and affidavit of the Plaintiff/Applicant, in which he contends that it was during the pendency of this suit that he learnt that the Star Publications Ltd was part and parcel of the publication complained of. Further that the said company is a sister company to the 2<sup>nd</sup> Defendant (*Radio Africa Group Ltd*).

3. He further states that at the time of the said discovery, the time for filing the claim had lapsed. He therefore seeks leave to file the claim against the Star Publications Ltd out of time. He further seeks leave to amend the plaint by adding, the said company's name as the 2<sup>nd</sup> defendant and removing the name of the Standard Group Ltd which was the 1<sup>st</sup> defendant.

4. The 2<sup>nd</sup> defendant (*Radio Africa Group Ltd*) filed a replying affidavit sworn on 1<sup>st</sup> December 2020 by **Linda Musita** a Legal Officer at the said company. She has denied knowledge of any defamatory statements made on 11<sup>th</sup> May 2017. She refutes the deposition that the 2<sup>nd</sup> defendant owns the intended 3<sup>rd</sup> defendant and avers that it was the Applicant's duty to conduct due diligence on the parties he is suing. She has further deponed that the Applicant's claim is time barred by statute.

5. The application was disposed of by written submissions. Counsel for the Plaintiff/Applicant (*M/s Kevin & Associates*) filed their submissions dated 8<sup>th</sup> February 2021. He submitted that the 2<sup>nd</sup> defendant and the intended 3<sup>rd</sup> defendant are sister companies and both were involved in the publication of the article complained of. Further that this realization came well after the limitation of action on defamation had lapsed, hence the present application.

6. Counsel argues that since the 2<sup>nd</sup> defendant and intended 3<sup>rd</sup> defendant were involved in the publication, they ought to be enjoined in the suit. He has referred to the bundle of documents, demand letter, service and receipt of papers by one Linda Musita (*deponent*) as indications of the relationship between the 2<sup>nd</sup> defendant and intended 3<sup>rd</sup> defendant.

7. Counsel contends that the application for leave has come seven (7) months after the lapse of the statutory limitation period under **Section 4 of the Limitation of Actions Act** which is not inordinate. That the delay was caused by the plaintiff's ignorance of material facts surrounding the identity of the intended 3<sup>rd</sup> defendant. He has referred to **Order 1 Rule 10 of the Civil Procedure Rules** to support this argument.

8. On amendment of pleadings counsel has relied on **Order 8 Rule 3 Civil Procedure Rules**, saying the requested for amendment of the plaint is necessary, since the 1<sup>st</sup> defendant is no longer a party to the proceedings.

9. He has referred to the case of **Eastern Bakery v Castelino [1958] E.A. 461** where Sir Kenneth O’Conner, President of the then Court of Appeal for East Africa said:

***“It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs.”***

10. He has also referred to the case of **Bosire Ogero v Royal Media Services Ltd Civil Suit No. 293 of 2013** where the Court held:

***“The Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs... the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by the parties ...”***

He therefore urged the court to grant the orders sought.

11. The 2<sup>nd</sup> defendant/respondent filed submissions through its counsel M/s Gikera & Vadgama Advocates dated 22<sup>nd</sup> February 2021 – opposing the application. On whether this court has power to grant leave to the plaintiff to initiate the suit against the intended 3<sup>rd</sup> defendant counsel referred to **Section 4(2) of the Limitations of Actions Act (Cap. 22 Laws of Kenya)** which provides:

***“(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.”***

12. It is his contention that whether the suit is grounded on a claim of defamation or tort the same is statute barred. He has also referred the court to Section 20 of the Defamation Act, Cap. 36 Laws of Kenya and Section 27 of the Limitation Act saying none provides for extension of the period for filing suit, in respect to defamation cases.

13. On this he has cited the case of **Jamleck Kamau vs Royal Media Services Ltd t/a Citizen TV (Nairobi Civil Case No. 378 of 2015, eKLR)** where it was stated:

***“this court exercising civil jurisdiction is barred by the Limitation of Actions Act from hearing and determining suits which are statute barred and where the said law prohibits any extension thereof of the limitation period”.***

14. Counsel further relied on the case of **Daniel Mungai Karanja v Attorney General & Anor. [2016] eKLR** which stated that:

***“In Royal Media Services Ltd HCCC at Nairobi No. 52 of 2008 in which case the Judge cited with approval the decision by Mbiti, J in Lucia Wambui Ngugi vs Kenya Railways & Another Nairobi HCCA No. 213 of 1989 as follows:***

***“From the foregoing, extension of time only applies to claims made in tort and even in tort the claims must be in respect of claims for personal injuries arising from 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). Therefore, Section 27 aforesaid does not provide for extension of time in defamatory matters.***

The court went further to say:

***The suit for defamation was filed after the expiry of 12 months from the date the cause of action arose and the same is struck off. The suit will proceed on other causes of action set out in the plaint.”***

15. Based on the above counsel has asked the court to reject the amendment sought by the Plaintiff/Applicant. He argues that enjoining the intended 3<sup>rd</sup> defendant as a party would have the effect of illegally and irregularly instituting a suit against the said party. It does not matter that the plaintiff has a valid cause of action against the intended 3<sup>rd</sup> defendant. He contends that **Section 27 of the Limitation of Actions Act and Section 20 of the Defamation Act** bar this court from exercising any jurisdiction in hearing and determining any suit against the intended 3<sup>rd</sup> defendant.

16. He calls upon the court to hold so and down its tools in respect to the application in line with the holding in **Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd (1989) eKLR** where the court held:

***“A court of law must lay down tools in respect of the matter before it the moment it holds the opinion, that it is without jurisdiction.”***

17. He has further referred to Section 4(2) of the **Limitation of Actions Act and Section 5 of the Civil Procedure Act** and submitted that the intended 3<sup>rd</sup> defendant cannot be enjoined as the claim against him is time barred, and so the plaint cannot be amended.

## Analysis and determination

18. Having considered the application, affidavits and both submissions I find the issue falling for determination to be one. It is whether the plaintiff/applicant has given sufficient grounds to make this court exercise its discretion and allow him to amend the plaint by adding the 3<sup>rd</sup> intended defendant as a party OUT OF TIME.

19. The pleadings show that the publication complained of was published on or about 11<sup>th</sup> May 2017. The suit against the initial two defendants was filed on 22<sup>nd</sup> June 2017. The application seeking leave to enjoin the intended 3<sup>rd</sup> defendant is dated 3<sup>rd</sup> November 2020.

20. The suit is based, on a claim of defamation. Under Section 4(2) of the Limitations of Actions Act, a defamation suit should be filed within twelve (12) months. Section 20 of the Defamation Act equally provides for the same.

21. Counsel for the plaintiff has submitted that the application seeking leave to enjoin the 3<sup>rd</sup> intended defendant has been brought seven (7) months after the lapse of the limitation period under Section 4 of the Limitation of Actions Act.

The said Section provides thus;

**“Section 4(2):**

***“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.”***

22. Defamation is generally the action of damaging the good reputation of someone by either slander or libel. Section 4(2) of the Limitation of Actions Act addresses claims based on tort. The **proviso** to it addresses slander and libel which are the two elements of defamation. The claim based on defamation cannot therefore come under the general “tort” because there is a clear provision for it.

23. The Court of Appeal in the case of **Wycliffe A. Swanya vs Toyota East Africa Ltd & Anor [2009] eKLR** stated as follows:

***“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 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. We find it strange that the appellant should wait to feel the impact of the remarks allegedly made by the respondents beyond the limitation period from May 2005 to file the case in the Superior court on 17<sup>th</sup> January 2007.”***

24. It follows that any suit against the intended 3<sup>rd</sup> defendant ought to have been filed on or before 11<sup>th</sup> May 2018. In this case the plaintiff/applicant is seeking leave, two (2) years and six (6) months late, and this cannot be said to be a short time. The reason he gives for the delay is that he was still trying to get the true identity of the 3<sup>rd</sup> intended defendant.

25. Besides, stating this the Applicant has not explained what it is that took him so long to identify the intended 3<sup>rd</sup> defendant and what steps he took to redeem time. I find it not enough just to say he delayed in filing the suit because he was tracing the intended 3<sup>rd</sup> defendant’s identity. What was so peculiar about this identification that it had to take him 3<sup>1/2</sup> years for the said party to be identified? There is nothing placed before this court for it to consider that question.

26. My finding is that the delay in filing a claim for defamation against the intended 3<sup>rd</sup> defendant is inordinate and has not been satisfactorily explained by the plaintiff/applicant.

I therefore decline to grant the leave sought in terms of prayer No.1.

27. Leave to enjoin the intended 3<sup>rd</sup> defendant having been denied there would be no need for any amendment to the plaint. The reason is that the record is clear that the suit against the 1<sup>st</sup> defendant was compromised and a consent dated 29<sup>th</sup> January 2019 filed in court on 1<sup>st</sup> February 2019.

28. In conclusion I find no merit in the application dated 3<sup>rd</sup> November 2020 which I dismiss with costs.

Orders accordingly.

**Delivered, signed and dated this 11<sup>th</sup> day of March 2021 in open court at Nairobi virtually.**

**H. I. ONG'UDI**

**JUDGE**