



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 224 OF 2017

DR TITUS NAIKUNI.....PLAINTIFF/RESPONDENT

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT/APPLICANT

MUGAMBI MUTEGLI.....2ND DEFENDANT/APPLICANT

RULING

1. Vide a plaint dated 7th December, 2016 and filed in court 6th November, 2017, the plaintiff filed this suit claiming to have been defamed by the defendants as contained in the Business daily edition on 12th October 2016 titled “*Transport Minister James Macharia puts KQ bosses on notice.*” Following the service of the summons and plaint, the 1st and 2nd defendants filed a statement of defence denying the allegations in the plaint. Before the suit could be heard the defendants filed a notice of preliminary objection (P.O) dated 18th December 2017, which is the basis of this ruling.

2. They seek that the entire suit be struck out with costs on the following grounds:

i. That the suit is time barred under the provisions of the Limitations of Actions Act, Section 4.

ii. That this Honourable court lacks the jurisdiction to entertain the said suit.

3. Both counsel orally submitted on the P.O. M/s Athman for the defendants/applicants submitted that no action should be brought after 12 months since the action before this court is dated 12th October 2016 and the suit was instituted on 6/11/17. Counsel submitted that even where there is discretion it must be exercised Judiciously.

4. Learned counsel further submitted that the plaintiff/respondent has never explained why the plaint was not filed in good time and that he should have moved the court to seek leave to file the suit out of time.

5. She referred to the following cases in support of the P.O:

a) Royal Media Services Ltd v Valentine Mugure Maina & Another (2019)eKLR

b) Kennedy Mureithi & another v Peterson Karimi Gacewa (2016) eKLR.

c) Kenya Civil Aviation Authority v W.K & 2 Others (2019) eKLR

d) Haron Onyancha vs National Police Service Commission & another (2017) eKLR.

e) I.G.A vs Makerere University (1972) EA 65

6. Counsel while referring to the case of **Royal Media Services Ltd (supra)** submitted that there was no republication in electronic and print media. Further that repeated republication is only applicable in the U.K and not Kenya as was held in the **Royal Media case (supra)**. She stressed that statutory provisions must be adhered to, and this can never change. See the case of **Kennedy Mureithi and another (supra)**.

7. Mr. Kinyanjui for the plaintiff/respondent opposed the P.O for being mischievous and urged the court to dismiss it. He submitted that the cause of action is based on an online publication which is not denied and has been republished. He referred to paragraphs 17-24 of the plaint where it is pleaded that the defendant has a website.

8. He submitted that Section 20 of the Defamation Act is not mandatory and the court has discretionary power over it. He referred to the following cases, which addressed the same issue.

(a) **Performance Products Ltd & Another v Hassan W Arero & 7 Others (2018) eKLR** by Lady Justice Thurania Jaden.

(b) **Lornah Jebiwott Kiplagat & Another vs Isaack Omulo & 2 Others (2016) eKLR** by Justice Mbogholi (as he then was)

9. Counsel referred to Articles 28 & 33 (2) (d) (i), 34 (1) of the Constitution in support of his submissions on electronic media as a ground of protection of defamation. He further relied on the following authorities:

a) *Okiya Omtatah Okoiti vs. Communication Authority of Kenya & 8 Others (2018) eKLR.*

b) *Captain (Rtd) Charles K.W Masinde vs Director of Public Prosecutions & 2 Others (2021) eKLR.*

c) *West Kenya Sugar Company Limited vs Moses Malulu Injendi & Another (2021)*

d) *Stanbic Bank Limited vs Consumer Federation of Kenya of Kenya (COFEK) being sued through its official Stephen Mutoro & 2 Others (2014) eKLR.*

e) *John Ritho Kanago & 2 Others vs. Joseph Ngugi & Another (2017) Eklr*

f) *Safaricom Limited Vs Transcend Media Group (2016) eKLR*

10. He therefore submits that the suit is not time barred and the P.O should be dismissed with costs.

Analysis and Determination

11. I have considered the submissions by counsel, the law and the cited authorities. The issue for determination is whether the issue raised by the defendant qualifies as a preliminary objection and if so then whether the plaintiff's claim is time barred.

12. On the first issue the definition of a preliminary objection was well set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. 696** where it was held;

“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 objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

13. **Sir Charles Newbold** in the same matter stated thus:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A P.O 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 had to be ascertained or what is sought is the exercise of judicial discretion. The improper raising of points the first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion confuse the issue. The improper practice should stop.”

14. In **Artar Singh Bhamra & Anor vs Oriental Commercial Bank Civil Suit No. 53 of 2004 – High Court Kisumu** the court held:

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

15. A perusal of the plaint and annexures confirms that the plaintiff/applicant filed the suit on 6th November 2017 exactly a year and a month later after the alleged defamatory publications. The issue being raised by the preliminary objection is whether the suit is time barred and whether this court lacks jurisdiction on the same. It is a point of law which could dispose of the case depending on how it goes. I therefore find the issue raised satisfies the principle in the **Mukisa Biscuit case (supra)**.

16. Section 20 of the Defamation Act states as follows

“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. The above is the statutory provision for filing defamatory cases. In the case of **David Githumbi Thande & Another –v- Githunugri Dairy Farmers Co-operative Society Ltd. & 9 others eKLR it was** 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.”

18. Other cases which have confirmed the said position are:

i) **Beth Wambui Mugo Vs Charles Hornby and 3 others {2019} eKLR.**

ii) **Republic Vs Principal Magistrate Ngare Gesora and 2 others exparte National Group Ltd {2013} eKLR.**

iii) **Stomach Clinic Ltd Vs Fuma Bank Ltd {2010} eKLR.**

iv) **Wycliffe Swanya Vs Toyota East Africa Ltd and another [2009] eKLR.**

19. There is however another angle to this defamation complaint which has been raised in paragraphs 17 and 38 of the plaint which state as follows:

Paragraph 17

“The plaintiff states that to date, the said publication by the 1st defendant Nation Media Group is maintained online at <http://www.businessdailyafrica.com/Transport-CS-James-Macharia-puts-KO-bosses-on-notice/539546-3414562-c39f3q/>”

Paragraph 18

“The plaintiff states that the article published by the defendants on October 12th 2016 and circulated to date online of, and concerning the plaintiff was false, reckless, and malicious as more specifically particularized herein below.”

20. The issue then is whether there is any republication of the defamatory words and if so when it was done. The pleadings don’t point that out and neither are the dates of the alleged republications given.

21. Mr. Kinyanjui for the plaintiff has argued that the fact that the publication has remained on the defendant’s website amounts to a new publication each time it is read by different people. M/s Athman for the defendants is of a different view, and relies on the case of **Royal Media Services (supra)** arguing that there was no new publication.

22. Counsel for the plaintiff referred to the case of **Performance Product’s Ltd and another (supra)** where Justice Thurairaja dealt with a similar issue. In the said case there were two clear publications with given dates after the initial one, hence the finding of republication. In the **Lornah Jebiwott Kiplagat case (supra)** Justice Mbogholi (as he then was) was dealing with an issue where the plaintiffs were seeking leave to amend the plaint because of republications. It was not an issue of republications per se that was being determined.

23. Also referred to by counsel Kinyanjui for the plaintiff is the case of **Captain (Rtd) Charles K.W Masinde (supra)** where the issue of limitation of time among others was raised. Justice Chitembwe in his ruling stated:

“The other issue involves Limitation. Part of the claim is for Aggravated and general damages for defamation. Section 4(2) of the Limitation of Actions Act provide that a claim based on libel or slander may not be brought after the end of twelve months. The twelve months are to be computed from the date the cause of action accrued. Paragraphs 13 and 14 of the plaint indicate that the alleged defamatory words were published by the Star Newspaper on 4th February, 2018 and by the Daily Nation Newspaper on 9th April, 2018. The suit was filed in August, 2019 outside the twelve months period from the date of publication.

*According to Counsel for the plaintiff, time started running from the moment the case for malicious prosecution was finalized on appeal. The line of reasoning is that had the plaintiff been convicted the suit would not have been filed. In my view time started running for the claim for defamation from the moment the alleged defamatory words were published. The Plaintiff felt at that moment that his reputation had been damaged. Any conviction or acquittal could not have erased the publication. I do therefore find that the claim for damages for defamation was filed out of time. However, it is not prudent at this moment to strike out that specific claim as the other claims for malicious prosecution and loss of employment are still active. I do associate myself with the holding in the case of **MWANIKI GACHUBA –V- SPEAKER OF THE COUNTY ASSEMBLY OF KAJIADO & ANOTHER***

(2018) eKLR that a Preliminary Objection should be able to dismiss the entire suit and not some parts of the claim.”

24. It is therefore clear that in the **captain (Rtd) Charles K.W Masinde (supra)** case the honourable Judge indeed found as a fact that the claim for defamation was filed out of time but because of the other claims in the suit it could not be struck out. Other cases referred to by Mr. Kinyanjui are **West Kenya Sugar Company Ltd (supra)** and **C.F.C Stambic Ltd (supra)** both of which dealt with applications seeking issuance of temporary injunctions against continued circulation of an article pending the hearing of the main suit. Also cited by counsel is the case of **John Ritho Kanago and 2 others (supra)** which did not deal with the issue at hand.

25. In the present case it is the initial publication that is alleged to have remained on the defendants' website. It is not a new publication as the plaintiff wants the court to consider it. The facts in the case of **Royal Media Services Ltd (supra)** are very similar to the present case. The publication therein had also remained on the appellant's website. It is the first date of publication that is considered as the date the cause of action commenced unless one republishes the original publication.

26. From the above it is clear that the plaintiff filed the suit after twelve(12) months which is outside the stipulated period. The court has power to enlarge time if requested and it is satisfied that sufficient reasons have been given for the delay in filing the suit. That is what the plaintiff should have done before filing this suit. He failed to do so.

27. I therefore find merit in the preliminary objection which I allow.

28. The entire suit is struck out with costs.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 13TH DAY OF JULY, 2021 NAIROBI.

H. I. ONG'UDI

JUDGE