



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E020 OF 2018

G. N. MACHARIA (GICHUHI NDIRANGU MACHARIA.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA DEFENDANT

RULING

1. **Barclays Bank of Kenya**, the Defendant in this action has failed a Notice of Motion dated 30th November 2018. By that application the Defendant seeks the striking of the suit filed by **G.N. Macharia (Gichuhi Ndirangu Macharia)**, the Plaintiff.

2. The Defendant seeks the striking out of this suit on the ground that this suit is statute barred. It is argued that the suit is statute barred because it is barred by Section 20 of the Defamation Act and Section 4(2) of the Limitation of Action Act. Both of those two Sections provide that an action in libel or slander may not be brought after the expiry of 12 months from the date of the cause of action. The Defendant, through the affidavit of Milka Gachanja, its Legal Counsel, stated that the cause of action arose in or about December 2015. That this action was filed on 14th May 2018. The Defendant's argument is that the Plaintiff's claim is substantially a defamation claim. That the contractual relationship between the parties, which the Plaintiff has pleaded in this case, is "only a condition precedent for the crystallization of the claim by the Plaintiff" which the Defendant argued is substantially a claim for defamation. The Defendant relied on the case **KIAMOKAMA TEA FACTORY CO. LIMITED V JOSHUA NYAKONI [2015] eKLR**. In that case the claim was based on the contract of employment. The employee further pleaded that the employer had breached its statutory duty to maintain a safe and proper working environment. The employee's claim on statutory breach of duty. The employer raised a preliminary objection to the suit on the ground that it was statute barred. Justice Edward M. Muriithi considered the appeal in that matter and held:

"As I understand the matter, the duty of care stipulated by the statute in employment cases is a civil obligation which arises where a relationship of employment exists, hence the need to plead the contract of employment. The contract of employment is a condition precedent for the crystallization of the statutory duty of care. This duty remains a tort which only arises in the context of a contract of service. Breach of the statutory duty is not a breach of the contract but breach of duty of care in tort and therefore the subsection of the limitation period prescribed for actions based on tort in the Limitation of action of Actions Act."

3. The Defendant in its submission submitted as follows:

"In paragraph 14 of the Plaintiff, the Plaintiff allegedly particularizes acts of breach of contract. The said acts arise when the credit card was not honoured and thus allegedly injured his reputation. They are couched as breach of contract but in essence fortifies his claim for injury to his reputation and are in all four to what defamation entails as stated in the case cited in paragraph 15 above."

4. The application was opposed by the Plaintiff. The Plaintiff by his replying affidavit deponed that his primary claim is for breach of contract which has a limitation period of six years. Further that the Defendant by its defence had defended the Plaintiff's claim for breach of contract and had also defended the Plaintiff's claim for defamation.

ANALYSIS AND DETERMINATION

5. The Plaintiff by his Plaintiff pleaded that the Defendant issued him with Barclays Gold Credit Card. That it was a term of the contract between the parties that the Defendant would not upgrade or downgrade Gold Credit card without informing and the consent of the Plaintiff. The Plaintiff also had visa card from the Defendant. The Plaintiff pleaded that while he was abroad the Defendant, in breach of the contract between the parties, refused and/or declined to honour the Plaintiff's instructions to make payment. Further that the Plaintiff's request for payment through the Automatic Teller Machine (ATM) was rejected. The Plaintiff in his Plaintiff enumerated the number of times the Defendant refused to honour his requests. That in that refusal, by the Defendant, the words were published, which the Plaintiff pleaded were

defamatory, that is “Not Authorized” and “Declined”. The Plaintiff further pleaded that the Defendant breached the contract and published defamatory words. In the final prayers of the Plaintiff, the Plaintiff sought:

- a. *General Damages for Breach of Contract.*
- b. *General Damages for Defamation.*
- c. *Punitive and Aggravated Damages.*
- d. *Interest on (a), b) and (c).*
- e. *Costs of the suit.*

6. It will be noted above that the Plaintiff pleaded for general damages for defamation and for breach of contract. There is no clear indication whether the punitive and aggravated damages, pleaded in paragraph (c) above, relate either to the prayer for defamation or for prayer for breach of contract. That paragraph is left hanging as though it is independent of the prayers for defamation and for breach of contract. That paragraph (c) is an unsatisfactory way of pleadings as required to be drawn with precision was discussed in the case **BRENDA MUTONYI MUNIKA & ANOTHER V CLARE WANG’UNDA BARASA & ANOTHER (2018) eKLR** viz:

““In **BULLEN AND LEAKE AND JACOB’S PRECEDENTS OF PLEADINGS 12TH EDITION**, the authors have stated the following:

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the Parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the Court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the Court will have to determine at the trial.”

7. Since the Plaintiff failed to plead with certainty on which of his prayers, either defamation or breach of contract, he seeks for punitive and aggravated damages as stand-alone. That being so that prayer in my view must and does fail because a prayer for damages cannot stand-alone without indication what those damages relate to. And because a party is bound by its pleadings that prayer 17 (c) of the Plaintiff is struck out.

8. The Defendant was correct in its submissions general damages are not recoverable for a claim in breach of contract. This was what the Court of Appeal stated in the case **KENYA TOURIST DEVELOPMENT CORPORATION V SUNDOWNER LODGE LIMITED (2018) eKLR** thus:

“We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent “had suffered serious damages” (sic).“

9. The issue however, whether general damages can be awarded for breach of contract was condition precedent of the alleged defamation. In my view the Plaintiff’s claim for breach of contract, in the Plaintiff, is distinct to his prayer for defamation. Paragraph 10 of the Plaintiff relate to the Plaintiff’s claim for breach of contract. Paragraph 12 to 14 and part of 15 relate to the Plaintiff’s claim for defamation.

10. Section 4(2) of the Limitation Act which reads the same as Section 20 of the Defamation Act is in the following terms:

“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.”

11. Justice R. E. Aburili the intention of having the Law of Limitation in the case **BOSIRE OGERO V ROYAL MEDIA SERVICES (2015) eLK**. The Judge had this to say:

“The law of limitation of actions is intended to bar the Plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998. It is for that reason that the issue of jurisdiction must be raised at the earliest opportunity. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (see Owners of Motor Vessel “Lillian S” vs Caltex Oil (k) Ltd (1989) KLR 1 Per Nyarangi JA. See also the Court of Appeal decision in Owners

and Masters of Motor Vessel “Joey” VS Owners and Masters of the Motor Tugs “Barbara” and “Steve B.” [2008]1 EA 367 where, echoing the decision in the case of Owners of Motor Vessel “Lillian S”, the Court of Appeal held, inter alia:

“The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 and without it, a court has no power to make one more step.....”

12. The Plaintiff’s claim arose between the year 2015 and 2016. The Plaintiff however filed his claim on 14 May 2018. The claim in respect to defamation was filed beyond the period provided in Section 4(2) of the Limitation Act and Section 20 of Defamation Act. The claim will therefore be struck out for being time barred. This I will do being aware the courts are required to sparingly use the power to strike out. this principle was discussed in the case **TULIP PROPERTIES LIMITED V MOHAMED KARIOU NUR & 6 OTHERS (2014) eKLR** viz:

“It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

13. In conclusion I grant the following prayers:

- a. **The Plaintiff’s Complaint is struck out at paragraph 12 to 14 and 15 where it refers to the Plaintiff’s claim in defamation.**
- b. **The Plaintiff’s paragraph 17(c) is hereby struck out.**
- c. **The Defendant is awarded ¾ of the costs of the Notice of Motion dated 30th November 2018.**

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**