



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 37 OF 2016

PERFORMANCE PRODUCTS LTD1ST PLAINTIFF

ROBIN KUNGU NJOGU.....2ND PLAINTIFF

VERSUS

DR. HASSAN WARIO ARERO.....1ST DEFENDANT

PROF. DR MONI WEKESA2ND DEFENDANT

ROYAL MEDIA SERVICES LIMITED.....3RD DEFENDANT

WAIHIGA MWAURA4TH DEFENDANT

MIKEOKINYI5TH DEFENDANT

HANS-JOACHIM HAJO SEPPELT6TH DEFENDANT

YOU TUBE.....7TH DEFENDANT

A.R.D GERMAN T.V.....8TH DEFENDANT

RULING

1. Vide a plaint dated 11th February, 2016 and filed in court on 15th February, 2016, the Plaintiffs filed suit claiming to have been defamed by the Defendants through the publication of a report titled **“Anti-Doping Taskforce Report.”** The said report dated 7th April, 2014 is stated to have been prepared by the 2nd Defendant, Prof. Dr. Moni Wekesa, at the material time the Chairman of the Anti-Doping Taskforce appointed by the 1st Defendant who was at the material time the Cabinet Secretary for Sports, Culture and the Arts in the Government of Kenya.

2. Through a Notice of Preliminary Objection dated 18th February, 2016 the 2nd Defendant sought to have the suit herein dismissed. Although the Preliminary Objection raised 14 grounds, only one ground was argued. The said ground (No. 5) states as follows:

“That by dint of the proviso in Section 4(2) of the Limitation of Actions Act (Cap 22 as revised in 2012) the Plaintiffs are time barred to raise a matter touching on an alleged libel contained in a report published more than 12 months ago.”

3. The 1st Defendant also filed the Preliminary Objection dated 20th April, 2016 on the following ground:

“That this Honourable Court be pleased to dismiss the Plaintiff’s suit with costs for it is statutorily barred in accordance with Section 3 of the Public authorities Limitation Act Cap 39 laws of Kenya”

4. The Plaintiff objected to the Preliminary Objection on the following grounds:

“1. The objections are not on points of law

2. The objections raised require facts in the case to be ascertained.

3. The objections seek exercise of judicial discretion.

4. Service was effected under Order 5 rule 10(1) of the Civil Procedure Rules 2010.”

5. I have considered the Preliminary Objections, the response to the same and the submissions made by the respective counsels for the parties herein.

6. As stated in the celebrated case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696:**

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

Sir Charles Newbold P. added as follows at page 701:

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.”

7. Section 4 rule 2 of the Limitation of Actions states as follows:

“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.”

8. Section 3 of the Government Public Authorities Act provides as follows:

“(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

(3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of –

(a) twelve months, in the case of proceedings founded on tort; or

(b) three years in the case of proceedings founded on contract,

from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.”

9. It is clear from the foregoing provisions of the law that a suit based on the tort of defamation should be brought within a period of 12 months.

10. The suit herein was filed on 15th February, 2016. The report in question is dated April, 2014. However, in paragraph 16 of the plaint it is alleged that on 15th February, 2015 the 3rd, 4th, & 5th Defendants published or caused the same to be published. In paragraph No. 18 of the plaint it is pleaded that in furtherance to the alleged doping, on 30th September 2015 the 1st Defendant together with police officers harassed and intimidated the Plaintiffs’ staff, ransacked the shop and ordered the arrest of the 2nd Plaintiff together with one of his employees and a customer and had them inaccurate in police custody overnight then arraigned in court the following day.

11. It is further pleaded in paragraph No. 20 of the plaint that on 30th September, 2015 the 1st Defendant held a press conference with the 3rd Defendant’s reporters and referred to information by the 6th Defendant and the report by the 2nd Defendant. The 4th and 5th Defendants are sued as employees of the 3rd Defendant. The 7th and 8th are sued as a worldwide web site and a television Station respectively who are alleged to have also published the defamatory material.

12. From the aforesaid pleadings, it is apparent that re- publication of the alleged defamatory report on 15th February, 2015 and 30th September, 2015 is pleaded. The plaint was filed within 12 months of the said re-publication.

13. Republications and repetitions of the alleged defamatory statement creates a further or new cause of action. The person repeating or republishing the alleged libel is as guilty as its author where the republication is authorized or intended; republication is a foreseeable consequence of the original publication or there was a moral, legal or social obligation on the recipient of the original publication to communicate the defamatory imputation in a third party. See for example:

- **Butterworths Common Law series**; The Law of tort (2nd Edition) Page 1330-1335, paragraph 25.87-25.95.
- **Clerk & Lindsell on Torts** (20th Edition) page 1445, paragraph 22-65
- **Winfield & Jolowicz Tort** (19th Edition W.E. Peel & Goudkamp) page 370, paragraph 13-028 and page 374-375 paragraph 13-036.

14. In the persuaded case of **Lornah Jebiwott Kiplagat & another v Isaak Omulo & 2 others [2016] eKLR** the court held as follows:

“The Plaintiffs have also alleged as late as 10th September, 2015 the Defendants posted defamatory material on their website and therefore the doctrine of republication and resetting the Limitation of Action in defamation should be invoked. This would necessarily mean that restatement of defamation having reset the limitation time, gives the Plaintiffs a platform or a chance to amend notwithstanding the fact that the original plaint was time barred.”

15. In the case of **James Ochieng Oduor t/a as Ochieng Oduor and Co. Advocates v Richard Kuloba [200] eKLR** the Court of Appeal stated as follows:

“It is quite clear from decided cases that a trial court has power to allow amendments of a plaint disclosing no cause of action (see *Motokov v Auto Garage Limited and another* [1971] EA 353). In special circumstances amendment of a plaint may be allowed, notwithstanding that the effect will be to defeat a defence of limitation (*Barclays Bank D.C.O v Shamsudin* (1973) EA 451). However, such amendments can only be allowed where peculiar circumstances are present.”

16. With the foregoing, this court’s conclusion is that the Preliminary Objection has no merits and is hereby dismissed with costs.

Date, signed and delivered at Nairobi this 3rd day of Oct., 2018

B. THURANIRA JADEN

JUDGE