



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CIVIL APPEAL NO 5 OF 2018**

**ANN CHEROP KOECH.....APPELLANT**

**VERSUS**

**CHARLES KIPROTICH LANGAT.....RESPONDENT**

*(Being an appeal arising from the judgement and decree dated 14/2/2018*

*in the Chief magistrate's court at Narok CMCC No. 155/2013,*

*Charles Kiprotich Langat v. Ann Cherop Koech)*

**JUDGEMENT**

**INTRODUCTION**

1. The appellant has appealed against the judgement and decree in which the respondent was awarded Sh.1,300,000/= as damages together with costs and interest in respect of the tort of defamation (slander).

2. The respondent has opposed the appeal. He has urged the court to dismiss it.

**Findings on the grounds of appeal**

3. In this court the appellant has raised 5 grounds in her memorandum of appeal. In ground 1, the appellant has faulted the trial court both in law and fact in failing to find that the suit was time barred in terms of section 4(2) of the Limitation of Actions Act (Cap 22) Laws of Kenya. In this regard, the provisions of section 4(2) provide as follows “*An action founded on tort may not be brought after the end of 3 years after which the cause of action arose: ‘ provided that an action for libel or slander may not be brought after the end of twelve months from such date*”

4. In this regard, it is clear from the pleadings that the cause of action arose on 28/7/2010 and the plaint was filed on 10/9/2013. It is therefore clear that the plaint was filed after the expiry of three years. In response to this, the respondent submitted that the period of limitation was not pleaded by the appellant in her defence. He therefore submitted that this issue cannot be raised for the first time in this appeal. He has cited *Dakianga Distributors (K) Ltd v. Kenya seed Company Limited (2015) eKLR*, in which the Court of Appeal pointed out that a party is bound by its pleadings and cannot be allowed to introduce evidence on unpleaded issues. Counsel has also cited *Joseph Njogu Kamunge v. Charles Muriuki Gachiri (2016) eKLR*, in which the court stated that the gist of the tort of libel and slander is the publication of the words that convey a defamatory imputation. The court went further and pointed out that defamatory imputation must be to a man's discredit, or which tends to lower him in the estimation of others. Alternatively, the defamatory imputation may also expose him to hatred, contempt or ridicule which may injure his reputation in his office, trade or profession in the opinion of right thinking members of society.

5. In this regard, the appellant has submitted that the cause of action is time barred. Counsel has cited a number of authorities including *Odd Jobs v. Mubia (1979) EA 476*, in which it was stated that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. The appellant has submitted that the issue of limitation was raised in her submissions during trial and therefore the trial court should have dismissed the suit for having been filed out of time.

6. In this regard, the law is that an issue of law may be raised for the first time in an appeal court. A case in point is *Mary Wambui Munene v. Peter Gichuki King'ara & the IEBC and Jane Mbai Petition No. 7 of 2014*, in which the Supreme Court agreed with the appellant that the first respondent's petition was filed outside the period of limitation. The court upheld the plea of limitation and allowed the appeal. The plea of limitation was raised and decided upon in that court sitting as a second appeal court.

7. Furthermore, in the *Hon. Attorney General & Ministry of State for immigration and 2 Others v. Andrew Maina Githinji & Another*, Civil Appeal No. 21/2015, the Court of Appeal entertained and determined a plea on the issue of limitation and proceeded to dismiss the action as having been filed out of time. The majority judgement (Waki, Kiage, JJA) held that a plea of limitation was properly raised notwithstanding that it was not pleaded. The minority judgement (Nambuye, JA) dissented and held that the issue of limitation had not been pleaded and on that score found that the preliminary objection was not properly raised in that court and was without merit.

8. It is clear from the foregoing that a pure point of law may be raised for the first time in an appeal court, as long as the point of law does not need any further investigations. In the instant appeal, it is clear from the pleadings that the plaintiff was filed three years after the cause of action arose. It is also clear that counsel for the appellant raised the issue of limitation of time during his submissions in the trial court. I find that the trial court erred in law in failing to find that on the pleadings, a pure point of law had been raised. It further erred in law by failing to find that the action was time barred by statute. In the circumstances, I uphold the first ground of appeal. In ground two, the appellant has faulted the trial court by failing to find that the statement recorded at the police station did not amount to defamatory words. In this regard, I find that the appellant went to Olmekenyu police post and reported that the respondent entered in her parcel of land by force, claiming that the land belonged to certain Kikuyus and not the respondent. The same statement indicated that in the same year (2005), the respondent maliciously destroyed the house of the appellant, which was valued at Shs.20,000/=. The statement went further and indicated that the respondent was illegally occupying the whole of her parcels of land being C is-mara/Ololulunga/13074 and 13077. Finally, the statement indicated that on 28/7/2010, he reported the same issue at Ololulunga police base, where she produced the title deeds in respect of these two parcels of land.

9. I find that as a result the appellant was charged in the Principal Magistrate's court at Narok with the offence of forcible detainer contrary to section 91 of the Penal Code (Cap. 63) Laws of Kenya, in Criminal case No. 823 of 2010. The charge was dismissed and the respondent was acquitted under section 202 of the Criminal Procedure Code (Cap. 75) Laws of Kenya, because the complainant did not turn up in court.

10. It is clear that the tort disclosed by the evidence against the respondent is malicious prosecution and not defamation. I therefore find that this ground of appeal is merited and I hereby uphold it.

11. In ground three, the appellant has faulted the trial court both in law and fact in awarding damages for defamation in an action that was time barred. In this regard, I find that the trial court was bound to assess the amount of damages it would have awarded to the respondent even if the claim had failed. In the circumstances, I find that the award of damages was based on the ground that the claim had succeeded. I therefore find no merit in this ground of appeal and is hereby dismissed.

12. In ground four, the appellant has faulted the trial court both in law and fact by failing to consider the issues raised in the appellant's submissions. In this regard, I find that the trial court erred by failing to consider the major issue of limitation. I therefore find that this ground of appeal succeeds and I hereby uphold it.

13. In ground five, the appellant has faulted the trial court both in law and fact by considering extrinsic matters by proceeding to base her judgement on the same. I have perused the judgement of the trial court and I find that the judgement is based on the evidence tendered before it.

14. In the circumstances, I find that the appellant's appeal has succeeded in respect of liability and I therefore set aside the judgement and decree of the magisterial court. The appellant is hereby awarded costs.

15. If I had upheld the judgement and decree, the issue of damages awarded would also become an issue for consideration. I have considered the authorities cited by both counsel in respect of the issue of general damages and the finding of the trial court. As a result, I find that the amount of damages awarded were manifestly excessive. In this regard, I find the case of *Joseph Nzalu Ngaena v. Winfred Kanyaa Mavaka*, Civil Appeal No. 15 of 2011 (High Court Machakos), in which the court found that it would have awarded Shs. 50,000/= general damages in respect of slander, in which the slanderous matters had alleged that the plaintiff was a thief and had been dismissed from his work due to stealing goats.

16. Following the decision of the Court of Appeal in *Ferinandes v. Rosterman Goldmines (1954) 21 EACA 97*, had I upheld the judgement, and decree in the instant appeal, I would have awarded the appellant Shs.70,000/= as general damages and Shs. 20,000/- as punitive or exemplary damages.

Judgement delivered in open court this 6<sup>th</sup> day of December, 2018 in the presence of Mr. Andama holding brief for Mr. Mambiri for the appellant and Mr. Mitiambo holding brief for Mr. Morintant for the respondent.

**J. M. Bwonwonga**

**Judge**

**6/12/2018**