



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 378 OF 2015

JAMLECK KAMAU.....PLAINTIFF/APPLICANT

VERSUS

ROYAL MEDIA SERVICES LTD t/a CITIZEN TV.....RESPONDENT

JUDGMENT

This ruling determines the exparte originating summons dated 29th October 2015 and filed in court on 5th November 2015 taken out by Ms Miller & Company Advocates on behalf of the applicant /plaintiff Jamleck Kamau. The originating summons seeks Orders:-

1. That leave be granted to the complainant/applicant to file suit against Royal Media Services Ltd t/a Citizen TV after the limitation period in terms of the annexed plaint.
2. That costs of this application abide the results of the intended suit.

The Originating Summons is predicated on the grounds that:

1. On various dates in the month of July 2013, in a television programme dubbed 'Road Hog' the respondent falsely, maliciously and spitefully aired/published and or caused be aired/published of and containing words that were defamatory in nature regarding the applicant herein. As a result thereof the claimant/applicants reputation has been badly tainted.
2. That the loss and/or damages claimed by the complainant applicant are in respect of the respondent's actions of publishing defamatory statements.
3. That the delay in filing suit was caused by the fact the complainant first sought an alternative remedy before the Complainants Commission of the Media Council formed under the Media Council Act (No. 46 of 2013).
4. That the said Commission does not award damages as a remedy hence the complainant's reason to file suit seeking the same.
5. That the applicant has a good claim against the respondent with high chances of success.
6. That is only mete (sic) and just that this application be allowed to enable the applicant to prosecute its claim against the respondent.
7. The respondent shall not be prejudiced in any way should this application be allowed.

The originating summons is further supported by an affidavit unsworn by Beatrice Nduta Advocate for the applicant on 29th October 2015 reiterating the grounds upon which the application (Originating Summons) is predicated and annexing copies of the complaint lodged with the Media Council and the decision of the said Media Council delivered on 9th September 2014. The 'affidavit' also annexes copy

of a draft statement of plaint setting out the proposed claim in libel. The Originating Summons is brought under Sections 27,28 of the Limitation of Actions Act and Order 36 Rule 3C of the Civil Procedure Rules and all enabling laws. As is with exparte summons, the Originating Summons was not defended. The applicants' counsel Ms Nduta appeared before me on 14th December 2015 exparte and argued the Originating Summons, relying on the grounds, her 'affidavit' and annexures thereto.

In her oral submissions Ms Nduta submitted that the publication complained of was on various dates in July 2013 and a complaint was lodged with the Media Council Complaints Commission and the verdict was arrived at on 9th September 2014 and the respondent was directed to air an apology which was done on 1st February 2015 and the applicant requested for the copy of the apology but the request was declined. She sought the discretion of the court under Section 27(2) of the Limitation of Actions Act since the respondent was found liable by the Media Complaints Commission hence the applicant would only be seeking for damages and liability to be confirmed.

I have seriously considered the Originating Summons as filed, the annexures and submissions made by the applicant's counsel Ms Nduta in support of the exparte Originating Summons.

The law that limits the time frames within which causes of action should be instituted in court is the Limitation of Act Cap 22 Laws of Kenya and the Public Authorities Limitation Act.

In the instant case, the relevant law is the Limitation of Actions Act and specifically, the provisions are in Sections 4,27,28,29,30 and 31 of the said Act.

Section 4(2) of the Act provides that:

“An action founded on tort may not be brought after the end of three years from the date 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.”

The above provision is nonetheless qualified by Section 22 of the same Act which provide that if on that date when a right of action accrues for which a period of limitation is prescribed by the Act, the person to whom it accrues is under a disability the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event occurs first, notwithstanding that the prescribed period of limitation has expired. There are, however, limitations to the above provision.

In this case, there has been no plea of disability or fraud or any other condition that could have prevented the applicant from instituting suit within the prescribed 12 months from the date(s) when the alleged publications were made.

Section 4(2) of the Act is also qualified by Section 27 (1) of the Act which provide that Section 4(2) does not afford a defence to an action founded on tort where:-

- a. The action is for damages for 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) and;
- b. The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person; and
- c. The court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
- d. The requirements of Subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this Subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all material times outside the knowledge (actual or constructive) of the plaintiff until a date which-

- a. Either was after the three years period of limitation prescribed for that cause of action or was

- not earlier than one year before the end of that period; and
- b. In either case, was a date of earlier than one year before the date on which the action was brought.

(3) This Section does not include or otherwise affect-

- a. Any defence which, in an action to which this section applies may be available by virtue of any written law other than Section 4(2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
- b. The operation of any law which, apart from this Section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

In this case, the claim is clearly not founded on the tort of negligence, nuisance or breach of duty.

Mbito J in **Lucia Wambui Ngugi V Kenya Railways & Another Nairobi HCC Miscellaneous Application 213 of 1989** stated as follows in interpreting Section 27 of the Limitation of Actions Act as reproduced above:-

“When an application is made for leave under the Limitation Act, a Judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support if the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the ex parte application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given ex parte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to done him by obtaining an order for the trial of a preliminary issue.....Section 27 of the Limitation of Actions Act.....provides that limitation period under Section4(2) of the said Act can be extended in certain circumstances and by the provisions of Section 31 of the Said Act, all limitation periods prescribed by any other written law is extendable by the provisions of Section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of Section 27 of the Act as read with Section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant’s ignorance of material facts relating to the cause of action which were of decisive character.... Although what amounts to “ignorance of material facts of decisive character” is not always easy to distinguish, by Section 30(1) of the Limitation of Actions Act when read with Subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action.”

Potter, J in **Gathoni vs Kenya Co-operative Creameries Ltd [1982] KLR 104** similarly has this to say:

“The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of Section 22(2) (b) of the Limitation of Actions Act does not include physical disability.....Of course, if the applicant were under a relevant disability, she would not need to leave of the court to commence her action. The issue as to whether the period limitation was extended in her case under Section 22 would no doubt be

raised as a preliminary issue at the trial. The applicant's application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge(actual or constructive).....Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have before that time for the purpose of obtaining appropriate advice with respect to those circumstances....In Section 30(5) "appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be.....The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suit against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."

From the above , clearly, extension of time in claims made in tort must be in respect of 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).

And from the aforesaid section 27 of the Limitation of Actions Act, 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 written law.) Therefore Section 27 does not provide for extension of time in defamation cases. This position was confirmed in the case of **Mary Osundwa V Nzoia Sugar Company Ltd CA 244 of 2000** where the Court of Appeal stated:

“ Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort.”

Odunga J in **Republic V Principal Magistrate P. Ngare Gesora & 2 Others Exparte Nation Media Group Ltd [2013] e KLR** held that a claim for damages for defamation cannot lend itself to the remedy of extension of time under Section 27 of the Limitation of Actions Act.

The Court of Appeal, Shah JA in **Mary Wambui Kabugu V Kenya Bus Services Ltd CA 195/1995** stated inter alia:

“.....There may even be cases where a judge because of workload in the superior court, may not have time to apply his mind to the requirements of the Act which Act of course limits the granting of such leave in respect of personal injury. Fatal Accidents Act and the Law Reform Act claims only often, the interpretation of Section 27, 28 and 29 of the Act as explained in Section 30 of the Act may not have been brought to the attention of the Judge.....”

The above decision of the Court of Appeal was also clear per Akiwumi JA that the order granting leave is only provisional and not final since it is made exparte and the defendant would have every opportunity of challenging the facts and the law afterwards at the trial. Nonetheless, the granting of leave is not an automatic right to every applicant. The court being asked to grant such leave must be

satisfied that the application satisfies the conditions to be fulfilled in Section 27(2) of the Limitation of Actions Act, since the issue of limitation is a jurisdictional issue and therefore it should not be decided by an erroneous decision (see **Carmella Wathugu Karigaca V Mary Nyokabi Kangaca CA 30/95** and without jurisdiction, as was held in Owners of **Motor Vessel Lilian "S" Vs Caltex Kenya Oil Co Ltd** a court of law has no power to make one more step. It must down its tools.

In **Dr Lucas Ndungu Munyua V Royal Media Services Ltd & Another [2014] e KLR G.V. Odunga J** held that as there was no jurisdiction to extend the time in respect of the claim in defamation, the suit in so far as the claim was concerned, was therefore incompetent and could not stand and proceeded to dismiss the suit. Similarly in **Nzoia Sugar Company Ltd V Collins Fungututi CA 7 of 1988[1988] KLR 399**. The court was clear that:

"A judge cannot lawfully award damages for defamation in an action barred 12 months after the cause of action arose."

In **Dhanesvar V Mehta Manilal M. Shah [1965] EA 321** the court stated that ***".....the effect of limitation enactment is to remove remedies irrespective of the merits of the particular case."***

In the other words, it matters not that the applicant herein has a good case and or that he delayed filing of the suit for reasons that he was pursuing his complaint with the Media Council Commission and or that the said Commission only rendered its decision on 9th September 2014 after the period of filing suit was over or that the said Commission could not award damages hence this action. Those are not acceptable grounds which this court can rely on to grant extension of time for filing suit that is statute barred. Even if the claim was falling within Section 27(2) of the Limitation of Actions Act, there is indeed no evidence that the applicant was ignorant of material facts of a decisive character as he was ably represented by the advocates Miller & Company Advocates who filed the complaint on his behalf before the Media Council Commission and who must have known and therefore advised him that the Commission does not award damages and or that the suit would be statute barred after 12 months from the date when the cause of action allegedly arose.

The object of limitation enactment, it should be noted, it to prevent a party from prosecuting stale claims and unless the person fulfils the conditions for extension of the limitation period as set out in the Act, the court has to reject the application especially where the law does not even permit extension of the limitation period as is in this case of defamation. See **Rawal V Rawal [1990] KLR 275 Bosire J and Iga V Makerere University [1972] EA 65**.

In addition to the above statutory enactment and the relevant case law which I have cited extensively, Section 5 of the Civil Procedure Act Cap 21 Laws of Kenya is explicit that:

"Any court shall, subject to the provisions herein, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred."

From the above bar, 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. In **David Githumbi Thande & Another vs Githunguri Dairy Farmers Co-operative Society Ltd & 9 Others** Mwera J (as he then was) allowed an application seeking to review orders of the court that had allowed extension of the limitation period to file suit based on the tort defamation on the ground that when the plaintiff filed a chamber summons and got time enlarged within which to bring the suit, all was in error because the Limitation of Actions Act only provided for such extension in the event of a claim for personal injury or death.

The upshot of all the above is that I find the Originating Summons dated 29th October 2015 misconceived and I proceed to strike it out and dismiss it with no orders as to costs.

I must however mention that the so called "affidavit" of Beatrice Nduta in support of the Originating Summons was not commissioned and therefore it remained a mere statement of fact not testable on

oath.

The requirement of the law, and hence the term affidavit, and that an affidavit can only be an affidavit if it is commissioned by either a commissioner for Oaths, a Magistrate or a Notary Public is an elementary requirement. An affidavit by its every character contains matters of evidence on oath and has attendant consequences including if one is found to have lied on oath, they may be culpable of perjury. It therefore follows that for a statement to be called an affidavit, it must be signed on an oath being administered on the deponent otherwise a non commissioned affidavit does not elevate such signed statement to status of an affidavit but places it at best as a mere signed statement of facts.

Consequently, I find that there was indeed no affidavit supporting the Originating Summons and therefore the question that follow is whether that situation is curable by Order 19 Rule 7 of the Civil Procedure Rules which provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof, or any technicality and or invoke Article 159(2) (d) of the Constitution which calls on the courts to ensure that justice shall be administered without undue regard to procedural technicalities. I am persuaded beyond peradventure that a non commissioned affidavit is not an affidavit. Commissioning of an affidavit is what clothes a statement to be an affidavit and therefore failure to commission an affidavit is not a mere technicality and neither is it a defect of misdescription or other technicality in form that a serious court of law can ignore. It goes to the root of the matter. Accordingly, I find that the Originating Summons dated 29th October 2015 was and is without a supporting affidavit.

The other question is, can that Originating Summons survive on its own without a supporting affidavit? The answer is found in the same procedural provisions that permit the filing of an Originating Summons for extension of the limitation period under Sections 27 of the Limitation of Actions Act Cap 22 Laws of Kenya. The relevant provision as correctly cited by the applicant is Order 37 Rule 6 of the Civil Procedure Rules which expressly provides that:

“6(1) an application under Section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by Originating Summons supported by affidavit.”

The above provision of Order 37 Rule 6(1) of the Civil Procedure Rule is clear that an Originating Summons such as the present one must be supported by an affidavit. It is therefore trite that the Originating Summons is unsupported by any evidence by way of an affidavit.

Noting that the summons is to be heard ex parte, affidavit evidence, and therefore evidence on oath would be absolutely necessary at this stage to satisfy the court as to the reasons for the delay in filing suit within the statutory period and which reasons are amenable to being challenged at the trial of the main suit where such leave is granted.

In the premise, and even if I was to be found wrong on my earlier finding that there is no jurisdiction for this court to extend the limitation period for filing of suit based on defamation (libel or slander), I would still be inclined to dismiss the Originating Summons as being incompetent. Accordingly, the Originating Summons dated 29th October, 2015 is hereby struck out and dismissed with no orders as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 10th day of February, 2016.

R.E. ABURILI

JUDGE

10/2/2016

Coram Honourable Aburili J

C.A. Adline

Miss Kihumba holding brief for Miss Nduta for the applicant (exparte)

Court – Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

10/2/2016