



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 261 OF 2014**

**LORNAH JEBIWOTT KIPLAGAT.....1<sup>ST</sup> PLAINTIFF**

**PIETER LANGERHORST.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ISAACK OMULO.....1<sup>ST</sup> DEFENDANT**

**THE EDITOR IN-CHIEF STANDARD GROUP.....2<sup>ND</sup> DEFENDANT**

**THE STANDARD GROUP LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiffs herein filed a suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants based on libellous and or defamatory statements attributed to the two defendants. The prayers sought are general damages, suitable apology and retraction article given the same prominence as the defamatory articles. Following the service of summons and plaint, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a statement of defence wherein the allegations in the plaint were denied but more importantly the jurisdiction of this court, in view of Section 5 of the Civil Procedure Act Cap 21, Section 4 of the Limitation of Actions Act Cap 22 and Section 20 of the Defamation Act, Cap 36, Laws of Kenya

Simultaneously filed with statement of defence was a Notice Of Motion dated 24<sup>th</sup> September, 2015 under Order 2 Rule 15 (a) and (d), Order 51 Rule 1 (3) seeking orders that the plaint dated 2<sup>nd</sup> September, 2014 be struck out and the costs of the application and the suit be borne by the plaintiffs. The grounds for seeking those orders are set out on the face of the said Notice of Motion.

On 1<sup>st</sup> of October, 2015 the plaintiffs filed a Notice of Motion under Order 1 Rules 3, 5,7,9,10 (2) and 10 (4), Order 8 Rules 3,5 and 7, Order 40 Rule 1,2,4 and 8 of the Civil Procedure Rules, Sections 1A, 1B,3 and 3A of the Civil Procedure Act and Article 159 of the Constitution, seeking orders that leave be granted to the applicants to amend the plaint as per the draft amended plaint, that the proposed amended plaint be deemed to have been duly filed and served, leave be granted to the plaintiff extending time to enjoin the Standard Group Limited as the 3<sup>rd</sup> Defendant in this case, and subject to leave being granted to extend time, the proposed amendments at paragraphs 4 A and 7 of the amended plaint be allowed.

There is also the prayer that injunctions do issue to restrain the defendants jointly and severally from publishing any other or further defamatory material against the plaintiffs. It is clear that this application by the plaintiffs was prompted by the defendant's application to strike out the plaint. Counsel for the parties have filed written submissions addressing the issues at hand with respect to the plaintiff's

application. They have also cited several authorities that I have considered.

Having pleaded lack of jurisdiction it is the defendants' case that this court should not hear the plaintiffs as clearly this suit is time barred. From the pleadings sought to be amended, the publications complained of were made on 29<sup>th</sup> September and 18<sup>th</sup> October, 2012 whereas the plaint was filed on 2<sup>nd</sup> September, 2014 meaning that that step was taken 22 months from the date of publication.

Section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya provides 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. “***

That proviso was effected under the Defamation Act Cap 36 Laws of Kenya Section 20 thereof, which amended the Limitation of Actions Act as follows,

**“20. (2) of Section 4 of the Limitation of Actions Act 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.”**

Section 5 of the Civil Procedure Act provides as follows,

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

A reading of the above provisions would lead any court to agree with the defendants that the plaintiffs' suit is time barred, and therefore the move to amend the plaint should not be entertained for want of jurisdiction. The applicants by the affidavit in support of the application and submissions presented, seek to persuade the court that notwithstanding the limitation provisions cited above, the court should entertain and allow the application. The order sought by the plaintiffs is discretionary which discretion should be exercised judicially.

Paragraph 15 of the supporting affidavit states as follows,

There is no doubt that the allegations made and upon which the plaint was grounded are serious. The two plaintiffs are said to own and manage the High Attitude Training Camp (HATC) and the 1<sup>st</sup> plaintiff is said to be a respected athlete both in the Republic of Kenya and internationally. The allegations are related to doping impliedly perpetrated by the plaintiffs and their institution. The publication was said to have been made by the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant.

The courts have no authority to amend a statute, therefore cannot either extend or accommodate a party who is clearly barred by statute from seeking to be accommodated therein. The Civil Procedure Act, points to a situation whereby life can be injected into an action to accommodate a party who may be time barred provided that no prejudice or loss may be occasioned to the other parties.

A person seeking a remedy for defamation is expected to act promptly for clear reasons that such actions relate to reputation, injury and in some cases preservation of the material complained of. In a publication by Carter- Ruck on Libel and Slander 5<sup>th</sup> Edition at page 187 the author quoting what I believe to be Limitation Act 1980 of England stated as follows,

**“Under the amended Section 32A of the Limitation Act 1980 the court will exercise its discretion with regard to all circumstances of the case, nevertheless, it is directed to have particular regard to: the length of any delay by a plaintiff and the reason for that delay; and the extent to which deal in bringing proceedings makes it likely that either evidence will be unavailable or that evidence will be less cogent than if proceedings had begun within one the one year limitation period. Additionally, where the plaintiffs reasons for delay include the fact that he did not know within the limitation period one or more of the basic facts needed to plead his claim the court will particularly scrutinize the dates when such facts did become known to him and how reasonably and promptly he acted once he knew those facts, and that based on them he might have a cause of action.”**

**“15. I and my co-plaintiff pray for leave to argue this case notwithstanding that it is out time on the grounds that the delay on our part to urge the case was on account of the additional grounds that were:-**

- a. Seeking witnesses including witnesses from World Anti-Doping Agency, International Association of Athletes Federations, etc.**
- b. Seeking defence exhibits from in and outside Kenya.**
- c. Seeking to authentic basis of the defamation and particulars of any justification for any publication seeking to establish the full scope and participants in the defamation network.**
- d. Seeking statutory duty violated by the parties involved.”**

The plaintiffs have also alleged as late as 10<sup>th</sup> 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.

In the case of **James Ochieng Oduor trading as Ochieng Oduor and Co. Advocates Vs. Richard Kuloba** [2008] 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 Vs 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 Vs Shamsudin (1973) EA 451). However, such amendments can only be allowed where peculiar circumstances are present.”**

In the event there is continued publication after the limitation period set out in the statute cited above, then how is the legal right of the plaintiffs supposed to be protected?. Should they be allowed to amend the original pleadings or file a fresh claim? If the substratum of the claim has not changed, there is no reason why a new claim should be filed and in that case, courts should be inclined to invoke the provisions of the Civil Procedure Act (Sections 1A, 1B, and 3A) that ensure the overriding objective of civil disputes is achieved. That is to say, the Civil Procedure Act is intended to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

There is then the question of prejudice on the defendants if the plaintiffs’ application is to be allowed. The thrust of objection in such cases is that memories fade and sometimes journalists move and may not be found. It is also noted that records in some instances are retained only for a short period and sometimes may be missing when the suit eventually comes to hearing.

While this is a genuine concern, it should be noted that the world has moved and today electronic records are stored in servers and newspaper reports are not the only source of storage in such circumstances. This

is an era of high technological innovation where a publication is not only on paper but posted on internet and other related platforms. A claim based on written material can be sustained if it is proved that the author is the person cited.

The allegations raised against the plaintiffs and their institution are no doubt serious. Subject to proof the implications would be far reaching. The institution is associated with high ranking sports and sports personalities. High profile individuals have been trained in that institution. The allegations of doping are now a concern world over, and for such a claim to be determined without a hearing would cause injustice to the parties. The contents of paragraph 15 of the supporting affidavit cited above alongside the continued publication of the report complained of present peculiar and special circumstances which work in favour of the plaintiffs.

The intended 3<sup>rd</sup> defendant is the employer of the 1<sup>st</sup> and 2<sup>nd</sup> defendant. There has been a candid admission on the part of the plaintiffs that failure to include it in the original plaint was an oversight which has been regretted. Further, a reading of the defence filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants clearly alludes to the defence of the intended 3<sup>rd</sup> defendant.

Prejudice may not be visited upon the defendants if I were to hold and find merit in the application. I have restrained myself from delving deeper into the allegations made in the plaint for obvious reasons. But doing the best I can in the circumstances of this case, and considering that the courts should be inclined to maintain actions rather than dismissing them, I am persuaded that the plaintiffs' application dated 28<sup>th</sup> September, 2015 should be allowed.

Accordingly I allow prayers no. 1, 2, 3 and 4 of the said application. Prayer No. 5 relating to injunction has not been sufficiently canvassed in the submissions and therefore I make no orders relating thereto. Having so held, the defendants application dated 24<sup>th</sup> September, 2015 cannot be addressed.

The 3<sup>rd</sup> defendant shall be served with summons to enter appearance within 14 days of today. Liberty to apply reserved.

Costs in the cause.

***Dated, signed and delivered at Nairobi this 9<sup>th</sup> Day of November, 2016.***

**A. MBOGHOLI MSAGHA**

**JUDGE**