



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 49 OF 2010

HESBON ONYURO PLAINTIFF

VERSUS

GILBERT ODUOR1ST DEFENDANT

THE ATTORNEY GENERAL2ND DEFENDANT

(On behalf of the Minister of State in-charge of Internal Security & Commissioner of Police)

RULING

This is a case that was transferred to this Court from Bungoma way back on 9th April 2009. By his Plaint dated 11th August 2008 the Plaintiff's prayers were:-

(a) a sum of Kshs.95,950,423/=

(b) General damages for:-

(i) Defamation

(ii) Malicious prosecution

(iii) False imprisonment

(c) Costs of the suit

(d) Interest on (a), (b) and (c) above

The claim arises from the alleged unlawful impounding and destruction of the Plaintiff's property by the police and his arrest, detention and subsequent prosecution which was however later terminated.

Upon transfer to this Court the matter was fixed for hearing but did not proceed as parties were not ready. When it came back to Court on 7th December 2011 Mr. Odeny, Advocate for the Plaintiff applied for adjournment on the ground that the Plaintiff had died. All went quiet until 27th May 2014 when the Notice of Motion now before this Court for determination was filed. The same is brought under Order 24 Rule 391) of the Civil Procedure Rules and seeks an order for substitution of the Plaintiff. It is premised on grounds that the Plaintiff died on 19th September 2011 and that Amos Okeyo Odago, the applicant, is the executor of his will. A copy of the certificate of death in respect of the deceased and a Grant of Probate of written will are annexed to the supporting affidavit.

The application is vehemently opposed by both the Defendants/Respondents. They both anchor their opposition on Section 2(1) of the Law Reform Act and Order 24 Rule 3(2) of the Civil Procedure Rules.

Parties proceeded by way of written submissions.

Mr. Odeny for the Plaintiff conceded that the prayer for damages for defamation does not survive the deceased. He however submitted that under Section 2(3) of the Law Reform Act the other causes of action survive the deceased and that as the Plaintiff died during the pendency of this suit the same are maintainable. He urged this Court to allow this application to enable the estate of the deceased benefit from the outcome of the suit.

Basing their arguments on Section 2(1) of the Law Reform Act and Order 24 Rule 3(2) of the Civil Procedure Rules the Advocates for the Defendants in their separate submissions urged this Court to dismiss the application.

Counsel for the 1st Defendant argued that the cause of action does not survive the deceased at all and added that as for the one on malicious prosecution it is not maintainable as the person wishing to be substituted is not the one who was maliciously prosecuted or falsely imprisoned. He also argued that the suit also abated for want of substitution within one year. He relied on:-

- **Chispine Otieno Caleb V. Attorney General [2014] eKLR**
- **James Karuga Kiiru V. Joseph Mwamburi & 3 Others NBI C/A NO. 171 of 2000**
- **Rotich Cherutich & 3 Others V. Ther Director of Surveys [2013] eKLR.**

He further argued that even the suit as filed was incompetent the same having been filed outside the three year limitation period provided for under section 4(2) of the Limitation of Actions Act. He prayed for the costs of this application.

Like Counsel for the 1st Defendant, in her submissions Counsel for the 2nd Defendant argued that the claim for the false imprisonment and malicious prosecution is a personal and further that in any event the suit against the 2nd Defendant could not stand as it was time barred under Section 3(1) of the Public Authorities Limitation Act which limits the time for bringing claims founded on tort against the government to twelve months from the date the cause of action accrued. She argued that the causes of action herein having accrued on 29th June 2006 and this suit having been filed on 13th August 2008 the same were time barred. She relied on:-

- **Thomas Mutsotso Bisembe V. Commissioner of Police and Another [2013] eKLR.**
- **M'Mboroki M'Arangacha V. Land Adjudication Officer Nyambene & 2 Others [2005] eKLR.**

The proviso to section 2(1) of the Law Reform Act rules out the survival of the Plaintiff's claim founded on defamation and as Mr. Odeny has conceded that I need not dwell on it. What about the other claims? The claim for pecuniary damages and those for damages for malicious prosecution and false imprisonment would under Section 2(1) of the Law Reform Act survive for the benefit of the deceased Plaintiff's estate. I do not however agree with Mr. Odeny's, Learned Advocate for the Plaintiff submission that Section 2(3) of the Law Reform Act fortifies his client's application. A closer reading of the sub-section shows that the same applies in instances where the claims that survive are against the estate of the deceased but not the other way round. That stated it is my finding that the instant application for substitution of the Plaintiff cannot stand even though the causes of action for pecuniary damages and for false imprisonment and malicious prosecution survive the deceased. Whereas Order 24 Rule 3(1) of the Civil Procedure Rules allows for substitution of Plaintiff who has died and the cause of action survives Rule 3(2) requires that the application to do so be made within one year. Order 24 Rule 3(2) states:-

"Where within one year no application is made under sub-rule (1) the suit shall abate so far as the deceased Plaintiff is concerned and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff."

The Plaintiff in this case died on 19th September 2011 so one year lapsed on 18th September 2012 yet this application was filed on 27th May 2014. Clearly, therefore this suit has abated and the claims by the deceased Plaintiff are not maintainable. It is instructive that whereas the section provides for extension of time upon application no application for extension of time to file this application was made.

The foregoing notwithstanding I do also agree that the suit against the 2nd Defendant was incompetent by virtue of Section 3 (1) of the Public Authorities Limitation Act which states:-

“(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.”

The cause of action herein arose on 28th September 2006 (see paragraph 4 of the Plaintiff). This suit was filed almost two years and was therefore time barred. The 1st Defendant did not plead limitation in his Defence and even if he had he would not succeed as the relevant provision in his case would have been Section 4(2) of the Limitation of Actions Act which limits the bringing of actions founded on tort to three years save for libel and slander which is twelve months.

The upshot however is that the applicant's Notice of Motion is not only incompetent but it also lacks merit. It is dismissed but with an order that parties shall bear their own costs both of the application and the abated suit. It is so ordered.

Signed, dated and delivered at Kisumu this 8th day of October, 2015

E. N. MAINA

JUDGE

In presence of:-

Mr. Odeny for the Plaintiff

Miss Oron for the 1st Defendant

N/A for the 2nd Defendant

CC: Moses Okumu