



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 638 OF 2009

PROF. SAM K. ONGERI.....PLAINTIFF

VERSUS

- 1. CATHERINE GICHERU..... 1ST DEFENDANT**
- 2. GEOFFREY MOSOKU.....2ND DEFENDANT**
- 3. ANDREW TAYIE.....3RD DEFENDANT**
- 4. THE NAIROBI STAR PUBLICATIONS LIMITED...4TH DEFENDANT**

RULING

The 4th Defendant has applied by Notice of Motion dated 9th February 2015 for the main order that the Plaintiff's suit against the 4th Defendant be struck out. It is brought under section 4(2) of the Limitation of Actions Act (Cap 22), Order 2 rule 15(1)(a) and Order 51 rule 1 of the Civil Procedure Rules, 2010.

The grounds for the application are –

- i. The cause of action in this suit arose on 9th November 2009 and is founded on the tort of libel, for which reason the limitation period for instituting a suit thereon lapsed on 9th November 2010.
- ii. By an amended plaint filed on 2nd March 2011, the Plaintiff enjoined the 4th Defendant to these proceedings following a ruling by Mwera J. (as he then was) allowing the Plaintiff's application to do so.
- iii. Although the 4th Defendant had raised the issue of limitation of actions in opposing the Plaintiff's joinder application, the learned Judge at page 4 of his Ruling refrained from making findings on the merits/demerits of the issue because he did not have an application to strike out a plaint before him or give such orders as could follow a plea under the Limitation of Actions Act;
- iv. The Defendant subsequently filed an amended statement of Defence in response to the Plaintiff's Amended Plaint in which the 4th Defendant has pleaded that the suit is time barred against it, hence this application.
- v. That the lapse of the limitation period for instituting a suit against the 4th Defendant is attributable to the Plaintiff's want of diligence.

The Plaintiff has opposed the application through grounds of opposition filed on 12th May 2015 which are to the effect that –

- i. The amended plaint discloses a reasonable cause of action against the 4th Defendant as it has been

- admitted that it is the owner and publisher of the Star Newspaper Edition No. 731 published on Monday 9th November 2009;
- ii. The application is tantamount to an appeal of the ruling of Justice Mwera and hence an abuse of process;
 - iii. The applicant's computation of the twelve months limitation period for defamation suits wrongly includes the period covering the Christmas vacation between and hence the twelve months had not lapsed;
 - iv. The ruling of Justice Mwera clearly made the joinder of the 4th Defendant an issue for trial in the main hearing and thereby intimating that the amended plaint disclosed a reasonable cause of action;
 - v. The application is incompetent as it offends the rule that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and Article 159 of the Constitution.
 - vi. The application is inequitable since it has been brought too late in the day yet the 4th Defendant was joined over three years ago;
 - vii. The applicant has not approached the court with clean hands since the application was filed to defeat the listing of the main suit for hearing.

Section 4(2) of the Limitation of Actions Act, Cap 22 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.”

The provisions of **section 27** of the same Act (extension of the limitation period) are not applicable to actions for defamation.

The cause of action as pleaded in the present suit (paragraph 8 of the plaint dated 24th November 2009) accrued on 9th November 2009. The suit was filed on 25th November 2009, within the limitation period yet the amended plaint which sought to join the 4th Defendant was filed on 2nd March 2011 way out of the period of limitation referred to above.

It has been contended for the Plaintiff that the application herein is without merit as it amounts to an appeal against the orders of Mwera J. when he made the decision to join the 4th Defendant. In the operative part of the ruling the learned Judge stated –

“The question whether this suit was statute-barred at the time of institution was addressed by both sides. But amendment to it cannot be said to be caught up in that. The intended defendant appeared to approach that issue as if it had before court an application to strike out the plaint or give such orders as could follow a plea under the Limitation of Actions Act. The court did not have such proceedings before it and so could not make any finding on the merits and demerits of the issue”

The Judge in the statement above intimated that since he did not have before him an application to strike out the plaint, he could not make a finding on the merits and demerits of the issue of limitation. Therefore, this is an issue which could be raised and argued at a later date as has happened through this application.

The other concern posed by the Plaintiff is that the 4th Defendant has raised the issue of limitation too late in the day and that it might have been fueled by the mention notice for pre-trial directions. As it is a jurisdictional issue, it is essential that it be addressed regardless of the stage of the proceedings. Though raised belatedly, the main suit is yet to be heard and so no concrete evidence on the substantive dispute has been tendered before court.

The Plaintiff's counsel has argued that the issue of limitation is procedural and that courts should endeavor to deliver substantive justice without undue regard to procedural technicalities.

The Court of Appeal has had occasion to pronounce itself on this matter in the decision of **Nicholas Kiptoo Arap Korir Salat – Vs - IEBC & Winfred Rottich Lesan & 2 Others 2014[eKLR]** -

“I am not in the least persuaded that Article 159 of the Constitution and the Oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed, courts cannot aid in the bending and circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

As stated earlier, as the law does not allow for extension of time within which the Plaintiff should institute suit against the 4th Defendant the application by **notice dated 9th February 2015 is allowed.** The suit as against the 4th Defendant herein having been filed out of the statutory period of limitation, and there being no provision under statute for extension of that period, the suit is hereby struck out with costs to the 4th Defendant.

It is so ordered.

Dated and delivered at Nairobi this 6th Day of November, 2015.

A.MBOGHOLI MSAGHA

JUDGE