



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 640 OF 2008

CAROLINE WANJIRU NDERITU :::::::::::::::::::: PLAINTIFF

-VERSUS-

PHOENIX PUBLISHERS LIMITED :::::::::::::::::::: 1ST DEFENDANT

GLAXOSMITHKLINE LIMITED :::::::::::::::::::: 2ND DEFENDANT

R U L I N G

1. The 1st Defendant has filed a **Notice of Preliminary Objection** dated **12th June 2013** on 13th June 2013 following the institution of the current suit. The Plaintiff instituted the suit by way of a **Plaint** dated **24th October 2008** against the Defendants where she alleged that the Defendants had infringed on her copyright by producing and authorizing the reproduction of substantial parts of her written works in a material form.
2. The 1st Defendant has raised three main objections in regard to the Plaintiff's suit. It is the 1st Defendant's contention that the current suit has been filed outside the time stipulated by law and that the Plaintiff did not apply for leave to file the suit outside the time limitation. It is also the 1st Defendant's contention that the Plaintiff has not yet applied for the leave of Court to amend the **Plaint** after the Court ordered that the 2nd Defendant be struck out from the suit.
3. The Plaintiff filed a reply to the Preliminary Objection on **27th February 2014** by way of a **Replying Affidavit** sworn by herself on **24th February 2014**. It is averred by the Plaintiff that the Preliminary Objection is not proper as it touches on matters of facts and evidence.
4. In response to the first and second objections, it is the Plaintiff's assertion that the current proceedings were brought within the proper time under law. She denies the allegation by the 1st Defendant that the cause of action arose on 23rd September 2004. It is further the Plaintiff's position that she sued the 1st Defendant for breach of contract for which the time limitation of bringing a claim is six (6) years from the date of breach. The Plaintiff referred the Court to the **Licence Agreement** between herself and the 1st Defendant dated **6th December 2003**.
5. With regard to the third objection, it is the Plaintiff's position that the fact that she has not amended the **Plaint** after the 2nd Defendant was struck off the suit is not fatal to her suit.
6. The Preliminary Objection was prosecuted by way of written submissions. The 1st Defendant filed

its submissions on **23rd May 2014** while the Plaintiff filed their reply on **27th May 2014**.

ANALYSIS

7. I have considered the Preliminary objections and the written submissions on record. Having done so I take the following view of the matter. The celebrated decision in the case of ***Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited***, still remains good law insofar as matters can be raised before Court by way of Preliminary Objection. The matters to be raised should be in points of law.
8. The first objection raised by the 1st Defendant is that the current suit was filed out of time, the cause of action having accrued more than three years prior to the commencement of these proceedings. It is submitted for the 1st Defendant that the alleged cause of action is a tort and therefore the current proceedings are in contravention of **section 4 (2) of the Limitations of Actions Act**. The said section provides that 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.
9. The second objection which is related to the first one above is that the Plaintiff did not apply for leave to file the suit outside the time limitation in accordance with **Order 37 Rule 6 (2) of the Civil Procedure Rules**.
10. I have perused the Plaintiff on record and I see no indication of when the cause of action in the said Plaintiff arose. In fact, there is no indication that the cause of action arose on **23rd September 2004** as suggested by the 1st Defendant.
11. On the issue of cause of action, the 1st Defendant has not laid a basis as to why they considered the current cause of action to be that of tort. The Plaintiff's position is that she is suing the 1st Defendant for breach of contract having entered into a license agreement with the Defendant dated 6th December 2003. This position is not controverted. Even if it was controverted, the same would be a disputed fact and therefore cannot form part of a preliminary objection.
12. With regard to the third objection, it is the 1st Defendant's contention that the Plaintiff has not amended the Plaintiff after the 2nd Defendant was struck out. It is therefore the 1st Defendant's submission that the Plaintiff has breached the provisions of **Order 8 rule 3** of the Civil Procedure Rules. The said order basically provides that amendment of pleadings shall be subject to the leave of Court. There is no provision that once a party has been struck out pleadings must be amended, though it may be the logical thing to do.
13. In the upshot, the Notice of Preliminary Objection dated **12th June 2013** and filed on **13th June 2013** is dismissed with costs to the Plaintiff.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Ndegwa for Plaintiff/Respondent

M/s Kariuki holding brief for Wachira for Defendants

Teresia – Court Clerk