



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 587 OF 2007

JOHNSON KOBIA M'MPWI.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....1ST DEFENDANT

ALOISE RENTARE NYAMU.....2ND DEFENDANT

RULING OF THE COURT

1. The 1st application by the 2nd Defendant is the Chamber Summons dated 26/03/2008 brought under Order 6 Rule 13(b) and (d) (sic) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking **ORDERS:-**

1. ***THAT the Plaintiff's suit herein be and is hereby struck out.***

2. ***THAT the Applicant be awarded costs of this suit.***

2. The application is premised on 5 grounds on the face thereof:-

(a) ***This suit has filed (sic) is bad in law, misconceived, incompetent and fatally defective, as the Plaintiff's claim is barred by the limitations of Actions Act Cap 22 of the Laws of Kenya.***

(b) ***The Plaintiff's claim arises out of a tort in which the cause of action arose in 2004. The Plaintiff's claim is now brought after 3 years after the statutory period of limitation.***

(c) ***The suit does not raise any reasonable cause of action.***

(d) ***The amended complaint herein offends the Provisions or order VII Rule 1 of the Civil Procedure Rules.***

(e) ***The entire suit against the Plaintiff (sic) is frivolous, vexatious and an abuse of the court process and the same should be dismissed with costs.***

3. To further support the application is the sworn affidavit of **ALOISE RENTARE NYAMU**, the 2nd Defendant herein. He says that on the advice of his advocates on record, the Plaintiff's amended complaint is incompetent, bad in law, misconceived and fatally defective in that it is statute barred by the Limitation of Actions Act, Cap 22 Laws of Kenya; that the suit does not disclose any reasonable cause of action and

that the entire suit as against the 2nd Defendant is frivolous, vexatious and an abuse of the due process of the court. The deponent also says that the Plaintiff should have sued the Attorney General who is the rightful person to be sued on behalf of the 1st Defendant in whose employ the 2nd Defendant works.

4. The 2nd application for determination before me is the Chamber Summons dated 12/06/2008 filed on behalf of the 1st Defendant and is expressed to be brought under Order 6 Rule 13(1) (a), (b) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking the following ORDERS –

(1) THAT [the] Plaintiff's suit herein be struck out.

(2) THAT the Applicant herein be awarded costs of the suit.

5. The application is premised on six grounds on the face thereof –

1. THAT this suit as filed is bad in law, misconceived, incompetent and fatally defective, as the Plaintiff's claim is barred by the Limitation of Actions Act Cap 22 and The Public Authorities Limitation Act Cap 39 of the Laws of Kenya.

2. THAT the Plaintiff's claim arises out of a tort in which the cause of action arose in February 2004. The Plaintiff's suit is now brought more than 3 years after the statutory period of Limitation.

3. THAT the suit discloses no reasonable cause of action.

4. THAT there is a material non-joinder of the necessary parties to this suit.

5. THAT the Plaintiff is a vexatious litigant.

6. THAT the entire suit is scandalous, frivolous, vexatious and an abuse of the court process and the same should be dismissed with costs.

6. It is also supported by the affidavit sworn by **EMMANUEL SILA ODERO** dated 16/06/2008. The deponent says that he is a Revenue Officer with the 1st Defendant (the K.R.A.) in the Road Transport Department – and the 2nd Defendant's Supervisor. That on the advice received from the 1st Defendant's counsel, the Plaintiff's suit is fatally defective and is brought outside the limitation period provided by the relevant statutes; that the KRA was never a party to criminal case No. 729 of 2004 which forms the basis of the Plaintiff's claim against the Defendants; that the letter dated 11/02/2004, which forms the basis of the Plaintiff's suit was an open letter which specifically instructed the Registrar of Motor Vehicles to disclose the contents thereof to the 2nd Defendant and "**for you to advise him**" and "**pass the message to him**". The letter referred to is annexed to Mr. Odero's supporting affidavit and marked "**ESO1**". The Plaintiff, Johnson Kobia signed the letter as the "**Complainant and Local Resident and Victim**". The letter addressed to the Registrar of Motor Vehicles concerns a complaint, against one Alois Nyamu, who is said to hail from Meru North District, Tigania Central Division in Mikinduri East Location. The letter says in part:-

"Mutewa Primary School has hard (sic) several criminal letters written against the former headteacher dated 28/2/01 and another letter dated 15/6/03 by unknown peoples with criminal allegation. This two letters (sic) are under security investigation.

The local community has associated Mr. Nyamu with funding and coordinating criminals and criminal activities in this respect. I also support ----

Mine is not to accuse Mr. Nyamu or subject him to disciplinary action or have a letter to his file, but for you to advise him and for him to know that you know it and it is known by members of the community. Of late he has started playing this game for the last four years

Signed

JOHNSON KOBIA

COMPLAINANT, LOCAL RESIDENT AND VICTIM”

7. At the close of the letter, the writer again asked the addressee to “**Pass the message to him**” Mr. Odero says further in his affidavit that the Defendant has failed to produce evidence of malice by the KRA against the Plaintiff; that since this prosecution against the Plaintiff was conducted by the police, the proper person to have been sued was the Attorney General; that in any event, he (Odero) has been advised by the KRA’s advocate that the Plaintiff is a vexatious litigant who has been involved in the following cases on the same issue:-

- (a) Criminal Case No. 729 of 2004**
- (b) Criminal Case No.471 of 2005**
- (c) Misc. Civil Suit No.1167 of 2005**
- (d) HCCC No. 198 of 2006**
- (e) HCCC No. 587 of 2007 (the instant suit)**

and that for the above reasons, the Plaintiff’s suit should be dismissed.

8. The Plaintiff/Respondent did not file any Replying Affidavit but there is on file a Notice of Preliminary Objection dated 21/04/2008, drawn by the firm of M/s C.B. Mwongela & Co. Advocates. Since the pleading is not received by the court registry, I intend to treat the same as a mere piece of paper without any import and effect upon the Applicants’ applications. I also wonder how a pleading could be on the file without passing through the necessary channels.

9. At the hearing of the application on 7/07/2008, both the Respondent and his advocate were absent. Though the hearing date was taken ex parte by counsel for the Applicants, it was clear that counsel for the Plaintiff/Respondent was duly served on 25/06/2008, which was more than 7 days notice. Mr. C.B. Mwongela advocate had written a letter explaining his absence from court but the court found the reason given for the absence to be inadequate and refused to adjourn the matter,

10. Before I consider the submissions by counsel it is necessary to give the background to this instant application. As has been pointed out above, the basis of the Plaintiff’s claim is the Plaintiff’s letter dated 11/02/2004, excerpts of which appear elsewhere in this ruling. The Plaintiff commenced suit by way of a plaint dated 14/08/2007 and filed in court on the 15/08/2007. The plaint was amended on 24/10/2007 and the amended plaint being filed in court on 2/11/2007. There is another amended plaint dated 19/02/2008 and filed in court on the same date. Paragraphs 4A, 5A, 6A and 7 of the amended plaint dated 19/02/2008 are relevant. This latter amended plaint is said to have been amended pursuant to the order of HON. WAWERU J. made on 6/02/2008 –

“4(A) Sometimes in the month of February 2004, the

Plaintiff wrote a letter of complaint to the 1st Defendant complaining about various issues and conduct touching on the 2nd Defendant and calling for investigations and the said confidential letter was sent by registered post to the 1st Defendant’s Registrar of Motor Vehicles under whom the 2nd Defendant was working.

5(A) The Plaintiff avers that the 1st Defendant's members of staff acting in connivance with the 2nd Defendant had the Plaintiff's letter of complaint under reference released to the 2nd Defendant who in turn used the same letter to trigger commencement of criminal proceedings against the Plaintiff as well as a civil suit purely based on the contents of the letter of complaint.

6(A) Pursuant to the connivance between the agents, employees and/or servants of the 1st Defendant on the one hand and the 2nd Defendant on the other the Plaintiff was arrested and charged with criminal libel in Maua Principal Magistrate's Criminal Case No. 729 of 2005 which was later transferred to Meru Chief Magistrate's Court as Criminal Case No. 471 of 2005, but the proceedings were terminated through a nolle prosequi after the Plaintiff moved to the High Court by way of a constitutional reference.

7. On or about 03/08/2005, the Plaintiff herein filed a constitutional reference challenging the legality of the aforesaid criminal charges and on 28/09/05, the Attorney General conceded to the constitutional application and consequently the state terminated the criminal charges against the Plaintiff."

11. The Plaintiff pleaded malice, illegality and caprice and also pleaded breach of duty on the part of the 1st Defendant's officers and further pleaded fraud on the part of the 2nd Defendant for allegedly –

- (a) intercepting a confidential letter from the mail section at the 1st Defendant's premises which was not meant for him;**
- (b) Divulging the contents of confidential information to other third parties.**
- (c) Laying a complaint with the police against the Plaintiff on the basis of a confidential letter not meant for him in the first instance thereby occasioning criminal charges against the Plaintiff.**

and that as a result thereof, the Plaintiff suffered –

- (a) Malicious prosecution**
- (b) False imprisonment**
- (c) Wrongful arrest and detention**
- (d) Psychological and physiological harassment and torture;**
- (e) Breach of trust and/or confidentiality in privileged circumstances;**

and the Plaintiff prays for judgment against the Defendants jointly and severally for:-

- (a) A declaration that the Defendants' actions were illegal and injurious to the Plaintiff.**
- (b) General and punitive damages to be paid to the Plaintiff for damage caused.**
- (c) Costs and interest.**

12. The 2nd Defendant alleges that this amended plaint not only does not raise a reasonable cause of action but that it also offends the provisions of Order 7 Rule 1 of the Civil Procedure Rules and that the same should be struck out. The KRA filed an amended Statement of Defence on 6/03/2008 denying the alleged tortfeasance and further pleaded that the Plaintiff's claim as per paragraph 4A of the Amended Plaint was time barred under the provisions of Cap 22 of the Laws of Kenya. The KRA put the Plaintiff on notice that it would raise a preliminary objection to the suit based on this point. The KRA also avers that if any criminal pleadings were instituted against Plaintiff, the same were done by the Attorney

General and/or the Kenya Police and that the KRA was neither the complainant nor was it required to give evidence. In this regard, the KRA avers that the Plaintiff should have sued the Attorney General. The KRA wants the Plaintiff's suit against it struck out for these reasons

13. The 2nd Defendant's Statement of Defence was filed on 26/02/2008 in which he denies the contents of paragraph 4A of the Plaintiff's amended plaint and further avers that in any event, the KRA carried out investigations into the Plaintiff's allegations by *inter alia*, interviewing the 2nd Defendant and thereafter confirmed that the contents of the Plaintiff's letter under reference were false. That the 2nd Defendant filed a defamation suit against the Plaintiff in Milimani CMCC No. 13936/2004 in which the Defendant was awarded damages in the sum of 700,000/= plus interest and costs out of which the Plaintiff has paid Kshs.100,000/=. The 2nd Defendant contends further that since the Criminal libel case against the Plaintiff was instituted by the Attorney General, it is the Attorney General who should be sued and not the 2nd Defendant.

14. The above in a nutshell are the pleadings. In his submissions on his application on behalf of the 2nd Defendant, Mr. Kurauka urged this court to find and to hold that it is the Plaintiff himself who forwarded the letter to the 1st Defendant with an express request that the contents of the said letter be made known to the 2nd Defendant and that in the circumstances, the Plaintiff's suit does not disclose a reasonable cause of action. He relied on the following cases:-

(i) ***Court of Appeal at Nairobi – Civil Appeal No.67 of 1998 – Barclays Bank of Kenya Ltd. –vs- Commissioner General, the KRA***, in which the court, referring to what **Madan J** (as he then was) said in **Sardah M.M. Shroff v The Commissioner of Income Tax Case No. 101**, E.A. Tax Cases Vol IV Part 1, 89:

“In the context of Statutory Limitation, the length or shortness of the delay is irrelevant.”

15. Both Mr. Kurauka for the 2nd Defendant and M/s Lavuna for the KRA contend that the Plaintiff's claim against the Defendants is statute barred. There is no response from the Plaintiff on this issue. Section 4 of Cap 22 of the Laws of Kenya makes provision for the limitation period in respect of actions of contract, and tort and certain other actions, and in particular, section 4(2) provides as follows:-

4(2) 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.”

Mr. Kurauka urged the court to find and to hold that the Plaintiff's claim had been brought after the statutory twelve months, and without leave of the court.

(ii) ***Musambu –vs- West Mengo District Administration [1971] EA 379***. In this case, the Plaintiff filed his claim for damages for wrongful arrest, false imprisonment and malicious prosecution one year and seventeen days after his arrest. On the plea that the claims for wrongful arrest and false imprisonment were barred by effluxion of time the Plaintiff contended that these claims were tied up with the claim for malicious prosecution and that until the dismissal of the prosecution against him he did not know that he had a cause of action. It was held that the cause of action for wrongful arrest and false imprisonment arose on the date of the arrest and the subsequent dismissal of the prosecution did not affect the position (see **O'Connor –vs- Issacs [1956]2 Q.B. 288, 328**).

16. Mr. Kurauka further contends that the Plaintiff's failure to bring the Attorney General into this suit is fatal to the Plaintiff's suit since all proceedings against the Government should be brought against or through the Attorney General. In this regard, Mr. Kurauka referred the court to **Simba –vs- Wambari [1987]KLR 601**, a case of persuasive authority in which the Plaintiff sued the Defendant claiming special and general damages for the torts of false imprisonment and malicious prosecution. The Plaintiff did not

sue the Attorney General and no party applied for him to be joined as a party to the suit. It was held inter alia, after finding that the initial arrest had been lawful,

“--- and the Plaintiff having failed to join the Attorney General as a party to these proceedings, he could not blame the defendant for the action of the police in detaining him for ten days after the arrest.”

17. In Mr. Kurauka’s view, since the Defendant failed to join the Attorney General in these proceedings, he (Plaintiff) cannot blame the Defendants for the unlawful arrest. Mr. Kurauka urges this court to find and to hold that the position taken by **Mbaluto, J** in the **Simba case** (above) is good law and to conclude that the Plaintiff’s failure to join the AG in these proceedings is fatal to the suit and to accordingly strike it out.

18. Miss Lavuna for the KRA takes a similar view of the Plaintiff’s case. She says that the Plaintiff’s suit should be struck out for being frivolous, vexatious and an abuse of the court process. She argues that the Plaintiff’s suit is time barred since it is based on a tort which arose in 2004 while the suit was filed in 2007. She referred the court to Section 3(3)(a) of the Public Authorities Limitations Act, Cap 39 Laws of Kenya which provides:-

“3(3) “Where the defence to any proceedings is that the Defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of –

(a) twelve months, in the case of proceedings

founded on tort; or

(b) three years in the case of proceedings founded on contract,

from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for the defendant.”

20. The KRA avers at paragraphs 3 and 4 of its Amended Statement of defence dated 6/03/2008 and filed in court on the same day that no vicarious liability arises against it for the actions of its officers who were all acting in the course of their employment, and further that the Plaintiff’s suit against the said KRA is statute barred by the provisions of Cap 22 Laws of Kenya. I have already set out the relevant provisions of Cap 22. It is not denied that the 2nd Defendant was at all material times to this suit, an employee of the KRA. Miss Lavuna also contends that no cause of action is disclosed against the KRA, if all that there is the Plaintiff’s dated 11/02/2004. She argues that the said letter was written to the KRA and that though the Plaintiff was arrested and charged and the Criminal Case against the Plaintiff subsequently withdrawn the 1st Defendant was not involved in the criminal case whether as complainant or in any other capacity. She says that though the Plaintiff alleges malicious prosecution because of the said letter, the letter specifically requested the KRA to disseminate its contents to the 2nd Defendant. Finally, Miss Lavuna contends that the Plaintiff’s failure to enjoin the Attorney General to this suit is a fatal misjoinder upon whose basis the Plaintiff’s suit should be struck out. Miss Lavuna cited the case on **Nzoia Sugar Company Ltd. –vs- Kenya Ports Authority [1990] KLR 319** in which the Applicant sought to claim damages from the Respondent for negligently selling spares for the factory of the Applicant which the Respondent had received in its custody. The Applicant also sought damages for the cost of having to rebuy the spares. Section 66 of the Kenya Ports Authority Act provided for a limitation period of 12 months for commencing the suit. The suit was dismissed for failure to comply with the said section 66 of the KPA Act.

20. The Plaintiff/Respondent has not opposed the two applications filed against him seeking to strike out his suit for the reasons given therein. After carefully considering pleadings and the submissions, I make the following findings:-

- (1) that the Plaintiff's claim in the instant suit is based on tort;**
- (2) that the Plaintiff's claim against the two Defendants was filed long after the twelve months' statutory period;**
- (3) that the 2nd Defendant was, at all material times to this suit an employee of the KRA and that both Defendants were acting in the course of their employment when handling the Plaintiff's letter dated 11/02/2004;**
- (4) that the Plaintiff was arrested and charged in court as a result of investigations carried out in accordance with his own instructions to the KRA;**
- (5) that the Attorney General who answers for all grievances made by or against the Government has not been joined in this suit, and that no party applied to have the AG so joined.**

21. It is my considered view that in light of the above findings and the law, I am satisfied that the Plaintiff's case must fail for reasons that his claims were brought way out of the stipulated twelve months period. That time began to run from the day of his arrest and not from the day of his acquittal. Secondly, the Plaintiff's failure to enjoin the AG in the suit is fatal to his entire suit. The Attorney General is the one who carries all the legal burdens on behalf of the Government so that when officers of the Government do wrong to the citizens of this country, the Attorney General is the one to be sued on behalf and instead of such officers.

22. In the circumstances, I find that the two applications filed by the two Defendants respectively for the striking out of the Plaintiff's suit are meritorious. The same are allowed and accordingly the Plaintiff's suit against each of the two Defendants is struck out with costs to the two Defendants.

23. Orders accordingly.

Dated and delivered at Nairobi this 2nd day of October 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Mwongela, C.B (present) For the Plaintiff

Miss Lavuna (present) For the 1st Defendant

Mr. Karauka (present) For the 2nd Defendant