



**REPUBLIC OF KENYA**

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

**Civil Case 2028 of 1997**

**FELIX DOMINIC MURIUNGI.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....DEFENDANT**

**RULING**

The plaintiff was employed by the defendant on 17th December 1984. On or about 18th November 1993 the defendant by its servants or agents wrongfully directed and procured a police officer, Martim to arrest the plaintiff and take him into custody on a charge, then made by the defendant that the plaintiff had committed the offence of fraudulent accounting contrary to Section 330(b) of the Penal Code at Kenya Commercial Bank, City Centre Branch Nairobi.

On 29th November 1993 after the defendant had caused the arrest of the plaintiff and before the criminal case was heard wrongfully terminated the services of the plaintiff. The plaintiff was charged in court and the charges were dismissed and the plaintiff was acquitted.

The plaintiff claims that as a result of the said arrest and subsequent prosecution in court he was injured in his reputation and was put to inconsiderable triable inconvenience and anxiety and expense and has suffered loss and damage.

He gave particulars of special damage as follows:-

- (a) Legal fees - Shs. 200,000/=
  - (b) Traveling and subsistence Shs. 100,000/=
  - (c) Loss of future earnings Shs.2,957,000/=
- Total Shs.3,257,616/=

He sought judgment against the defendant for:-

- (a) Special damages Shs.3,257,616/=
- (b) General damages for malicious prosecution and false imprisonment

- (c) Compensation under Section 72(b) of the Constitution
- (d) Costs of this suit
- (e) Interest on (a), (b) and (c) at court rates

This suit was filed on 3<sup>rd</sup> April 1997. Mr. Ougo for the defendant raised two objections against the suit and which are contained in the defendant's defence.

First the plaintiff claims that his services were terminated wrongly on 29<sup>th</sup> November 1993. The plaintiff's cause of action is grounded on a contract. The limitation period is 6 years. This suit was filed on 18<sup>th</sup> August 1997. Mr. Ougo submits that the objection is specifically on the claim as contained in paragraph 11 of the Plaintiff. Legal fees of Shs.200,000/= the amount he paid a lawyer to defend him in the criminal case. Traveling to court Shs.100,000/=. Loss of future earnings Shs.3,257,616. The nature of these claims are claims in tort and therefore the claim is barred by statute which is 3 years.

See Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya. Secondly Mr. Ougo challenged the validity of summons to enter appearance. The suit was filed on 18<sup>th</sup> August 1997 and the summons to enter appearance was not served until 4 years later on the 11<sup>th</sup> July 2001. This contravened the provisions of Order IV Rule 3 (1) of Civil Procedure Rules which provides that when a suit has been filed there is a mandatory requirement that summons shall issue and Order V Rule 1 provides that summons shall be valid for first instance for 12 months.

Further that validity of summons cannot be extended beyond 24 months. The original summons having been issued on 12<sup>th</sup> August 1997, could not be extended beyond 12<sup>th</sup> August 1999 and therefore there was no proper suit before the court and ought to be dismissed.

Mr. Muriithi for the plaintiff submitted that suit was filed on 18<sup>th</sup> August 1997 and the claim is based on contract of employment between the plaintiff and the bank. But he concedes that on the face of it the particulars as set out on paragraph 11 of the Plaintiff are based on tort but the evidence when adduced will bring out on what that loss is based.

The loss is based on earnings lost through wrongful termination of employment. Mr. Muriithi went on to submit that whether or not these wrongs were called different names or descriptions the whole claim is based on wrongful termination of employment and that since parties had agreed on issues which were filed by consent it would not be fair and just to dismiss the plaintiff's suit by way of preliminary objection without giving him an opportunity to canvass those issues through a full trial. On the second issue on validity of the summons, he submitted that the summons issued on 21<sup>st</sup> June 2001 duly complied with the provisions of Order IV Rule 3 (1) of the Civil Procedure Rules.

The rules give the court a discretion to dismiss the suit under Rule 7 but since the suit was not dismissed it is not correct to say that it automatically abated. The first point to consider is whether the plaintiff's claim is based on tort or contract.

Mr. Muriithi concedes that the particulars of claim as particularized on paragraph 11 of the Plaintiff are based on tort but submits that since issues had been agreed and filed by consent, the plaintiff should be allowed to bring out his case properly at the hearing. But the agreed issues as filed particularly paragraph 6 and

7 support Mr. Ougo's objection:

**"6" Whether or not the plaintiff was injured in his character and reputation as the result of the prosecution.**

**“7” Did the plaintiff suffer any pain and anguish loss and expense as averred in paragraph 11 of the Plaintiff?”**

This clearly shows that the plaintiff’s claim is based on tort. Parties are bound by their pleadings. Order VI Rule 6 provides:

“VI” ‘6’ No party may in any pleadings make an allegation of fact or raise any new ground of claim inconsistent with a previous pleading of his in the same suit.”

The plaintiff’s claim being based on tort is therefore barred by statute.

The second point raised is the validity of service. The suit was filed on 18<sup>th</sup> August 1997. Summons served then could be valid for 12 months but subject to their being extended from time to time but to a maximum of 24 months. Service in this suit was effected on 21<sup>st</sup> June 2001. This was 4 years after the suit was filed. The 24 months

having expired on 18<sup>th</sup> August 1999, so that, on 21<sup>st</sup> June 2001 there was no valid summons to be extended and served. The record also shows that the summons were never extended and could not be extended beyond 12<sup>th</sup> August 1999. The Deputy Registrar had no power to extend invalid summons.

For the reasons stated above the plaintiffs’ suit is dismissed with costs to the defendant.

Delivered and dated at Nairobi this 6<sup>th</sup> day of July 2005.

J.L.A. OSIEMO

JUDGE