IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 269 OF 2016

BETWEEN

WZO KONJIT TEDLA...1ST APPELLANT

ETHIOPIAN AIRLINES (S.C) LIMITED.........................2ND APPELLANT

AND

OSBORNE ASHIONO MUTUMIRA...................................RESPONDENT

(Being an appeal from the judgment and decree

of Sergon J., dated 25th day of February, 2015

in

H.C.C.C. No. 638 of 2011)

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JUDGMENT OF THE COURT

[1] It is unfortunate the main suit, the subject matter of this appeal which was filed in April, 2010 before the Chief Magistrate's Court is still going round the courts on an interlocutory issue on whether certain paragraphs of the said suit ought to have been struck out. A brief background of the matter is that, on 23rd April, 2010 Osborne Ashiono Mutumira (respondent) filed the said suit before the Chief Magistrates' Court at Milimani Commercial Court seeking general damages for certain defamatory utterances allegedly made on or about 4th March, 2009 by one Yenesu Fekadeneh the Airline manager of the 2nd appellant, who lodged a complaint with the police alleging that the respondent had forged a delivery book and subsequently stole $4241, the property of the 2nd appellant.

[2] Further, the respondent alleged that on diverse dates, Uzo Konjit Tedla (1st appellant) on behalf of Ethiopian Airlines (2nd appellant) uttered words that were defamatory of him. The said words are alleged to have been uttered on diverse dates to the directors of MARTIN AIR (then employers of the respondent in her capacity as employee, or agent of the 2nd appellant). The said words were to the effect;-

> **"Why have you kept the plaintiff in your employment when the plaintiff had been dismissed**

> **for stealing $4241, indeed, the plaintiff had agreed to reimburse us Dollars 4242."**

[3] The respondent also alleged that by a letter dated 9th October, 2009 the appellants advocates M/s Shah & Pareka uttered words concerning the respondent in the following words;-

> **"Our client is not satisfied with the investigation of the theft/ disappearance of US Dollars 4241 which was received by your client and who has failed to hand over the same to Ethiopian Airlines or to account for the same. Your client on or about 24th June, 2008 agreed to pay US Dollars 4241 to Yinnesu Fekandene, Airport service manager Ethiopian Airlines."**

The respondent alleged that the said words were highly defamatory of him as he was portrayed as a thief and a dishonest employee who had interfered with investigations by the police, as a result therefore he sought damages.

[4] The appellants filed a joint defence on 15th June, 2010 denying, not only liability, but they raised two points of law that challenged the competency of the suit which they claimed was *res judicata* as they alleged the respondent had filed a similar suit being Chief Magistrate's Court at Nairobi Milimani Commercial Court **Civil suit No 7518 of 2009** which suit was struck off and dismissed by the court on the 27th January, 2010. The second legal issue that was raised in the said defence was that the suit was time barred by virtue of **section 4 (2) of the Limitation of Actions Act.** Finally, and without prejudice to the above legal issues, the appellants pleaded there was privilege of communication relating to letters written by their advocates in respect of prospective court proceedings.

[5] Convinced the said legal issues should be determined before the suit, the appellants filed a notice of motion under **Order 51 Rule 1**, **Order 2 Rules 15 (1) (a), (b), (c)** and **(D)** of the Civil Procedure Rules, **Section 4 (2)** of the Limitation of Actions Act, **Section 20** of the Defamation Act among other enactments seeking to strike out paragraphs 6, 8 and 9 of the respondent's plaint. This was on the grounds, *inter alia*, that the cause of action arose on 4th March, 2009 yet the suit was filed on 23rd April, 2010 more than one year after the event. Thus, there can be no cause of action against the appellants as the said suit did not disclose any cause of action. The application fell for hearing before Olao Chief Magistrate (as he then was), who dismissed it with costs.

[6] The appellants appealed before the High Court on 24th September, 2010; the appeal was heard by Sergon J, in his brief judgment dated 25th February, 2015 the subject matter of this appeal, the learned Judge found the claim by the respondent was not *res-judicata* and the particular pleadings could not be struck out as they were not beyond redemption considering there was even a pending application seeking amendments to the same. The appeal was similarly dismissed with costs to the respondents.

[7] Unrelenting, the appellants have filed this second appeal that is predicated on some 10 grounds of appeal, which, in our view, are not only repetitive but also argumentative and contrary to the provisions of ***Rule 86(1)*** of the ***Court of Appeal Rules***. The Rule stipulates in mandatory terms thus;

> **"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."** (Emphasis added)

[8] We shall therefore summarize them as the learned Judge erred in law and on facts in failing to;-

Consider the cause of action was time barred by virtue of **section 4(2)** of the limitation of Actions Act and **section 20** of the Defamation Act and to strike out paragraph 6 of the plaint.

Appreciate that paragraph 8 of the plaint did not disclose when a cause of action arose.

Interpret the provisions of **Order 2 Rule 3 (1),** and **7 (3)** of the Civil Procedure Rules and the

cited authorities.

Applying and adopting the rendition in the case of **NANCY MWANGI T/A WORTHLIN MARDETERS VS AIRTEL NETWORKS (K) LTD** that time barred causes of action can be amended.

[9] During the plenary hearing, Mr Osando, learned counsel for the appellant addressed us on the above grounds. There was no appearance on the part of the respondent although duly served with the hearing notice. Mr. Osando went on to elaborate on the three issues of law raised in the appeal that is res*-judicata*; another suit over the same subject matter and against the same parties was filed before the same court; *limitation of action* in regard to the cause of action which he argued was time barred, and that matters contained in paragraph 9 of the plaint were based on *privileged communication* to an advocate.

[10] From the foregoing submissions, the record of appeal and the authorities cited before us and the two courts below, we have analysed the points of law raised by the learned Judge of the High Court, the subject matter of this appeal. As stated in the opening paragraph of this judgment, this is an interlocutory appeal against a ruling seeking to strike out pertinent portions of the respondent's plaint which if struck out there would be nothing left in our view for trial; the whole suit by the appellant would collapse. Our task is to establish whether the learned Judge erred by dismissing the appellants appeal; firstly, by holding even though the respondent had filed another suit before the Chief Magistrate's Court being **CMCC No. 7518 of 2009** which was struck out and dismissed with costs for describing the 2nd appellant wrongly as Ethiopian Airlines Limited, the present suit was not *res judicata.* This is what the learned Judge said in his own words;

> **"I have also re-evaluated the submissions before the trial court. The issues falling for determination are whether the suit was res –judicata and whether the suit should be struck out due to limitation of time. The doctrine of *res (sic)* serves the purposes of preventing multiplicity of suits and ensuring that litigation comes to an end. The substantive law on res judicata is found in section 7 of the Civil Procedure Act Cap 21, Laws of Kenya as follows:-**
>
>> **"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**
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>> **It is worth noting that the suit before the lower court was dismissed on technicality and was not heard on merits it is my view therefore that this suit is not res judicata."**

[11] That is how the learned Judge disposed of the allegation that the issues raised in the suit were *res judicata* which matters were specifically pleaded under paragraph 4 of the appellant's defence. The difficulty we have in this second appeal is that the pleadings or proceedings in Chief Magistrate's Court in **CMCC No. 7518 of 2009** are not part of this record. For that reason, we may not be able to fault the learned Judge being also aware that for the doctrine of *res judicata* to apply; the matter must be directly and substantially in issue in the two suits; the parties must be the same or the parties be litigating under the same title and lastly, the matter must have been finally decided in the previous suit. Whereas the subject matter and the parties were the same in the two suits, it is doubtful the dispute was decided to finality. Whereas we agree the doctrine of *res judicata* is founded on public policy, which is aimed at achieving two objectives, namely, that there must be a finality to litigation and that a party should not be vexed twice on account of the same litigation, however, in the prevailing circumstances of this matter, it is difficult for us to say that the appellants herein are being vexed over the same litigation for reasons that we have not been shown the records of the previous suit. We therefore go by what the learned Judge posited that the said suit was struck out on technicality.

[12] The next issue is whether the claim of damages for defamation was time barred by reason of

Limitation of Actions Act. We agree with counsel for the appellants that the learned Judge may have overlooked this particular issue as it is not discussed in the impugned judgment. The appellant's contention is that under **section 4 (2)** of the Limitation of Actions Act:

> **"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."**

There are allegations by the respondent that on or about 4th March, 2009, one Yenesu Fekadene the Airline manager of the 2nd appellant lodged a complaint against the respondent with the police that he had forged an entry in a delivery book and subsequently stole $4241 the property of the 2nd appellant. If the respondent was seeking damages for a claim of libel or slander in regard to the above utterances/or complaints, certainly, that would fall outside the limitation period. The problem we have in striking out the above pleading, is that under paragraph 7 of the same plaint, the respondent claim is generalized no date is indicated it states as follows;

> "**That on diverse dates the first defendant acting in her capacity as an employee, servant and/or agent of the second defendant and also in her own capacity called the director of MARTIN AIR then employers of the plaintiff and summoned them to a meeting in the defendant's offices where the first defendant uttered defamatory words of and concerning the plaintiff…"**

[13] Also, under paragraph 9 is about allegations contained in a letter dated 9th October, 2009 written by the appellants' advocates, which the appellants contend was privileged communication. Taking the totality of the whole claim or allegations by the respondent, there is a thin line that can only be sorted out during trial regarding which allegations fall within and outside the Limitation period. To us, striking out paragraph 6 alone and leaving the rest of the claim to proceed to trial will not serve the interest of justice. It is obvious to us why the two courts below were reluctant to exercise their discretion and strike off the said paragraphs of the plaint. They did so while bearing in mind the cardinal principles enunciated in case of; **D.T. Dobie & Company Kenya Ltd Vs. Joseph Mbaria Muchina,** CA No. 37 of 1978, in which this Court stated that:-

> **"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."**

[14] The two courts below also alluded to an application that was on record seeking amendments which had not been determined. In view of the above, we would be reluctant to remove the respondent from the seat of justice prematurely. This is in line with the overarching principles in the administration of justice as enunciated under **Article 50** and **159** of the Constitution that courts should aim to dispense substantive justice by allowing parties to ventilate their cases and when faced with applications to strike out pleadings it is done only in plain and obvious cases.

For the foregoing reasons, we find no merit in this appeal which we hereby order dismissed with no order as to costs as the appeal was not opposed.

Dated and delivered at Nairobi this 15th Day of December, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR