



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. E156 OF 2020

EVELYNE ONYAMO AGINDU.....PLAINTIFF

-VERSUS-

JOYCE KANURI MWANGI.....DEFENDANT

RULING

1. For determination is the notice of preliminary objection (p.o) dated 12th May, 2021 filed by **Joyce Kanuri Mwangi** (hereafter the Defendant) and the motion dated 7th June, 2021 by **Everlyne Onyamo Agindu** (hereafter Plaintiff). The gist of the Defendant's preliminary objection raised in response to the suit herein is that Plaintiff's suit filed on 26th October, 2020 is time barred pursuant to section 4(2) of the Limitation of Actions Act. The Plaintiff's motion, apparently prompted by the p.o is expressed to be brought under sections 1, 1A, 1B, 3 & 3A of the Civil Procedure Act and Section 27 and 28 of the Limitation of Actions Act and seeks that leave be granted to file suit against the Defendant out of time.

2. The grounds on the face of the motion are amplified in the supporting affidavit deposed by the Plaintiff. To the effect that she was employed by **Advtech Ltd t/a Crawford International School** on 15th August, 2018 and was subsequently dismissed on allegations of failing to uphold transparency and integrity during the recruitment process. She goes on to depose that she challenged the termination by filing **Nairobi High Court Employment and Labour Relations Cause No. 604 of 2019** on 10th September, 2019; that subsequently her employer filed a response on 20th November 2019 and upon perusing the same, she discovered that the Defendant herein had on 18th October, 2018 published a defamatory statement about her to Summit Recruitment Agency. That she was not aware of the defamatory statement made against her until service of the employer's response, by which time the statutory period of one year had already lapsed. The Plaintiff concludes by averring that the court has discretion to extend time for filing the suit and that no prejudice will be occasioned upon the Defendant if the motion is allowed.

3. The Plaintiff's motion is opposed through the replying affidavit sworn by the Defendant. She deposes that the Plaintiff's motion is unprocedural and an abuse of the court process as Section 4(2) of the Limitation of Actions Act states that an action for libel or slander may not be brought after the lapse of twelve months. That after becoming aware of the defamatory statement the Plaintiff filed suit against the Defendant a year later, the delay therein being unreasonable and unexplained. She particularly took issue with the motion on the ground that the Plaintiff failed to approach the court in good faith as the motion ought to have been filed before filing the suit and pointed out that, the motion was prompted by service upon the Plaintiff of the notice preliminary objection dated 12th May, 2021. In conclusion the Defendant avers that the motion is an afterthought and thus urged the court to dismiss the motion with costs.

4. In a further affidavit the Plaintiff disputed the Defendant's depositions by asserting that the motion is properly before court as section 27 and 28 of the Limitation of Actions Act allows the present motion to be filed before or after the commencement of a suit; that delay in filing the suit has been explained and was further compounded by the COVID-19 pandemic that led to delay in

instructing counsel and the transition by the judiciary to the online filing system.

5. The preliminary objection and motion were simultaneously canvassed through written submissions. Submitting on the motion 2021 counsel for the Plaintiff asserted that the Plaintiff has explained the delay resulting in the filing of the suit beyond the statutory period and it was in the interest of justice that the motion be allowed and suit proceeds to be determined on merit. That prejudice will be visited on the Plaintiff if the court declines to grant the orders sought. Counsel cited several decisions, including **Royal Media Services Ltd v Valentine Mugure Maina & Another [2019] eKLR** and **Nation Media Group Limited & 2 Others v Margaret Kamene Wambua [2021] eKLR**. Counsel emphasized the discretion of the court under section 27(1) (c) and 28(3) of the Limitation of Actions Act to grant leave, either before or after the commencement of a suit.

6. Concerning the notice of preliminary objection dated 12th May, 2021 counsel argued that it did not raise pure points of law as determination thereof involves the exercise of judicial discretion and requires ascertainment of certain facts. Hence the p.o did not match the definition of a preliminary objection in **Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) EA 696**. In conclusion it was submitted that section 4(2) Limitation of Actions Act is not couched in mandatory terms and thus, the court has wide discretion to extend time in respect of suits in actions constituting libel or slander.

7. Submitting on the preliminary objection dated 12th May, 2021 counsel for the Defendant relied on **Mukhisa Biscuits** (supra) and **Royal Media Services Ltd** (supra) in arguing that the objection ought to be sustained and the suit struck out because the facts pleaded by the respective parties agree that the defamatory words were published on 18th October, 2018 and as such, the instant suit was filed out of time. Concerning the motion dated 7th June, 2021 it was asserted that the Plaintiff had not satisfactorily explained the delay in commencing her defamation suit and the motion for enlargement of time is therefore not merited and ought to be dismissed. Counsel relied on a raft of cases on extension of time among them **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**, **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, and **Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited [2015] eKLR**.

8. The court has considered the material canvassed in respect of the motion and the preliminary objection. The law regulating the time for filing of suits in respect of different causes of action is found in the Limitation of Actions Act, and I have to say that some of the authorities cited by the parties did not involve the application of the provisions of the said law. Section 4(2) of the Limitation of Actions Act 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;

Provided that an action for libel or slander may not be brought after the end of twelve months form such date”.

9. Admittedly, the cause of action in this instance allegedly accrued on or about 18th October 2018 and the Applicant ought to have filed her suit for defamation by 19th October, 2019. Her suit was filed on 26th October 2020, after serving a demand letter upon the Defendant in March 2020. The Plaintiff has anchored her motion for leave primarily on Sections 27 and 28 of the Limitation of Actions Act, the former which provides as follows:

“ [Section 4\(2\)](#) does not afford a defence to an action founded on tort

where—

1 (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action

(2)

(3)..."

10. The above provision has been the subject of interpretation in different superior courts. In the case of **Mary Osundwa V. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 [2002] eKLR** the Appellant had successfully sought leave (granted by consent in the High Court) to file a cause for alleged breach of contract, some 7 years since the cause of action accrued. The Court of Appeal having set out the provisions of Section 27 (1) of the Limitation of Actions Act stated that:

“The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”. (Emphasis added)

11. Similarly, in **Bosire Ogero v. Royal Media Services [2015] eKLR** and **Dr. Lucas Ndung’u Munyua V. Royal Media Services Ltd & Another [2014] eKLR**, the courts held that Section 27 (1) does not provide for the extension of time to file a suit for defamation. No doubt echoing the holdings in **Wycliffe A. Swanya V. Toyota East Africa Limited and Another [2009] eKLR; Rawal v Rawal (1990) KLR 275** and **Dhanesvar V. Mehta vs Manilal M. Shah [1965] EA 321**, **Aburili J.** restated the rationale behind the Limitation of Actions Act, in **Bosire Ogeto’s** case as follows:

“The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.

12. This court therefore having considered the undisputed date on which the instant cause of action arose finds that, on a plain reading of Section 27(1) of the Limitation of Actions Act, and based on precedent, there is no jurisdiction conferred on this court to extend time for the filing of a defamation suit. The Applicant’s reliance on the decision of **Ngaah J’s** decision in **Royal Media Services Ltd. vs Valentine Mugure and Another** is to no avail. The learned Judge’s comments at the conclusion of his judgment considered only the provisions of Section 4(2) and not Section 27(1) of the Limitation of Actions Act and appear to be *obiter dictum* in nature. The motion dated 7th June, 2021 must therefore fail and is hereby dismissed with costs to the Respondent.

13. The notice of preliminary objection was based on the undisputed fact that the cause of action herein accrued on 18th October 2018 when the alleged defamatory statements were published by the Defendant, hence the suit for defamation ought to have been filed by 19th October 2019. In my view, it is beyond argument that the p.o raised a pure point of law based on limitation, and there is no relevant matter of fact requiring determination by the court. Neither is the matter raised one that involves the exercise of court’s discretion.

14. The above notwithstanding, it is pertinent to observe that while the Plaintiff has vigorously denied any knowledge of the alleged defamatory publication prior to 19th November 2019, her own statement filed in the Employment and Labour Relations suit appears to suggest otherwise. See for instance paragraphs 9-15 thereof. Whatever the case, the legal position is that the court has no jurisdiction to enlarge time for the filing of suits for defamation outside the period prescribed under section 4(2) of the Limitation of Actions Act.

15. In view of the foregoing, the Court is satisfied that the preliminary objection is well taken. The Court hereby strikes out the Plaintiff's suit with costs for offending section 4(2) of the Limitation of Actions Act

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF APRIL 2022

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Obieroh/b for Mr Ogembo

For the Defendant: Ms. Mwikali

C/A: Carol



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