



**CIVIL PRACTICE AND PROCEDURE**

**An amendment to pleadings can be allowed even if the effect of it would be to admit a claim time barred.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 63 OF 2001**

**WILSON OGOT OWERA T/A OGOT & ASSOCIATES.....PLAINTIFF**

**-VERSUS-**

<b>AMOS KASASIRA.....</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>SIMON N. NGUGI.....</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>REV. KISIA.....</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>MR. KABAGE.....</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>FRANCIS JOMO.....</b>	<b>5<sup>TH</sup> DEFENDANT</b>
<b>REV. KIATU.....</b>	<b>6<sup>TH</sup> DEFENDANT</b>
<b>REV. MARCOS HAMISINI.....</b>	<b>7<sup>TH</sup> DEFENDANT</b>

**RULING**

I am asked to rule on a preliminary objection raised on behalf of the defendants. The objection is that the cause of action is time barred. The cause of action arose in the year 2001. The background of this matter is that the plaintiff initially sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants. On obtaining the court’s leave the plaintiff amended its pleadings on **2<sup>nd</sup> September, 2005** by joining in this action **Rev. Kisia** as 3<sup>rd</sup> defendant, **Mr. Kabage** as the 4<sup>th</sup> defendant, **Francis Jomo** as the 5<sup>th</sup> defendant, **Rev. Kiattu** as the 6<sup>th</sup> defendant and **Rev. Marcos Hamisini** as the 7<sup>th</sup> defendant.

Those defendants were sued by that amended pleadings in their capacity as ‘*registered trustees of the Mombasa Baptist High School*’. This court by a ruling delivered on **5<sup>th</sup> December, 2008** found that those defendants that is; 3<sup>rd</sup> to 7<sup>th</sup> defendant were wrongly sued. Consequently the suit was struck out as against them. The plaintiff has filed a notice of motion dated **15<sup>th</sup> February, 2011** whereby it seeks leave to amend its pleadings to include the very same defendants once again in this action by suing them in their capacity as ‘*trustees of the Baptist Convention of Kenya*’. It is that application which is the subject of the preliminary objection. The application is dated **15<sup>th</sup> February 2011**. It has not yet been prosecuted.

Learned counsel **Mr. Ananda** for the defendant submitted that the suit was founded on defamation and was accordingly time barred by virtue of The Limitation Act Cap 22. The plaintiff by its pleadings alleges that the defamation occurred on or about **19<sup>th</sup> December, 2000**. According to **Mr. Ananda** argued that

under Cap 22, the plaintiff should have brought this action within 12 months of the alleged wrong. Section 4 (2) of Cap 22 provides as follows:

***“(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.”***

The defendants’ learned counsel submitted that the suit was struck out as against the 3<sup>rd</sup> to the 7<sup>th</sup> defendants about 3 years ago. That the plaintiff did not seek to amend the plaint in those 3 years. He submitted that the plaintiff is not entitled to the amendment now sought. That the plaintiff could only amend the plaint to join the 3<sup>rd</sup> to the 7<sup>th</sup> defendants where leave has been obtained to file a suit out of time. The defendant termed the plaintiff’s application as an abuse of the court process.

The preliminary objection was opposed by the plaintiff’s learned counsel **Ms. Umara**. Learned counsel relied on Order 1 Rule 14 of the Civil Procedure Rules 2010. That rule provides as follows:

***“14. Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner.”***

The plaintiff’s learned counsel argued that what the plaintiff seeks to do by its amendment is authorized by that rule. Further she argued that the plaintiff’s proposed amended plaint is not a new suit and it is not therefore caught by the law of limitation under cap 22. She submitted that the cause of action in the proposed amended plaint has not changed.

Although the plaintiff’s counsel said that she was relying on certain cases, I could not trace them in the court file. The issue for determination by this court is whether the plaintiff’s proposed amendment to the plaint is time barred. Order 8 Rule 3 of the Civil Procedure Rules 2010 provides that a court may allow an amendment to pleadings at any stage of the proceedings and on such terms as to cost or otherwise as may be just.

An amendment can be allowed any time before judgment is entered. But rule 3 (2) of Order 8 is probably the most relevant rule in this matter. It is therefore necessary to reproduce it in this ruling as follows:

***“(2) Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.”***

It is clear from that rule that there is no basis for the preliminary objection raised by the defendants. That rule provides that an amendment can be allowed even in instances where such amendment would admit a claim which is beyond the limitation period. The preliminary objection is without merit and is overruled and dismissed with costs to the plaintiff.

**DATED and DELIVERED at MOMBASA this 7<sup>th</sup> day of December, 2011.**

**Mary Kasango**  
**JUDGE**