



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL SUIT NO. 27 OF 2018**

**GEORGE GB OGENGO.....PLAINTIFF**

**VERSUS**

**JAMES NANDASABA.....1<sup>ST</sup> DEFENDANT**

**MARTIN WANYONYI.....2<sup>ND</sup> DEFENDANT**

**KENNEDY WEPUKHULU.....3<sup>RD</sup> DEFENDANT**

**THE STANDARD LIMITED.....4<sup>TH</sup> DEFENDANT**

**CENTRE FOR HUMAN RIGHTS & DEMOCRACY.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. On 25<sup>th</sup> June 2009, the court delivered a judgment in this matter against all the five defendants. The matter had proceeded in the absence of the defendant. The court found in favour of the plaintiff against all the defendants, and awarded damages.

2. Thereafter, the 2<sup>nd</sup> defendant brought an application, dated 9<sup>th</sup> November 2010, for the setting aside of the said judgment on grounds that he had not been served with summons to enter appearance. In the end, the court concluded that the 2<sup>nd</sup> defendant had been properly served, but found that the draft of the defence placed on record raised triable issues, which it felt warranted being determined on merits. The judgment of 25<sup>th</sup> June 2009 was set aside, as against the 2<sup>nd</sup> defendant, in a ruling delivered on 16<sup>th</sup> February 2012, and the 2<sup>nd</sup> defendant was ordered to pay throwaway costs. The 2<sup>nd</sup> defendant was also ordered to enter appearance and file defence within 21 days. It is against that background that I am called upon to determine the suit herein as against the said 2<sup>nd</sup> defendant.

3. The suit had been commenced by way of a plaint dated 1<sup>st</sup> December 2002, seeking general damages, aggravated or exemplary damages, a permanent injunction and costs. The cause was against three individuals, being the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, a media house, being the 4<sup>th</sup> defendant, and a non-governmental organization, being the 5<sup>th</sup> defendant. The plaintiff was a public officer, working at the Ministry of Lands, at Bungoma, as a land registrar, while the 2<sup>nd</sup> defendant was an employee of the 5<sup>th</sup> defendant. The 3<sup>rd</sup> defendant worked as an editor with the 4<sup>th</sup> defendant. The plaint raised two causes of action against the defendants. The first the cause was primarily against the 2<sup>nd</sup> defendant, with the 5<sup>th</sup> defendant being alleged to have been vicariously liable for the acts of the 2<sup>nd</sup> defendant. The second cause was against the 3<sup>rd</sup> and 4<sup>th</sup> defendants. The second cause does not appear to touch on the 2<sup>nd</sup> defendant at all, and I shall, therefore, confine myself to determining the first cause.

4. The case against the 2<sup>nd</sup> defendant was that he had, on 22<sup>nd</sup> February 2002, written a letter to the Commissioner of Lands, which was published to several other persons, wherein he made words that were false and highly defamatory of him. He averred that the ordinary natural meaning and innuendo of the said words was that he was a corrupt individual, who had no regard for the rule of law and administration of justice, and that was an unscrupulous person who issued a title deed fraudulently and unprocedurally, a land grabber and a criminal. He alleged that by reason of the said publication, he was seriously injured in his character, credit and reputation, and he had been brought to public scandal, odium and contempt.

5. The order of 16<sup>th</sup> February 2012, which set aside the judgment of 25<sup>th</sup> June 2009, had directed the 2<sup>nd</sup> defendant to enter appearance and file defence within 21 days. I have closely browsed through the file of papers before me, and I have not come across a memorandum of appearance and or a defence filed by the 2<sup>nd</sup> defendant after and in compliance with the orders made on 16<sup>th</sup> February 2012. The said orders

were, therefore, not complied with, and an issue should arise as to whether the 2<sup>nd</sup> defendant ever came on record and whether he had a defence which could be heard. The only filing on record, which could pass for a defence, is the proposed defence attached to his affidavit sworn on 9<sup>th</sup> November 2010, in support of the application, dated 9<sup>th</sup> November 2010, for setting aside of the judgment of 25<sup>th</sup> June 2009. The said proposed defence was not deemed to be properly on record, and, if the 2<sup>nd</sup> defendant did not file any defence after 16<sup>th</sup> February 2012, it would mean that he has no defence on record.

6. Let me suppose for a moment that the proposed defence, dated 9<sup>th</sup> November 2010, is properly on record, which is not the case, and consider what it says. It comprises of denials of the averments by the plaintiff in his plaint on one hand, and makes additional averments in answer to the averments made in the plaint. It denies paragraphs 6, 7 and 8 of the plaint, but then, in paragraph 4, the 2<sup>nd</sup> defendant avers that he no longer worked for the 5<sup>th</sup> defendant. He denies, in the same paragraph, writing the letter in contention, but then pleads that the words complained of had been made in quasi-judicial circumstances and were, therefore, privileged. He then avers that he was justified to make the words complained of, as they were true in substance, and were made in public interest.

7. The plaintiff testified on 24<sup>th</sup> September 2019. He placed on record the letter dated 22<sup>nd</sup> February 2002, and asserted that it was very malicious. He stated that it had been authored by the 2<sup>nd</sup> defendant. He also placed on record a letter from the Chief Land Registrar, dated 8<sup>th</sup> April 2002, which he said exonerated him of the allegations made against him. He explained that the allegations were in respect of a property known as Kimilili/Kibingei/642, and that the changes he effected on the register were based on court orders made in Kakamega HCCC No. 55 of 1974, which he also placed on record. He asserted that the 2<sup>nd</sup> defendant was a person he knew. He identified him in court, and said that he had chased him out from his office in 2002 because he was trying to incite the public, while styling himself as an advocate and a human rights crusader. He stated that he was hovering over his office all the time.

8. The 2<sup>nd</sup> defendant testified on 22<sup>nd</sup> January 2020. He confirmed that he had known the plaintiff for a long time. He asserted that he knew nothing about the alleged defamatory letter, and that he was not the person who had signed it. He further said that he was not the Martin Wanyonyi who was a human rights crusader. He stated that he never worked for the 5<sup>th</sup> defendant. He denied receiving any demand letter, and denied that the advocates who had allegedly responded to that demand letter had not been instructed by him. He explained that he had met the plaintiff at his work station at lands office at Bungoma, but in circumstances that were different from those alleged in the plaint.

9. The 2<sup>nd</sup> defendant called an officer from the National Archives, whose testimony was not altogether relevant to the matters at hand.

10. At the conclusion of the matter, both sides filed written submissions. The plaintiff's written submissions are dated 19<sup>th</sup> March 2020, and were filed herein on 19<sup>th</sup> May 2020. The 2<sup>nd</sup> defendant's written submissions are dated 20<sup>th</sup> May 2020 and were filed herein on 29<sup>th</sup> May 2020. I have perused through them, inclusive of the authorities cited, and noted the arguments articulated therein.

11. The starting point is whether the 2<sup>nd</sup> defendant has any defence. I say so as the 2<sup>nd</sup> defendant did obtain orders to set aside the judgment previously rendered against him, and orders were made, on 16<sup>th</sup> February 2012, for him to regularize his position on the record, by way of entering appearance and filing a defence within given timelines. As indicated elsewhere, I have carefully and closely perused through the record before me, and I have not come across a memorandum of appearance and a statement of defence filed by the 2<sup>nd</sup> defendant. That means that the 2<sup>nd</sup> defendant did not comply with the terms on which set aside the Judgement though the ruling delivered on 16<sup>th</sup> February 2012. That was where he should have started. It was the filing of the appearance and statement of defence that would have given him a platform upon which he could then take to the witness stand to verbalize his defence. Non-compliance with those terms meant that he had no basis upon which he could testify. He was improperly before the court, and he had no right to be heard, and, therefore, all the proceedings, conducted after the time within which he was to comply expired, were a nullity. He was given a second chance. He bungled it.

12. I am alive to Article 159 of the Constitution, about the court paying more attention to the substance of a matter, as opposed to the technicalities of procedure. I am cognizant of the fact that the 2<sup>nd</sup> defendant placed a draft or proposed defence on record. The defence filed was proposed, the order to file a substantive defence was meant to upgrade it from a proposed defence. Without a substantive defence, it is the only filing, in the form of a defence, that is on record, and that the court has to work with, to determine the matter. Thirdly, he testified and called a witness. Therefore, there is some material which I can consider in an effort to determine the matter on its merits, regardless of the failure by the 2<sup>nd</sup> defendant to comply with the terms of the setting aside of the judgment of 25<sup>th</sup> June 2009.

13. In that proposed defence, the 2<sup>nd</sup> defendant does not categorically deny working with or for the 5<sup>th</sup> defendant. He does not even deny that he is the person sued as such. Indeed, he pleads, at paragraph 4, that he no longer worked for the 5<sup>th</sup> defendant, which is admission that he did work for the organization at some point or other. He has, however, not indicated when he ceased to work for it. He denies writing the impugned letter, but, at paragraph 8, goes on to justify the contents of the letter. That attempt is a suggestion that he owned the said contents, for why would he seek to justify what he alleges he did not write.

14. The written submissions that were filed in support of the application, dated 9<sup>th</sup> November 2010, which was the basis for the setting aside order of 16<sup>th</sup> February 2012, further articulated the proposed defence. The said submissions are dated 11<sup>th</sup> July 2011, and were filed herein on 12<sup>th</sup> July 2011. It was argued, at paragraph (b), that the 2<sup>nd</sup> defendant was justified to make the words complained of because they substance and were uttered in public interest, and he went on to give what should pass as a factual basis for the making of the said words.

15. When he testified in court, the 2<sup>nd</sup> defendant took a position that was diametrically inconsistent with the averments in the proposed defence. He asserted that he was not the person that the plaintiff sued. He also asserted that he was not the person, who bore a similar name

with his, who worked for the 5<sup>th</sup> defendant. His advocates had even indicated that they would call officials from the 5<sup>th</sup> defendant to support that contention, but they eventually did not. He also asserted that he knew nothing about the letter, and went on to say that his interactions with the plaintiff were over something different. He then went on to attempt to justify the contents of the impugned letter.

16. A party is bound by its pleadings. The pleadings are the vehicle through which his case is initially placed before the court. The oral hearing is intended to formally prove the averments made in the pleadings. It is about breathing life into the said averments, otherwise the same remain allegations on paper. The case that is presented on paper, should, therefore, be the same case presented orally in court. The oral testimony ought to be aligned to or in sync with the pleadings since it is designed to prove the averments in the pleadings. A party cannot, in the circumstances, present one case in the pleadings, and another in his oral presentation in or testimony before the court at trial. It has to be one case throughout. The case presented or articulated through the pleadings should be the same case presented orally at the trial. There has to be consistency and continuity.

17. The 2<sup>nd</sup> defendant presented, at the trial, a totally completely and entirely different case from that which he had presented in and through his proposed defence. He cannot possibly have two defences against the one case he faces, one on paper and the other at the trial. There has to be only one defence, and that is the one on the paper that he filed in court. The presentation at the trial did not give him an opportunity to present another defence, as he could only present the defence contained in his filings. That is what it means by a party being bound by its pleadings. The defence on paper is the one that was disclosed, and, therefore, it is the one that the plaintiff used to prepare to respond to the 2<sup>nd</sup> defendant's case at the trial. If the 2<sup>nd</sup> defendant had abandoned his line of defence, disclosed in the proposed defence, by the time the trial opened, then he should have, before the trial began, amended his papers, and served them on the plaintiff. That way, the plaintiff, and the court, would have had notice that his line of defence had changed. By presenting a defence different from that on the record meant that the 2<sup>nd</sup> defendant was articulating a position that was not supported by his pleadings, and, therefore, he was bound, destined or primed to fail. A trial is conducted on the basis of the pleadings. Once a party departs from their pleadings, they get derailed, and their case must fail.

18. I believe that I have said enough on the subject. The 2<sup>nd</sup> defendant did not present a case, at the trial, that could be said to be in answer to the plaintiff's case. His testimony did not formally prove his proposed defence. Consequently, there is no plausible answer to the averments made by the plaintiff in his plaint, and I shall, in the circumstances, proceed to consider the matter on its merits, based only on what is alleged in the plaint. This court had tried the matter previously, and found in favour of the plaintiff. That determination was set aside, to give opportunity to the 2<sup>nd</sup> defendant to make a case against the averments by the plaintiff. As decided above, he has failed to meet the case by the plaintiff, and, therefore, the previous findings by the court, that he was liable, must stand, and I hereby adopt them for the purpose of this judgment.

19. On assessment of damages, the court previously awarded damages at Kshs. 500, 000.00, as against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants, on the basis that the letter published by them, dated 22<sup>nd</sup> February 2002, had very limited circulation. I am alive to the fact, and take judicial notice, that the shilling has lost value since 25<sup>th</sup> June 2009 when that judgment was pronounced. The libel was in respect of an allegation of fraud, corruption and abuse of office, all of which are serious criminal offences. Taking everything into account, I award the plaintiff a sum of Kshs. 1, 000, 000.00 as compensation for the libel. I shall make no award for aggravated or exemplary or punitive damages.

20. The final orders that I shall make in the circumstances are as follows:

- (a) Judgement is entered hereby against the 2<sup>nd</sup> defendant and in favour of the plaintiff for Kshs. 1,000, 000.00 general damages;
- (b) That the said award shall carry interest at court rates from the date of this judgment until payment in full;
- (c) That there shall be no award for aggravated or exemplary or punitive damages;
- (d) That the plaintiff shall have costs of the suit; and
- (e) That any party aggrieved has twenty-eight (28) days to move the Court of Appeal, appropriately.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 12<sup>th</sup> DAY OF FEBRUARY, 2021**

**W MUSYOKA**

**JUDGE**