REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 2 OF 2011

BETWEEN

JOSEPH OTIENO ADUNDO…….....…….APPELLANT

AND

FESTO OGENO OLENGE…….....…1ST RESPONDENT

OWINO OYIERA…….....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Senior Resident Magistrate's Court at Ukwala in Civil Case No.27 of 2009 by Hon. E.K Mwaita- Senior Resident Magistrate).

JUDGMENT

JOSEPH OTIENO ADUNDO, the appellant herein, was the plaintiff in the Ukwala Senior Resident Magistrate's Court Civil Case Number 27 of 2009. He sued for a claim for general damages on allegations that the respondents had defamed him by uttering words that were actuated by malice.

After the hearing of the case the learned trial magistrate dismissed the suit on grounds that it was filed without the leave of court for it was time barred and that the appellant did not prove his claim.

The appellant was dissatisfied with the judgment which was delivered on 12th January 2011 and this prompted him to file this appeal. In the Memorandum of Appeal the appellant set out seven grounds of appeal which I have summarized as follows:-

1. The learned trial magistrate erred in law and fact by failing to appreciate that the suit was filed on 4th December 2009 and not on 6th December 2009.

2. The learned trial magistrate erred in law and fact by failing to appreciate that time does not run for the period running from 21st December in any year to 13th January of the succeeding year.

3. The learned trial magistrate erred in law and fact by dismissing the suit against the weight of the evidence.

The respondents did not file any response except a notice of appointment of advocate.

When the matter came for directions on 26th June 2013, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions within 30 days. Both parties did not file

submissions within the agreed time but the appellant's were filed on the 26th April 2017. When the matter came before the court on 21st June 2017, the respondents' submissions had not been filed. They were given another 14 days to do so but on 18th July 2017 when the matter came up for mention to confirm compliance, they still had not complied.

This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

In my perusal of the trial court record, I noted that the plaint dated 2nd December 2009 was filed on 6th December 2009. This is what the court's date stamp indicate. However, the copy of Summons to Enter Appearance and the copy of the official receipt are dated 4th December 2009. The date stamp on the plaint, I agree must have been erroneous.

This is a claim based on slander. The proviso to Section 4(2) of the **Limitations of Actions Act** provides as follows:

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

It was argued for the appellant that time does not run from 21st December of any year to 13th January of the succeeding year. I do not know the basis of this proposition. It was not elaborated either.

From the analysis of the court records it is clear that the plaint was filed within time and no leave of the court was required.

Parties are bound by their pleadings. In **DAVID SIRONGA OLE TUKAI vs. FRANCIS ARAP MUGE & OTHERS, CA NO. 76 OF 2014**, the Court of Appeal expressed itself as follows:

> ***And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.*** *[Emphasis mine]*

In the instant case the appellant in his plaint stated that the incident took place on 5/12/2008 but in court his evidence in chief that the incident was on 12/12/2008. This variance was cured by his evidence in cross examination, that of his witnesses and the defence witnesses who acknowledged that there was a meeting on 5/12/2008. The discrepancy was not therefore material.

The plaint had specific words complained of. However, it is not clear from the pleadings or the oral evidence in court whether they were uttered in a chorus or in whichever format. Paragraph 3 of the plaint attributed the words to both defendants (respondents herein). In his evidence in chief, the plaintiff attributed the words to the 1st respondent and linked the 2nd respondent to the utterances during cross examination and in what appeared to be a casual statement. He said:

The two are the ones who said I steal their sugar cane.

From the evidence on record there was consensus that the sugar cane farmers in the area where both parties come from had a meeting on 5th December 2008 to deliberate on theft of their sugar cane. In that meeting the plaintiff was identified as a thief. **Alex Chuma** (DW3) testified that he had actually seen the appellant stealing his sugar cane.

Though the appellant complained that apart from being called a thief, he was called a witch and a womanizer. Other than his words, it was doubtful if the witnesses he called were in a position to hear anything. **Alloys Owiti** (PW2) said she was 100 meters away while **Pamela Akinyi Otieno** (PW3) said she was 200 meters away. What she testified to have been said at the meeting was therefore hearsay. The appellant did not prove his case to the required standards and the learned trial magistrate was justified in dismissing it.

The upshot of the foregoing analysis of the evidence on record is that the appeal must fail. The same is dismissed with costs.

DELIVERED and **SIGNED** at **BUSIA this 18th day** of **October, 2017**

KIARIE WAWERU KIARIE

JUDGE