REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 638 OF 2011

WZO KONJIT TEDLA & ANOTHER…….....……APPELLANT

VERSUS

OSBORNE ASHIONO MUTUMIRA…….....RESPONDENT

(Appeal from the original judgment and decree of Hon. Mr. B. N. Olao in Milimani Commercial Court CMCC No. 2424 of 2010 delivered on 21st November, 2011.)

JUDGMENT

1. The Respondent sued the Appellant and Ethiopian airlines (S.C) Limited (herein after referred to as ***Ethiopian Airlines***) seeking general damages for defamation. It was the Respondent's case that the on or about 4th March, 2002, Yenesu Fekadeneh, the manager of Ethiopian airlines lodged a complaint against him of having forged an entry in a delivery book and subsequently stole $ 4241 the property of Ethiopian airlines. The said complaint was investigated by Kenya Police and no reasonable cause was disclosed against him and he was exonerated. He averred that on diverse dates he and others were summoned by the Appellant for a meeting where defamatory words concerning him were uttered to wit ***'why have you kept the Respondent in your employment when the Respondent had been dismissed for stealing $ 4241, indeed, the Respondent had agreed to reimburse us $ 4241.'*** That by a letter dated 9th October,2009 the Respondent through their advocates Shah & Pareka uttered the following words against him:- ***"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 Mr. Yinnesu Fekadenah, Airport service manager, Ethiopian airlines".*** It was the Respondent's gravamen that the said words in their true and ordinary meaning are defamatory and portrayed that he had received $ 4241 on behalf of Ethiopian airlines but misappropriated the same; that he was guilty of theft of $4241; that he admitted theft of the said $ 4241 and offered to repay; that he was a dishonest employee and that he had interfered with investigations by the police.
2. The Appellant and Ethiopian Airlines filed a statement of defence and denied the Respondent's claim. They contended that since the Respondent had prior to this suit filed Chief Magistrates Court at Milimani Commercial Court CMCC No. 7518 of 2009 which suit was struck off and dismissed with costs for describing the Defendant wrongly as Ethiopian Airlines Limited, this suit is res judicata and cannot be maintained. Secondly it was contended that this cause was time barred by virtue of Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya as amended by Section 20 of the Defamation Act, Cap 36 Laws of Kenya.
3. The Defendants then filed a notice of motion dated 24th May, 2011 seeking to strike off the suit on the aforesaid grounds.
4. The application was heard and the trial magistrate dismissed it.

5. Being aggrieved by the trial court's ruling the Appellant has filed the appeal dated 24th September, 2010 on the following grounds:-

a. ***The learned Chief magistrate erred in and in fact in failing to appreciate and consider that the cause of action under paragraph 6 of the plaint was time barred by virtue of section 4(2) of Limitation of Actions Act Cap 22 Laws of Kenya as amended by Section 20 of the Defamation Act, Cap 36 Laws of Kenya.***
b. ***The learned Chief magistrate erred in law in failing to strike out paragraph 6 of the plaint under Order 2 Rule 15(1) (a) (b) (c) and (d) of the Civil Procedure Rules 2010 on the grounds that the cause of action was time barred on the day the Respondent filed his plaint and therefore tthe same was scandalous, frivoulous or vexatious and it is an abuse of the process of law.***
c. ***The learned Chief magistrate erred in law and in fact failing to appreciate that paragraph 8 of the plaint does not show when the cause of action arose. Hence, there is no cause of action and should have struck off paragraph 8 of the plaint.***
d. ***The learned Chief magistrate erred in law and in fact to interpret Order 2 Rule 3 (1) of the Civil Procedure Rules 2010 and failed to consider the cited authority namely AFRICAN OVERSEAS TRADING COMPANY VS. TANSUKH S. ACHARYA (1963) E.A.L.R. page 468 (the authority was annexed to the written submissions of the Appellants) Had the Chief Learned Magistrate applied his mind properly and applied the law he would have come to the conclusion that paragraph 8 of the plaint discloses no cause of action and would have struck off paragraph 8 of the plaint under Order 2 Rule 15 (1) (a) (b) (c) and (d) of the Civil Procedure Act, 2010.***
e. ***The learned Chief magistrate erred failed to appreciate and consider the application of Order Rule 7 (3) of the Civil Procedure Rules, 2010 in that the Appellants have pleaded in their defence that the communication by letter of the Appellants' Advocates to the Respondents Advocates is/was a privileged communications and in absence of express pleading of "express malice" there cannot be a cause of action as the privilege is an absolute defence.***
f. ***The learned Chief magistrate erred has erred in law in failing to appreciate that there is no cause of action and failed to appreciate and consider three authorities cited on the issues.***
g. ***The learned Chief magistrate has failed to appreciate that paragraphs 6, 8 and 9 of the plaint are three separate and distinct and independent causes of action and erred in law and on combining them together to import cause of action or cause of action.***

6.The appeal was canvassed by way of written submissions which I have considered. 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* 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 which provides that:

"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"

It is worth noting that the suit before the lower court was dismissed on a technicality and was not heard on merits. It is my view therefore that this suit is not res judicata.

6. On the second issue I adopt the rendition in **Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR**

"See the cases of BOW VALLEY HUSKY (BERMUDA) LTD v SAINT JOHN SHIPBUILDING LTD AND OTHER APPEALS [1998]2 LRC, 666 and HENDERSON SYNDICATE v MERRET SYNDICATE LTD [1994]3 ALL E.R.506. The application for striking out the pleadings also involves prolonged and serious arguments which require serious legal discourse in a plenary

trial. In sum, the plaint cannot be said to be devoid of a shred of a cause of action against the 2nd and 3rd Defendants. For those reasons, my discretion favours sustaining the suit rather than striking it out as against the 2nd and 3rd Defendants. Of course, the rationale behind that approach is that striking out of a suit is a draconian act which drives away the plaintiff from the judgment-seat, hence, it must be exercised cautiously, sparingly and only in the clearest of case. See the constitutional desire under Article 50 and 159 of the Constitution that courts should dispense substantive justice by allowing parties to ventilate their cases in an open and full trial. I am delighted how courts of law have, in sheer simplicity and clarity, enunciated on the need to safeguard the right to fair trial when faced with applications to strike out pleadings in an unambiguous expression that 'it is only in plain and obvious cases recourse should be had to the summary process of striking out pleadings'. In the present case, I will not allow the proverbial 'sword of the Damocles' to be drawn upon the plaintiff's suit. I save it. The application dated 8th January, 2014 is substantially determined."

7. Considering that the discrepancy pointed out by the Appellant were curable by amendment, I find that the suit ought not to be dismissed I in the end uphold the trial magistrate's ruling and dismiss this appeal with costs to the Respondent. Orders accordingly.

Dated, Signed and Delivered in open court this 25th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

Parekh for the Appellant

N/A for Ashimoshi for the Respondent