REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NOS. 130 & 131 & 132 OF 2010

ISABELLAH M. ABUGA……..……..APPELLANT

VERSUS

THE FACTORY UNIT MANAGER
KEBIRIGO TEA FACTORY CO. LTD……..…….1ST RESPONDENT
KEBIRIGO TEA FACTORY CO. LTD…….……2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court at Kisii, Hon. Maxwell Gicheru in Kisii CMCC No. 256 of 2007 delivered on the 25th day of May, 2007

THOMAS ABUGA MORIASI……....…….……..APPELLANT

VERSUS

THE FACTORY UNIT MANAGER
KEBIRIGO TEA FACTORY CO. LTD……...……..…….1ST RESPONDENT
KEBIRIGO TEA FACTORY CO. LTD…….....…….……2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court at Kisii, Hon. Maxwell Gicheru in Kisii CMCC No. 255 of 2007 delivered on the 25th day of May, 2007

THOMAS ABUGA MORIASI…….……..APPELLANT

VERSUS

THE FACTORY UNIT MANAGER
KEBIRIGO TEA FACTORY CO. LTD……..…….1ST RESPONDENT
KEBIRIGO TEA FACTORY CO. LTD……...…….……2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court at Kisii, Hon. Maxwell Gicheru in Kisii CMCC No. 257 of 2007 delivered on the 25th day of May, 2007

JUDGMENT

On 10th June, 2011, directions were taken in these appeals in the following terms:-

§ ***The appeals be consolidated.***
§ ***The appeals to be heard by a single judge of this court.***
§ ***The appeals be canvassed by way of written submissions.*** Accordingly an order in those terms was issued**.**

These appeals arise from the judgment and decree of the Chief Magistrates court, Kisii delivered on 25th May, 2010. In the 3 suits before the trial court, the appellants as plaintiffs had sued the respondents then

as defendants jointly and severally for general damages on account of defamation, costs of the suit as well as interest. Their case was that on 30th June, 2006, the respondent either by themselves, their servants, employees and or agents published and or connived at and or condoned the publication of and concerning them by placing placards at their factory gate with words and which words were defamatory of the appellants to the effect ***"FARMERS SEE HOW ABUGA AND HIS WIFE ISABELLA ABUGA CONNED YOU MILLIONS OF MONEY***.

No.	**CASES**	**LEGAL FEES**	**AUCTIONEERS**	**& H/M**	**TOTAL**
1.	SPMCC.NO. 733 OF 1993	Kshs.69,744	82,401	798,501/75	860,646.75
2.	Kisii HCCC.NO.28 OF 2001	Kshs.29,560	-	-	29,560.00
3.	Kisii SPMCC.NO.733 OF 1993	Kshs.81,833	-	-	81,833.00
4.	Kisii HCCCA.NO. 218 & 219 OF 1998	Kshs. 72,440	176,18	199,960	448,538.00
5.	Kisii HCCCNO.28 OF 2001	Kshs.41,513/60	-	571,884/60	653,397/60
6.	Kisii CMCCC.NO. 733 OF 1993	-	-	398,166.00	653,397.00
				Total	**2,471241/95**
				Roughly	**2.5 Million/=**

THIS IS ALL CROOKISM IN OUR FACTORY. WE MUST STOP THIS ONCE AND FOR ALL IN OUR FACTORY. ALL CASES ARE OF THOMAS ABUGA N. MORIASI AND ISABELLA M. ABUGA VS KTDA & KEBIRIGO TEA FACTORY OR LEAF BASE" "ABUGA AND HIS WIFE ISABELA ABUGA MORIASI SHOULD GET BACK THE KHS.2.4 MILLION THEY HAVE ROBBED THE FARMERS THROUGH COURT CASES WITHOUT DELAY…" It is instructive that **Isabella M. Abuga** and **Thomas Abuga Moriasi** are the appellants herein and are husband and wife.

To the appellants the said publications were made by the respondents in that they knew of their existence but failed to remove the said placards from the gates of the 2nd respondent. Those words were meant and were understood to mean in their natural and ordinary meaning that, the appellants were con people, thieves, crooks, of low morals and or criminals. In the alternative, the said words bore and were understood to bear by way of innuendo, that the appellants were con people, thieves, crooks, persons of low morals and or criminals. The same were intended to disparage the appellants. As a result, the appellants had been injured in their occupations, characters, reputations feelings and had suffered distress, embarrassment, been put into contempt, ridicule and odium in the eyes of right thinking members of society.

In their joint written statements of defence filed in court on 27th March, 2008, the respondents denied the placards complained of. They also denied placing them on the factory gate. They further denied that the words complained of were defamatory of the appellants either in their plain and ordinary meaning or by innuendo. They added further that the words did not in any way disparage the appellants' occupations, characters or reputations. Finally, it was their case that if the words were published as claimed, they amounted to fair comment.

In support of their case the appellants testified. They testified that on 30th June, 2006 an annual general

meeting called by the managing director of KTDA was to be held. The 2nd appellant, **Thomas Abuga Moriasi,** was a director of the 2nd respondent. He did not attend the said meeting as he had obtained an injunction against the said meeting from **Nyamira Law Courts.** However at about 8.a.m. he received a call from one, **Joshua Nyakamba (PW1)** who informed him of the presence of defamatory placards about him outside the gate of the 2nd respondent. He went there personally and confirmed what he had been told. He caused the placards to be photographed by one **Charles Okemwa (PW2).** He thereafter pulled them down and preserved them. During the hearing he tendered the same in evidence. Prior to this, the 2nd appellant had informed the 1st appellant, **Isabella M. Abuga** of the placards. The appellants went to the 2nd respondent factory and saw the placards themselves as aforesaid. They had seen employees of the 2nd respondent scrutinizing the placards. The 2nd respondent's employees did not make any attempts to remove the placards. They denied that they had fleeced the farmers off kshs.2,400,000/-. Though they conceded that they had filed a civil suit in court against the 2nd respondent being **Kisii SPMCC. No. 733 of 1993** and had been awarded kshs.766,000/-. They thus felt defamed by the respondents in that the respondents placed the defamatory placards at the gate or if they did not, they connived with others to do so.

On the part of the respondent, two witnesses testified. These were **George Akuma Sagwe (DW1)** and **Job Atandi (DW2).** DW1 was an employee of the 2nd respondent as a data clerk whereas DW2 was the factory manager at **Nyamache Tea Factory**. On that day however he was the unit manager at the 2nd respondent with a brief to facilitate the annual general meeting. He is actually, the first respondent. Their evidence was to the effect that when they reported to work in the morning, they did not see the offending placards and at no time were their contents brought to their attention. They took the view that since it was election time for the factory directorship, then the placards could have been the work of the appellants' rivals. They categorically stated that the management of the 2nd respondent did not author the placards nor were they seen. Similarly, they opined that nobody authorized the placards to be pinned on the gate of the factory. During the campaigns, candidates can put their own posters anywhere in the factory and they do not require the permission of the factory management to do so.

In reserved judgments delivered on 25th May, 2010, the learned magistrate dismissed the appellants' claim on the ground that they had failed to prove that the respondents were behind the publication of the placards complained of. This holding triggered these appeals. The grounds of appeal in all the appeals are similar. They are:-

"1. That the learned trial magistrate erred in law by failing to find that the 1st and 2nd Respondents were responsible for and/or did publish defamatory placards that injured the reputation of the appellant.
2. That the learned trial magistrate erred in law and fact by failing to find that suspension of defamatory placards on the 2nd defendant's premises constituted publication.
3. That the learned trial magistrate erred in fact and in law by finding that the defamatory placards may have been authorized by his opponents while the evidence on record indicates that it was not election period for directorship.
4. That the learned trial magistrate erred in law and in fact in failing to address evidence and submissions tendered by the appellants hence failed to take into account relevant facts."

As already sated at outset of this judgment, parties agreed to canvass the appeals by way of written submissions. They subsequently filed and exchanged the written submissions together with authorities which I have carefully read and considered.

This is a first appeal. That being the case, this court is called upon to revisit the evidence tendered before the trial court, re-evaluate it and reach its own independent decision as to whether the judgment and decree of the learned magistrate can be upheld.

It is trite law that in a suit founded on defamation be it slander or libel, the plaintiff must prove that:-

§ ***Defamatory statements were authored or uttered by the defendant.***
§ ***Thereafter the defamatory statement were published by the defendant***
§ ***That they were published of and concerning the plaintiff***
§ ***That they were defamatory in character***
§ ***They were published maliciously; and***
§ ***In slander, subject to certain exceptions, that the plaintiff has thereby suffered special damage.***

It is common ground in these appeals that nobody saw who authored the placards. The appellants admit that much. However, according to them their case is not about who authored them but that the respondents allowed their premises to be used to publish the defamatory placards. For this proposition they rely on the case of **Byrne V Dean (1937) ALL.ER.204.** This is the authority for the proposition that a defendant who fails to remove defamatory material placed on his premises is liable for defamation because the publication in defamatory sense does not mean the writing or printing of words but rather the communication of the same to a third party. This may well be true. However, this is like putting the cart before the horse. There must first authorship of the defamatory statement. The evidence on record clearly shows that the respondents and or their servants, agents and or employees had no hand in the authorship of the placards. The burden of proof lies on the party who alleges that he was defamed. In this case the burden was on the appellants to prove that the respondents were behind the publications of the placards complained of. They did not do so. Further, even if the foregoing was not a consideration on the authority of **Byrne v Deane, (supra),** they were still duty bound to prove that the management of the 2nd respondent knowing of the existence of the defamatory material in their midst, had maliciously refused to confisticate and or pull them down and opted to play along with the authors of the offending placards. No such evidence was forthcoming and or that the respondent knowing of the offending placards permitted the authors to place on its factory gate. It cannot be assumed that the management would have been aware of the existence of such placards in their factory that early morning.

The appellants called **Joshua Nyakamba** as well as **Charles Okemwa,** the photographer as their witnesses. All these witnesses were in agreement that they had not seen who had pinned the placards on the factory gate. The appellants themselves could not say whether the respondents or their employees pinned the placards. They could also not say whether they drew the attention of the respondents to the existence of the offending placards requested them to pull them down and the respondents refused. Nor did they say that they brought to the attention of the respondents the offending placards and the respondents refused to take action. The appellants' claim is essentially founded on vicarious liability. It therefore behoves the appellants to bring in the nexus between whoever planted the placards at the gate and the respondents. This was campaign time. Indeed the 2nd appellant knew that he was due for removal as a director of the 2nd respondent. Campaigns were in high gear to replace him. Even though it could be probable that the appellants' rivals could have authored and pinned the placards, still the appellants were by law required to adduce evidence to connect the respondents with the tort alleged. This again they miserably failed.

In view of the foregoing, it is evident that the appellants were unable to establish their case against the respondents as required and thus the trial magistrate was right in rejecting the claims as not having adequately been supported by the evidence before court. Essentially therefore the appellants were unable to prove that the respondents, their agents, servants or employees authored and pinned placards. That the respondents were aware of the offending placards and did nothing about it, instead they permitted the authors to hoist on their premises neither did they alert them about it and they folded their hands. Having been unable to blast open the first two grounds upon which successful party in a defamation suit must prove the other considerations did not fall for determination.

These appeals are therefore dismissed with costs to the respondents. Had I otherwise found in favour of the appellants, I would have enhanced the award of damages proffered by the learned magistrate from kshs.40,000/- to kshs.200,000/- for each appellant going by the recent trends in the market and also based on the authorities cited.

Judgment dated, signed and **delivered** at **Kisii** on this 23rd day of September, 2011.

ASIKE – MAKHANDIA
JUDGE