



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 1081 OF 2004

FRANCIS OCHIENG OIRO.....PLAINTIFF

VERSUS

NAKUMATT HOLDINGS LIMITED.....DEFENDANT

R U L I N G

1. This matter is part-heard before me. The Plaintiff, Francis Ochieng Oiro was still giving his evidence in chief when an objection was raised by the defence counsel as to whether the Plaintiff could refer to other unrelated alleged publications by the Defendant but which are not the subject matter of this suit. This suit arises out of an alleged defamatory article published by the East African Standard Newspaper on or about 10/12/2003.

2. Mr. Karori, learned counsel for the Defendant argued that since the plaint only mentions the publication of 10/12/2003, the Plaintiff had no business trying to introduce other unrelated publications without seeking to amend his plaint, which amendment Mr. Karori argued, would avail the Defendant an opportunity to answer to those allegations through an amended defence. Mr. Karori argued further that the Plaintiff was bound by his pleadings and he (Mr. Karori) urged the court to find that by trying to introduce fresh evidence while in the witness box, the Plaintiff was ambushing the Defendant since the pleadings do not contain the additional documents intended to be produced by the Plaintiff.

3. The court ordered both parties to put in written submissions on the issue and to provide authorities, since according to learned counsel for the Defendant, the Plaintiff was trying to introduce a new cause of action without following proper procedure.

4. In its submissions, the Defendant's contends that

(a) the law on defamation is clear that it is the publication of the alleged defamatory material which forms the basis of a claim, that a claimant must be able to set out such words with reasonable certainty in the plaint and if necessary, identify the factors relied upon by the claimant

(b) since the natural and ordinary meaning has to be obtained from a consideration of the words in their context, the claimant must include or make reference to the documents which form part of the context. In this case, the Defendant contends that the relevant newspaper article containing the words complained of must be included in the plaint

(c) The Plaintiff's attempt to bring in meanings derived from other publications is an after thought as these other publications ought to have been particularized in the statement of claim.

5. Learned counsel for the Defendant cited a number of authorities in which the courts dealt with this issue. In **Collins –vs- Jones [1955] 2 AII ER 145**, the court at page 146 said the following:-

“He (a Plaintiff) must in his pleading set out the words with reasonable certainty or at least have sufficient basis from which to state the actual words in it [the letter]. A suspicion that it [the letter] is defamation is not sufficient ... the court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one. If he cannot give the particulars, he will not be allowed to go on with the charge.”

6. In **Fullam –vs- Newcastle Chronicle and Journal Limited & Another [1977] AII ER 32**, Lord Scarman held as follows at page 39:-

“Justice requires in this case that the Plaintiff should fully particularize the publication relied on so that the Defendants may understand the nature of the case they have to meet. The Defendants are entitled to know so that they know generally what course they ought to follow”.

This principle was restated firmly in **British Data Management Plc –vs- Boxer Commercial Removals Plc & Another [1966]3 AII ER 717** where the court held that:-

“It is important to bear in mind the purpose of a statement of claim. It is to enable the defendant to know the case that he has to meet so that he can properly plead his case, with the result that the issues are sufficiently defined to enable the appropriate questions for decision to be resolved. This purpose will not be achieved unless the words are pleaded with sufficient particularity to enable the Defendant not only to understand what it is the Plaintiff alleges that they meant, but also to enable him to decide whether they had that meaning and, if not, what other meaning they had or could have. Equally, unless the words are so pleaded the Defendant will not be able to determine whether the words in their alleged meaning or other perceived meaning are true, or fair comment, and plead accordingly,:

7. Learned counsel for the Defendant cited a number of other authorities to support his contention that the Plaintiff herein is bound by the four walls of his pleadings and cannot now purport to ambush the Defendant with new material that is not referred to in the plaint – see **PA Syed Aboothabir, 2nd August, 1989, (HCM)**, quoting from **Philips –vs- Philips (1878) 4 QBD 127**.

8. On his part, learned counsel for the Plaintiff submitted that in pleadings a party need not go into detail regarding the facts of the case, and that all facts which tend to prove the fact in issue will be relevant at the trial, and that such facts are not material facts for pleading purposes. Learned counsel relied on **Philips –vs- Philips** (supra) where Brett LJ said the following:-

“I will not say that it is easy to express in words what are the facts which must be stated and what matters need not be stated. I know that great pains were taken to draw rule 4 (now r.7(1)) and it is difficult to state the matter more clearly than in that rule. The distinction is there pointed out that every pleading shall contain a statement of the material facts on which the party pleading relies, but not the evidence by which they (that is, those material facts) are to be proved. The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle C.J. expressed it in this way. He said that there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon that expression of opinion of Erle C.J. that rule 4 (now r. 7 (1)) was drawn. The facts which ought to be stated are the material facts on which the party pleading relies.”

9. In his view, learned counsel for the Plaintiff thinks that the matters complained of by the Defendant are subordinate facts which are the means of proving the Plaintiff’s claim and that the evidence is for sustaining the Plaintiff’s allegations. The Plaintiff further argues that since he has pleaded innuendo in paragraph 5 of the plaint, he ought to be allowed to rely on any evidence which does not need to be pleaded in proving his claim.

10. Regarding the innuendo, the Plaintiff contends that facts in the publication containing the words sued on are not extrinsic facts in their sense, but are merely part of the context meaning collected from other parts of some publication or from other publications which should be read as part of the context in which the meaning of the words complained of is to be determined. It is also contended that where a newspaper article refers to another report in the same issue, either party is entitled to have that other report read as part of the context in which the meaning of the words complained of is to be determined. It is the view of the Plaintiff that the other documents proposed to be produced by the Plaintiff midstream his evidence in chief relates closely to the document in issue, and that all these document should be treated as forming part of the same transaction and not as separate documents.

11. I have now considered submissions by both parties. I have also considered the law cited to me. I have also considered the pleadings. The question that arises for determination is whether the documents, appearing at pages 13 to 18 (both pages inclusive) of the Plaintiff's List of Documents should be read as forming part of the publication complained of and therefore admissible or whether the inclusion of such documents would be introducing fresh matters that have not been pleaded by the Plaintiff and therefore be an ambush upon the Defendants. In other words, is the Plaintiff bound by his pleadings in this case?

12. On the basis of the law, I do not think that the additional evidence can reasonably be treated as being merely subordinate to the article complained of. My view is that these documents contain substantive allegations that ought to have been particularized in the plaint. If the Plaintiff had done so, he would have put the Defendant on notice that there was something beyond the publication reproduced in the plaint. I am persuaded in this case that the Plaintiff is bound by his pleadings. To conclude otherwise would defeat the purpose of a statement of claim which is to enable a Defendant to know the case that he has to meet. Such knowledge will assist him to prepare adequately for battle, after being exposed to the full spectrum of the words complained of. A look at this additional documents reveals that these documents are not simply to prove the innuendo which is pleaded. Paragraph 3 of the plaint sets out the words complained of while paragraph 5 of the plaint gives the innuendo meaning of those words. Paragraph 8 gives more reasons why the Plaintiff thinks that the article complained of and appearing at paragraph 3 of the plaint was malicious and why it calls for an award of exemplary damages against the Defendant. The Plaintiff should have done the same with these additional documents.

13. For the above reasons, I do find and hold that the Defendant's objection is valid. The same is upheld. Accordingly the Plaintiff shall give evidence only on what is expressly pleaded in the plaint and not other documents that are from outside and which documents were not expressly pleaded as forming the basis of his claim for defamation.

13. The costs of this objection shall be in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of June 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... For the Plaintiff

..... For the Defendant

..... court clerk