



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 90 OF 2008

Ibrahim Mbogo Kanyuira.....Appellant

Versus

Joseph Gitahi Ndirangu.....1st Respondent

John Ndung'u King'ori.....2nd Respondent

***(An appeal from the Judgment and Decree of Hon. K. Bidali, (S.R.M) delivered on 6th October 2008
in Nyeri C.M.C.C. No. 565 of 2004)***

JUDGMENT

This appeal arises from the decision of the SRM in Nyeri in C.M.C.C No. No. 565 of 2004 in which the appellant sued the respondents seeking two substantive prayers, namely, **(a)** a declaration that the respondents herein could not partake in the affairs of the running of plot number 4, Kinunga until they were appointed as legal administrators to the estate of their respective benefactors and, **(b)** recovery of general damages for defamation.

The appellants claim against the respondents' in the said case is enumerated in the plaint dated 30th June 2004 in which the appellant averred *inter alia* as follows:-

- i. *that the appellant together with the 7 persons listed in paragraph 3 of the plaint are true owners of plot number 4 Kinunga Market, and that out of the 7, only three were alive.*
- ii. *that the respondents have been participating in management meetings of the said plot masquerading as the appointed heirs to their alleged deceased benefactors and that the defendants have been acting against the interests of the owners of the said plot by insisting that they be allowed to collect rents which money they put to their own use and accused the respondents of inciting tenants not to pay rent to the appellant.*
- iii. *that the respondents uttered defamatory words of and concerning the appellant as enumerated in paragraph 8 of the plaint.*

The first respondent did not enter an appearance or file a defence and on 9th September 2004 interlocutory judgement was entered against the first respondent in default thereof. The second Respondent filed a defence and a counter claim.

It is settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.(See ***Stanley Maore - vs- Geoffrey Mwenda***^[1] ***“the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusions...”***)

The appellants evidence was essentially that he owned a plot at Kinunga market jointly with the persons listed in paragraph 3 of the plaint, and that 4 of them were deceased and that the respondents represented interests of deceased members and that the respondents were attending meetings relating to the said plots. The appellant also testified that the respondents used to insult him and alleged that the appellant was benefitting from the property and accused the respondents of uttering some alleged defamatory words to the effect that *"you are happy and boastful before people since their father passed away."*

The second respondent's testimony was that he succeeded a one Kigotho Ndungu a deceased shareholder who died in 1973 and that he inherited his shares. He further testified that the appellant chased him from meetings, that several members were deceased and all had representatives who attend meetings. The second respondent also produced a grant of letters of administration obtained after the said case was filed against him.

DW2 Simon Gachuri confirmed that he represented his deceased father and that has never provided any documents to be allowed to represent his late father, that the society had no bye-laws.

After evaluating the evidence, the learned magistrate identified two issues, namely **(a)** whether the defendant uttered the alleged defamatory words and **(b)** whether the plaintiff had *locus standi* to participate in the affairs and activities of the said plot owners.

As for the first issue the learned magistrate concluded that the alleged defamation was not proved while on the second issue, the learned magistrate held that the orders sought would affect other persons who were not parties to the suit. Consequently the learned magistrate dismissed the suit with costs.

Aggrieved by the said verdict, the appellant appealed to this court and raised four grounds of appeal, namely:-

- i. *That the learned Magistrate erred in law and in fact by holding that the plaintiff could not, independently of the other co-owners of the plot sue on a matter relating to the plot yet the orders sought could be granted without affecting the non-suing members.*
- ii. *That non-jointer of parties is not fatal to a suit.*
- iii. *The magistrate erred in failing to rule on matters brought and canvassed before him.*
- iv. *That the magistrate erred in giving judgment against the weight of the evidence.*

Having taken into account the pleadings, the evidence adduced as well as the submissions made, the following are, in my respectful view, the issues that fall for determination in this suit:-

- i. *Whether the appellant established the necessary ingredients to prove the tort of defamation.*
- ii. *Whether the plaintiff was entitled the relief sought in prayer **(a)** of the plaint.*

Regarding the second issue, it is clear from the evidence and the pleadings that by the time the second defendant was sued, he had not obtained grant of letters of administration to the deceased's estate and the declaration sought was to the effect that he could not participate in the affairs of the plot in question for lack of legal capacity to represent his father who died in 1985. It's also clear that subsequently and during the pendency of the said case he obtained a grant of letters of administration in succession cause no. 451 of 2005 dated 5th December 2005. Thus, by the time the case came up for hearing he was a lawful administrator of the deceased's estate and he then henceforth possessed the necessary capacity to represent his father.

The effect of the changed circumstances was simple, prayer **(a)** of the plaint had effectively been overtaken by events. Courts of law do not act in vain. It was not necessary for the appellant to pursue the said relief because the ground upon which his case was premised had been cut and or had drastically shifted. This crucial occurrence was not captured by the parties or the court because in so far as the said relief is concerned, the trial had become an academic exercise and even if the said order was granted as framed in the plaint, I am afraid it could not have defeated the said grant which was already in force. Had

the parties appreciated the said reality, these proceedings could have been terminated much earlier and both parties could have saved time, resources and valuable judicial time.

A court of law is not interested in reliefs which are merely academic or speculative. A court of law deals with issues which will have bearing in one way or the other on any of the parties or all the parties before it. Discussing this issue the Supreme Court of Nigeria in the case of *The State vs Fatai Azeez & 4 Others*[2] held that "a court of law cannot serve as a forum for moot trials and academic exercises."

I hold that the above position disposes this ground for it was not necessary for the proceedings to continue the moment the grant was obtained, because once the second respondent obtained the grant, the alleged lack of *locus standi* was no longer there. Thus, my answer to issue number two is in the negative. Having so found, I find no need to discuss this ground further.

On the first issue, its trite law that the elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiffs reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory *per se*. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice.[3] The defamatory words must be shown to have been published by the defendant.

The foregoing ingredients of defamation were reiterated in the case of *John Edward vs Standard Ltd*[4] where the court stated as follows:-

"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:-

- i. *The statement must be defamatory.*
- ii. *The statement must refer to the plaintiff.*
- iii. *The statement must be published by the defendant.*
- iv. *The statement must be false."*

Black's Law Dictionary[5] defines defamation as "the act of harming the reputation of another by making a false statement to a third person." The book *Gatley on Libel and Slander*[6] authoritatively states that a statement is defamatory of the person of who it is published if it tends to lower him/her in the estimation of right thinking members of the society generally or it exposes him/her to public hatred, contempt or ridicule or it causes him to be shunned or avoided. A plaintiff in a defamation case must prove that the words were spoken or written by the defendant, that those words refer to him/her, that those words are false. That the words are defamatory or libelous and that he/she suffered injury as a result, that is, his/her reputation was injured as a result.

The learned magistrate correctly observed that *it's not clear of the two respondents who uttered the alleged defamatory words nor was it stated clearly where or when the words were uttered*. The appellant stated "we had a meeting and there were problems. They used to insult me saying I had new clothes..." It was not shown who were in the said meeting and in any event to prove publication it was necessary to show that other persons other than the appellant heard the words complained of. The statement that "they used to insult me" is so general that it cannot be enough prove to show when, where, who of the two and the nature of insults complained of to prove the tort of defamation.

I therefore hold that the tort of defamation was not proved at all and my answer to issue number one is in the negative.

I find that the learned magistrate correctly interpreted and applied the law and arrived at the correct finding, hence I uphold the decision of the lower court. The upshot is that this appeal fails and I hereby dismiss it with costs to the Respondents.

Orders accordingly.

Dated at **Nyeri** this **11th** day of **February** 2016

John M. Mativo

Judge

[1] **Nyeri civil appeal no. 147 of 2002**

[2] {2008} 4 SCNJ 325

[3] See Godwin Wachira vs Okoth {1977} KLR 24, J. P. Machira vs Wabethi Mwangi & Nation Newspapers Ltd Civil Appeal No 179 of 1977

[4] {2006}eKLR

[5] 8th Edition

[6] 10th Edition