**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL 70 OF 2008**

**WYCLIFFE A. SWANYA.........................................APPELLANT**

**AND**

**TOYOTA EAST AFRICA LTD.........................1ST RESPONDENT**

**FRANCIS MASSAI..........................................2ND RESPONDENT**

***(An appeal from the ruling of the High Court of Kenya at Nairobi (Waweru, J.) dated 19th February, 2008***

**in**

**H.C.C.C. No. 28 of 2007)**

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**JUDGMENT OF THE COURT**

On 17th January, 2007 the appellant filed a suit in the superior court to claim from the respondents jointly and/or severally general damages, costs and interest thereon arising from words the respondents are alleged to have uttered on 12th November, 2005 and which the appellant believed were defamatory of him. The words allegedly uttered were to the effect that:-

> "***... If this company (**Toyota East Africa Limited**) had customers/people like you – Mr. Swanya, the company would close down."***

After the respondents filed their defence on 19th March, 2007 to which the appellant replied on 2nd April 2007, the respondents filed an application by Chamber Summons dated 14th May, 2007 in which they sought the striking out of the 1st respondent's name and the plaint generally on the grounds that there was no cause of action for the claims made by the appellant; the cause of action in the suit did not subsist under the Limitation of Actions Act (*Chapter 22*) Laws of Kenya and the Defamation Act (*Chapter 36*) Laws of Kenya; that the 1st respondent in its capacity was incapable of uttering the alleged defamatory words and had wrongly been joined as the 1st respondent in the suit; that in the alternative the plaint was scandalous and purely intended to victimise the 1st respondent, that the plaint could not be sustained by the Honourable Court as it was totally defective; that the plaint was untrue, vexatious and an abuse of the court process, that the 1st respondent was a stranger to the suit and that it was fair and just that the 1st

respondent's name be struck out of the proceedings.

This application was supported by an affidavit deponed to by Mahmood Omar, the General Manager of the 1st respondent which repeated in the main the grounds on the body of the application. The appellant filed a replying affidavit to the application and stated that the suit should not be struck out because the 1st respondent was primarily or vicariously liable for tortuous acts of its representatives or officers; that though the utterances were made on 12th November, 2005, the appellant started to feel their negative impact in May 2006 and the suit was filed within one year thereafter; that the appellant's claim was real and should be allowed to be ventilated; that from the letters exchanged between the advocates for the parties the respondents were estopped from raising the defence of limitation and that the respondents had failed to show that the appellants claim was scandalous frivolous or vexatious; hence the application lacked any merit.

The application was placed before the superior court (*Waweru J.*) on 19th February, 2008 where Mr. Inyangu, learned counsel for the respondents submitted that the 1st respondent had been misjoined in the suit and had only been sued merely because the 2nd respondent who allegedly uttered the scandalous words was its employee. That this being a defamation matter, the suit should have been filed within 12 months after the utterances were made. He prayed that the application to strike out the plaint and 1st respondent's name from the suit be allowed.

***Mr. Ombwayo***, learned counsel for the appellant, opposed the application and relied on the replying affidavit. He submitted that the cause of action was founded on slander and that the 1st respondent was properly joined in the suit. He reiterated paragraph 4 of the replying affidavit that the cause of action arose in May 2006 when damages were realized. In his short ruling the learned Judge of the superior court stated as follows:-

> "***It is pleaded in paragraph 4 of the plaint that the words alleged to have been scandalous of the plaintiff were uttered on 12th November, 2005. The cause of action therefore arose on the said date. Suits for defamation must be brought within 12 months of the cause of action arising. This suit was filed on 17th January, 2007 clearly out of time. No leave to bring it was sought or obtained. It is also doubtful that a limited liability company can utter words as pleaded in paragraph 4 of the plaint. In the circumstances, this suit is struck out with costs to the defendant. It is so ordered."***

The appellant was aggrieved by this decision and has filed this appeal before us through a memorandum of appeal dated 27th February, 2008 and lodged in Court on 25th April 2008. In the memorandum of appeal, the appellant complains that:-

> "***(1) The Judge of the superior court failed to exercise his discretion or exercised it injudicially by failing to appreciate that the tort of defamation is not actionable perse and that the appellant had otherwise justified that the limitation period within which to file the suit had not expired.***
>
> ***(2) The Judge of the superior court erred in law and fact by failing to appreciate that the appellant was entitled to apply for leave to file the suit out of time either before or after the commencement of the suit and that it was therefore, premature to strike out the appellant's suit.***
>
> ***(3) That the Judge of the superior court erred in law and fact by failing to take into consideration all the appellant's leadings*** (*sic*) ***and submission which, had been done so, would have lent*** (*sic*) ***to a different finding in favour of the appellant.***
>
> ***(4) The Judge of the superior court erred by failing to appreciate that the appellant had a reasonable cause of action against the respondents jointly and or severally, and that the respondents had failed to that*** (*sic*) ***the suit was scandalous and vexatious."***

The appeal was placed before this Court for hearing on 8th December, 2008 when counsel for the parties advanced their arguments thereon. Mr. Ombwayo, learned counsel for the appellant submitted that the cause of action arose out of slander from words which were uttered on 12th November, 2005. These words spread to the appellant's place of work so that the cause of action arose in May 2006 and that when the suit was filed on 17th January, 2007, it was within the limitation period and it was premature for the respondents to file an application to strike out the suit. According to counsel, apart from the defamation cause of action there was another independent cause of action in the plaint, namely, malicious falsehood.

Mr. Inyangu, learned counsel for the respondents, opposed the appeal and submitted that the cause of action in this matter arose when the defamatory words were uttered. That there were no averments when these defamatory words were published and uttering words alone does not constitute defamation. Counsel stated that if there was a tort of malicious falsehood, it is not show against whom this tort was committed. He said further that no reasons were shown why the 1st respondent was sued in the case the subject of this appeal. He prayed that the appeal be dismissed.

A limited liability company is a legal entity capable of suing or being sued – ***Solomon v. Solomon*** ***[1897] A.C. 22***. In defamation cases, limited liability companies have been sued and ordered to pay compensation therein, – ***Kenya Tea Development Agency Ltd v. Benson Ondimu Masese T/A B. O. Masese & Company Advocates***, ***Civil Appeal (C.A) No. 95 of 2006.*** This was a libel case and evidence against the company arose from letters written by the Chief Executive Officer of the company, the appellant, complaining against the respondent. But this is not the case in the appeal before us because there is no correspondence exchanged between the parties. Here there were two parties sued, Toyota East African Limited a limited, liability company and an individual, Francis Massai. They are alleged to have uttered the words:-

> "… ***If this Company (Toyota East Africa Limited) had customers/people like you – Mr. Swanya, the company would close down."***

These words are alleged to have been uttered by the two respondents jointly and severally. Certainly, a limited liability company as the 1st respondent, cannot make verbal remarks, but for it to be held liable its officers or servants can in their official capacity and with the authority of the employer. In the case before the superior court it was not disclosed who made the remarks and in what capacity, ***Tanganyika Transport Company Ltd v. Ebrahim Noorani.*** ***[1961] EA 55*** at page 60. Without this disclosure we cannot fault the learned Judge for finding that the 1st respondent was wrongly enjoined to the suit. And apart from the appellant describing the 2nd respondent as:-

> "***an adult of sound mind who is gainfully employed with 1st respondent,"***

his rank in that company is not disclosed or whether he was the one who made these remarks with the express or implied authority of the 1st respondent. Neither did the appellant disclose his involvement with the respondents which gave rise to the remarks so as to give the court the opportunity to consider the context in which these remarks were made – (see ***section 3*** and ***5*** of the Defamation Act). It is true the remarks allegedly uttered indicated the appellant was a customer of the 1st respondent but this alone was not sufficient to show the full context in which the utterances were made.

Moreover, under ***section 4(2)*** of the Limitation of Actions Act an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued:

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

When does the cause of action in the case of slander accrue? The appellant submitted through counsel that, in his view, it accrued after he started feeling the impact of the respondents' remarks at his place of work in May 2006; then he filed the suit the subject to this appeal. The pleadings did not disclose where his place of work was apart from what was disclosed in paragraph 4 of the plaint. The counsel submitted

further that this was within the limitation period. Unfortunately the Limitation of Actions Act (*Chapter 22 Laws of Kenya*) does not say so. It says in case of libel or slander no action may be filed

> "***after the end of 12 months from the date the cause of action accrued"***

and we understand this to mean from the date the slanderous remarks are made. (see ***proviso to section 4 (2)*** – of the Limitation of Actions Act and ***section 20*** of the Defamation Act). It would be absurd for slanderous remarks to be made about a person and then he/she waits until he/she feels the effects thereof to file an action in court. If this be the case then there would be no need for any limitation period to be specified. In the appeal before us the slanderous remarks were made on 12th November, 2005 and the latest the suit should have been filed would have been 11th or 12th November, 2006. We find it strange that the appellant should wait to feel the impact of the remarks allegedly made by the respondents beyond the limitation period from May 2005 to file the case in the superior court on 17th January, 2007.

For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

> "***(i) That the matter of which the plaintiff complains is defamatory in character.***
>
> ***(ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.***
>
> ***(iii) That it was published maliciously***
>
> ***(iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage."***

See ***Kenya Tea Development Authority Limited v. B. O. Masese & Company Advocates,*** (*ibid unreported*) and ***Mikidadi v. Halfan & Another [2004] 2 KLR 496*** at page 503.

Words uttered by a party against another amount to slander if they are published and intended to disparage that person in his office, profession, calling, trade or business held or carried on by him, (see ***section 3*** *of the Defamation Act*). The words allegedly uttered by the respondents and which gave rise to the case in the superior court do not appear to have been communicated to third parties or shown to have been intended to disparage or directed at disparaging the appellant in his office, profession, calling, trade or business held or carried on by him. The pleadings or even the proceedings do not disclose this important aspect of the case nor do they disclose any third party who would have heard the disparaging remarks in order to establish the ingredient of publication and to hold the appellant to ridicule or contempt. Neither is the defamatory nature of the alleged remarks clearly brought out. Given all these circumstances, we are of the view that no defamation case was made out by the respondents against the appellant and even if it had done so the case would have been caught by the limitation period. The issue of the tort of malicious falsehood, if it exists, was not raised before the superior court and we do not wish to entertain it in this appeal. We agree that the learned Judge rightly struck out the appellant's suit. We see no merit in this appeal which we order that it be dismissed with costs.

***Dated and delivered at Nairobi this 13th day of March, 2009.***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**