

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE JUDE O. OKEKE FICMC

ON MONDAY THE 13TH DAY OF JANUARY, 2020

SUIT NO: FCT/HC/CV/1147/2017

BETWEEN:

TONY OGBULAFOR.....CLAIMANT

AND

EMEKA UGWUONYE.....DEFENDANT

JUDGMENT

By a Writ of Summon and Amended Statement of Claim filed on 18/11/2017, the Claimant seeks for the following reliefs against the Defendant

- “(a) The sum of One Billion Naira as exemplary damages against the Defendant for the destruction of the reputation and character of the Plaintiff (SIC) through the publication of vicious and defamatory material of and concerning the Plaintiff.
- (b) An order of perpetual injunction restraining the Defendant, his agents, privies, associates or howsoever called from making further defamatory publications of and concerning the Plaintiff.
- (c) Cost of this suit”.

The Amended Statement was filed with a witness's Statement on oath and documents to be relied on in evidence.

Records of Court show the Amended Statement of claim and Hearing Notice were served on the Defendant by substituted means on 20/10/2017. He was also served with Hearing Notices on 1/2/2018 and 24/6/2019.

On 5/2/2018, Mr. O. Ojaome of Counsel appeared in Court for the Defendant. He applied and was granted an adjournment to enable him file the Defendant's processes having just been briefed in the case. At resumed sitting on 6/3/2018 he was granted leave, pursuant to his application, to file Memorandum of Appearance, Statement of Defence and Counter Claim within seven days.

The order of Court in the above regard was not complied with by the Defendant as he did not file the processes for which leave was granted to him. Following his continued unexplained absence, the Court proceeded with trial of the case.

On 3/12/2019 scheduled for adoption of Final Written Addresses the Defendant came up with a motion on notice with number: M/7748/2019 seeking for leave of Court for extension of time within which to enter appearance and file the Defendant's defence.

As the Counsel who filed the application was not the counsel on record for the Defendant and did not fulfill the condition precedent for the application to be heard, and the reason too that the default penalty attendant on the filing of the Application out of time was not paid as required by the Rule of Court, the Court refused the application. The

Claimant next, with leave of Court proceeded to adopt his final Written Address. This has now set the stage for this Judgment.

Trial did commence in the suit on 6/12/2017 with the Claimant testifying for himself as PW1. He adopted his Witness Statement on Oath deposed to on 15/11/2017 as his evidence in chief.

He testified, inter alia, that he is a legal practitioner. The Defendant is also a private legal practitioner carrying on business in the name and style of EculawGroup and the operator of a Social medial platform known and called "Due Process Advocate (DPA)" with over 120,000 members and over 2 million followers. He operates from Lagos outside the jurisdiction of the Court. He (himself) is a member of NBA Abuja Branch Elders Forum by virtue of being a past secretary of the Branch. He is the current chairman of Catholic Men's Organization of Holy Trinity Parish Maitama Abuja. He is also the patron of Umuahia Union Abuja Branch. He has attained a respectable and responsible status in society by virtue of hard work and integrity in his undertakings and is looked upon by many as a role model.

The Defendant published or caused to be published on 14/7/2016 on the wall of Due Process Advocate (DPA) the following words of and concerning him:-

"I saw Mr. Tony Ogbulafor, Mr. Aiyedobon's Lawyer handover an envelope to a Police Officer, Mr. George Agada as Mr. Agada assured him I would be detained. I request that the Commissioner of Police place Mr. Agada on administrative leave while the police investigate this complaint. And I request that Agada be removed from (SIC) case entirely. I shall also file a bar complaint against Ogbulafor for bribing a

police officer to ensure that I was detained. I can't believe that a lawyer would engage in such conduct.”

On reading the words written of and concerning him, he believes the said words complained of are innuendos and disparaging of his person. He instructed his lawyer to write to the Defendant demanding a retraction of the said publication and an unqualified apology for the defamation.

His Solicitors – Lloyd Solicitors did write the demand letter on 3/8/2016 and posted same on 8/8/2016 using Ups Courier Service.

The said letter was received by the Defendant on 5/8/2016 through Ups Courier Service.

The Defendant did not retract the said publication and did not tender any apology to him for the defamatory publication.

The Defendant is not remorseful as he went further to publish another material on 14/10/2016 reaffirming the earlier publication.

As a result of the vicious and defamatory publications made by the defendant against him, right thinking members of the public look at him with hatred, contempt, odium opprobrium and ridicule as a person who is not fit to be a lawyer and one who sells his colleagues to the enemy for whatever reason he may have.

As a result of the offensive publication, his community has suspended him from the Chairmanship of the board of Trustees and

excommunicated him from the activities of the community in Abuja where he resides.

Because of the defamatory publication, the Nigeria Bar Association Abuja Branch has barred him from participating in its activities until he clears himself of the grievous allegation.

As a result of the publication, the Catholic Men's Organization Holy Trinity Parish Maitama Abuja suspended him from their activities in the church.

Because of the publication, the Umuahia Union Abuja Branch, removed him as a patron of the Union and banned him from its activities.

He has been gravely injured in his reputation, professional calling and social standing as people now shun him and look down on him as a person of little or no character at all.

He is now being treated as a social leper by professional colleagues and other right thinking members of the public.

No monetary compensation can restore his lost self-esteem, professional reputation, standing in the church and community and in the society at large but that monetary compensation should be given to him as the publication made against him by the Defendant is false and the monetary compensation awarded against the Defendant will force him to desist from making such false publications against him and other people in future.

He claims in the terms of his Amended Statement of claim.

The witness tendered the following documents in evidence:-

- (1) Original copy of computer generated publication dated 14/7/2016 – EXHIBIT A
- (2) Original copy of computer generated publication dated 14/10/2016 – EXHIBIT B
- (3) Original copy of Certificate of production of electronically generated evidence dated 15/11/2016 – EXHIBIT C
- (4) Photocopy of letter written by Lloyd Solicitor to the Defendant dated 3/8/2016 – EXHIBIT D
- (5) Original copy of UPS receipt and shipper's copy of shipment document issued by UPS to Lloyd's Solicitors – EXHIBIT E.
- (6) Original copy of letter dated 14/2/2017 written by Olukoro Welfare Association to the Claimant – EXHIBIT F.
- (7) Original copy of letter dated 7/3/2017 written by Catholic Men Organization to the Claimant – EXHIBIT G
- (8) Original copy of letter dated 1/2/2017 written by Umuahia Union Abuja to the Claimant- EXHIBIT H.

After the above evidence in chief of the Claimant, the case was scheduled for cross examination by the Defendant on 5/2/2018.

The learned Defendant's Counsel on the said date however applied for an adjournment for the reason that he was just briefed in the case. The application was granted. However, on the next scheduled date being 6th March 2018 the counsel rather than cross examine the witness, moved his motion for extension of time to file the Defendant's defence.

The case was again adjourned to 23/4/2018 for cross examination.

On that date following the unexplained absence of the Defendant and his Counsel, the Defendant's right to cross examine the PW1 was foreclosed and the witness discharged. With this, the Claimant closed his case.

Despite Hearing Notice served on him, the Defendant did not appear in Court on 20/3/2019 scheduled for defence. Likewise for his counsel. There was no written explanation for their absence.

Consequent upon this, the Claimant counsel's application to foreclose the Defendant's right to defence was granted and time lines given to the parties to file and exchange Final Written Addresses.

As aforesaid, the Defendant's application for extension of time to file Statement of Defence after the case had been set down for adoption of Final Written address was refused for being incompetent while the Claimant filed and served his Final Written Address the Defendant did not file any.

The Claimant with leave of Court adopted his Final Address on 3/12/2019. Judgment was then reserved for today 13/1/2020.

I have taken time to read and digest the said Claimant's Counsel's Final Written Address. The central issue that calls for determination is whether or not the Claimant has made out a case to justify a grant of the reliefs sought in the Amended Statement of Claim.

Before proceeding to resolve the issue, it is pertinent to restate the law albeit briefly as it relates to libel and burden of proof of same so as to be properly guided.

The settled position of the law in our adversarial legal system is that where a party asserts a state of affair and desires the Court to make an order or pronouncement in his favour, the burden of proof first lies on him to lead preponderance of evidence on same, lest he fails. The burden of proof is not static but shifts from party to party until the issue on contention is resolved. The evidential burden is however always in the party who will fail where further or rebuttal evidence (where necessary) is not adduced. See: Sections 131 to 133 of the Evidence Act 2011; AKANDE V. ADISA (2012) 15 NWLR (Pt. 1324) p.538; FAMUROTI V. AGBEKE (1991) 5 NWLR (Pt. 189) P1 and OLAIYA V. OLAIYA (2002) 12 NWLR (Pt. 782) p.652.

In a declaratory action, as this, the Claimant succeeds on the strength of his case (ie evidence he adduced) and not on the weakness or absence of defence by the Defendant, although he can rely on the aspects of the Defendant's case which support his case. The Court nevertheless is to be satisfied that the evidence adduced by the Claimant sufficiently sustains and proves the relief sought. The Court does not grant declaration on admission of parties. See KWAJAFFA V. BNV. LTD (1999) 1 NWLR (Pt. 587) p. 423; BELLO V. EMEKA (1981) 1 SC P. 101 and OFOEZE VS OGUGUA (1986) 6 NWLR (PT. 455) P. 451.

With respect to libel which is the subject matter of this action, judicial authority are settled that Claimant must prove five basic ingredients in proof of his case. The ingredients are:

- (1) That there was a publication in writing
- (2) The publication was false:
- (3) The publication is defamatory of the Claimant
- (4) The defamatory statement was published to a third party.
- (5) The Defendant published the words.

The authorities are also settled that it is the publishing of a defamatory matter that constitutes the cause of action in the libel.

The material part of the cause of action is not the writing but the publication of the libel. See *INLAND BANK (NIG) PLC V. F&S CO. LTD* 2010 15 NWLR (Pt. 1216) P.395 *AMUZIE V. ASONYE* (2011) 6 NWLR (Pt.1242) P. 19 and *NSIRIM V. NSIRIM* (1990) 3 NWLR (Pt. 138) p.285.

To found an action in libel, the Claimant must strictly prove publication of it. Publication means the making known of the defamatory matter after it was written to some person other than the person of whom it is written. If the material is read only by the person of whom it is written, there is no publication of it. A communication of the defamatory matter to the person allegedly defamed cannot injure his reputation though it may wound his self-esteem. A man's reputation is not the good opinion he has of himself but the estimation others hold of him. See: *OTOP V. EKONG* (2006) 9 NWLR (Pt. 986) p. 533; *YAHAYA MUNCHIKA* (2000) 7 NWLR (Pt. 664) p. 300 and *NSIRIM V. NSIRIM* (supra). An action for libel must fail if publication of the defamatory matter is not proved. The proof must be given by admissible evidence of a third person who says he read the matter. Where a Claimant does not prove publication of the alleged libel, no cause of action has arisen. See *AMUZIE V. ASONYE* (supra).

Dwelling on the duty and what a Claimant in an action needs to do to be said to have proved publication of libel. The Supreme Court in *AJAKAIYE V. OKANDEJI* (1972) 1SC P. 92 explained that “The publication of the words complained of must be proved positively. That the mere fact that the newspaper containing the words complained of is admittedly published by the Defendant would not constitute “publication” that would ground libel until a third persons testifies that he had read the words complained of, or facts adduced from which the irresistible and only inference that could be drawn is that a third party had read the words complained of. For it is not unlikely that persons to whom the document, containing the said words complained of, were allegedly published did not in fact read the said words. It is this likelihood that the law seeks to eliminate in respect of holders, recipients or buyer of the document containing the said words complained of, that at least, one and only one of such persons the law requires, should testify that he has read the word complained of. In other words, the Plaintiff in a libel case must first establish the fact that the document containing the words, complained of reached a third party thereby establishing prima facie evidence of publication”

Being so guided, I have given a serious thought to the Claimant’s claim in the instant action and evidence adduced in support of it. Admittedly, the Defendant did not file a Statement of Defence and did not lead evidence in opposition of the Claimant s case. Ordinarily, this should result to the Court holding that by that failure the Defendant admitted the Claimant’s case. But then, the instant action is declaratory in nature and the Claimant seeks for order or pronouncement of Court to the effect that the alleged offensive words defamed him. The law, as earlier pointed

out, is that a Claimant in a declaration action is to succeed on the strength of his case and not on the weakness or absence of defence by the Defendant. By this the Claimant is under a duty to succeed based on the evidence he adduced in proof of the claim and not the weakness or absence of defence by the Defendant.

Upon a global overview of the Claimant's case, even if the Court is satisfied based on the evidence adduced by the Claimant who testified as PW1 that the Defendant wrote of and concerning him the words contained in Exhibit A upon which the Claimant's case is predicated, there is no evidence in proof of publication of same to a third party before the Court. The cardinal way to prove publication of a libel is to prove vide the evidence of a person who read the offensive words, that he/she indeed read it and it lowered the Claimant in his/her estimation. As clearly pointed out by the Supreme Court in *AJAKAIYE V. OKANDEJI* (supra), there is the need for a Claimant to call at least one person who testifies that he read the words complained of before the Claimant can be said to have proved publication of the libel. The apex Court did reason that it is not unlikely that the persons to whom the words complained of were allegedly published did not in fact read the said words. That it is this likelihood that the law seeks to eliminate in respect of holders, recipients or buyers of the document containing the said words complained of that makes it imperative that at least one of such persons to whom the words were sent should testify to their having read same.

In this case, other than the Claimant who testified as to the writing and publication of the alleged offensive words, he did not consider it necessary and did not call at least one person whom he claims read the

offensive words to testify to his/her having read the words. Although the Claimant did tender as EXHIBITS F (being a letter written by Oluroko Welfare Association, Abuja Branch suspending him as Chairman of its Board of Trustees); Exhibit G (being a letter written by Catholic Men Organization (CMO) directing him to handover to the Vice Chairman of the Organization) and Exhibit H (being a letter written by Umuahia Union Abuja to him as its patron) all allegedly on account of the said offensive publication of the Defendant, it cannot be gainsaid that the Claimant still had a duty in order to be seen to have positively proved publication of the words to have someone out of any of these organizations testify to the effect that they read the said words. Documents do not speak for themselves alone. Merely dumping the said documents on the Court without evidence from one of the authors of any of them or even from the membership of the organizations attesting that he or they indeed read the offensive words which resulted in the sanction stated in the letter is necessary for publication of the words to them to be grounded.

Beyond this, it will be presumptions for the Court to hold that the Claimant proved publication of the alleged libel vide the contents of Exhibits F, G and H when none of the authors testified as to the contents and was made available for cross examination by the Defendant, if he so chose. Section 126 of the Evidence Act 2011 provides the way and manner in which oral evidence of fact in issue may be proved. The Section provides: -

“Subject to the provisions of Part III, oral evidence shall in all cases whatever, be direct if, it refers to:

- (a). A fact which could be seen, it must be the evidence of a witness who says he saw that fact;
- (b). To a fact which could be heard, it must be the evidence of a witness who says he heard that fact.
- (c). To a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner...”

In this case, there is no oral evidence of any of the authors of Exhibits F, G and H before the Court to show that their reading the offensive words led to the sanctions stated in the exhibits. Such oral testimony ought to be placed before the Court in fulfillment of the requirement to enable the Defendant interrogate them, if he so wishes. There is no such evidence before the Court.

By reasons of the foregoing, the Court holds the view that the Claimant has not by evidence proved an essential ingredient of libel which is proof of publication of the offensive words to a third person. This failure is regrettably fatal to this case. As the law has not been fulfilled by the Claimant to justify a finding in favour of the Claimant, despite the failure of the Defendant to lead evidence, this case cannot succeed. It is, in the circumstances, dismissed.

I make no order as to cost.

**Signed
Hon. Judge
13/1/2020**

LEGAL REPRESENTATIONS:

- (1). Chuma Chukwudi Esq for the Claimant.
- (2). Oluwatosi Ojaomo for the Defendant.