Muigai, SC v Nation Media Group Limited & another (Civil Case 238 of 2019) [2024] KEHC 13327 (KLR) (Civ) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13327 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 238 OF 2019

AN ONGERI, J

OCTOBER 30, 2024

BETWEEN

PROF GITHU MUIGAI, SC ..... PLAINTIFF

AND

NATION MEDIA GROUP LIMITED ..... 1ST DEFENDANT

KEN OPALA ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case Prof. Githu Muigai SC (hereafter referred to as the plaintiff) sued the two defendants Nation Media Group LTD (NMG) and Ken Opala (hereafter referred to as the 1st and 2nd defendants respectively) seeking the following remedies;

    i. A declaration that the plaintiff is entitled to a retraction of the defamatory words and an order be issued compelling the defendants to publish prominently a suitably worded retraction and apology in the 'Daily Nation Newspaper' with the same prominence as the defamatory article.

    ii. An injunction to restrain the defendants, and each of them by themselves, their servants, agents or employees from further printing and publishing or causing to be printed and published on their digital platforms any of the defamatory material contained in the said article or any such material as would be scandalous or defamatory to the plaintiff in any manner whatsoever.

    iii. An order to compel the 1st defendant to remove permanently from its online platform, internet and social media the defamatory publications of 30th September 2019 and 2nd October 2019 of and concerning the plaintiff.

    iv. General damages

v. Aggravated damages.

vi. Punitive damages

vii. Interest on (d), (e) and (f) above at court rates

viii. Costs of the suit.

ix. Any other or further relief as this honourable court may deem fit to grant.

2. The plaintiff averred in his plaint dated 29/10/2019 that on Monday, 30th September 2019, the 1st Defendant published in the Daily Nation Newspaper an article authored by the 2nd Defendant under the headline; 'How Kenya bungled Somalia border talks' with the following subtitle;

> 'Authorities tasked with handling maritime issue slept on the job and even considered it a small case'

3. At page 9 of the said newspaper from the fourth paragraph in the first column, the Defendants printed and published or caused to be printed and published of and concerning the Plaintiff the following defamatory words in bold print and underline;

> " According to multiple interviews and Memorials filed at the International Court of justice (ICJ), the negotiation team led by officials from the Attorney General (AG) and the Kenya International Boundaries Office (KIBO), slept on the job. And because of this, Kenya now risks losing a crucial chunk of land to its neighbour, and even paying billions of shillings in compensation. The officials didn't just dilly-dally and delay; they even stalled the bilateral talks between July to August 2014, and this forced Mogadishu to seek ICJ's arbitration.
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> When the United Nations asked Kenya whether Somalia should go ahead with the case, Kenya said 'yes ' and this was a big mistake, says a source privy to the bilateral talks.
>
> Thus, Kenya allowed Somalia to move to the ICJ headed by Abdulqawi Ahmed Yusuf, a Somalia. This appears to have put the nail on any move to have the case settled outside the Court.
>
> According to highly-placed sources privy to the initial negotiations, Kenyan authorities failed to deploy the requisite diplomatic tools to dissuade Somalia from moving to the ICJ.
>
> 'I think we showed signs of naivety at the beginning. There are people who felt it was time to make money rather than pursue the interest of the country '
>
> Mogadishu Meetings
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> During the negotiations in March 2014 through to July 2014, which understandably gobbled up Kshs. 3 Billion, Kenyan delegations would comprise 50 members against Somali's two.
>
> And because the AG didn't do much to have the issue resolved amicably and in time, the lethargic KIBO — known to have (ailed over the Migingo Island issue — seized the opportunity only to later bungle up the negotiations.
>
> 'They had a mentality that this was a small case, and that Somalia was a failed State that couldn't handle the issue', according to the source. There must have been disconnect between KIBO and the A G's office then headed by Prof. Githu Muigai.

Instructively, Kenya failed to attend a crucial follow-meeting in Mogadishu. The officers in charge of the negotiations didn't even send an apology for Kenya 's absence, and when Somalia requested for alternative dates, Nairobi went Mute'

4. Further in the said article on the fifth column, the Defendants printed and published or caused to be printed and published of and concerning the Plaintiff the following defamatory words in bold print and underline;

> 'Somalia concluded that further negotiations would be pointless. It therefore took the decision to seek resolution of the dispute in accordance with international law. Somalia appear to be placing the blame on KIBO Chief Juster Nkoroi, who was the head of the head of the Kenyan delegation to the talks.
>
> Implicitly, were Kenya to lose the case, it won 't be because Somalia will have to put up a splendid show at the Hague. It will be because Kenya undermined its own effort through greed, naivety and sheer incompetence'.

5. The said issue of the Daily Nation Newspaper containing the said article was widely distributed in this jurisdiction and worldwide through its online editions.

6. By the said words in their entirety in their ordinary and natural meaning, or by necessary implication and/or innuendo, the words published in the article were understood to mean and meant that the Plaintiff;

   a. is an incompetent and unprofessional person, who by inaction failed to defend the country's interest;

   b. is an unpatriotic as he jeopardized national interest for personal gain and his actions were actuated by greed;

   c. is a corrupt and untrustworthy person;

   d. abused his office and wasted public resources;

   e. is unworthy of the respect and reputation that would otherwise be due to him in his professional calling;

   f. Ought to be shunned by right thinking members of the society since he is disgraceful and a self-seeking person unworthy of any respect or esteem.

7. The Plaintiff avers that the publication of the defamatory article by the Defendants was actuated by extreme malice and utter recklessness and calculated to cause, and indeed caused the Plaintiff to be ridiculed and treated with contempt and disdain.

8. The said defamatory words printed, published and disseminated by the Defendants were reckless and the Defendants published the defamatory article without seeking to verify the factual position with the Plaintiff.

9. The defamatory words have been circulated through the 1st Defendant's digital platform and shared on the internet and social media receiving the widest possible circulation through the 1st Defendant's online platforms available at https://www.nation.co.ke/news/africa/How-Kenyan-bungled-Somalia-border talks/ 1066-5292066-e00p7yz/index.html.

10. The Plaintiff will rely on the following facts and matters to support his claim for aggravated and punitive damages;

i. The Defendants were aware from a reading of memorials filed at the International Court of Justice (ICJ) that the negotiations were being handled by the Ministry of Foreign affairs from 2014 to 2017 before Somalia filed the case before the Court. The Plaintiff was not involved in the negotiations at all and the 2nd Defendant deliberately and maliciously ignored the facts pertaining the case in his quest to defame the Plaintiff at all costs;

ii. The Defendants published the defamatory words and deliberately alleged that the Plaintiff had wasted and squandered Kshs.3 Billion, a fact which is not true and could have been ascertained from public records. The office of the Attorney General did not spend Kshs.3 Billion in five (5) months. The Defendants published the defamatory words without seeking to verify the factual position from the Plaintiff;

iii. The sensational manner in which the said article was published as evidenced by the use of the words "bungled" and "slept on the job" in the header and the sub heading respectively, were meant to connote lack of professionalism and incompetence and to attract maximum attention locally and internationally;

iv. The Defendants published the words without contacting or interviewing the Plaintiff to establish and verify the correct factual position;

v. The Defendants published the story on the entire page 9 of the Daily Nation Newspaper with a bold title to increase its circulation without due regard of the damage the same would cause the Plaintiff;

vi. The Plaintiff wrote a demand letter dated 1st October 2019 giving the correct factual position and seeking a retraction and apology but instead the 1st Defendant published a further defamatory editorial in its Daily Nation newspaper of Wednesday 2nd October 2019. At page 14 from the sixth and tenth paragraphs, the 1st Defendant printed and published or caused to be printed and published of and concerning the Plaintiff under the headline; 'Kenya should prepare well for Somalia case' the following defamatory words;

> " Furthermore, in typical Kenyan style, the officials seemed unperturbed that their actions risked soiling Kenya's territorial integrity. But they went ahead to benefit at the personal level. For instance, during the negotiations between March and July 2014, thev are reported to have spent more than Kshs. 3 billion on trips and allowances but with little to show (or the numerical advantage.
>
> Kenya seems to have shot itself in the foot. The only option open to the country now is to assemble a formidable legal team ahead of the courtroom battle that begins on November 4 or hope that Somalia changes its mind and opts for talks or drops the case. "

iv. The Defendants published the said words actuated by ill-will and malice.

And the Plaintiff claims aggravated and punitive damages.

11. The Plaintiff avers that instead of publishing an apology, the Defendants published an editorial on 2nd October 2019 that was also defamatory of the Plaintiff as pleaded hereinabove. The Plaintiff is apprehensive that unless a restraining order is issued by this Honourable Court, the Defendants will

continue with the publication of the defamatory articles against him. The Plaintiff therefore prays for an order of injunction against the Defendants.

12. In the circumstances of this matter, this Honourable Court will be asked to infer that the Defendants published the said articles;

    a. In the knowledge that the contents thereof were libelous or with a reckless disregard as to whether or not they were libelous as the factual position was easily verifiable from information available in the public domain;

    b. With prejudice for failing to offer the Plaintiff an opportunity to comment or otherwise rebut the offensive publication despite the Plaintiff being a public figure easily accessible and available to the Defendants for a fair comment;

    c. Having established that the prospects of material advantage to them by way of a quick and handsome profit far outweighed the prospects of material loss by way of such actions as may be brought against them, the Defendants decided to proceed with the publication of the articles;

    d. Having been served with the demand letter dated 1st October 2019 for an apology and retraction, the Defendants elected not to publish any apology or retraction but to further defame the Plaintiff by publishing a further defamatory article in the editorial on 2nd October 2019 at page 14 of the Daily Nation Newspaper.

13. The defendants filed a defence dated 16/12/2019 denying the plaintiff's claim.

14. The defendants raised the defence of fair comment on a matter of public interest.

15. The defendants averred as follows in their defence:

16. In further answer to paragraphs 9, 13,14 and 15 of the plaint and without prejudice to the foregoing, the defendants state that the words being complained of constituted a fair comment on a matter of public interest.

    Particulars Of Fair Comment

    a. Following the collapse of negotiations between Kenya and Somalia on the existing border dispute and referral of the dispute to the International Court of Justice (ICJ), there was great public interest in the maritime dispute as this would pit two neighbouring countries against each other in an international court.

    b. The dispute would have the effect of stifling diplomatic relations between Kenya and Somalia

    c. The progress of the dispute at the International Court of Justice (ICJ) was followed keenly by Kenyan citizens and widely covered by mainstream print and digital media.

    d. In publishing the articles, the defendants were merely commenting on the failed negotiations that led to the dispute being referred to the ICJ.

    e. The articles complained of were objective and constituted a fair and accurate representation of the events leading up to the matter being referred to the ICJ.

    f. The comments made by the defendants were in good faith and not actuated by malice.

17. In further answer to paragraphs 9, 13 and 15 of the plaint and without prejudice to the foregoing, the defendants state that the words being complained of were published on an occasion of qualified privilege.

Particulars Of Qualified Privilege

a. The article complained of relates to a maritime dispute between Kenya and Somalia which had not been resolved by diplomatic negotiations as would be expected.

b. Public funds had already been expended in the failed negotiations and it was likely that more public funds would be applied in the proceedings at the ICJ.

c. In all the circumstances, the defendants were under a moral or social duty to publish the information being complained of to members of the public who had an interest and/or were entitled to receive the information being published by the defendants.

18. The plaintiff testified as PW 1 and called one witness, Geoffrey Silas Imwende who testified as PW2.

19. PW 1, the plaintiff adopted his witness statement dated 29/10/2019 as his evidence in chief.

20. The plaintiff stated in the said written statement that he is a Professor of Law, and a former Attorney General of the Republic of Kenya, a Senior Counsel, a respected jurist and scholar, a distinguished member of the Law Society of Kenya and an advocate of the High Court of Kenya.

21. He produced copies his Curriculum Vitae (CV), the Gazette Notices in which he was gazetted as a Senior Counsel and Attorney General of the Republic of Kenya and his biography as Plaintiffs Exhibits 1, 2, 3 and 4 at pages 1 to 15 of the Plaintiff's list and bundle of documents.

22. The plaintiff stated that the 1st Defendant is the proprietor, printer and publisher of the 'Daily Nation' newspaper which has substantial circulation throughout the Republic of Kenya and having a broad global circulation and readership through its online editions.

23. The 2nd Defendant is a journalist employed and working for the 1st Defendant.

24. That on Monday 30th September 2019, the 1st Defendant published in the Daily Nation Newspaper an article authored by the 2nd Defendant under the headline; 'How Kenya bungled Somalia border talks' with the following subtitle;

> 'Authorities tasked with handling maritime issue slept on the job and even considered it a small case'
>
> "According to multiple interviews and Memorials filed at the International Court of justice (ICJ), the negotiation team led by officials from the Attorney General (AG) and the Kenya International Boundaries Office (KIBO), slept on the job. And because of this, Kenya now risks losing a crucial chunk of land to its neighbour, and even paying billions of shillings in compensation. The officials didn't just dilly-dally and delay; they even stalled the bilateral talks between July to August 2014, and this forced Mogadishu to seek ICJ's arbitration.
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> When the United Nations asked Kenya whether Somalia should go ahead with the case, Kenya said 'yes ' and this was a big mistake, says a source privy to the bilateral talks.
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> Thus, Kenya allowed Somalia to move to the ICJ headed by Abdulqawi Ahmed Yusuf, a Somalia. This appears to have put the nail on any move to have the case settled outside the Court.
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> According to highly-placed sources privy to the initial negotiations, Kenyan authorities failed to deploy the requisite diplomatic tools to dissuade Somalia from moving to the ICJ.
>
> 'I think we showed signs of naivety at the beginning. There are people who felt it was time to make money rather than pursue the interest of the country'

Mogadishu Meetings

During the negotiations in March 2014 through to July 2014, which understandably gobbled up Kshs.3 Billion, Kenyan delegations would comprise 50 members against Somali's two.

And because the AG didn't do much to have the issue resolved amicably and in time, the lethargic KIBO — known to have failed over the Migingo Island issue — seized the opportunity only to later bungle up the negotiations.

'They had a mentality that this was a small case, and that Somalia was a failed State that couldn't handle the issue', according to the source. There must have been disconnect between KIBO and the A G's office then headed by Prof. Githu Muigai.

Instructively, Kenya failed to attend a crucial follow-meeting in Mogadishu. The officers in charge of the negotiations didn't even send an apology for Kenya 's absence, and when Somalia requested for alternative dates, Nairobi went Mute '

Further in the said article on the fifth column, the Defendants printed and published or caused to be printed and published of and concerning me the following defamatory words in bold print and underline;

'Somalia concluded that further negotiations would be pointless. It therefore took the decision to seek resolution of the dispute in accordance with international law. Somalia appear to be placing the blame on KIBO Chief Juster Nkoroi, who was the head of the head of the Kenyan delegation to the talks.

Implicitly, were Kenya to loose the case, it won 't be because Somalia will have to put up a splendid show at the Hague. It will be because Kenya undermined its own effort through greed, naivety and sheer incompetence'.

25. At page 9 of the said newspaper from the fourth paragraph in the first column, the Defendants printed and published or caused to be printed and published of and concerning the plaintiff the following defamatory words in bold print and underline;

26. A copy of the article from the Daily Nation dated 30th September 2019 was produced as Plaintiffs Exhibit 5 at page 16 of the Plaintiff's list and bundle of documents.

27. That the said issue of the Daily nation Newspaper containing the said article was widely distributed in this jurisdiction and worldwide through the 1st Defendant's online platforms available at https://www.nation.co.ke/news/africa/How-Kenyan-bungledSomalia-border-talks/1066-5292066-e00p7yz/index.html.

28. By the said words in their entirety, in their ordinary and natural meaning, or by necessary implication and/or innuendo, the words published in the article were understood to mean and meant that;

    a. The plaintiff is an incompetent and unprofessional person, who by inaction failed to defend the country's interest;

    b. The plaintiff unpatriotic as I jeopardized national interest for personal gain and my actions were actuated by greed;

    c. That he is a corrupt and untrustworthy person;

    d. That he abused his office and wasted public resources;

e. That he is unworthy of the respect and reputation that would otherwise be due to him in his professional calling;

f. That he ought to be shunned by right thinking members of the society since he is disgraceful and a self-seeking person unworthy of any respect or esteem.

29. The publication of the defamatory article by the Defendants was actuated by extreme malice and utter recklessness and calculated to cause, and indeed caused me to be ridiculed and treated with contempt and disdain by Judges, professional colleagues, my students and the public in general.

30. The said defamatory words printed, published and disseminated by the Defendants were reckless and the Defendants published the defamatory article without seeking to verify the factual position from myself. The editor of the Daily Nation newspaper and the 2nd Defendant did not bother to call me or even write to me to verify the facts before publishing the defamatory articles.

31. The 2nd Defendant makes reference to 'multiple interviews and Memorials filed at the International Court of justice (ICJ)'. The Defendants were therefore aware that between 2014 and 2017, there were diplomatic negotiations between Somalia and Kenya. The Attorney General's office and I were not involved in the diplomatic negotiations. This was a task assigned by the His Excellency the President of the Republic of Kenya to the Ministry of Foreign Affairs, the Cabinet Secretary and her team of professionals in the Ministry.

32. In the Memorial file by Her Excellency Mrs. Makena Muchiri on 'Maritime Delimitation in the Indian Ocean (Somalia vs. Kenya) Preliminary Objection' to the International Court of Justice, which the 2nd defendant had access to and is referred to in the defamatory article, it is clear at paragraph *5* that the Ministry of Foreign Affairs was handling the negotiations. No reference is made to the office of the Attorney General or me. A copy of the Memorial by Her Excellency Mrs. Makena Muchiri is produced as Plaintiffs Exhibit 6 at pages 17 to 24 of the Plaintiffs list and bundle of documents.

33. The plaintiff relied on the following facts and matters to support my claim for aggravated and punitive damages;

a. The Defendants published the defamatory words and deliberately alleged that the plaintiff had wasted and squandered Kshs.3 Billion, a fact which is not true and could have been ascertained from public records. The office of the Attorney General did not spend Kshs.3 Billion in five (5) months. The Defendants published the defamatory words without seeking to verify the factual position from the plaintriff;

b. The sensational manner in which the said article was published as evidenced by the use of the words "bungled" and "slept on the job" in the header and the sub heading respectively, were meant to connote lack of professionalism and incompetence and were meant to attract maximum attention locally and internationally;

c. The Defendants published the words without contacting or interviewing the plaintiff to establish and verify the correct factual position;

d. The Defendants published the story on the entire page 9 of the Daily Nation Newspaper with a bold title to increase its circulation without due regard of the damage the same would cause me;

e. The plaintiff's advocates wrote a demand letter dated 1st October 2019 giving the correct factual position and seeking a retraction, the Defendants elected not to publish any apology or retraction but to further defame the Plaintiff by publishing a further defamatory article in the editorial on 2nd October 2019 at page 14 of the Daily Nation Newspaper;

34. The Defendants published the said words actuated by ill-will and malice.

35. Having established that the prospects of material advantage to them by way of a quick and handsome profit far outweighed the prospects of material loss by way of such actions as may be brought against them, the 1st Defendants instead published a further defamatory editorial in its Daily Nation newspaper of Wednesday 2nd October 2019. At page 14 from the sixth and tenth paragraphs, the 1st Defendant printed and published or caused to be printed and published of and concerning the Plaintiff under the headline; 'Kenya should prepare well for Somalia case' the following defamatory words;

> " Furthermore, in typical Kenyan style, the officials seemed unperturbed that their actions risked soiling Kenya's territorial integrity. But they went ahead to benefit at the personal level. For instance, during the negotiations between March and July 2014, they are reported to have spent more than Kshs.3 billion on trips and allowances but with little to show for the numerical advantage.
>
> Kenya seems to have shot itself in the foot. The only option open to the country now is to assemble a formidable legal team ahead of the courtroom battle that begins on November 4 or hope that Somalia changes its mind and opts for talks or drops the case. "

36. The plaintiff further stated that he is apprehensive that unless a restraining order is issued by this Honourable Court, the Defendants will continue with the publication of the defamatory articles against him.

37. The plaintiff also produced a second witness statement dated 22/12/2022 filed in court on 26/2/2022. He indicated that the article dated 30/9/2019 was also published online by the 1st defendant on 29/9/2019 under the same headline. The defendant also caused the same article to be published on 30/9/2019 in an online edition of the East African another of the 1st defendant's flagship brands. The article remains available on the websites upto date. However, the articles have since been updated but the defendants did not amend their defamatory allegations made in the articles.

38. He indicated that the defendants in a bid to maximize the circulation of the article repeated posted links on its social media platforms on 29/9/2019, 30/9/2019 and on 1/10/2019. The 1st defendant has over 15.3 followers on twitter and over 19.4 million users on Facebook and a digital reach of over 51 million users. Thus, the articles received a wider coverage following their publication on the 1st defendant's online platforms.

39. The plaintiff said in cross examination that it is not the work of the Attorney General to conduct diplomatic negotiations in the country.

40. The said negotiations of Kenya and Somalia were handled by the Ministry of Foreign affairs under the Leadership of Amina Mohamed.

41. The plaintiff said that had the author reached out to him, he would not have stated that the delegation consumed three billion shillings because he would have established that the plaintiff was not in the delegation and that the plaintiff did not have access to any money and that the funds were paid by the Ministry of Foreign Affairs.

42. The plaintiff said that Kenya solved a boundary demarcation with Tanzania and the office of the AG was not involved.

43. He said the office of the AG was not in charge of policy. He said that the AG is a lawyer and individual ministries that approach the AG for legal opinion

44. The plaintiff said that the office of the AG was not a super ministry governing over other ministries giving advise it is a department where other ministries seek legal advice when they need it.

45. He said the Somali issue was not a legal issue but a political issue and further that the AG had no role to play in it unless invited by the client ministry.

46. PW 2, Geoffrey Silas Imende adopted his statement dated 8/8/2023 as his evidence in chief.

47. PW 2 said in the said statement that he is well informed of the facts of this case and thus competent and duly authorized to make this statement in support of the Plaintiffs claim.

48. That he is an advocate of the High Court of Kenya with over 18 years of post-admission experience and the Managing Partner at Mohammed Muigai LLP, a Fellow of the Chartered Institute of Arbitrators, Kenya Branch and also serves as an examiner at the Council of Legal Education which administers the Bar Examinations.

49. PW2 said that he has known the Plaintiff, Prof. Githu Muigai SC, for over twenty-one (21) years.

50. He said he has known the Plaintiff to be professional, diligent and hardworking. He has throughout his career earned the recognition and respect of his peers both in the academic and legal fraternity in Kenya and internationally. He has had a distinguished career. He is a gentleman of good moral character and reputation.

51. He said that on Monday, 30th September 2019, the 1st Defendant published the impugned article in the Daily Nation Newspaper.

52. Further, at page 9 of the Daily Nation newspaper in the first column, at paragraph *4*, the Defendants printed and published and/or caused to be printed and published another article of and concerning the Plaintiff, which article stated that;

> " Officials from the Attorney General had deliberately bungled the peace talks between Kenya and her neighbour Somalia, resulting in Kenya running the risk of losing a crucial chunk of the maritime border to her neighbour and even being forced to pay billions of shillings in compensation.
>
> The officials had deliberately dilly dallied the bilateral talks and had seized the opportunity as one to make money rather than one to pursue the interests of the country..,
>
> During the negotiations from March 2014 to July 2014, the delegation had estimatedly gobbled up Kenya Shillings Three Billion (Kshs.3,000,000,000.00) and that during that time the Attorney General had not taken any steps to handle the issue. "

53. The article further stated that,

> " There had been an obvious disconnect between the Attorney General's Office and that of the Kenya International Boundaries Office (KIBO), which had resulted in Kenya failing to attend crucial follow up meetings in Mogadishu and further failing to apologize for the non-attendance."

54. PW2 said that the article concluded in a sensationalized manner subtitled "panic and despair" highlighting that "should Kenya lose the case it will have resulted not from Somalia's splendid display at the Hague but will have been because Kenya undermined its own efforts through greed, naivety and sheer incompetence."

55. The publication also detailed what the Defendants termed as "The lethargy of officials representing the Kenyan delegation."

56. The Defendants deliberately and maliciously singled out the person of the Attorney General, who at the time was the Plaintiff, together with the Director of the Kenya International Boundaries Office (KIBO) as being responsible for the mishandling of the case between Kenya and Somalia.

57. The issue of the Daily Nation newspaper containing the said article was widely distributed by the 1st Defendant, its agents and representatives both within the Kenyan jurisdiction and worldwide. A copy of the articles was further published on and publicized through the 1st Defendant's online platforms available through the Uniform Resource Locators (URL) https:www.nation.co.ke/news/Africa/How–kenya-bungled-somalia-boarder-talks/1066-5292066-e00p7yz/index.html and remains on the said online platform to date.

58. The Defendants further either jointly and/or severally also caused the same article to be printed and published on Monday, 30th September 2019 in The East African, another of the 1st Defendant's flagship brands on its online platform available at https://www.theeastafrican.co.ke/tea/news/east-africa/how-kenva-bungled-somaliaborder-talks-1428364.

59. A copy of the article published on the 1st Defendant's online platform was updated on 3rd July 2020, despite the update however, the defamatory contents regarding the Plaintiff in the article were not removed or altered. As amended, the article purports to summarize the content therein for the reader and has been sensationalized to read under the sub heading "what you need to know" and specifically states that ' The negotiation team led by officials from the Attorney General (AG) and the Kenya International Boundaries Office (KIBO) slept on the job.' The defamatory articles were published extensively, especially on social media.

60. A further defamatory article was published on Wednesday, 2ud October 2019 by the 1st Defendant in the Daily Nation at page 14 under the headline "Kenya Should prepare well for Somalia case" and contained the following defamatory contents;

    61. "Furthermore, in typical Kenyan style, the officials seemed unperturbed that their actions risked soiling Kenya's territorial integrity, But they went ahead to benefit at the personal level. For instance, during the negotiations between March and July 2014, they are reported to have spent more than Kshs.3 billion on trips and allowances but with little to show for the numerical advantage.

62. He was alarmed by the publications and the manner in which they depicted the Plaintiff as it presented a different picture from the person he knew him as a partner and colleague at Mohammed Muigai LLP.

63. Further, that the article presented the Plaintiff as being a man who was incompetent, without integrity, greedy, interested in his own personal interests as opposed to those of the country, untrustworthy, capable of abusing his office, unworthy of respect and even capable of going as far as to deliberately sabotage national interest.

64. It is abundantly clear that by the said words, in their entirety, in their ordinary and natural meaning or by necessary implication and/or innuendo, the words published in the articles were maliciously intended to tarnish the Plaintiffs reputation and lower his esteem before the right-thinking members of society. The articles insinuated that the Plaintiff;

    i. Is incompetent and failed to provide leadership in the manner in which the dispute on the maritime border between Somali and Kenya was handled;

ii. Jeopardized Kenya's national interests by sleeping on the job and stalling bilateral talks between Kenya and Mogadishu;

iii. Failed to take issues touching on Kenya's territorial integrity seriously and did not do much to have the issue resolved in time;

iv. Was actuated by personal greed and incompetence;

v. Undermined Kenya's case by misadvising the government;

vi. Failed to deploy requisite diplomatic tools during negotiations

vii. Participated in the squander and misappropriation of Kshs. 3 billion of public funds with nothing to show for it;

viii. Failed to attend follow up meetings in Mogadishu and further lacked the professional courtesy to communicate this to Somalian team or to reschedule.

65. After reading the articles, he enquired from the Plaintiff about the veracity of the serious allegations made against him. The Plaintiff set the record straight. He explained that the events subject matter of the publication, occurred four (4) years before the publication and that further, he had not been in charge of the negotiations between Kenya and Somalia. It is clear that for a person of his standing, a more defamatory could not be published.

66. Although the Defendants were aware that the articles contained untrue statements and further imputed grave wrongdoing on the part of the Plaintiff, which he had attempted to clear up, the Plaintiff confirmed to me that the Defendants failed to take any steps to correct the erroneous statements contained in the articles or even issue an apology.

67. The articles have had the effect of tarnishing the Plaintiff's career built for over forty (40) years. An appropriate relief would be to award the Plaintiff damages.

68. PW 2 said he is the managing partner of the firm of Mohamed Muigai LLP.

69. PW 2 said the impugning article was published on 29/9/2019 and updated on 3/7/2020.

70. PW 2 said that the Article said that the plaintiff failed in his mandate and also slept on the job.

71. The 2nd defendant, Ken Opala, testified as DW 1. He adopted his witness statement dated 17/10/2022 as his evidence in chief.

72. DW1 stated in the said statement that he was contracted by the first defendant as a consultant writer and reporter for the Daily Nation Newspaper during the period of the article.

73. That he is conversant with the facts of this case and been authorised to give evidence on behalf of the first defendant.

74. As a consultant writer and reporter, his role was to write material touching on specific topical issues concerning the society, These are matters of public interest, he also carried out investigations in his line of work.

75. DW1 stated that Kenya has been faced with disputes over its territorial integrity and its territorial sovereignty and the issue of territorial sovereignty is an issue that goes to the core of the Kenyan citizen.

76. In 2004, the Ugandan authorities moved into Migingo Island by deploying police officers and hoisting the Ugandan flag. This action evoked concerns by Kenyan citizens who lived on the Island and relied

on fishing from the island as a source of income. This action also raised concerns about what the status of the Kenyan boarders are and the steps the Kenyan Government was taking to protect the territorial integrity and sovereignty of our boarders, News reports over the Migingo Island dispute are at pages 1 to 13 of defendants' bundle of documents ('the bundle').

77. That Kenya and Uganda have been in negotiations over the Migingo Island disputes. In 2019 Senators expressed (Senators' remarks are at pages 14 to 19 of the bundle) their disappointment with how the Ministry of Affairs was handling the dispute and alluded that the Memorandum of Understanding (MOU) between the two countries would lead to the sharing of the Island between the two countries yet the map of Kenya clearly showed that the Migingo Island was in Kenya. They termed the MOU unconstitutional. Many Kenyans also expressed their disappointment with their government,

78. In the circumstances, when the news about the Kenya Somalia maritime boarder dispute came to light, many Kenya's took much interest as the stakes over this particular dispute were higher.

79. The dispute related to a maritime area in the Indian Ocean with a seabed which contains lucrative oil and natural gas reserves.

80. Kenya and Somali entered into negotiations to try and resolve the disputes amicably and signed a Memorandum of Understanding in 2009 (MOU, 2009) to this effect. The MOUS 2009 indicated that the parties would eventually amicably settle the issue and not object to each other's claim over the disputed areas.

81. These negotiations however failed in August, 2014 when Somalia filed its claim before the International Court of Justice (ICJ) after indicating that Kenya was not keen on settling the disputes and had jeopardised the negotiations, A copy of Somali's application to institute proceedings before the ICJ are at pages 20 to 29 of the bundle.

82. Kenya filed a preliminary objection against the jurisdiction of the ICJ and even withdrew from the case after the ICJ found its preliminary objection to lack merit. Kenya did not participate in the oral hearing of the case on merit. Reports of Kenya's withdrawal from the ICJ hearings are at pages 30 to 37 of the Subsequently, the outcome of the case before the ICJ was not favourable to Kenya as the ICJ apportioned Somalia a huge track of the disputed area.

83. During the negotiations, it was expected that the Kenyan delegation would be led by the Office of the Attorney General as the Chief Legal Adviser to Government. It was also expected that the Office of the Attorney General would play a crucial role in the negotiations in line with the terms of the MOU, 2009 which bound the parties to negotiations in good faith.

84. The issue of the Kenya's sovereignty and territorial integrity is an issue of great public interest.

85. The article being complained of commented on the concerns surrounding Kenya's territorial integrity and the Kenya- Somalia maritime border dispute.

86. It is not true that the article was aimed at tarnishing the name of the plaintiff. The contents of the article were believed to be true, were not exaggerated and completely devoid of malice.

87. He said the AG as the chief legal advisor of the government should have taken a lead role.

88. In cross-examination, DW 1 said negotiations were undertaken 5 years before he published the Article.

89. DW 1 said he knew the plaintiff. He said he attempted to get clarification from the office of the AG but he did not get through.

90. DW 1 said he conducted about 20 interviews before he published the article but he did not identify the people he interviewed.

91. DW 1 said even now he still holds the view that the AG slept on the job and further that the article is fair and balanced.

92. The parties filed written submissions as follows; the plaintiff submitted that the articles published by the defendants on 30/9/2019 and 2/10/2019 were published of and concerning him as the attorney general of the republic of Kenya and the role he allegedly played in the maritime dispute between Kenya and Somalia. The defendants published both articles on print form as well as through online editions on the 1st defendant's website and social media platforms to their over 45.5 million readers.

93. The plaintiff submitted that the defamatory articles became subject of public discussion and were even shared severally by their readers and subscribers increasing the reach of the articles and further defaming and causing harm to the plaintiff.

94. The plaintiff argued that the statements contained in the articles were false because he nor his officers were involved in the negotiations of the maritime dispute between Kenya and Somalia. The said negotiations were exclusively handled by Kenya and Somalia foreign affairs ministries as well as the Kenya International Boundaries Office (KIBO)

95. The plaintiff submitted that the defendants publication was malicious and negligent as they did not seek to confirm the veracity of the statements from either the plaintiff, the officer of the attorney general, the ministry of foreign affairs , KIBO or even the ministry of foreign affairs. The publications were intended to harm the plaintiff both in his personal and professional capacity.

96. The articles stated that the plaintiff as the head of the team handling the negotiations with Somalia had slept on the job, deliberately delayed and stalled negotiations, had failed to attend follow up meetings in Mogadishu and had failed to deploy requisite diplomatic tools to dissuade Somalia from moving to the international court of justice. This was confirmed by both PW1 and DW1 in their testimonies.

97. The plaintiff submitted that from the evidence on record, he pursued Kenya's best interest once he became involved in the dispute by assembling the team of 5 advocates who defended Kenya's claim before the international court of justice and even personally arguing Kenya's preliminary objection before the said court. DW1 further admitted that no proof had been produced in support of the statement that kenya's delegation consisted of around 50 members thus the numbers in the article of 30/9/2019 is false.

98. The plaintiff submitted that it is evident that the defendant's publications were motivated by malice as the defendant deliberately published false information and further failed to verify the facts regarding the negotiations and the contents of the impugned article prior to publication. DW1 under oath admitted that he was aware that the negotiations were not led by the office of the attorney general.

99. The plaintiff argued that PW2's evidence in chief was not controverted and that after reading the contents of the impugned article he questioned the plaintiff's character. It was not until he received clarification from the plaintiff regarding what has transpired in the negotiation when his doubts regarding the plaintiff were settled.

100. It was the plaintiff contention that the defence of fair comment and/or qualified privilege was not pleaded by the defendants. That further the defendants impugned articles asserted that the plaintiff participated in the negotiations but only for nefarious purposes.

101. Further, that the constitutional and statutory mandate of the attorney general did not feature anywhere in the impugned article and therefore cannot be the basis of raising the defense of qualified privilege. No evidence was adduced to support the 2nd defendant's testimony that he sought to verify the information in his articles.

102. Further, that despite having access to the memorials filed by both countries before the international court of justice the 2nd defendant deliberately authored and caused to be published false and misleading information linking the plaintiff to the failed negotiations despite being aware of the fact that he was not involved.

103. On the reliefs sought the plaintiff submitted that he has proven that the impugned articles were defamatory and were intended to injure his reputation. Further, the defences pleaded by the defendants are not available to them as it is apparent that their actions were actuated by malice. The defendants having admitted that the information published concerning the plaintiff was incorrect then the plaintiff is entitled to the publication of a retraction and apology.

104. On general damages the plaintiff proposed the sum of Kshs. 25,000,000 and in support cited Samuel Ndungu Mukunya v. Nation Media Group and another [2016] eKLR where the plaintiff was awarded Kshs. 20,000,000 as damages following allegations by the defendant that his name had been shortlisted by the JSC for the position of the High Court Judge through favouritism in 2016.

105. The plaintiff on aggravated damages argued that the defendants republished the same defamatory article on 3/7/2020 over 9 months after receipt of the demand letter on their website and had declined to remove the defamatory contents regarding the plaintiff and had further sensationalized it. It was the plaintiff's argument that the defendant should pay aggravated damages and punitive damages for repeating the defamatory article. The plaintiff proposed an award of Kshs. 10,000,000 under this head and in support cited Biwott v. Mbuguss and Another [2002] 1 KLR 321 where Kshs. 10,000,00 was awarded as aggravated damages.

106. The defendant alternatively submitted that the boundary dispute between Kenya and Somalia had generated public interest as Kenya stood to lose a chunk of its territory in the event that Somalia prevailed in the dispute.

107. The defendants argued that the plaintiff did not need to be asked to act or advice the ministry of affairs to allow him to take action as *the constitution* and the Officer of the Attorney General Act empowered the plaintiff to act and lead negotiations or take an integral part in the negotiations to ensure that Kenya gets a favorable outcome in the dispute.

108. As a state officer the plaintiff was bound by article 156 of *the constitution* particularly Article 156 (6) which required the AG to promote, protect and uphold the rule of law and defend the public interest. That further section 5 (1)(c) of the Office of the AG Act provides that one of the functions of the AG is negotiating international agreements on behalf of the Kenya government and that is why the AG ought to have taken the lead in the maritime dispute between Kenya and Somalia.

109. The defendant argued that the article dated 30/9/2019 constituted a fair comment on a matter of public interest. In the article the defendants were commenting on the role that plaintiff played as the then AG and in the maritime dispute between Kenya and Somalia. The publication was made on an occasion of qualified privilege. The defendants indicated that they took steps to verify the information published. Calls were made to the office of the AG to seek clarification on the story before the articles were published. The publications were a fair and accurate of the negotiations between Kenya and Somalia.

110. The defendants argued that the plaintiff has not established that the article was actuated by malice to defeat the defendants put forward by the defendants. The plaintiff indicted that a copy of the online article originally published on 29/9/2019 was updated on 3/7/2020 but did not produce the updated article. There is thus no basis for claiming that there was malice on the part of the defendants in updating the articles.

111. The defendant submitted that the plaintiff has not established a case for the award of damages however if the court finds that the plaintiff is entitled, the following cases among others should be taken into consideration;

    a. Johnson Evan Gicheru v. Adrew Morton & Another [2005] eKLR where the court of appeal awarded the appellant a composite award of Kshs. 6,000,000

    b. Erci Gor Sungu v. George Odinga Oraro [2014] eKLR where the court of appeal awarded general damages of Kshs. 5,000,000 and aggravated damages of Kshs. 4,000,000 to the plaintiff a senior counsel.

112. I have considered the evidence adduced in this case together with the rival submissions filed by the parties.

113. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.

114. The issues for determination in this case are as follows;

    i. Whether the plaintiff proved his case to the required standard.

    ii. Whether the defendants have a valid defence again the plaintiff's claim.

    iii. Whether the plaintiff is entitled to the remedies he is seeking against the defendants.

    iv. Who pays the costs of this suit?

115. On the issue as to whether the plaintiff has proved his case to the required standard, the plaintiff is duty bound to establish the elements of libel which are as follows;

    1. That the defendant made a defamatory statement to a third person.

    2. That the statement was false.

    3. That the defendant was legally at fault in making the statement; and

    4. That the plaintiff suffered harm.

116. I find that the defendants did not deny that they published the impugned articles.

117. The defendants having admitted that they published the impugned articles, this court must consider whether the articles are defamatory of the plaintiff and whether the defendants have a valid defence against the plaintiff's claim.

118. The defendants evidence was that the plaintiff who was the AG. ought to have taken a lead role in the negotiations and that he failed in his duties as the Government Principal Legal Advisor.

119. Further, that during the negotiations, it was expected that the Kenyan delegation would be led by the Office of the Attorney General as the Chief Legal Adviser to Government. It was also expected that the Office of the Attorney General would play a crucial role in the negotiations in line with the terms of the MOU, 2009 which bound the parties to negotiations in good faith.

120. That the issue of the Kenya's sovereignty and territorial integrity is an issue of great public interest and that the article being complained of commented on the concerns surrounding Kenya's territorial integrity and the Kenya- Somalia maritime border dispute.

121. The plaintiff said that the statements contained in the articles were false because neither the plaintiff nor his officers were involved in the negotiations of the maritime dispute between Kenya and Somalia. That the said negotiations were exclusively handled by Kenya and Somalia foreign affairs ministries as well as the Kenya International Boundaries Office (KIBO).

122. The plaintiff's evidence was that the defendants publication was malicious and negligent as they did not seek to confirm the veracity of the statements from either the plaintiff, the officer of the attorney general, the ministry of foreign affairs , KIBO or even the ministry of foreign affairs and that the publications were intended to harm the plaintiff both in his personal and professional capacity.

123. The plaintiff maintained that Defendants were aware from a reading of memorials filed at the International Court of Justice (ICJ) that the negotiations were being handled by the Ministry of Foreign affairs from 2014 to 2017 before Somalia filed the case before the Court.

124. The Plaintiff said that he was not involved in the negotiations at all yet the 2nd Defendant deliberately and maliciously ignored the facts pertaining the case in his quest to defame the Plaintiff at all costs.

125. I find that the AG is responsible for representing the National Government in any legal proceedings to which the National Government is a party.

126. The AG is the chief legal advisor to the Government also the promoter of the rule of law and defender of public interest.

127. It is not in dispute that the issue of the Kenya's sovereignty and territorial integrity is an issue of great public interest and that the article being complained of commented on the concerns surrounding Kenya's territorial integrity and the Kenya- Somalia maritime border dispute.

128. I find that the defendants are entitled to raise the defence of fair comment on a matter of great public interest.

129. The Defence of fair comment rests on four principles:-

    a. The matter commented on must be of public interest. Public interest includes many recognized topics, in particular and in general anything which may fairly be said to invite comment or challenge public opinion.

    b. The comment must be an expression of opinion and not an assertion of fact.

    c. The comment must be fair. The principle of law is that for the comment to be fair, it must be based upon true facts.

    d. The comment must not be malicious. Malice here means evil motive.

130. In the case of Slim Vs Daily Telegraph [1968] 1 All E.ER. 497, the court stated as follows;

> "If [the writer] is an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more

> into it… I stress this, because the right of fair comment is one of the essential elements of freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to 'write to the newspaper' [or write in the newspaper, as is the case herein] and the newspaper should be free to publish his letter [or article]. It is often the only way to get things put right. The matter must of course be one of public interest. The writer must get his facts right; and he must honestly state his real opinions. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions…"

131. I find that the defendants are not liable for defamation in the circumstances of this case.

132. In the impugned articles, the defendants were commenting on the role the plaintiff ought to have played as the then AG and in the maritime dispute between Kenya and Somalia.

133. During the negotiations, it was expected that the Kenyan delegation would be led by the Office of the Attorney General as the Chief Legal Adviser to Government. It was also expected that the Office of the Attorney General would play a crucial role in the negotiations in line with the terms of the MOU, 2009 which bound the parties to negotiations.

134. The plaintiff was bound by article 156 of *the constitution* particularly Article 156 (6) which required the AG to promote, protect and uphold the rule of law and defend the public interest.

135. Further section 5 (1)(c) of the Office of the AG Act provides that one of the functions of the AG is negotiating international agreements on behalf of the Kenya government and that is why the AG ought to have taken the lead in the maritime dispute between Kenya and Somalia.

136. The plaintiff submitted that from the evidence on record, he pursued Kenya's best interest once he became involved in the dispute by assembling the team of 5 advocates who defended Kenya's claim before the international court of justice and even personally arguing Kenya's preliminary objection before the said court.

137. I find that the articles constituted a fair comment on a matter of public interest. The publication was made on an occasion of qualified privilege.

138. In the case of Peter Walker Ltd vs Hodgson [1909] KB at p 259Buckley LJ, said that the defendant may succeed upon his defence of fair comment:

> " if he shows that that imputation ….although defamatory, and although not proved to have been founded on truth, yet was an imputation in a matter of public interest, made fairly and bona fide as an honest expression of the opinion which the defendant held on the facts truly stated, and was in the opinion of the jury warranted by the facts, in the sense that a fair-minded man might upon these facts bona fide hold that opinion."

139. I dismiss the case with no orders as to costs. Had the plaintiff proved his case he would have been entitled to general damages of Kshs 5,000,000 and exemplary damages of Kshs, 2,000,000 for reasons that the defendants repeated the publication after the plaintiff wrote to them to clarify the issue.

140. However, the plaintiff did not prove his case to the required standard in civil cases and I dismiss the plaintiff's case with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30TH DAY OF OCTOBER, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the 1st Defendant

..... for the 2nd Defendant