Pipeplastic Samkolit Kenya Limited v African Broadcasting Limited (Civil Suit 978 of 2002) [2023] KEHC 474 (KLR) (Civ) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 474 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 978 OF 2002

CW MEOLI, J

JANUARY 24, 2023

BETWEEN

PIPEPLASTIC SAMKOLIT KENYA LIMITED ..... PLAINTIFF

AND

AFRICAN BROADCASTING LIMITED ..... DEFENDANT

JUDGMENT

1. Pipeplastic Samkolit Kenya Ltd, (hereafter the Plaintiff) sued the African Broadcasting Ltd (hereafter the Defendant) for defamation and seeks inter alia an injunction to restrain the Defendant, its agents, servants, officers and directors from further publishing defamatory statements concerning the Plaintiff, general damages, exemplary and or aggravated damages, and the costs of the suit with interest.

2. It was averred that on July 31, 2001 during its prime time news bulletin at 9:00p.m , in a commentary aired in the category of "Business News", and while the names Kenya Commercial Bank Limited (hereinafter KCB) , Joshua Kulei, Manga Mugwe, HZ Construction, Mugoya Construction and Pipeplastic Samkolit (the Plaintiff) , were displayed on the screen, the Defendant falsely and maliciously published words to the effect that "In spite of the debts owed by major business people, government officials and well connected firms the Bank posted its first profit in two years". It was averred that the said words (and publication) were false and the inclusion of the Plaintiff's name reckless, as the Plaintiff was not indebted to the KCB at all. That by reason of the publication, the Plaintiff had been brought to public odium, scandal, hatred, ridicule, contempt, and its reputation lowered in the estimation of right-thinking members of the society in general.

3. On July 26, 2002 the Defendant filed a statement of defence admitting publication of the words set out in the plaint however denying that they did so falsely and or maliciously and that the said words were published concerned the Plaintiff or were defamatory. The Defendants asserted that the words were published in the public interest and on a privileged occasion.

4. During the trial, Prof. Samson Ongeri testified as PW1. He adopted his witness statement dated June 5, 2012 as his evidence- in- chief and produced the transcript of news item aired on Nation TV on July 31, 2001 as PExh.1; the demand letter dated August 8, 2001 as PExh.2; and a letter from Nation Media Group as PExh.3. Under cross-examination by the defence counsel, he asserted that he was a director of the Plaintiff and admitted that he had neither a copy of the CR12 that would identify the directors of the Plaintiff nor a resolution by the board of directors authorizing the filing of the suit.

5. He reiterated that he had tendered the transcript of the publication but accepted that he did not avail a digital copy for the court's benefit. He further confirmed that whereas the broadcast in question was on television and not radio, the transcript was unsigned. That the bulletin mentioned the Plaintiff and not individuals related to the Plaintiff. He went on to state that the Plaintiff did not have an account with KCB and it was erroneous for the Defendant to state that the Plaintiff owed money to KCB even while admitting that it was in the public interest that information about non-performing loans owed to KCB be put in the public domain. He stated that the Plaintiff was currently not actively trading as some of its directors were deceased.

6. During re-examination he asserted that the ownership or directorship of the Plaintiff is not a question in dispute herein and reiterated that the Defendant had in its statement of defence admitted to making the publication. He asserted that a resolution was made by the board of directors to file suit and that he was authorized to institute the instant proceedings on behalf of the Plaintiff.

7. The Defendant did call evidence.

8. The parties subsequently filed submissions. The Plaintiff's submissions addressed two issues, namely, liability and damages. On the first issue, counsel anchored his submissions on the decision in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR regarding the ingredients of defamation. It was argued that the words published by the Defendant concerning alleged debtors of KCB while the name of the Plaintiff and others appeared on the screen were false and malicious and could be understood to mean that the Plaintiff owes KCB a substantial amount of money.

9. Calling to aid the English decisions in *Knuffers v London Express Newspaper Ltd* and *Newstead v London Express Newspaper Ltd* (1940) 1 KB 377 (1939) 4 ALL ER 319 counsel submitted that words published and broadcast by the Defendant could in no doubt be understood to refer to the Plaintiff since the Plaintiff was referred to by name. Counsel asserted that the publication by the Defendant was defamatory of the Plaintiff and intended to lower its reputation in the eyes of the right-thinking members of society. Because, in its natural, literal, ordinary and inferential meaning the publication imputed that the Plaintiff owed the bank a substantial sum of money, did not service or repay loans, used third party connections and influence to obtain credit, had stifled the growth of the bank by failing to repay its debt, obtains credit facilities through dubious means, is untrustworthy and responsible for the loss occasioned to the bank. That contrary to all the foregoing the Plaintiff did not have a customer relationship with KCB.

10. Submitting on damages, counsel reiterating the defamatory nature of the Defendant's publication asserted that the Plaintiff is entitled to damages. Counsel called to aid the decisions in *C A M v Royal Media Services Limited* [2013] eKLR, *Kwacha Group of Companies v Tom Mshindi & 2 Others* [2012] eKLR, *Habihalim Company Limited v Barclays Bank of Kenya Limited* [2019] eKLR, *Alnashir Vishram v Standard Limited* [2016] eKLR and *Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others* [2000] eKLR to urge an award of Kshs. 50,000,000/- in general damages and Kshs. 25,000,000/- in exemplary or aggravated damages , costs and interest.

11. On the part of the Defendant as a preliminary issue counsel argued that PW1 lacked locus standi to institute the suit. It was contended that, companies being artificial persons can only make decisions through the board of directors or general meetings. Hence a company must pass a resolution to file a suit. Counsel proceeded to rely on the decisions in *Bugerere Coffee Growers Ltd v Sebaduka & Another* [1970] EA 147, *Affordable Homes Africa Ltd v Henderson & 2 Others* [2004] eKLR and *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR . Pointing out the failure by PW1 to exhibit such resolution and or remedy the fundamental legal defect the suit ought to be struck out with costs.

12. Submitting on the question whether the published words were defamatory of the Plaintiff, it was contended that the article constituted a fair comment on a matter of public interest. It was further contended that the broadcast was an expression of opinion and fair comment upon facts which were matters of public interest and in the alternative the said words were published under a sense of public duty without malice and in the honest belief that the charges against the Plaintiff were true. While citing the decisions in *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* [2009] eKLR, *Kudwoli & another v Eureka Educational & Training Consultants & 2 Others* Civil Case No, 126 & 135 of 1990 and *Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR counsel argued that the entire publication ought to be contextualized in its meaning and imputation before a conclusion can be reached that the same was defamatory.

13. Further calling to aid the decisions in *Helen Makone v Francis Kahos & another* HCCC No. 2869 of 1997, *Nation Newspaper Limited v Gibendi* [2002] 2 KLR, *K L v Standard Limited* [2014] eKLR, *Simeon Nyachae v Lazarus Ratemo Musa & another* [2007] eKLR and *Ndungu Njoroge & Kwach Advocates & another v Standard Limited & 2 others* [2012] eKLR it was submitted that the Plaintiff failed to demonstrate that the broadcast was actuated by malice or was deliberately made to disparage the Plaintiff's character.

14. Counsel argued that the Plaintiff was under a duty to adduce evidence to show that the Plaintiff's reputation had been lowered in the eyes of the right thinking members of public due to the publication. The decisions in *George Mukuru Muchai v The Standard Limited* HCCC No. 2539 of 1997, SMW v ZWM [2015] eKLR, *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR and Jessica Clarise Wanjiru (*supra*) were cited in support of the foregoing.

15. Concerning damages, counsel relied on the decisions in Simeon Nyachae (*supra*), *John v MGN Limited* [1996] 2 All ER 35 as cited in *Nation Media Group Limited & 2 others v John Joseph Kamotho & 3 others* [2010] eKLR, *Ndungu Njoroge & Kwach Advocates & Another* (*supra*) and *Sankale Ole Kantai v Nyamodi Ochieng Nyamodi & Anor* [2012] eKLR to submit that the Plaintiff has not demonstrated any loss suffered due to the publication ; that damages are not intended to not enrich a party but to restore the said party to the position it was in prior to the injury. Hence an award of Kshs. 500,000/- was sufficient as general damages.

16. Counsel asserted that the raison d'etre for exemplary damages was to punish a Defendant for its misconduct and that aggravated damages are awardable where the conduct of the Defendant exacerbated the injury caused to the Plaintiff. That in the instant matter the Plaintiff failed to tender evidence of financial gain to the Defendant from the publication and or that the Defendant's conduct led to increased injury towards the Plaintiff. The Defendant took the position that this is not a suitable case for the award of both exemplary and aggravated damages. In conclusion it was submitted that the Plaintiff had not proved that the publication was in any way defamatory and that it was actuated by malice or ill will, and therefore the suit ought to be dismissed with costs.

17. The Court has considered the evidence on record and the parties' respective submissions. The issues falling for determination are whether the Plaintiff has established on a balance of probabilities that the Defendant's liability for the tort of defamation and if so, the damages awardable.

18. However, before addressing the substantive issues, it is necessary to consider the preliminary issue raised by the Defendant concerning the competency of the instant suit. During cross-examination PW1 was hard pressed to confirm the existence of a resolution authorizing the filing of this suit. He admitted that no such resolution had been filed and that he could not recall if such a resolution had been passed. In final submissions counsel for the Defendant pursued the matter further, and vehemently argued that a company being artificial person could only make decisions through the board of directors or general meeting and a resolution of such board or meeting is necessary to authorize the institution of a by the company. It was stated that no such resolution had been tendered in this case and the suit ought to be struck out with costs.

19. In support of these arguments counsel cited the decisions in *Bugerere Coffee Growers Ltd v Sebaduka & another* [1970] EA 147 and *Affordable Homes Africa Ltd v Henderson & 2 others* [2004] eKLR. The Plaintiff on its part did not address the said objection in its submissions but in re-examination PW1 reiterated his capacity as a director of the Plaintiff , that a resolution was made by the board of directors to file suit and therefore he was authorized to institute the instant proceedings on behalf of the Plaintiff.

20. *Black's Law Dictionary*, Tenth Edition defines locus standi as: "...the right to bring an action or to be heard in a given forum." The Court of Appeal in *James Teko Lopoyetum v Rose Kasuku Watia & 4 others* [2021] eKLR reiterated its decision in *Alfred Njau & 5 others vs. City Council of Nairobi* [1983] eKLR where it held:

> " The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

See also;- Sheila Nkatha Muthee v Alphonce Mwangemi Munga & Another [2016] eKLR where it was held that:

> "Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent."

21. In the plaint, the Plaintiff is described as a "Limited liability company duly incorporated". Thus, it is a body corporate with perpetual succession and a common seal, with the power to sue and be sued in its own corporate name. Further, the verifying affidavit accompanying the plaint as sworn by PW1 states in the first paragraph that:--

> " 1. That I am the director of the Plaintiff herein and I am duly authorized and competent to make this affidavit. I am familiar with the subject matter of the application above mentioned and I am able to verify the same."

22. The suit was filed in 2002 under the auspices of the then *Companies Act* which has since been repealed by the *Companies Act 2015*. The former Act had provided at Section 181 (now Section 133 of the new Act) that: -

> " The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."

23. Recently, in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR the Court of Appeal of Kenya adopted the decision of the Ugandan Supreme Court in *United Assurance Co. Ltd v Attorney General*: SCCA No.1 of 1998 where the latter court determined that the dicta in *Bugerere Coffee Growers Ltd v Ssebaduka & another* [1970] EA 147 was bad law.

24. The words of the Court of Appeal (Kenya) in the Arthi Highway case deserve replication in extenso:-

> 42. Lord Denning MR in his characteristic literary style summed up the law in Moir v. Wallersteiner [1975] 1 ALL ER 849atp. 857, as follows:
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> > "It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue".
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> 43. As we understand it, the argument is rather that the Directors appearing in the Company Register at the time were Musa and Mwau who, in law, were the ones entitled to pass a resolution for institution of the suit but there was no evidence of any resolution. However, as the trial court observed, correctly in our view, the suit was in part about who the rightful shareholders/directors of West End were. Those who asserted they were the rightful shareholders/Directors and who the alleged fraud was committed against West End, gave instructions for the filing of the suit in the name of the Company. They testified that they did so, and the Advocate testified that he accepted those instructions. In the end, the original directors were vindicated on this since the fraudsters never showed up to dispute their right to the shareholding and directorship of the company. The submission made that the two fraudsters were capable of passing a lawful resolution for filing suit in the name of West End, in our view, offends common sense and is not tenable.
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> 44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere CoffeeGrowers Ltd v Sebaduka & anor*(1970) 1 EA 147.The court in that case held:-
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> > "When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."
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> 45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No 8 of 2000.
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> The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United*

Assurance Co. Ltd v Attorney General: SCCA No 1 of 1998.The latter case restated the law as follows: -

> "…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others* [2014] eKLR.

> ..... For the above reasons we find no merit in the procedural challenge and accordingly reject that ground of appeal" (sic)

25. The key question here is whether PW1 was duly authorized to swear the verifying affidavit and or institute proceedings on behalf of the Plaintiff as he did in this matter. PW1 asserted that as director of the Plaintiff he was duly authorized. Despite the spirited challenge raised at the eleventh hour, the Defendant did not tender any evidence to controvert the assertions by PW1. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* (2014) eKLR while discussing legal burden vis- a -vis evidential burden observed *inter alia* that;

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

26. Upon assertions by PW1 on oath regarding his capacity and authority to file suit being made, the onus shifted on the Defendant to tender evidence to the contrary, but the Defendant failed to take up the gauntlet . In the circumstances, the Defendant's objection must be rejected.

27. Now moving on to the substantive issue for this court's determination, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act* which provides that:-

> " 107.
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> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.. 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

28. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

29. Similarly, in *Karugi & Another v Kabiya & 3 other*s [1987] KLR 347 the Court of Appeal stated that:

> "[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

30. The Plaintiff's cause of action is founded on the tort of defamation. The Court of Appeal had this to say in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR:

> "The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the *Common Law Series: The Law of Tort* at paragraph 25.1 expressed himself in the following manner:
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> > "The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbor. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

31. Actions founded on the tort of defamation bring out the conflict between private interest and public interest. The rights in respect to a cause of action founded on defamation are reinforced by the provisions of the *Defamation Act*. Contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & others* [1969]1 ALL ER 8;-

> "The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed."

32. In *Halsbury's Laws of England* 4th Edition Vol. 28 paragraph 10 - a defamatory statement is defined as follows:

> " ....a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business".

See also the Court of Appeal definition of a defamatory statement in *SMW v ZWM* (2015) eKLR.

33. Additionally, Gatley on *Libel and Slander* 6th Edn. states that;-

> " A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another".

34. It was reiterated in *Selina Patani & Another vs Dhiranji V. Patani* [2019] eKLR that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:-

> " In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward v Standard Ltd* HCC 1062 of 2005 as follows:
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> i. The statement must be defamatory;
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> ii. The statement must refer to the plaintiff;
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> iii. The statement must be published by the defendant;
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> iv. The statement must be false."

35. In this case, ingredient (iii) above has not been contested as the Defendant readily admits to publishing the words in question at paragraph 4 of its defence statement. Three questions in dispute and to be considered simultaneously are whether the statements or words referred to the Plaintiff; whether they were defamatory and or false; or whether they were made in the public interest on an occasion of privilege or maliciously.

36. If the contents of the uncertified transcript produced as PExh.1 is believed, the words published by the Defendant on July 31, 2001 are to the effect that;

> " Like National Bank of Kenya where the government is the majority shareholder, KCB was struggling to recover from a 20 billion shillings non performing debt.
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> In spite of the debts owed by major business people, government officials and well connected firms, the bank posted its first profit in two years.
>
> Joshua Kulei
>
> Manga Mugwe
>
> HZ Construction
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> Mugoya Construction
>
> Pipeplastic Samkolit

> Its path to recovery began after the appointment of George last year. His entry followed a retreat by strategic investors who were initially interested in buying 26% of the bank. 9% stake in KCB was to be floated at the Nairobi Stock Exchange. There were no takers for the then loss-making bank. The government therefore announced this year that it had put KCB sale on hold to access the impact of the restructuring programme.
>
> The decision to put off the sale and the invitation of a transaction advisor, the bank could return to sustainable profitability and attract better value for the 35% government shareholding" (sic)

37. On the face of it the Plaintiff was associated with the words in the publication by the display of its name among others simultaneously as the words in question were published. And although the Defendant denied in its defence that the words in question referred to the Plaintiff, in a letter produced as PExh.3 responding to the Plaintiff's demand letter (P.Exh.2), the Defendant not only confirmed that the Plaintiff was indeed one of the persons named in the publication but also reiterated the statements in the news bulletin by asserting that the Plaintiff "was indebted to the Kenya Commercial Bank to the tune of Kshs.128 million." PExh.3 was a letter from the Company Secretary of Nation Media Group while PExh.2 was specifically addressed to Defendant herein.

38. PW1 in his evidence stated that the Defendant which aired the offensive commentary on Nation Television was a subsidiary of the Nation Media Group. The defence did not object to the production of P.Exh. 3 on this account nor the fact that it was marked "without prejudice". Moreover, the Defendant did not challenge the asserted relationship between the two companies. In the circumstances the court holds that the publication by the Defendant indeed referred to the Plaintiff, among others.

39. The court understands the Plaintiff's pleaded complaint concerning the broadcast by the Defendant to be that it was false and malicious as the Plaintiff did not owe any money to KCB and neither did it hold or operate any account with KCB making it impossible for the Plaintiff to owe the substantive amounts as imputed by the Defendant's broadcast; and secondly that the words used in the broadcast were defamatory in their natural and ordinary meaning and or by innuendo that the Plaintiff is a bad debtor who obtains loans through dubious means and fails to pay the same. The Defendant denied that the words were defamatory and alternatively asserted them to be true in so far as they were statements of fact or fair comment in and made out of public duty in so far as they represented an expression of opinion. The Plaintiff made no attempt to demonstrate the false nature of the statements and was content to rely on his oral assertions that it had no relationship with KCB but the more pertinent issue is whether the words complained about were defamatory in nature.

40. In the case of the *Onama v Uganda Argus Ltd* (1969) EA the East African Court of Appeal stated as follows:

> " In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those "who have a greater or special knowledge of the subject matter".

41. The Court stated in *Elizabeth Wanjiku Muchira v Standard Ltd* [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the "probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published."-*Clerks & Lindsell on Tort* 17th Edition 1995-page 1018."

42. The Defendant correctly argued that the Plaintiff was under a duty to adduce evidence to show that the statements had the effect of lowering its reputation in the mind of any right thinking member of society generally who read the publication. PW1 was the only witness to testify on behalf of the Plaintiff. No witness was called to testify concerning the publication and effect it had on him on reading it. It seems the Plaintiff's counsel made up for this by way of submissions to the effect that the publication in its natural, literal, ordinary and inferential meaning imputed that, the Plaintiff owes the bank a substantial sum of money, does not service of repay loans, uses third party connection and influence to obtain credit, has stifled the growth of the bank by failing to repay its debt, obtains credit facilities through dubious means, is untrustworthy by receiving any credit from a financial institution and is responsible for the loss occasioned to the bank.

43. In Musikari Kombo (supra) the Court of Appeal stated that:

> " The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In *Halsbury's Laws of England* 4th Edition Vol. 28 at page 23 the authors opined:
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> "In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense."

44. Having carefully reviewed the words contained in the transcript of the broadcast and the evidence of PW1 it would be a stretch to conclude that the broadcast therein in its natural and ordinary meaning convey the imputations attributed to them by the Plaintiff. The broadcast in question states that "In spite of the debts owed by major business people, government officials and well connected firms, the bank posted its first profit in two years" . Although the display of the Plaintiff's name simultaneously with the uttering of the words in question no doubt associated the Plaintiff therewith, the statement refers to "debts owed by major business people, government officials and well connected firms connected firms". Even if it had been shown indeed that the Plaintiff was not a customer or debtor of the KCB the statement does not expressly refer to non-performing or bad loans. Banks are in the business of lending money to all kinds of people who then can be described as owing debts to such banks while such loans are outstanding. Moreover the display of the Plaintiff's name while the statements were uttered did not place the Plaintiff in any of the specific categories named.

45. In the court's view therefore, even if the statements were shown to be false, in their ordinary and natural meaning they are not defamatory. As regards the assertion that the words constituted defamation by innuendo, the particulars thereof were not pleaded in the plaint as required by Order 2 Rule 7 (1) of the *Civil Procedure Rules*.

46. The Court of Appeal in *Baraza Limited v George Onyango Oloo* (2018) eKLR equally apply in this case:

> " The second issue as regards liability is whether innuendo was properly pleaded to justify a finding of liability against the appellants. The *Black's Law Dictionary*, 8th Ed. 2007 defines an innuendo in the context of the law of defamation to mean: "the plaintiff's explanation of a statement's defamatory meaning when the meaning is not apparent from the statement's face." Ordinarily the innuendo meaning is resorted to show that words that are on the face of it innocent carry a different and defamatory meaning that is not in general knowledge. It

is for that reason that Order 2 rule 7 (formerly Order VI rule 6A) of the *Civil Procedure Rules* requires a party who relies on an innuendo to give particulars of the defamatory meaning of the words complained of, if such meaning is not apparent in their natural and ordinary meaning. (See *Grace Wangui Ngenye v Chris Kirubi & another* [2015] eKLR). We agree with the appellants that the respondent's pleadings were not elegantly drawn. He simply lumped together the ordinary and natural meaning of the words of the broadcast as well as the alleged innuendo and pleaded their meaning in paragraph 6 of the plaint. Strictly speaking other than throwing around the word "innuendo" in the plaint, the respondent neither pleaded an innuendo properly so called, nor gave any special meaning of the words in the broadcast. A careful reading of the judgment leaves no doubt that the learned judge determined the case on the basis of the ordinary and natural meaning of the words complained of, which she found to be defamatory of the respondent. She totally ignored the alleged and ill-pleaded innuendo, and for that we cannot fault her."

47. In the absence of an express pleading, the contents of PExh.2 particularizing the facts and matters upon which an inference of innuendo could be premised are to no avail. Moreover, defamation primarily involves imputations that tend to cause injury to the reputation of a person, and a successful plaintiff must demonstrate the injury to his reputation or standing as part of the ingredients of defamation, and not merely rely on his own estimation of himself. As earlier observed, no evidence was led through a third party in that regard. On what basis then can it be found that the words in the publication complained of caused or had the tendency to cause injury to the Plaintiff's reputation by way of public ridicule, hatred or even being shunned or that it tended to lower his esteem in the mind of right-thinking members of society?

48. In *SMW v ZWM* (2015) eKLR, the Court of Appeal observed:

> " 15. Black's Law Dictionary 8th Edition defines defamation as the act of harming the reputation of another by making a false statement to a third person. (emphasis added). A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt, or ridicule or if it causes him to be shunned or avoided: see Gatley on Libel and Slander (10th edition). A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result. ...
>
> 19. The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant's witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.
>
> The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is not what defamation is in law. The appellant himself further testified before the trial court that nothing had

changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent…" (Emphasis added).

49. The foregoing was reiterated in Selina Patani's case (supra), where the same Court stated:

> "26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.
>
> 27. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant's character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation. (Emphasis added)

See also *Daniel N. Ngunia v K.G.G.C.U. Limited* (2000) eKLR and *Hezekiel Oira v Standard Limited & another* (2016) eKLR.

50. Ultimately, upon reviewing all the material placed before it, the court finds that the Plaintiff has failed to prove all the ingredients of defamation. In the circumstances, the Plaintiff's suit must fail and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONOCALLY AT NAIROBI ON THIS 24TH DAY OF JANUARY 2023

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Gathuri h/b for Mr. Gitonga

For the Defendant: Ms. Olunga

C/A: Carol