



Gatabaki & another v Nation Media Group Limited & another (Civil Suit 77 of 2016) [2023] KEHC 21073 (KLR) (Civ) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 77 OF 2016

CW MEOLI, J

JULY 28, 2023

BETWEEN

NANCY WANJA GATABAKI 1ST PLAINTIFF

DR. SAMUEL MUNDATI GATABAKI 2ND PLAINTIFF

AND

NATION MEDIA GROUP LIMITED 1ST DEFENDANT

BRIAN WASUNA 2ND DEFENDANT

JUDGMENT

1. On 16.03.2016 Nancy Wanja Gatabaki and Dr. Samuel Mundati Gatabaki, (hereafter the 1st and 2nd Plaintiff/Plaintiffs) filed this suit that is founded on the tort of defamation, as against the Nation Media Group Limited and Brian Wasuna (hereafter the 1st and 2nd Defendant/Defendants). The Plaintiffs seek inter alia that the Defendants be compelled to pull down/withdraw the article entitled “Karume, Gatabaki’s fight over Sh. 200m prime Nairobi Land” published online at www.businessdailyafrica.com and available at <http://www.businessdailyafrica.com/karumes--Gatabakis-fight-over-Sh200m-prime-nairobi-land/-/539546/2957994/-/item/0/-/qesvx9z/-/index.html>; general damages; aggravated damages for libel; and costs of the suit.
2. The Plaintiffs averred that the 2nd Defendant wrote the alleged defamatory article in respect of the Plaintiffs which was published by the 1st Defendant on the front page of the Business Daily Newspaper on 16.11.2015 and online at <http://www.businessdailyafrica.com/karumes--Gatabakis-fight-over-Sh200m-prime-nairobi-land/-/539546/2957994/-/item/0/-/qesvx9z/-/index.html>. The Plaintiffs averred that the statements published therein concerning the 1st Plaintiff were false, malicious and were not a truthful account of court proceedings by the Plaintiffs ; and that the article referred to the 1st



Plaintiff as Ms. Nancy Gatabaki and her photo prominently displayed, while the 2nd Plaintiff referred to therein as Samuel was described as the 1st Plaintiff's husband.

3. It was averred that the words in the article did not comprise an accurate and fair public comment but were maliciously intended to drive a wedge in the relationship between the Plaintiffs and the Karume family. It was further averred that the Defendants never sought clarification from the Plaintiffs regarding the article before publication and despite demand and notice of intention to sue having been served on the Defendants, they have declined to render an apology, compensate the Plaintiffs or to withdraw the defamatory article from the internet.
4. On 13.09.2016 the Defendants filed a joint statement of defence denying the key averments in the plaint. In the alternative, the Defendants averred that the article was published under a sense of public duty, without malice, in the honest belief that the information contained therein was true, fair comment on matters of public interest, and a fair account of court proceedings and therefore was privileged.
5. Prior to the trial, the attention of the court was drawn to the fact that the 2nd Plaintiff had passed away. The cause being one that did not survive the said deceased Plaintiff therefore abated pursuant to the provisions of Order 24 Rule 2 of the Civil Procedure Rules but proceeded at the instance of the 1st Plaintiff.
6. The 1st Plaintiff testified as PW1. Having adopted her witness statement dated 22.07.2019 as her evidence-in-chief she produced the bundle documents in the list of documents filed on 16.03.2016 as PExh.1 comprising a copy of the newspaper article dated 16.11.2015, a copy of the online article dated 16.11.2015 and demand letter dated 30.11.2015, respectively. During cross-examination, she asserted that she did not know the late Njenga Karume personally although she had filed Commercial & Admiralty HCC No. 142 of 2015 against Jacaranda Holdings regarding a dispute revolving around a sale agreement for property she had sold to the said company. She reiterated that her reputation was injured in the face of friends and family and was not aware if the offending article was taken down by the 1st Defendant pursuant to this court's interim orders issued earlier. In re-examination she asserted that Commercial & Admiralty HCC No. 142 of 2015 was not against the Karume family as she had no grievance against them.
7. On the part of the Defendants, the 2nd Defendant testified as DW1. He identified himself as an employee of the 1st Defendant before proceeding to adopt his witness statement dated 08.11.2019 as his evidence-in-chief. He produced the bundle of documents in the list of documents filed on 05.12.2018 as DExh.1 being copies of pleadings relating to Commercial & Admiralty Case HCC No. 142 of 2015. The gist of his evidence was that at the time he wrote the article he was a court reporter with the Business Daily and the article was based on documents filed in court in Commercial & Admiralty HCC No. 142 of 2015 filed in Nairobi. That he relied on pleadings filed in the said matter in preparing the article in question.
8. During cross-examination he confirmed that his witness statement stated that the article referred to Jacaranda Holdings as owned by the Karume family, that being his reasonable belief at the time. He was, however, unable to identify the pleading in which the Karume family was mentioned.
9. At the close of the hearing, the parties filed written submissions. The Plaintiff's submissions addressed the twin issues of liability and damages. Restating the pleadings and evidence before the court, counsel anchored his submissions on the decision in CFC Stanbic Bank v Consumer Federation of Kenya & Another [2014] eKLR on the ingredients of the tort of defamation. It was submitted that the article published on 16.11.2015 specifically targeted the 1st Plaintiff and pointed out that no prior attempt



- was made to obtain her comment or to verify with the 1st Plaintiff's advocate on record in HCC No. 142 of 2015.
10. Counsel further contended that the 2nd Defendant violated the Code of Conduct for practice of Journalism in Kenya and stated that the court has jurisdiction to entertain defamation claims against the media and journalists who deliberately publish false and injurious information about other Kenyans notwithstanding the freedom of expression enshrined in *the Constitution*. The decision in *Standard Media & 2 Others v Christopher Ndathi Murungu* [2016] eKLR was called to aid in that regard.
 11. Also citing Patrick O'Callaghan in the Common Law Series: The Law of Tort, para. 25.1 and the decision in *Musikari Kombo v Royal Media Services* [2018] eKLR, counsel contended that the article as published was not an accurate report of the contents in the pleadings in HCC No. 142 of 2015 and had injured the 1st Plaintiff's reputation both locally and internationally by portraying her as a person seeking unjust benefit from the family of the late Njenga Karume. A family known to own vast properties and businesses.
 12. On quantum, counsel basing his submission on the English decision in *John v MGN Limited* [1996] 2 All ER 35 and *Jones v. Pollard* [1997] EMLR 233 concerning the applicable principles urged the court to award Kshs. 25,000,000/- as general damages, because the article was published on the front page of the Business Daily and on its website. Here, counsel relying on the decisions in *Alnashir Visram v Standard Limited* [2016] eKLR, *Samuel Ndungu v Nation Media & Another* [2015] eKLR and *Mwangi v Machira* [2001] eKLR.
 13. Addressing the award of aggravated damages, counsel reiterated that the Defendants' article prominently displayed the 1st Plaintiff's photograph; that the 2nd Defendant failed to verify the information contained in the pleadings in HCC No. 142 of 2015; that the Defendant did not produce any official records to verify the directors of Jacaranda Holdings; and that it took a court order for the Defendants to pull down the article in question. He therefore urged an award of Kshs. 10,000,000/- as aggravated damages, citing *Kipyator Nicholas Kiprono Biwott v George Mbugus & Another* [2002] eKLR and *Machira* (supra).
 14. On the part of the Defendants, counsel began by restating the pleadings and evidence before the court. Her submissions equally addressed the twin issues of liability and quantum of damages. Regarding the question whether the published words were defamatory of the 1st Plaintiff, counsel anchored her submissions on the decision in *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* [2009] eKLR to contend that the article constituted a fair comment on a matter of public interest. It was further submitted that the article was published pursuant to pleadings in HCC No. 142 of 2015, hence on an occasion of absolute privilege pursuant to the provisions of Section 6 of the *Defamation Act*.
 15. She argued that the 1st Plaintiff failed to demonstrate malice on the part of the Defendants and contended that there was no deliberate attempt or ulterior motive by the said Defendants to injure the Plaintiff's reputation. Citing on the decisions in *Daniel N. Ngunia v KGGCU Limited* [2000] eKLR, *Hezekiel Oira v Standard Limited & Another* [2016] eKLR, *SMW v ZWM* [2015] eKLR and *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR counsel argued that it was the duty of the 1st Plaintiff to adduce reliable evidence that a right thinking member of society who knew her prior and after reading the said publication viewed the 1st Plaintiff in a different and adverse way after the publication. That the 1st Plaintiff, having been the sole witness to testify in support of alleged damage to her character or reputation through the impugned publication, failed to discharge the burden of proving how the publication was defamatory. Hence the claim was not proved.



16. Concerning awardable damages, counsel equally anchored her submissions on the English decisions in *MGN Limited (supra)* and *Pollard (supra)* on the principles to be considered in defamation claims.
17. In urging the court to award Kshs. 2,000,000/- as general damages and to decline to award aggravated damages, counsel relied on raft of decisions including *Jakoyo Midiwo v Nation Media Group & Another* [2018] eKLR, *Royal Media Services Limited v Jakoyo Midiwo* [2018] eKLR, *Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Co. Advocates* [2013] eKLR, *Musikari Kombo (supra)*, *Margaret Wanjiru Kariuki v Nairobi Star Publication Limited* [2018] eKLR and *Margaret Wanjiru Kariuki v Nation Media Group Limited* [2021] eKLR. And submitted that in awarding damages, the court ought to be guided by comparable authorities. Further pointing out that the 1st Plaintiff did not adduce evidence to demonstrate conduct by the Defendants that aggravated her reputational injury for instance through republication of the article, or malice on their part. Moreover, counsel stated that pursuant to a court order, the article was pulled down and hence the Plaintiff is not entitled to an award of aggravated damages. In conclusion the court was urged to dismiss the suit with costs or in the alternative award damages as proposed by the Defendants.
18. The court has considered the evidence on record and the parties' respective submissions. The key issue for determination is whether the 1st Plaintiff has proved her case on a balance of probabilities and if so, the appropriate awardable damages. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, addressed itself as follows in this regard: -

“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.”
19. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated concerning the burden 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.”



20. This suit, being founded on defamation, it is apposite to state the rationale behind the law 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:

“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 neighbour. 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...”

21. Actions founded on the tort of defamation surface the tension between private interest and public interest. Article 33(1) of *the Constitution* guarantees every person’s right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”. Article 34 guarantees the freedom of the media while Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*. Contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & Others* [1969]1 ALLER 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.”

22. Gately 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”.

23. In *Selina Patani & Another vs Dhiranji V. Patani* [2019] eKLR the Court of Appeal held 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:

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



24. There is no dispute in this case regarding ingredients (ii) and (iii) above as Defendants readily admitted to publishing the articles in question in its statement of defence, and appeared to concede the former during the trial. The key issues in dispute are whether the articles as published are defamatory and false and or whether the defence of qualified privilege or fair comment as per Section 6, 7 and 15 of the Defamation Act are available to the Defendants. The court proposes to deal with these issues concurrently.
25. It is common ground that the 1st Plaintiff is a businesswoman in Nairobi, with expansive investments in Kenya, which include the real estate known as Fourways Junction development and that on 16.11.2015, the Defendants published an article to the effect that the Plaintiff's family and the Karume family (a well-known equally wealthy family) were entangled in a dispute over prime property worth Kshs. 200,000,000/- within Nairobi County. At this stage, it is useful to set out in extenso the contents of the article complained about.
26. The printed article published by Defendants on 16.11.2015 in "Business Daily" read as follows:

"Karumes, Gatabakis fight over Sh200m prime Nairobi land.

By Brian Wasuna

"Nancy Gatabaki, the woman who nearly brought the construction of upmarket Fourways Junction estate in Nairobi to a stop four years ago, has opened a fresh court battle against the family of the late Kiambu politician and business magnate Njenga Karume.

At the centre of the legal battle is a 20-acre piece of land worth Sh200 million that is registered in Ms. Gatabaki's name and was initially part of a large parcel that the couple sold to real estate firm Suraya Properties Group for the construction of the Sh30 billion Fourways Junction estate.

Ms Gatabaki and her husband Samuel have sued Jacaranda Holdings – a firm owned by the Karume family – seeking to regain full ownership of the land. The Gatabaki's claim that the Karume-owned company has been selling the property to third parties illegally and is seeking order to stop it.

Jacaranda has replied to Ms. Gatabaki insisting that she agreed to the sale of the land to Suraya Property, which wants to use it to expand the multi-billion-shilling Fourways Junction Estate.

Jacaranda reckons that it struck a deal to sell the land to Suraya for Sh.200 million in 2009, and that it has already received a Sh.20 million deposit for the transaction.

Mr. Karume was initially to buy the land from Ms. Gatabaki for 18 million in 1992 through his firm Jacaranda Holdings, but the deal stalled for over 10 years as disputes arose, with the taxman causing a caveat to be placed on the land.

Ms. Gatabaki was all along aware of the said transaction and gave consent for the sale of the suit property by Jacaranda Holdings to Suraya Properties. She gave Suraya irrevocable authority to finalize the sale agreement between it and Jacaranda Holdings either by way of cash or issuance of land titles" Jacaranda says in court filings.

Mr. Karume's firm had paid a Sh6 million deposit and was waiting for caveats to be lifted so it could seal the deal. The Karume-owned company, however, took occupancy of the land as the Gatabaki's attempted to resolve the numerous disputes.



Ms. Gatabaki's latest court fight now threatens to stall a lucrative deal that would have seen Mr. Karume's firm earn a massive profit from selling the land to Suraya.

Jacaranda was to complete its purchase of the land at the same Sh18 million purchase price agreed in 1992 despite the protracted battle to settle the tax dispute with the Kenya Revenue Authority and the Kenya Platers Co-operative Union (KPCU) which has placed caveats on the land.

Jacaranda was to sell the land to Suraya at Sh200 million and use the proceeds to pay Ms. Gatabaki her dues as agreed in the original contract. The firm had already paid a Sh6,345,000 deposit to Ms. Gatabaki and her husband in 1992, leaving a balance of Sh11,655,000.

The transaction would have left Mr. Karume's firm with a whopping 182 million profit, mainly arising from the steep rise in land prices in the past 13 years and its 23-year wait to acquire the prime property. The value of land has been on the rise in the area because of its close proximity to the Northern Bypass and the upmarket Runda Estate.

Mr. Karume formed Jacaranda Holdings to control all his real estate interests, which includes the Jacaranda Hotels and a number of apartments in Nairobi and Kiambu.

The property firm is one of the assets at the centre of another vicious court case pitting Mr Karume's children against the trustees of a company which the politician formed to consolidate and run his massive business empire after his death. Mr. Karume died in 2012 following a battle with cancer.

The list of properties under Mr. Karume's firms includes Jacaranda Hotels in Nairobi and Mombasa, Lake Elementaita Lodge, and the Village Inn.

Ms. Gatabaki wants the High Court to revoke any transactions the Karume-owned firm may have initiated regarding the land. She also wants the court to dismiss Jacaranda's defence and award her the land. The businesswoman claims Jacaranda's defence is scandalous and an abuse of the court process. But Jacaranda in its rejoinder says Ms. Gatabaki's case is full of half-truths and selective disclosures aimed tricking the court into ruling in her favour.

Jacaranda claims that Ms. Gatabaki had promised to protect its interest in the land stemming from the 1992 sale agreement, and that the same was included in its 2009 deal with Suraya.

The firm has attached a copy of the 2009 agreement as evidence that Ms. Gatabaki consented to the sale.

It was a fundamental condition of the contract that Ms. Gatabaki was to indemnify and to keep indemnified Jacaranda in respect of the suit property Jacaranda denies that it was wrongfully alienated and deprived Ms. Gatabaki possession and interest in the suit property by transferring it to third parties" Jacaranda says.

The dispute has opened a second battle involving Ms. Gatabaki and Suraya over land for the Fourways Junction, following the 2011 court case that saw her walk away with a cool Sh750 million award in an out-of-court settlement.

Ms. Gatabaki has enjoined Suraya as a defendant in the suit, as she seeks to stop the allegedly illegal sale of her land. She had in 2011 sued Suraya for locking her and her husband out of the Sh30 billion Fourways Junction Project, which was initially a joint venture between Suraya and Gatabaki's



The matter was, however, settled out of court, and Suraya paid Gatabaki's a Sh.725million settlement. Ms. Gatabaki received Sh402 million in cash, received the remaining Sh323 million in the form of residential apartments and land in the estate.

Suraya signed off 24 three-bedroom apartments valued at Sh75 million each six two-bedrooms apartments valued at Sh4.9 million each and 12 three-bedroom villas with a market price of Sh9.5 each as part of the settlement.

Suraya Properties also agreed to allocate Ms. Gatabaki 3.6 acres of land free from encumbrance or costs and within the disputed project area effectively making her one of Kenya's richest women. The settlement, however, saw Ms. Gatabaki relinquish her stake in the multi-billion-shilling project. She had initially sought Sh20 billion as compensation from Suraya prior to the out-of-court deal.

suit paper indicates that Suraya has spent over Sh100 million in bid to clear the caveats and settle all other disputes arising from the 20-acre land." (sic)

27. The online article published through the link <http://www.businessdailyafrica.com/karumes--Gatabakis-fight-over-Sh200m-prime-nairobi-land/-/539546/2957994/-/item/0/-/qesvx9z/-/index.html> was essentially an abridged version of the print version of the publication.
28. On the question whether the words referring to the Plaintiff were defamatory, the test to be applied is that spelt out in the case of the *Onama v Uganda Argus Ltd* (1969) EA by the East African Court of Appeal was that:

“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”.
29. 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.”
30. The respective printed and online articles published on 16.11.2015 employed words and phrases such as “fight over” “fresh court battle” “latest fight” “pitting” and “latest court fight”. The gist of the articles was that the Plaintiffs were embroiled in a protracted legal dispute with the Karume family over the ownership of the property in question thereby stalling the Fourways Junction project. The court understands the Plaintiff's pleaded complaint regarding the article by the Defendants to be that, the article was false and malicious as she was not involved in any dispute with the Karume family, and secondly that the words used in the article were defamatory in their natural and ordinary meaning, and or by innuendo.
31. 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.

32. The Court of Appeal 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:

“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.”

33. As rightly contended by the Defendants, it was the duty of the 1st Plaintiff to adduce evidence that an ordinary reasonable person who knew the Plaintiff before, would upon reading the said publication, view the 1st Plaintiff differently, or in other words, that the article, whether believed by such reader or not, had the tendency to lower the reputation of the Plaintiff in the reader’s eyes. As stated in *Hezekiel Oira v Standard Limited & Another* (supra) the successful claimant in a defamation cause must tender evidence not only that the publication complained of bore falsehoods, but also that the published words tended to lower her reputation, causing right thinking members of society to shun or avoid her or to treat her with contempt.

34. The only person who testified in support of the Plaintiff’s case was the 1st Plaintiff. Defamation involves imputations that tend to cause injury to the reputation of a person, and a successful plaintiff must demonstrate the injury to her reputation or standing as part of the ingredients of defamation, and not merely rely on her own estimation of herself and the effect of the defamatory statements to that estimation.

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

“ 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).

36. The above holding was reiterated in Patani’s case (supra), where the same Court stated that: -

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“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 appellant’s 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.

37. Similarly in this case, the Plaintiff did not tender evidence through other witnesses that the words in the article complained of caused or had the tendency to cause injury to her reputation by way of public ridicule, hatred or even being shunned, or that it tended to lower her esteem in the mind of right-thinking members of society. While the article in question may appear barely flattering to the persons named therein, the test to be applied is that of the reasonable ordinary man; it is not the 1st Plaintiff’s view of herself that matters, as stated in Musikari Kombo (supra).

38. Equally, the burden lay upon the Plaintiff to prove the falsity of the contents of the article, specifically, her key complaints that her family was not involved in a legal dispute with the Karume family over the



suit property in Commercial & Admiralty HCC No. 142 of 2015 and that the 1st Plaintiff was not a litigious person as portrayed in the article. The pleadings therein reveal that the suit was brought by the 1st Plaintiff herein against Jacaranda Holdings and Suraya Property Group relating to sale agreements entered into between the two Plaintiffs herein and the said companies concerning the suit property.

39. The court is of the considered view that it was upon the Plaintiff, and not the Defendants, to demonstrate that none of these defendant companies were associated by directorship or otherwise with the Karume family, as asserted in the article. Further, this court having perused the statement of defence filed by the latter company noted the averment made therein concerning the existence of no less than 10 cited court cases said to have been filed by the 1st Plaintiff against Suraya Property Group, Muga Developers, jointly with many other persons in respect of the same suit property. In the absence of proof of the defamatory and false nature of the statements complained of, it is difficult to see how the claim founded on defamation could be sustained, even if the defence of fair comment and privilege were unsustainable.
40. As stated in the case of Wareham t/a A.F. Wareham & Others (supra), if the evidence tendered does not support the facts pleaded, the party with the burden of proof should fail. See also Karugi & Another v Kabiya & 3 Others (supra). In the result, the court finds that the 1st Plaintiff has failed to prove all the necessary ingredients of defamation. Her suit must fail and is hereby dismissed with costs to the Defendants.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Kibukosya h/b for Mr. Wandeto

For the Defendants: Mr. Ogutu h/b for Ms. Jan Mohamed SC.

