



**Okiiti & another v Kidero & 2 others (Civil Suit 352 & 467 of 2012 (Consolidated)) [2023] KEHC 26915 (KLR) (Civ) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26915 (KLR)

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

**CIVIL**

**CIVIL SUIT 352 & 467 OF 2012 (CONSOLIDATED)**

**CW MEOLI, J**

**DECEMBER 15, 2023**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PLAINTIFF**

**AND**

**EVANS KIDERO ..... 1<sup>ST</sup> DEFENDANT**

**MUMIAS SUGAR COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**CIVIL SUIT 467 OF 2012**

**BETWEEN**

**EVANS KIDERO ..... PLAINTIFF**

**AND**

**ANDREW OKIYA OMTATAH ..... DEFENDANT**

**JUDGMENT**

1. The lead suit herein is High Court Civil Case No. 352 of 2012 (hereafter the 1<sup>st</sup> suit) which was filed on 16.07.2012 by Okiya Omtatah Okiiti (hereafter the Plaintiff) against Evans Kidero and Mumias Sugar Company Limited (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, respectively) and is founded on the tort of defamation. The Plaintiff seeks inter alia general, exemplary, and punitive/aggravated damages and an order to compel the Defendants to issue an immediate and unconditional apology.



2. The Plaintiff averred that at all material times, the 1<sup>st</sup> Defendant was the former Chief Executive Officer (CEO) of the 2<sup>nd</sup> Defendant. The Plaintiff also averred that on 26.08.2011 he delivered a letter to the 2<sup>nd</sup> Defendant with the intent of notifying it of his intention to mobilise mass action aimed at evicting the said Defendant from Nasewa Nucleus Estate (the Estate), a property which purportedly belonged to the Kenyan people. That subsequently on 29.08.2011 the Plaintiff and the 1<sup>st</sup> Defendant held a meeting at Kakamega Golf Club during which the latter requested the former to suspend the imminent action and to separate the resolution of the Estate issues from other businesses being carried out by the 2<sup>nd</sup> Defendant.
3. That in good faith, the Plaintiff attended a public rally on 1.09.2011 at the Nucleus Estate, with the aim of suspending the planned action. That however, the Plaintiff came to learn that the 1<sup>st</sup> Defendant in his capacity as CEO of the 2<sup>nd</sup> Defendant, had earlier addressed a letter dated 24.08.2011 to the Provincial Police Officer-Western Province (PPO), containing the following defamatory statements in reference to the Plaintiff:
  - a) ... Okiya Omtatah and a group of his usual hirelings
  - b) ... Okiya Omtatah is threatening to relocate his usual public drama to Western Province...
  - c) ... the land in question is private land and not community land as Omtatah ignorantly seems to think.
  - d) ... They are to say the least self-seeking hirelings out to exploit any opportunity that is available and/or imagined.
  - e) ... What Omtatah is threatening to do is exacerbate the situation by inciting cane farmers in Busia to stop supplying their contracted cane to MSC...
  - f) ... The interests of the public must be protected against self-interests of people like Omtatah, he is not only committing economic sabotage but also exciting hate and resentment in the minds of people in Busia against MSC.”
4. The Plaintiff averred that in their natural and ordinary meaning the aforesaid words meant and were understood to portray him as inter alia, a liar and dishonest person, a schemer and a person with selfish interests. The Plaintiff deemed the 2<sup>nd</sup> Defendant vicariously liable for the actions/words published by the 1<sup>st</sup> Defendant.
5. The Plaintiff also averred that he consequently wrote a demand letter to the 1<sup>st</sup> Defendant and dated 2.09.2011 to which the latter responded with an apology and request that the former eschews any legal action on the letter. That subsequent negotiations between the parties herein pertaining to resolution of the land crisis fell through.
6. It was further pleaded that later, the Plaintiff obtained a copy of a letter addressed to the Commissioner of Police by Prof. Tom Ojienda advocate acting on behalf of the Defendants and dated 8.02.2012, containing the following allegations:

“These statements/words are extremely defamatory and are meant to harm the reputation of Dr. Evans Kidero so as to lower him in the estimation of the community or to deter third parties from associating with him... the said allegations are completely false.”



7. That the Plaintiff similarly obtained a copy of a further letter also dated 8.02.2012 addressed to him by Prof. Tom Ojienda advocate and containing the following defamatory statements:

“Your recent conduct and state of mind where you unsuccessfully requested my client to intervene and solve a personal civil case which you have filed against Mumias Sugar Company Limited involving your tractor, the particulars of which are well within your knowledge, demonstrate that the publication of the said defamatory (sic) were actuated with extreme malice on your part.”

8. The Plaintiff averred that the contents of the above letters insinuated that the Plaintiff was an extortionist, a liar, full of malice and driven by the sole motive of tarnishing the name of the 1<sup>st</sup> Defendant. That the contents of the letter were published in several print media, including the Star online publication of 10.02.2012; the Star Newspaper of 10.02.2012; Weekly Citizen of 13.02.2012 to 19.02.2012; and in the Sunday Express of 12.02.2012 to 19.02.2012.
9. That the publications referenced caused the Plaintiff great embarrassment and shame, and that the Defendants have refused and/or neglected to offer an apology despite demand.
10. On 21.08.2012 the Defendants filed their joint statement of defence denying the key averments made in the plaint and liability. The Defendants averred that the words complained of in the plaint are based on truthful facts and cannot therefore be termed as being defamatory of the Plaintiff.
11. Subsequently, the 1<sup>st</sup> Defendant filed Civil Suit No. 467 of 2012 (hereafter the 2<sup>nd</sup> suit) on 21.09.2012 against the Plaintiff, also for defamation and seeking general and aggravated damages. Therein, the 1<sup>st</sup> Defendant pleaded that he is the former Managing Director (MD) of the 2<sup>nd</sup> Defendant, whereas the Plaintiff was at all material times a trustee of Kenyans for Justice and Development (the Trust).
12. The 1<sup>st</sup> Defendant averred that on various dates between July 2011 and March 2012 the Plaintiff published or caused to be published various defamatory and malicious statements concerning him. More specifically, the 1<sup>st</sup> Defendant pleaded that by way of a letter left at the 2<sup>nd</sup> Defendant’s offices in Nairobi on 23.08.2011, and addressed to the Western Province PPO and the Commissioner of Police, and a subsequent letter dated 26.08.2011 addressed to the 1<sup>st</sup> Defendant and copied to various groups and persons, the Plaintiff stated thus:

“we will call on the people of Western and Nyanza provinces residing in Nairobi and other conscientious Kenyans to support our efforts to protect public assets from grabbers by carrying out appropriate mass action against Mumias Sugar at your uphill offices in Nairobi...”

13. The 1<sup>st</sup> Defendant pleaded that the foregoing words could be taken and understood to mean that he was, inter alia, a criminal, a land grabber and a corrupt public officer. The 1<sup>st</sup> Defendant further pleaded that subsequently on 14.02.2012 the Plaintiff caused to be published the following false and defamatory words concerning him, by way of text messages circulated to various people and media houses through mobile number 0722684xxx:

“...Dr Evans Kidero has no reputation worth injuring/defaming until the High Court at Bungoma clears him of the accusations we have leveled against him in our petition that we reasonably suspect him of authoring and involvement in criminal activities including perjury, forgery and outright fraud, in his evil designs to grab 843 acres Nasewa/Bukhayo/1500...”



14. That the above words could be taken, in their natural and ordinary form, to mean that the 1<sup>st</sup> Defendant is a land grabber and a criminal, among others.
15. Furthermore, that the Plaintiff vide a text message sent through mobile number 0722684xxx on 16.02.2012 published the following defamatory words in respect of the 1<sup>st</sup> Defendant:

“...ndugu, I hope you are keeping well and that my carelessness won’t jeopardize your life for saving mine. Yes, I am the original author of that ‘careless’ SMS you complained about then forwarded to me on Wednesday 8<sup>th</sup>, I hang my head in shame for the inadvertent mistake. It was not intended. I am indeed very sorry and embarrassed, but I panicked and inadvertently sent out the sms to the media and others without taking precaution to fully conceal your identity. I am very sorry. I know that I cannot apologize enough. But I hope you will understand that I panicked and made an error of judgment. I never anticipated matters to take that ghastly dimension coz I never thought Dr Kidero would resort to murder the way he did. All the same I owe my life to you and I can never pay you for that. But should need be I’ll stand by you thru thick and thin. For saving my life may God bless you in his own time and way. Thanks. Sincerely. Omtatah...”
16. That in their natural and ordinary sense, these words could be interpreted to mean that the 1<sup>st</sup> Defendant is a criminal and murderer, among others.
17. It was pleaded further that the Plaintiff further caused to be published the following false and defamatory words vide the text messages sent on 10.02.2012 and 11.02.2012 respectively:

“...on November 4<sup>th</sup>, 2012 (sic) I smsed David Onyattah my lawyer thus: ‘Hi Boss, I have decided not to pursue the out of court settlement Re: KAKAMEGA TRACTOR ISSUE. It is being used to prevail upon me in a public interest litigation cause am pursuing against Mumias Sugar Co. in Busia. Kindly take a date for the case and let the court determine the matter. Thanks, Omtatah...”

“...vide O.B. No. 44/7/2/2012 I reported to District, Provisional and National levels of CID that Dr Evans Kidero M./D Mumias Sugar Co. had paid hit men to kill me...”
18. The 1<sup>st</sup> Defendant averred that the publications which were collectively made by the Plaintiff constitute malicious falsehoods, the particulars of which were set out in the plaint filed in the 2<sup>nd</sup> suit.
19. When the parties attended court on 24.05.2018 it was noted that both the lead suit and the 2<sup>nd</sup> suit involved the same parties and subject matter. Consequently, the court ordered that the two (2) files be consolidated and the 1<sup>st</sup> suit comprising the lead file.
20. At the trial, the Plaintiff testified as PW1. He proceeded to adopt his signed witness statement dated 25.06.2012 as his evidence-in-chief and to produce his bundle of documents dated 4.06.2012 as P. Exhibits 1-82.
21. In cross-examination, he restated the contents of his witness statement that he had filed a separate suit against the 2<sup>nd</sup> Defendant, namely Kakamega HCCC No. 36 of 2005 involving a tractor and that he did not seek the assistance of the 1<sup>st</sup> Defendant in settling that suit out of court, as a means to harass the Defendants in respect of the Estate. That from his knowledge, the Estate had previously been compulsorily acquired by the Government and was therefore constituted public land. He further confirmed inter alia that the mobile number 0722684xxx referenced in the pleadings pertaining to the



- 2<sup>nd</sup> suit belonged to him; that he had called for a strike at the 2<sup>nd</sup> Defendant's offices; and that he did have a meeting with the 1<sup>st</sup> Defendant at Kakamega Golf Club on the in that regard.
22. Calistus Crinis Aleri testifying as PW2 introduced himself as a businessman and farmer in Busia County, before proceeding to adopt his executed witness statement dated 26.02.2012 as his evidence-in-chief. During cross-examination, the witness upon being referred to a letter dated 27.08.2011 and mentioned in his witness statement, stated that the letter was written by the 1<sup>st</sup> Defendant and that it contained defamatory statements of the Plaintiff who was at all material times a national sugarcane farmer in Busia County enjoying national reputation. In re-examination, he said that upon receipt of a copy of the subject letter, he wrote to the 1<sup>st</sup> Defendant and copied all relevant persons, conveying his displeasure with the contents related to the Plaintiff, a leader in his society. This marked the close of the Plaintiff's case.
23. On his part, the 1<sup>st</sup> Defendant he testified as DW1 as the sole witness. He adopted his witness statement dated 30.08.2012 as his evidence-in-chief. The 1<sup>st</sup> Defendant testified that he was the MD of the 2<sup>nd</sup> Defendant at all material times, until the year 2013 before he was elected Governor of Nairobi County. He also testified that the land upon which the Estate was situated (namely land parcel LR No. Nasewa/Bukhayo/1500) (the subject land) belonged to Busia Sugar Co. and was privately owned. That the Plaintiff was neither a party to the contractual agreement between the 2<sup>nd</sup> Defendant and Busia Sugar Co. nor held interest in the matter concerning the land. That in a meeting with the Plaintiff, the latter demanded a large sum of money in respect of Kakamega HCCC No. 36 of 2005 in return for not pursuing the land issue concerning the Estate. That it is on this basis that the 1<sup>st</sup> Defendant through his lawyer, wrote the letter dated 8.02.2012 to the Commissioner of Police with the aim of seeking protection.
24. The 1<sup>st</sup> Defendant gave evidence that the Plaintiff later insinuated that he (the 1<sup>st</sup> Defendant) had put in place plans to kill the Plaintiff and which allegations resulted in the institution of the 2<sup>nd</sup> suit. That the matters contained in the letter of 8.02.2012 were factual and could not therefore be deemed defamatory.
25. In cross-examination, the 1<sup>st</sup> Defendant testified that he wrote the letter dated 24.08.2011 to the Plaintiff but that could not confirm whether or not the articles published by the various media houses arose from the contents of his letter. He further testified that whereas the Plaintiff claimed that the subject land was public land, he (the 1<sup>st</sup> Defendant) knew it to constitute private land. That the Plaintiff resorted to violence and use of threats and sending insulting text messages to the 1<sup>st</sup> Defendant.
26. In re-examination, the 1<sup>st</sup> Defendant stated that at the time of writing the letter dated 24.08.2011 he knew the land in question to be privately held, until the court later declared the same to be public land in Bungoma Constitutional Petition No. 1 of 2012. It was similarly his testimony that the media reports contained in paragraphs 29-32 of the Plaintiff's bundle of documents appear to have been triggered by the demand letter written to the Plaintiff by his advocate. That the demand letter coupled with his witness statement replicate the text messages sent to him by the Plaintiff and whose contents are particularized in the pleadings in the 2<sup>nd</sup> suit.
27. At the close of the trial, parties filed written submissions which by and large rehashed the evidence at the trial. Counsel for the Plaintiff in arguing that the defamatory statements were made by the Defendants herein, cited Sections 107, 109-112 of the *Evidence Act* and the decisions in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR and Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR regarding who has the legal burden of proof in civil claims. Counsel argued that



- the 1<sup>st</sup> Defendant failed to prove his claim for defamation against the Plaintiff by way of the 2<sup>nd</sup> suit and hence the same ought to fail.
28. Submitting on whether the Plaintiff's claim in the 1<sup>st</sup> suit had been proved, the Plaintiff's counsel argued that the ingredients of defamation had been established by the Plaintiff. Counsel citing Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 40 and Fraser on Libel and slander, 7<sup>th</sup> Edition as to what constitutes a defamatory statement. Counsel submitted that the impugned words/statements made by the 1<sup>st</sup> Defendant were not only untrue but had the impact of lowering the reputation of the Plaintiff in the eyes of right-thinking members of society, as was witnessed through the numerous phone calls made to the Plaintiff following the defamatory publications.
  29. On quantum, the Plaintiff's counsel submitted that he is entitled to the damages sought and proposed a sum of Kshs. 20,000,000/- on general damages inclusive of aggravated damages, relying on the decisions in inter alia Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR and Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others [2000] eKLR where the respective courts awarded sums of Kshs. 6,000,000/- and Kshs. 30,000,000/- under similar heads. On the premise that the Defendants refused and/or neglected to offer an apology following the alleged defamatory publications. Counsel also sought an award of exemplary damages but did not offer any proposals on the same.
  30. On the part of the Defendants, their counsel submitted that in order for the Plaintiff to succeed on his claim, he would be required to satisfy the conditions associated with the tort of defamation as reaffirmed by the respective courts in Francis Cheronu Ngeny & 11 others v Sammy Kiprop Kilach [2017] eKLR and Joseph Ndungi v Victor Munyao [2020] eKLR. Namely, that the statement has the impact of lowering the reputation of the concerned person in the eyes of right-thinking members of society, and that the statement is false and malicious. Counsel argued that the impugned letter could be termed as defamatory of the Plaintiff within the above context, since it was purely aimed at protecting the public peace and security.
  31. Counsel further argued that malice had not been proved by the Plaintiff, citing the decision in Alnashir Visram v Standard Limited [2016] eKLR. Counsel for the Defendants maintained that the words published are true both in fact and substance, and not falsehood. Counsel also maintained that the impugned letter by the 1<sup>st</sup> Defendant was copied to various persons, none of whom fall within the category of media outlets, and hence it cannot be deemed as malicious and therefore defamatory. In so submitting, counsel relied on the decision rendered in Francis Cheronu Ngeny & 11 others v Sammy Kiprop Kilach [2017] eKLR.
  32. It was the submission by the Defendants' counsel that the circulation of the impugned letter to other persons cannot be traced to the 1<sup>st</sup> Defendant or that following the impugned publication, the Plaintiff lost his reputation, since he went ahead to garner majority votes in the 2022 senatorial elections for Busia County.
  33. In addition, counsel for the Defendants asserted that the defence of qualified privilege is available to the Defendants, since it has been shown that the purpose and effect of the impugned letter which was drawn by the 1<sup>st</sup> Defendant in his capacity as MD of the 2<sup>nd</sup> Defendant, was to raise alarm regarding the imminent plans for breach of peace and destruction to property following the planned demonstrations. Counsel cited inter alia, the decisions in Francis Cheronu Ngeny & 11 others v Sammy Kiprop Kilach (supra) and Chirau Ali Mwakwere v Nation Media Group Ltd & another [2009] eKLR on the applicability of the defence of qualified privilege.
  34. On quantum, it was contended that the Plaintiff is not entitled to any award on damages. Consequently, the court was urged to dismiss the lead suit with costs.



35. The Court has considered the pleadings, the evidence on record and the parties' respective submissions. It is worth pointing out at this stage that the parties' respective submissions, and to some extent the evidence, were rivetted on the Plaintiff's suit being the lead suit and barely addressing the 2<sup>nd</sup> suit brought by the 1<sup>st</sup> Defendant, despite consolidation of the two suits. The court proposes to simultaneously address both suits.

36. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:

“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 exists.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“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.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

37. Further, the same court in *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 noted 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.”

38. Both suits are founded on the tort of defamation. In *Halsbury's Laws of England* 4th Edition Vol. 28 paragraph 10, a defamatory statement is defined as :

“....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”.

39. Additionally, Gately on Libel and Slander 6<sup>th</sup> 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.”

40. The rationale behind the law of defamation was spelt out by the Court of Appeal in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR as follows:

“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...”

41. In *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR the Court of Appeal reiterated that the law of defamation is concerned with the protection of a person’s reputation, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal further set out the ingredients of defamation as follows:

“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.”

42. To succeed in his claim and in the 1<sup>st</sup> suit, the Plaintiff was required to establish the above ingredients on a balance of probabilities. The 1<sup>st</sup> Defendant admitted to writing the impugned letter dated 24.08.2011 to police authorities (found on page 9 of the Plaintiff’s bundle of documents) in his capacity as MD of the 2<sup>nd</sup> Defendant, principally in reaction to the letter of 23.8.2011 by the Plaintiff giving notice of protests against the 2<sup>nd</sup> Defendant. A cursory reading of the letter reveals express reference to the Plaintiff therein. Equally admitted is the letter addressed to the Commissioner of Police by Prof. Tom Ojienda advocate for the Defendants and dated 8.02.2012.

43. In the 2<sup>nd</sup> suit, it is similarly apparent that the letter delivered to the 2<sup>nd</sup> Defendant’s offices in Nairobi, the first dated 23.08.2011 and addressed to the Western Province PPO and the Commissioner of Police, and a subsequent letter dated 26.08.2011 addressed to the 1<sup>st</sup> Defendant but copied to various groups



and persons, were written by the Plaintiff and were in reference to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. These letters by the Plaintiff and others served notice of imminent protests and mass action in respect of the subject land. It is also not in dispute that the mobile phone number 0722684xxx from which the impugned text messages concerning the 1<sup>st</sup> Defendant were sent, belonged to the Plaintiff at all material times, the Plaintiff admitting during cross-examination to have published the text messages of 6<sup>th</sup>, 14<sup>th</sup> and 16<sup>th</sup> February 2012 all contained in the 1<sup>st</sup> Defendant's documents, the Plaintiff then asserting that he stood by the contents therein.

44. That being the case, the key matters for determination are whether the impugned publications were defamatory and false.
45. On the question whether the words referring to the Plaintiff were false, the court considered the pleadings and testimony by the Plaintiff that the impugned letters, including the one addressed to the PPO Western dated 24.08.2011, portrayed him as being inter alia as, a liar, untrustworthy and a schemer. From the contents of the impugned letter, other related letters together with rival evidence on record, it emerges that the conflict or contest between the parties herein, which drew in other persons including PW2, revolved primarily around an ownership dispute relating to the subject land.
46. The Plaintiff on the one hand claimed the same to be public land earlier compulsorily acquired for a public utility but allegedly later "grabbed" by its then owners, Busia Sugar Company who handed it to the 2<sup>nd</sup> Defendant to manage. The Defendants on the other hand asserted it to be private land owned by Busia Sugar Company and managed by the 2<sup>nd</sup> Defendant pursuant to a management contract to which the Plaintiff was not privy, not being a shareholder or holding any interest in Busia Sugar Company. The 1<sup>st</sup> Defendant asserted in his evidence that the Plaintiff was therefore a mere busy body.
47. Suffice to say that as of 2011, the land in question was registered in the name of Busia Sugar Company, and in February 2012, the Plaintiff and other petitioners filed Bungoma Constitutional Petition No.1 of 2012 seeking several reliefs in that regard. The Court in its judgment delivered on 31<sup>st</sup> July 2018 while dismissing the petition ordered that the title to the subject land be reverted to the government for the establishment of the sugar factory envisioned as the object of the earlier compulsory acquisition.
48. That said, from the evidence, a second matter relating to the suit filed by the Plaintiff against the 2<sup>nd</sup> Defendant, being Kakamega HCCC 36 of 2005 and seeking compensation for damage or loss of the Plaintiff's tractor appears intertwined with the land ownership contest, the 1<sup>st</sup> Defendant asserting by his pleadings and evidence that, the Plaintiff had in the period prior to the filing of the Constitutional Petition demanded an out of court settlement therein in the sum of Ksh.67, 000,000/- odd in order to abandon the campaign concerning the subject land. Indeed, during cross-examination, the Plaintiff admitted to writing the email dated 13.09.2011 to one Paul K. Murgor (found at page 53 of the Defendant's bundle) whose subject was therein stated to be "Tractor Claim Projections", to which email was attached a computation amounting to Ksh. 67, 965,281.00.
49. The impugned letter dated 24.08.2011 and tendered on page 9 of the Plaintiff's bundle must be viewed in perspective. It related to planned imminent protests in respect of the subject land, as confirmed by the Plaintiff through his oral evidence as well as that of PW2. Which suggests that while Plaintiff took offence at the choice of words used in the letter, the basic substance addressed in the letter, namely the raging land dispute and call to mass action by the Plaintiff in that regard existed. Secondly, contemporaneously, the Plaintiff was pressing for settlement of his tractor claim. This much was admitted by the Plaintiff; that while leading the claimants to the subject land, and in the heat of the contention and threats to mass protests, the Plaintiff not only met the 1<sup>st</sup> Defendant but also corresponded directly with the latter's appointed person to press his personal claim quantified at Ksh. 67, 965,281.00 regarding the loss of his tractor.



50. Considering the context in which these letters were written, and despite the colourful language employed by the authors, it is difficult to conclude that the contents of the impugned publications were false in substance. The letters arose from a real controversy over land and the intentions of the Plaintiff to mobilise people of Busia and elsewhere to mass action, with the attendant spectre portended. What the 1<sup>st</sup> Respondent was essentially seeking in his letters was to move the police to take pre-emptive action in protection of the property in dispute, the business at stake and the upholding of law and order, even though his choice of words regarding the Plaintiff may have been poor.
51. One of the two letters dated 8.02.2012 addressed by Prof. Tom Ojienda to the Plaintiff (pp. 22-24 of the Plaintiff's bundle) is evidently a demand letter before legal action. On the face of it, the letter was not copied to any person. The second is addressed to the Commissioner of Police (found on pages 20-21 of the Plaintiff's bundle) seeking those investigations be carried out against the Plaintiff concerning the text messages quoted therein. This letter was copied to four police heads in Western Kenya.
52. It seems that the contents of these letters were picked up and published by various media houses. Both relate to the allegations made by the Plaintiff against the 1<sup>st</sup> Defendant, which formed the basis for the 2<sup>nd</sup> suit. It is not clear that the wide publication of the letters' contents was by the 1<sup>st</sup> Defendant or on his instructions. Because of the legal nature of the two letters, being a demand letter and a criminal complaint to the police, it is difficult, without more, and inappropriate, for this court to purport to make the finding that the contents of these letters were false. Besides, as earlier noted, it is a fact that the Plaintiff while issuing threats of mass protests concerning the subject land was simultaneously pressing for a personal settlement.
53. The next question to be answered is whether the publications made by the 1<sup>st</sup> Defendant were defamatory. A defamatory statement is defined in Halsbury's Laws of England 4th Edition Vol. 28 (supra) as one which paragraph 10 as one that 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.
54. 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 17<sup>th</sup> Edition 1995-page 1018."
55. The Plaintiff's case was that the published letters of 24.08.2011 and those issued by Prof. Ojienda on 8.2.211 were defamatory their natural and ordinary meaning, portraying him as a liar, schemer, selfish and untrustworthy person inter alia. PW2, while clearly disbelieving the contents of the publications thought they had a defamatory tendency, while in contrast, the 1<sup>st</sup> Defendant denied that the impugned publications in any way lowered the reputation of the Plaintiff. In that regard testifying that the Plaintiff had attempted to obtain a personal benefit from the 2<sup>nd</sup> Defendant and sought the 1<sup>st</sup> Defendant's consent to an out of court settlement exceeding Kshs. 67,000,000/- in respect of his claim for compensation for damage to the Plaintiff's tractor in exchange for dropping the claim on the subject land. The 1<sup>st</sup> Defendant asserted further that the Plaintiff indeed had surreptitiously visited the 1<sup>st</sup> Defendant's office to this end, and when the proposal failed, the Plaintiff wrote the letters of 23<sup>rd</sup> and 26<sup>th</sup> August notifying police of mass action against the 2<sup>nd</sup> Defendant.



56. The Plaintiff admitted meeting with the 1<sup>st</sup> Defendant on 29.08.2011 but disputed any relationship between the two claims. This denial is put to doubt by some of the admitted pieces of evidence. First, as noted earlier, the Plaintiff during cross-examination admitted writing the email dated 13.09.2011 (found on page 53 of the Defendants' documents) to one Paul K. Murgor, as referred by the 1<sup>st</sup> Defendant in that regard. Among other items that are seemingly relating to the land matter and found in the copies of scribbled "notes" of the admitted meeting that are at pages 6-7 of the Plaintiff's documents, is the name Paul Murgor and his contact.
57. The Plaintiff's projections, presumably related to is tractor claim, as attached to the email to Paul Murgor of 13.09.2011 amounted to Ksh. 67, 965,281.00. The email read in part as follows:
- "Re: Tractor Claim Projections
- Hi!
- Attached are the projections I had made for my land preparation operations.
- Kindly print out the entire workbook and familiarize yourself with it before we discuss the out of court settlement as directed by the MD.
- I will be asking for both loss of tractor and loss of use."
58. Notably, the Plaintiff though evidently represented in his personal suit by counsel appears to have engaged directly with the Defendants in this instance in seeking a settlement payout. The Plaintiff's subsequent text message dated 10.02.2012 regarding instructions to his advocate on the tractor claim, and referring to the dispute concerning the subject land (as replicated at paragraph 17 of the 1<sup>st</sup> Defendant's plaint and issued from the Plaintiff's admitted telephone number) also appears to partly confirm the 1<sup>st</sup> Defendant's assertions.
59. The Plaintiff was obligated to demonstrate through evidence that an ordinary person reading the impugned publications would perceive them in the defamatory sense pleaded. What the court heard through PW2's oral evidence, his written statement dated 26.6.2012 and letter dated 1.09.2011 was a generalized assertion that the letters were defamatory of the Plaintiff. His letter and written statement are for the main part a strong canvassing of the argument by the Plaintiff and others concerning the subject land, the witness stating that the Defendant's letters were "calculated" inter alia to cast the Plaintiff in "negative light" with authorities and to weaken his leadership of the "struggle" by undermining "the farmers" confidence in him".
60. The lingering question here is whether PW2 would have reconsidered this position had he been privy to information that while evidently publicly leading the said "struggle", the Plaintiff was also privately engaging with the Defendants in a bid to obtain a large settlement in respect of his personal claim. In *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".
61. The court has already considered in context the 1<sup>st</sup> Defendant's letters to the police as part of the contest over the subject land, and essentially seeking to move the police to take pre-emptive action in protection of the property in dispute, the business at stake and the upholding of law and order. The poor choice of words notwithstanding.



62. 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.”
63. Applying the above tests to the facts of this case, the court is not persuaded that the Plaintiff has demonstrated to the required standard the defamatory purport attributed in his pleadings to the impugned publications. This notwithstanding the court addressing its mind to the question whether the defence of justification and qualified privilege was available to the Defendants herein is persuaded in the affirmative. With regard to the former, some of the admissions made by the Plaintiff appear to bring this matter within section 14 of the *Defamation Act* which provides:
- “In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges.”
64. Regarding the defence of qualified privilege, it was held in *Adam v Ward* (1917) AC 309 that:
- “A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or .... to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”
65. It was held in *Dorcas Florence Kombo V. Royal Media Services* [2014] eKLR that the defence of qualified privilege can be rebutted through evidence of express malice such as lack of belief in the truth of the statement made or the use of the privileged information for an improper purpose on the part of the defendant. From an examination of the obtaining circumstances proven, no malice has been proved or could be imputed against the 1<sup>st</sup> Defendant concerning the subject publications. The Defendant’s letters dated 24.08.2011 and 8.02.2012, were chiefly prompted by the Plaintiff’s own letters of 23<sup>rd</sup> and 26<sup>th</sup> August 2011 concerning mass protests, and were addressed to the Commissioner of Police and copied to various Officers in the police force. There is no evidence to indicate that the said letters were copied to or distributed to other persons outside the police force, and no credible evidence was tendered to show that additional publications either to members of the public or media houses, was orchestrated by the Defendants herein.
66. The 1<sup>st</sup> Defendant as the MD of the 2<sup>nd</sup> Defendant had a legal duty to make the communications with the police who, in execution of the mandate of law enforcement were duty bound to receive the communications. The defence of qualified privilege was therefore available to the Defendants, in any event.
67. Upon reviewing all the material on record, the court finds that the Plaintiff has failed to prove his case for defamation against the Defendants, to the required standard.



68. Turning now to the 2<sup>nd</sup> suit, the impugned publications against the 1<sup>st</sup> Defendant in part involved the Plaintiff's letters dated 23.08.2011 and 26.08.2011. These letters do not contain any direct imputations against the 1<sup>st</sup> Defendant and in my view, equally belong to the same category as some of those complained of by the Plaintiff. They form part of the war of words between the respective parties and were based on some true facts which had been embellished for the purposes of making a point to the respective addressees. Also cited by the 1<sup>st</sup> Defendant as defamatory were the text messages of 6<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup> 16<sup>th</sup> February 2012 emanating from the Plaintiff's admitted phone number, as itemized, and reproduced at paragraphs 9 to 23 of the 1<sup>st</sup> Defendant's plaint. The actual texts were however not produced, the 1<sup>st</sup> Defendant relying on copies thereof reproduced in the demand letter dated 11<sup>th</sup> July 2012.
69. The plaintiff admitted that the mobile phone number 0722684xxx from which the impugned text messages concerning the 1<sup>st</sup> Defendant were sent, belonged to the Plaintiff at all material times, the Plaintiff admitting during cross-examination to have published the text messages of 6<sup>th</sup>, 14<sup>th</sup> and 16<sup>th</sup> February 2012 all contained in the 1<sup>st</sup> Defendant's documents, and asserting that he stood by the contents therein.
70. It appears that by this time, the negotiations relating to the Plaintiff's tractor claim had fallen through, the Plaintiff curiously publicizing in that regard by way of a text message on 10<sup>th</sup> February 2012, his instructions to his advocate to suspend any further out of court discussions on account of alleged unwarranted pressure piled on him concerning a "public interest litigation cause" he was pursuing against the 2<sup>nd</sup> Defendant. Presumably, this reference is to Bungoma Constitutional Petition No. 1 of 2012 filed in late January or early February 2012.
71. The court has looked at the messages in the context of the evidently degenerating circumstances. In sum, these publications centered around the alleged fraudulent acquisition of the subject land by the 2<sup>nd</sup> Defendant as well as the alleged plot by the 1<sup>st</sup> Defendant to assassinate the Plaintiff. The contents, especially of the text messages, imputed that the 1<sup>st</sup> Defendant had engaged in fraudulent activities including fraud, forgery, and perjury in respect of the subject land, the accusations being allegedly the subject of related newly instituted constitutional litigation.
72. Clearly, the text message of 10<sup>th</sup> February 2012 makes no direct reference to the 1<sup>st</sup> Defendant, and except for the text messages of 16<sup>th</sup> February 2012, the striking feature common to the text messages is their reference to either the pending constitutional petition or reports allegedly made by the Plaintiff to police concerning the 1<sup>st</sup> Defendant.
73. For instance, the text message of 14<sup>th</sup> February 2012 cited allegations of a criminal nature pleaded in Bungoma Constitutional Petition No.1 of 2012. The copy of the Petition contained in the Plaintiff's bundle does indeed at paragraph 53 contain such allegations against both Defendants herein, but which the court did not expressly address in its judgment. Whereas the text messages of 6<sup>th</sup> and 11<sup>th</sup> February 2012 refer to reports made by the Plaintiff concerning the alleged plot by the 1<sup>st</sup> Defendant to eliminate the Plaintiff.
74. From my reading of the text message of 16<sup>th</sup> February 2012 together with that dated 6<sup>th</sup> February 2012 and admitted by the Plaintiff, the two appear to relate to the same subject matter allegedly reported to police vide Occurrence Book No. 4/7/2/2012 alleging that that the 1<sup>st</sup> Defendant had hired "hitmen" to kill the Plaintiff. These text messages, in so far as they assert matters contained in judicial pleadings and reports to police authorities as reckless as they may be, are mere replications of such allegations, and without seeming to assert the truth thereof.



75. It would be perilous in the circumstances of this case, and probably imprudent with the bare material before the court, to conclude that the allegations were false. Upon reviewing the text messages, it is apparent to the court that the Plaintiff embellished his official reports to police authorities and court proceedings to publicize unverified allegations against the 1<sup>st</sup> Defendant without appearing to assert the truth therein. This ploy appears to be a tactful cover for his publications as no doubt, a plea of qualified privilege as in *Adam v Ward* (supra) could, in a proper case, afford some modicum of defence to the Plaintiff.
76. As to whether the text messages were defamatory of the 1<sup>st</sup> Defendant, this court having applied the tests in *Elizabeth Wanjiku Muchira v Standard Ltd* [2011] eKLR and *Musikari Kombo* (supra) was not persuaded, principally because, the 1<sup>st</sup> Defendant failed to demonstrate the falsity of the publications and secondly, failed to summon a witness, the ordinary reasonable man, to testify on the tendency of the publications, to injure his reputation. *Gatley on Libel and Slander* 6<sup>th</sup> Edn. emphasizes the element of falsity in defamation as follows; -
- “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”.
77. Notwithstanding the patently offensive nature of the statements in question, it was the duty of the 1<sup>st</sup> Defendant to adduce evidence that an ordinary reasonable person who knew him before, would upon reading the said publications, view him differently, and or that the publications, whether believed by such reader or not, had the tendency to lower his reputation 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 his reputation, causing right thinking members of society to shun or avoid him or to treat him with contempt.
78. The only person who testified in support of the 1<sup>st</sup> Defendant’s case himself. Defamation involves imputations that tend to cause injury to the reputation of a person. Hence, a successful plaintiff must demonstrate the tendency of the publication to injure his reputation or standing as part of the ingredients of defamation, and not merely rely on his own estimation of himself and the effect of the defamatory statements to that estimation.
79. 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).

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

“

“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.

81. Similarly, in this case, the 1<sup>st</sup> Defendant did not tender evidence through other witnesses that the words in the publications complained of, as serious as they seem, caused, or had the tendency to cause injury to his reputation by way of public ridicule, hatred or even being shunned, or that they tended to lower her esteem in the mind of right-thinking members of society. While the text messages in question allege grave criminal conduct on the part of the 1<sup>st</sup> Defendant, the test to be applied is that of the reasonable ordinary man; it is not the 1<sup>st</sup> Plaintiff’s view of himself that matters, as stated in SMW v ZWM and



Patani's case (supra). Additional testimony by a third party was all the more necessary in this case where astounding claims were made in the text messages by the Plaintiff, including one to the effect that the 1<sup>st</sup> Defendant had "no reputation worth injuring/defaming". Consequently, the 1<sup>st</sup> Defendant's case must also fail.

82. In the result, both the Plaintiff and the 1<sup>st</sup> Defendant have failed to establish their respective cases to the required standard. The consolidated suits are accordingly dismissed, the court further directing that each party shall bear its own costs in either suit.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of**

For the Plaintiff: Ms. Obure h/b for Mr. Kanjama

For the Defendants: N/A

C/A: Emily

