



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 252 OF 2013

OLIVER MERRICK FOWLER.....1ST PLAINTIFF

NIGEL HAVERGAL SHAW.....2ND PLAINTIFF

-VERSUS-

KENYA REVENUE AUTHORITY.....DEFENDANT

JUDGMENT

1. The plaintiffs herein filed a suit by way of the plaint dated 1st July, 2013 and sought for judgment against the defendant in the following manner:

a. General damages

b. Aggravated and Exemplary damages

c. Costs of this suit;

d. Interest on items (a) and (b) at Court from the date of filing this suit until payment in full and

e. Any other relief as this court may deem fit to grant.

2. The plaintiffs pleaded in their plaint that on or about 29th January 2013 the defendant wrote and published and/or caused to be written and published to a third party, "*Baran Telecom Networks Ltd*" (hereinafter third party) which words were contained in a typewritten letter whose heading was "*Tax in Arrears/compliance certificate*" which are defamatory of the plaintiffs.

"29th January 2013

Baran Telecom Networks Ltd

P.O Box 19718-00100

NAIROBI

Dear sir,

RE: TAX IN ARREARS/COMPLIANCE CERTIFICATE

Reference is made to your letter dated 11/11/2012 and received by us on 21/01/13.

It is receiving our attention.

Please settle the following

Corporation tax

Avail Original withholding tax certificates for year 2009 to enable us allow the credit.

VAT.

Avail the following copies of VAT 3 to enable ascertain the correct tax position.

Year 2010.....October

Year 2011.....August to December

Year 2012.....January to December

Directors: Oliver Fowler Merrick-A000116826H

Pay Kshs.12, 542,361 for the years 1996, 1999-2001, 2004, 2008 & 2010 as per attached statements.

Director Shaw Nigel Havergal-A001117352J

Pay Kshs.9, 328,393 for the years 1997, 1999, 2003-2005, 2010 & 2011 as per attached statement.

Your early response on this matter is highly appreciated”

3. The plaintiffs further pleaded in their plaint that the defendant knew or should have known that the plaintiffs ceased to be directors of the third party on or about 22nd October, 2008 and that the defendant also knew that the plaintiffs had paid their taxes to it without fail for the previous 30 and 20 years.
4. It was also pleaded by the plaintiffs in their plaint that in their natural, ordinary and direct sense, the words employed in the letter meant and were understood to mean that the plaintiffs were tax evaders, devious, venal, self-seeking, fraudulent and unworthy of any public trust.
5. It was further pleaded by the plaintiffs that the plaintiffs' basic and fundamental constitutional rights were scurrilously trashed by the plaintiffs' words in the letter, which were calculated to bring them, jointly and severally, into horrendous public opprobrium in their person and in their professional and business dealings, and that the letter was designed and published to cause the plaintiffs and their reputation the greatest possible harm.
6. The plaintiffs stated that the letter violated Article 31(c) of the Constitution, which protects people from having information about their personal matters disclosed to third parties. Furthermore, the plaintiffs claim that the defendant's revelation of their tax matters was in blatant breach of section 125 of the Income Tax Act's duty of confidentiality.
7. The plaintiffs contend that despite knowing and having the opportunity to confirm the true position, the defendant acted recklessly and cynically by promulgating and publicizing the aforementioned letter in utter disregard of the effect it may or would have on the plaintiffs' reputation.
8. The plaintiffs further contend that the plaintiffs' reputation has been significantly harmed as a result of the defendant's activity in publishing and/or causing the letter to be published, and that the plaintiffs have suffered distress and embarrassment.
9. The defendant entered appearance upon service of summons and filed its statement of defence on 8th August, 2013 to deny the plaintiffs' claim.
10. The defendant pleaded in its statement, admitted the factual content of the letter dated 29th January 2013 but denied the allegations that they were defamatory.
11. The defendants further pleaded that the plaintiffs are statutorily required to reply to tax inquiries posed by the defendant as citizens of Kenya, and that the subject letter and its content are founded on justified motivation and good faith in the course of the defendant's functions of tax collection.
12. The parties reached an agreement in which the plaintiffs and the defendant agreed to admit their witness statements and their bundle of documents into evidence without summoning the witnesses to testify orally.
13. Further, the court issued directions for the parties to put in written submissions. Mr. Gachuhi advocate for the plaintiff vide his submissions gave a brief background of the matter and identified five issues for determination as follows:

i. Whether the defendant defamed the plaintiffs by its letter of 29th January 2013 published to a third party.

ii. Whether in publishing its letter of 29th January 2013, the defendant violated the plaintiffs' right to privacy as enshrined in

Article 31(c) of the Constitution

iii. Whether in disclosing the plaintiffs' tax affairs to a third party vide its letter of 29th January 2013, the defendant was in violation of the duty of secrecy imposed by section 125 of the Income Tax Act.

iv. If 1,2 and or 3 are in the affirmative ,what is the measure of damages?

v. Who should bear the costs of the suit?

14. On the first issue, the plaintiff submitted that the defendant at paragraph 4 of its defence admitted having written the impugned letter but asserts that it did not amount to publication. On this the plaintiff relied on the case of **Wycliffe A Swanya v Toyota East Africa Limited & Another Nairobi CA No.70 of 2008** ,the Court Of Appeal held that "Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed"

15. The plaintiff further relied on the case of **Elisha Ochieng Odhiambo v Booker Ngesa Omole(2021) eKLR** publication was defined citing **Pullman v Walter Hill & Co (1891) 1QB 524**,

"What is the meaning of 'publication'" The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise..... If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter" Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" "

16. It is the plaintiff's submissions that Baran was incorporated on November 8, 2007, and they adduced evidence that they resigned as directors on October 22, 2008, and new directors were appointed, and Baran verified to the defendant that the plaintiffs were not directors in a letter dated February 2, 2013.

17. The plaintiffs further submitted that the plaintiffs' tax issues were communicated to Baran and its directors, and that defendants stated in their defense that they had no means of knowing the plaintiffs had ceased to be directors of Baran, which is a false claim.

18. The plaintiffs contend that the defendant has not demonstrated any attempt made to verify Baran's directors before the letter was written. The plaintiff went further and cited **Section 69(2) of the Income Tax Act** states as follows;

"For the purpose of obtaining full financial information from the government or local authority or other public body, the Commissioner may, by notice in writing, at any time require an officer in the service of the Government or of a local authority or other public body, within reasonable time, not being less than thirty days after the date of service of the notice-(a)to furnish him or a person authorized by him with such financial information as may be considered necessary by the Commissioner;and (b) to supply such further particulars as may be required in respect of such financial information."

19. On the second issue, the plaintiffs submitted that the defendant's action was a gross violation of the plaintiffs' Constitutional rights, not to have their tax matters disclosed and not to have their tax affairs revealed to Baran or its directors.

20. On the third issue, the plaintiffs submitted that there can be no worse damage to the plaintiffs' personal and professional reputation than to portray the plaintiffs' to be tax evaders, devious,venal,self-seeking ,fraudulent and or unworthy of any public trust including to their erstwhile client's Baran.

21. On this the plaintiffs relied on the Court of Appeal case of **Wangethi Mwangi & Another v J.P Machira T/A Machira & Co. Advocates(2012) eKLR** held that;

"We consider that most of the essential elements for the award of aggravated damages as set out above, were in our view present and for that reason, the judge was perfectly entitled to award them and in addition the level of the damages cannot in the circumstances be said to lack a juridical basis because the learned Judge had clearly set out the elements he considered before making this part of the award. Thus there were elements of recklessness on the part of the appellants in telling the truth behind the story after having been prompted or alerted the previous day by the respondent. The Court cannot therefore be faulted."

The Court of Appeal dismissed the appeal and upheld the judgment of the High Court which awarded the respondent of compensatory damages in the sum of Kshs.8 million together with aggravated damages in the sum of Kshs.2 million.

22. The plaintiffs each pray for general damages assessed at Kshs.8,000,000/=.

23. On aggravated damages, the plaintiffs on this held relied on the case of **John v MGN Ltd (1996)I ALL ER 35** where the Court of Appeal held that;

"Exemplary damages on the other hand go beyond compensation and are meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive eg where he is actuated by malice; insistence

on a flimsy defence of justification or failure to apologise.”

24. On the issue of damages for breach of statutory duties, the plaintiffs relied on the Supreme case of **Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited (2018) eKLR** where it was held as follows:-

“It is clearly established in all common law jurisdictions that public bodies can be held liable in negligence for the negligent exercise of statutory duties and powers.”

25. The plaintiffs contend that the defendants had a statutory duty to keep the plaintiffs' tax affairs private and not to share the tax statements with other members of the public, and that the disclosure, combined with the plaintiffs' false claim of being in tax arrears for over 17 years, was damaging to their reputation in their personal capacities and as members of the legal profession for more than 20 years.

26. The plaintiffs therefore each claim Kshs.1, 000,000/= under this head.

27. On the damages for violation of the plaintiffs' constitutional rights, the plaintiffs relied on the case of **Edward Akongo Oyugi & 2 Others v Attorney General (2019) eKLR** where the court held that the payment of compensation.....” *in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the constitution”*

28. The plaintiffs' submit that the defendant's breach of their right to privacy as enshrined in Article 31 (c) of the Constitution of Kenya ought to compensate each Plaintiff an award of Kshs.1,000,000/= under this head.

29. The plaintiffs therefore each pray for judgment against the defendant as follows:

Liability at 100%

Quantum of damages

General damages-Kshs.8, 000,000/=

Aggravated damages-Kshs.2, 000,000/=

Damages for breach of statutory duty-Kshs.1, 000,000/=

Costs of this suit.

30. In retort, the defendant submitted that it operates under a universally accepted system of tax administration and one of the accepted tax system is called the best judgment principle. The defendant has relied on the case of **Saima Khalid v The Commissioner for Her Majesty's Revenue & Customs –Appeal No.TC/2017/02292** the Tribunal observed as follows concerning the application of best judgment:-

“the requirements for a decision to be to the best of HMRC's judgment were set out in the High Court case of Van Boeckel v C & E Commissioners where Woolf J as he then was, said:

...the very use of the word judgment makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them...

Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due

Thirdly, it should be recognized particularly bearing in mind the primary obligation of the tax payer, to which I have made reference, of the tax payer to make a return himself, that the commissioners should not be required to do the work of the tax payer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain the information without carrying out exhaustive investigations. What the words best of their judgment envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due.As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them. ”

31. The defendant contends that it is not tasked with carrying out exhaustive investigations in order to raise an assessment and all the taxing authority needs is some material upon which to base its judgment before arriving at an assessment as to what tax is due from a taxpayer.

32. On whether one can be defamed by a tax decision, the defendants relied on the case of **Joseph Njogu Kamunge v Charles Muriuki Gachari (2016) eKLR** the Honourable court observed as follows:

“The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiffs

reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory *per se*. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of.”

33. The defendant submits that this suit is a contra-statue route of challenging a tax decision and ought to be dismissed. The defendant further submitted that one can deduce that the approach adopted by the plaintiffs is that the defendant knew that they were tax compliant and that no taxes were due from them which is a misapprehension of the law of taxation.

34. The defendants therefore submit that a case for defamation has not been established or even proved according to the test of the case of **Selina Patani & Another v Dhiranji V Patani (2019)eKLR** on calling witnesses and since it has not been made the claim for damages too ought to be dismissed.

35. I have considered the evidence placed before this court and the rival submissions coupled with the authorities cited. I have established that the issues for determination are as follows:

i. Whether the defendant defamed the plaintiffs by its letter of 29th January 2013 published to a third party.

ii. Whether the plaintiff is entitled to an award of damages and how much?

iii. Costs of this suit

36. On the first issue, it is the plaintiff’s case that the letter in its natural, ordinary and direct sense, the words employed in the letter meant and were understood to mean that the plaintiffs were tax evaders, devious, venal, self –seeking, fraudulent and unworthy of any public trust. The plaintiffs claimed that the words were calculated to bring them into horrendous public opprobrium in their person and their professional and business dealings as well as wreck the worst possible prejudice to the plaintiffs and their reputation and trashing of their basic and fundamental constitutional rights.

37. The defendants on the other hand contended that the factual content of the letter are admitted save that the allegation that they are not defamatory.

38. In **GATLELY ON LIBEL AND SLANDER 6th Edition at pg 6** the learned author stated that –

“A defamatory statement must be false and it must also be defamatory to the plaintiff, that it is to say, the statement must contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess.”

39. Another authority often cited as definitive on defamation is that of **Thomas vs. CBC (1981) 4WWR (29)** as follows;

“The gist of the torts of Libel and Slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man’s discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit. The standard opinion is that of right thinking person’s generally. To be defamatory, an imputation need not have actual effect on a person’s reputation. The law looks into its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it. Conveying untruth alone does not render an imputation defamatory.”

40. The test for whether a statement is defamatory is an objective one. It is not defendant on the intention of the publisher but on what a reasonable person reading the statement would perceive. In the **Halsbury’s Laws of England 4th Edition**, the author opines thus;

“In deciding whether or not a statement is defamatory, the court must consider what meaning the word would convey to the ordinary man.”

41. 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. The elements of the tort of defamation are well set out in the case of **J. Kudwoli vs. Eureka Educational and Teaching Consultants & 2 others Hcc. No. 126/1990** which are:

- 1. The matter of which the plaintiff complains were published by the defendant*
- 2. The publication concerned or referred to the plaintiff*
- 3. That it was defamatory in character*

4. That it was published maliciously;

5. That in slander, subject to certain exceptions, the plaintiff has suffered special damages.

42. Applying the above principles to our case, it is not in dispute that the letter was written by the defendant and that it refers to the plaintiffs. In fact, it mentions the plaintiffs by name. The defendants have also not denied having published the article but they have raised a defence of best judgment principle which is one of the universally accepted tax system.

43. The test is universal and has been applied by our own courts whenever dealing with tax disputes. The defendants relied on the case of **Income Tax Appeal No.E085 OF 2020 Commissioner of Domestic Taxes v Priyguru Company Limited**

“As was held in the case of Commissioner of Domestic Services v Galaxy Tools Limited [2021] eKLR, tax laws are unique as they are contrary to the general rule that he who alleges must prove. In that case, the Court explained that: -“This country operates under a self-assessment tax regime. Under this regime, the tax payer assesses self and declares what he considers to be taxable income on which he then pays tax to the authorities. For this reason, the tax laws are coached in a manner that gives the tax authorities wide powers and discretion in ascertaining ex-post facto, what taxable income is. Further, the tax Laws reverse the well-known principle of evidence of “he who alleges must prove”. In this regard, the tax authorities would assess what it considers to be the tax due from a taxpayer and the tax laws would burden the tax payer to disprove that the assessment or tax demanded is wrong or incorrect. This is borne by the fact that the assessment and demand is ordinarily made way after the tax payer has assessed himself and made a declaration of what according to him is the tax payable and has already paid such tax. The burden is therefore shifted to the tax payer because, the tax authority has to rummage through the documents of the tax payer years after the tax payer assessed himself and paid what he considered to be his tax liability.”

44. On whether the article was defamatory, the plaintiffs in their submissions stated that the words used in their ordinary and natural meaning meant that the plaintiffs to be tax evaders, devious, venal, self-seeking, fraudulent and or unworthy of any public trust including to their erstwhile client’s Baran.

45. It was further submitted that the defendant’s action was a gross violation of the plaintiffs’ Constitutional rights not to have their tax matters disclosed in short not to have their tax matters revealed to Baran and or its directors.

46. The plaintiff contended that the defendant has in any event misapplied the best judgment principle as quoted in the case of **Saima Khalid v The Commissioner for her Majesty Revenue & Customs Appeal No. TC /2017/02292** That principle applies when the issue at hand is assessment of tax. The present circumstances and the suit had nothing to do with the plaintiffs’ tax assessments or even Baran’s for that matter. Baran was seeking a VAT clearance certificate.

47. The defendants on their part submitted that the plaintiffs ought to have called witnesses other than themselves to demonstrate they subsequently viewed the plaintiffs after the publishing of the said tax demand and supposedly despised them for being tax evaders, devious, venal, self-seeking, fraudulent and unworthy of any public trust.

48. The defendants further submitted that they are mandated by Article 201 and 210 of the constitution of Kenya 2010 to ensure that all tax payers remit what is due and owed by them and the two articles underpin tax justice to ensure that the burden of taxation is borne fairly and equitably by all.

49. The court has perused the letter complained of and realized that it was a just a demand letter to the plaintiffs to pay taxes to a company that they had since ceased to be directors for the said Company. The only wrong doing of the defendant was to write a letter to a third party who happens to be a company that the plaintiffs were directors and demand for taxes which is their duty as a government body.

50. The defendants also raised the issue of plaintiff failure to call an independent witness. The court of appeal in the case of **Miguna Miguna vs. The Standard Group Limited & Another (civil Appeal No. 164/2016)** held that;

“Where the credentials of the plaintiff are not challenged, he/she need not call a character witness”

51. Going back to the impugned letter, it is a fact that the publication was made on 29/01/2013. There is no doubt that the impugned letter referred to the Plaintiffs. Further, there is no doubt as to who wrote the letter. The letter was written by defendant.

52. It is also true that the evidence of at least an independent witness is mandatory to prove defamation. I therefore fully agree with the Court of Appeal in **Wycliffe A. Swanja vs. Toyota East Africa Ltd & Another** (supra) and **Selina Patani & Another vs. Dhiranji V. Patel** (supra).

53. In this case therefore the plaintiff never called an independent witness. I hence find that there was no independent witness in this case which was called by the plaintiffs.

54. I do find that the defendant being an agency of the government of Kenya that is responsible for the assessment, collection and accounting for all revenues that are due to government in accordance with laws of Kenya has a right to follow up on tax arrears and in doing so they are not trying to defame anyone but to carry out their mandate.

55. The defendant is mandated by Article 201 and 210 of the constitution of Kenya 2010 to ensure that all tax payers remit what

is due and owed by them and the two articles underpin tax justice to ensure that the burden of taxation is borne fairly and equitably by all.

56. Further to that the way the plaintiffs seem to suggest that the defendant knew or ought to have known that they are tax complaint is not how tax laws works and that tax payers should not assume that the defendant knows they have paid their taxes.

57. Following the above, I find that Plaintiffs have not proved that the defendants committed the tort of defamation against them on a balance of probabilities as required by law.

58. On the second issue as to whether the Plaintiffs is entitled to the damages they are seeking, the plaintiffs has cited several cases in support of the claim for damages for defamation mostly on quantum. The Defendant denied the claim of defamation and relied on several cases as well.

59. The Plaintiff has not proved any case to be awarded damages and in that line quoted the decision of the Court of Appeal in **Civil Appeal No. 89 of 2017 Standard Limited V. Alnashir Visram (unreported)** where the Judge referred to Defamation in the book "Law, Procedure & Practice 2nd Ed" by Sweet & Maxwell as follows;

60. It is noted that compensation for reputation by damages operates in two ways; one as a vindication of the Plaintiff to the public and secondly, as a consolation to him for a wrong done. In **Uren V John Fairfax & Sons Pty Ltd (1966) HCA 40** Windeyer J held that compensation is here a solarium rather than a monetary recompense for harm measurable in money.

61. In accessing damages, the court has to consider the particular circumstances of each case; the Plaintiffs' position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the Defendant from the time when libel was published up to the time of judgment.

62. I therefore do find that the plaintiffs did not prove his case against the defendant, on a balance of probabilities, I hereby dismiss the suit as filed against the defendant and award costs of this dismissed suit to the defendant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the 1st Plaintiff

.....for the 2nd plaintiff

..... for the Defendant