



REPUBLIC OF KENYA



**Rose Ochanda & another v Richard Wafula t/a R. M Wafula Makokha & Co Advocates
(Civil Appeal 33 of 2021) [2022] KEHC 13539 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 33 OF 2021
EKO OGOLA, J
SEPTEMBER 28, 2022**

BETWEEN

ROSE OCHANDA 1ST APPELLANT

AGRICULTURAL FINANCE CORPORATION 2ND APPELLANT

AND

**RICHARD WAFULA T/A R. M WAFULA MAKOKHA & CO
ADVOCATES RESPONDENT**

*(An appeal from the Judgment and Decree of Hon. L. Kassan (CM)
in Eldoret CMCC No. 533 of 2016 delivered on 29th March 2021)*

JUDGMENT

1. By a plaint dated 29/1/2013, the Respondent herein (the Plaintiff in the trial court) sued the Appellants herein (the Defendants in the trial court) for libel and slander including aggravated and exemplary damages together with costs.
2. In that plaint, the Respondent averred that on or about 30/1/2012, the 1st Appellant in the course of her employment as the 2nd appellant's corporate secretary and /or chief legal advisor and/or for and on behalf of the 2nd appellant managing director falsely and maliciously wrote, printed and/or caused to be written and published in a letter dated 30/1/2012 and titled " Title Number Kakamega /Soy/215 Eliud Sachida Wangusi " of and concerning the plaintiff and in the way of his profession, trade and calling as an Advocate the following words which were highly defamatory of the plaintiff;

"...The proprietor charged all that parcel of land known as Kakamega/soy/215 as security for the loan facility, but defaulted in repaying the said loan, and this statutory power of sale to realize the security with a view to recovering the money owed to it. These efforts have however been frustrated by the borrower and his agents by fraudulently purporting to sub



divide and sell the security parcel to unsuspecting purchasers who are now invading the land and the corporation is considering them as squatters.

The Corporation has since established that your office has been engaged to purportedly subdivide and sell the security parcel to 3rd parties without due regard to the existing charge registered in favour of the Corporation. It is assumed that as an Advocate, you are supposed to exercise due diligence and offer sound advice to your clients and endeavour to uphold the principles of justice, equity, fairness and professionalism when discharging your duties. It is expected that you have or ought to have exercised due diligence before purporting to dispose of the said parcel with a view to giving the intended purchasers valid title.

It is in light of the foregoing that we hereby issue Notice to you, your servants and / or your agents that you forthwith desist from selling, purporting to sell and/or in any other manner dealing with the subject parcel at least during the subsistence of the existing charge in favour of the Corporation.

Since such conduct is criminal in nature and by a copy hereof, we hereby take the liberty of informing the officer commanding police division- Likuyani and the Advocates Complaints Commission for appropriate action against you and such other person that may purport to deal with the said land.

In any event, the Corporation reserves the right to pursue other and / or further remedial recourse against you including but not limited to civil action.

Please be accordingly advised. ”

3. The Respondent averred that the said letter was on the 2nd Appellant’s letter head and which was signed by the 1st Appellant, was copied to the O.C.P.D Likuyani Police Division, Advocates Complaints Commission, Nairobi, the 2nd defendant’s regional manager, North Rift and the 2nd Appellant’s branch manager – Turbo- for his attention and due follow up. It was further contended that the said letter was delivered by hand to the Respondent’s office, and that at all material times the appellants knew that the said letter was likely to be read by an employee(s) of postal corporation and a substantial number of police officers, their other employees, the Respondent’s employees and/or students.
4. The Appellants denied the claim by their joint statement of defence dated 29th January 2014 and prayed for the Respondent’s suit to be dismissed.
5. Upon full hearing, the trial court, rendered its judgment on 29th March 2021 whereby the court held that the Respondent had proved his defamation case against the Appellants and awarded Kshs 5,000,000 for general and punitive damages and Kshs 1,000,000 damages in lieu of apology together with costs of the suit and interest.

The Appeal

6. The Appellants filed an amended Memorandum of Appeal on 16th August 2021 setting out 7 grounds of appeal as follows:
 - i. That the learned magistrate made a fundamental error of law and fact by deliberately failing to take cognizant of the fact that there was a qualified occasion where the 1st Appellant made communication based on her legal duty to make it to the firm of the Respondent and that the said firm of the Respondent had a corresponding duty to receive it.
 - ii. That the learned magistrate made a fundamental error of law and fact by ignoring the glaring facts of the case and gaps in the evidence of the Respondent for failure to demonstrate that



the purported letter was defamatory of the Respondent of whom it was published and that lowered him in the estimation of right thinking members of society generally and/ or it exposed him to public hatred, contempt or ridicule or it caused him to be shunned or avoided or injured him in his office, profession or calling.

- iii. That the learned magistrate made a fundamental error of law and fact by failing to appreciate the fact that the letter was addressed to the firm of R.M Wafula & Co. Advocates and therefore Richard M. Wafula had no cause of action against the Appellants.
 - iv. That the learned magistrate made a fundamental error of law in holding and proceeding to award general and punitive damages of Kshs.5,000,000 and damages in lieu of apology of Kshs 1,000,000 in favour of the Respondent despite the fact that the letter was addressed to the law firm and not the Respondent in person thus he did not prove and demonstrate how he suffered damages and the extent of damages and injury caused him as a person, his office, profession or damages hence making the award unreasonable and manifestly excessive, preposterous, untenable, unconscionable and exorbitant.
 - v. That the learned magistrate made a fundamental error of law and fact by deliberately and erroneously arriving at a conclusion that the professional advice extended by the 1st Appellant to the Respondent to exercise due diligence amount to acts of defamation.
 - vi. That the learned magistrate made a fundamental error of law and fact by holding that the 1st Appellant's letter copied to the O.C.S Turbo, District Officer Likuyani and the Chief Likuyani amounted to circulation of a defamatory letter and deliberately ignoring the contents of the Respondent's letter copied to the same agencies save for the Advocate's Complaints Commission.
 - vii. That the learned magistrate made a fundamental error of law and fact by holding that since the letter was copied to O.C.S Turbo, District Officer Likuyani, the Chief Likuyani and Advocate's Complaints Commission were actually delivered and yet none of the said officers or agencies were ever summoned to corroborate his evidence.
 - viii. That the learned Magistrate erred in law and fact by arriving at a fundamentally erroneous conclusion that the letter delivered to the R.M Wafula & Co. Advocate offices and rightly received by the Secretary amounted to defamation of Richard M. Wafula.
 - ix. That the learned trial magistrate erred in law and fact by purporting to impose a duty on the 1st Appellant based on her profession by sarcastically stating that as a lawyer she lacked a morsel of facts and in the same line exonerate another professional who was being advised to take due diligence while carrying out land transaction related to a parcel of land which was charged in favour of the 2nd Appellant.
 - x. That the learned trial magistrate made a fundamental error in law and fact by deliberately misinterpreting paragraphs 2 and 3 of the letter in question which letter does not expressly or impliedly infer and/or refer to the firm of the Respondent or the respondent as a fraudster.
 - xi. That the learned magistrate erred in law and fact by failing to determine the case on merit.
7. On 24th May 2022, the court directed that the appeal be canvassed by way of written submissions.



Submissions

8. The Appellants filed their submissions on 5th July 2022 and averred that the Respondent's case failed to demonstrate that his case met all the ingredients of defamation as summarized in the case of *John Ward vs Standard Ltd*, HCCC NO. 1062 of 2005 and that the trial court erroneously failed to make that finding .
9. According to the Appellants, the impugned letter is not defamatory and that the 1st limb of defamation fails on the basis that a statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office , profession or calling. The Appellants submitted that none of this was proved in the trial court and that the onus was on the Respondent to prove the truth of the words in their ordinary and natural meaning but instead delved in none issues that could not prove defamation.
10. On the second limb, the Appellants submitted that the letter was written to the firm of R.M Wafula & Co. Advocates and that the respondent had no locus in the matter. They felt that the letter was a response to the firm of the Respondent and not the Respondent in person. It was Appellant's submission that the Respondent had no right to sue in this suit and considering that defamation is a personal action, he had no right to initiate the suit in the lower court. The Appellants relied in the Court of Appeal case of *Musikari Kombo V Royal Media Limited* (2018) eKLR in support of their submissions.
11. The Appellants further submitted that the Respondent failed to lead evidence to the effect that the letter was published to third parties by the Appellants. It was averred that none of the parties copied in the letter received the impugned letter and that the onus of proof was on the Respondent to demonstrate that indeed they received the letter and his name was tarnished. The trial court was faulted for finding that the respondent had demonstrated his case on a balance of probability as there was no witness stating that they understood the said letter to be published against the Respondent and that it was defamatory in nature.
12. Lastly, it was submitted that there was no demonstration by the Respondent that the Appellant acted with malice in writing the impugned letter. The case of *Phineas Nyagah V Gilbert Imanyara* (2013) eKLR was cited where the court held;

“Malice here does not necessary mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts.”
13. It was the Appellant's submission that based on the submissions and authorities filed, the court should overturn the lower court's decision and make a finding that the Respondent failed to prove any or all the elements of defamation. They also sought to be awarded costs both in the lower court matter and the instant appeal.
14. The Respondent filed his written submissions on 1st July 2022 and maintained that the letter dated 30th January 2012 contained words that were false and highly defamatory of his person and were calculated to disparage the Respondent in his office, profession, calling, trade or business carried on by the Respondent. Counsel for the Respondent submitted that the elements of defamation were stated in the case of *James Njagi Joel v Junius Nyaga Joel*(2020) eKLR as being;The statement must be defamatoryThe statement must refer to the plaintiffThe statement must be published by the defendantThe statement must be false.



15. On the 1st element, it was contended that the gist of that letter was that the Appellants had established that the Respondent was engaging in the process of subdividing and selling the security parcel (Kakamega /Soy/215) to 3rd parties without due regard to the existing charge registered in favour of the 2nd Appellant. According to the Respondent, from the statement, “We hereby issue Notice to you , your servants and/or your agents that you forthwith desist from selling , purporting to sell and/or in any other manner dealing with the subject parcel....” an inference can be drawn to the effect that a reasonable man reading the above, would have concluded that the Respondent was selling, purporting to sell and/or dealing with the subject parcel when that was not the position.
16. As to whether the statement referred to the Respondent, it was averred that the said letter was addressed to him, R.M Wafula & Company Advocates. The Respondent submitted that he is an advocate of the High Court of Kenya of 27 years in active practice and the proprietor of the said firm of advocates. He further stated that from the excerpts of the Appellant’s letter, and particularly the use of the words “...The Corporation has since established that Your Officehas been engaged.....It is in light of the foregoing that we herebyIssue Notice To You ...” were referring to none other than the Respondent.
17. On the third element on whether the statement was published by the Appellant, the Respondent avers that apart from the letter dated 30/1/2022 being sent to him, it was copied to 4 other recipients being the OCPD, Likuyuani Police Division, the Advocates Complaints Commission, the Regional Manager , AFC North Rift and the Branch Manager, AFC Turbo. It was submitted that the four were given strict instructions that the letter was for their attention and due follow up. Reliance was placed on the case of *Pullman vs Walter Hill & Another* (1891)1QB 524 quoted in *Selina Patani & Another Vs Dhiranji Patani*(2019)Eklr to buttress this submission.
18. Lastly on the element on whether the statement was false, the Respondent submitted that the statement was indeed false. It was contended that the Appellant alleged in their letter that the Appellant had established that the Respondent was engaging in the process of subdividing and selling the security parcel (Kakamega/ Soy/ 215) to 3rd parties without due regard to the existing charge registered in favour of the 2nd Appellant. According to the Respondent, at no one point did the Respondent subdivide and sell the charged property.
19. The Respondent thus submitted that the trial court’s award was reasonable in the circumstance as the Appellants had defamed the Respondent as proved by the elements of defamation analysed in his submissions.
20. The court was urged to dismiss the appeal with costs.

Determination

21. I have Carefully re-evaluated the evidence on record , the appeal, the submissions of the opposing parties as well as the authorities relied upon by the parties and I find that the main issues for determination are;whether the Respondent was defamed by the Appellants and;whether the award of Kshs 5,000,000 for general and punitive damages and Kshs 1,000,000 damages by the trial court was exorbitant.
22. It is trite law that for one to prove defamation they must proof the following elements of defamation;
 - a. That the libel was published by the defendant.
 - b. The words must refer to the plaintiff.
 - c. The words were false and malicious



- d. The statement must be defamatory.
23. Defamation is defined in the *Black's Law Dictionary* 8th Edition as "the act of harming the reputation of another by making a false statement to a third person."
24. *Halsbury's Laws of England* 4th Edition Volume 28 Page 23 states:
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.
25. It is not disputed that the impugned letter was written by the Appellants and particularly the 1st Appellant.
26. On whether the letter or the words therein referred to the respondent, the Appellants have argued that the letter was addressed to the law firm R. M Wafula & Advocates Company and not the respondent in his individual capacity. I have carefully read the said letter and it read in part,

“.....The Corporation has since established that your office has been engaged to purportedly subdivide and sell the security parcel to 3rd parties without due regard to the existing charge registered in favour of the Corporation. It is assumed that as an Advocate, you are supposed to exercise due diligence and offer sound advice to your clients and endeavour to uphold the principles of justice, equity, fairness and professionalism when discharging your duties. It is expected that you have or ought to have exercised due diligence before purporting to dispose of the said parcel with a view to giving the intended purchasers valid title.

It is in light of the foregoing that we hereby issue Noticeto you, your servants and / or your agents that you forthwith desist from selling, purporting to sell and/or in any other manner dealing with the subject parcel at least during the subsistence of the existing charge in favour of the Corporation.

Since such conduct is criminal in nature and by a copy hereof, we hereby take the liberty of informing the officer commanding police division- Likuyani and the Advocates Complaints Commission for appropriate action against you and such other person that may purport to deal with the said land.....”

27. In my view and from these extracts, there is no doubt that the words referred to the respondent in his personal capacity and the letter was addressed to him and the evidence on record reveals that it was delivered and received by him.
27. On whether the contents of the letter by the Appellants to the Respondent was defamatory of the Respondent, it was submitted by the respondent that the letter was copied to and read by third parties. The Court of Appeal in the case of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, stated as follows;

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being



construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See Gatley on Libel and Slander (8th edition para. 31).

The ingredients of defamation were summarized in the case of John Ward V Standard Ltd , HCCC 1062 of 2005 as follows:-

".....The ingredients of defamation are:

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false."

28. I have considered at length the impugned letter and the circumstances under which the letter was written and it is my considered view that any person reading the impugned article would conclude without straining to do so that the respondent, as an advocate has been engaging in some irregularities in cohorts with the proprietor of the charged parcel of land known as Kakamega/soy/215 in a bid to illegally sell the same to third parties despite fully knowing that the subject land is charged to the 2nd Appellant instead of giving professional and legal advice against the said exercise as expected of an advocate.
29. Lastly as to whether the words in the alleged letter were false; while the appellants were silent on this issue, the Respondent in his submissions maintain that the contents were false. According to the Respondent, the Appellants in the impugned letter had alleged that they had established that the Respondent was engaging in the process of subdividing and selling the security parcel (Kakamega/Soy/215) to 3rd parties without due regard to the existing charge registered in favour of the 2nd Appellant. The Respondent submitted that, at no one point did the Respondent subdivide and sell the charged property .In defamation, it is trite that where a defendant states that the words are true, it is his duty to prove the truthfulness of the publication. In this case, the truthfulness of the letter was not proved.
30. In light of the foregoing coupled with the 1st respondent's career standing, I find that in the ordinary meaning of the words complained of, the defamatory nature of the article are quite clear and make a finding that the letter complained of was defamatory.
31. Having established that the plaintiff was defamed, the final issue is the reliefs due to the him. In *Standard Limited v G.N. Kagia t/a Kagia & Company Advocates* [2010] Eklr, the Court of Appeal stated: -

“In situations where the author or publisher of a libel could have with due diligence verified the libellous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages;

the level of damages awarded should be such as to act as a deterrence and to instil a sense of responsibility on the part of authors and publishers of libel. Personal rights freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers”



32. In the case of *Ken Odondi & 3 Others v James Okoth Omburah t/a Okoth Ombura & Co. Advocates*, Kisumu Civil Appeal No. 84 of 2009 a sum of Kshs. 4,000,000/= was awarded as general damages for libel and Kshs.500, 000/= awarded for aggravated damages.
33. The above case is similar and of persons of the same profession as the Respondent and having considered the circumstances of this case, I find that a sum of Kshs. 2,000,000/- would suffice on account of general damages.
34. As regards the award on aggravated damages, the plaintiff must satisfy the principles as laid out in *Gatley On Libel And Slander* 12th Edition para 9.18 at page 353 as follows:
- “The conduct of the defendant his conduct of the case, and his state of mind are all matters which the claimant may rely on as aggravating the damages in so far as they bear on the injury to him.
- “It is very well established that in cases where the damages are at large the judge can take into account the motives and conduct of the defendant, where they aggravate the injury done to the Plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff’s proper feelings of dignity and pride. These are matters which the jury can take into account in assessing appropriate compensation.”
35. In *Ken Odondi* case(*supra*), an award of Kshs 500,000 was granted in a case similar to the instant case and I am of the view that the same amount would be sufficient considering the circumstances of the instant case.
36. In the end, considering all the factors of this case, I set aside the trial court award of Kshs. 5,000,000/= general damages and substitute thereof a sum of Kshs. 2,000,000/= general damages for libel. The award of Kshs. 1,000,000 aggravated damages is also substituted with an award of 500,000/= as aggravated damages.
37. Since the Appeal has partly succeeded, each party shall bear own costs of this appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE

