



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL CASE NO. 3 OF 2020

ERNEST OMONDI OWINO.....1ST PLAINTIFF

MBINGO ENTERPRISES LTD.....2ND PLAINTIFF

VERSUS

FELIX OLICK.....1ST DEFENDANT

THE STAR NEWSPAPER.....2ND DEFENDANT

RADIO AFRICA GROUP LTD.....3RD DEFENDANT

JUDGMENT

1. Ernest Omondi Owino and Mbingo Enterprises Ltd the plaintiffs herein have sued the defendants herein and are seeking the following reliefs:

- a) Punitive and aggravated or exemplary damages for libel.
- b) General damages.
- c) An apology in terms of and text approved by the plaintiffs to be published in a manner as prominent as the offending article.
- d) A permanent injunction to restrain the defendants, servants and/or agents from publishing or continuing to publish articles defamatory to the plaintiffs now and in the future.
- e) Costs of this suit.
- f) Interest on (a) and (b) above.
- g) Any further relief the court may deem fit to grant.

2. The contention by the plaintiffs is that on 26th September, 2018 the defendants published an article at page 2 of the Star Newspaper titled:

EACC Probes Obado's Sh.100m Palatial Home.

The article read as follows:

“On Saturday and Tuesday, the Star exclusively reported how Obado and his associates registered about 30 companies and used them to pocket Sh. 2.5 billion in ‘fictitious contracts’ according to EACC sleuths.”

“The EACC says Mbingo Enterprises, one of the dubious firms owned by Obado's accomplices, built the Uriri home. Puzzling to the detectives was lack of evidence indicating that the governor paid the contractor.”

“Mbingo director Ernest Omondi was paid more than Sh.700 million in questionable contracts by the County ...”

“The EACC they have taken all the suspects to task to explain the source of their massive wealth.”

This article aggrieved the plaintiffs who claim it to be defamatory.

3. **Gatley on Libel and Slander** defines defamation 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 of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory.

4. The defendants admitted the publication of the complained of article, they however said that it was factual and published in good faith due to immense public interest.

5. The issues for determination are:

- a) Whether the complained of article was defamatory;
- b) Whether the defence of justification is available to the defendants; and
- c) Whether the plaintiffs are entitled to damages.

6. The first plaintiff is the director of the second plaintiff herein. He contended that the second plaintiff was incorporated before the coming into existence of the County Government of Migori. Among the documents he attached is a copy of Certificate under the Companies Act, 2015 in respect Mbingo Enterprises limited. The certificate shows that it was registered on 22nd September, 2009.

7. County governments came into being after the promulgation of the Constitution of Kenya in 2010. The constitution was promulgated on 27 August 2010. The evidence on record therefore, confirmed that the second defendant was incorporated before the County Government of Migori Came into existence.

8. The plaintiffs attached documents that show that the second defendant was in business with other entities other than the County government of Migori.

9. From the attached documents, the plaintiffs have proved that the second plaintiff was not incorporated by or with the influence of Obado. It has also been proved that the second plaintiff is not a dubious firm.

10. It was not in dispute that the second defendant was subject of investigations by the EACC. The Star on realizing the falsity of their article published an apology on 26th September, 2018. They said their source was EACC.

11. The test to determine whether a statement is defamatory is an objective one which depends on what a reasonable person on reading the statement would perceive. **Halsbury's Laws of England 4th Edition Volume 28** states at 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.

12. In the instant case, it is clear that the defendants rushed to publish the impugned article without checking on its veracity. The fact that one is under investigations does not make him/her guilty of the allegations being investigated.

13. Though the first defendant testified that the story behind this case was factual, the apology that was published is an indication that the defendants realized that it was not. The plaintiffs have proved the same to be false.

14. The circumstances under which the publication was made, any person reading the impugned article would conclude without straining to do so that the defendants were corrupt and formed part of the cartel that was siphoning public funds in Migori County. I therefore make a finding that the article complained of was defamatory.

15. It was contended for the defendants that the article is justified due to great public interest. When is the defence of justification available to a defendant in a defamation suit? **Peter Carter - Ruck on Libel** states:

The defence of justification cannot succeed unless the defendant proves that the expression of opinion was based upon the facts..... if the facts upon which the comment purports to be based does not exist, the comment cannot be fair..... there are two qualifications to the general rule in the first place, where the facts commented upon are contained in a privileged document such as a parliamentary paper or a report of judicial proceedings, the defendants comments upon the fact set out in such reports is entitled to protection as fair comment even though the facts contained in the privileged document or referred to in the judicial proceedings, turns out to be untrue.

16. While in the case of **In the case of Machira t/a Machira & Co. Advocates vs. East African Standard (2001) KLR 638**, the Court stated at page **644**:

“...A Defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true in fact or substantially so. He cannot be allowed to set out a version . . . For him to rely on justification, he must accept the Plaintiff’s version of the statement or a statement which is in sum identical with the Plaintiff’s version.

17. From these two authorities for justification to be available to the defendant, he/she must agree that he/she made the statement complained of, that the statement must be true or substantially so.

18. In the case of **Hon. Uhuru Muigai Kenyatta vs. Baraza Limited [2011] eKLR** Judge Rawal DCJ (as she then was) held:

While taking defence of justification or qualified privilege in the defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified privilege does not insert the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.

19. The conclusion I draw is that the defence of justification was not available to the defendants. I therefore find that the plaintiffs have proved their case on a balance of probabilities.

20. I have perused the authorities cited by the parties on the subject and the guiding principle in awarding damages in defamation matters. One such a case is the **Nation Media Group Limited & 2 others vs. Joseph Kamotho & 3 others** where the court observed:

In actions of defamation or in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily or even more highly subjective element, such action involved a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges.

21. The first plaintiff is a businessman and a director of the second plaintiff. The plaintiffs have been in business at least since 22nd September, 2009 when the second plaintiff was registered. The publication imputed criminality on the part of both plaintiffs and this must have harmed their public standing. After considering the authorities cited by both parties I award Ksh.10 million to each plaintiff in general damages, Kshs.1 million exemplary damages to each plaintiff against the defendants jointly and severally. A permanent injunction to restrain the defendants, servants and/or agents from publishing or continuing to publish articles defamatory to the plaintiffs now and in the future, to issue. Costs of the suit will be borne by the defendants. Right of appeal 30 days.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE