



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAKURU

CIVIL SUIT NO 142 OF 2008

BENARD T. GETECHA.....1ST PLAINTIFF
NAHASHON MAHUGU KABIRI.....2ND PLAINTIFF
ELIUD B NYAGICHANGA.....3RD PLAINTIFF
JOSEPH MUHUUH NGANGA.....4TH PLAINTIFF
SAMUEL NDUMBI NJOROGE.....5TH PLAINTIFF
SAMUEL GIKUNJU.....6TH PLAINTIFF
GRACE NYAMBURA MWANGI.....7TH PLAINTIFF
DUNCAN K. MWANGI.....8TH PLAINTIFF
MILLICENT MATHENGE.....9TH PLAINTIFF
CATHERINE KATUMO.....10TH PLAINTIFF
DR. JOHN NJAGA WACHIRA.....11TH PLAINTIFF
JUSTUS NYACHOTI KIMAL.....12TH PLAINTIFF
JOHN RUKWARWO THAIRU.....13TH PLAINTIFF
SAMUEL MWANIKI.....14TH PLAINTIFF
STEPHEN K NJOROGE.....15TH PLAINTIFF
WILSON NYARIGE.....16TH PLAINTIFF
PAUL OSIMA KIBOMA.....17TH PLAINTIFF
JOSEPH M. KAIBERE.....18TH PLAINTIFF
JAMES MUGO KARIUKI.....19TH PLAINTIFF
JAMES OMARE.....20TH PLAINTIFF
GITHAIGA WAITHAKA.....21ST PLAINTIFF

EUNICE WANJIKU MAINA.....	22 ND PLAINTIFF
JAMES MUTINDA MULIKA.....	23 RD PLAINTIFF
GABRIEL N. KIMANI.....	24 TH PLAINTIFF
SIMON MURAGURI.....	25 TH PLAINTIFF
RICHARD G. WAHOME.....	26 TH PLAINTIFF
SAMUEL KAMUNYA MACANI.....	27 TH PLAINTIFF
JOSEPH MBOTE.....	28 TH PLAINTIFF
HENRY MWAURA KIMANI.....	29 TH PLAINTIFF
ERASTUS JUMA NJOROGE.....	30 TH PLAINTIFF
PETER ONIMI.....	31 ST PLAINTIFF
CHARLES JULIUS MOKORO.....	32 ND PLAINTIFF
F.W. KARIUKI.....	33 RD PLAINTIFF
DAVID MAINA NDUNGU.....	34 TH PLAINTIFF
KIRU NJOROGE KAMAU.....	35 TH PLAINTIFF
PATRICK KANGETHE.....	36 TH PLAINTIFF
THOMAS OLOO.....	37 TH PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION.....DEFENDANT

AND

MUNICIPAL COUNCIL OF NAKURU PRESENTLY COUNTY

GOVERNMENT OF NAKURU.....3RD PARTY

JUDGMENT

BACKGROUND

1. The plaintiffs filed this claim by way of Plaint dated 31st of July 2008 seeking judgement against the Defendants for the following orders:-

- i. A declaration that the notice published in the Daily Nation Newspaper dated 21st of July 2008 was illegal, invalid and of no consequences.
- ii. A declaration that the Defendant has no interest over the Plaintiffs' plots mentioned at paragraph 3 hereinbefore capable of being protected by disposal; or adopted by the Defendant.
- iii. A perpetual injunction restraining the Defendant by itself and/or its servants, agents or assigns from ever advertising for sale, selling, disposing, charging, dealing in, trespassing unto the Plaintiffs parcels of land herein.
- iv. General damages for demolition.
- v. Costs and interest.

vi. Any other or further relief as this Honourable Court may deem fit to grant.

2. The Defendant entered appearance through the firm of **Messrs Kiplagat & Co. Advocates** and filed their defence dated 28th of January 2009 denying contents of the plaint.

3. The **Municipal Council of Nakuru** entered appearance on the 11th of July 2011.

4. The Plaintiffs and the Defendant each availed one witness in support of their respective cases.

PLAINTIFFS' CASE

5. The Plaintiff's argument is that, at all times material to this suit, they were and are still proprietors of the parcel of land within Racetrack Estate Nakuru Municipality by either being the original allottees or purchasers for a consideration from the previous owners; the allocations having been done by the municipality Council of Nakuru.

6. The Plaintiffs further stated that there was an arrangement between the original allottees and the Municipal Council of Nakuru where willing allottees were allowed to borrow money in form of materials to enable them develop their respective plots.

7. Thereafter, a dispute arose between some of the Plaintiffs and the Municipal Council of Nakuru in Nakuru HCCC 414 of 1992 leading to an order being made on the 8th of May 1998 to the effect that, the interest payable on the material loan owing from the allottees was agreed at the rate 12 % per annum. Plaintiffs stated that they repaid the said loans to the municipal Council of Nakuru until around 2002 when the Council refused to receive payment from the Plaintiffs for reasons not disclosed to date. They denied having entered into any agreement with the Defendants concerning their parcels of land.

DEFENDANT'S CASE

The defendant's witness DW1 testified that National Housing Corporation (NHC) was dealing with defendant Municipal Council and Local authorities; that they would advance loan to Municipal Council which could be used to develop infrastructure and purchase of property. He confirmed that there are several agreements that National Housing Corporation entered into with Municipal Councils and that documents are as old as 1965. He produced 6 agreements. He testified that National Housing Corporation advanced loans to Municipal Council to assist them either build structures or provide materials to allottees; that it was the council which advanced money to allottees upon identifying them.

He testified that as time moved on, the council defaulted in paying the loan and National Housing Corporation wanted to recover securities as agreed. He confirmed that the property was advertised by National Housing Corporation following the default following instructions of Municipal Council. He said that the Municipal Council and National Housing Corporation negotiated and finally settled the issue in the year 2009. He said that relinquished management of the property after getting into debt agreement. In cross examination he said the property advertised was developed using the loan and in re-examination he said the law allows National Housing Corporation to advertise. He said it's the Municipal Council who knew who defaulters were.

SUBMISSIONS BY PARTIES

PLAINTIFFS'S SUBMISSIONS

8. In submissions filed on the 16th of September 2019, the Plaintiffs submitted that the 3rd Party which is now known as the County Government of Nakuru was enjoined in this suit because of its involvement in respect to an agreement between itself and the Defendant over grant of infrastructure loans sometimes on or about 13th of May 1965.

9. That the subject matter of the suit is the advertisement published in the Daily Nation whereupon the Defendant sought to repossess properties occupied by the Plaintiffs. The said properties having been allotted to the Plaintiffs by the 3rd Party, it was the obligation of the 3rd Party to offset the loan advanced to it by the Defendant.

10. The Plaintiffs' contention is that, the Plaintiffs were not privy to any repayment plans or the contract between the 3rd Party and the Defendant and therefore any adverse action against them by the Defendant is non-binding.

11. Issues raised by the plaintiffs for determination are as follows:-

- i. Whether the Plaintiff was privy to the contract between the 3rd Party and the Defendant.
- ii. Whether the Defendant's actions were defamatory to the financial character of the Plaintiffs.
- iii. Who bears the costs of this suit?

12. On privity of contract, plaintiffs submitted that the statement of Ronald Majani-Accounts Assistant with the Defendant confirmed that there was an agreement for the disbursements of infrastructure loans to the 3rd Party from the Defendant; and that, there was no obligation for performance of any duty bestowed upon the Plaintiffs herein as they were never parties to the agreement.

13. Plaintiffs cited the case of **Dunlop Pneumatic Tyres Co. V Self ridge & co. Ltd (1915) AC 847** where the court held that **only a party to a contract can sue on it.**

14. Also the case of **Agricultural Finance Corporation V Lengetia Ltd (1985) KLR 765** where the court held that **a contract only affects parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.**

15. In conclusion, Plaintiffs submitted that the dealings between the 3rd Party and the Defendants were being carried without involving the Plaintiff despite the fact that the arrangements would affect the interest of the Plaintiff.

16. In respect to advertisement, Plaintiffs submitted that, the statements in the Newspaper were neither factual nor true. Plaintiffs' argument is that, a defamatory statement is one that causes an adverse effect on somebody's reputation; that the publication that commands wide readership and circulation in Kenya and beyond and was defamatory as against the Plaintiffs. They referred to the case of **Cassel & Co. Ltd V Broone and Another (1972) 1 ALLER 801** where the court held that, **a man considering himself defamed can bring an action against the person who authorized the defamatory material or caused it to be published** and in **John v MGN Ltd (1996) 1 ALLER 35** court held that, **a successful Plaintiff in defamation action is entitled to recover, as general compensatory damages such sums as will compensate him and prayed for general damages of Kshs 1,000,000 for each Plaintiff.**

17. On costs, the Plaintiff places reliance on **Judicial Hints on Civil Procedure 2nd Edition at page 101** that states that **the Plaintiff is entitled to enforce his legal right and in the absence of any such reason such as misconduct is entitled to the costs of the suit as a matter of course.**

DEFENDANT'S SUBMISSIONS

18. The Defendant filed submissions dated 5th of November 2019 and raised 4 issues for resolution as follows: As to whether the Defendant has relinquished all its interests in the suit property the defendant cited the case of **Omar Guled Vs Sahal Alaso & another [2018] eKLR** where court held that **any contract on the disposition of interest in land must be in writing and signed by both parties and their signatures attested by a witness.** The defendant's contention is that it had relinquished all its interest in all the properties.

19. On whether the Defendant was exercising its power/carrying out a lawful duty under the Housing Act Cap 117, defendant submitted that their understanding is that, the relationship between the 3 was that the Municipal Council of Nakuru approached the Defendant and requested for infrastructure loans for developing its property which was later offered to them; the persons allocated the plots were to repay the loans and the Plaintiffs ought to have known that the defendant had the power to take up management of their funds as per **Section 9 (1) of the Housing Act.** The defendant referred to the case of **Municipal Council of Kisumu Vs. National Housing Corporation [2018] eKLR** where the court stated that **the Defendants power in respect of management and sale of the suit property is in Section 8 and 9 of the Housing Act; defendant further quoted section 11 (2) of the Housing Act.**

20. As to whether the Plaintiff has established the necessary ingredients for the tort of defamation, defendant submitted that they were not driven by malice in respect to the Newspaper Notice dated 21st of July 2008 as the same was a 30 day notice to the purchasers to fully pay the arrears of the loan advanced to them; that the defendant had a contractual relationship with the 3rd party dating back to 1965 and was simply carrying out a right backed by statute to protect its own interests.

21. Defendant referred to the the case of **Williamson Diamonds Ltd & another v Brown (1770) EA 1.** Where the court held that **the Court should consider whether the Publication was done in the reasonable and necessary protection of the Defendant.** The Defendant will be protected even though his language should be violent or excessively strong... The onus is on the Plaintiff to prove malice and in **Tolley Vs. Fry (1930) 1 KB 467 CA** court held that **words are not defamatory however much they may damage a man in the eyes of the society unless they disparage his reputation.** They conclude that there is enough evidence that the Defendant was exercising its powers in respect of management and administration and advertisement of the suit property as provided for in **Section 8 and 9 of the Housing Act.**

22. In conclusion Defendant submitted that the Plaintiffs have failed to prove all the ingredients of the Tort of defamation on a balance of probability and the Defendant was not driven by malice.

ANALYSIS AND DETERMINATION

23. I have considered evidence adduced. I have also perused and considered documents filed and submissions filed by parties herein. I consider the following to be in issues:

- i. Whether advertisement of plaintiffs' plots was illegal/whether there was privity of contract between the plaintiffs and the defendant.
- ii. Whether the defendants should be restrained from advertising, selling, disposing, charging or dealing in or trespassing into plaintiff's plots.
- iii. Whether plaintiffs were defamed and whether they are entitled to damages for defamation/ whether advertisement was done in good faith.

24. In respect to the first issue, plaintiff's argument is that, they were not privy to the contract between the defendant and 3rd party; that the 3rd party arranged to get funds from the defendant and that they were allotted plots by the 3rd party. That they were making payments to the

3rd party who was supposed to pay the defendant. That the arrangement between 3rd party and defendant date back to 1965.

25. Plaintiffs stated that the arrangement between defendant and 3rd party was in respect of infrastructure loan while contract between plaintiffs and 3rd party was material loan; plaintiffs alleged that there was no communication between defendant and plaintiff; further, that the 3rd party and defendant entered into an agreement where the loan obligation was settled thus settling claim over the suit properties.

26. The question that arise is, did the defendant demonstrate that plaintiff was party to contract between defendant and a 3rd party? Was there understanding that in the event of default in repayment loan the property would be attached? What does the Housing Act CAP 117 provide? Does the Act give defendant power to take over and manage or dispose of property of persons allocated properties by the loanee? If so, were the plaintiffs bound to the agreement?

27. Section 11 of the Housing Act CAP 117 provide as follows:-

(1) All loans made to a local authority by the Corporation shall be secured against the development financed by the loan advanced or against or in addition to any other specific immovable property owned by the local authority.

(2) The Corporation shall be a party to any contract or agreement between any person and the local authority advanced such loans with power to assume all the rights and remedies of such local authority in respect of developments financed by funds advanced by the corporation. [Act No. 18 of 1967, s. 10, Act No. 21 of 1990, Sch.] CAP. 117 Housing [Rev. 2019] “

28. And **Section 12** of same Act provide as follows:-

Powers of the Corporation where local authority is in default.

(1) Where a local authority defaults in the repayment of debt charges due to the Corporation, the Corporation shall take over the management of the property developed by the local authority using funds borrowed from the Corporation and assume collection of any monies payable to the local authority by the beneficiary or any other person as provided in section 8(2) until the outstanding debt is recovered substantially or in full.

(2) Upon taking over the management of the property under subsection (1), the Corporation shall have the same rights and obligations as the local authority has in respect of the developments financed with funds provided by the Corporation.

(3) Any shortfall experienced as a result of the Corporation exercising its powers under this section shall be recovered from any other securities provided by the local authority or as civil debt recoverable summarily.

(4) Notwithstanding any other provisions of this Act or of any other written law, the Corporation may take over the management, control and title to any property developed by a local authority which is in default using funds provided, secured or guaranteed by the Corporation upon the expiry of a ninety days' notice given by the Corporation to the local authority: Provided that the Corporation shall compensate for the undeveloped site value of such property upon the vesting of title in the Corporation under this subsection.

29. The plaintiffs have not denied that the plots allotted to them were developed using loan advanced by defendant to the 3rd party. In evidence they said they stopped paying the 3rd party from 2002, none has indicated that they had made full payments to the 3rd party. This confirm there was default.

30. The above legal provisions give powers to the defendant to take over property developed using corporations funds. Even if the contract was between defendant and 3rd party, the plaintiffs were beneficiaries and they have not demonstrated that at the time of advertisement, they had made full payment.

31. I have seen in the plaintiffs' supplementary list a letter dated 16th April 2005 from plaintiffs' Advocate who was responding to demand for payment by plot owners in arrears. In the letter, the advocate says his clients have been willing to pay the 3rd party who had refused to receive money.

32. This confirm that plaintiffs were in arrears and if they had difficulties with 3rd party concerning repayment they should have sought intervention of court. It is evident that the plaintiffs were aware that 3rd party obtained loan advanced to them for development from defendant and they were aware that the loan was in arrears and defendant's intention to sell the property was known to them.

33. Advertisement did not therefore get the plaintiffs by surprise; they were aware of defendant's intention and should have made attempts to meet their obligation of repaying the loan.

34. The plaintiffs 'contention is that the advertisement lowered their standing in the society. The question is, have they demonstrated that the contents of the advert is false? Have they demonstrate that they cleared the loan advanced by the defendant through 3rd party? Their evidence is that they stopped paying the year 2002 confirm that the loan was still owing. Knowing that the money advanced was owing, plaintiffs should have taken steps to ensure that the loan is fully paid. If the 3rd party declined to receive their money as alleged, they should have sought intervention from the court.

35. The plaintiffs cannot therefore say that they were defamed yet they were in default. Plaintiffs have not demonstrated that they have come to court with clean hands. They have not demonstrated that they have played their role in repaying loan advanced to them for development. Orders sought are not merited.

36. FINAL ORDERS

1. Suit is hereby dismissed.
2. Costs to the defendant.

Judgment dated, signed and delivered at Nakuru this 30th day of January, 2020

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Mr. Kahiga Counsel for plaintiff

Ms. Kiberenge holding brief for Kiplagat Counsel for defendant

Ms. Kiberenge holding brief for Kiplagat Counsel for 3rd Party