



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 151 OF 2011**

**JAMES KIMEU MULINGE.....PLAINTIFF**

**V E R S U S**

**RADIO AFRICA LIMITED.....DEFENDANT**

**JUDGEMENT**

1) On 1<sup>st</sup> October 2010, Radio Africa Ltd, the defendant herein, through its Daily Publication Newspaper “**The Star**” published an advert relating to court proceedings arising from Mombasa High Court Bankruptcy cause no. 6 of 2010 allegedly against James Kimeu Mulinge, the plaintiff herein. The publication appeared as follows:

**“REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**BANKRUPTCY NOTICE NUMBER 6 OF 2010**

**BANKRUPTCY NOTICE**

**TO: JAMES MUTUA KIMEU MULINGE**

**Hon. Ambassador**

**NAIROBI**

**TAKE NOTICE that within seven (7) days after service of this Notice on you, excluding the day of such service you must pay EMM of Care of MULWA & COMPNAY ADVOCATES, BONDENI HOUSE. P. O. BOX 88747, MOMBASA its advocates and agents duly authorized the sum of Kenya shillings fifty thousand only (Ksh.50,000/=) until payment in full being the amount due by you as per the decree issued on 10<sup>th</sup> October 2008 in Tononoka Children’s Court, Mombasa Case Number 131 of 2008 YOURSELF versus EMM (Copy whereof is annexed hereto).**

**WHEREON execution has not been stayed or you must secure or compound for the said sum to EMM satisfaction or to the satisfaction of its said advocate, MULWA & COMPANY ADVOCATES, or counterclaim, set-off or cross demand against the said EMM which equals or exceeds the sum claimed by them and which you could not set up in the action or other proceedings in which the order was obtained.**

**DATED at Mombasa this 17<sup>th</sup> day of September 2010.**

**BY TEH COURT**

**DEPUTY REGISTRAR**

**AT HIGH COURT MOMBASA”**

2) The aforesaid publication prompted the plaintiff to file this suit whereof he sought for inter alia, general and exemplary damages for defamation an apology, costs of the suit and interest. The defendant filed a defence to deny the plaintiff’s claim.

- 3) When this suit came up for hearing, the plaintiff testified and summoned one independent witness in support of his case. The defendant on its part closed its defence without summoning any witness to testify in support of its case. James Kimeu Mulinge (P.W.1) told this court that on 1<sup>st</sup> October 2010, he was informed by a friend of the advertisement appearing in the Star Newspaper prompting him to read the same. PW1 averred that he received numerous inquiries from friends, business associates, colleagues in the diplomatic world and fellow military officers. He stated that people were seeking clarification on his part since the advertisement prima facie seemed genuine.
- 4) PW1 further stated that upon reading the advertisement he became shocked and embarrassed to learn that someone published falsehoods with the aim of damaging his reputation using innuendo that he was bankrupt and was in contempt of a court order. He also stated that the advert depicted him as an immoral person.
- 5) PW1 also averred that his business associates demanded for an immediate clarification or else they would avoid engaging with him. The plaintiff further stated that his superiors within Government were equally embarrassed by the advertisement as he continued to attend to his duties of meeting Government officials of foreign countries and having dealings with his counter parts on official duties. P
- 6) W1 averred that his employer and associates, lost confidence in him and looked down upon him contrary to the sterling career he had at the Kenya Army and as a high ranking diplomat for the country.
- 7) Brigadier (RTD) Michael Muololo Fundi (PW2) told this court that the plaintiff is a close friend having joined the military in early 1970s. PW2 said that he read the offending advert and was shocked since he knew PW1, his wife and children. He said he called the plaintiff to inquire about the advertisement. PW2 further said that his perception about the plaintiff got lowered tremendously as a result of the publication and his explanation without a court order vindicating him did not convince him to hold PW1 in high esteem.
- 8) At the close of evidence, learned counsels appearing in this suit were invited to file written submissions. I have considered the evidence and the rival written submissions. It is the submission of the plaintiff that the advertisement when read together in its natural and ordinary meaning has the effect to mean that the plaintiff has disobeyed a court order, that he is of immoral standing and not fit to hold a public office.
- 9) The plaintiff further argued that the publication disparaged him professionally and socially. It was also submitted that the publication was false in that no such a case like Mombasa Bankruptcy cause no. 6 of 2010 existed.
- 10) It is the submission of the defendant that it was not motivated by malice in its publication and hence it should not be condemned to pay damages. The defendant pointed out that when its attention was drawn to the publication to be incorrect, the defendant promptly published a clarification and even tendered in advance a deposit of ksh.250,000/= to make amends. The defendant further argued that the plaintiff had failed to provide sufficient evidence showing actual damage to his reputation and character therefore the defendant is of the view that plaintiff is entitled to a nominal award.
- 11) I think from the evidence and submissions presented to this court, two main issues commend themselves for determination. **First**, whether or not the publication was defamatory of the plaintiff. **Secondly**, is whether the plaintiff is entitled to damages and if yes, how much?
- 12) On the first issue it is not in dispute that defendant published the offending article. The defendant has argued that the same was published without malice. Prima facie, this is a strong defence put forward, but unfortunately the defendant failed to summon any witness to establish this defence. In my view, it was incumbent upon the defendant to establish who really placed and paid for the advertisement so that this court can come to the conclusion that the publication was placed by a third party who would take responsibility for the contents of the advertisement.
- 13) In the absence of evidence to prove otherwise, I find that the publication was motivated by malice. The publication of an apology on the part of the defendant acts a mitigating factor and also acts as acknowledgment that the advert was defamatory of the plaintiff.
- 14) I am convinced that the publication portrayed the plaintiff as a high ranking government official who was incapable of complying with court orders. The publication also depicted the plaintiff as immoral and untrustworthy. The plaintiff tendered evidence showing that he was a man held in high esteem but that esteem was lowered as a result of the publication. In the end I am satisfied that the plaintiff was defamed.
- 15) The second issue in respect of quantum. To begin with, I am convinced that the plaintiff having proved that the defendant is liable for defamation, that he is entitled to damages. The plaintiff has proposed that a sum of ksh.10,000,000/= is sufficient for general damages while the plaintiff should be awarded ksh.2,000,000/= for exemplary damages. The defendant on the other urged this court if it deems fit to award damages not to award more than ksh.500,000/=. The defendant beseeched this court to find that it had no malice and to also take note of the fact it had published an apology. I have already stated that the apology published by the defendant will act as a mitigating factor which will obviously affect the amount to be awarded. The plaintiff admits that the defendant published its apology in a prominent page as opposed to the publication of the advert.
- 16) In the case of **Raphael Kitur vs= The People Media Group Ltd T/A The People (2017) eLKR** this court awarded a sum of ksh.3,000,000/=. In the case of **Nation Media Group Ltd & 2 Others vs= John Joseph Kamotho & 3 others (2010) eKLR** the plaintiff was awarded ksh.6,000,000/=.
- 17) In this case, it clear to this court that the defendant upon realizing that it had published a defamatory article, quickly published an apology in a prominent page than that of the offending advert. In the circumstances I am convinced that an award of ksh.3,000,000/= is appropriate and reasonable.
- 18) The plaintiff has also asked for exemplary damages. This court was urged to make an award of ksh.2,000,000/= on this head. An award

of exemplary damages is a punitive remedy. In this case, I have pointed out that the defendant has published an apology. The defendant's conduct throughout these proceedings exonerates the defendant from being slapped with a punitive award. Consequently I decline to award the plaintiff exemplary damages.

19) The plaintiff has further prayed for an order directing the defendant to publish an apology. Since the defendant has already published an apology in a prominent page of its newspaper, I find no reason to once again order it to publish another apology.

20) In the end, I enter judgement in favour of the plaintiff and against the defendant as follows:

**i. General damages for defamation ksh.3,000,000/=**

**ii. Costs of this suit**

**iii. Interest on (i) above at court rates from the date of judgement until the date of full settlement.**

Dated, Signed and Delivered in open court this 28<sup>th</sup> day of February, 2019.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant