



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 16 OF 2011

MICHAEL OTIENO JUMA.....PLAINTIFF

VERSUS

NON-GOVERNMENTAL ORGANIZATION

CO-ORDINATION BOARD.....1ST DEFENDANT

MARTIN LUTHER OMONDI OCHOLA.....2ND DEFENDANT

CHRISTINE AWUOR OTIRI.....3RD DEFENDANT

JUDGMENT

The Plaintiff, **MICHAEL JUMA OTIENO**, has brought this action seeking compensation for libel. He has asked the court to award him General Damages on the footing of Aggravated and Exemplary Damages.

1. He has also asked the court to order the Defendants to publish the revocation of the Plaintiff's replacement.
2. The basis of his claim is that the publication was not only false and malicious, but was published deliberately, with the aim of maligning and disparaging his reputation.
3. The publication in issue was by way of an advertisement which was carried by the "Daily Nation" newspaper dated 15th October 2010.
4. The gist of the message was that the Plaintiff had ceased to be the **SECRETARY** of the **CENTRE FOR PEACE & DEMOCRACY (CEPAD)**, with effect from 1st May 2010.
5. The publication indicated that the 1st Defendant, the **NON-GOVERNMENTAL ORGANISATIONS CO-ORDINATION BOARD**, had ratified the removal of the Plaintiff from his position as the Secretary of **CEPAD**.
6. The 2nd Defendant, **MARTIN LUTHER OMONDI OCHOLA** was the Chairman of **CEPAD**, whilst the 3rd Defendant, **CHRISTINE AWUOR OTIRI** was the Treasurer of **CEPAD**.
7. It was the Defendant's case that the Plaintiff had been validly removed from the position of Secretary of **CEPAD**.
8. Therefore, the Defendants asserted that they had a duty to notify the general public about the facts.
9. In a nutshell, the Defendants asserted that the advertisement in issue was not libelous at all, as it was a true reflection of facts, and was also a fair comment which had been communicated without any ill will or malice.
10. At paragraph 5 of his Complaint, the Plaintiff described himself as the Chairman of the Board of Directors of the Centre for Peace and Democracy (**CEPAD**). He said that at the material time he was the Interim Secretary of **CEPAD**.
11. At paragraph 10 of the Complaint, it was indicated that the Non-Governmental Organizations Co-ordination Board (hereinafter "the Board") gave an Order on or about 5th October 2010, ratifying the change of officials of **CEPAD**.
12. According to the Plaintiff, the effect of Board's letter dated 5th October 2010 was to allegedly replace him as the Secretary of the

Organization.

13. However, the Plaintiff firmly believed that, notwithstanding the decisions pronounced by the Board, he was never validly removed from his post, as the Secretary of the Organization.

14. Notwithstanding that fact, the 2nd and 3rd Defendants caused an advertisement to be carried in the “Daily Nation” of 15th October 2010, words to the following effect;

***“This is to bring to the attention of the General Public, Development Sector & our Constituents that the person whose photograph appears here, Mr. Michael Juma Otieno, holder of Kenyan ID Card No. 10546956, ceased to be the Secretary of Centre for Peace & Democracy (CEPAD) effective 1st May 2010 as ratified by the NGO Co-ordination Board vide letter referenced NGO/218/051/2003/010(49), and is subsequently not authorized to transact, conduct, enter into, and or represent CEPAD in any capacity whatsoever. Further, be informed that CEPAD is not in any way related to an outfit calling itself Community Action for Change in Kenya (CAACK) and will not take responsibility for its actions.*”**

Board of Directors

Centre for Peace & Democracy

P O Box 536 – 00600 Nairobi.”

15. It was the Plaintiff’s case that the words above meant that he had been validly replaced as the Secretary of **CEPAD**, and that he was therefore not a fit person to be dealt with in that capacity.

16. The Plaintiff’s complaint was based on his contention that the advertisement contained falsehoods which were intended to disparage his reputation.

17. The Defendants intended to portray the Plaintiff as a person who was deceitful and who could not be trusted; that is the Plaintiff’s case.

18. Therefore, the Plaintiff prayed for compensation by way of an award of Damages for libel. He also sought Aggravated and Exemplary Damages.

19. Thirdly, the Plaintiff sought an order to compel the Defendants to publish a revocation of the replacement.

20. When testifying, the Plaintiff asserted that it was his mandate, as the Executive Secretary of **CEPAD**, to call for meetings of the Board.

21. Therefore, when he received letters inviting him to attend meetings, the Plaintiff did not attend the said meetings. He said;

“I was sent a reminder on 1st August 2010 to attend a meeting on 7th August 2010 to discuss my conduct. I did not attend because I did not want to grace illegalities. Letter dated 9th August 2010 was addressed to me and I received it. Letter dated 26th August 2010 again concerns my removal. It was sent to me. These were illegal meetings so there was no obligation for me to attend,”

22. As the Defendants went ahead with the meeting, and because they communicated their decision through an advertisement, the Plaintiff described those actions as being irresponsible and reckless.

23. He also said that he first learnt of his replacement through the advertisement.

24. The Plaintiff then said;

“ it is the Plaintiff’s case that by the time the First Defendant released the letter dated 5th October 2010, it knew well the goings-on at CEPAD, was in regular communication with the Plaintiff and was aware that the Plaintiff had disputed his attempted replacement”

25. In my understanding if the Plaintiff had already disputed his “attempted replacement” before the 1st Defendant had released the letter dated 5th October 2010, that can only mean that the Plaintiff had already been aware of the so-called replacement prior to the release of the letter.

26. It is very true that the 1st Defendant reviewed its decision, after the Plaintiff had complained about the attempt to replace him.

27. As a result of the said review, the 1st Defendant made it clear that the position prior to 5th October 2010 would remain in place. In effect, the 1st Defendant continued to recognize the Plaintiff as the Secretary to **CEPAD**.

28. The Plaintiff has submitted that;

“The position in law is that once fault is admitted, as in this case by the First Defendant through its letters and testimony, then the role of the court is to order for the remedy and award to the victim or the affected party.”

29. In this case, the claim by the Plaintiff is one of defamation.

30. The said defamation is said to have occurred when the Defendants published a falsehood about the Plaintiff.

31. The “admission” made by the 1st Defendant was not in relation to having published any falsehood.

32. Indeed, the Plaintiff never asserted that the 1st Defendant had published any defamatory information concerning him.

33. Even the 2nd and 3rd Defendants never attributed the publication in issue, to the 1st Defendant.

34. As the Plaintiff pointed out in his submissions, the publication was done by the 2nd and 3rd Defendants, allegedly on behalf of the **CEPAD** Board of Directors.

35. The Plaintiff did not provide evidence to prove that the 1st Defendant caused the publication of the advertisement which gave rise to this suit.

36. Secondly, even if the 1st Defendant had erred, by acknowledging receipt of the resolution passed by **CEPAD’s** Board of Directors, the said action could not constitute defamation of the Plaintiff.

37. As stated in the case of **K L Vs Standard Limited HCCC No. 20 of 2007;**

“Defamation is a tort and is defined as the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally or which tends to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers, by lowering him/her in the estimation of the right thinking members of society generally and in particular to cause him/her to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the Plaintiff by attributing to him/her any form of disgraceful conduct such as crime, dishonesty, cruelty and so on.”

38. In the second authority cited by the Plaintiff, being **Gideon Mose Onchwati Vs Kenya Oil Co. Limited, HCCC No. 140 of 2008,** the Court emphasized that whilst **Article 33** of the **Constitution of Kenya** recognizes the right of every person, to express himself, the said freedom of expression shall respect the rights and reputation of other persons.

39. The court went on to express itself thus;

“It is trite law that in defamation the claimant must prove to the required standard that the words complained of were published of and concerning him; that they were published by the defendant; that they were false, and that they were defamatory in character of the claimant, and finally, that the publication was done with malice.”

40. As there is no evidence that the 1st Defendant published a falsehood concerning the Plaintiff, I find that the case against the said Defendant lacks merit. It is therefore dismissed, with costs to the 1st Defendant.

41. Meanwhile, as regards the 2nd and 3rd Defendants, the evidence on record shows that they participated in a meeting which was held on 1st May 2010.

42. At that meeting, it was resolved that the Plaintiff be replaced as the Secretary of **CEPAD**.

43. Secondly, there is evidence that the 2nd and 3rd Defendants caused an advertisement to be published in the “Daily Nation” newspaper of 15th October 2010, indicating that the Plaintiff had been replaced in **CEPAD**.

44. According to the 2nd Defendant, the decision to advertise the removal of the Plaintiff was informed by the fact that the Plaintiff had continued to portray himself as the Secretary of **CEPAD**, notwithstanding his removal.

45. The 2nd Defendant, **MARTIN LUTHER OMONDI OCHOLA**, (hereinafter “Martin”) testified that the Plaintiff had continued to masquerade as the Secretary, by engaging with **CEPAD’s** Development Partners.

46. The Defendants provided evidence of email communication between the Plaintiff and various donors.

47. As the 2nd and 3rd Defendants believed that the Plaintiff was no longer the Secretary of **CEPAD**, they decided that there was a need for **CEPAD** to notify the public that the Plaintiff was no longer the Secretary.

48. It is common ground that **CEPAD** was being run by three persons, namely Martin, the Plaintiff and the 3rd Defendant, **CHRISTINE AWUOR OTIRI**.

49. It is further common ground that there was a stalemate between those three persons.

50. As both the Plaintiff, on the one hand, and the Defendants on the other hand have indicated, there was a definite need for **CEPAD** to resolve the stalemate, if the Organization was going to be able to perform its functions.

51. Yet, the Plaintiff was not willing to attend meetings which were called by the other two directors.

52. It is within that context that the meeting was held on 1st May 2010.

53. When Martin testified, he pointed out that pursuant to the **Constitution** of **CEPAD**, the quorum for the Board Meetings was two-thirds of its membership.

54. Therefore, in his understanding, two members of the Board constituted a quorum as the whole Board was made up of three members.

55. After perusing the Constitution of **CEPAD** I find that two members of the Board constituted a quorum. Therefore, in principle, the said two members who attended the meeting on 1st May 2010 could have passed a lawful resolution.

56. However, as the **NGO's** Co-ordination Board advised **CEPAD**, there was a "stranger" who participated in the meeting, thus depriving it of its legitimacy.

57. But when the Plaintiff wrote letters purporting to suspend the operations of **CEPAD**, and also another letter indicating that the **COMMUNITY ACTION FOR CHANGE IN KENYA (CACK)** was taking over various **CEPAD** Projects, I find that his said actions were inconsistent with his being the Secretary of **CEPAD**.

58. On the other hand, when **CEPAD** wrote letters to the Plaintiff, after 1st May 2010, inviting him to meetings which were intended to discuss his conduct, that is inconsistent with the position taken by the 2nd and 3rd Defendants concerning the date when the Plaintiff ceased to be the Secretary of **CEPAD**. If he had been removed with effect from 1st May 2010, he would not need to be removed again thereafter.

59. In an email dated 6th July 2010, the Plaintiff complained that **CEPAD** had released information to **CSOs** and **Donors**, that the Plaintiff had been replaced at **CEPAD**.

60. He described the situation at **CEPAD** as being a "crisis". He said;

"In the meantime, please note that we cannot pretend that any projects/operations can continue at CEPAD under such confusion and divisions, and indeed there are no ongoing projects right now."

61. In my understanding, the words of the Plaintiff were an accurate summary of the situation at **CEPAD**. There was confusion and divisions, resulting in a crisis.

62. The **NGO** Co-ordination Board appears to have fallen victim to the said confusion. I say so because the Board first effected the change, which ousted the Plaintiff as **CEPAD's** Secretary. Thereafter, the Board reviewed their position, and concluded that the procedure used to remove the Plaintiff was irregular.

63. On 5th October 2010, the **NGO's** Co-ordination Board notified **CEPAD** that it had amended its records to reflect the change of officials, and in particular, the replacement of the Plaintiff as Secretary.

64. 10 days later, on 15th October 2010, there was an advertisement in the "Daily Nation" newspaper, notifying the public about the Plaintiff's replacement.

65. As stated at paragraph 14 of the **Plaint**, it is on 27th October 2010 when the **NGO's** Co-ordination Board wrote to **CEPAD** having reviewed its position and lifted the acknowledgement in the change of officials at **CEPAD**.

66. In effect, at the time the advertisement appeared in the newspaper, it does appear that the Defendants were under the impression that the Plaintiff was not **CEPAD's** Secretary.

67. Therefore, it cannot be said that the advertisement was motivated by any malice.

68. In my considered view, the Plaintiff has not proved the innuendo he alluded to, that the advertisement implied that he was not a fit person to be dealt with in the capacity of **CEPAD's** Secretary.

69. If a person no longer holds a particular position in an organization, he would be without authority to carry out the functions bestowed upon the holder of that position.

70. Therefore, when the 2nd and 3rd Defendants caused an advertisement to be published, in which it was indicated that the Plaintiff did not have authority to represent **CEPAD**, following the resolution to remove him as Secretary, that statement was not defamatory.

71. Accordingly, I find no merit in the Plaintiff's case. The same is dismissed with costs.

72. However, in the event that the Plaintiff had been defamed by the 2nd and 3rd Defendants, I would not have awarded any Aggravated or Exemplary Damages. Instead, I would have awarded him some Nominal Damages of Kshs 200,000/=. I so find because I find that the circumstances prevailing at the time, within **CEPAD**, was very confused and the Plaintiff fueled the said confusion.

73. It would not be right to reward the Plaintiff when it is clear that his conduct, of being dismissive of the attempts to discuss his position in the organization, played a pivotal role which led to the confusion and divisions in **CEPAD**, thus giving rise to the situation and hand.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF AUGUST 2019

FRED A. OCHIENG

JUDGE