



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 130 OF 2014**

**WYCLIFFE A. SWANYA**

**T/A SWANYA & SWANYA ADVCOATES.....PLAINTIFF**

**-VERSUS-**

**DYNAPLAS LIMITED.....1<sup>ST</sup> DEFENDANT**

**BIMAL SHAH.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1) Wycliffe A. Swanya T/A Swanya & Swanya Advocates, the plaintiff herein, filed an action vide the plaint dated 12th May 2014 against Dynaplas Ltd and Bimal Shah, the 1st and 2nd defendants herein, in which he sought for *inter alia* damages for defamation. The defendants filed a joint statement defence to deny the plaintiffs claim.

2) When this suit came up for hearing, learned counsels appearing in this matter recorded a consent order to have the same disposed of by reliance on written witness statements and written submissions without summoning witnesses to testify in court.

3) It is important at this stage to identify the witnesses who executed written witness statements. The plaintiff filed the witness statement he executed on 12th May 2014 in support of his claim. The defendants filed the written witness statement executed by Bimal Shah on 15th Dec. 2014.

4) The plaintiffs' case is supported by the evidence of Wycliffe A. Swanya (PW1) who averred in his witness statement that on 10th August 2007, the plaintiff was appointed to act for the 1st defendant in the matter of registration of industrial Designs no. 2007/000852 and 2007/000853 and produced a notice of appointment as an exhibit in evidence.

5) PW1 further stated that later on the plaintiff received instructions from the defendants to enter opposition proceedings against M/s Safepark Ltd which had also made an application to register the same designs. It is said that the plaintiff acted on the aforesaid instructions and proceeded to file grounds of opposition.

6) The plaintiff also averred that before the objection was heard, he received further instructions from the defendants to withdraw the grounds of opposition. PW1 tendered written instructions to that effect as exhibits in evidence. He also stated that the plaintiff acted on the later instructions by writing a letter to the managing Director of Kenya Industrial Property Institute (K.I.P.I) informing him of the retraction of the opposition and also notified the advocates of Safepark Ltd of the withdrawal. It is the evidence of PW1 that the Managing Director KIPI confirmed the withdrawal of the opposition which information he passed to the defendants.

7) PW1 stated that he was surprised to receive a letter dated 14.11.2013 from M/s Kaplan & Stratton Advocates acting

for M/s Safepark Ltd, forwarding a statutory declaration/affidavit which averred that M/s Swanya & Swanya Advocates without instructions, had acted maliciously and misleadingly to withdraw the aforesaid opposition proceedings.

8) It is the submission of PW1 that the statutory declaration/ affidavit filed and published was defamatory per se. PW1 said he replied the aforesaid letter and denied ever acting without instructions or misleading the defendants.

9) The plaintiff avers that he wrote a demand letter to the defendants whereof he sought for unconditional published apology, admission of liability, withdrawal of the statutory declaration and for assessment of damages.

10) PW1 further stated that the defendants responded to his demand letter through the firm of Nyaencha, Waichari & Co. Advocates in which they impliedly admitted liability. The plaintiff also states that he wrote back to the defendants' advocate seeking for clarification of the apology and whether the defendants were willing to discuss the issue of damages.

11) The plaintiff stated that at all material times he acted professionally, diligently and ethically to the best interest of the clients. The plaintiff averred that so far the defendants have ignored, refused, failed and or neglected to meet the plaintiff's demands.

12) The defendants on the other hand tendered the evidence of Bimal Shah (DW1) who confirmed in his written witness statement that the 1st defendant engaged the firm of Swanya & Swanya Advocates to represent it in the matter of Industrial Registration and KIPI registration.

13) DW1 also admitted that the defendants gave instructions to the plaintiff to retract the application for revocation because there was a considerable delay in prosecuting the opposition. DW1 also stated that due to lapse of time between the date of instruction to revoke and the present cause of action, he totally forgot that he had given instructions on behalf of the 1st defendant to the plaintiff to withdraw the revocation application.

14) The defendants further stated that they sought for alternative legal representation who advised that the process of revocation of registration of the disputed design could be re-ignited afresh which meant that they had to disclose their earlier objection. DW1 stated that no malice was intended whatsoever but they were genuinely mistaken about the said instructions.

15) DW1 further averred that once his memory was refreshed, the defendants did not object or deny the said instructions but proceeded to withdraw the offending averments and duly apologized to the plaintiff.

16) The main issue which has to be determined is whether the statutory declaration complained of were defamatory of the plaintiff. The plaintiff identified paragraphs 20 to 24 of the statutory declaration as the offending portions. Those averments are reproduced as follows:

**20. That from the foregoing it is obvious that this design was registered by Kenya Industrial property Institute (KIPI) due non-disclosure of materials fact and should not in all fairness and in the interests of justice be allowed to remain on the register.**

**21. THAT exhibit marked "BS1" "BS2" "BS3" "BS4" "BS5" filed with the statutory declaration supporting the Notice for revocation were filed in error by previous counsel on record and should be disregarded.**

**22. THAT in response to paragraph 10 of the counterstatement, I wish to state that though Swanya and Swanya advocates had instructions to file an oppositions proceedings on behalf of the Requester the latter only became aware that the same had been withdrawn when it appointed new counsel upon learning that the design had infact been registered.**

**23. THAT I further categorically state that the Requester did not at any time give instructions to Swanya and Swanya Advocates to withdraw the opposition and the letter written by the said**

**advocates on the 25<sup>th</sup> of July 2008 was misleading and malicious.**

17) It is the submission of the plaintiff that the said publication were published to the staff of KIPi, the staff of Industrial Tribunal Court and those of Messrs Kaplan and Stratton advocates amongst other people. It is said that the publication disparaged and lowered the high esteem of the plaintiff in the legal profession with which right thinking members of the society, entire membership of the legal fraternity and society in general regarded and held the plaintiff. It is argued that as a result of the publication the plaintiff has been brought into grave public ridicule, scandal, odium and contempt in the eyes of right thinking members of society.

18) The plaintiff further submitted that the contents of aforesaid statutory declaration in their entirety either in their natural and ordinary meaning or by imputations and innuendoes, the 1st and 2nd defendants meant and were understood to mean that the plaintiff:

*a. Engages in acts of dishonesty, corruption and is untrustworthy, of unreliable moral fibre to hold the position of an advocate of High Court of Kenya he currently holds in society.*

*b. As an advocate practicing law, takes advantage of his clients to deceive, cheat, mislead them for selfish gains.*

*c. Is dishonest, unfit and incompetent to discharge his duties in the legal professional.*

*d. Has no regard whatsoever to the rights and interests of his clients.*

*e. Was and is unethical, unprofessional, unscrupulous who engages in unethical dishonesty activities.*

*f. Engages in unjust enrichment of himself by misleading his clients.*

*g. Is not a fit person to hold the position of an advocate of the High Court of Kenya and as an officer of the court.*

*h. The plaintiff's law firm should be shunned by the members of society and in particular, the current and potential clients of the firm.*

*i. Was and is an advocate who engages in dishonest and corrupt business practices.*

*j. Was and is an untrustworthy person in the noble legal professional.*

*k. Was and is a fraudulent and corrupt.*

*l. Was and is a compulsive liar and cheat.*

19) The defendants are of the submission that the contents of the statutory declaration were not defamatory or libelous and could not therefore form a basis of a defamation suit or claim. The defendants are of the submission that they enjoyed the defence of absolute privilege which protects the 2nd defendant who was a witness and a party in judicial proceedings. It is argued that the alleged publication was only meant to persons involved in the process of proceedings in the Tribunal hence this cannot in any way amount to publishing.

20) Having considered the rival submissions, it is important from the outset to set out the definition of defamation.

In Halsbury's Laws of England 4<sup>th</sup> Edition vol. 28 defamation is defined as

**“a statement which tends to lower a person in the estimation of right members society generally or cause him to be shunned or avoided or to expose him to hatred contempt or ridicule or to disparage him in his office, professional calling trade or business.**

21) There is no doubt in my mind that the portion of the statutory declaration published by the defendants of the plaintiff is defamatory.

22) Having come to the conclusion that the affidavit was defamatory of the plaintiff, the question which needs to be determined is whether in publishing the statutory declaration the defendants were actuated by malice. It is clear from the affidavit that the defendants drew the same on references from an existing record hence

the deponents were seized with the truth on record as admitted in their witness statement and yet they decided to plead false and untrue statements.

23) I am convinced that the defendants acted with malice. I am not convinced that the deponents had forgotten that they had given the plaintiff instructions to withdraw the objection to registration of industrial design.

24) The publication went beyond the alleged Tribunal file but spilled over to members of staff of law firms and those of the industrial Appeal Tribunal. Though the defendants have claimed that they offered a written apology and retracted the offending affidavit, no evidence were provided to establish that.

25) I am convinced that the plaintiff did not receive any written apology. This conduct shows that the defendant had malice at the time of publication of the offensive affidavit.

26) The final issue to be determined is quantum of damages. The plaintiff has asked for both general and exemplary damages. The plaintiff sought to be paid ksh.20 million and ksh. 3 million as aggravated and exemplary damages respectively. The plaintiff cited and relied upon the following cases.

i. **J. P. Machira t/s Machira & Co. Advocates =vs= Wangethi Mwangi & Ano. (2018) eKLR** where this court awarded a sum of kshs. 5 million.

ii. **Dorcas Florence Kombo =vs= Royal Media Services Ltd (2014) eKLR** where the claimant was awarded ksh.4.5 million as general damages plus ksh. 1 million for exemplary damages.

iii. **Samuel Ndungu Mukunya =vs= Nation Medial Group Ltd and Ano. (2015) eKLR** in which this court awarded kshs. 20 million for general damages.

iv. **Daniel Musinga t/a Musinga & Co. Advocates =vs= Nation Newspapers Ltd (2005) eKLR** where the claimant was awarded ksh. 10 million.

27) The defendants on the other hand are of the submission that they offered a written apology and retracted the offending affidavit. The defendant beseeched this court to make a bare minimum award in the circumstances of this case.

28) The defendants cited and relied on the case of **Kenya Tea Development Agency Ltd =vs= Masese t/a B. O. Masese & Co. Advocates (2008) K.L.R 149** where the claimant was awarded a composite sum of ksh.1500,000/=.

29) Having considered the competing proposals made, I have come to the conclusion that the plaintiff is entitled to be awarded general damages and because there is no evidence that the defendant made an apology to the plaintiff, then the plaintiff too is entitled to claim exemplary damages. Taking into account the authorities relied upon by the parties, I think the appropriate and reasonable award on general damages is ksh.10,000,000/=. The plaintiff is also awarded exemplary damages of ksh.2,000,000/=.

30) The plaintiff has asked for an order of permanent injunction but I do not think the same has been established. The prayer is declined.

31) In the end, judgement is entered in favour of the plaintiff and against the defendants as follows:

**i. General damages Ksh.10,000,000/=**

**ii. Aggravated/exemplary damages Ksh. 2,000,000/=**

**Total Ksh.12,000,000/=**

**iii. Costs of the suit.**

**iv. Interest on (i) and (iii) above at court rates from the date of judgment until the date of full payment.**

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of September, 2019.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent