



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**(CORAM: R.MWONGO, J)**

**HCCC NO 1338 OF 2000**

**J.P. MACHIRA T/A MACHIRA & CO.ADVOCATES.....PLAINTIFF**

**VERSUS**

**WANGETHI MWANGI.....1<sup>ST</sup> DEFENDANT**

**NATION NEWSPAPERS.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The plaintiff, Mr Machira is an advocate of the High Court. He filed this defamation suit in August, 2000, against Wangethi Mwangi, who was at the time the Editor of Nation Newspapers, the 2<sup>nd</sup> defendant.
2. He claims that on multiple occasions, the defendants published statements that defamed him. For example, on 26<sup>th</sup> July, 2000, the defendants published an entitled “**Lawyer flattens his client’s house**”. The report explained that the plaintiff demolished the matrimonial home of his ailing client, P K M, in the up-market suburb of Karen. The client was said to be of unsound mind, and had been admitted at Mathari Mental Hospital. Then on 27<sup>th</sup> July, 2000, the defendants published another report titled: “**Woman kept off disputed property**”: that guards stationed over property the plaintiff had allegedly bought from his client, stopped his wife and caused the clients children to be evicted. Finally, on 1<sup>st</sup> August, 2000, the defendants published an report entitled “**Court stops demolition of house**” stating that the plaintiff was stopped from demolishing more houses owned by a Karen family he had evicted.
3. The plaintiff claims that the defendants never bothered to find out the truth of the matter before making the said publications, nor did they bother to write truthfully. As a result the publications were so malicious and extreme that they were meant not only to discredit the plaintiff both in his personal and professional capacity, but were meant to ruin him professionally as an advocate.
4. According to the plaintiff, all the facts and matters which would have aided the defendants in publishing the truth, were available in court records and in the judgment of the court in HCCC No 113 of 1999; that the alleged eviction was done through a valid decree and court order carried out by a duly appointed court bailiff; that the plaintiff had a sale agreement for the said house as far back as 1989 and that the agreement was drawn by the client’s advocates; that the court had issued an order of specific performance with regard to the said house in HCCC No 113 of 1999; that at the time of making the said malicious defamatory statements there was a pending case before the court namely, HCCC No 1709 of 1996, in which the plaintiff had sued the defendants for defamation under similar circumstances and interlocutory judgment entered by the Court of Appeal ( in Civil Appeal No 179 of 1997).
5. In the plaint, the plaintiff seeks general damages, aggravated and exemplary damages, interest thereon and costs of the suit.
6. The defendants denied that they published all the content in the alleged reports, or that they did so falsely, maliciously, contemptuously or disparagingly. They also denied that the published words in their natural and ordinary meaning meant or were understood to have any defamatory meaning.
7. They assert in their amended defence that the publication in the newspaper were a fair accurate representation of the words uttered in court by parties involved in the proceedings which they covered.

8. Further, whilst denying all the plaintiff's allegations, the defendants repeatedly asserted that insofar as the statements in the articles were concerned, they published what was uttered in court and part of the court proceedings, and that reporter was in court on the material dates and the words uttered in court by counsel and are a fair and accurate report of the proceedings in court.

9. The defendants state that the words were published under a sense of duty and without malice towards the plaintiff and in the honest belief that the charges in them were true, and for the public benefit. Most significantly, it is asserted by the defendants, the words alleged to have been defamatory were in fact published on a privileged occasion.

10. In his reply to the defence, the plaintiff stated that the words allegedly uttered did not form or constitute the court proceedings; that they were simply false, malicious and defamatory and contemptuous of the plaintiff; that the defendants did not bother to establish the true factual position and that despite the plaintiff's letters to them demanding an apology and correction, the defendants declined to do so.

### **The Parties' Cases - Hearing and Submissions**

11. After the hearing of witnesses, the parties by agreement filed written submissions and highlighted the same orally.

12. At the hearing and through his supplementary witness statement, the plaintiff quantified the global damages he is seeking as Shillings twenty four million (Kshs 24,000,000/-).

13. The plaintiff gave evidence through two witness statements dated 21<sup>st</sup> May, 2012 and 7<sup>th</sup> March, 2017, respectively, which he adopted at the witness stand. He availed a second witness, Mr James Macharia Gichuki, who gave oral evidence. Both were cross examined. The defendants did not call any witnesses.

14. Mr Machira's evidence was that he was an advocate of the High Court of Kenya of forty years standing. He was admitted to the bar on 17<sup>th</sup> November, 1975 and started his own practice in April 1979, practising in the name and style of J.P. Machira & Company Advocates.

15. He testified that in 1989 he was searching for a residential plot in Karen area, and got in touch with Town Properties Limited. They introduced him to P K M, owner of a property LR No 12252/3 in Karen. Interested, he viewed the property in the presence of both Mr M and his wife Juliana Nyokabi, and liked it. Town Properties Limited offered to sell it at Kshs 2,625,000/=, which he accepted, and he paid the required KShs 200,000/= deposit. According to the evidence of PW2 Mr James Michuki, the plaintiff viewed the sale property in the presence of both Mr Kaniaru M and his wife and that he, Mr Michuki, was also present on one of the occasions when viewing was done.

16. According to the plaintiff, a Sale Agreement was then prepared which the plaintiff signed on 8<sup>th</sup> September, 1989, according to the correspondence availed by him, in the office of Mr Gatuguta, the Vendor's lawyer. It was due for completion on 6<sup>th</sup> December, 1989. According to the undisputed evidence of the plaintiff, he fully complied with the agreement. However, it was when Mr Kaniaru M failed to transfer the property in breach of the agreement, that the plaintiff filed a suit HCCC No 113/1999 for specific performance.

17. The plaintiff produced in his bundle a valuation report dated 4<sup>th</sup> December, 1989 by Tysons Ltd requested by him, according to which the property of 4.99 acres was valued at Kshs 3,000,000/-. The property comprised a permanent stone dwelling house in a bad state of repair. There was also a timber outbuilding whose value was not taken into account in the valuation. An earlier valuation by Tena Associates on 5<sup>th</sup> June 1984, prepared on the instructions of Mr PKaniaru M, the vendor, had placed the property's value at Kshs 720,000/-.

18. According to the plaintiff, when Mr P K M failed to transfer the property to him due to a complication on a loan with a charge, Kenya Reinsurance Corporation, the plaintiff filed suit to compel specific performance of the sale agreement. The suit was HCCC No 113/1999. The proceedings in that suit were before O'Kubasu, J, as he then was, and were exhibited in the Plaintiff's bundle of documents. Following the failure of the defendant, Patrick M, to file a defence, interlocutory judgment was entered, and finally a Court Order was issued on 20<sup>th</sup> December, 1999. The court order directed as follows: that the Kenya Reinsurance Corporation do release to the plaintiff, Mr Machira, all documents of title for the suit property fully discharged upon Mr Machira paying an outstanding loan to the Corporation; and that the Senior Deputy Registrar to thereafter execute transfer documents in favour of the plaintiff after he has effected all payments to the Corporation.

19. In that same suit, HCCC 113 of 1999, a chamber summons application was filed on 17<sup>th</sup> July, 2000, by the defendant's wife, Julia Nyokabi Kaniaru, in which she sought to be assigned as the guardian of Mr Kaniaru, and to set aside the *ex parte* judgment and consequent orders of Justice O'Kubasu. It is the proceedings in respect of that chamber summons application, allegedly misreported by the defendants, which are the subject of the defamatory accusations herein.

20. In her affidavit in support of the chamber summons, Julia Kaniaru averred, *inter alia*: that the suit property being sold by her husband the defendant, was their matrimonial home; that he had been admitted to Mathari Hospital twice – and attached a letter from the hospital to that effect – as a result of which he was unable to defend the suit or enter into any agreement to dispose the property; that the plaintiff knew of the defendant's illness; that the plaintiff had acted for the defendant and had a conflict of interest; that the summons in the suit were allegedly served when the defendant was at home sick and under medication under her care, and no process server had come to the home that day.

21. In her further affidavit annexed to her amended chamber summons, Julia Kaniaru averred: that she had been forcefully evicted from the suit property without notice by a group of about twenty eight persons brandishing crude weapons; that she later attempted to go to the property and was denied entry by guards; that she noticed that one of the houses on the property had been demolished, and a new construction was being erected thereon.

22. The chamber summons application was filed under urgency and came up for hearing before Aluoch J (as she then was) on 18<sup>th</sup> July, 2000.

23. The plaintiff's complaints are about three statements published by the defendants in the Nation Newspapers. On account of the fact that they are alleged by the plaintiff to be defamatory and untrue; and by the defendants are asserted to be representative of the court proceedings in the application in HCC 113 of 1999, they are quoted herein *in extenso*, as set out in the plaint. The newspaper reports were produced as part of the parties' bundles of evidence.

24. The first report is as quoted below:

**a) Report 1 - published on 26<sup>th</sup> July 2000 :**

***"Lawyer flattens his client's house"***

*" A Lawyer has demolished the matrimonial home of his ailing client, claiming he has bought the property. Mr. John Patrick Machira's Lawyer confirmed before Lady Justice Joyce Aluoch yesterday that his client had "flattened" Mr. P K M's house in the up-market Karen Suburb, Nairobi. Mr. M, the Court was told, was of "unsound mind" and is currently admitted at Mathari Mental Hospital, Nairobi. The Lawyer told the court that Mr. Machira was now the owner of property said to be worth Sh. 16 million, and had started putting up structures after demolishing Mr. M's home and servants' quarters. Lady Justice Aluoch certified an application filed by Mr. M's wife, Mrs. Julia Nyokabi, as urgent and directed that it be heard this morning. The Judge further restrained Mr. Machira from further demolitions. Saying the matter was contentious and should be heard as soon as possible, the judge directed lawyers for the parties to furnish her with details of the matter this morning. Mrs. M has filed an application under a certificate of urgency, seeking to have Mr. Machira, his agents or servants restrained from demolishing or renovating her family house in Karen. She is also seeking orders that Mr. Machira, his agents or servants be restrained from carrying on or continuing construction or other work on the land. Her lawyer told the court that her husband did not receive summons to enter appearance in a suit between him and Mr. Machira. She added that she was unaware of a suit between her husband and Mr. Machira over the property, the Court was further told that Mrs. M was neither aware of the purported sale of the property to Mr. Machira by her husband nor of money having been paid to her family. Her Lawyer said Mr. Machira had represented Mr. M in two suits between him and his former employer, Kenya Reinsurance, over the property. Mr. Machira knew or ought to have known, the lawyer argued, that Mr. M was ailing when he purportedly entered into an agreement with him to buy the property."*

25. The plaintiff alleges that this report was meant to show that the plaintiff had committed a sin of demolition whereas no such order was issued at the material time. Further, he does not conduct demolitions. That despite the plaintiff's letter protesting the misreporting the defendants ignored his letter, and proceeded to publish two further reports.

26. The second report complained of by the plaintiff is as quoted below:

**b) Report 2 - published on 27<sup>th</sup> July 2000 :**

***"Woman kept off disputed property"***

*"A Lawyer has hired 11 guards to protect a disputed property he says he has bought, a Nairobi Court was told yesterday. Mrs. Julia Nyokabi Kaniaru, who also claims ownership of the Karen property, said through her lawyer that she had visited the premises and found guards stationed there by lawyer J. P. Machira. Mr. Machira says he bought the property worth Sh16. million, from her husband who is now admitted to Mathari Mental Hospital in Nairobi. But Mrs. Kaniaru maintains she is unaware of any transaction between her husband and Mr. Machira. She and her four children were evicted on June 30 and one of the houses on the premises demolished. Doors and windows of the second house have since been ripped off. High Court Judge Joyce Aluoch was also told that Mrs. Kaniaru had also been threatened with "dire consequences" if she set foot on the property. Her Lawyer, Mr. Francis Mutua, said Mr. Machira and his lawyer had written to the High Court registry staff, castigating them for allocating a hearing date for Mrs. Kaniaru's application without notifying them. Mrs. Kaniaru wants the court to restrain Mr. Machira from demolishing her home and putting up other buildings. The hearing continues on Monday."*

27. The plaintiff urges that the above report gives the meaning that: the plaintiff was a conman, unethical or unprofessional as the figure of Shs 16 million was farfetched and imaginary, since it had been professionally valued; that the plaintiff was immoral, dishonest, greedy unethical, criminal-minded, a conman and a totally unreliable advocate of the High Court.

28. The third newspaper report complained of by the plaintiff is reproduced as quoted below:

**c) Report 3 - published on 1<sup>st</sup> August 2000:**

***"Court stops demolition of houses"***

*"A Lawyer was yesterday stopped from demolishing more houses owned by a Karen family he evicted last month after allegedly buying their property, High Court Judge Richard Kuloba made the order after the wife of Mr. P K M urged him to order Nairobi lawyer John Machira not to demolish one of her two houses in Karen. The Lawyer has allegedly demolished a timber house. Mr. Machira claims to have bought the property said to be worth Sh.16 million from Mr. M, who is admitted at the Mathari Mental Hospital, Nairobi. However, Mrs. Julia Nyokabi Kaniaru has challenged the alleged sale, saying her husband was incapable of entering into a sale agreement due to his mental state. Mrs. Kaniaru, through Nairobi lawyer Francis Mboya, has applied for judgment entered in default of appearance in favour of Mr. Machira to be set aside. She also wants to be allowed to defend the suit instead of her sick husband, and the lawyer ordered to give the property back to her. Mr. Mboya said Mr. Machira has*

represented Mr. M in two cases involving the property. “He knew Mr. M was of unsound mind,” he explained. He produced a certificate from a Mathari Hospital psychiatrist to show that Mr. M was mentally ill. The lawyer further said Mr. M was not served with a notice to attend court. He said five summonses said to have been served on Mr. M were never acknowledged. Mr. Mboya said another lawyer said to have served the summons on Mr. M’s former employer, Kenya Reinsurance, at midnight was a “perennial liar”. The lawyer said proceedings in the suit were “full of irregularities and misrepresentation and concealment of facts”. Had the Court been given the proper picture, the order made in favour of Mr. Machira could not have been made, Mr. Mboya averred. Hearing continues on September 2000.”

29. The plaintiff urges that the publication of the above report gave a negative impression of him as already stated.

#### Issues for Determination

30. The parties agreed to adopt the plaintiff’s list of issues dated 21<sup>st</sup> May, 2012 as issues for determination by the court, omitting issues 8, 10 and 12. I have carefully perused the list and clustered the remaining eleven issues as follows:

- a. Whether the proceedings reported about by the defendants were court proceedings in terms of **section 6 Defamation Act**, and whether privilege attaches to them;
- b. Whether the publications by the defendants were false, malicious, spiteful and defamatory of the plaintiff;
- c. What damages, if any, are awardable and who should pay costs?

#### Analysis and Determination

***Whether the proceedings reported about by the defendants were court proceedings in terms of section 6, and whether privilege attaches to them***

31. The defendants argued that their publications concerned privileged occasions and were therefore entitled to the protection of absolute privilege. They rely on **section 6** of the **Defamation Act** which provides as follows:

***“A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged; provided that nothing in this section shall authorise the publication of any blasphemous, seditious or indecent matter.”*** (Emphasis supplied).

32. It is clear that, to qualify for the protection of absolute privilege under **section 6**, a newspaper report must have the following characteristics: 1) it must be a report of proceedings heard before a court exercising judicial authority; 2) it must be a fair report of those proceedings; 3) it must be an accurate report of those proceedings and 4) it must not contain any blasphemous, seditious or indecent matter.

If this *four-point Section 6* test is satisfied by the newspaper report, absolute privilege automatically attaches.

33. The defendants placed reliance on the case **Khasakhala v Aurah (1995-1998) 1EA 112** in which the court stated at pages 118-119:

***“The defendants were reporting proceedings in a court of law. As such they were entitled to absolute privilege under section 6 of the Defamation Act, Chapter 36 laws of Kenya. This is not qualified privilege requiring explanation and contradiction and therefore proof of malice. But absolute privilege under section 6 will only be enjoyed by a defendant who has made a fair and accurate report in his newspaper provided that such a report does not contain blasphemous, seditious or indecent matter***

34. The defendants also asserted that the plaintiff was not disputing the accuracy of the reports published relative to the proceedings which they characterised although, clearly, the plaint is littered with assertions that the reports were not truthful, were unbalanced and one-sided, and were unverified.

35. To this, the plaintiff suggested that what came up in the chamber summons was not a proceeding in respect of which privilege attaches for the following reasons: First, that what was in court was a chamber summons heard privately in chambers which was of no public concern; Second, that the applicant in the chamber summons, Juliana Kaniaru, was a stranger to the proceedings and not a party; Third, that publication of her affidavit, which is a pleading, cannot carry the entitlement to privilege; and finally, that her application to be enjoined was in any event dismissed.

36. The plaintiff cited **George Oraro v Wangethi Mwangi & Another Nairobi Civil Case No 1205 of 1993** where Ole Keiwua, J stated:

***“At any rate there is no right for a newspaper to report to the public the contents of pleadings filed in court but which have not become the subject matter of open court proceedings. There cannot be any privilege extended to such reports.***

*This is clearly and authoritatively stated in Gately on Libel & Slander 8<sup>th</sup> Ed. pg 265 para 264:*

***‘...but privilege will not, semble, attach to the publication in a newspaper of the contents of pleadings, affidavits or other papers filed in civil proceedings and not brought up in open court... it would be carrying privilege further than we feel prepared to carry***

*it , to say that , by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation may be laid for scattering any libel with impunity...the reason underlying the common law rule as to qualified privilege make it entirely logical to draw a line between what took place in open court and that which is done out of court by one party alone .’* ” (Emphasis supplied).

37. In my understanding, the essence of the rule as to absolute privilege is that anything stated by parties in court and which may therefore be seized of in the court record, may, subject to other legal qualifications such as in camera proceedings, be the subject of a newspaper report provided that it is a fair and accurate report.

38. In the old English case of **Rex v Astor (1913) 30 TCR10**, Scrutton, J said:

***“A newspaper ought not before a case comes on for trial, to publish in full the private proceedings such as the statement of claim or an affidavit charging fraud or a writ containing similar charges”***

And , Ridley, J in the same case said:

***“It seemed to be established that while Newspapers might report fully the proceedings on the hearing of a case, they ought not to publish in full the private private proceedings before the case came on for trial. For instance, they ought not to publish the statements of claim or the affidavit on which it was sought to wind up a company on th grounds of fraud in the directors.***

39. In essence therefore, it is necessary to carefully look at the statements published and compare and contrast them with the court record to assess the four point test under section 6. In **J.P. Machira v Wangethi Mwangi & Nation Newspapers HC Judicial Review No 1338 of 2000** a case emanating from the same circumstances as in the present case and in which the plaintiff sought an unqualified apology and damages, Wendoh, J stated:

***“The other report is “woman kept off property”. Again, the (sic) generally seems to carry what happened in court. The Court would need to examine in detail whether or not that report is accurate or whether it is meant to malign the plaintiff. That also goes for the third report....”*** (Emphasis supplied).

And later on the Judge stated:

***“It was also the submission of the plaintiff that court pleadings and affidavits are not synonymous with court proceedings and that under section 6 of the Act what is privileged is the ‘fair and accurate report of any proceedings before a court’ and therefore the defendants cannot avail of the defence of absolute privilege.***

***In this case the published report refers to both the pleadings and the proceedings before the court on the three occasions. It would be necessary to separate which pleadings are unfair and inaccurate from the proceedings and it is my view that, that cannot be a matter to be done by way of summary proceedings.”***

40. The above are arguments which have similarly been raised in the present case by the plaintiff here.

41. Accordingly, I have perused carefully the proceedings in HCCC 113/1999, and also the three publications complained of. The reports are asserted by the defendant to be in respect of the chamber summons application heard by Aluoch, J, from 18<sup>th</sup> July, 2000 to 30<sup>th</sup> July, 2000 and on 31<sup>st</sup> July 2000 by Kuloba, J. There is nothing to expressly show whether the proceedings were held in chambers or in open court, or whether the public was barred from attendance thereto.

42. In his cross examination at the hearing of the present case, Mr Machira said he did not know if the proceedings were sealed. He, however, confirmed in cross-examination that the court conducted its business in chambers on the material dates, and that the proceedings were not *in camera*.

43. I have noted that from the amended defence, the defendants did assert repeatedly that their reporter was in court on the material dates when the proceedings were heard, and that the words in their reports were uttered in court by counsel present, and that the report was a fair and accurate report of the proceedings in court. See amended defence paragraphs 5(v. vi, vii, viii, ix, xi, xii and xiv). In the amended reply to defence, the plaintiff did not dispute that the defendant’s reporter was present during the conduct of the proceedings. To that extent, the proceedings were not a private hearing in respect of which the public or third parties were excluded.

44. From the proceedings recorded on 26<sup>th</sup> July, 2000, in HCCC 113 of 1999 there is the following exchange between K’Owade (acting for the Plaintiff) and the Court:

***“K’Owade: I have instructions from my client that there has been gross misreporting of the proceedings of yesterday in this court....***

***Court: I have not had time to read the newspapers, but if there is a misreporting then I direct the newspapers concerned to correct (sic) accurately in future”***

This exchange dispels any notion that the proceedings were a private affair because it appears that the reporters were present during the proceedings, given that Aluoch, J, directed them to make corrections or report correctly in future. It is also clear and I am so satisfied, that the

proceedings were conducted in chambers. This I draw from the plaintiff's evidence.

45. It appears that the proceedings of each day were published on the following day in the defendant newspapers. In order to determine whether absolute privilege attaches under **section 6** of the **Defamation Act**, the four-point test must be applied.

46. It is for the party that seeks to rely on the provisions of **section 6** to prove that the report qualifies under the four-point test thereunder. In **Gatley on Libel & Slander 9<sup>th</sup> Ed. pg 321 para 13.45** the learned author states as follows:

*“The onus of proving that the report is fair and accurate lies on the defendant, but it is sufficient if this appears from the plaintiff's own evidence. If the defendant fails to prove that the report is fair and accurate, the plaintiff is entitled to succeed, however honestly it may have been published. Whether the report is fair and accurate is a question of fact for the jury, provided always that there is some evidence of unfairness or inaccuracy to go to the jury. This is a question for the judge to determine. It is for the judge to decide whether the matter complained of can fairly be said to be a report of judicial proceedings”*

47. The defendants did not take any serious steps to prove that their report was fair and accurate other than asserting so in their defence and attaching the proceedings alongside their reports. As earlier stated, they called no witnesses.

48. The proceedings of 25<sup>th</sup> July were reported in the Nation newspaper of 26<sup>th</sup> July, 2000, as **Report 1**, herein. Mr Wachira appeared for the plaintiff respondent, and Mr Mutua for the Applicant, Julia Kaniaru. The proceedings were recorded as follows:

*“25.7.2000*

*Wachira: The defendant, after eviction of 30.6.2000 took a date ex parte for tomorrow 26.7.2000. We were not served.*

*Mutua: The plaintiff is demolishing properties on the defendant's land. This started subsequently after 18.7.2000. The plaintiff was an advocate for the defendant, since 1994. He was acting for him in respect of the suit HCCC No, 1728 of 1988 and HCCC No, 809 of 1994. These cases are in respect of the same properties – i.e. the defendant was having problems with his employer and Machira was representing him. Machira knew or ought to have known that the defendant was of unsound mind. When he purported to have purchased this property, he knew that that plaintiff (sic: defendant) was of unsound mind, he ought to have sought leave of the court to apply for somebody to represent the defendant.*

*My client through the wife says that they have never been served with any document.*

*By Court: As there are allegations that the suit premises have been sold and transferred with no payment, whilst the plaintiff advocate is aware of the fact that the defendant is unwell (unsound mind), the matter appears to be urgent. I direct that the application be served for hearing. Application to be heard inter partes tomorrow 26.7.2000 (sic) at 10.30 am.”*

49. I have noted the following critical discrepancies and differences between **Report 1** and the Proceedings. In **Report 1 “Lawyer flattens client's house”** the defendants make reference to the client's matrimonial home, which is not referred to in the Proceedings. Report 1 indicates that the *plaintiff's lawyer* confirmed in court that his client had “flattened” Mr Kaniaru M's home, which is not in the proceedings. Report 1 makes reference to the suit property as being valued at Shs 16 Million, which is not indicated in the proceedings. Unlike Report 1, the proceedings do not indicate that the court was told that Mr M was admitted at Mathari Mental Hospital, though the proceedings indicate that he was alleged to be unwell (of unsound mind). Report 1 indicates that “*the Judge further restrained Mr Machira from further demolitions*”, when this was neither factual nor evident from the proceedings. Finally, Report 1 states that the court was told that Mrs M was neither aware of the purported sale of the property to Mr Machira, nor that any money had had been paid to her family, whilst this is not reflected in the proceedings. It must be recalled that the chamber summons application and annexed documents had not been broached or heard at this point.

50. On the basis of the foregoing, I find the defendant's **Report 1** to be generally inaccurate and exaggerated. That notwithstanding, it is clear that the court was made aware that Mr P K M, the client, was unwell or of unsound mind, a fact repeated by Justice Aluoch whilst determining the urgency of the application.

51. The proceedings of 26<sup>th</sup> July, 2000, reported by the defendants in **Report 2** in the Nation of 27<sup>th</sup> July, 2017, are as follows:

*“26.7.2000*

*Coram:*

*Aluoch, J*

*Interpreter – Kaniaru*

*Kowade assisted by Wachira for JP Machira, the plaintiff*

*Mutua for the applicant*

*Kowade: I have instructions from my client that there has been gross misreporting of the proceedings of yesterday in this court.*

*My client has had problems with the press before and the matter even went to the Court of Appeal. Things have been reported which my Lord you did not order. I have all the papers with me.*

*Court: I have not had time to read the newspapers, but if there is a misreporting then I direct the newspapers concerned to correct accurately in the future.*

*Court: The parties were not able to tell me what the “status quo” is at the suit premises so I could not make any order to that effect.*

*Mutua: As we sit here, one of the buildings has been completely demolished, this was a timber building of four rooms with concrete foundation. The second building is a permanent stone building serving as the matrimonial home. All the doors were removed plus all the windows. Secondly, the plaintiff has posed eleven security guards at the entrance and my client cannot go in.*

*Kowade: The court bailiff who was authorized by this court carried out eviction order on 30.6.2000.*

*Mutua: I require time to respond to this replying affidavit.*

*By Court: Leave is granted to the applicant/defendant to file a reply to the replying affidavit.*

*Further by Court: Hearing of the application to be on Monday, 31.7.2000 at 9.00 a.m.”*

52. In **Report 2, “Woman kept off disputed property”**, the following critical inaccuracies and discrepancies are evident relative to the court proceedings: The Report does not indicate that the plaintiff’s counsel complained about the mis-reporting or accuracy of the newspaper reports, an aspect which took almost half the time in the proceedings, nor is the court’s order thereon reflected in Report 2; the Report 2 states that Mr Machira said he bought the property, worth Kshs16 million from the client’s husband, but the proceedings have no such record; the Report refers to the Mrs Kaniaru’s husband as being admitted at Mathari Mental Hospital, which was not recorded in the proceedings; The Report refers to Mrs Kaniaru and her four children being evicted whilst the proceedings make no reference to the eviction nor to the children; the Report states that Mrs Kaniaru told the court she was threatened with “dire consequences” if she stepped on the premises, which is not reported in the proceedings; Mr Mutua is alleged in the Report to have said that Mr Machira and his staff had written to court staff and castigated them for allocating a hearing date without notifying him whilst in the proceedings there is no such record. The Report also failed to mention the important fact stated by Mr Kowade for the plaintiff that a court bailiff had been authorised by the court to carry out the eviction.

53. On the basis of the above observations, I find that the defendant’s Report 2 was also inaccurate and exaggerated, to the extent identified above.

54. The hearing of the application finally came up on 31<sup>st</sup> July, 2000, when the chamber summons, the affidavits and the annexures thereto were referred to by the parties and the court, including the letter from Mathari Hospital and documents relating to the sale agreement for the suit property. The hearing was contained in Report 3 published by the defendants. For better context in the judgment, I have reproduced the court proceedings later herein.

55. However, having carefully compared defendant’s Report 3 with the proceedings of 31<sup>st</sup> July, 2000, I am of the view that Report 3 generally covered what transpired in the proceedings, but in far less detail. That Report is not, in my view, either generally exaggerated or an inaccurate report of what transpired in the proceedings. Further, the day’s proceedings ended with the plaintiff’s counsel seeking another hearing date to reply, as he was to appear before another judge on a different matter. This explains why the plaintiff’s side of the story is not contained in the proceedings of that day, and likewise, in Report 3.

56. The question which arises in my mind now is whether the defendants were entitled to look into and report on the affidavits of Mrs Julia Kaniaru and her other filed documents contained in the chamber summons before they were “brought up”, so to speak, in open court or into the hearing of the application.

57. I think that the object of the rule on absolute privilege is that it is intended to protect newspapers that report the content of what happened or was said in court during proceedings. It is not intended to give protection regarding material which has not been heard by or put to the court during the judicial proceedings. So that, I find that in this case, the affidavits of Mrs Kaniaru from which the defendant reporter mined information for his reports before the chamber summons application had been fixed for hearing, were reported upon prematurely, and without privilege. Thus, Reports 1 and 2 have more information than had been raised before the judge on 25<sup>th</sup> and 26<sup>th</sup> July, 2000, according to the record of proceedings prior to the hearing of the actual application. This resulted in the substantial inaccuracies and differences between the two reports and the proceedings, and led to the overall misreporting and appearance of unfairness and bias towards the plaintiff.

58. I am fortified in my conclusions on the issue of privilege by the legal authorities that seem to suggest that until documents are formally put on the floor or raised in open court, or become the subject of the attention of the judge, they would generally not be amenable to publication in a newspaper. As such, they would not be entitled to privilege. In **Gatley on Libel and Slander 9<sup>th</sup> Ed pg 319 para 13.44**, it is argued that:

***“Privilege will, of course attach to the publication in a newspaper of a document read out in open court and filed as an exhibit in an action or to a fair and accurate statement of the contents of such document, but privilege will not attach to the publication in a newspaper of the contents of pleadings, affidavits, or other papers filed in civil proceedings and not brought up in open court.”***

59. Accordingly, the answer to the first issue is that the proceedings which the defendants reported on were court proceedings in terms of **section 6 of the Defamation Act**, but Reports 1 and 2 are not privileged, as they were not fair and accurate. Report 3 was a fair representation of the proceedings that occurred in court, and though not restated in the same words as the proceedings, it was nevertheless in consonance with them.

***Whether the publications by the defendants were false, malicious, spiteful, ill- motivated and defamatory of the plaintiff***

60. Having found as above, it is now necessary to determine whether the defendants' Reports 1 and 2 were false, malicious, spiteful and defamatory of the plaintiff.

61. During the hearing, the plaintiff gave substantial evidence of examples of facts tending to show that the defendants were mistaken, untruthful or spiteful. Some of the evidence that the court cannot take into account includes findings that were subsequently made by the court – long after the fact of publication of the reports – and which are now supportive of the plaintiff. For example, the fact that Mrs Kaniaru's chamber summons was eventually dismissed in 2002, and the court declined to enjoin her in the suit, cannot be taken into account in support of evidence of mistake, malice, spite and the like.

62. I start with Report 1. The defendants in their defence admitted that with regard to the source of their figure of Shillings sixteen (16) million stated in Report 1 for the suit property, they obtained it from the affidavit of Julia M. This is stated in their amended defence at **paragraph 5 (xxv) (c)** where they aver:

***“That the figure of Kshs 16 Million was stated in the affidavit of Julian Wambui M sworn on the 17<sup>th</sup> day of July, 2000 and filed in HCCC No 113 of 1999”***

As earlier pointed out, this amounted to mining information from documents that had not been brought up on 25<sup>th</sup> July, 2000 according to the proceedings, and are therefore not privileged. The question is: why did the defendant reporter lay out this information in Report 1 which the parties had not referred to in the application for urgency? The chamber summons was indeed yet to be heard – which happened on 31<sup>st</sup> July, 2000. It raises the prospect or suspicion that the defendant was sensationalising the matter at that stage and not reporting the proceedings as nearly as they actually occurred.

63. The other discrepancies in Report 1 also call for explanation. For example, the statement that *“Mr John Patrick Machira's lawyer confirmed before Lady Justice Joyce Aluoch that his client had flattened Mr P K M's house”* was at best false, cheeky and unfair as there is no record of such in the proceedings of 25<sup>th</sup> July, 2000. In this regard, the bold title to the newspaper Report 1: *“Lawyer flattens his client's house”*, read in the context of the whole report, was therefore suggestive of the fact that the plaintiff had admitted to unfairly demolishing the client's house.

64. The statement that P K *“was currently admitted at Mathari Mental Hospital, Nairobi”* is also inaccurate as it was not reflected in the proceedings, but only in the affidavit of Julian Wambui M of 17<sup>th</sup> July, 2000 and in the letter from the hospital to which no reference was made in the proceedings.

65. The statement that the judge restrained Mr Machira from further demolitions was again an outright falsehood as there was no mention of the restraining order on 25<sup>th</sup> July, 2000. The order restraining demolitions was finally issued by Kuloba, J on 31<sup>st</sup> July, 2000, after hearing the applicant's side of the story in the chamber summons application.

66. With regard to Report 2 of 27<sup>th</sup> July, 2000, the inaccuracies and discrepancies are as earlier pointed out. This is my appreciation of them in the context of the present issue for determination.

67. The first one third of the time (eight of twenty-three sentences of the proceedings) recorded on this day, was spent on a complaint by the plaintiff's lawyer on the issue of mis-reporting and inaccuracy of the newspaper reports, and the court's response and order that corrections be made. Yet none of this was reported by the defendants. This is all the more astounding given the fact that the plaintiff had already personally delivered to the defendant, on the same day, his demand letter of 26<sup>th</sup> July, 2000, pointing out the various errors in the report, giving details of the correct information, and seeking publication of a correction and apology on 27<sup>th</sup> and 28<sup>th</sup> July, 2000. This letter was ignored, which suggests that although the defendants had opportunity to correct or verify the critical facts, they either negligently or wilfully declined to do so.

68. Secondly, there is the inclusion in Report 2 of the alleged value of the suit property of Kshs 16 million, which is not contained in the proceedings. That is to say, according to the proceedings, that issue never arose. This lends credence to the plaintiffs apprehension that it would be implied by anyone reading the newspaper report that he had bought the property – worth Kshs 16 Million – at a throw away price by taking advantage of the illness and state of his client.

69. Thirdly, the Report refers to Mrs Kaniaru's husband as being presently admitted at Mathari Mental Hospital, which was not recorded in the proceedings. As stated elsewhere, at this point of the proceedings the chamber summons had not been heard, and the proceedings do not show that the affidavit or attachments had been referred to. This information, relayed to readers and the public together with the information on the allegedly high price of the suit property of Kshs 16 Million, suggests that the dire state of the plaintiff's client had truly been taken advantage of by the plaintiff, and reinforces the implication that he was callous, conniving and uncaring.

70. Fourthly, Report 2 refers to Mrs Kaniaru and her four children as having being evicted whilst the proceedings of the day make reference neither to the eviction nor to the eviction of children. In essence the Report introduces new evidence which is found only in the applicant's affidavits, but not alluded to during the proceedings. This appears, in my view, to be false reporting.

71. Fifthly, Report 2 states that Mrs Kaniaru told the court she was threatened with “*dire consequences*” if she stepped on the premises. In fact, according to the proceedings, neither Mrs Kaniaru nor her counsel told the court of any such threats. This is an exaggeration which I agree with the plaintiff as tending to paint him as callous and cruel, and which is not reported in the proceedings.

72. Finally, and very significantly, Report 2 failed to mention the important fact stated in court by Mr Kowade for the plaintiff, that a court bailiff had been authorised by the court to carry out the eviction. Had the Report stated this fact, it would have tempered the negative impression created that the plaintiff had acted improperly, cruelly and without concern for his client or his client’s family. In other words, the defendants failed to exercise fairness in their coverage by balancing the utterances of both parties and instead reporting only the negative aspects related to the plaintiff.

73. Taking the cumulative effect of Reports 1 and 2 together and in light of the above reasons, I find that they were biased, unfair, and false reporting in Reports 1 and 2 that resulted, overall, in defaming the plaintiff by painting him in a light that was unsavoury and demeaning. The defendants, to be protected from defamation, were under duty to give fair and accurate coverage of the proceedings.

#### **Damages and costs**

74. A successful plaintiff is naturally entitled to damages. The plaintiff sought a global figure of damages amounting to Kshs 24 million. The defendants suggested that in the event any award is made, it should not exceed 800,000/-.

75. The plaintiff gave evidence concerning how he had been negatively perceived by his friends and clients as a result of the reports. He testified that he was an advocate of many years standing, having been in practice since his admission to the bar in 1975. That in light of his present experience and the past litigation on defamation which he had succeeded against the defendant newspaper, he felt that there was something of a vendetta that they had against him. That is why they ignored his letter demanding correction and apology. That in light of the reports, he had no way of defending his character. That as long as the defendants newspapers remain in print and possibly on internet, he would continue to be the brunt of defamatory material without recourse.

76. PW2. Mr James Macharia Gichuki, a good friend of the plaintiff testified that he had known the plaintiff for almost forty years. As friends, they shared experiences and he became aware that the plaintiff was buying land from Mr Kaniaru. He accompanied the plaintiff on several occasions to see the land, and there met Mr Kaniaru, who appeared to him to be very sound and balanced. He came to know Mr Kaniaru as a practising accountant in 1989 and in the 1990’s. PW2 was therefore surprised to read in the newspapers that the plaintiff had bought land from a person of unsound mind. He testified that the newspaper reports were embarrassing both to him and to the plaintiff, whom he knew as a respected lawyer all those years. People began to ridicule the plaintiff saying “*look, your friend is stealing from a poor and helpless lady*”

77. At the clubs which he and the plaintiff patronised, people would make jokes about the plaintiff, and word grew that the plaintiff took advantage of people. He himself was frequently embarrassed to be with the plaintiff because the damage to the plaintiff’s reputation and integrity was great. That it is very difficult to come out of such a damaging scenario. PW2 recalled an occasion when he and plaintiff were at Railways Club, and people stared pointing at the plaintiff saying “*that is the one*”.

78. I have no doubt that the plaintiff was injured in his reputation as an advocate of many years’ standing. An advocate depends on his professional reputation for a continued flow of clients and hence his livelihood. The Nation newspapers, the defendant, have a national circulation, and therefore numerous people have access to information published by them.

79. In **John v MGN [1996] 3 W L R 593 at 607**, Bingham, MR stated:

***“The more closely it [the defamation] touches the plaintiff’s integrity, professional reputation, honour, courage, loyalty and the core attributes of this personality, the more serious it is likely to be”***

80. It is trite law that there is no set formula for assessing damages. The common method appreciated in practice is to compare cases of similar nature and take a perspective of damages based on such comparisons.

81. I have considered the various authorities cited to me by the parties. I do not see the need to delve into the details of the circumstances of each case, given the unusual circumstances in the present case, which I will set out shortly. In particular, there are those cases involving advocates of the High Court, where defamation has been found as against defendants.

82. In **Samuel Ndungu Mukunya v Nation Media Group and Another [2016] eKLR** the plaintiff was awarded Kshs 20,000,000/-. The circumstances of that case are far more egregious than in the present case. In **J P Machira v Wangethi Mwangi and Nation Newspapers Nairobi HCCC No 1709 of 1996**, the plaintiff was awarded 10,200,000/= in 2001. In **Daniel Musinga v Nation Newspapers Ltd Mombasa HCCC No 102 of 2000**, the plaintiff was awarded Kshs 10,000,000/= in May, 2005. In **CK Kariuki v the StandardLtd and Association of Kenyan Insureres Meru HCCC No 5 of 2000** the successful plaintiff was awarded global damages of Kshs 20,000,000/= in 2001.

83. In assessing damages, I have considered the nature of the publications complained of. I note that essentially, the defendant sought to report the proceedings taking place in court. These would have been privileged, but I found as shown here above, that the reporter was unfair and inaccurate in capturing each day’s proceedings and also mined information from pleadings which had not been brought up to the attention of the judge in the proceedings.

84. One complication I have encountered in the present case is the fact that Report 3 contained a fairly accurate record of the proceedings of 31<sup>st</sup> July, 2013. In the court proceedings, the detail of negative content recorded about the plaintiff is even more. The content covers all the

matters covered under Reports 1 and 2, which the plaintiff has complained about. The conundrum that now faces the court, and which was not addressed by the parties, is: where the information presented to the court in proceedings contains material that would otherwise be defamatory, except for privilege, but such material has, for several days before becoming privileged, been published, what is the effect of the latter material on the findings of defamation earlier made?

85. Put another way, I have found Reports 1 and 2 to contain defamatory material. Those reports were published on 26<sup>th</sup> and 27<sup>th</sup> July, 2000. On 31<sup>st</sup> July, 2000, a report was published that reiterated all the material in Reports 1 and 2, but being a fair record of the court's proceedings, privilege is attached to it under section 6 Defamation Act. Since the latter report cannot aggravate the defamation, what is its potential effect on the outcome?

86. In my view, the defamatory effect is watered down and diminished by the latter privileged material. There remains defamation for a period, in respect of Reports 1 and 2, but its full effect is watered down by the latter similar material which is reported but is now privileged. As stated, this issue was not addressed by the parties, and I have not come across of any authorities thereon.

87. For completeness and context, I now set out the content of the proceedings of 31<sup>st</sup> July, 2000 as follows:

**“31.7.2000**

**Coram: Kuloba, J**

**Kabetu – Court Clerk**

**Mr. Mutua for applicant**

**Mr. Kowade with Mr. Wachira for respondent**

*Mr. Mutua: The application is the amended chamber summons dated 17<sup>th</sup> July 2000. It seeks to set aside a default judgement entered on 14.4.1999 against the defendant in default of appearance, defendant's wife assigned as guardian and litem to appear and defend the suit; a temporary injunction to restrain the plaintiff from continuing with any further demolition of the defendant's houses; the plaintiff to hand over vacant possession of the suit property, retransfer of the property to the defendant.*

*There are 3 grounds for seeking these orders. 1<sup>st</sup> ground is that the defendant being a person of unsound mind or being mentally sick was incapable at the commencement of this suit to be made a party. The suit was filed on 22.1.1999 and at the time the defendant was admitted at Mathare Mental Hospital. See “JNM1”, a certificate issued by Dr. J.M Irungu, dated 6<sup>th</sup> July 2000. These facts were known to the plaintiff who had been the defendant's advocate in respect of this particular property for a long time, in HCCC 1728 of 1988 and in HCCC No. 809 of 1994. There is no way the plaintiff would have failed to know that the defendant was a person of unsound mind.*

*2<sup>nd</sup> ground on which we rely is with regard to service of summons. Applicant denies that summons to enter appearance was served. Mr. Njoroge Wachira who swore an affidavit of service says he received instructions from plaintiff to serve the summons to enter appearance. The plaintiff was at the time represented by an advocate, Messrs S.K. Ritho & Co. Advocate. So the plaintiff could not give the instruction to serve process. Again the affidavit of service is full of contradictions. E.g. in para 5 he says he exchanged greetings and pleasantries with the defendant and he allowed defendant to read the documents and allegedly the defendant refused to sign acknowledging receipt. But in para 6 the defendant allegedly told Mr. Wachira that he would not like to have a long legal tussle with the plaintiff. This does not agree with the defendant refusing to sign the papers.*

*Again, there are a number of affidavits of service in these proceedings, and yet in none of them the different persons served ever signed acknowledging service. E.g. Page 5 it is also said that even a big corporation, Kenya Re-insurance Corporation, also refusing to sign acknowledging receipt. Note that Mr. Wachira said he received instructions to serve just before midnight, i.e. at 11.30 p.m. it is same Wachira who served process as shown at p.139. He says at para. 3 that he was directed by plaintiff on where to find defendant, yet in para. 3 at p.15 he says he had known defendant all along.*

*3<sup>rd</sup> ground is that the proceedings in this suit have been marred by serious irregularities, misrepresentation and concealment of material facts. Had the court been put in a full picture this suit would not have been entertained, leave alone granting any order in this suit. There are 6 irregularities. 1<sup>st</sup>, this suit was premature, uncalled for and baseless. At p.118 is a sale agreement. It shows contractual complete date to be 6<sup>th</sup> December 1989. At page 182 is agreement extending the completion date until two court cases are finally determined. At p.187 is another extension to await determination of HCCC No. 809 of 1994. That case has not been heard and determined. That is why we say this suit is premature. Plaintiff came to court seeking specific performance. In order to succeed, plaintiff must have done everything on his part of the contract. By 14.4.1999 when Judgement in this suit was entered, the only money the plaintiff had paid was Kshs. 557,250/= out of a purchase price of Kshs. 2.625,000/=. So, the Judgement was uncalled for. Had the court been informed of these facts it would not have entered the judgement. Even as of now the money paid by plaintiff is less Kshs. 498,465.50/=. That is, plaintiff had not paid the full purchase price. This is a serious fact concealed. Another factor at the time the suit was filed, defendant was plaintiff's client in respect of the same property in the 2 suits. Leave to withdraw from acting was granted to the plaintiff on 15.3.1999, but was not served on the defendant until 27.11.1999 (see p.86). The plaintiff never told the court the conflict of interest. While purporting to act for defendant he was acting for himself.*

*The order appearing at pp. 44-45 by consent, is still in force. The application at p.56 is another attempt to conceal material fact -*

*the way the release of the document was to be made was specified in the order at pp. 44-45. But plaintiff wished in his application to change it. The account of payment made to Kenya Re-insurance does not agree with annexure marked 9 in the affidavit of applicant. This means that plaintiff would walk away with the property and leave the defendant's estate with a debt of Kshs. 3 million.*

*Finally, at para 20(d) of replying affidavit of John Patrick Machira, he says he took over case on humanitarian grounds and that he filed case free of charge. This humanitarian advocate, at para 14 deducted a sum of Kshs. 63,000/= for his fees. At para 56, humanitarian advocate had "old timber house", pulled down by auctioneers. Arrogance of plaintiff demonstrated para 57 and 58 of the same replying affidavit.*

*Disregard documents appearing at pp. 20 to 43, because they do not relate in any manner to the transaction. At most they are personal letters, not signed, not copied to plaintiff and he does not state how he came across them. They are inadmissible.*

*For these reasons, we ask for prayers sought.*

**R. KULOBA, JUDGE**

31.5.2000

**ORDER**

*As it is time over and Mr. Kowade says he is before another judge and he cannot be present, Mr. Kowade is to reply on 20.9.2000, at 2.30; no more demolitions till that date.*

**R. KULOBA, JUDGE**

31.7.2000"

88. From the above, it is clear that Report 3 of the Defendants contained even less content than is contained in the proceedings.

89. Thus, doing the best I can in the circumstances, and in light of the foregoing, I would assess the damages to the plaintiff at Kshs 5,000,000/=. I have taken into account the third and very substantial report covering all the similar material complained of in respect of Reports 1 and 2 whereby privilege was granted. In my view the third report having been found to be privileged, this diminishes the injury and damage to the plaintiff and reduces damages.

**Disposition**

90. Given all the foregoing findings, the analyses of comparative suits and awards discussed herein and the circumstances of this case, the defendant shall pay the plaintiff a composite figure of damages of Shs 5,000,000/=.

91. The plaintiff is also awarded the costs of these proceedings, with interest at court rates.

Orders accordingly.

**Dated and Delivered at Nairobi this 27<sup>th</sup> Day of September, 2018**

\_\_\_\_\_

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1.....for the Plaintiff

2.....for the Defendant

3. Court Clerk.....