



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO 74 OF 2013**

SELINA AMBE .....1<sup>ST</sup> PLAINTIFF

CAPACITY BUILDING &

RESEARCH COMPANY LTD.....2<sup>ND</sup> PLAINTIFF

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF STATE FOR

PUBLIC SERVICE .....1<sup>ST</sup> DEFENDANT

THE HON. ATTORNEY GENERAL .....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

By dint of a plaint dated 28<sup>th</sup> February and filed on 1<sup>st</sup> March, 2013 the plaintiffs pleaded that they were engaged in the business of offering consultancy services to private and public institutions and individuals. It is their case that they participated in a tender by giving a consultancy proposal for evaluation of the Government of South Sudan /Government of Kenya Technical Training and Capacity Building: Tender No. MSPS/GOSS/05/2011 – 2012 and restricted tender No. MSPS/GOSS/05/2011 – 2012 (Re-invitation).

Following some concerns, the plaintiffs wrote a letter to the 1<sup>st</sup> defendant and allegedly copied the same to the Ethics and Anti-Corruption Commission as well as the Public Procurement Oversight Authority complaining about the handling of the tender. The plaintiffs' letter aforesaid was dated 5<sup>th</sup> June, 2012. The said letter elicited a reply by the 1<sup>st</sup> defendant dated 12<sup>th</sup> June, 2012 which contained in part the following words,

**“Canvassing to influence the tender outcome is unethical and this is evidenced by the fact that your first letter of complaint was written before the Ministry communicated the outcome of the tender. How would you know that you won without any formal communication?”**

**“That the restricted tender was processed strictly in accordance with the Act and no unfair treatment was done on your part. Instead you made attempts to influence the outcome of the tender in your favour which is unethical.”**

The plaintiffs have cited the above extracts to underscore that they were understood to refer and meant to be understood by right thinking members of the public that, the 2<sup>nd</sup> plaintiff is a dishonest consultancy company, fraudulent and corrupt business entity; is unethical and unscrupulous and engages in unjust enrichment of itself. Further and in the alternative, that without prejudice to the above, the words were meant and understood to mean by way of insinuation and innuendo that the plaintiffs did not owe their success to hard work and prudent management, and carried on business in complete and utter disregard of the law and engaged in criminal and illegal activities.

It is also the plaintiffs' case that they have lost business and have been injured in their credit and reputation, and brought into the public scandal, odium and contempt. It is their case that prior to the publication of the libel they were a leading consultancy company in Kenya and enjoyed extremely high esteem and respect from many organizations and companies in the business community.

It is further the plaintiff's case that the 1<sup>st</sup> defendant knew or ought to have known that the publication of the said letter would result in defamation proceedings. A notice of intention to sue was given to the 1<sup>st</sup> defendant who was asked to furnish a written apology and retraction of the entire content of the letter and admission of liability. However the defendants failed, refused and or neglected to meet any of those demands.

This therefore is a claim for general damages, aggravated or exemplary damages and costs of the suit.

In their statement of defence, the defendants denied the plaintiffs' claim and in particular that the plaintiffs' letter dated 5<sup>th</sup> June, 2012 was copied to the Ethics and Anti-Corruption Commission or the Public Procurement Authority as alleged.

It is also the defendants' case that the plaintiffs' letter dated 5<sup>th</sup> June, 2012 amounted to an attempt to influence the tender outcome in contravention of Section 38 (i) (a) of the Public Procurement and Disposal Act Chapter 412 C Laws of Kenya.

Contravention of Section 38 (i) (a) of the Act is an offence as provided under Section 38 (2) for which one is liable on conviction to a fine or imprisonment. The defendants also denied that the words in the letter dated 12<sup>th</sup> June, 2012 were false and malicious or that they concerned the plaintiff. On the contrary, what was written in the said letter was fair comment and made in good faith and without malice pursuant to Sections 37 (i) and 38 (i) (a) of the Act. The defendants therefore prayed that the plaintiffs' suit be dismissed with costs.

I have set out the pleadings of the parties above extensively in view of what I am about to state herein below. When this suit came up for hearing, on 17<sup>th</sup> November, 2016, only the 1<sup>st</sup> plaintiff appeared and ready to prosecute the suit while the defendants or their advocates did not. Upon confirming that a hearing notice had been served, the court decided to proceed with the hearing.

After receiving the 1<sup>st</sup> plaintiff's evidence, an order was made to file submissions which was done. Again the defendants were served with a copy of the plaintiffs' submissions but once again they did not reply thereto.

The plaintiffs through counsel have cited some authorities attached to their submissions to justify their claim. It is true that the plaintiffs' letter dated 5<sup>th</sup> June, 2012 was not copied to either the Ethics and Anti-corruption Commission of the Public Procurement Oversight Authority. However, the letter by the 1<sup>st</sup> defendant dated 12<sup>th</sup> June, 2012 addressed to the plaintiffs was copied to the Permanent Secretary and the Director General, Public Procurement Oversight Authority. There was therefore publication of the said letter.

The 1<sup>st</sup> plaintiff is a Director of the 2<sup>nd</sup> plaintiff and testified in that capacity. The participation in the tendering process was in the name of the 2<sup>nd</sup> plaintiff but all correspondence was signed by the 1<sup>st</sup>

plaintiff as Managing Director. She was and still is the face of the 2<sup>nd</sup> plaintiff. Her testimony in this court and as contained in her witness statement dated 28th September, 2012 which she adopted as her evidence in chief, reinforced the pleadings and the case against the defendants.

I have already noted that the defendants and their counsel did not attend the trial, to justify the contents of their statement of defence. Pleadings in any case are not evidence, and a party is required to present evidence to support such pleadings. In the absence of any evidence to contradict what the 1<sup>st</sup> plaintiff stated, her evidence remains uncontroverted.

There is no evidence to show either by way of correspondence or any other way that the plaintiffs canvassed to influence the tender outcome or to secure any favour in the process. There is also no evidence that the plaintiffs applied any unethical practices to secure a favourable outcome in the process. Further, despite the 1<sup>st</sup> defendant alleging that the plaintiffs may have committed an offence, no charges were preferred against them. The allegations in the letter dated 12<sup>th</sup> June, 2012 by the 1<sup>st</sup> defendant were serious but unsupported by any evidence.

I agree they were damaging to the reputation of the plaintiffs, whose claim that they have been participating in the tendering process with the 1<sup>st</sup> defendant has not been contradicted. The allegations were published to third parties. In the absence of any evidence to justify any such serious allegations, there is no doubt that the image, reputation and business standing of the plaintiffs was affected adversely.

The 1<sup>st</sup> plaintiff has not mentioned failure to secure any tender as a result of that publication either from the defendants, any other Ministry or business entity. Such information would only be within the knowledge of the plaintiffs and failure to do so may be inferred to mean that the 1<sup>st</sup> defendant's letter had negative effects within that Ministry alone. There is no doubt however that the plaintiffs suffered loss as a result of the said publication. The defendants cannot escape liability; I so find.

I have looked at the authorities cited by counsel for the plaintiffs as a guide to arriving at what I consider to be a reasonable award in terms of damages. – see **Kitto Vs. Chadwick & Another (1975) Ea 141, Hccc No. 1709 Of 1996 J.P Machira Vs. Wangethi Mwangi & Another, Johnson Evan Gicheru Vs. Andrew Morton & Another (2005) e KLR, Nation Media Group Limited & Two Others Vs. John Joseph Kamotho & 3 Others (2010) e KLR.** The plaintiffs have to be vindicated for the wrong done while considering that any award may not restore a reputation of a party. The defendants did not reply to the demand letter addressed to them by the plaintiffs.

Doing the best I can with the material before me, I believe an award of Kshs. 5,000,000/= (five million) is adequate compensation in terms of general damages suffered by the plaintiffs as a result of the 1<sup>st</sup> defendant's unfounded publication. In addition, I award a sum of Kshs. 1,000,000/= (one million) aggravated damages.

In the end there shall be judgment for the plaintiffs against the defendants jointly and severally in the total sum of Kshs. 6,000,000/= (six million).

The plaintiffs shall also have the costs of the suit and interest at court rates.

***Dated, signed and delivered at Nairobi this 29<sup>th</sup> Day of March, 2017.***

**A. MBOGHOLI MSAGHA**

**JUDGE**