



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2002 OF 2000

J. P. MACHIRA T/S

MACHIRA & CO. ADVOCATES..... PLAINTIFF

V E R S U S –

WACHIRA WARURU.....1ST DEFENDANT

THE STANDARD LIMITED..... 2ND DEFENDANT

JUDGMENT

1. J.P. Machira T/A Machira & Co. Advocates , the Plaintiff herein, filed a compensatory action against Wachira Waruru and The Standard Ltd, the 1st and 2nd Defendants respectively vide the plaint dated 30th November, 2000. The Plaintiff has identified three publications published by the Defendants to be libelious, defamatory and malicious. The first was published on 26.7.2000 with the heading **“Mathari Inmate’s wife in a bid to save property”**. The second was published on 27.7.2000 with the heading **“Woman is fearing for her life, says lawyer”** and the third was published on 1st August 2000 with the heading **“Demolition of ill man’s home stopped by court”**. The Plaintiff filed this suit seeking for an apology, general and aggravated damages plus costs of the suit.

2. When served with the summons and the plaint the Defendants filed a statement of defence to deny the Plaintiff’s claim. At the close of the Plaintiff’s evidence, the Defendants through their advocate closed their defence without summoning witnesses to testify in support of their case.

3. The Plaintiff testified in person and also summoned one Ernest Stephen Kamau to testify. J. P. Machira (PW1) adopted the contents of his two witness statements in his evidence. PW1 also relied on the documents contained in his list of documents which were produced as exhibits in evidence. PW1 told this court that the aforesaid publications were malicious and defamatory articles about him. He alleged that the Defendants never bothered to contact him before publishing the offending articles. PW1 said that the articles were given unusual prominence. He also said that all the articles about him were false, malicious, spiteful and defamatory of him and were published in a sensational manner. PW1 further claimed that there was bad blood between him and the Defendants in that, earlier on, he had filed a suit against the Defendants in similar circumstances whereof the Defendants had alleged that he had stolen client’s money. He stated that the Defendants published the present complained of articles so as to intimidate, demean and to discredit him ahead of the hearing and determination of the said H.C.C.C no. 612 of 1996. He further alleged that the offensive articles and publications were purely meant to harass, discourage and deter him from proceeding to prosecute this suit and to further give members of public the impression that he was a dishonourable and a dishonest advocate. PW1 also alleged that the publications arose out of proceedings over an application conducted in chambers and not in open court therefore the

Defendants were not justified. The Plaintiff further stated that the allegations and publications by the Defendants to the effect that he bought L.R. No. 12252/3 Karen from an insane person at ksh.3,000,000/= as opposed to ksh.16,000,000/= were meant to discredit his professional status and integrity. He stated that P K M who sold him the aforesaid land was very sane and the issue of insanity was a creation of his wife and the Defendants so as to defraud him. He claimed that he acted fairly towards Mr. P K M and there has never been any conflict of interest in his dealings with and his family. PW1 further stated that the Defendants knew and or ought to have known that this court had issued eviction orders against P K and his family from the suit premises and this eviction was carried out by a court bailiff and not him but because the Defendants were actuated by malice and spite they were not interested in knowing the truth. Mr. J. P. Machira argued that the objectives of the Defendants were to make members of the public and his clients to shun him. He urged this court to award him general damages.

4. Earnest Stephen Kamau (PW2) testified in support of the Plaintiff's case. PW2 told this court that he has known PW1 for many years. He stated that he deals with the sale and purchase of properties and managing real estate. PW2 claimed he witnessed a sale transaction between the Plaintiff and P K. PW2 said that he is aware Town Properties Ltd, a firm he worked with had advertised L. R. No. 12252/3 Karen for sale and the Plaintiff got interested upon seeing the advert. The Plaintiff eventually bought the property at ksh,2,625,000/=. PW2 stated that in the aforesaid transaction, P K was represented by Gatumuta J. K. & Co. Advocates while the Plaintiff was represented by his firm of J. P. Machira & Co. Advocates. PW2 said on 26.7.2000 he read a newspaper report about the sale of the property which depicted the sale transaction as dubious and fraudulent. He said he knew the transaction as above board and that the parties involved were sane people. PW 2 said he found the article defamatory to the Plaintiff and was prompted to call and to console him.

5. The first issue to be determined is whether or not the offensive publication was defamatory to the Plaintiff. I have considered the evidence tendered by the Plaintiff's witnesses and the submission. It is the submission of the Plaintiff that those publications were defamatory to him. The Plaintiff argued that the publication of *ex parte* proceedings arising from a chamber summons heard in chambers are not protected and cannot therefore enjoy any privilege under the provisions of the Defamatory Act (Cap 36 L.O.K). The Plaintiff cited an excerpt from **Gatley on Libel and Slander P. 173** as follows

“The onus of proving that the report is fair and accurate lies on the Defendant, but it is sufficient if this clearly appears from the Plaintiff's own evidence. If the Defendants fails to prove that the report is fair and accurate the Plaintiff is entitled to succeed however honestly it may have been published.....”

6. Though the Defendants did not tender evidence their advocate however participated in the cross-examination of the Plaintiff and his witness. The Defendants also filed written submissions together with authorities. The Defendants pointed out that they pleaded in paragraph 5 of their defence that the words complained of constituted a fair and accurate report of proceedings conducted in court. In short the Defendants have stated that the publication was a report of exactly what took place in court. The Defendants produced in court the typed proceedings that captured what transpired in court on the material days before Lady Justice Joyce Aluoch(as she then was).

7. I have carefully perused the typed proceedings in respect of H.C.C.C. 113 of 1999 and produced as an exhibit by the Plaintiff. The first article complained of reads **“Mathari inmate's wife in a bid to save property”**. The Plaintiff took issue with this publication. The publication clearly states that the story was captured in proceedings in court. I have perused the proceedings of 25.7.2000 before Lady Justice Aluoch (as she then was) and it is clear that learned advocates appeared before the honourable judge to argue an application in a case between the Plaintiff herein and one P K M. In those proceedings Mr. Mutua learned advocate for Mr. K is quoted to have submitted that his client was unsound mind and the Plaintiff ought to have know that fact. In fact the court noted in **page 21** of the aforesaid proceedings in part that **“whilst that Plaintiff advocate is aware of the fact that the Defendant is unwell (unsound mind), the matter appears urgent.”** In my humble view I do not find the publication of 25.7.2010 to be false. The Defendant merely reported the proceedings as it were in eh court file albeit by using different words. The issue here is that this court is not looking at the truth or veracity of the submission but

whether what was reported is actually what was submitted in court.

8. The second publication which was cited was done on 27.7.2000 and titled:

“Woman is fearing for her life, says lawyer”.

Again, the Plaintiff took issue with that statement to be malicious, false and defamatory. The court record of 26.7.2000 which was reported on 27.7.2000 shows that Mr. Mutua, learned advocate for the Defendant/applicant had submitted that the timber structures on the suit land had been demolished and that windows and doors of the permanent building had been pulled down and that the Plaintiff had stationed security guards to the entrance and his client could not go in. The above words were attributed to a lawyer. In my humble understanding, I am unable to say that the above words are false and defamatory. I also do not understand how the aforesaid publication could be said to be defamatory to the Plaintiff. A critical examination of the proceedings will reveal that the publication can be deduced from what transpired in court.

9. The final offensive publication was done on 1st August 2000 and titled:

“Demolition of ill man’s home stopped by court”.

I have perused the proceedings of 31.7.2000 and it is quite plain that Mr. Justice Kuloba (as he then was) is recorded to have issued an order stating inter alia: “no more demolitions till that date”

10. It is obvious from the reading of the proceedings that the court had issued an order stopping further demolitions. The reporting in my view was accurate.

11. The Plaintiff has ably argued that since the proceedings were done in private and in chambers the Defendants ought not to have published the same. It is further submitted that the Defendants are not protected and cannot enjoy any privilege under the provision of the Defamation Act. The Plaintiff heavily relied on the case of **Rex =vs= Astor (1913) 30 TCR 10** in which Scrutton J stated as follows:

“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.”

12. A careful analysis of the above authority will show that a newspaper is not completely barred from reporting such proceedings. It is allowed to publish in part but not in full. It cannot be said that the Defendants published in full the proceedings in the instant case. It is therefore inconceivable for one to state that the Defendants are not protected and privileged under the provisions of the Defamation Act.

13. In sum I find that the Plaintiff has failed to establish to the required standard of proof of actual or intrinsic malice, ill will or spite on the part of the Defendants.

14. The other issue which has to be determined is the question of quantum. The Plaintiff has urged this court to award him a reasonable award in damages. The Plaintiff has stated in his submissions that on previous occasions he was awarded in cases of similar nature a sum of ksh.1,500,000/=. The Defendants on their part completely ignored the question relating to quantum.

15. In the circumstances of this case and looking at this court’s previous awards, and had the Plaintiff succeeded in this case I would have given him ksh,5,00,000/= as damages for defamation.

16. In the end I find no merit in this suit. The same is dismissed with costs to the Defendants.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant