



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 128 OF 2009

NOAH CHEBII.....PLAINTIFF

VERSUS

CHRISTINE CHEPKURUI CHANGWONY.....DEFENDANT

JUDGMENT

1. In his Complaint dated and filed on 11.05.2009 the Plaintiff herein claimed in paragraph 4 -

“4. On or about the 12th May 2008, the Defendant falsely and maliciously wrote and published or caused to be published of and concerning the plaintiff and of him in the way of his office or occupation, in the form of a typed written or computer printed letter dated 12th May 2008, written on her behalf and on her instructions to her lawyers KIPKENEI & CO. ADVOCATES and addressed to the District Land Registrar, Koibatek District and copied inter alia, the the Chairman, Koibatek Land Control Board, the words -

“He (the Plaintiff) has been interfering with the official records in your registry.”

2. The Plaintiff also claimed in paragraph 5 of the Complaint that -

“5. The said letter was, on the Defendant's instructions typed or printed by the staff of the said Advocates and was thereafter signed by an authorized person in the Advocates' Offices and was delivered in envelopes addressed by the said officers. The Defendant well knew at the time she gave the said instructions to her Advocates that the said letter was likely in the ordinary course of business to be opened and read by some Secretary or Clerk or other person in the employment of the Government at the Land Registry, Koibatek District and those at the Offices of the Chairman Koibatek Land Control Board. The said letters were in fact read by employees in the said offices and the same became the subject of discussions and disparaging comments by members of staff of the said offices.”

3. The Plaintiff claimed in paragraph 6 of his Complaint that the said words in their material and ordinary meaning meant and were understood to mean that -

“the Plaintiff was dishonest, corrupt, unreliable and had abused his office in the execution of his duties as an officer in the Lands Department and was therefore unfit to hold office, and that the said words also meant and were understood to mean that the Plaintiff had

acted in breach of his contract of employment and was guilty of misconduct and crimes under the Penal Code, the Public Officers Ethics Act, and other statutes.”

4. By reason of the foregoing the Plaintiff claimed that he had been greatly injured in his credit and integrity, character and reputation, and in his said office or occupation and had been brought into hatred, ridicule and contempt, and had suffered damage. The Plaintiff also claimed that despite a demand for an apology, the Defendant had refused and/or neglected to comply and hence this suit. For all those reasons the Plaintiff prayed for judgment against the Defendant for -

- (a) Damages,
- (b) Interest,
- (c) Costs,
- (d) Other relief the court may deem fit to grant.

5. In a Defence dated 3.06.2009 and filed on 4.06.2009, the Defendant denied all the specific allegations of the Plaintiff.

6. In addition the Defendant states in paragraphs 6 and 7 of the Defence that if any letter was written, typed and published in regard to the said matters (*which is denied*), then the words were published on an occasion of privilege, in that -

- (a) the words complained of comprised a fair, accurate, and justified enquiry emanating from the proceedings recorded in the minutes of a meeting held on various dates between the Plaintiff, the Defendant, and the elders of the Land Disputes Tribunal,***
- (b) the letter complained of was written and published in response to the admission of the Plaintiff that he had caused the revision of the terms of a written agreement dated 28.05.2003 signed between the Defendant and one Elima Jeruto Kipsiren in regard to the property then known as Title Number Baringo/Ravine/102-247 wherein the Defendant purchased a parcel of it measuring six acres which became Baringo/Ravine/102/46 after the sub-division of Baringo/Ravine 102-247.***
- (c) the letter complained of was published in absolute privilege to establish why and how the Plaintiff had caused the replanning, survey and sub-division of the six acres purchased by the Defendant is ... and unlawfully caused the reduction of the Defendant's portion in acreage in Baringo/Ravine/102/461 from 6 acres to 4 acres while alienating for himself two acres excised now known as Baringo/Ravine/462.***

7. In the **alternative**, the Defendant pleaded in paragraph 7 of the Defence that the said words were written and published on an occasion of qualified privilege in that -

- (a) the author of the letter is a practising Advocate and acted as an Advocate for both parties in an Agreement for Sale dated 28.05.2003 in regard to the property Title No. Baringo/Ravine 102-247 which was sub-divided into parcels in which Parcel E measuring 6 acres was specifically sold to the Defendant,***
- (b) in violation of the terms of the agreement between the Defendant and the Seller, one Elima Jeruto Kipsirem (who is the Plaintiff's mother), the Plaintiff without any lawful justification caused the survey and sub-division of Parcel E into Baringo/Ravine/102/461 measuring four acres, purportedly for the Defendant and Baringo/Ravine/102/462 measuring 2 acres which the Plaintiff caused to be registered in his own name without any colour of right,***

(c) the District Land Registrar and the Chairman Koibatek Land Control Board are, inter alia, mandated to receive complaints, investigate and take corrective action in regard to all land transactions in the District,

(d) in the premises, the Defendant, the District Land Registrar and the Chairman Koibatek Land Control Board had a common, or corresponding interest in the subject matter of the letter complained of and/or Kipkenei & Co. Advocates wrote and published the letter complained of in the reasonable execution of their mandate as Advocates for both parties in the sale of the suit land,

(e) the typing and publication of the letter complained of by the Secretary of M/s Kipkenei & Co. Advocates and its receipt thereof by the Secretary or Clerk of the District Land Registrar and the Chairman of the Koibatek Land Control Board in the ordinary course of business is protected by absolute privilege or alternatively by qualified privilege ancillary to the privilege herein pleaded.

8. The Defendant also contended that the Plaint is vague, inept, discloses no cause of action against the Defendant and should be struck out.

The Evidence

9. It was the Plaintiff's evidence that he was at the time of the publication of the allegedly defamatory letter a civil servant attached to the Ministry of Lands and worked at the Lands Registry, Eldama Ravine. The Plaintiff claimed that as a result of that letter he was moved from the District Land Registry to the Ministry of Water and Irrigation, and he is still a Clerk, and attached to the Irrigation Department.

10. The Plaintiff testified that he failed to understand why the Defendant wrote the letter in question, and involved him in a matter in which his mother, the Seller of the land, and not him, was involved. The Plaintiff explained that it was the failure of the Defendant to pay the balance of the purchase price that caused the reduction of the parcel being sold to her from 6 to 4 acres, and his mother the Seller, transferred the 2 acres to him. He denied that he was responsible for the sub-division and reduction of the land to be sold. He attributed the decision to his mother, and that the two acres were transferred to him by her.

11. In cross-examination by counsel for the Defendant, the Plaintiff admitted that the allegedly defamatory letter was written by Kipkenei & Co. Advocates on his instructions to the said Advocates that his mother, the Seller, had reduced, the acreage from 6 to 4 acres. Though the Plaintiff insisted that he suffered as a result of that letter, he never lost his job and he is still a civil servant in the same grade as a Clerical Officer.

12. In her evidence, the Defendant testified that she first met the Plaintiff when she entered into a Sale Agreement with the Plaintiff's mother to purchase 6 acres of land. The Plaintiff was however, the main spokesperson. She paid the purchase price in instalments, having first paid Shs 400,000/= when the Sale Agreement was executed and paid the total sum of Shs 562,000/= from the agreed purchase price of shs 840,000/=. The balance of Kshs 280,000/= was to be paid after obtaining Land Control Board Consent when she came to pay the balance of Ksh 280,000/= the Defendant refused to accept the money despite the fact the mother was willing to accept and complete the sale for 6 acres as originally agreed. The Plaintiff prevailed. The Defendant resorted to the help of the Eldama Ravine Land Disputes Tribunal at which both the Plaintiff and Defendant appeared. The Tribunal though lacking jurisdiction to enforce contractual agreements, purported to do so, and went along with the Plaintiff and awarded the Defendant the 4 acres for which the Plaintiff had persuaded his mother to accept the moneys, and refused her to accept the balance of Ksh 280,000/= representing the cost or value of the 2 acres which the Defendant had conveniently persuaded his mother to transfer to himself. After all, he had already carried out a survey and sub-division of the suit land without as much notice or whisper to the Defendant who was already in occupation of the land.

13. More importantly, the Defendant testified that she neither wrote the letter, nor did she instruct the Advocate to do so. The Advocate was after all acting for both her, the purchaser, the Seller, the Plaintiff's mother. She asked the court to dismiss the Plaintiff's suit with costs.

14. When cross-examined by the Plaintiff the Defendant reiterated her evidence in-chief, that she never wrote any letter, defaming the Plaintiff and had no cause to apologise to the Plaintiff.

OPINION

15. I have reviewed the pleadings by the parties, the evidence by the Plaintiff and the Defendant. This being an action for defamation, the first question is whether or not the Plaintiff was defamed by Defendant, and the second question would be what are the consequences of the answer to the first question.

16. Apart from the denial by the Defendant she never wrote the allegedly defamatory letter, the Plaintiff's own evidence on cross-examination by the Defendant's counsel was this -

“It was the Advocate who wrote the letter I am complaining about. The letter was written to the District Land Registrar on 12.05.2008, after I had instructed the Advocate that my mother had reduced the acreage from 6 to 4 acres.”

17. The evidence clearly vindicates the Defendant, that she neither instructed the Advocate nor wrote the letter in question. Thus from a purely evidentiary point of view, the Plaintiff has absolutely no cause of action against the Defendant. If he had any cause of action at all, it may have been against the author of the letter. The letter is not even copied to the Defendant. The Plaintiff's action against the Defendant seems to be motivated by some other undisclosed circumstance rather than the letter written by the Advocate. On this question alone, the action should stand dismissed.

18. However, the Defendant has taken the further position, that even if she had instructed the Advocate to write the letter (which she denies) her action was justified on the ground of absolute and/or qualified privilege. Order 2 rule 7(3) of the Civil Procedure Rules 2010, provides -

3. where in action for libel or slander the Plaintiff alleges that the Defendant maliciously published the words or matters complained of, he need not in his Pleint give particulars of the facts on which he relies in support of the allegations of malice, but if the Defendant pleads that any of those words or matters are fair comment on a matter of public interest, or were published upon a privileged occasion and the Plaintiff intends to allege that the Defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.”

19. In this case, the Defendant has in paragraph 6 and 7 of the Defence pleaded both absolute and qualified privilege. The Plaintiff never filed a reply as required by rule 7(3) aforesaid, that the publication of the letter was actuated by express malice. The effect of this failure to file a reply clearly shows that the Plaintiff is on a strange mission against the Defendant. It means that his action on libel, has no leg to stand on., as he cannot prove any malice by either the Defendant or the Advocate the author of the letter, and who is not even a party to the suit.

20. But assuming he is a lay man, he appeared in person, he does not understand the intricacies of civil procedure, and the court were to judge his case on its merits, is there any merit in his case? The answer to this question must be in the negative, no, the case has no merit at all. The letter was written by his Advocate, according to his evidence, on his instructions for the reasons he gave.

21. **Firstly**, the communication between him (*the client*), and the Advocate, (*his Advocate*) is privileged. **Secondly**, the communication was made to the Land Registrar, a Public Officer, who received it in the ordinary course of his usual duty, and is therefore protected by both absolute and qualified privilege.

22. Taking all the above into account, I must hold that the Plaintiff's claim is inept and discloses no cause of action against the Defendant.

23. It is dismissed with costs to the Defendant.

24. It is so ordered.

Dated, signed and delivered at Nakuru this 28th day of March, 2014

M. J. ANYARA EMUKULE

JUDGE