



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO 1061 OF 2001**

**KYALE MWENDWA.....PLAINTIFF**

**V E R S U S**

**1. FRANCIS NYENZE**

**2. THE PEOPLE LIMITED.....DEFENDANTS**

**J U D G E M E N T**

1. The Plaintiff's claim in this suit is in defamation. General as well as punitive/exemplary damages are sought. The words pleaded by the Plaintiff to be defamatory of him are to be found in paragraph 5 of the plaint. Those words were published in *The People* newspaper of 5<sup>th</sup> February, 2001 published by the 2<sup>nd</sup> Defendant. The words were allegedly uttered by the 1<sup>st</sup> Defendant.

2. At paragraph 5 of the plaint, the Plaintiff has pleaded that the words complained of, in their natural and ordinary meaning, and also by innuendo and inference, were defamatory of him. Particulars of innuendo and inference are given.

3. The Plaintiff has also pleaded that the publication was actuated by malice and recklessness; particulars thereof are given in paragraph 7 of the plaint.

4. The 1<sup>st</sup> Defendant entered appearance and filed a statement of **defence dated 8<sup>th</sup> August, 2001**. Publication of the words complained of was denied; in the alternative it was pleaded that the said publication was not motivated by malice and in any case was justified.

5. The 1<sup>st</sup> Defendant further pleaded that the words complained of were a fair and *bona fide* comment made on a matter of public interest as it concerned safeguarding public land. Additionally he contended that the words were made on occasion of qualified privilege in pursuance of his duty to communicate the information to the public.

6. The 2<sup>nd</sup> Defendant in its statement of defence dated 21<sup>st</sup> August 2001 admitted publishing the words complained of. It denied that the said publication was motivated by malice. It also denied that the words complained of were, in their ordinary and natural meaning, meant, or could be construed to have meant or imply, or that the same were capable of being understood to mean or to imply, any of the meanings defamatory of the Plaintiff pleaded in paragraph 6 of the plaint.

7. The 2<sup>nd</sup> Defendant pleaded in the alternative and without prejudice that the words complained of were

fair comment made in good faith and without malice upon a matter of public interest, and published on occasion of qualified privilege. Particulars are given in paragraph 6 of its statement of defence.

8. At the hearing the Plaintiff testified and called three witnesses. The 1<sup>st</sup> Defendant also testified but called no witness. The 2<sup>nd</sup> Defendant did not offer any evidence. Written submissions were filed on behalf of the Plaintiff; I have considered the same.

9. The Plaintiff testified that on 5<sup>th</sup> February 2001, he was called by the Manager of the **Ukamba Agricultural Institute (UKAI)** who accused him of having grabbed the institution's land on the faith of what had been published by the 2<sup>nd</sup> Defendant. He managed to get a copy of the newspaper and that is when he learnt that the 1<sup>st</sup> Defendant was the source of the story (**Exhibit 1**).

10. The Plaintiff contended that the story was defamatory of him as it accused him of fraudulently acquiring land belonging to a public institution and portrayed him as a thief and a criminal. His lawyers wrote a demand letter to the Defendants (**Exhibit P2**). UKAI then published a clarification of the matter in the **Daily Nation** newspaper (**Exhibit P3**). The Defendants never issued any apology.

11. The Plaintiff further testified that the Defendants' actions were actuated by malice as no investigations had been carried out to substantiate the allegations before publishing. He was injured in his reputation and also suffered other loss, including decreased enrolment in his schools and loss of friends. He also came under pressure to resign from the UKAI board, which he did shortly after the story was published.

12. Upon cross-examination, he conceded that he was not the only former Minister of Government at the time the article was published nor was he at the function where the 1<sup>st</sup> Defendant allegedly made the statements published by the 2<sup>nd</sup> Defendant; and that the enquiries he got from friends were made verbally. He also stated that UKAI records show the pressure he went through to resign from his position.

13. PW2, **Sammy Mulwa Ngangi**, testified that he worked as a farm manager in UKAI until 2003 where he reported to the Plaintiff; that when he read the article in question he inquired from the Plaintiff who denied the allegations and sent him to verify the truth from the land registry; and that when this was done UKAI issued a retraction of the statement.

14. Upon cross-examination, he confirmed that he was not the Plaintiff's personal assistant, nor had he ever campaigned for him; that he was answerable to the Plaintiff when he held the position of Secretary-General of UKAI Board of Trustees, which was vested with the properties in question; and that he obtained search certificates of the properties shortly after reading the offending articles which confirmed that no UKAI land had been grabbed.

15. In re-examination PW2 insisted that the Board of Trustees of UKAI verified the allegations were false.

16. PW3, **Musyemi Manzi Joseph**, a retail shop owner and a former driver of the Plaintiff, testified that he had known the Plaintiff for over 50 years. He attended a feast hosted by the 1<sup>st</sup> Defendant on 3<sup>rd</sup> February 2001 where the 1<sup>st</sup> Defendant accused the Plaintiff of having grabbed 10 acres of land; and that thereafter he read the statements published by the 2<sup>nd</sup> Defendant (**Exhibit 1**). Upon enquiring from the Plaintiff, he denied the allegations.

17. On being cross-examined, PW3 denied having been directed by the Plaintiff to falsely testify as he had attended the thanksgiving ceremony hosted by the 1<sup>st</sup> Defendant, and that though he spoke in 'Kamba' his statement was correctly translated by the 2<sup>nd</sup> Defendant.

18. **Susan Gathoni Kamau** (PW4), a fruit and vegetable vendor in Kitui, testified that she attended the

1<sup>st</sup> Defendant's thanksgiving ceremony as she had been his party agent during the previous elections; that during his speech the 1<sup>st</sup> Defendant stated the defamatory words and added that the grabbed land would be returned to the people; that though he spoke in 'Kamba' she understood the language; that she subsequently saw the story reported in Exhibit P1; and that due to the defamatory statements levelled against the Plaintiff, PW4 lost trust in him as she saw him as a land-grabber.

19. The 1<sup>st</sup> Defendant testified that in February 2001 when he was Member of Parliament for Kitui West Constituency and Minister for Environment and Natural Resources, he was visited by about 8 councillors from different locations in Kitui County Council; that there were no gate crashers; that their conversation had nothing to do with UKAI land; that whereas PW1 was a councillor in Kitui Municipal Council, he was not present during the said meeting; that when he read the report in Exhibit 1 quoting him, he immediately called one of the councillors who had attended the meeting who denied having spoken to the 2<sup>nd</sup> Defendant's reporters about the allegations; and that the reporter who reported the story was not at his home as he had not invited the media.

20. He denied that he received the demand letter (Exhibit P2). He stated that when he tried to contact the Plaintiff to explain the circumstances under which the story was written, he did not get him. When they later met, he attempted to explain that he had not uttered the defamatory words but the Plaintiff remained adamant that he had been defamed.

21. In cross-examination he insisted that he never held a home-coming party on 3<sup>rd</sup> February 2001, and that PW3 and PW4 did not go to his home on the said date. Regarding the averments in his statement of defence to the effect that he admitted having uttered the words, he asserted that it was after the denials and in any case had been 'without prejudice' and as an alternative to his defence. Besides, it is his lawyers who filed the defence and he did not have a chance to look at it before it was filed. When he tried to make amends with the Plaintiff, he was unsuccessful. He did not complain to the 2<sup>nd</sup> Defendant as, he said, he does not engage newspapers.

22. A plain reading of the words complained of shows that the article accuses the Plaintiff, a former Member of Parliament and a Minister of Government, of being a land-grabber. The article says in part -

**“...Nyenze accused former Cabinet Minister Kyale Mwendwa of grabbing 10 acres of the Ukambani Agricultural Institute (UKAI). He vowed to use all means at his disposal to reclaim the land and subsequently redistribute it to the local community.”**

23. The Defendants have pleaded fair comment made in good faith and without malice upon a matter of public interest. It may be true that the public actions of a reputable member of the society may be matters of public interest. But fair comment cannot include what amounts to an accusation that a person is a land-grabber without any evidence to that effect. The Defendants did not bother to bring evidence to justify the words complained of, not even after UKAI, the institution said to have had its land grabbed, published a notice denying the allegation.

24. Any ordinary and reasonable member of the public reading the article in issue would have had no hesitation at all in concluding that the Plaintiff was being accused of acquiring public land illegally. In fact, such an ordinary and reasonable member of the public would be forgiven for concluding that the Plaintiff was dishonest, lacked integrity and was not a man of honour.

25. The words complained of were defamatory of the Plaintiff, both in their natural and ordinary meanings, and also by innuendo. On liability, therefore, the Plaintiff has proved his case on a balance of probabilities.

26. Damages in defamation are at the discretion of the judge. Whereas in slander the claimant must prove actual harm or damage to his reputation, libel is actionable *per se*. The claimant does not have to prove actual damage or harm to his reputation to be entitled to damages. Such harm or damage is presumed by the law.

27. The Plaintiff has sought both general damages as well as punitive/exemplary damages. General damages are awarded to compensate the claimant for the injury to his reputation and the hurt to his feelings. It will be expected that such damages will vindicate him to the public as well as console him for the wrong done to him.

28. In assessing compensatory damages, the court will take into account the distress, hurt and humiliation which the defamatory publication has caused the plaintiff. The court will consider the gravity of the libel: the more closely it touches the Plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious the libel is likely to be. See the case of *Johns –vs- MGN Limited [1996] All ER 34*. It was also stated in that case that -

**“The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the Plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way.”**

29. The court will thus consider the conduct of the defendant after the defamation, and even the conduct of the plaintiff; whether or not there has been a satisfactory apology or attempt at correction of the wrong impression created; whether there has been malicious and/or insulting conduct and whether the plaintiff was accorded an opportunity to give his side of the story in order to correct the wrong impression created.

30. The Defendants in the present case did not publish an apology. The 1<sup>st</sup> Defendant in his testimony alluded to the fact that he attempted to clear the air with the Plaintiff but was unsuccessful despite UKAI taking it upon itself to apologize for the wrong impression created by the Defendants. He tendered no evidence of this 'clearing of the air'. I find that the article was motivated by malice towards the Plaintiff.

31. Considering the Plaintiff's place in society, including the fact that he was a well-known politician and businessman, a Member of Parliament for several terms, and also at some point a Minister in Government, there is no doubt that he is a man of good standing, reputation and character.

32. The words complained of accused him of fraudulently acquiring public land for his own private use. As it turned out, the allegations were false. The libel committed by the Defendants against the Plaintiff is indeed a grave one.

33. The Plaintiff called three witnesses. Out of the three, PW4 stated that the defamation harmed the Plaintiff's character in her eyes as she believed every word. It appears that the article changed her view of the Plaintiff's character and reputation. Apart from this, no other evidence was tendered to show how the Plaintiff's businesses were affected due to the defamatory article. However, this does not take away anything from the very grave nature of the defamation committed against him by the Defendants.

34. Courts must guard against unduly high awards in defamation cases as such awards would no doubt negatively impact upon the freedom of speech and press. It is also not the business of the courts to unduly enrich litigants in defamation cases. This would have the effect of encouraging more and more defamation litigation.

35. Compensatory damages of KShs. 1.5 million and punitive or exemplary damages of KShs. 500,000/= seem reasonable. That makes a global award of KShs. 2 million. I will award the same. There will be judgment for the Plaintiff for that sum against the Defendants jointly and severally. This sum will attract interest at court rates from the date of judgment until payment in full.

**36.** The Plaintiff will also have costs of this suit together with interest thereon at court rate from the date of filing suit. There will be judgement accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**H. P. G. WAWERU**

**JUDGE.**