REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 117 & 52 of 2004

NDUNGU NJOROGE AND KWACH ADVOCATES..... 1ST PLAINTIFF

PAUL NDERITU NDUNGU.....2ND PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

MANAGING EDITOR, EAST AFRICAN STANDARD..2ND DEFENDANT

PATRICK MATHANGANI.....….....….....3RD DEFENDANT

CONSOLIDATED WITH

NDUNGU NJOROGE AND KWACH ADVOCATES..... 1ST PLAINTIFF

PAUL NDERITU NDUNGU.....2ND PLAINTIFF

VERSUS

THE KENYA NATIONAL ACADEMY OF SCIENCES.....1ST DEFENDANT

PROFESSOR THOMAS R ODHIAMBO.....2ND DEFENDANT

PROFESSOR FESTO A MATERE.....….....….....3RD DEFENDANT

PROFESSOR R M MUNAVU.....4TH DEFENDANT

PROFESSOR N O BWIBO.....5TH DEFENDANT

PROFESSOR JOSEPH MALO.....6TH DEFENDANT

JUDGEMENT

This Judgement is in respect of two cases which were consolidated for hearing. The first is HCCC No. 117 of 2004 (the first case) while the second is HCCC No. 52 of 2005 (the second case). The plaintiffs in

both suits are the same. The first plaintiff (hereinafter referred to as **Ndungu Njoroge & Kwach Advocates**) is a prominent law firm in this country in which the 2nd plaintiff is a partner. The 2nd plaintiff was also the Chairman of the Presidential Commission of Inquiry into Illegal/Irregular Allocation of Public Land (hereinafter referred to as **the Commission**) also known as the ***Ndungu Commission***. Whereas in HCCC No. 117 of 2004 (hereinafter referred to as the 1st suit) the suit was filed against a media house, its managing editor and a reporter respectively, HCCC No. 52 of 2005 (hereinafter referred to as the second suit) was filed against the Kenya National Academy of Sciences (hereinafter referred to as **the Academy**) and its officials.

The cause of action in both cases is a publication in the Issue of ***East African Standard*** dated 20th January 2004 in which it was stated as follows:

"The head of the presidential commission investigating irregular land allocations could be forced to resign following allegations involving him in an irregular land deal.

The National Academy of Sciences claims that Ndung'u Njoroge and Company Advocates, where the commission Chairman is a partner, conspired with "powerful conmen" to grab the land between 1997 and 2000.

The Academy has now asked the commission to investigate the case, putting Ndungu's future leadership of the team in jeopardy, the East African Standard has learnt.

However, when contacted, Ndungu hit back at the Academy's top managers and absolved the law firm of any wrongdoing.

Confirming that it indeed acted for Stanmore, he denied that the firm was involved in the negotiations that caused the institution to lose its land.

He told the East African Standard at the law firm's offices: "I don't take allegations lightly. Why pick on me for blame" This issue will certainly not end here. Bigger names than you think were involved in the fraudulent transaction. They now want to malign my name and protect themselves."

Documents forwarded to the commission by the Academy's Chairman, Prof. Joseph Malo, claim that Ndungu's firm, while acting for a city firm, while acting for a city firm called Stanmore Investments Limited, facilitated the allocation of the land measuring about eight hectares.

Malo alleges that through Ndungu's Law firm, Stanmore entered an agreement to swap its plot situated in Karura Forest, with the one belonging to the Academy.

But during the final stages of the transaction, Academy officials realized they had been duped into surrendering their land while the one at Karura was non-existent, documents presented to the commission claim.

Headquarters

The lost land where the academy planned to construct its headquarters, was situated in Bellevue area, off Mombasa Road in Nairobi's South C.

In his letter to the commission dated last October 29, Malo attaches an earlier one to Lands Minister Amos Kimunya asking him to intervene.

Says the letter to Mr. Kimunya:

"Between 1997 and 2000, there emerged very powerful conmen who through a long sequence of events managed to illegally grab this plot from KNAS ... immediately the KNAS realized foul play, both the company and their lawyers went underground."

Malo told the commission:-

"We hope and trust that the commission will speedily investigate this matter and advise the Government accordingly. The public is very interested to see how you will deal with this particular case."

By remaining the commission's Chairman Ndungu while digging up the secrets of the shady transaction would in effect be investigating his own law firm.

Conduct

Commission rules require that a member steps down if his or her conduct and interests are found to compromise investigations.

It means that if members formally discuss their chairman's involvement in the case as stipulated by the rules, he could be pushed to leave.

Ndung'u however, said investigations by the commission indicated that the swap involved the then Commissioner of Lands, Mr. Wilson Gachanja, and the then Permanent Secretary in the Ministry of Research, Technical Training and Technology, Mr. Wamatu Njoroge.

Ndung'u and his team were appointed by Kibaki last year to inquire into irregular allocation of public land.

On whether or not he could resign, Ndungu said that none of the commission's members had raised the issue.

He declined to reveal the "big names', which he claimed were powerful people in the former government.

They would, however be exposed after a report was handed to President Kibaki on completion of investigations, he said.

The commissions mandate expires on Friday.

Yesterday, our investigations at the Registrar of Companies established that Stanmore Shareholders own a firm known as Proshare Limited.

Ndungu said the Karura Plot was one among nearly 100 others which were irregularly allocated to individuals in the 1990s"

According to the plaintiffs the said publication was done knowing or with reason to know that they were false or recklessly or without taking any care to ensure that the words were true. According to the plaintiffs, the publication of the said matters defamed them as they were depicted *inter alia* as having plotted and conspired with conmen to defraud **the Academy** of its land; that they were land grabbers not worthy of the exalted position of chairing a presidential commission investigation irregular allocation of land; were guilty of professional misconduct and not of moral standing and integrity; were dishonest and engaged in fraudulent activities and not fit to offer professional services. This was done despite the fact that prior to the said publication, the plaintiffs had provided the defendants in the first case with the full facts including documentary material that showed that the allegations linking the plaintiff's in a conspiracy to defraud Kenya National Academy of Sciences of its land were false. The defendants further failed to tender an apology forcing the plaintiffs at their expenses to place advertisements in the media to

correct the position. The plaintiff's claim that as a result of the said publication the reputation and goodwill was seriously injured and they suffered embarrassment in the eyes of the reasonable man and the business adversely affected and that they were subjected to public ridicule, odium and have suffered loss and damage. The plaintiffs therefore claim special damages, general damages for libel, damages on the footing of aggravated or exemplary damages, an injunction restraining further publication of similar statements as well as costs of the suit and interests.

The defendants in the first case filed a joint defence on 18th March 2004 in which while admitting the publication of the said material, denied that the same was published falsely or recklessly and that the same was not defamatory of the plaintiffs. They further pleaded that it made an offer of rejoinder to the plaintiffs which the plaintiffs ignored and proceeded to file the suit. As a rejoinder had been published, it is the defendants' view that there was no need to publish the advertisement. Alternatively they pleaded that they published the said material as a fair information in a matter of public interest and concern, without malice towards the plaintiff and under a common interest with and duty to the public hence the occasion is privileged. According to these defendants the publication was meant to bear the meaning attributed to them by the plaintiff and therefore deny that the plaintiffs have been injured thereby. The defendants therefore deny that the plaintiffs are entitled to the claims sought.

On their part the defendants in the second case in their amended defence pleaded that the 1st defendant, since it has no separate legal entity from its members, ought not to have been sued and its name should be struck out. They further pleaded that the 2nd and 3rd defendants having been deceased, are improperly joined in the suit. With respect to the publication, the defendants denied supplying the said material which in any case, in their view, is not defamatory of the plaintiffs. According to these defendants they simply sent a report to **the Commission** concerning their plot which was lost while in the process of being swapped with another in which transaction the plaintiffs were acting for the proprietors of the other plot namely **Stanmore Investment Ltd**. Therefore the defendant maintained that the context in which the statement was made rendered the same privileged. Since the plot in question belonged to the 1st defendant, a public body, the defendants had social, moral and legal duty to communicate with the said Commission on the same and the 2nd plaintiff as a member of the said commission had a duty to receive the report and establish the truth thereof. According to them there was no malice spite or deliberateness in giving the report although the deny authorising the publication of the report to any other persons, news media or whomsoever. However, if the said words were defamatory, it is the defendants' position that the issues were of public interest. Therefore the defendants deny that they were entitled to render an apology and contend that the suit does not disclose any cause of action is incompetent, bad in law and an abuse of the court process and is *sub judice* and or a duplicity.

Suffice it to state that the plaintiffs, as is usual in such matters, filed a reply to the defences.

At the close of the pleadings the parties filed agreed issues which were as follows:

1. Whether the words complained of could, in their natural and ordinary meaning, be understood to have the meanings attributed to them in the respective plaints.

2. Whether the words complained of were defamatory of the Plaintiffs.

3. Whether the Defendants in HCCC No. 52 of 2005 supplied, published and/or caused to be published to one Patrick Mathangani of East Africa Standard the alleged defamatory words.

4. Whether the occasion or the circumstances in which the defendants made or published the words complained of was privileged.

5. Whether the defendants published the words falsely and maliciously.

6. Whether the Plaintiffs suffered any loss and/or damage to their reputation, credibility and goodwill.

7. Whether the Defendants in HCCC No. 117 of 2004 made any offer(s) of rejoinder to the Plaintiffs, and if so, whether the Plaintiff accepted the same.

8. Whether the Plaintiffs are entitled to the reliefs claimed.

9. What orders should be made as to costs.

The plaintiffs called **Paul Nderitu Ndungu**, the 2nd plaintiff as PW1. While adopting his statement filed in court on 24th October 2011 as part of his evidence in chief, the witness testified that he is an advocate of the High Court practising in the 1st plaintiff having practiced for 43 years since 1969. He also produced the plaintiff's bundle of documents and supplementary documents filed in this court as Plaintiffs' Exhibits 1(a) and 1(b) respectively. According to the Statement, the witness testified that upon admission, he was employed by the firm of ***Hamilton Harrison & Mathews Advocates*** (hereinafter referred to as HH&M) as a legal assistant/associate and was subsequently admitted as a partner in HH&M in April 1973 and was in charge of **Ndungu Njoroge & Kwach Advocates**'s conveyancing and probate departments between 1977 and 1986. Together with his colleagues, they left HH&M in October 1986 and formed the 1st defendant where he continued being in charge of the aforesaid departments. According to him, he has served as a member of the Law Society of Kenya, Convenor/Chairman of the Conveyancing and Property of which he is still a member, a member of the Task Force mandated to comprehensively review the Government Lands Act and make recommendations on amendments thereof, a member of the Commission of Inquiry into the Land Law System of Kenya (***The Njonjo Land Commission***) and the Chairman of the Presidential Commission of Inquiry into Illegal/Irregular Allocation of Public Land (hereinafter referred to as **the Commission**).

According to PW1 he has never been involved in any unprofessional activity.

On 17th January 2004, one **Patrick Mathangani**, the third defendant in the first case (hereinafter referred to as **Mathangani**) telephoned him and informed him he was doing a story revolving a story in which **Ndungu Njoroge & Kwach Advocates** had been accused of being involved in the theft or grabbing of land belonging to **the Academy**. Due to the urgency of the matter and in order to enable him get the relevant facts from the file as he was not dealing with the matter they agreed to meet on 18th January 2004. On making inquires from his colleagues at **Ndungu Njoroge & Kwach Advocates** he established that his partner **Raphael K. Ngethe** had a file dealing with a client of **Ndungu Njoroge & Kwach Advocates**, Trust Bank Limited (hereinafter referred to as the Bank), to a customer of the latter, **Stanmore Investments Ltd**. On reviewing the file he established that there were negotiations between **the Academy** and **Stanmore Investments Ltd** in consultation with the Permanent Secretary of the Ministry of Research, Science and Technology (the Ministry) for the exchange of **Stanmore Investments Ltd**'s land, LR No. 21095 situated off **Kiambu Road** Nairobi (hereinafter referred to as the **Stanmore property**) with **the Academy**'s Plot (LR No. 209/13422) situate in the Nairobi South area of Nairobi (hereinafter referred to as South C Plot). Apparently this swop was approved by the said Permanent Ministry and accepted by **the Academy** subject to the refund by **Stanmore Investments Ltd** to **the Academy** of Kshs. 7,453,959/- **the Academy** spent. This was communicated to **Stanmore Investments Ltd**. On 6th January 1998, the Bank undertook on behalf of **Stanmore Investments Ltd** to pay the said sum through their lawyers, **Ndungu Njoroge & Kwach Advocates**, on receipt by the said lawyers of title documents free from encumbrances. **Ndungu Njoroge & Kwach Advocates** similarly vide its letter dated 6th January 1998 to **the Academy** forwarded the title documents relating to the **Stanmore property** for the foregoing purposes and gave professional undertaking to pay the said sum of Kshs. 7,453,959.00 within seven days of receipt of the title in respect of the Sough B Plot free of all encumbrances and requested **the Academy** to authorise the Commissioner of Lands (the Commissioner) to proceed with the exercise. By a letter dated 8th January 1988 the firm of **Lumumba & Ojwang** who indicated that they were acting for **the Academy**, sought from **Ndungu Njoroge & Kwach Advocates** a confirming of the transaction which confirmation was made vide a letter from the first plaintiff to **Lumumba & Ojwang** vide a letter dated 20th January 1998. In the same letter **Ndungu Njoroge & Kwach Advocates** advised **Lumumba & Ojwang** that **Ndungu Njoroge & Kwach Advocate**'s understanding was that **Stanmore property** was **"being surrendered by our client to the Government and the Commissioner of Lands**

will then issue a new Grant to your client, and perhaps the confirmation you seek should therefore proceed from the Commissioner of Lands". **Ndungu Njoroge & Kwach Advocates** then on 6th January 1998 forwarded the original Grant relating to the **Stanmore property** to the Commissioner **"for the purpose of surrender by our client of LR No. 21095 in exchange for LR No. 30188/XIN/76"**. On 8th June 1998, **Ndungu Njoroge & Kwach Advocates** wrote to **Lumumba & Ojwang** advising that **Ndungu Njoroge & Kwach Advocates** had obtained title to LR No. 209/13422 in the name of **Stanmore Investments Ltd** and that **Stanmore property** had been transferred to **the Academy** and hence were in a position to discharge their undertaking. It also communicated that **Stanmore Investments Ltd** had paid to the Commissioner on behalf of **the Academy** a sum of Kshs. 2,575,820/- being stand premium, consent fees and stamp duty on South C Plot and therefore the amount payable to **the Academy** was Kshs. 4,878,139.00 which sum was confirmed the same day by **Lumumba & Ojwang** and a cheque for the said sum drawn by the Bank sent to **Lumumba & Ojwang** with a request that **Ndungu Njoroge & Kwach Advocates** be discharged from its professional undertaking. The title documents provided to **Ndungu Njoroge & Kwach Advocates** by the Commissioner showed that the transfer deed in favour of **the Academy** was prepared by one **K S Brahmbatt, Advocate** of P. O. Box 47220, Nairobi. The receipt of the cheque was confirmed by **Lumumba & Ojwang** on 25th June 1998 who confirmed that they would discharge the form once it was confirmed that the cheque had been cleared and accounts balanced. On 8th August 2003 **Lumumba & Ojwang** wrote to **Ndungu Njoroge & Kwach Advocates** to say, *inter alia*, that it had been discovered that the **Stanmore property** did not exist and that the title was fake and that **Ndungu Njoroge & Kwach Advocates**'s client had knowingly committed fraud by illegally grabbing the South C Plot. Further it stated that the said transaction between its client and **Ndungu Njoroge & Kwach Advocates**' client was being revoked and threatened legal action unless the form prevailed upon its client to solve the problem amicably. This letter, which according to the witness placed the fraud at the doorsteps of **Stanmore Investments Ltd** and not **Ndungu Njoroge & Kwach Advocates** was copied, *inter alia*, to the Minister of Lands and Settlement, the Commissioner, **the Academy** and the Office of the President.

On 18th January 2004, the witness explained to **Mathangani** the circumstances under which the exchange was done and that **Ndungu Njoroge & Kwach Advocates** was not involved in any way whatsoever in the negotiations and provided him with copies of relevant correspondences. However, on 20th January 2004, ***the East African Standard*** went ahead and published an article on page 1 of the newspaper under the title "**Land probe boss and irregular deal**" which article ran from page 1 and continued over two columns on page 11 which article forms the basis of this suit. On the morning the article was published, the witness telephoned the Editorial Director of ***the East African Standard***, **Mr. Tom Mshindi**, the second defendant in the first case (hereinafter referred as **Mshindi**). The witness's partner, **Eliud Njoroge** met with **Mshindi** and once again clarified the position and strongly protested. On 21st January 2001, ***the East African Standard*** published on its back page in a small print an article headed "Law firm: We didn't negotiate the deal" which article did not exonerate **Ndungu Njoroge & Kwach Advocates** from the allegations made against it. By an article placed in both ***the East African Standard*** and ***the Daily Nation*** on 27th January 2004, **Ndungu Njoroge & Kwach Advocates** explained the plaintiffs' position on the matter. Following these advertisements, **Ndungu Njoroge & Kwach Advocates**'s partners were flooded with inquiries from clients, family members, professional colleagues and members of the public seeking to know where the truth lay.

According to PW1, the article alleged fraud on both plaintiffs and he went to great lengths to explain himself to the Government through the Minister for Lands and his Permanent Secretary as well as to fellow Commissioners on **the Commission**. The article further distressed him deeply since himself and his firm were for the first time being portrayed as dishonest crooked persons capable of conspiring with conmen and criminals to cause loss to **the Academy**'s property and conveyed the message that he was not fit person to Chair **the Commission**.

Apart from the appointments and positions held by PW1 mentioned above, he also avers that he is a member of several Charitable and Commercial Organisations such as St. John's Ambulance of Kenya, Rotary Club of Nairobi North, Parklands Sports Club, Muthaiga Country Club, Nairobi Club, Muthaiga Golf Club some of which he has been a chairman as well as a director of companies. He has further been

decorated by the President by being conferred The Order of the Burning Spear in recognition of distinguished service to the Nation.

Although the defendants were requested to publish an apology, it is PW1's evidence that todate they have not offered any hence the reliefs sought in the plaint.

In cross-examination by **Mr. Muchiri**, learned Counsel for the defendants in the first case, he confirmed that he was the Chairman of **the Commission** whose mandate was to inquire into the allocation to private individual or corporations of public and or land dedicated for public purpose. He admitted that **the Commission** was dealing with matters of grave public interest. He also confirmed that **the Commission** put up notices seeking information. While conceding that knowing **the Academy**, he said he became aware of its complaint after the publication of the newspaper report. Referred to **the Commission**s Report he confirmed that there is a report of the reserved part of Karura Forest with respect to Plot No. 21095 with an area of 4.236 ha originally allotted to **Frankway Limited** and Another on 16th June 1993 but the current owner is **Stanmore Investment Limited** who sold the same to **the Academy**. From the report the witness said that the transaction was illegal and it was recommended that the title be revoked. He further stated that **Stanmore Investments Ltd** had borrowed Kshs. 7,453,959.00 from Trust Bank Ltd to enable them complete the acquisition of the plot No. 21095. He clarified that the transaction between **Stanmore Investments Ltd** and **the Academy** was actually an exchange and not a sale. The exchange was between the **Stanmore property** and the South C Plot and the Kshs. 7,453,959.00 was to be paid by **Stanmore Investments Ltd** to **the Academy** as part of the exchange. While confirming that he was a partner in **Ndungu Njoroge & Kwach Advocates**, he said that the role of **Ndungu Njoroge & Kwach Advocates** in the transaction was to create a legal charge of Kshs. 7,453,959.00 being advance to **Stanmore Investments Ltd** by the Bank, a client of **Ndungu Njoroge & Kwach Advocates**. Additionally **Ndungu Njoroge & Kwach Advocates** was asked to give certain undertaking to the advocates of **the Academy** to the effect that once the titles were exchanged and registered and the charge registered the amount would be released to the Advocates of **the Academy**. According to him, they were acting for the Bank in the transaction. He confirmed that **Raphael K. Ngethe** was a partner in **Ndungu Njoroge & Kwach Advocates** and that in the letter dated 12th January 199 he referred to "our client" which could only have been **Stanmore Investments Ltd**. However the witnessed maintained that their client was the Bank although the letter referred to **Stanmore Investments Ltd** as the client. Confirming that the transaction was a swap between two parcels of land, he said it is common that advocates involved in such transactions do carry out searches although he could not tell whether in this particular case searches were carried out. According to him **the Commission**'s finding would not have been revealed on the search since the land registry does not tell one more than the basic particulars. The search would not have indicated that the land was part of Karura Forest but would only show that it was in Nairobi. He stated that the practice to go to the site where the land is only after **the Commission** had published its report. According to him the lawyer is entitled to assume that the client has seen the property and is satisfied. He confirmed that **the Commission** did find that LR No. 21095 was excised from Karura Forest. According to him, his firm was involved in charging a property in favour of a client, but not in the actual negotiations leading to the exchange or even in the preparation of the documents. He, however, admitted that the property sold was LR No. 21095 and that **Mr. Ngethe** referred to **Stanmore Investments Ltd** as the client of **Ndungu Njoroge & Kwach Advocates**. He also conceded that the allocation was irregular and that the Bank was advancing money to **Stanmore Investments Ltd** to purchase the property and that **Ndungu Njoroge & Kwach Advocates** was involved in facilitating the charge. He admitted that it was correct that **Ndungu Njoroge & Kwach Advocates** had a dealing with the company purchasing the plot. He was, however, unaware that **Ndungu Njoroge & Kwach Advocates**'s position was a matter of public interest since **Ndungu Njoroge & Kwach Advocates** only facilitated the charge between the Bank and **Stanmore Investments Ltd**, a matter which is not of public interest. He reiterated that **Patrick Mathangani** is a report and that he met him and the article was written under his hand. Prior to their meeting with Mathangani the latter had called him on phone but he declined to comment on phone. He admitted that Mathangani approached him to give his side of the story which he did and supplied copies of the correspondences. However, the article was published the following Thursday on 20th January 2004. He said that he did not give his version of the transaction. Rather the version he gave was based on a perusal of the file which was being handled by **Mr. Ngethe**. However, in the publication of 20th January 2004 his version of the transaction was not published. He denied that he told the reporter what appeared

in the article such as that **Ndungu Njoroge & Kwach Advocates** acted for **Stanmore Investments Ltd**. He said he gave the reporter documents which showed a different situation and told him that **Ndungu Njoroge & Kwach Advocates** had denied being involved in the illegal transaction. Referred to the defendant's bundle filed on 19th February 2007 at page 3 last column, he admitted that that part of the report is not erroneous and was a correct reflection of the conversion. He reiterated that the defendant did not apologise and was unaware that they had been given an opportunity to reply after the publication. He was, however, aware of the subsequent publication when approached but it was a tiny write-up dated 21st January 2004 which he did not consider a right of reply in the sense that the defendant was not apologetic and was not convinced that **Ndungu Njoroge & Kwach Advocates** was not involved. He admitted that they instructed the firm of **Waweru Gatonye & Co.** to complain and that a letter was written to the defendants which appears in Plaintiff's Exhibit 1(a) at page 4 and which was conveying the information that a defamatory matter had been published and south an apology dated 21st January 2004. While unaware that the letter was responded to when referred to page 7 of Exhibit 1(a) he said that he might have seen the letter although he could not recall. The letter made reference to a meeting held on 20th January 2004 and that the defendant availed opportunity for discussion. However, the subsequent publication only said that the plaintiffs had denied and not that what they said was the truth although some form of his version was published. According to him the defendant harboured ill-will against **Ndungu Njoroge & Kwach Advocates** because it is one thing to say that he had denied and another to say that they had established that it was incorrect. While admitting knowing the Managing Director of ***the East African Standard*** as a social acquaintance, he denied knowing **Mathangani** and denied that the publication was in public interest.

On being cross-examined by **Mr. Wambola**, learned counsel for the defendants in the second case, PW1 admitted that they invited members of the public to give information with respect to irregular allocation of public land after which they established that the defendant in the second case had written a letter of complaint to the Ministry of Lands and copied the same inter alia to **the Commission**. The letter was addressed to the joint secretaries of **the Commission** by **the Academy** forwarding a report and was not copied to any other person. According to him the source of his information that the said defendants supplied ***the East African Standard*** with the information that was published was the journalist, **Mr. Mathangani**, himself who told him that he had been given information by the defendant in the second case. Referred to the statement by Mr. Mathangani, he admitted that there was no reference therein that he had been given the said information by the said defendants. However, the witness admitted that his statement does not indicate that his source was Mr. Mathangani. He, however, reiterated that the negotiations were done by the institutions and **Ndungu Njoroge & Kwach Advocates** facilitated the charge on behalf of its client, the Bank.

The second witness for the plaintiffs was **Raphael Kamau Ngethe**, an advocate of the High Court and a partner in **Ndungu Njoroge & Kwach Advocates**. He likewise relied on his statement filed in court as part of his evidence in chief. According to the said statement filed on 24th October 2011, after giving an elaborate background, **Ndungu Njoroge & Kwach Advocates**, in 1998, acted in a transaction involving an exchange of land between **Stanmore Investments Ltd** and **the Academy** and that he was the advocate in **Ndungu Njoroge & Kwach Advocates** who handled the transaction. According to him, **Ndungu Njoroge & Kwach Advocates** received instructions from the Bank vide a copy of the letter by the Bank to **the Academy** dated 6th January 1998 with respect to the said exchange. In the said letter the Bank irrevocably undertook to pay on behalf of its customer sum of Kshs. 7,453,959.00 through the Bank's advocates, **Ndungu Njoroge & Kwach Advocates**, within seven days from the date of issuance of clear title deeds free from all encumbrances in favour of Messrs **Stanmore Investment Ltd** to be submitted to **Ndungu Njoroge & Kwach Advocates**. With the said letter were other related correspondences one of which was from the Chairman of **the Academy** intimating that **the Academy** had carefully considered the proposal by **Stanmore Investments Ltd** for a swop. According to PW2 **Ndungu Njoroge & Kwach Advocates** had not been involved in any negotiations or talks concerning the exchange and its role in the matter started with the instructions from the Bank to receive the title deeds on behalf of the Bank ands to make payment to **the Academy**. Accordingly **Ndungu Njoroge & Kwach Advocates** obtained titles in respect of the **Stanmore property** from **Stanmore Investments Ltd** and forwarded the same to **the Commissione**r while giving an undertaking to **the Academy** with respect to the sum of Kshs.

7,453,959.00 on behalf of the Bank. Subsequent on receiving a letter from **Lumumba & Ojwang** asking for confirmation of the undertaking, the same was appropriately given. According to the witness, **Ndungu Njoroge & Kwach Advocates** was not involved in the matter until June 1998 when the said title was forwarded to them by **Stanmore Investments Ltd** and were not involved in the preparation or registration of the Transfer which is endorsed to have been drawn by **K S Brambhatt**, Advocate. On receipt of the documents **Ndungu Njoroge & Kwach Advocates** informed **Lumumba & Ojwang** and informed them on the amount payable being Kshs. 4,878,139.00 which was confirmed by the latter firm and a cheque in the said sum drawn by the Bank forwarded to **Lumumba & Ojwang** in favour of **the Academy**. By a letter dated 25th June 1998, **Lumumba & Ojwang** acknowledged receipt of the cheque and requested for a meeting between representatives of **Stanmore Investments Ltd** and **the Academy** to determine the boundary beacons of the **Stanmore property**, a matter which according to the witness, the parties should have sorted out as **Ndungu Njoroge & Kwach Advocates** was not involve in the preliminary matters. Nevertheless **Ndungu Njoroge & Kwach Advocates** agreed to take up the issue with **Stanmore Investments Ltd** leading to a flurry of correspondences. Eventually **Lumumba & Ojwang** by their letter dated 8th August 2003 to **Ndungu Njoroge & Kwach Advocates** intimated that **Ndungu Njoroge & Kwach Advocates**'s client had fraudulently exchanged **the Academy**'s land for land which was illegally grabbed and threatened to take legal action. The said letter was forwarded to **Stanmore Investments Ltd** by **Ndungu Njoroge & Kwach Advocates**. However, **Ndungu Njoroge & Kwach Advocates** denies that it was at any time part of the scheme to defraud **the Academy** as all agreements in the matter were arrived at between **the Academy**, the Permanent Secretary in the Ministry, the Commissioner and **Stanmore Investments Ltd** and **Ndungu Njoroge & Kwach Advocates** was not at any time called upon to advise any party in the matter and bears no responsibility to **the Academy**.

In his evidence, **Ndungu Njoroge & Kwach Advocates**'s client was the Bank and before the publication of the article complained of ***the East African Standard*** never got in touch with him although he learned from the 2nd plaintiff that he had spoken with them. According to him the article is not a fair representation of what transpired as it portrayed **Ndungu Njoroge & Kwach Advocates** as facilitating corrupt transactions and injured him as a person and as a firm. Despite his partner getting in touch with ***the East African Standard*** there has never been any apology and neither has been any correction absolving **Ndungu Njoroge & Kwach Advocates** hence the remedies sought in the plaint.

On cross-examination by **Mr. Muchiri**, he reiterated that in that transaction he acted for the Bank which was lending money towards the exchange of the two parcels between **the Academy** and **Stanmore Investments Ltd**. According to him, their role was to ensure **Stanmore Investments Ltd** got a clear title. As far as the transaction was concerned, they were preparing the charge documents after the titles came out. On instructions, they were to ensure the title was clear but not to carry out a search but limited to ensuring that **Stanmore Investments Ltd** got the property. The duty to conduct the search, according to him, is the role of the advocate acting for the party accordingly no search was done as **Stanmore Investments Ltd** was not his client but the Bank was. Referred to his statement at page 6 he admitted that in that instance the reference to their client was **Stanmore Investments Ltd**, the company that was not their client. Referred to the correspondences exchanged he admitted that he referred to **Stanmore Investments Ltd** as their and they referred to the transaction revolving the swapping between **Stanmore Investments Ltd** and **the Academy**. He, however, denied knowledge of the mention of **Stanmore Investments Ltd** in **the Commission**'s report. Referred to the said report, he admitted that **Stanmore Investments Ltd** features as one of the companies which was holding public land. While admitting that the result of the swap was that **the Academy** was to take **Stanmore Investments Ltd**'s land, from the report it was **the Academy** that was to be left holding public land. He, however said their firm would not have participated in the swap and that the Kshs. 7.4 was part of the consideration together with the Karura Forest Land and that the said sum was to be transferred through their firm in which **Paul Ndungu** is a senior partner who was, at the time of the publication of the article the Chairman of **the Commission**. The general public, he admitted would have had an interest in the allegation that a firm in which **the Commission**'s Chairman was a partner was involved in a transaction in respect of irregular transaction. He said he was aware of statement in the publication attributed to **Mr. Paul Ndungu.** Referred to the publication at page 3 of the defendant's bundle, he admitted that it is largely a correct depiction of **Ndungu Njoroge & Kwach Advocates**'s role in the transaction. Although he was not in the meeting between **Mr. Ndungu** and the officials of ***the East African Standard***, he did gather that the thrust of the

same was to seek for a correction although he was unaware of the details thereof. Referred to the article no. 1 in the defendant's bundle he admitted that that was what he was referring to as a denial that **Ndungu Njoroge & Kwach Advocates** was involved in any irregular transactions. He was however, unaware of any correspondence between **Ndungu Njoroge & Kwach Advocates** and ***the East African Standard***. He, however, admitted that **Waweru Gatonye & Co** were their advocates and the existence of correspondence seeking the withdrawal of the article on the ground that it was erroneous. He, however, insisted that ***the East African Standard*** harboured ill-will against **Ndungu Njoroge & Kwach Advocates**.

In answer to questions put to him in cross-examination by **Mr. Wambola**, he confirmed that the suit was brought because **Ndungu Njoroge & Kwach Advocates** was defamed in ***the East African Standard*** on 20th January 2004. Going by the Article he said the source was **the Academy**. He was aware, however, that a report touching on the transaction was made by **the Academy**. However, from **Mr. Mathangani's** statement, the witness said the source seemed to have been someone within **the Commission**. While aware of the meeting between **Mr. Mathangani** and **Mr. Ndungu** prior to the publication, the witness said he was not at the said meeting. While admitting that he was aware that **Mr. Ndungu** gave **Mr. Mathangani** a lot of documents, he denied admitting that their firm acted for **Stanmore Investments Ltd**.

Next, the plaintiffs called **William Henry Boyd Parkinson**, as PW3. According to him he is in the field of aviation and recorded a statement which he relied upon as part of his evidence in chief. In his statement he is the Chairman of Phoenix Aviation Limited and the 2nd plaintiff is a long time friend and legal adviser whom he has known for a long time. He has also known **Ndungu Njoroge & Kwach Advocates** for 30 years and has had many dealing with **Ndungu Njoroge & Kwach Advocates** and regard them very highly. When the saw the newspaper article in ***the East African Standard*** on 20th January 2004, he was very shocked, surprised and disturbed because he did not expect the plaintiffs to be involved in such deals. He called the 2nd plaintiff who took time and explained and reassured him that it was untrue. He further said that he was aware that **Ndungu Njoroge & Kwach Advocates** went underground during the periods and had the feeling that the newspaper was throwing/smearing mud at the plaintiffs being the chairman of **the Commission**. He said if the words were true the same could have been very damaging to his reputation and led to loss of business and may have caused some future/prospective clients to keep off **Ndungu Njoroge & Kwach Advocates** as it defamed the plaintiffs by portraying them as conspirators with conmen to defraud **the Academy**; land grabbers not worth the chair of **the Commission**; unprofessional, immoral dishonest and fraudulent; dissolute and prolifigate; and morally incompetent and untrustworthy. According to him if such words were uttered against him he would not hesitate to sue.

On cross-examination by **Mr. Muchiri**, he admitted that he was aware **Mr. Ndungu** expressed his views and the views of **Ndungu Njoroge & Kwach Advocates**. He was, however, unaware of any subsequent articles to the one of 20th January 2004. The impression that he was given was that the plaintiffs were corrupt. He reiterated that he has known the 2nd plaintiff for 30 years both in his social and business capacity and this was affected by the adverse by the nature of the report.

In their defence, the defendants in the first case called **Patrick Mathangani**. He similarly relied on his statement filed in court on 14th November 2011. According to him he is a journalist with ***the East African Standard*** having so worked with the said newspaper for the past 10 years. He is a graduate in Education from Moi University. On 14th January 2004, he received a call from a member of **the Commission** that during the course of his work, the member had come across information tending to suggest that **Ndungu Njoroge & Kwach Advocates** had been involved in grossly irregular land transaction between a government institution, **the Academy**, and a client of **Ndungu Njoroge & Kwach Advocates**, **Stanmore Investments Ltd** and the Chairman of **the Commission**, Mr. Paul Ndungu, happened to be a founding and senior partner at **Ndungu Njoroge & Kwach Advocates**. He was on meeting the said source supplied with documents written on behalf of **the Academy** addressed to the joint secretaries of **the Commission** making a request for investigations to be carried out by **the Commission** in respect of the alleged illegal and fraudulent allocation of **the Academy**'s land. The letter also made reference to some other correspondences copies of which the source supplied to him whose effect was

that **Stanmore Investments Ltd** had in an ingenious, technical and calculated manner colluded with their advocates, **Ndungu Njoroge & Kwach Advocates**, to fraudulently deprive **the Academy** of its land – LR 209/13422 Nairobi. The matter was, according to the witness extremely extensive due to the fact it touched on the person charged with identifying perpetrators of irregular allocation of land. According to the witness the correspondences mention **Ndungu Njoroge & Kwach Advocates** as variously acting for **Stanmore Investments Ltd** and also with respect to the fact that **Ndungu Njoroge & Kwach Advocates** was to avail a person to identify the beacons of the **Stanmore property** for **the Academy**. As is the common procedure, the witness then secured the authority of the News Editor who is his supervisor to write an article based on those documents. He accordingly made concerted efforts to secure a meeting with Mr. Ndungu in order to ascertain the facts of a story and get the views of all parties to the story before publication since he had been informed by his source that in event of a conflict of interest a member would have to step aside. A meeting was scheduled between him and **Mr. Ndungu** was scheduled for 17th January 2004 at which interview **Mr. Ndungu** informed him that **Ndungu Njoroge & Kwach Advocates** had not been involved in the land transaction that had seen **the Academy** loose its property and that **Ndungu Njoroge & Kwach Advocates** had only acted for **Stanmore Investments Ltd** in respect of a loan obtained by the latter from the Bank which loan was secured against **the Academy**'s property. This information, according to the witness, went contra to the information contained in the aforesaid correspondence and documentation. He then prepared a draft publication incorporating the views of both **the Academy** and **Mr. Ndungu** and submitted the same on 19th January 2004 to the then editor of ***the East African Standard*** **Mr. Kiptanui Tanui** and the same was published on 20th January 2004. Before such a story is published it has to be perused by the News Editor who weighs the factual basis thereof, its truthfulness, whether it is in the public interest and whether written in good faith and only then is the same published. According to him the reason for the publication of the story was because it touched on a matter of public interest and concern given the fact that it made reference to alleged irregular dealings with land by a law firm inextricably linked with the chairman of the Commission charged with dealing with irregular allocation and acquisition of land in the Republic of Kenya. Land, he continued, is an emotive issue in this country and this was the time when the Government was trying to correct past wrongs by the new Government which was one year old. The investigation was on grabbing of public land and here it involved a public institution, **the Academy** and the documents relied upon were confirmed to be authentic having been received by **the Commission** which documents he produced as Defendants' Exhibit 1. At that time, he said he did not know **Mr. Ndungu** personally having neither met him before nor interacted with **Ndungu Njoroge & Kwach Advocates**. On 21st January 2004, the witness saw in ***the East African Standard*** a follow up publication to the story which further gave the views of **Ndungu Njoroge & Kwach Advocates** in respect of the said allegations. In reporting the story, the witness says that he did so fairly, accurately and without bias and on a matter of public concern and did not act under any ill will or with malice towards any of the plaintiffs while reporting the story. To his knowledge none of the defendants were actuated by any malice in reporting and publishing the story. The fact that he secured an interview with **Mr. Ndungu** before publishing the story as well as the plaintiffs' version coupled with the publication of the follow up is a testimony to lack of malice or ill motive but based on a true, fair and unbiased account of the story as relayed to him by the source and **Mr. Ndungu**.

On being cross-examined by **Mr. Wambola**, the witness confirmed that his source was from **the Commission** which was the basis of his publication. His second source was **Mr. Ndungu**. He confirmed having not received any documents from **the Academy** and having not met any of the officials of **the Academy** for the purposes of publication.

On further cross-examination by **Mr. Kahonge**, learned counsel for the plaintiff, he confirmed that he had a degree in Education from Moi University which he obtained in 1999 and has been trained by ***the East African Standard*** and ***Nation Media Group***. He, however, admitted that he has no professional qualifications as a journalist despite practising as such for 11 years. He is, however, undertaking a Diploma at the University of Nairobi. In 2004 he was not a professional journalist. He confirmed the source from **the Commission** was known to him although he was not at liberty to disclose the same. While admitting that a journalist investigates both sides of the story before publishing the same, he did not establish from **the Academy** whether the correspondences came from **the Academy**. The Chairman of **the Commission** however confirmed to him that he was aware of the case and that the documents came from **the Academy**. Whereas there are several letters referred to in the correspondences he

received, he did not see the letters referred to and did not request to see the same and consequently wrote the article without going through them. Referred to the article he admitted that the name "**Kwach**" was omitted from the name of **Ndungu Njoroge & Kwach Advocates** though he could not tell the reason. He however, denied that he wanted to fix **Mr. Ndungu** and only presented a factual situation. Before publishing the article he said he arranged for a meeting with **Mr. Ndungu** although he was not sure of the day of the week when the meeting was held. **Mr. Ndungu** asked for time to check as he was not the one dealing with the matter but did not tell him the person who was dealing with the same. He, however, gave his side of the story although the witness could not recall whether **Mr. Ndungu** gave him any documents. He confirmed that he was in possession of the documents appearing from page 13 to 16 prior to the publication and that in those documents **Ndungu Njoroge & Kwach Advocates** is not mentioned. He admitted that they showed that a swap had been agreed upon prior to 1998. The fact that **Ndungu Njoroge & Kwach Advocates** was not mentioned tallied with the version that he was given by **Mr. Ndungu**. However, the witness sad that since there were documents mentioning **Ndungu Njoroge & Kwach Advocates** he could not say that **Ndungu Njoroge & Kwach Advocates** was not involved. He, however, was not in possession of the documents at page 7 and relied on the documents which were availed to him and **Mr. Ndungu's** version. The documents from page 13 to 16, according to the witness implicated **Mr. Ndungu** and tallies with his evidence. He, however, said the article was not done in a hurry and that **Mr. Ngethe** was not availed to him. While denying that he was being used by the source to tarnish **Mr. Ndungu's** name, the witness testified that he is not an incompetent journalist and that the most important thing to do was to seek comments which he did. The headline of the article according to him was factual. While stating that he took notes while in **Mr. Ndungu's** office he said he did not have the same. He, however, insisted that **Mr. Ndungu** said that big names were involved and denied the allegation irresponsible journalism and sensationalism.

In re-examination by **Mr. Muchiri** he said he had worked previously for ***Nation Media Group*** and was an experienced journalist. As he had made a commitment to protect the identity of his source he was unwilling to disclose the same. He, however, had no explanation why the law firm referred to in the article was **Ndungu Njoroge & Company Advocates** although he attributed the same to inadvertence. He confirmed that the documents received from the source included documents of complaint and letters to **the Commission** which referred to **Ndungu Njoroge & Kwach Advocates**. He said **Mr. Ndungu** informed him his law firm was not involved in the swap and he wrote that. On the clarification, he said he was unaware of who supplied the information although it could have emanated form **Ndungu Njoroge & Kwach Advocates** urging their side of the story. He. However, stated that from the documents it was not possible to tell whether **Ndungu Njoroge & Kwach Advocates** was involved in the final stages of the swap.

With the end of the re-examination, the defence case in HCCC No. 117 of 2004 was closed.

On their part, the defendants in the second case called **Professor Raphael Mwatine Munavu,** a professor of Chemistry at the University of Nairobi and the Chairman of **the Academy**. He testified that he became a Fellow of **the Academy** in 1983, and was elected Honorary Secretary of **the Academy** in 19888 and served in that capacity until 1992. He was elected **the Academy**'s vice chairman in 1992 and served in that position until September, 2011when he was elected the Chairman. According to him, **the Academy** is a learned, non-political, non-sectarian and non-profit making body founded in 1983 and registered in the Republic of Kenya, under the auspices of the National Council for Science and Technology which is a government body for advising the Government on matters related to science and technology and derives its authority from the Government through the National Council for Science and Technology Act Cap 250. The fundamental aim of the agence, according to the witness is to co-operate with the Kenya Government, and other scientific organisations and the general public in the mobilisation of the scientific manpower in Kenya and for the promotion of the scholarly application of all aspects of science and technology for development. It is a public body which own property. **The Academy** owned a piece of land granted to it by the Government in 1987 situated in Nairobi South C being land parcel no. LR 209/13422 granted on 26th March 1987 approximately 10 hectares for a term of 99 years with effect from 1st March 1997. plot was to be used for the construction of **the Academy**'s Headquarters and preliminary professional surveys and drawings were commissioned on the site being in Nairobi South C near the National Park in the Area where other parastatals have their headquarters e.g. Weights and

Measures, KIRDI, Kenya Literature Bureau. However, the land is nolonger owned by **the Academy**. In 1997 **the Academy** was approached by the Commissioner of Lands through the Permanent Secretary in charge of research and technology with a request to consider swapping the land allocated to it with another plot allocated to **Stanmore Investments Ltd** based in Gigiri being LR No. 21015. This was discussed and **the Academy** had no problem with the request since what hey needed was an area for their headquarters for the promotion of sciences. The only condition they put forward was reimbursement of Kshs. 7,453,959.00 incurred on the development of the plot which amount was paid in tranches. To the knowledge of **the Academy** the advocates for **Stanmore Investments Ltd** were the firm, **Ndungu Njoroge & Kwach Advocates** as evidenced from the letter dated 16th January 1997 authored by the said firm to the Commissioner of Lands signed by Raphael K. Ngethe and copied to **Stanmore Investments Ltd** in which it was stated that it was written on the instructions of **Stanmore Investments Ltd**. Similarly the letter dated 6th January 1998 also confirmed that they were acting for **Stanmore Investments Ltd** in relation to the parcel of land in question. At the conclusion of the transaction, **the Academy** discovered that the **Stanmore property** did not actually exist and this is the land which the Advocates for **Stanmore Investments Ltd** made reference to despite **Ndungu Njoroge & Kwach Advocates** indicating that it had sought the services of a surveyor to locate the beacons on the plot. When the surveyor visited the site, it was found that two of the beacons of the plot were duplicated while the others could not be traced due to thick forest cover. On 24th February 2000 **the Academy** received a letter from **Ndungu Njoroge & Kwach Advocates** informing them that **the Academy** had purportedly been shown the property beacons and forwarding a beacon certificate purportedly signed by **Mr. Z Ayienda** on behalf of **the Academy** as its vice chairman, a person who according to the witness is unknown to **the Academy**. It was later found that there existed no file or any other documentation on plot No. 21095 at the Ministry of Lands thus indicating that the plot did not exist and consequently the document forwarded to **the Academy** was fake and the beacon certificate forwarded by **Ndungu Njoroge & Kwach Advocates** misleading. **The Academy** then sought assistance to have the process reversed so that it could get back its land and wrote to **the Commission** on 29th October 2003 and lodged the same complaint with the Minister. Todate **the Academy** has not been informed of the outcome of the matter and neither has it been able to recover its land. Since it was a Commission of inquiry on irregular allocation of public land the witness testified that they did not give any report to any media house or journalist. It however received a letter of demand from the plaintiff's advocates relating to the publication the subject of this suit. After submitting the complaint they could not determine to whom they gave the report and they were not involved in the publication the subject of the suit. **The Academy** was therefore under no obligation to tender an apology for a matter it did not publish. However, the matter of loss of the land was of great public interest and the information was of public interest. According to the witness the charges against **the Academy** ought to be dismissed with costs and relied on his statement filed in court on as part of his evidence in chief. He also produced the bundle of documents filed by the defendants in the second case as Defence Exhibit 2.

Cross-examined by **Mr. Muchiri**, the witness said that **the Academy** is a public institution funded by the Government i.e. tax payer and holds property in trust for the Kenyan people. At the time of the swapping the Chairman of **the Academy** was **Prof. Shem Wandiga** and the witness was a member of **the Academy** and therefore familiar with the details. He further said that at the time of the transaction **Ndungu Njoroge & Kwach Advocates** was acting for **Stanmore Investments Ltd**. since it was the one that was acting on behalf of **Stanmore Investments Ltd** including survey and subdivision of land. **The Academy** neither owns the South C plot nor the **Stanmore property** and through that transaction the public lost a property of 10 hectares in South C. He confirmed that he was aware of the publication of 20th January 2004 which he came to learn about later. According to the witness the publication generally depicted a fair representation of what **the Academy** had been saying from 19888 and could be founded on the complaint **the Academy** had made to **the Commission**. However, the purpose of sending the letter was not to harm **the Commission** since the complaint started even before **the Commission**. Once the complaint was sent no communication was received from **the Commission**. Although he had not seen **the Commission**'s report he was able to confirm that the parcel mentioned in the report being LR No. 2109 was the one that was to be swapped and from the report the original allottee was Frankmore with the current owner being **Stanmore Investments Ltd** which sold it to **the Academy**. According to the remarks on **the Commission**'s report the title of the same was recommended to be revoked.

On being cross-examined by **Mr. Kahonge**, the witness stated that **the Academy** is a society and he was

the vice chairperson between 2004 and 2005. The society had other officials who were **Prof. Joseph Otieno Malo** who was the chairperson, **Prof. Lutta** who was the secretary, **Prof. Makawiti** who was the Treasurer. There were also Assistant Secretary and Assistant Treasurer whose names he could not recall. According to him decisions of the Society are arrived at through consultations either by meetings or other means of communication. However, there is an administrator responsible for the day to day running of the Society. Sometimes the Chairman is expected to communicate and at other times it is the Secretary who communicates the decisions of the Society which would generally bind the Society. **Prof. Malo** left in September 2011 after serving the required three terms. He is still alive and is a Fellow of **the Academy**. Referred to a letter at page 109 in the Plaintiff's Supplementary list of documents he said the letter was authored by **Prof. Malo** and was addressed to **Hon. Amos Kimunya**, the Minister for Lands and Settlement and was copied to **Lumumba & Ojwang**, the office of the President and the Commissioner of Lands and in was in respect of plot No. 209/13422 in which **the Academy** was complaining about the loss of the plot which had been allotted to it at South C. He confirmed that **the Academy** accepted to swap the said property with another one along Kiambu Road on refund of the sum spent on the land. He confirmed that the land was vacant. The Communication to swap came from the Ministry of Lands and there was no due diligence done and no search was conducted at that time. He could not however recall whether a valuation was done at that time though it was subsequently done. There was no sale as the properties were just being exchanged and there were no negotiations and even the owner of the property was not known to the defendants in the second case. Referred to the letter dated 26th April 2002, authored by **Prof. Wandiga**, giving the chronology of events that transpired, he confirmed that the Communication was between **the Academy**, the Permanent Secretary, the Commissioner with **Stanmore Investments Ltd** and that there was an agreement. At that time **Ndungu Njoroge & Kwach Advocates** was not involved in the negotiations at the initial stages but were involved in the implementation. At the time **the Academy** made the decision, **Ndungu Njoroge & Kwach Advocates** was not involved. Referred to the name of **Brambhatt Advocate**, he said he could only confirm the payment of stamp duty but did not know who prepared the documents for transfer but believed the communication was by **Ndungu Njoroge & Kwach Advocates** on 6th January 1998, the time they wrote directly to **the Academy** after which **the Academy** appointed **Lumumba & Ojwang** to represent it. He could not, however, recall **the Academy** being called upon to execute documents though he was aware that **the Academy** was paid by **Ndungu Njoroge & Kwach Advocates** from the funds from the Bank. According to him **Stanmore Investments Ltd** could not be reached while **Ndungu Njoroge & Kwach Advocates** went quiet. Whereas the word "conspired" was published in the newspaper, the witness said it does not appear in the Chairman's letter. He further confirmed that the figure of 20 million was not mentioned in the letter and the only figure was Kshs. 10 million which was the value of the **Stanmore property**. He was therefore unaware of the source of the 20 million since their property had not been valued at the time of swapping although it is possible it could have been valued. Therefore the figure of 20 million might not be factual. He confirmed that the letter by **Prof. Malo** did not talk of conspiracy and the word "conspired" came from ***the East African Standard*** not **the Academy**. He was, however, unaware how the complaint got to ***the East African Standard*** and denied the possibility of **Prof. Malo** leaking it to the press. While denying knowledge that **Prof. Malo** has been sued, he could not tell why he was not in court.

On re-examination, he reiterated that **the Academy** is a registered Society established under an Act of Parliament capable of suing and being sued. According to him the valuation of the property does not change the circumstances as their concern was that the land allocated to **the Academy** was grabbed. **The Academy**, however, continued dealing with **Ndungu Njoroge & Kwach Advocates** up to 2003 on issues such as going to the ground to have beacons placed. According to the witness they were brought to Court because of the publication and not due to communication to other people. He confirmed that the correspondence by Prof. Malo were on behalf of **the Academy**.

At the close of the case, the parties filed written submissions. In their submissions, the plaintiffs submit that the defendants published the said impugned article and secondly caused it to be according to the plaintiffs it is the Complaint by **Prof. Malo** that was picked up by the defendants in the first case. It is submitted that **Prof. Munavu** admitted that the plaintiffs were not involved in the prior swap of the properties and that there were no allegations of conspiracy. Although **Mr. Mathangani** contended the publication was in the public interest they did not seek to interview **the Academy**. In determining the matter the court is urged to take into account the fact that the source of **Mr. Mathangani's** information

was not disclosed while **Prof. Malo** failed to adduce any evidence. In the light of the inconsistencies in the defence case, it is submitted that the defence of fair comment on a matter of public interest cannot stand taking into account the fact that figures were plucked from the air. According to the plaintiffs the letters authored on behalf of **the Academy** were defamatory of the plaintiffs and the court ought to invoke the provisions of section 119 of the Evidence Act on the failure by **Prof Malo** to adduce evidence. According to the plaintiffs they have proved the elements of defamation and under section 8(10) of the Defamation Act Cap 36 Laws of Kenya publication in a permanent form is actionable per se. Other than general damages, it is submitted that aggravated damages are also available where the defendants have not tendered an apology despite being called upon to do so. The plaintiff in support of the claim for award of damages cited the following cases:

I.Abrahim Kiptanui Vs Francis Mwaniki & 4 others HCC No 42 of 1997 Juma J in March 1998 awarded a former state house comptroller the sum of Kshs 3.5 million as general damages and Kshs 1.5 million in aggravated damages for publications/injurious statements published by a moderate circulation paper and now defunct 'Target'

II.Honourable Christopher M. Obure Vs Tom Alakwa & Others HCC No. 956 of 2003, I Lenaola Ag. J as he then was in January 2004 awarded the honourable Obure a former minister the sum of Kshs 15 million as general damages and Kshs 2 million as exemplary damages for statements published in a low circulation alternative media newspaper titled 'the weekly citizen.'

III.Oyaro Vs Alakwa T/A Weekly Citizen & 2 others[KLR] 2003 575 where Justice Onyancha on the 1st of September 2003 awarded the plaintiff a manager at the Kenya Ports authority the sum of Kshs 3 million for statements published in the weekly citizen herein before referred.

IV.John Patrick Machira Vs Wangethi Mwangi & 2 others HCC No. 1709 of 1996 where Justice Kassanga Mulwa on 7th September 2001 awarded the plaintiff a senior advocate of this court the sum of Kshs 8 million in general damages and Kshs 2.million exemplary damages for statements published in The Nation newspaper.

V.John Joseph Kamotho & 3 others versus nation Media Group Limited & 2 others HCC No. 368 of 2001 where Justice J. B. Ojwang awarded the 1st plaintiff Kshs six million as general damages and Kshs one million as aggravated damages for defamatory utterances published in its radio show 'Changamka' and where the defendants practiced irresponsible journalism and failed to apologize or make amends.

VI.Wilson Kalya & another Vs Standard Limited and another HCC No 165 of 1999 where Omondi Tunya J awarded for plaintiffs the sums of Kshs 9 million general damages and Khs 2 million special damages to the 1st plaintiff and Kshs 4 million general damages and Kshs 2 million aggravated damages this consequent upon defamatory publication in the Standard newspaper wherein it was alleged that their firm of advocates had stolen dairy farmers monies.

VII.Wangethi Mwangi & another Vs J.P. Machira Court of Appeal Civil Appeal number 148 of 2003 where the Court of Appeal considered elements necessary for the award of general damages to be amongst others recklessness in telling the truth behind the story after having been prompted or alerted before publication.

VIII.Benson Ondimu Masose Vs Kenya Tea Development Authority High Court Kisumu Civil Case No 750 of 2004 wherein Justice B. K. Tunoi awarded in October 2005 the plaintiff an advocate of this Honourable court the sum of Kenya Shillings 7 million as general damages and Kenya 3 million as exemplary damages wherein the defendants had maliciously and recklessly defamed the plaintiff as being a fraudulent corrupt and unscrupulous lawyer.

IX.Richard Otieno Kwach Vs the Standard Limited & Another Nairobi HCC No. 1099 of 2004 where Justice Alnashir Visram awarded (in October 2007 the plaintiff a retired judge of appeal the sum of Kenya shillings 5.5 million arising out of defamatory publications in the Standard

newspaper stemming from an article linking the said judge with corruption allegations.

X.Honourable Martha Karua Vs the Standard Group Limited HCC No. 295 of 2004 wherein Justice Kihara Kariuki awarded (in May 2006) the plaintiffs a learned advocate and member of parliament the sum of Kshs 4 million as general damages and the sum of Kshs 500,000 as aggravated damages this arising out of the defendants publication of defamatory articles in their paper under the banner 'politicians just want a license to behave.'

In conclusion it is the plaintiffs' view that the first plaintiff is entitled to Kshs. 12,000,000.00 as general damages and Kshs. 3,000,000.00 as aggravated damages while the second plaintiff is entitled to Kshs. 10,000,000.00 in general damages with aggravated damages in the sum of Kshs. 3,000,000.00. The plaintiffs also contend that they are entitled to an injunction as well as costs of the suit.

The defendants in the first case, relying on ***Gatley and Libel and Slander, 7th Edition at pages 188, 189 and 191***, submit that in publishing the report of 20th January 2004, they had a tangible duty to convey the contents of the said report to the public and the public had a corresponding legitimate interest to receive and be informed on the contents of the report. On the authority of ***Winfield & Jolowicz on Tort, 16th Edition at page 453***, it is submitted that this duty is not only legal but embraces moral and social duties and the Court is urged to find that the Defendants had a genuine moral/social and legal duty to publish the report in issue and inform the Kenyan Population which had a legitimate interest in being informed of alleged involvement in irregular land dealings of a firm whose senior partner at the time was heading a public inquiry into the irregular allocation of land in all parts of Kenya. A public in a newspaper, it is submitted based on ***Gatley on Libel and Slander*** (supra) at page 224, does not deprive a defendant the defence of qualified privilege in instances where the matter published is of general public interest and it is the duty of the defendant to communicate to the general public. Based on **Reynolds vs. Times Newspapers Ltd [2001] 2 AC 127**, it is submitted that as it is the task of the news media to inform the public and engage in public discussions of matters of public interest, so is that to be recognised as its duty. The defendants further submit that they were not actuated by malice since in publishing the report in issue they were exercising their duties under the Media Act, No. 3 of 2007, as journalists and not advancing any ulterior motive. The Media Act, it is submitted, is only obliged to interrogate those persons who will be adversely mentioned in the publication which the defendants did and communicated the views of the plaintiffs to the public. It is the defendants' further submission that the statements published were true in fact and in substance based on the documents produced in evidence. With respect to the defence of fair comment, it is submitted that the defendants have proved the elements thereof which are that the matter commented on was of public interest, the comment was an observation from true facts and the comment was fair. It was therefore their submission that the plaintiffs' suit ought to be dismissed with costs.

On the part of the defendants in the second case, it is submitted that, from the plaint it is clear that the only reason for suing the defendants in the second case is that they "supplied the Defendants in the first case with the information which they later printed and published in their newspaper dated 20th January 2004. From the evidence of DW1, it is submitted that he stated that he neither received any information whatsoever from the defendants in the second case nor had he ever met any of them prior to the publication of the article. This was confirmed by the evidence of DW2 who stated that the defendants in the second case never supplied any information to DW1 as alleged by the plaintiffs. The testimony of these two witnesses was never challenged and the plaintiffs failed to adduce evidence to prove that the material published was supplied by the said defendants. Accordingly, it is submitted that since the issue no.2 is in the negative there is no point in dwelling on the rest of the issues. However, it is further submitted that although in cross-examination of DW2 a great deal was placed on the defamatory nature of the letters written by the defendants in the second case, nowhere in the plaint is it stated that the cause of action was based on the said letters but to the contrary the cause of action was based on the article in the newspaper. It is therefore submitted that the letters written by the said defendants to various government agencies were inadmissible as evidence to prove defamation. Since the publication of the said letters was not one of the framed issues, it is submitted based on **Highway Carriers Ltd vs. Hughes Ltd & Another [19997] eKLR** that a Court can only make a decision on issues submitted to it. Since the Commission invited representations from the public on unlawful or irregular allocation of public land any

representations made to it pursuant thereto, it is submitted, could not form a basis for an action for defamation. Accordingly, on the evidence available, it is submitted that the plaintiffs' suit against the said defendants is unsustainable and they ought not to have been joined in this suit at all and the suit ought to be dismissed with costs.

I have considered the pleadings, the evidence adduced by the parties as well as the submissions made and the authorities cited.

Although the parties agreed on the issues for trial and based on the said agreed trial, it was the defendants in the second cases' position that the court cannot go outside the issues agreed by the parties, it must be clarified that the issues in a suit arise from the pleadings as well as the evidence. The Court is not limited to the issues agreed by the parties in arriving at its decision. This is clearly so when it is taken into account that a Court may base its decision on unpleaded issue if it appears from the course followed at the trial that the issue was left to the Court for decision. See **Odd Jobs vs. Lubia [1970] EA 476.** Under the overriding objective provided in sections 1A and 1B of the Civil Procedure Act an agreement between the parties on what the issues in a suit are does not necessary bind the Court since the Courts are now on the driving seat of justice. Whereas, parties should as a matter of procedure draft and file what in their views are the issues for trial, that does not bind the court and the court is not obliged to go by the version filed if to adopt that course would go contrary to the provisions of the aforesaid provisions. To quote **Oder, JSC** in the case of **Gokaldas Tanna vs.**

Rosemary Muyinza & DAPCB SCCA No. 12 of 1992 (SCU) expressed himself as follows:

"An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions".

Having said that I am in agreement with the parties that the issues agreed and filed by them reflect the real issues for determination in this suit.

However, before determining the above issues it is important to set out the various principles of the law of defamation. Under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion and provides that the freedom to express one's opinion is a fundamental freedom. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.

Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the

plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See **J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of1997.**

As opposed to slander, libel is punishable *per se* without proof of damageand the actual sum to be awarded is "at large" and although a person's reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances.

The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. However, in libel the words cannot be protected as mere abuse since it is presumed that the defendant had time for reflection before he wrote them. Secondly, the words must refer to the plaintiff**.** Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself. The language used is utterly beyond the facts. The failure to inquire is into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement, was false or did not care whether it be true or false will be evidence of malice. See **Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mwangi** (supra).

The law of course recognises certain defences that may be invoked by a defendant in a defamatory suit. I will, however, only deal with the ones relevant to the present case. The law recognizes that there may be occasions in which freedom of communication without fear of an action for defamation is more important than the protection of a person's reputation and such occasions are said to be "privileged" and the privilege may be either absolute or qualified. Absolute privilege covers cases in which complete freedom of communication is regarded as of such paramount importance that actions for defamation cannot be entertained at all: a person defamed on an occasion of absolute privilege has no legal redress, however outrageous the untrue statement which has been made about him and however malicious the motive of the maker of it. Qualified privilege, though it also protects the maker of an untrue defamatory statement, does so only if the maker of the statement acted honestly and without malice. If the plaintiff can prove "express malice" the privilege is displaced and he may recover damages, but it is for him to prove malice, once the privilege has been made out, not for the defendant to disprove it.

For the purposes of this judgement it includes -Statements made by A to B about C which A is under a legal, moral or social duty to communicate to B and which B has a corresponding interest in receiving.The protection of such statements is justified for the common convenience and welfare of society. With respect to newspaper reports, the matter which is reported may be of very wide public interest, but the protection of privilege is not thrown about it unless its publication is in the public interest and the newspaper can be said to be fulfilling a duty in revealing it. There is no defence of "fair information on a matter of public interest". The defence of fair comment is available if facts are true and the matter is of public interest and the opinion is honestly held.

On the other hand, **Waweru, J** in **Nation Newspapers Ltd vs. Gibendi [2002] 2 KLR 406** held on 29/05/02 as follows:

"But the appellant pleaded fair comment on a matter of public interest that is, qualified privilege. To defeat that defence the respondent needed to prove actual malice. Actual or express malice is ill will or spite or any indirect or improper motive in the mind of the defendant at the time of the publication...The trial court did not address this issue in its judgement. There was no evidence that in publishing the words complained of the appellant acted from an indirect or improper motive such as spite, ill will or jealousy. Even if it were to be accepted that the reporter was rash or negligent that would not be sufficient...From the evidence placed before the trial court the respondent failed to prove actual malice on the part of the appellant. The appellant's defence of fair comment on a matter of public interest therefore succeeded, and the trial court should have so held. That the matter was of public interest there cannot be doubt. This was a public school and there was evidence, on balance, that there had been some kind of disturbance and that some teachers in the school had staged a sit-in. The matter was serious enough to be investigated by the District Education Officer. The appellant had a social duty to write and comment on it...Upon the defence of fair comment on a matter of public interest therefore, the respondent's action should have failed".

In the case of Shah Vs. Uganda Argus [1972] EA 80 the East African Court of Appeal stated that "the publication of a matter of a public nature and of public interest and for public information was privileged, provided it was published with the honest desire to afford the public information and with no sinister motive".

The Court went on:

"in the instant case, it was an occasion when the respondent newspaper had a moral duty to publish a matter of a public nature and of public interest and for public information, and qualified privilege attached to the publication. In the article the heading was "Asians Held". The heading was accurate and although there was some shift in the emphasis, the court cannot say that the general sense had in any material particular been altered. This is one of those difficult and border-line cases since the article just stopped short of altering the sense conveyed in the Ministry's hand-out. It was on the whole a reasonably accurate paraphrase of the contents in the handout. We agree with the trial judge findings that the defendants in publishing the article were actuated by "the best possible motives and had the honest desire to afford the public information....There was no evidence of indirect or improper motive to constitute malice and in publishing the article the respondents were protected by qualified privilege which was in no way destroyed…It is, no doubt, often very difficult to determine whether a particular occasion is privileged or not. The circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact and the facts of each case must be scrutinised in the light of its peculiar circumstances…However, the protection of such privilege is destroyed if the plaintiff can show that publication was made maliciously. Malice in this connection does not necessarily connote ill-will or spite; it will include any indirect or wrong motive. A defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose but is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive...Whether or not the alterations done by the editorial staff amounted to sensationalism and use of excessive language as to amount to evidence of malice in the legal sense such as to deprive the respondents of the protection afforded by the occasion being one of qualified privilege is a question of degree, and where the line is to be drawn has to be decided in the light of the facts of each case. As regards the heading, the court can see nothing sinister or improper in the words "Asians held". The word "held" is appropriate to describe detention, and the heading was factually correct. As regards the use of the word "arrested", whereas the appellant was in fact detained, this seems to be somewhat a distinction without a difference. The appellant was taken from his home by a police officer, and detained in a prison under the Emergency Regulations for over three weeks. Accordingly the court has come to the same conclusion as the judge that the respondents "were actuated by the best possible motives and had the honest desire to afford the public information and were seeking to assist the Government, Police and general public in ridding Uganda of suspected illegal practices in its Immigration Department".

Qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or use of the privileged occasion for an improper purpose. Lack of belief in the truth of the statement is generally conclusive as to malice, except in cases where a person is under a duty to pass on defamatory reports by some other person. Mere carelessness, however, or even honest belief produced by irrational prejudices, does not amount to malice. But an honest belief will not protect the defendant if he uses the privileged occasion for some other purpose other than that for which the privilege is accorded by law: if his dominant motive is spite or if he acts for some private advantage he will be liable. Existence of malice can be evinced by language; If the language used is utterly beyond or disproportionate to the facts; however, it does not follow that merely because the words are excessive malice must be inferred. It can also appear from the relations between the parties before or after publication or from the conduct of the defendant in the course of the proceedings themselves, as, for example insisting on the defence of justification while nevertheless making no attempt to prove it...However mere pleading of justification is not itself evidence of malice even though the plea ultimately fails. It may be deduced from the mode of publication where the dissemination of the statement is wider than is necessary. When a defamatory communication is made by several persons on an occasion of qualified privilege, only those against whom express malice is actually proved are liable.

We now come back to the issues in this case. The first issue is whether the words complained of could, in their natural and ordinary meaning, be understood to have the meanings attributed to them in the respective plaints. It is not disputed that the defendants in the first case published the words set out in paragraph 5 of the plaint. It is true that in the said article it was stated that **the Academy** claimed that **Ndungu Njoroge and Company Advocates** conspired with powerful conmen to grab the land. It therefore follows that the words in their natural meaning meant just that and paragraph 6(a) of the plaint in HCCC No. 117 of 2004 which is similar to paragraph 7(a) of the plaint in HCCC No. 52 of 2005 is correct. If the plaintiffs conspired to grab the land, it would follow that the plaintiffs themselves would be land grabbers and from the opinion formed in the article, the 2nd plaintiff would not be justified in occupying the position of the chairman of the Commission. Accordingly paragraphs 6(b) and 7(b) of the respective plaints are similarly correct. It goes without saying that an advocate who engages in "land grabbing" of public land would be guilty of professional misconduct and in my view a person who conspires to grab public land has no moral standing and integrity more so in light of Chapter 6 of the current Constitution. Such conduct in my view would be dishonest and such a person properly speaking should not be entrusted with any public work and being guilty of professional misconduct would be unfit to offer professional serices. If follows that I accept that words complained of could, in their natural and ordinary meaning, be understood to have the meanings attributed to them in the respective plaints.

The second issue is whether the words complained of were defamatory of the Plaintiffs. On the face of it the publication of such material would ordinarily tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. However, it cannot be decided at that stage that the words were defamatory since defamation is a technical term and the conclusion whether a defamation was committed must come at the end after all the factors have been considered.

The next issue that falls for consideration is whether the Defendants in HCCC No. 52 of 2005 supplied, published and/or caused to be published to one **Patrick Mathangani** of ***East Africa Standard*** the alleged defamatory words. Although the plaintiffs pleaded that the defendants in the said case was the supplier of the published material to **Mr. Mathangani**, there was no direct evidence adduced to prove this. **Mr. Mathangani** expressly denied having received the said material from the said defendants and denied having met the said defendants. **Prof. Muniavu** similarly denied that the said material was availed to **Mr. Mathangani** by the said defendants. In attempt to connect the said defendants with the supply of the said information, the plaintiffs relied on the fact that the then Chairperson of **the Academy Prof. Malo** failed to appear and adduce evidence. I accept the principle stated in section 119 of the Evidence Act that failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. However, as was held in **Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634** and**Pushpa D/O Raojibhai M**

Patel vs. The Fleet Transport Company Ltd Civil Appeal No. 5 of 1960 [1960] EA 1025, whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter, which must depend upon particular circumstances of each case when it is taken into account that there is no number of witnesses in law required to prove any fact unless provided so by law and there is no rule that all material or all eye witnesses must be called otherwise adverse inference is to be drawn. In this case evidence was given by the current Chairperson of the Academy based on the records of the Academy who was also a member of the Academy at the material time. Whereas, all the defendants could have been availed to adduce evidence, I am not prepared in the circumstances of this case, where the real complainant was a statutory body, to hold that the failure by **Prof. Malo** to testify should invite the drawing of an adverse inference. Based on the evidence on record, there is, therefore, no basis upon which I can find that Defendants in HCCC No. 52 of 2005 supplied, published and/or caused to be published to one **Patrick Mathangani** of ***East Africa Standard*** the alleged defamatory words. The only admitted evidence was that the evidence was availed to the Commission which was a Presidential Commission of Inquiry entitled to receive the said information.

On the issue that some correspondences were copied to third parties, I agree with **Mr. Wambola**, that the said correspondences are not the subject matter of this suit. In any case the said letters were dated the year 2003 and HCCC No. 52 of 2005 was filed on 19th January 2005 bringing to question whether by virtue of the proviso to section 4(2) of the Defamation Act, Cap 36 Laws of Kenya, the cause of action would be within the limitation period. However, that issue does not fall for determination in this suit as it is not an issue in this suit and going by the decision in **Highway Carriers Ltd vs. Hughes Ltd & Another [19997] eKLR** this court cannot stray into that area.

That brings me to the issue whether the occasion or the circumstances in which the defendants made or published the words complained of was privileged. As already indicated above the publication of a matter of a public nature and of public interest and for public information is privileged, provided it was published with the honest desire to afford the public information and with no sinister motive. It is therefore my view and I so hold that the defendants in the first case would have been within their right to publish matters which went to show the impartiality or otherwise of the second plaintiff in carrying out his duties as the Chairman of the Commission tasked with conducting an inquiry into illegal and irregular allocation of public land. The public would definitely be interested in knowing whether the person conducting such investigations was not himself a beneficiary of the very ills under investigation. From the record it is clear that **the Academy** is a public body and the allocation of land to it was in public interest and the public would therefore, similarly, be interested in knowing the circumstances under which the land allocated to it was lost. As long as the publication is done with the honest desire to afford the public information and with no sinister motive, it would, in my view be privileged.

That brings me to the issue whether the defendants published the words falsely and maliciously. If I understood the plaintiffs' case properly they contend that the publication was not factual, was false and malicious. It is contended that what was published was not the actual information that was in possession of the defendants in the first case. For example the issue of conspiracy was not disclosed in the letter that was written by **the Academy** to **the Commission**. Whereas it is true that the word "conspire" was not used by **the Academy**, it is clear from the correspondence that the Academy did cast some aspersions at the 1st plaintiff through whom the transaction in question was done and who according to them "went underground" a term which DW2 stated meant that they did not respond to the Academy's correspondence. However, it is the plaintiffs' case that had the defendants taken into account all the correspondences in question, they would have realised that the plaintiffs were not acting for **Stanmore Investments Limited** and that the plaintiffs came into the picture much later in the transaction. That may be so, however, as was admitted, correctly, in my view by PW-1, the language in which some of the correspondences emanating from **Ndungu Njoroge & Kwach** were written depicted the firm as acting for **Stanmore Investments Ltd**. Accordingly, I cannot fault a third party reading the said correspondences in concluding that the firm of **Ndungu Njoroge & Kwach Advocates** acted for **Stanmore Investments Ltd** at some point in the transaction. For example why would a firm instructed by a bank to facilitate the transfer and exchange of titles and facilitate the exchange of the sums involved in the transaction get itself embroiled in the murky waters of identification of beacons"

The other issue taken by the plaintiffs is that the defendants published the material without conducting proper investigations in the matter by taking a statement from **the Academy** or **Mr. Ngethe**. Whereas a prudent journalist is expected to take any necessary steps to ensure that the versions of all the parties mentioned are taken on board, I must take cognisance of the fact that **Mr. Mathangani** did at least contact **Mr. Ndungu** prior to the publication and **Mr. Ndungu** sought for time to cross-check the records of the firm. Maybe by the wisdom of the hindsight **Mr. Ngethe** should have been available at the interview which was conducted within the premises of the 1st plaintiff. With respect to the failure to obtain the Academy's version I do not see what difference that would have made since the Academy similarly maintains that **Ndungu Njoroge & Kwach Advocates** was acting for Stanmore and the issue was that the Academy lost land in a matter in which the 1st Plaintiff was acting for the party whose actions led to the loss of the said land while the 2nd plaintiff a partner in the said firm was tasked with investigating such misdemeanours. That the name "Kwach" was omitted in the newspaper reports would not, in my view, necessarily connote malice. As for the publication of the plaintiff's version, it is clear that the firm's version was not totally omitted. The whole version may not have been printed but I am satisfied that the gist of the said version was published. Whereas the employment of a strong language may be evidence of malice, the mere fact that the defendant's language was strong does not necessarily import malice as it is only one of the factors to be considered. The law as I understand it is that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so. See **Williamson Diamonds Ltd and Another vs. Brown [1970] EA 1.** In **Shah vs. Uganda Argus Kampala HCCC No. 456 of 1968 (HCU) [1971] EA 362**, a decision that was confirmed by the Court of Appeal in **Shah vs. Uganda Argus** (supra)it was stated that "not only was the defendants' newspaper article published on a privileged occasion but the defendants did not lose or forfeit that privilege by using the more picturesque journalistic language and words that they did use when seeking to create the maximum impact upon and understanding by members of the public reading their article. There was no evidence suggestive of malice or of improper or dishonest motive on the part of the defendants in and about the publication of their newspaper article, and accordingly the defence of qualified privilege succeeded and the defendants were not legally liable to compensate the plaintiff in respect of their newspaper article which was found to be defamatory of him".

It is true that as a result of a transaction between **the Academy**, a statutory body and **Stanmore Investments Ltd**, the former lost a parcel of land that was allocated to it. It is also true that the 1st plaintiff herein was somehow involved in the said transaction. It is also a fact that the second plaintiff who was appointed the Chairman to the Commission is a partner in the said firm. Whether or not the value of the land was Kshs. 20 million is not the crux of the matter. Based on those facts the defendants' opinion that the 2nd plaintiff's position at the Commission could have been the subject of interest by the public is not totally farfetched. Accordingly, taking into account the circumstances of the case in its totality I am unable to find that in publishing the impugned article the defendants in the first case were actuated by malice. In my view, there would be no justification in reading more into the heading "***Land probe boss and irregular deal***".

That then leads me to the issue whether the Plaintiffs suffered any loss and/or damage to their reputation, credibility and goodwill. From the evidence on record and from my finding on issue number 1 I am not in doubt that the plaintiffs' reputation, credibility and goodwill must have been dented by the publication and would have, in the absence of privilege, been entitled to compensation.

As to whether the Defendants in HCCC No. 117 of 2004 made any offer(s) of rejoinder to the Plaintiffs, and if so, whether the Plaintiff accepted the same, it is not in dispute that the day following the publication of the impugned article the defendants in the first case caused to be published in ***the East African Standard*** issue of 21st January 2004 inter alia the following:

"The information made available shows that the law firm only came into the picture to facilitate

payment for the land from Stanmore to the academy through Trust Bank...It was instructed by its client then. Trust Bank, to issue a professional undertaking that the made would be made available once the transfer deeds had been registered...This was almost a year after the two parties began negotiations on the swapping of the contentious land".

In my view, this was an appropriate rejoinder to what had been published the previous day and the mere fact that it was not on the first page does not make it any less a rejoinder although the plaintiffs did not seem to have been mollified by the same.

In follows from the foregoing that the issue whether the Plaintiffs are entitled to the reliefs claimed must be answered in the negative. With respect to the defendants in the second case it has not been proved that they supplied the fuel leading to the publication of the article by the defendants in the first case. With respect to the defendants in the first case, they are covered by the defence of qualified privilege. This is not to say that the plaintiffs' reputations were not dented. It is only that the said defendants' actions are excused by the law as long as they are within the legal parameters, which I find they are.

It follows that the plaintiffs' case must be dismissed. However taking into account the fact that the defendants in HCCC No. 117 of 2004 could have done better by conducting thorough investigations into the matter before publishing the said article I will not award it the costs. The plaintiffs will, however, bear the costs of the defendants in HCCC No. 52 of 2005.

Nevertheless, as the law requires me to assess damages despite the foregoing finding, I will proceed to do so. Although the plaintiff claimed exemplary and aggravated damages, I am unable to find that the conditions necessary for the award of the said damages have been satisfied. Exemplary damages are awarded where compensatory damages are not sufficient and when the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not and decided to publish it because the prospects of material advantages outweighed the prospects of material loss; i.e. the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty. I am not satisfied that the publication of the article complained of was done with such a motive. Aggravated damages, on the other hand, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances and will be ordered against a defendant who acts out of improper motive e.g. where is actuated by malice; insistence on a flimsy defence of justification or failure to apologise. I have found that there was no evidence of malice on the part of the defendants and I have also found that a rejoinder was duly published.

Whether an award of exemplary and aggravated damages against the media may be awarded is, in light of the provisions of Article 34 of the Constitution, moot. Under the said Article which provides for the freedom of the media, states that the State is prohibited in mandatory terms from exercising control over or interfering with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium ***or penalising*** any person for any opinion or view or the content of any broadcast, publication or dissemination. (Emphasis mine)

In **Esso Standard Ltd vs. Semu Amanu Opio SCCA No. 343 of1987** it was held:

"As is very well known, the function of civil law is to compensate, while the function of criminal law is to inflict deterrent and punitive penalties. Damages for breach of contract and tort are, or ought to be, fixed at a sum, which will compensate the plaintiff. In the case of tort, the damages should be fixed at a sum, so far as money can do, to compensate the victim for all the injury, which has been suffered. This compensation sum may be enhanced to cover the loss suffered as well as the injury to the plaintiff's feelings and reputation. On the other hand, there is the loss of the plaintiff, and on the other there is the conduct of the defendant. The latter may have acted in a high-handed, insulting, malicious or oppressive manner. The defendant's action may cause the damages of a purely compensatory kind to be increased; and such increase, still compensatory, would be called aggravated damages. But then as a tort is a wrong done to the plaintiff how can the court prevent a

wrong done repeatedly in disregard of the plaintiff's rights" The notion arose that a further sum of damages could be meted out by way of punishment or by making an example of the defendant's conduct. Hence this extra sum may be called punitive or exemplary damages. Other names have been used such as vindictive damages but vindictiveness can hardly be a trait properly pursued by a court of justice".

That issue will, however, await a determination another day.

However, with respect to damages, it is not in doubt that the 1st plaintiff is a highly reputable legal firm in this country while the 2nd plaintiff is a lawyer of long standing who has acquired, justifiably so, several accolades in the course of his legal practice and social life. I have considered the authorities cited by the plaintiffs' counsel. I am aware that the case of **Benson Ondimu Masese vs. Kenya Tea Development Authority Kisumu HCCC No. 750 of 2004** was appealed against in **Kenya Tea Development Agency Ltd Vs. Benson Ondimu Masese T/A B O Masese & Co. Advocates Civil Appeal No. 95 of 2006** and the Court of appeal reduced the award from Kshs. 10,000,000.00 to Kshs. 1,500,000.00. However, the advocate concerned was not of the same status as the 2nd plaintiff herein. Accordingly, I would have awarded the plaintiffs Kshs.5,000,000.00 each as general damages taking into account the fact that not so much damages was caused by the said defamation as the 2nd plaintiff's position as the Chairperson of the Commission does not seem to have been affected thereby.

That being my finding this suit is dismissed with costs to the defendants in HCCC No. 52 of 2005.

Dated at Nairobi this 15th day of October 2012

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Kahonge for Plaintiff

Mr Muchiri for the Defendants in HCCC No. 117 of 2004

Mr Yusuf for the Defendants in HCCC No. 52 of 2005