REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 259 OF 2003

SANKALE OLE KANTAI…….PLAINTIFF

VERSUS

NYAMODI OCHIENG NYAMODI & ANOTHER……DEFENDANTS

JUDGMENT

The plaintiff herein approached the seat of justice by way of a plaint dated the 18th day of March, 2003 and filed on the 21st day of March, 2003. The salient features of the same in a summary form are that:-

(i) The plaintiff was at the material time the proprietor of a legal firm under the name and style of "**Kantai and Co advocates",** whose work involved in handling a wide spectrum of legal matters. Where as the first defendant was at all material times a partner and or a joint proprietor of a legal firm under the name and style of "**Nyamogo & Nyamogo Advocates,"** the second defendant.

(ii) The source of complaint is a letter dated the 11th day of December, 2002 which in the plaintiff alleges the defendants to have maliciously printed and published and/or caused to be written and published in a type written form on the 2nd defendants' letter head the words complained of. For purpose of the record these are reproduced as:-

"**With respect we see this as your latest misguided attempt to delay taxation of the many bills we have filed against Kenya Bus non of which you have been ready and able to proceed with!**

We note quite instructively that you are writing to us exactly one(1 day) tomorrow being a public holiday before the taxation date which was taken by consent weeks ago. This is clearly designed to aid your intended application for adjournment (as usual) and we hope the court will not be fooled by this.

In furtherance of our duty to court, we shall tender proof that the information you are pretending to seek is in fact already in your possession and or that of your client.

All these antics may be helping your client to delay facing its financial obligation but we need to remind you that as an officer of the court you owe a duty to the court to prevent your client from wasting the courts valuable time". Also remember; these bills will one day be taxed. When the matter comes to court, we intend to complain to court that you Sankale Ole Kantai is mischievous and probably idle person whose position as an officer of the court needs to be reevaluated.

Finally we probably appreciate the embarrassing position of your client but hasten to point out to

you if we need to it is clearly the author and continues to be even the midwife of that embarrassment"

(iii) That the letter whose contents are complained of was hand delivered to the plaintiffs offices, copied to the Deputy Registrar High Court and the plaintiffs client Kenya Bus Services Limited knowing that it would at all material times be opened in the ordinary course of business.

(iv) As at the time the letter complained of was authored the defendants knew that the plaintiff was a reputable advocate of the High Court of Kenya of long standing with an experience spanning more than 15 years; a highly regarded advocate by highly placed persons both in the public and private domain; was offering a broad spectrum of legal services in all spheres of the law; was an advocate of Kenya Bus Service limited; had not had his reputation conduct of his business or character brought under servitum or questioned by either the High Court of Kenya, the Kenya Bus Service limited or by other persons, institutions or body and was an employer of many persons in his firm.

(v) By reason of matters complained of , it is the stand of the plaintiff that the words complained of were meant and understood to mean of the plaintiff:-

(a) Will always engage himself in misguided attempts at doing things.

(b) Will always delay court matters unnecessarily.

(c) Is a pretender.

(d) Does not prevent and actually aids his clients to waste courts valuable time.

(e) Is a mischievous and idle person.

(f) His position as an officer of the court needs to be re-evaluated.

(g) Does not deserve the respect and repute which he is accorded by the high court and the Kenya bus service limited.

(h) Should be struck from the roll of Advocates as an unfit person to practice as an advocate"

(vi) That the said words were also meant and understood by the persons to whom the letter and words were provided and published to mean that the plaintiff is an unfit person to practice law at the High Court of Kenya and that he does not deserve to be retained by Kenya Bus Service limited as its Advocate.

(vii) That the said words were calculated to cause pecuniary damage to the plaintiff and to him in respect of his said legal practice and law business which business has seriously been damaged and him as a person has suffered absolute distress and embarrassment.

In consequence thereof the plaintiff sought from the defendant jointly and severally:-

(a) Damages

(b) Costs of this suit.

(c) Interests on (a) and (b) above.

(d) Any other relief and/or remedy that this Honourable court may deem fit to grant in the circumstances of this suit"

The defendants were served with the plaint herein, entered appearance and filed a defence dated 20th day of May, 2003 and file don 28th May, 2003 and subsequently amended by order of court issued on the

24/4/2004.

The salient features of the amended defence are that:-

(i) Admitted publishing the words complained of save that the letter hand delivered to the plaintiffs offices had been marked to the plaintiff personally but concede that it was indeed copied to the Deputy registrar of the High Court and Kenya Bus Service Limited.

(ii) Denied the words published were meant or understood to mean what the plaintiff has attributed to those words as their meaning.

(iii) On the other hand contends that the said words are true in substance and or fact in so far as the said words consist of expression of ponies, they are fair comment on matters of public interest.

(v) The defendant rely on the provision of section 7(1) and (2) of the defamation Act cap 36 of the laws of Kenya.

(v) Denied particulars of the meaning of the words complained of attributed to the defendant.

(vi) The defendants in addition to their contentions in number (i) (ii) (iii) (iv) and (v) above will also content that the words were published on an occasion of qualified privilege whose particulars are given that:-

(a) Before the publication complained of the defendants acted as lawyers for the plaintiff's now client who had failed, ignored and or refused to pay the defendants legal fees in full.

(b) Consequently the defendants filed an Advocates client Bill of costs against their then client (Kenya Bus Service) who now instructed the plaintiff herein to act for them in the taxation thereof.

(c) The date for the taxation was taken by consent.

(d) That it was clear on the face of the plaintiffs letter giving rise to their complaint that both the plaintiff and their client had in their possession the very information that they were purporting not to have.

(e) Even if they did not have that information which is denied, they had ample time to seek and obtain it without interfering with the date of taxation.

(f) The said words/letter were written as an honest response to the plaintiff's letter and under a sense of duty and without malice towards the plaintiff and in the honest belief that the statements therein made were true.

In consequence thereof contended that the defendant in pursuit of a reasonable and necessary protection of their client were under a legal and or moral duty to publish the aid words to the said publishes who had a like duty and or interest to receive them and on that account prayed for the dismissal of the plaintiffs suit against them with costs.

Parties were heard. The plaintiff was the first one to take the witness stand. The sum total of his evidence in a summary form is that he is an advocate of the high court of Kenya of 20 years standing as at the time of trial. In addition to his professional standing the plaintiff was also holding leading positions in various institutions and professional bodies' informed by his rich C.V outlined as an introduction to his evidence. He is also involved in various charitable and welfare activities within the community in which he is well respected and his offices are located in a prestigious location within the city of Nairobi namely Bruce House on Standard street Nairobi.

In terms of professional expertise, just to the run up to the events leading to the presentation of the

case they had specialized in the area of corporate clients among them Kenya Bus service a subject in these proceedings. The said corporate client had a pool of lawyers among them the plaintiff and the 2nd defendant. The plaintiff had knowledge that differences arose between the would have been common client with the 2nd defendant where by the 2nd defendants services were either discontinued by the corporate client or withdrawn by the 2nd defendant in several matters giving rise to the 2nd defendant filing bills for taxation where the plaintiff was required to attend court and defend the interests of the corporate client. Among them is the file giving rise to these proceedings namely HCCC Misc Application No. 1189/2002 whose parties were "**Nyamogo and Nyamogo**" advocates the 2nd defendant and Kenya bus services. In controversy was an advocate's client's bill. The plaintiff had the brief to defend the said taxation when given the brief, KBS did not allegedly give the case number in respect of which the bill of costs for taxation had arisen and that is why the plaintiff addressed a letter to the second defendant seeking the details as sought in exhibit 1. It is PW1s' stand that their request for particulars was a normal routine because they were not explicit in the documentation handed to him by his corporate client. Further that the letter PW1 wrote was in plain professional language.

The plaintiffs letter exhibit 1 is what solicited the defendants response exhibit 2 forming the subject of these proceedings. When brought to his attention the letter had already been opened as a routine procedure in PW1s office. PW1 continued to state that the content of the said letter exhibit 2 conveyed the message complained of and since it had been copied to the Deputy Registrar, it became open knowledge to the Registry staff who stopped the plaintiff to inquire about the issues raised therein whenever the plaintiff went to the said Registry to transact his normal court business. PW1 confirmed that the letter was copied to the corporate client and opened by the claims manager PW3 who called the plaintiff and expressed alarm at the content.

It is PW1s stand that the content of the letter was an attack on his professional standing, considering that the said issue had never been raised by any other person he had interacted with in his professional capacity, more so when he had been commended severally for his art of professionalism in his professional capacity by even high court and court of appeal judges. This conduct of professionalism earned him the recognition as the lead law firm for their corporate client KBS resulting in the said KBS referring most of their matters to the plaintiffs firm. The defendants were aware of PW1s' good professional qualities.

The plaintiff took it upon himself to correct the situation by doing a letter to the defendants asking the defendants to withdraw their allegations and apologize which they never did failing which the plaintiff handed the matter to his advocates who demanded an apology and a withdrawal of the offending letter to which the defendants replied stating that they would not withdraw the letter or apologize giving the plaintiff no other option but to file these proceedings as the plaintiff felt that his integrity had been questioned without any reason in a calculated move intended by the defendants to damage his professional standing.

Turning to the defence PW1 stated that the defendants admitted publishing the letter and also admit having copied the same to those names. He noted the defendants had contended that the contents of the letter were not false. The plaintiff contends the said contents were false because his (plaintiff) letter of 10/12/2002 was a formal letter addressed to a fellow advocate addressed to the court because the subject of this letter was pending in court. He denied setting a pattern of engaging himself in false hoods. Still contended that the contents of the defendants letter was plainly defamatory; that the particulars relied upon by the defendants are not correct because the correct position was that the date for taxation had not been taken by consent and it was true that he did not have the information he was calling for. When writing his letter of 10/12/2002, the plaintiff was simply discharging his duty professionally both to the court and his client in a professional manner and also to his professionally colleagues the defendants. It is his stand that he is not a mischievous or idle person as depicted by the defendants.

When cross examined PW1 reiterated his stand on the matter as per his evidence in chief and then added that the content of his C.V. as outlined to court are correct. Maintains he did not have the information he was seeking for. His firm was not aware that a date had been taken by consent. Concerning the contents of the offending letter he states that he did not respond to each and every

allegation in the offending letter because the language used by the defendant was irregular and he had to restrain himself as a professional.

Further asserted that the letter did damage his business as the flow of work even from the corporate client just trickled in although he had no documentary proof that clients dumped him after the letter complained of was published.

Added that he found it difficult to appear in the high court or file matters personally and used to send either his junior or clerks to do what he used to do himself. Denied intending to delay the matter complained of as he had a responsibility to court to ensure that matters where he is involved are concluded expeditiously.

PW2 Wanjugu Wambugu was at the material time leading to the events subject of these proceedings an executive secretary with the plaintiffs firm of advocates. Her duties among others included handling of correspondence to and from the office some suo moto others on instruction. She is the one who typed exhibit 1 on the instructions of PW1. She recalled receiving the offending letter in the course of normal business, opened , read and since it dealt with issues she could not handle on her own she instructed the messenger to get the relevant file. She was surprised at the contents and since there was no restriction on the receiving of the letters in the office, the letter attracted attention from other staff in the office who also read its content.

It is PW2s evidence that after the receipt of the said letter flow of work from KBS went down. She eventually resigned and left in February, 2003.

When cross-examined she stated that as an executive secretary she had authority from PW1 to read all correspondences to the office in order to take prompt action on them. To her recollection there was no restriction on correspondences and these were accessible to staff in the office.

PW3 Rose Rachel Diangia testified that at the material time the events leading to these proceedings arose, she was working with Kenya bus services from 1993-2004 and more specifically as acclaims manager from 1998. She recalled the disputants were pool lawyers serving her employer and she dealt with all of them harmoniously. She recalled receiving exhibit 1 in the cause of duty from the 2nd defendant. It was dated 11/12/2002 she assigned it to the plaintiffs firm with instructions for them to defend KBS in the taxation coming up in Misc application No. 1189/2002. All PW3 did was to forward the naked letter to PW1.

It is her testimony that when her firm received the letter from the defendants, it did not have the details of the matter in which the defendants firm had acted for them which had given rise to the bill of costs coming up for taxation and asked the plaintiffs to seek those particulars from the defendants.

She believes it was in pursuance of their (PW3s') instructions that him pw1 did seek details from the defendants that gave rise to PW1 writing exhibit 1 to the defendants.

Regarding the offending letter, it is PW3s evidence that the same was copied to them from the letter which the defendants had addressed to PW1. The letter was received by the receptionist who opened and stamped it, then handed it to the secretary who in turn gave it to the clerk to place it on PW3 desk. It is her testimony that the letter caused tension in the office because of its contents.

PW3 was surprised because all along her employers' establishment had always regarded both disputants as reputable and competent firms of advocates and after reading the said content they formed an opinion that they were dealing with an incompetent firm of advocates (PW1).

PW3 brought the contents of the said letter to the attention of the management who discussed it in a meeting and which meeting resolved that the management should slow down in giving work to the plaintiffs firm of advocates. PW3s' management was uncomfortable dealing with a mischievous person. It is PW3s' testimony that KBS took the content of the letter seriously because their credibility in the

claims' office was being questioned. Previous to the receipt of the offending letter, PW3 had held PW1 in high esteem as a competent lawyer and that is why they decided to go slow in allocating matters to him as they felt that he was not the right person to deal with as a lawyer.

When cross-examined PW3 responded that indeed her establishment received the bill of costs dated 14/10/2002, court stamped on 15/10/2002 received by PW3s' establishment on 6/11/2002 and they must have instructed PW1 between 6/11/2002-11/11/2002. She was firm when she received the bill of costs for taxation she could not immediately lay her hands on their file and that is why she told PW1 to get the information from the defendants; that the reference number given on the bill of costs referred to a file in PW3s' establishment which contained many suits. One had to go to this file scrutinize the contents and then fish out the particular case number. She was firm that exhibit 2 was discussed at their management meeting and the managing director questioned as to why they were dealing with such a firm of advocates.

PW4 Moses Mbugua Kinyanjui gave evidence to the effect that he was an advocate of the high court of Kenya since 1996 and was at the material time practicing in PW1s firm of advocates with PW1 as the senior partner and PW4 as the junior partner. He had been in that firm since 1999. The firm comprised a number of 5-7 persons.

With regard to events leading to these proceedings, he recalled coming from attending to court cases and on arrival on 11/11/2002 he found staff reading a letter exhibit 2. PW4 also read it and he was shocked. He also had a chance to have a look at the envelope which was on the file. He is firm that it had no writing of confidential or marked personally to PW1. PW4 exercised reservation on the use of the words mischievous and a person who need to be reevaluated.

When cross-examined he responded that he found staff in the office reading the letter in question and he also read its contents. PW4 does not recall attending court to take consent dates for taxation. To PW4 they asked for information in good faith. He confirmed that indeed that they had come on record on the 11/11/2002 and that is why they sought information from their client KBS.

The defence called two witnesses with DW1 being a formal witness who simply produced the subject file Misc. Application 1189/2002 which concern an advocate client bill between the 2nd defendant and KBS having been filed on 15/10/2002 with the first notice having been issued on 22/10/2002 for hearing on 11/11/2002 when it was marked stood over generally. It was then fixed for hearing on 13/12/2002 with hearing dates having been taken by consent on 20/11/2002 between Nyamogo for applicant and Pius for Kantai.

DW2 is the key witness for the defence. In summary his testimony is that he had been working for KBS as counsel in numerous matters one of which was the subject of taxation in Misc. Application No. 1189/2002. He confirmed the evidence of DW1 on the transactions in Misc. Application No. 1189/2002. Also confirmed the evidence of PW3 that indeed a notice of taxation was served on PW3 for KBS where upon the firm of the plaintiff come on record. DW2 has personal knowledge that it had been marked stood over generally. They gave the plaintiffs firm sufficient notice dated on 14/11/2002 acknowledged receipt on 15/11/2002 for them to appear in court and take dates on the 20/11/2020. He has personal knowledge that a representative of the court plaintiff appeared in court and they took dates by consent one month earlier and that is why he read mischief in the letter which was written a day to the date of taxation asking for information.

It is further his testimony that indeed he wrote exhibit 2 and the same was addressed personally to PW1 and he is surprised that it was opened and read by staff in PW1s' office. DW2 does not agree that the content of the letter is inflammatory or that it portrayed what has been said to have been portrayed as DW2 had explained why he felt PW2 was being mischievous and not diligent enough as an officer of the court. There were no issues between him and KBS save for KBS inability to pay for their bills. There was no problem between PW1s firm of advocates and that of the defendants.

Him DW2 as a professional he has always conducted himself professionally as confirmed by PW3

that his firm (DW2) had always been held in high esteem. Him DW2 has always also held himself out professionally and conducted himself properly in all his engagement both locally, regionally and internationally. He is not responsible for what transpired in PW1s office as he does not understand how a secretary could open a letter meant for his boss lastly that there is nothing to show that indeed the plaintiff lost clientele as a result of the communication complained of.

When cross-examined DW2 responded that he had personal knowledge that they had acted variously for their mutual client KBS, they had raised various fee notes which had not been settled hence the filing of the bill for taxation; DW2 confirmed that he was in court with PW1 on 11/11/2002 and if he needed any information then he could have raised it with the defendants or when he was invited to take dates. That one month was sufficient time within which to obtain instructions. It is his stand that he responded to PW1s letter the best way he could and there was nothing wrong with the content of the letter. He did not use the word "**mischievous"** in a derogatory manner but in its ordinary dictionary meaning. Same to "**idle"** which was used innocently. All that he meant was that counsel was not being diligent in the discharge of his professional duties in so far as DW2 was concerned as a colleague and the court. He had no intention of abusing the plaintiff.

DW2 conceded that he had an option to use the word diligent but chose not to because he had used the word mischievous. The reaction to the letter came as a surprise to him since he had not intended the contents to reach beyond the plaintiff and the plaintiff is to blame for allowing staff in his office not to respect instructions in letters personally addressed to him whereby staff are permitted to open and read such letters.

With regard to copying the letter to other people, it is DW2s stand that he copied it to the KBS because the plaintiff had also copied his letter to them. Same to the High Court. By saying that he would ask to have the plaintiff's status reevaluated was in relation to the plaintiffs conduct in relation to the matter which was pending in court because to DW2 the plaintiff should have acted in such away so as to place value on the courts limited time so that if the plaintiff were to be sanctioned by the court then the court should have reevaluated the plaintiffs conduct.

Going by the definition of "**mischievous**", the plaintiffs' conduct was intended to cause injury to DW2s client whose bill was to be taxed. In sum all that DW2 was complaining about in that letter was that the plaintiff had had ample time to sort out the issue of particulars. DW2 was not in the wrong considering that it later transpired that there were no further information that he needed. Denied admitting liability and that is why they did not apologize.

Contents that the content of the letters were true because the plaintiff had attended court when the bill was taxed; it transpired that the next hearing date had been taken by consent as confirmed by the content of the court; the plaintiffs letter which invited their reaction had also been served a day to the hearing date; that the KBS reference file number indicated on the plaintiffs letter was the correct reference number and their fear that the taxation fixed for 5/12/2002 might not be done because of the content of the plaintiffs letter turned out to be true as the intended taxation did not take place; subsequent adjournments were also occasioned by the plaintiffs insistence on production of certain documents.

Lastly DW2 stood by the contents of his letter and also the language used as the same is not objectionable.

Parties filed written skeleton arguments. Those for the plaintiff are dated the 11th day of October, 2007 and filed on the same date. The salient features of the same are as follows:-

(i) Both disputants are advocates of the High Court of Kenya with the first defendant being the senior in the profession of the two and practicing in the 2nd defendant.

(ii) The proceedings were set in motion by a letter exhibited dated the 10th of December, 2002 which the plaintiff sent to the 2nd defendant written in the ordinary course of business seeking routine information

concerning a matter the plaintiff was handling in court in which the 2nd defendants' firm was involved.

(iii)It is common ground and it was admitted by the 1st defendant that he is the one who issued a quick response to exhibit 1 vide his exhibit 2 copying to the court and KBS who was their mutual client.

(iv)It is the contention of the plaintiff that exhibit 2 is defamatory and made his stand to the defendants vide exhibit 3 to which there was no response leading to the plaintiff causing a demand letter exhibit 6 through his advocates being issued asking for the defendants withdrawal of the content of exhibit 2 and rendering of an apology which the defendant did not relent or apologize and instead they sent exhibit 4 and 7.

(v) The plaintiff became thus aggrieved and presented the proceedings herein to which the defendants have moved to defend citing qualified privilege and public interest.

(vi)Parties were heard. The plaintiff and his three witnesses were categorical that the content of exhibit 2 were defamatory and deamining of the plaintiff in the eyes of the persons who read the letter notably members of his staff namely PW2 and PW4 who gave similar evidence on how the letter reached them and PW3 who was also categorical that in view of the content of the letter it had to be read and discussed at the management meeting of KBS.

a. (Vii) The results of the discussion of the contents of exhibit 2 by the management committee as per the evidence of PW3 was that the management of KBS was of the view that since the integrity and professional propriety of the plaintiff had been put in doubt, PW3 was to deal with the matter appropriately leading to PW3 sizing down the flow of work to the plaintiffs firm. A matter confirmed by the evidence of PW2 and 4 who testified that before the incident they used to receive a lot of briefs from KBS but these started just trickling in after the incident.

(vii) It is further their stand that staff at the high court Registry ridiculed the plaintiff by pestering him to answer questions concerning the contents of exhibit 2 and in the process forcing the plaintiff to curtail drastically his attendance to court matters at the Registry.

(viii) The first defendant in his evidence dismissed the fact that he had demeaned and defamed the plaintiff asserting that the words complained of were not defamatory and that he had copied a letter to the persons he copied to because the plaintiffs letter had also been copied to those persons.

(b) That when questioned about the language used, the first defendant retorted that he was angry both at the time exhibit 2 was authorized and also as at the trial.

(ix)Three issues are raised for the courts determination namely whether or not the defendant defamed the plaintiff; whether the defendants wrote the words complained of in a position of qualified privilege and whether or not the defendants wrote the words complained of in the public interest.

(x) The court is invited to answer the first issue in the affirmative because the proper and inescapable inference of the contents of the said exhibit 2 and its intended effect was to warn KBS not to deal with an idle and unworthy person who is not suitable to be an officer of the court.

(b) That the content was clearly designed to ruin the advocate client relationship between the plaintiff and KBS which was achieved as per the content of the evidence adduced with the aim of harming the plaintiffs' profession and cause pecuniary loss which it did as it resulted in the dwindling of work flow to the plaintiffs from KBS.

(xi)Contend the defendants were actuated by malice as they failed to inquire into relevant facts in order to determine as to whether the plaintiff in his professional or otherwise life was an idler and needed to be reevaluated in so far as the plaintiffs' professional conduct towards court works as well as their clients work was concerned.

(xii) Contends that the plaintiff was one of the lead advocates in the panel lawyers of KBS as confirmed by PW3 and the plaintiffs employees PW2 and 4 as well as the high court staff who were aware of the volume of work which flowed from KBS and the contents of the words complained of were intended to curtail that flow of work which they succeeded in doing and for this reason they contend that the said words were malicious unjustified and calculated to injure the plaintiffs reputation.

(xiii) With regard to the defence of quantified privilege, they contend it is not available to the defendants because the plaintiff had not at any one time been found to be an idler or wanting as an officer of the court as there has been no demonstration of existence of any application which has ever been presented to any court, tribunal or firm seeking to have the plaintiffs status reevaluated as an officer of the court or officer of all the institutions he serves as enumerated in the evidence.

(xiv) Contends neither KBS nor members of the high court Registry had a corresponding interest in receiving the said information.

(xv) Since the contents of the offending letter were not copied to the public or made in a public forum and for this reason the defence of privilege is not available to the defendant.

(xvi) That having discounted the defendants defence and having established that the contents of the said letter were unjustified, the court has no alternative but to find for the plaintiff and considering that the plaintiff suffered pecuniary damages owed award the plaintiffs Kshs.3, 000,000.00 as general damages for defamation.

The defendant's submissions are dated the 8th day of October, 2007 and filed on the 9th day of October, 2007. The salient features of the same are that:-

(i) The plain facts of the plaintiffs claim as laid was that on the 11th day of December, 2002 the defendants printed and or caused to be written a letter which was produced as exhibit 2; he said words contained words which the plaintiff alleges to have been defamatory particularly "**mischievous"**

(ii) The defendant has denied that the said words are defamatory and instead that the said words were fair comment and written on a privileged occasion.

(iii) By reason of what has been stated in number (i) and (ii) above the issues for determination are four namely did the defendant publish the said words and if so to whom?, was the occasion of publication privileged? Do the said words constitute defamatory matter and lastly were the said words published maliciously?

(iv) In response the afore set out own issues, the court is invited to make the following findings as the correct position:-

(a) The only professional standing of the plaintiff which should be taken into consideration when assessing the facts herein should be his status as an advocate of the high court as the other appointments enumerated in the evidence of membership to other professional societies and Directorship in an Insurance company were made after the events complained of had occurred.

(b) Since it is admitted by the evidence of the plaintiff that the letter exhibit 1 authored by the plaintiffs firm and dated the 10th day of December, 2002 was copied to the Deputy Registrar of the High Court the court is invited to hold and or find that the said Deputy Registrar had a duty and interest legally and or morally in receiving the said communication.

(c) With regard to publication, the defence contends that the letter had been marked for Mr. Kantai and that is why the envelope was never produced in evidence. And having been marked for Mr. Kantai, the staff in the plaintiff's office had no business opening and reading its contents. The failure to produce the envelop in evidence should be construed against the plaintiff.

(v) The plaintiff is further disentitled to the relief sought because:-

(a) Although he alleged that he had been instructed by KBS to take up the brief in the taxation cause giving rise to these proceedings on 10th December, 2002, it turned out to be false because when the taxation cause file was availed to court it turned out that he had obtained instructions earlier and in fact had placed himself on record a month earlier a matter asserted by DW2 and confirmed by DW1 who produced the file in question.

(b) The plaintiff had also contended that the date for taxation had not been taken by consent a matter also asserted by the defence and confirmed by DW1 from the record that indeed the date for taxation had been taken by consent.

(c) It also transpired that the information the plaintiff was allegedly seeking from the defendant with a view to derailing the taxation date were already within the plaintiffs knowledge. All the above go to show that the plaintiff was not truthful in his testimony to court.

(vi) From the evidence of PW2, it is evident that the plaintiff had given permission to his executive secretary to open letters and for this reason he is estopped from claiming that there was involuntary publication in his office.

(viii) Maintains the letter was written on an occasion of privilege as the recipients had a duty and interest to receive the said information considering that these involved legal proceedings in which the plaintiff and the defendants had interest and were involved in.

(ix) On the basis of the facts displayed herein the defendants in pursuit of a reasonable and necessary protection of themselves and their clients were under a legal and or moral duty to publish the words complained of to the said publishes who in turn had a moral duty and interest to receive them.

(x) The court is invited to hold that the evidence of the 1st defendant is explicit that it came to light subsequently and was confirmed by the plaintiff when he admitted that his client KBS had misled him, that infact him plaintiff and PW3 their clients had the information the plaintiff was allegedly seeking from the defendants long before the said matter was even fixed for taxation by consent hence the justification for the defendant employing the use of the words "**Mischievous" and "idle"**

(xi) The court is invited to believe the defence assertion that the letter complained of is not in any way offensive but a honest response whose sole desire was to do what the defence conceived to be his duty both to the plaintiff and to the court which had a reciprocal interest in receiving it in the context of goings on in the matters concerning them and their client.

(xii) Also contend that no malice has been shown either expressly or impliedly in the content of the said letter and for this reason the court is invited to dismiss the plaintiff's suit with costs to them.

In supplementary submissions dated 7th day of November, 2007 and filed the same date, the defendant added that the words complained of are not defamatory though they may be a harsh statement as neither innuendo nor hidden meaning may attach to them to bring the plaintiff into ridicule, contempt or hatred.

(ii) Still reiterates that in the ordinary meaning of the words complained of no malice can be inferred from them.

(iii) On quantum, the court was invited to note that the rationale for awarding damages in our legal system should be to try to compensate the injured person with a sum sufficient to compensate the resulting injury and in the premises an award of KSHS.200, 000.00 would be adequate compensation should the court find the defendant liable.

Parties also referred the court to case law for guidance. For the plaintiff, there is reliance on the case of **OCHIENG & 8 OTHERS VERSUS STANDARD LIMITED (2004) 1KLR 225** where in

Lenaola Ag.J as he then was (now J) held inter alia that:-

(1) Defamation is publication without justification or lawful excuse which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule.

(2) The law recognizes in every man a right to have the estimation in which he stands in the opinion of others an affected by false statements to his credit and if such false statements are made without lawful excuse and damage results to the person of whom they are made he has a right of action.

(3) Compensatory damages in a case in which they are at large may include several different kinds of compensation to the injured plaintiff. They may include actual pecuniary loss and anticipated pecuniary loss, disadvantages which may result, or may be thought likely to result, from the wrong which has been done; they may also include the natural injury to his feelings. The natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high handed, oppressive insulting or contumelia behavior by the defendant which increases the mental pain and suffering by the defamation and may constitute injury to the plaintiffs pride and self confidence those are proper elements to be taken into account in a case where damages are at large"

The case of **OYARO VERSUS ALWAKA t/a WEEKLY CITIZEN & 2 OTHERS (2003) KLR 574** wherein Onyancha J ruled inter alia that:-

(1) In all actions for libel and in some of slander, the law presumes that the plaintiff has suffered harm.

(2) Although the person's reputation has no actual cash value the court will form its own estimate of the harm in the light of all the circumstances of the case. The court will therefore take into account the plaintiffs profile vis avis what has been published about him. The case of BILDED ABIUD MBUTHIA VERSUS UNIVERSITY OF NAIROBI (1978) KLR 27 wherein Haris J as he then was held that"a defendant to proceedings for defamation who sets up a defence of qualified privilege must show an interest or duty (legal social or moral) to communicate the defamation statement to the persons to whom it was published and their corresponding duty to receive it.

And lastly the case of **NATION NEWS PAPER LIMITED VERSUS CHESIRE (1984) KLR 156** where in the court of appeal held inter alia that:-

"(1) An action for libel by innuendo depends for its success on the proof by the plaintiff that special circumstances are known to persons who read the offending publication and evidence of the special circumstances.

The defendant on the other hand relied on the case of **UNIVERSITY OF NAIROBI VERSUS MBUTHIA (1985) KLR 821** where in the court of appeal held inter alia that:-

"(1) **Publication became qualified privilege in occasions where the person who makes a communication has an interest or a duty legal, social or moral to the person to whom it is made and the person to whom it is made has a corresponding interest and duty to receive it- here reciprocity is essential**. The case of **HON. MARTHA KARUA VERSUS THE PEOPLE LIMITED AND MUKALU KWAYERA NAIROBI HCCC NO. 412 OF 2004** decided by P.J. Ransley J as he then was on the 23rd day of March, 2005. Herein issue of the defence of qualified privilege arose. The learned judge drew inspiration from the observation of Lord Atkinson in the case of **ADAM VERSUS WARD (1917) A.C. 309** at page 334 that:-

"**A privileged occasion is ……..an occasion where the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential: "In the same decision on malice the same learned judge as he then was drew inspiration from the observation Lord Diplock in the case of" HORROCK VERSUS LOWE (1975) AC 135 at page 151 and 152 that:-**

"It is essential to dispel malice for the defamer to have an honest belief. If he publishes in five defamatory matters technically without considering or caring whether it is true or not if he treated as if he believed it to be false"

On damages, the same learned judge as he then was drew inspiration from own decision of **AKILANO MOLADE AKIWUMI VERSUS ANDREW MORTON AND ANOTHER NAIROBI HCCC NO. 1717 OF 1999** wherein the learned judge as he then was held inter alia that:-

"**The rationale for any award of damages in our legal system is to try to compensate the injured person with a sum sufficient to reinstate that person back into the same position they were in prior to the injury being suffered. Hurt feelings are only awarded in a few exceptional cases. Defamation being one of them, it is a metaphysical exercise to gauge what sum will compensate for hurt feelings. It must however in my view be considered in light of the prevailing economic, social and financial state of Kenya…"**

Other principles are sourced from Gatley on libel and slander page 161 paragraph 7.1 where there is observation that:-

"To succeed in an action of defamation the plaintiff must not only prove that the defendant published the words but that they are defamatory and that he has identified himself as the person defamed…"

In Clark and Lindsel on Tort 17th Edition London, Sweet and Maxwell 1995 at page 1018 paragraphs 21-12 there is observation that:-

"**Whether a statement is defamatory or not does not depend on the intention of the defendant but on the probability of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published. The mere intention to vex or annoy will not make a language defamatory which is not so in its own nature. Words apparently defamatory may be proved by the evidence of the circumstances to have been understood in another and involvement meaning.**

Further on case law, there is the case of **MIKIDADI VERSUS KHAIGAN AND ANOTHER (2004) KLR 496** wherein Ochieng Ag J as he then was now J held inter alia that:-

"A successful plaintiff in a defamation action is entitled to recover as general compensation damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damages to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused. The court must take the necessary precaution to ensure that whatever a ward it gives to a successful plaintiff is generally in line with what courts have been awarding …"

The case of **JOSHUA KULEI VERSUS KALAMKA LIMITED NAIROBI HCCC NO. 375 OF 1997** wherein it was held inter alia that:- **"damages to be awarded are compensatory save in exceptional circumstances i.e to restore or give back the party injured what he lost"** The case of **WAMBUGU NJOROGE VERSUS KENYA COMMERCIAL BANK LIMITED CIVIL APPEAL NO. 179/92 (UR)** wherein it had been held inter alia that: "**malice can be inferred where the defendant in publishing the information knows the statement to be false or did not care whether it be true or false and regard it to be heard to the defendants conduct and the information available to him**. The case of **FRANCIS P.LOTODO VERSUS STAR PUBLISHERS AND ANOTHER NAIROBI HCCC NO. 883 OF 1998** wherein it was held inter alia

"that section 7(1) of the law of defamation Act chapter 36 allows for qualified privilege if what was published was fair and accurate report on a matter of public interest unless malice is proved. Qualified privilege is not lost even if in the course of publishing the fair and accurate report on a

matter of public interest a matter defamatory to the plaintiff included. But it can be lost if the plaintiff demanded an explanation or contradiction as required under section 7(2) of the defamation Act, and the defendants refused or neglect to give that explanation or contradiction or the defendants gave the explanation or contradiction in a manner not adequate or not reasonable having regard to all the circumstances…"

Further inspiration is drawn from the case of **TANGANYIKA TRANSPORT CO. LIMITED VERSUS EBRAHIM NOORAY (1961) EA 55** wherein it was held inter alia that:- **In actions of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action and in court during trial.** The case of **DANIEL MUSINGA T/A MUSINGA & CO. ADVOCATES VERSUS NATION NEWS PAPERS LIMITED MOMBASA HCCC NUMBER. 102 OF 2000.** Wherein Khaminwa J drew inspiration from the case of **JOHN VERSUS M.G.N. LIMITED (1996) 2.A ER 35** that "**the successful plaintiff in a defamation action is entitled to recover as general compensation damages. Such sum as will compensate him for the wrong he has suffered. That sum must compensate him for damages to his reputation, vindicate his good name, and take account of the distress" hurt and humiliation which the defamatory publication has caused".** The case of **BIWOTT VERSUS DR IAN WEST AND ANOTHER NAIORBI HCCC.1067 OF 1999** wherein it was held inter alia that:- "**The court has to look at the whole conduct of the parties before action after action**" on damages that:-

"In compensation damages, what is to be awarded is such sum as will compensate him for the wrong he has suffered. The sum must compensate him for the damage to his reputation vindicate his good name, and take account of the distress, hurt, humiliation which the defamatory publication has made"

Lastly there is also the latest decision of the court of appeal on the subject. There is the case of **WYCLIFFE A. SWANYA VERSUS TOYOTA EAST AFRICA LIMITED AND FRANCIS MASSAI NAIROBI CA NO. 70 OF 2008** decided by the CA on the 13th day of March, 2009 wherein the law lords of the CA ruled that:-

"**It is common ground that in a suit founded on defamation the plaintiff must prove:-**

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterances was published by the defendants publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously.

(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages"

The case of **RICHARD OTIENO KWACH VERSUS THE STANDARD LIMITED AND DAVID MAKALI NAIROBI HCCA NO. 1099 OF 2004 decided** by Visram J as he then was now JA where in there is observation that:-

"**Words are defamatory if they involve a reflection upon the personal character or official reputation of the plaintiff…"**

On assessment of damages there is the case of **NATION MEDIA GROUP LIMITED, MUTEGI NJAU AND BOB KIOKO VERSUS JOHN JOSEPH KAMOTHO, CHARLS GITHII KAMOTHO, JAMES KAMOTHO AND DAVID KAMOTHO NAIROBI CA 284 OF 2005** decided by the CA on the 25th day of March, 2010 wherein the CA drew inspiration from own decision in the case of **JOHNSON EVAN GICHERU VERSUS ANDREW MORTON AND ANOTHER CA NO. 314 OF 2000** that:-

"The latitude in awarding damages in an action for libel is very wide, the case of **TANGANYIKA TRANSPORT CO. LIMITED VERSUS EBRAHIM NOORAY (SUPRA) PRAUD VERSUS GRAHAM 24 Q.B.D. 53, 55** that in **an action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider what this conduct has been before action, after action and in court during the trial**"; the case of **BROOM VERSUS CASSEL & CO. (1972) A.C. 1027** where in the house of lords stated that:-

"**In action of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in interregrum has necessarily an even more highly subjective element such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by stander of the baselessness of the charges; lastly** the case of **UREN VERSUS JOHN FAIRFAX & SONS PTY LIMITED 117 C.L.R.115,150**: Where in Windeyer J made observation that:-

"It seems to me that, properly speaking a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways- as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here as sacatium rather than a monetary recompense for harm measureable in money"

This court has given due consideration to the afore set out rival pleadings, evidence, submissions and armed with the afore assessed rich heritage of principles of both law and case law the court proceeds to make the following findings in the disposal of the issues in controversy herein.

(1) That there is no dispute with regard to the identity of the parties disputing with the plaintiff being the person alleged to have been defamed and the first defendant being the person who is alleged to have defamed the plaintiff. The 2nd defendant has been brought into the proceedings because it is the firm in which the first defendant and another practiced in their professional capacity as advocates of the high court. The plaintiff was also an advocate of the high court then and had been addressed as such.

(2) The issues in controversy herein arise from the disputants interactions with each other in their professional capacity in relation to matters arising from the filing of Misc Application Number 1189 of 2002.

(3) The proceedings in Misc Application number 1189/2002 were set in motion by the 2nd defendants' firm under the stewardship of the first defendant moving to court and filing an advocate client's bill of costs for taxation.

(4) It is common ground that the bill of costs was directed to the claims manager Kenya bus service for action. The filing of the bill of costs for taxation had arisen from KBS's alleged neglect or inability to respond to the defendants fee note demand for professional services rendered not paid for by the said firm KBS. PW3 the then KBS claims manager confirms to have received the said bill of costs in the course of normal business within their establishment. PW3 stated that they had a panel or pool of lawyers at their service to whom they allocated briefs for work to be undertaken on their behalf. No particulars or criteria was given for deciding on which firm of lawyers is to be given which kind of work which may have arisen. It is in the said normal course of business that the plaintiffs firm was assigned the role of defending KBS in the taxation of the bill of costs which had been presented to court by the defendants.

(5) It is the stand of PW3 that when they received the naked bill of costs they did not have information at hand with regard to the particular matter in which the defendants had acted for KBS giving rise to the filing of the bill of costs and that she duly handed over the brief to the plaintiffs' firm with instructions to them to seek further and better particulars from the defendants.

(6) PW3's assigning of this particular brief was just routine like any other brief previously assigned to the plaintiffs firm and did not in any was anticipate what came to transpire thereafter.

(7) PW1 confirmed PW3's evidence that KBS was one of their big corporate clients and they used to receive a lot of briefs from them prior to the onset of events leading to the proceedings subject of this judgment.

(8) As per the evidence of the plaintiff, he received a naked bill of costs and acting on the instructions from PW3 he set about seeking the required information so that he could get further and better particulars from the defendants to enable him get the information on the matter in which the defendant had acted for KBS and that is what gave rise to PW1 writing exhibit 1 to the defendants. A perusal of the content of exhibit 1 reveals that information was being sought with regard to HCCC NO. 899 of 2000 of which PW1 was not sure whether it was a Nairobi file or not. There is also an indication that efforts to trace the file in order to enable the plaintiffs firm peruse the same had been fruitless. The communication goes on to state that they had been instructed to seek information from the defendants regarding PW1s clients file reference number , copies of pleadings, copy of the letter instructing the defendants to act in the said matter, copies of letters exchanged with PW1s client and any other relevant documents available. The content added that their (PW1's) client had been placed in an embarrassing position without access to the information being sought. It is noted that the heading of the letter indicates that the information requested for relate to Misc. Application No.1189 of 2002. There is no mention that in fact the plaintiff had already appeared in court with regard to the same file.

(9) Exhibit 1 was duly received by the defendants and it gave rise to the contents of exhibit 2(two) from the defendants reproduced in the plaint as the offending letter. It is the contention of the plaintiff both in his pleading (the plaint) evidence and submissions that the said content is defamatory of the plaintiff in his profession. Where as the contention of the defence right from their pleadings evidence and submission is that the communication is nothing but an innocent routine communication between professional colleagues.

(10) Centrol in the content of the said letter exhibit 2 is the allegation that the plaintiff already had the said information with him considering that he had already appeared in court on the said matter Misc. Application No. 1189 of 2002 and sought an adjournment because he had just been instructed. Further that when they last appeared in court the plaintiff never raised the issue of inability to access the relevant information. More so when infact the date for the taxation sought to be fore stalled by the plaintiff had been taken by consent.

(11) The plaintiff in his evidence tended to indicate that infact he had not appeared in the said matter or a date taken by consent. It is noted that as at the time the plaintiff gave evidence the subject file exhibit D1 was not available in order to cross-examine PW1 on its contents. It was produced in evidence much later at the defence stage. It is common ground that a perusal of its contents reveals that the bill was filed on the 15th day of October, 2002. On 17th day of October, it was fixed for taxation on the 11th day of November, 2002. On the 11th day of November, 2002 the plaintiff and first defendant appeared. It is correct that indeed the plaintiff sought an adjournment on account of being enabled to get better instructions a move opposed by the defendant but acceded to by the court which had the matter marked stood over generally. The defendants moved with speed and invited the plaintiffs office to take dates, an action done on 20/11/202. The record o thus reveals that indeed the date had been taken by consent of the clerks from both firms of advocates with one Boniface representing Nyamogo & Co. Advocates for the applicant and one Pius for Kantai for the respondents.

(12) Not the entire content of exhibit 2 had been stated to be offensive. The plaintiff and his witnesses pointed out the portions alleged to be defamatory and gave evidence as to why they thought these were defamatory. The first defendant on the other hand who was the sole witness for the defence on this aspect gave evidence as to why he though the said words complained of by the plaintiff and his witnesses were not defamatory all of which has been assessed.

(13) It is on record that there followed an exchange of correspondences between the parties with regard of

what each thought of the content of exhibit 2. The first flowed from the plaintiff produced as exhibit 3 dated 16/12/2002. Of importance in this correspondence is the mention that the plaintiff had received the content of exhibit 2 with dismay and distress; noted that the writer of exhibit 2 is not only a senior advocate but an old man and him PW1 was not willing to trade insults with old men but was firm that the said content of exhibit 2 contains defamatory matter in respect of which the first defendant was going to be addressed accordingly. The first defendant responded to exhibit 3 vide exhibit4 dated 18/12/2002. Notable words in this correspondence are such as "**nobody had been insulting yet we shall take this to court when your misconceived defamation suit comes up…. What then is so special about you as a lawyer? … sue Sankale sue for we shall be very disappointed if you only bare your fangs and then recoil…"** Exhibit 4 from the first defendant attracted exhibit 5 dated 19/12/2002 from the plaintiff which merely acknowledged receipt of exhibit 4 and noted its contents. What followed was a demand letter from the plaintiffs counsel exhibit 6 dated 19/12/2002 seeking admission of liability for defamation followed by an apology. The defendants responded to the said letter exhibit 7 vide their letter dated 15/10/2003 denying liability and adding that they had no apologies to make and in the process prompting the initiation of these proceedings.

(14) The question that the court has to ask itself is whether on the facts assessed in number 1,2,3,4,5,6,7,8,9,10,11,12 and 13 above the plaintiff has brought himself within the ambit of the ingredients required to be established before one can earn a relief of vindication for an alleged libel. These parameters have been set out in the assessed case law decided by courts of concurrent jurisdiction and refined and crystallized by the decisions of the court of appeal. These include:-

(i) Demonstration of existence of proof that:-

(i) The matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterance was published by the defendants' meaning that it was communicated to some one other than the person alleged to have been defamed.

(iii) That it was published maliciously.

(15) This court has given due consideration to these ingredients and applied them to the rival arguments herein and the court proceeds to make the following findings on the same:-

(a) With regard to the defamatory content of the letter complained of namely exhibit 2, the court adopts its earlier findings on the factual aspects of this exhibit. It also adopts its earlier observations on the stand taken by each side with regard to the defamatory or non defamatory effect of the said words. These have to be looked at in the light of the professional standing of the disputants. Both of whom are advocates of the high court of Kenya one of whom is very senior to the other. It also has to be borne in mind that the communication were exchanged in the ordinary course of their professional duties firstly to their respective clients, secondly to themselves as participating counsels and 3rdly to the court and 4thly to their opposite clients. The question that the court has to ask is whether the language used in exhibit 2 went beyond the acceptable limits of professionalism expected of both the recipient and the sender. In this courts opinion the courts responses to this own paused question is in the affirmative because the court takes judicial notice of the fact that from its experience in the discharge of its judicial functions all participants in the judicial process expects the learned friend lawyer/advocates to behave not only responsibly but honourably to each other in order to protect their dignity and integrity which are the whole marks of their tool of trade "**lawyering**" without which their practice is lost. It therefore follows that any mention of a lawyer who is "**misguided, who is never ready to proceed in similar matters, whose usual habit is to write letters seeking adjournment a day before he hearing, hoping that he would fool the court, one who pretends to be seeking information when infact he is not in earnest doing so, one who is engaged in antics to delay his client facing its financial obligation, one who doesn't prevent his client from wasting the courts time, one who serves the raise of allegation that him as a person "individually" is a mischievous and idle person who should be reevaluated, one who tries to shield an embarrassed client and confirms to be the midwife of that embarrassment**" stands defamed if those allegations turn out not to be true.

(ii) When put to the defence through DW2, he simply played down the other identified strong words and zeroed in on two namely "**Mischievous and idle**" and when asked to justify their being imputed of the plaintiff DW2 stated he was angry at the time he penned them down to have them form the contents of exhibit 2 and was still angry even as at the time of trial.

(iii) It is the finding of this court that a part from the evidence through DW1 through production of the contents of Misc application 1189/2002 showing that indeed the plaintiff became seized of the matters in the said file a month earlier there has been no demonstration by the defence to show that the plaintiff was making a misguided attempt to delay taxation, that the plaintiff had been in the habit of not being ready to proceed in other like bills of taxation against his client KBS, that the plaintiff as an advocate is in the habit of delaying matters from proceeding by writing to the opposite party with an intention of seeking last minute adjournments, that he was pretending to seek the information alleged, that the plaintiff was playing antics with a view to delaying the clients meeting its financial obligation to the defendants clients, that he was wasting the courts valuably time and one who is personally mischievous and an idler and one who needs to be re evaluated.

In this courts opinion any advocate who is so described but who has not been shown to be possessing those characteristics stands defamed in the eyes of right thinking members of the society. For these remove such an advocate from the list of Honour cushioned by the acceptable professional ethics that this court has judicial notice of. It therefore follows that where these have been proved, the estimation of that lawyer as a professional stands lowered. This court is satisfied that the aspects of exhibit 2 which have been pointed out above are defamatory.

(16) With regard to publication, it is common ground that exhibit 2 was authored by the defendants. It is common ground that it was addressed to the plaintiff and copied to the court and PW3s employer KBS. KBS are the plaintiffs most esteemed clients as per the plaintiffs own evidence. Although DW2 alleges to have secured the contents against their being accessed by employees of the plaintiff by reason of addressing the envelope and marking it personally to the plaintiff the heading of that communication betrays them. It clearly reads:-

"HCCC Misc Application Number 1189 of 2002 ourselves versus Kenya Bus Service Limited."

It was an official letter. Even if it would have landed on the personal desk of the plaintiff and opened and acted on it by the plaintiff, it would still have found its way into the relevant file accessible to staff in the plaintiffs office. There was no caveat placed on the copies send to the employer of PW3 and the court. As confirmed by the undisputed evidence of PW3, it is the language and the tone of the contents which attracted the calling of a management meeting of KBS PW3 was categorical that it was the weight of the contents and its implication on the future relationship of the plaintiff with KBS. Although the court does not have independent evidence on the reaction of the court staff to the said contents there is nothing to doubt what the plaintiff said of the court staff reaction towards the plaintiff as a result of the content of exhibit 2.

The court is therefore satisfied that on the evidence adduced by both sides the defendants published the content of exhibit 2 to persons other than the plaintiff.

(17) The plaintiff pleaded that the intention of the defendants for doing so was malicious. The defendants have pleaded qualified privilege in that they had a legal and moral duty to communicate the content to the persons who also had a legal and or moral duty to receive the same.

This court has given due consideration to this rival argument in the light of the applicable principles of case law assessed above. In its opinion the legal and or moral duty to communicate in the party communicating and its corresponding duty to receive in the receiving party have an attendant duty running side by side with it namely the duty to gauge the situation and determine what needs to be communicated by the communicator and what would have been expected to be received by the recipient as content of the communication received. Herein, considering that what was in issue was an intended adjourned of a taxation matter which one party did not want adjournment, a matter concerning official

court business, one would have expected the communication to have simply conveyed the fact that the plaintiff appeared in the matter a month earlier, that the defendants expected the plaintiff to have obtained full instructions as earlier intimated to court. That they express surprise that despite the length of time they have had the plaintiff has not obtained instructions and that they will oppose the application for adjournment. The personal derogatory remarks personally directed at the plaintiff as a person were not supposed to find their way in the said communication.

(ii) The defendants were given an opportunity to rectify the situation they declined to do so. This being the case, the duty to communicate the content of exhibit 2 as presently is and the duty to receive were lost and obliterated by the presence of the derogatory remarks contained therein as high lighted therein and for this reason the right of qualified privilege is lost to the defendants.

(iii) Principles of case law assessed go to show that proof of malice may be express or implied. When applied to the content of exhibit 2 the court finds malice proved, expressly because;-

(a) Having been meant to have been an official letter, the content could have been couched in a non derogatory manner simply to convey the clear intention of the defendants desire to oppose the adjournment.

(b) Mutual respect amongst professionals should have been called to the fore especially when the communication was coming from a senior member of the profession to a junior one and regarding the conduct of that junior.

(c) Considering that the content was being copied to the client of the junior whose continued ties with the subject depended very much on the proper conduct of the junior.

(d) The consequence of the derogatory portion of the communication to the future professional relationship of the plaintiff and PW3's employer was within the defendants' knowledge. The knowledge that PW3s' employer who had been the defendants clients for long were likely to reconsider their position with the plaintiffs professional standing considering that the description had come from a senior lawyer who was in a better position to know the conduct of the plaintiffs in court and the likelihood that those comments were likely to be taken seriously and acted upon were not remote to the defendant.

(e) There was also knowledge that the intent and meaning of the derogatory portion of the communication would hurt, demean and humiliate the plaintiff in the estimation of the recipients was foreseeable. And it indeed did so in the case of PW3 and his employer.

(18) <u>ASSESSMENT OF DAMAGES</u>

From the assessment made above, the court is satisfied that the plaintiff has made out a case for compensation. When assessing damages the court has been enjoined to bear in mind the conduct of the parties before the initiation of the proceedings, and in the course of the proceedings. The plaintiffs conduct is drawn from the content of exhibit 1, 3 and 5. In exhibit 1 the plaintiff portrayed lack of sufficient previous touch with the subject matter of the proceedings. The contents do not reveal the existence of a deliberate intention to take advantage of the defendants or to hold them at ransom in order to invite the reactions that is contained in exhibit 2. In exhibit 3 the use of the word "**old man"** as between professional, in exhibit 3 was uncalled for. The rest of the content of that letter is civil and professional. Exhibit 5 is blame less.

(ii) Turning to the defendant's exhibit 2, the source of the complaint subject of these proceedings has been ruled by this court to be defamatory. The tone and stand continues in the content of exhibit 4 and in fact is contemptuous of the intended threatened defamatory action by the plaintiff evidenced by the use of the words "**we shall be disappointed if you only bare your fangs and then recoil…"** The plaintiff was being dared to take action. He was being likened to the only living object known to have been created with fangs- a snake which as a matter of public notoriety is said to be cunning. Likening a whole advocate of the High Court of Kenya to a snake and without actually confirming in court that he was indeed a

snake with fangs and was capable of recoiling is clear demonstration of the defendants continued conduct of treating the plaintiff not only in a hurting, demeaning and humiliating manner but was also being contemptuous of the plaintiff as well as the plaintiffs attempt to assert his claim to a fair and dignified treatment from a professional colleague in their interactions with each other on a professional front.

(iii) Turning to the conduct through their lawyers', exhibit 6 from the plaintiff's lawyer to the defendants forming the demand letter is written in not only a civil language but also a professional language. Exhibit 7 from the defence conveys a message of defiance in other words shows no remorse or regret for the demeaning, contemptuous and humiliating manner the junior professional colleague had endured since the controversy arose. While in court the plaitnfif said nothing untoward to the defendant. The defendant still continued their defiance and showed no remorse for what transpired between them leading to the filing of these proceedings. To the defendant the plaintiff deserved the hurt, humiliation, and the demeaning which this court has stated that he did not deserve any such treatment.

(19) Other principles that the court has to take into consideration to guide it in the assessment of damages are among others that:-

(a) The value of the persons esteem is priceless but since the law says injury to a persons' esteem should be compensated the court has no alternative but to fix a price for that injury bearing in mind that the price fixed is not to enrich the plaintiff but to compensate him for the injury suffered.

(b) Assessment of damages at large is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.

(c) Each case depends on its own peculiar circumstances.

(d) Past awards are mere guides and where these are to be taken into consideration the value of the Kenyan shilling then when these awards were made and the value of the Kenyan shilling as at the time of the making of the intended award as well as the prevailing rate of inflation should be considered.

(e) The award should not be meant to enrich the plaintiff but to compensate him for the injury suffered.

(f) The award should not be inordinately too low or too high.

(20) Bearing all the relevant factors in mind the court makes a finding that although the plaintiff was defamed, hurt, demeaned and humiliated in his professional capacity, such hurting, humiliation and demeaning did not seriously affect his professional standing as no evidence was produced to that effect.

(21) On quantum the court notes that the plaintiff suggested Kshs.3, 000,000.00 whereas the defence suggested Kshs.200, 000.00. Bearing all the relevant factors in mind, the court is of the opinion that the figure suggested by the plaintiffs is rather on the high side while that suggested by the defence is extremely too low.

This court has weighed all the relevant factors together and also considering that the publication was made to a restricted group of persons and was not blown into the public domain and doing the best it can, the court assess an award of Kshs.800, 000.00. (Eight Hundred Thousand Kenya Shillings as adequate compensations for the injury suffered.

For the reasons given in the assessment, the court proceeds to make the following final orders in the disposal of this matter:-

1. An order be and is hereby made and ordered that the plaintiff is entitled to general damages for defamation against the defendants jointly and severally because:-

(a) The content of exhibit 2 have been found to be defamatory.

(b) They were published by the defendants.

(c) They were actuated by malice both express and implied.

2. For the reasons given of matters stated in number 1 above, the court makes an award of Kshs.800,000.00 (Eight Hundred thousand shillings) as adequate compensation for the defamation suffered by the plaintiff at the hands of the defendants.

3. The plaintiff will have costs of the suit.

4. The delay in the drafting and delivery of this judgment which is highly regretted was occasioned by systemic work constraints beyond the control of the court.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE.-JA

DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS 12TH DAY OF OCTOBER, 2012.

JUDGE