



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1062 OF 2001

KYALE

MWENDWA.....PLAINTIFF

-VERSUS-

**HON. FRANCIS NYENZE.....1ST
DEFENDANT**

**THE NATION MEDIA GROUP.....2ND
DEFENDANT**

JUDGMENT

This plaint seeks damages for the alleged defamatory words uttered by the 1st Defendant in a public meeting and publication in the 2nd Defendant’s Daily Nation of 5th February, 2001. The impugned article stated as under:-

“Environment Minister Francis Nyenze has told his Kitui West constituents to occupy land owned by the Ukamba Agricultural Institute (Ukai), which was allegedly grabbed by a former Cabinet Minister from the area.

Mr. Nyenze said it was unfair for his former colleague to secretly change the institute’s status from a public to a private institution, a move he claimed led to its collapse last year.

He told a group of councilors at his Kiondoni home, Mutonguni Location, at the weekend, that he would marshal the residents to invade and subdivide the 10,000 acres.

Describing himself as an “invisible politician”, Mr. Nyenze said he will “not just sit in Cabinet and watch my constituents wallow in abject poverty while greedy individuals indiscriminately grab public land.

He warned councilors who were backed by Kanu agents during the 1997 General Election to be wary of former Cabinet Minister Nyiva Mwendwa’s campaign to malign me.”

The plaintiff also alleges in paragraph 6 thereof that the said words were uttered by the 1st Defendant on 3rd February, 2001 at his Kiondoni home in Mutonguni location, Kitui West constituency. It is further stated that the said words were directly, indirectly and by innuendo defamatory of the Plaintiff. The particulars of defamation were stated namely:-

- 1. The Plaintiff is the only former cabinet minister from the constituency who is associated with UKAI being its Secretary-General.***
- 2. The Plaintiff is the only former cabinet minister from the constituency who is an UKAI official capable of “grabbing” its land.***
- 3. The Plaintiff is the only former cabinet minister from the area who is an UKAI official capable of secretly changing the status of UKAI from a public to a private institution.***
- 4. The Plaintiff is the only former cabinet minister from the area who is an UKAI official capable of “grabbing” UKAI land as the constituents allegedly “wallow in poverty.”***

The Plaintiff further avers what the said words meant and understood to mean. What is stated as per paragraph 7 specifically alleges that the Defendants knew or ought to know that those words were false, spiteful, malicious and defamatory.

The particulars of malice were also specified in paragraph 7.

The 1st Defendant was at the relevant time the Minister for Home Affairs, Heritage and Sports and MP for Kitui West Constituency. In the Statement of Defence dated 8th August, 2001, he denies the publication of the said words and that they were defamatory. All other averments are denied in paragraph 5, 6 and 7 of the Defence. In the alternative, it is stated that the words were not defamatory as they were justified by truth and that they were fair and bona fide comment made on a matter of public interest, namely, safeguarding of public land and utilities against personal appropriation.

In paragraph 10, it is averred:-

“Further and in the alternative, the 1st Defendant avers that the words complained of were made in an occasion of qualified privilege. A moral and social duty on the part of the 1st Defendant (in his capacity as a Minister in charge of natural resources) did exist to communicate the information to the public as the matter was concerned with the safeguard of public utilities and land.”

The statement of defence of 2nd Defendant dated 13th August, 2001 also denied the averments as regards alleged defamatory publication and without prejudice to those denials, the 2nd Defendant has raised defence of qualified privilege. The particulars of justification are specified:-

(a) The words complained of were uttered in a meeting at the home constituency of the 1st Defendant who was at the time the Member of Parliament for Kitui West.

(b) The meeting was lawfully convened by the Member of Parliament for Kitui West.

(c) The words published by the 2nd Defendant were a fair and accurate report of the proceedings at the aforementioned meeting.

The defence of fair comment on a matter of public interest also is raised in paragraph 9 of the statement of defence.

Both the Defendants thus pray that the plaint be dismissed with costs.

The parties did not agree on the issues and I shall specify the following issues for determination as per the pleadings.

(1) Were the words complained by the Plaintiff uttered by 1st Defendant on 3rd February, 2001 and published by the 2nd Defendant in the Daily Nation of 5th February, 2001.

(2) Whether the publication contained words which were defamatory against the Plaintiff.

(3) Whether the words were uttered and published with malice being untrue.

(4) Whether the Plaintiff suffered damages.

(5) Whether the Plaintiff should be awarded aggravated and exemplary damages.

EVIDENCE:

The Plaintiff testified and called 3 witnesses to substantiate his claims for defamation and damage.

The Plaintiff is a businessman and Chairman of Academic Services Ltd. which runs schools in Nairobi and Mombasa. He has been a Member of Parliament for Kitui West and was elected unopposed. He also was the Minister of Water Development from 1987 to 1988. At the material time, he was the Secretary General of Ukambani Agriculture Institute. (Referred as UKAI).

On 5th February, 2001 he received a call from one Sammy Ngangi (PW2), the then Manager of UKAI. He sounded agitated and asked him why he had grabbed UKAI land and referred him to the day's Daily Nation at page 3 (P Exhibit 1). He then read an article titled "**Nyenze plans seizure of 10,000 acres**" though he was not named in the article it was testified by him that any reasonable reader would see that the same referred to him, that he was the only former Minister of the area who was directly involved with UKAI matter. He testified that he was deeply offended and disturbed by the allegations made in the publications. Many people on reading the article thought of him as a criminal, dishonest and thief. He denied the veracity of the allegation.

He reiterated that the particulars were untrue and the committee of UKAI along with himself published an article to confirm that the land referred in the publication belonged to UKAI (P Exhibit 2).

There was no response from either of the Defendants after the said publication by UKAI. He had sent a demand letter dated 14th February, 2001 to both the Defendants (P Exhibit 3). The 2nd Defendant responded by its letter of 23rd February, 2001. It reiterated that the article complained and published consists in total the statements made by the 1st Defendant who was addressing a meeting at his rural home wherein its reporter was present and thus it is the 1st Defendant who should apologize (P Exhibit 4)

According to him, his reputation was damaged and he found reduction in the number of students in his two schools and his teachers started leaving. The colleagues and friends thought of him as a land grabber.

In cross examination, he was asked a specific question which was responded namely, ***“If Nyenze told that I grabbed the land against the law, he would be a terrible liar.”*** Apart from asking for details of reduction in school business and the people knowing him as a director of the company owning the schools, no other question was asked by the counsel for the 1st Defendant. He reiterated that no apology has been offered by either of the Defendants.

In response to the questions from the counsel for the 2nd Defendant, he conceded that the article did not mention his name and that he was Secretary General of UKAI.

He also conceded that the 2nd Defendant agreed to publish the article subject to the approval by the Managing Director and it was so published (P Exhibit 2)

The second witness was Sammy Ngangi who was referred in the evidence of the Plaintiff. He reiterated that on reading the publication in question, he understood that the 1st Defendant had alleged that the Plaintiff who was Secretary General of UKAI had grabbed the land. His understanding was based upon the description of the person who was alleged to have grabbed the UKAI land. The Plaintiff was an ex-minister and an official of UKAI.

There were other two former Ministers from Kitui West Constituency but the first ex-Minister left in 1974 before formation of UKAI and another ex-Minister Nyiva Mwendwa was captured as maligning the 1st Defendant. His name was specifically mentioned in the publication.

After ruling out the above two, he concluded that the publication was referring to the Plaintiff. He believed the allegation and thought of him as a dishonest person who had grabbed land.

On reading the newspaper, he called the Plaintiff and told him that he believed what he read about him. The Plaintiff called him later and explained to him that all what was written was untrue. It was only after making his own investigations that he believed the Plaintiff.

In cross-examination on behalf of the 1st Defendant, he denied the suggestion that the article was only referring to Nyiva Mwendwa. He carried out search at Land Registry after talking to Chairman and Treasurer of UKAI and confirmed that the title of the land has not been changed. He conceded that, if the allegations were true, the 1st Defendant could make those allegations in public.

He also conceded in response to the question put forth by the counsel of the 2nd Defendant that if the land was being grabbed, it would be legitimate expectation of the public to know of that and he would expect the entire story to be published.

The third witness was Musimi Manzi Joseph who was at the a councilor of Kalimani Ward from 1958 to 2002. The party at the 1st Defendant’s home was for ‘Thanks giving’ as they had campaigned for the 1st Defendant. The party was at his rural home. In his speech, the 1st Defendant told the people gathered that the Plaintiff has grabbed 10,000 acres of UKAI land and they should invade the land with pangas in hand.

The publication on 5th February, 2001 reflected the proceedings of the event. He then met the Plaintiff and told him whatever the respect he had for him had been lost, as he had stolen government land. Then the Plaintiff informed him that he would go to the court on this matter.

In cross examination, he testified that the Mayor of Kituyi council invited him to the party about a week prior to the event. He described the rural home and stated that the party was outside the main house. At the meeting soda was served.

When challenged that he could not read, he was given the Nation paper in the court and the court found, he could read English. He also named one journalist out of the two who were present at the event. According to him, the two were from Nation and People Newspapers each.

He was asked about a meeting of councilors at Kituyi town on 3rd February, 2001 but he did not know of it.

The last witness was Susan Gathoni Musau. According to her, she was the polling agent of the 1st Defendant during general election and she was called to attend a party at this rural home on 3rd February, 2001. The councilors were also invited. She produced the documents to show she was 1st Defendant's polling agent and the invitation letter (P Exhibit 5A and 5B).

She reiterated that the 1st Defendant in his speech stated that the Plaintiff has grabbed 10,000 acres of UKAI land and has changed the title in his name. On listening to the speech, she thought that the Plaintiff was not a good person and she recalled an incident of January, 2001 when she had gone to the Plaintiff to get assistance for school fees. The Plaintiff refused to assist her unless she could give security like a title deed. She then pondered that the Plaintiff could also have changed her title deed if given to him.

On 5th February, 2001 at market place at Matingoni she found people gathered reading Nation and People Newspapers and that people were talking bad about the Plaintiff.

On 10th February, 2001 she went back to the Plaintiff for the issue of the school fees but refused to give him title and then told him what the 1st Defendant had talked about him. He then requested her to be his witness and she agreed.

She also described the venue of the party. The only thing which she contradicted to PW2 was the description of fence which she stated was a barbed wire.

In cross examination, she figured the number of people present at the party as 150. She also stated that she had not read the article (P Exhibit 2) clarifying the matter.

I may note here that the contradictions in the testimonies of witnesses like the detail of fencing and whether lunch was offered at the meeting are minor ones on irrelevant facts and shall not weigh too much on them.

The Defendant in his defence took a surprising about turn by giving evidence that there was no meeting as alleged by the Plaintiff and his witnesses. What he had was a meeting with councilors of Mitongoni location which was requested by Chairman of Kitui county council, Munyoki Kangami who is now deceased. The meeting was in respect of development projects, namely, construction of Divisional Headquarter, Health Centre and Improvement of Road in Mitonguni. The meeting lasted about 2 hours. The chairman and six councillor attended. There was no one from Media. After the publication in question, he called Nation and was told they would look into the matter. When he talked to the Chairman of Kitui County Council, he stated that he talked to the press at Kitui town and talked about his people who were squatting on UKAI land stressing that they should not be evicted. He tried to reach to the Plaintiff whom he knew for a long time. In 1992 they both contested for Kitui West seat and the Plaintiff won but in 1997 he won against the person who was supported by the Plaintiff. He stated that there was a rivalry in politics between him and the Plaintiff but added that his faith could not allow him to utter such words.

In cross examination, he agreed that he knew of publication on 14th February, 2001 on receipt of the demand letter and his lawyer's letter dated 22nd February, 2001 in response was shown which stated that they were taking instructions from their clients. He also stated that he did not write even to the Nation Newspaper and simply called a senior person whose name or designation he did not recall. His lawyers as per his knowledge also did not write any letter to the Nation.

When he was taken through his Statement of Defence, his response was that as a Minister of Environment and Natural Resources, he did not have duty to inform the public on the matter of land and ***what is stated in paragraph 10 of the defence did not necessarily represent his position***, that he has been aware of his defence since August, 2001, that he also disassociated with paragraph 9 of his defence which has raised the defence of fair and bona fide comment, that he similarly disassociated with paragraph 8 of the defence of justification, that he had read the article in Nation (P Exhibit 2) and said that he knew of the dispute but the article (P exhibit 2) thus clarified the issue.

In response to the questions from the counsel of the 2nd Defendant, he stated that he knew PW3, Musyimi Mwazi who was a councilor and prior to that he was driver of the Plaintiff. He also stated that he came to know Susan (PW4) since the filing of the case.

I would note here that no questions were asked to Susan on the documents produced by her which are P Exhibit 5A and 5B as well as on the letter from the 1st Defendant introducing her as his agent and the invitation letter for a meeting of 3rd February, 2001 at his rural home.

His witnesses testified in stereotype statements about the meeting called by the late Chairman of Kitui County Council, the topics of discussion in the meeting, taking the public vehicle from Kobouni to Kitui, having tea at Kitui and the Chairman meeting two people. They did not divulge what the chairman talked to those persons. It came out from their cross examinations that there was no agenda, or the minutes of the meeting. The meeting did not include any expert in constructions, though they discussed plans to construct council buildings, health centre and repair of the roads.

I have stated in brief the evidence led by the witnesses of the 1st Defendant for simple reason that they talked about the event i.e. a meeting which has not been pleaded in his defence and no questions were asked suggesting that the meeting was totally a different one than the one pleaded, either to the Plaintiff or to any of his witnesses.

The 2nd Defendant did not adduce any evidence.

Written submissions were filed by all the three counsel of the parties.

The burden of proof that the publication, in question, was defamatory of the Plaintiff rests on him and that burden is to be discharged on balance of probability, the defamation being a civil tortious liability.

The Plaintiff's evidence is specified hereinbefore and the same does show that it is cogent and concise. PW2 categorically explained why and how he deduced that the article did refer to the Plaintiff and not the other Minister named in the article. The Plaintiff also produced the reply of the 2nd Defendant in evidence, wherein it has been specifically mentioned that the words were uttered by the 1st Defendant in the meeting held at his rural home on 3rd February, 2001 where its reporter was present. The 1st Defendant has totally ignored contents of the said letter which completely contradicts the evidence led by him and his witnesses. The article also shows that the same is from the Nation correspondent. The Plaintiff's witnesses, PW3 and PW4 corroborated the contents of the said letter from the 2nd Defendant. Moreover, none of the witnesses of the Plaintiff including himself has been referred to or questioned on the meeting of only six councilors and the chairman.

I may add that even if the evidence of the 1st Defendant was true, when he testified that the late Chairman of Kitui County Council talked about squatters on UKAI land and that they should not be removed it does

not meet with any logic and moreover 2nd Defendant's response to the Demand letter from the Plaintiff was produced and not challenged to the 2nd Defendant how a totally different article was produced.

To add insult to injury, the Statement of Defence filed by the 1st Defendant, corroborates the evidence of the Plaintiff. Mere denial and/or declaration of disassociation by the 1st Defendant as to the clear averments made in the Statement of Defence, leads me to accept the contentions made by the Plaintiff that the evidence adduced by the 1st Defendant is an afterthought and contradicts the pleadings. I get further support by the evidence that the 1st Defendant has not raised any complaint in writing to the 2nd Defendant on publishing the article which was not true as per the 1st Defendant and that the defence which is being disassociated by the 1st Defendant has not been amended even after the Plaintiff's evidence of the trial, or before the commencement of the Defence case.

In the premises aforesaid, I cannot do anything else, except to find that the Plaintiff has proved his case and I do reject the defence raised and the evidence led by the 1st Defendant being without merit and lacking credibility.

This leaves me to the determination whether the words uttered by the 1st Defendant and published by the 2nd Defendant were defamatory.

Gately on Libel and Slander 8th Edition at paragraph 31 describes the defamatory imputation viz

“A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule or to injure his financial credit. The standard of opinion is that of a right-thinking persons generally.”

From the evidence, it has come out clearly that the 1st Defendant mentioned the names of the Plaintiff when he spoke about land grabbing of UKAI Land and that even in the article published, it was clear that the ex-Minister said to have been connected to the grabbing of UKAI land was the Plaintiff. The ordinary and simple meaning of the words uttered and published was very clear. It definitely lowered the repute of the Plaintiff who was a known public figure with serious responsibility of UKAI.

From the evidence led, it has also come out clearly that the words uttered and published were not true. The 2nd Defendant's Daily Nation also published the statement from committee of UKAI (P exhibit 2) clarifying the issue which also proves that they were not true.

Salmond a great English Jurist has stated:-

“The tort consists in the publication of a false and defamatory statement concerning another person without lawful justification.”

I can thus at this stage find, which I hereby do, that the 1st Defendant uttered and did nothing to controvert its publication, and thus he is liable for both tort of slander and libel, the latter being actionable per se and the law, by its publication simpliciter, shall presume that the Plaintiff has suffered damage.

In Halsbury's Laws of England 4th Edition – vol 28 paragraph 18, it is stated:-

“The Plaintiff is not obliged to testify although, it is customary for him to do so, but having proved a statement defamatory of him and not excused by any available defence, he is always entitled to at least to nominal damages. However, it is open to a Plaintiff in a libel action to plead and prove special

damage which he is entitled to recover in addition to the general damage. In appropriate circumstances, he may also seek aggravated or exemplary damages.”

The factors to be considered while assessing the compensatory award to be granted were succinctly put forth in the famous case of ***Jones –vs- Polland (1997) EMLR 233*** at 243. They include objective features of the libel itself, such as its gravity, circulation, the Defendant’s conduct thereafter both up to and including the trial itself, matters tending to mitigate damages, such as publication of apology etc.

However, the damages to be assessed are at large in law and the reputation cannot be weighed in cash. The court has to be guided by all the circumstances of the case including the behavior of the Defendant.

It is also trite that the court shall desist from awarding aggravated or exemplary damages but it shall award them if the circumstances of a case goad it to do so.

The behavior of the 1st Defendant in this case does merit even the award of aggravated damages. I may not reiterate the factors I have already observed. It is not in doubt that the Plaintiff and 1st Defendant are political rivals. His defence, which was not in any event pleaded, that the late Chairman talked to two media persons at Kitui to seek the plea that his squatting constituents on UKAI land should not be evicted has no bearing at all to what was published in the article. The allegation of land grabbing by the Plaintiff has no connection to what he purported the court to believe. His neglect to response to the demand and continuing with the trial placing unbelievable and pathetic story involving a deceased Chairman, cannot and does not generate any sympathy from the court.

Considering all the aforesaid, I award the consolidated damages in the sum of Kshs.3,500,000/= against the 1st Defendant.

I have advisedly found as above, because I do tend to agree with the 2nd Defendant that what it did was to disseminate to the public the information which is in the realm of the public interest i.e. the issue of land grabbing.

The article was published after two days and in the meantime, a responsible journalism required of it to get the verification. I do note that 2nd Defendant has taken precaution not to name the Plaintiff but the description was so apparent that it clearly pointed the issue to the Plaintiff. Moreover, even after publishing the statement from UKAI in its issue of 29th March, 2001, it did not take any steps to retract the article or offer apology which was not given even during trial. With these factors, I shall find that the 2nd Defendant also is liable for publication of defamatory article in lesser degree.

I do thus award the sum of Kshs.500,000/= in favour of the Plaintiff against the 2nd Defendant.

I have exercised my discretion given under Sec. 1A and 3A of CPA to give individual damages against the two Defendants, despite the prayer of joint and severally judgment. Grant of such order will do injustice to the 2nd Defendant.

The Defendants shall also give costs proportionally to the Plaintiff.

Orders accordingly.

Dated, signed and delivered at Nairobi this 20th day of **May, 2011**

K. H. RAWAL

JUDGE

20.05.2011