



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1135 of 2004**

**DAVID CHEGE MWANGI.....PLAINTIFF**

**Versus**

**MUGAMBO WA GACHOCHO CO. LIMITED.....DEFENDANT**

**JUDGMENT**

In this suit the Plaintiff is praying for judgment against the Defendant for:-

- “(a) General damages for defamation;
- (b) Costs of this suit
- (c) Interest on (a) and (b) above
- (d) Any other orders the court may deem fit to grant.”

The Defendant in the suit is a company registered under the Companies Act, Cap 486 Laws of Kenya. The Plaintiff is one of the Original shareholders of the Company and has remained such a shareholder to-date according to the evidence before me. Out of the letters which have been written between the Plaintiff, the Registrar General and the Defendant, I have chosen to reproduce only three thinking they will be sufficient to reflect the circumstances of this suit. The three letters I will reproduce are the following:

- First, is a letter dated 19<sup>th</sup> January 2004 addressed to the Registrar General by the Plaintiff. It was copied to two other offices but Defendant was not included.
- Second, is a letter dated 12<sup>th</sup> February 2004 addressed to the Defendant by the Plaintiff and copied to the Registrar General among others
- Third, is the Defendant’s letter complained of and dated 13<sup>th</sup> February 2004.

The first mentioned letter dated 19<sup>th</sup> January 2004 is as under:

**“SECOND APPEAL”**

**David Chege Mwangi**

**P.O. Box 57911**

**NAIROBI**

Tel: 0722-395928 C/o Mrs. Wairuhi

Or 0722-907749 C/o Irene Waruguru Chege

19<sup>th</sup> January 2004

The Registrar General,

P.O. Box 30031,

Nairobi.

Dear Madam,

Attn: Mrs. Dorothy N. Angote

REF: MUGAMBO WA GACHOCO CO. LTD.

C.12535: GENERAL COMPLAINT

Please, refer to your letter dated 15<sup>th</sup> of January, 2004 addressed to Mr. David Chege Mwangi and a further one of the same date addressed to the Directors of the above quoted company in reply to Mr. Chege's letter of 12<sup>th</sup> January, 2004 and to the director's of the said company dated 5<sup>th</sup> of January, 2003 both on the same subject.

I wish to register my deep disappointment with the way the officers in your department namely Mr. Gikonyo, Mr. George Mola and Mrs. J.N. Joram have dealt with this case for the last 7 months I have been on and off the corridors of your department.

Allow me to give a brief perspective of the issue at hand. I reported the disputed regarding the operations of this company to your office on the 12<sup>th</sup> of June, 2003 (See copy attached)

I was requested to come back in July. I met with Mr. Gikonyo and our discussions for that day are the subject of the record of my letter of 9<sup>th</sup> July, 2003 copy attached. After my complaints, I was referred to a Mr. Mola who wrote directing the company to hold its AGM before 30<sup>th</sup> September 2003 (See copy attached). Since then a chain of dramatic events have taken place. On the 16<sup>th</sup> October 2003, after much complain to you through my letters and several visits to your office, Mrs. Joram wrote to me informing me that the company, AGM would take place in October 2003. I do not know what happened to Mr. Molas order that the AGM was to be held before 30<sup>th</sup> September 2003. Annual Returns which were missing in the company file hitherto suddenly appeared from where is anybody's guess.

Although Mrs. Joram had written to me assuring me of the company's AGM before the end of October 2003, she then wrote to the Directors of the company on the 4<sup>th</sup> of November 2003 advising me to call the AGM with the other members of the company following failure by the company Directors to call the same as directed by your office subject to the provisions of Section 132 of the company's Act which gives the company directors a breathing period of 21 days.

I and other aggrieved member called for the AGM on the 19<sup>th</sup> December 2003. The directors having noticed the new developments called theirs for the 20<sup>th</sup> of December 2003. Purely to avoid confrontation, we backed down and advised our camp to attend the Directors' meeting on 20<sup>th</sup> December 2003. In spite of my complaint that the meeting was called without an agenda, when it was finally held, there was indeed no agenda. I had constantly insisted in my letters to your department that you send a representative(s) to the meeting and Mrs. Joram did in several occasions in fact promise me that she would personally be in attendance with two other officers. All these same, no representative from your department was present, when the meeting was finally called even though Mrs. Joram was fully informed of the same.

The directors in their letter to your office of 05/01/2004, lied to you that during the adjourned meeting there was an agenda which covered among others topics like Reading of the minutes of the previous meeting(s); matters arising; chairman's report, reading of accounts of years 2001 to 2003. This was a blatant lie. The meeting was rushed through to cover prayers; letters from Registrar; and dividends. At this juncture, the directors requested for an adjournment apparently to enable them pay outstanding Income Tax bills amounting to Kshs.226,000/= after which the AGM would reconvene in January to receive accounts audited reports and elections as well as A.O.B. The rural people are uneducated and ignorant and they simply fell prey to this request and granted the adjournment. Please refer to CAP 63 laws of Kenya Penal Code Section 129 which states "Whoever gives to any person employed in the public service .....is guilty of a misdemeanor and is liable to imprisonment to three years" (See copy attached)

My letter of 12<sup>th</sup> January 2004 touched on very important matters of law which reflects on this issue. We pointed out that the directors were buying time so that by the expiry of 3 months, our claims would be rendered null and void (see the copy of our letter). We did also request your office to intervene and use the powers given by law to force the Directors to call the meeting since they had not only defaulted but ignored your earlier directives. The law requires that a Limited company hold an AGM every year among other issues. This company has held none for 3 years. Is this not default? What other meaning does your department attach to default? (Jane Joram letter refers)

I feel very strongly that the staff that have dealt with this issue have been compromised and have been all through colluding with the directors of this company to frustrate the cause of justice. I watched with disbelief when on 14/01/2004 Mrs. Joram after going through my letter of 12/01/2004 sent me out to go and get the section of law that we had referred to in our letter. I knew all the time she knew the law, she had it in the shelves if not in her office or even in the library; but she was trying to frustrate me into submission.

When I finally brought copies of the Law she did not utter a word. If in deed she was not aware of this law what is she doing in this department? Why is she that senior?

Madam, I shall further invite you to note that although I have addressed all my letters to you, I have never been allowed to meet you personally to present my case for the last 7 months I have visited this department. My case has always been sent to the same officers who as I have said above have been compromised.

I come from the rural areas and I have spent a lot of money on travel and upkeep while staying in the city as well as losing a lot of valuable time on this issue. At 68 years old I think I also require greater attention.

I believe this is an issue which was easy to solve if your officers have not been compromised or inefficient or both whichever is applicable.

Madam, it is my submission that there is something very wrong going on in your department and we pray that you will urgently address yourself to this issue for your own good and that of the country in general. One indeed wonders, how many poor rural people have faced the same treatment in the hands of your staff?

I have the honour to be, Mandam

David Chege Mwangi

CC The Hon. Kiraitu Murungi

Minister for Justice and Constitutional Affairs

P.O. Box 56057,

Nairobi

Mr. John Githongo

Permanent Secretary

Officer of the President

Governance and Ethics

P.O. Box 40530-00100

Nairobi

The second mentioned letter dated 12<sup>th</sup> February 2004 is as under:

**DAVID CHEGE MWANGI**

**P.O. Box 57911**

**NAIROBI**

**Tel: 0722-395928**

**(Mrs. Wairuhi)**

**Or**

**Tel: 0722-907749**

**(IRENE WARUGURU)**

**12<sup>th</sup> February 2004**

**THE DIRECTOR**

**MUGAMBO WA GACHOCHO CO. LTD.**

**P.O. Box 135,**

**KIGUMO**

**Dear Sir,**

F/NO. C 12535

You are aware that the above quoted company held its Annual General Meeting after three (3) years of break (contrary to the Company's Act CAP 486) on the 20/12/2003 which was adjourned following the Director's request, apparently to give the Directors to go and clear outstanding taxation obligations with income tax department. You indicated to the members that the company owes Kenya Revenue authority Kshs.226,000/=. The Directors disclosed to the members that this figure has been charged by the Kenya Revenue Authority (K.R.A.) following Mr. David Chege Mwangi disclosure that the company is made up of 74 members while their returns to KRA have always indicated that the company is made up of 50 members.

We further note with concern that the meeting did not have an agenda. At the time that the meeting was adjourned we had covered the following items: prayer letter from the Registrar, member's dividends for 2003.

In your letter to the Registrar General's office of 5<sup>th</sup> January, 2004 you continued with your culture of lies to the Registrar General indicating that you had an Agenda for the meeting and hereby numerated 9 points which were to be discussed. You continued to lie that the meeting progressed very well when in fact there was a lot of tension and disagreements.

The directors refused to accept the members that had been sent by their families to represent them (proxies) even though they had given sufficient notice as stipulated by law.

The members acknowledged the contributions and sacrifices Mr. Chege had made in particular exposing the details of company law to them. No member was able to challenge the issues Mr. Chege had raised. The directors were heavily criticized for delaying the company's A.G.M for three (3) years.

Mr. Chege further informed and was able to concretely prove that the company's returns made to the registrar general were fake since they were filed and signed by officials who were already dead. The dead members include:-

1. Mr. Wallace Gakinya - died in 1992
2. Robert Muhu - died in 1992
3. Rishipar Nyambura - died in 1996
4. Gicharu Ngobu - died in 1998

You are further reminded that Mr. Chege Waweru and Musa Muthuo who have signed the returns to the Registrar of Societies are not officials of the company but ordinary members. For your own recollection, just in case you have forgotten, the following officials were in attendance in the adjourned meeting of 20/12/2003

1. Mr. Kioi Kaboro - Chairman
2. Mr. James Mwangi Gitau - Secretary
3. Mr. Njuguna Mwaniki - Treasurer

The dead members indicated to have signed the returns to the Registrar of Societies were not in attendance for obvious reasons.

The directors were challenged by members as to why they had to use dead people as signatories as well as people who are none officials. The explained that they wanted to avoid a situation where the houses could be sold due to debts and expiry of lease. This explanation was rejected by the members who felt that an extraordinary meeting could have been called to elect new office bearers to replace the dead members who in any case would have been replaced along time ago.

Pursuant to the Laws of Kenya CAP 63 Penal Code Section 129, it is a criminal offence to cheat a public officer knowingly (see the same attached) which is punishable by a three (3) year jail term (not to mention forgeries).

It is further noted that it is not disputable that the company has not held any AGM for 3 years i.e. 2001, 2002 and 2003 save for the adjourned meeting of 20/12/2003. The two (2) years return to the Registrar General have indicated various dates that the AGMs were held. This is again part of the Directors culture of lying.

We further note that the returns to the Registrar General's office included what the Directors claim to be audited accounts. Anyone who has a little knowledge of account will tell you that these are figures collected together to cheat the members. These do not qualify to be called accounts let alone audited accounts. These can only be referred to a "Record-keeping". It is sad to further note that the directors have posted an expenditure of Kshs.79,000/= spent on the faked audited accounts which do not in reality exist. Who are the auditors of the company? Where were they during the AGM of 20/12/2003 to present the so called audited account? It is our submission that accounts in this company have not been audited and the Kshs.79,000/= supposedly paid to the auditors should be return to the company.

As the Directors, you are further advised that it was not our intention to write to you this letter. We have not written to you for the last 8 months we have dealt with this case. We were advised to remind you of your legal responsibilities by the General Registrar of Societies in a meeting held in her office on Wednesday, the 11<sup>th</sup> of February 2004 at 10.00 a.m. in the presence of Mrs. Jane Joram and our lawyer Mr. Kibe Mungai.

Finally, but probably most important before the meeting of 20/12/2003 was adjourned the members unanimously resolved that the meeting SHALL and MUST be held in January, 2004. It is noted with great concern that today is the 13/02/2004 but the meeting has not been reconvened yet. Your letter of 05/01/2004 to the General Registrar, lied that the AGM resolution included February, as a possible date for the meeting, probably to circumvent the law after the expiry date of the complaints on 4<sup>th</sup> February 2004 (our letter of 19<sup>th</sup> January, 2004 to the Registrar refers).

It is our hope that you will take the earliest opportunity to do the needful in conclusion of this matter once and for all. In the meantime we look forward to the Registrar General for her timely guidance.

Yours faithfully,

DAVID CHEGE MWANGI

CC Mrs. Dorothy N. Angote

The General Registrar of Societies

P.O. Box 30031

Nairobi

The Honourable Kiraitu Murungi,

Minister for Justice and Constitutional Affairs

P.O. Box 56057

Nairobi

Mr. John Githongo

Permanent Secretary

Officer of the President

Governance and Ethics

P.O. Box 40530-00100

Nairobi.

In October 2004 the Plaintiff filed this suit against his company, the Defendant, on the ground of "Defamation". He is alleging that on or about 13<sup>th</sup> day of February 2004, the Defendant's secretary acting on instructions and/or as agent and/or servant of the Defendant, falsely and maliciously wrote, printed or caused to be written a letter to the Registrar General of Companies concerning the Plaintiff using the following words which are found in Paragraph 3 of the Plaint:

**".....Secondly we are in receipt of Mr. David Chege's letter dated 12/02/2004. We have also been informed by the members how he is holding meetings at his home for campaigning even with people who are not members. We think we have enough information of what is disturbing him in his old age of 68 years as he claims in his letter....."**

**Though we may not wish to character assassinate anybody, we would like to reveal some few things to you to be aware of what sort of person you are dealing with:**

- i) This man Chege had a case with his father in the High Court for many years of which he was the complainant. Finally he lost the case.**
- ii) He Chege had another case with the University of Nairobi, where he was employed. He was the complainant. Finally he was dismissed.**

- iii) **Chege is a man who has no respect for anybody and his letter to you can confirm this.**
- iv) **On 24/12/2003 he abused the directors when he came to the office during a meeting.**
- v) **The case at hand is your office which is being accused to have been compromised. This is just to mention a few.**

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**We have brought this Company far despite our little knowledge and members know that, except Chege and a few people who want to destroy the company by any means to occupy leadership. That is why he is traveling to any office, camping there wasting his money and holding meetings at his home.....”**

That is alleged to have constituted part of the contents of a letter addressed to the Registrar of Companies by the Defendant dated 13<sup>th</sup> February 2004 which the Defendant’s Secretary General read to the Annual General Meeting of members of the Defendant after the letter was sent to the Registrar General. This is the third letter I said I will reproduce. The Annual General Meeting at which the letter complained of was read was held on 28<sup>th</sup> February 2004 at Gachocho Primary School in Maragua District and present in the meeting were the Defendant’s shareholders or members only and evidence is that they were all from Gachocho Village and knew each other both in the Defendant Company and back at their respective homes. They were about 60 members present at the Annual General Meeting (AGM).

According to the Plaintiff, by the words complained of, the Defendant meant and were understood to mean:-

- “a) That the Plaintiff being 68 years of age he had diminished mental capacity and/or was not in the proper state of mind.**
- b) That the Plaintiff was a dishonest person who had malicious tendencies of a perennial vexatious litigant.**
- c) That the Plaintiff was all bent to destroy the Defendant Company in which he subscribed as a member**
- d) That the Plaintiff was out to campaign and occupy the Defendant’s company leadership through back door and/or unorthodox methods.**
- e) That he had camping and/or moving from office to office while holding clandestine meetings with others in a bid to disrupt the operations of the Defendant company.”**

As indicated earlier this suit arose as a result of several letters having been exchanged between the Plaintiff, the Registrar General and the Defendant concerning affairs of the Defendant Company; so that just before the Defendant wrote the letter complained of dated 13<sup>th</sup> February 2004, the Plaintiff had written to the Defendant, with copy to Minister Mr. Kiraitu Murungi, then Permanent Secretary Mr. John Githongo and Registrar General; a letter dated 12<sup>th</sup> February 2004 aforesaid, accusing the Defendant of various failures.

Apparently, that is the letter which prompted the Defendant’s Secretary, Mr. James Mwangi Gitau, to write the letter complained of dated 13<sup>th</sup> February 2004, partly to inform the Registrar General of the Defendant’s intention to hold a Special General Meeting on 28<sup>th</sup>

February 2004 and partly to show the Registrar General the Defendant's response to the Plaintiff's letter dated 12<sup>th</sup> February 2004.

I will now reproduce the Defendant's letter dated 13<sup>th</sup> February 2004 which states as follows:

**MUGAMBO WAGACHOCHO CO. LTD.**

**P.O. BOX 135**

**KIGUMO**

**DATE: 13/02/2004**

**THE REGISTRAR GENERAL**

**P.O. BOX 30031**

**NAIROBI**

**Dear Sir/Madam**

**REF: OUR LETTER DATED 5/01/2004**

**This is to inform you that we shall be holding our special general meeting on 28/02/2004 as we had promised. Attached is a copy of the notice.**

**Secondly we are in receipt of Mr. David Chege's letter dated 12/02/2004. We have also been informed by the members how he is holding meetings at his home for campaign even with people who are not members. We think we have now enough information of what is disturbing him in his old age of 68 years as he claims in his letter. We hope we shall address his problems in the General Meeting as we have it as an agenda.**

**We noted with a lot of concern that Chege did not note anything of importance discussed in that meeting except the prayers and members dividends. We believe that members will remind him in our meeting when minutes will be read. In fact there were two people who wanted to be in the meeting yet they were not members who were refused to be in the meeting after which the meeting continued smoothly which case did not please Chege.**

**Though we may not wish to character assassinate anybody, we would like to reveal some few things to you to be aware what sort of a person you are dealing with.**

- 1. This man Chege had a case with his father in the High Court for many years of which he was the complainant. Finally he lost the case.**
- 2. He Chege had another case with the University of Nairobi, where he was employed. He was the complainant. Finally he was dismissed.**
- 3. Chege is a man who has no respect of anybody and his letters to you can confirm this.**
- 4. On 24/11/2004 he abused the directors when he came to the office during a meeting.**
- 5. The case at hand is your office which is being accused to have been compromised. This is just to mention a few.**

**We feel we may have not been conversant enough with all that is pertained in law, but we are ready to and to be helped how to improve our company to reach to higher heights from where it is but not in the way Chege is doing it. We have brought this company this far despite our little knowledge and members know that, except Chege and a few people who want to destroy the company by any means to occupy leadership. This is why he is travelling to any office, camping there and wasting his money and holding meetings at his home.**

**We shall update your office with the outcome of our meeting of 28/02/2004 which we believe will address all Chege's problems once and for all.**

**Yours faithfully,**

**JAMES M. GITAU**

**SECRETARY"**

According to the Plaintiff therefore, the dispute arose from his letter to the Registrar of Companies dated 12/6/2003 in which he reported and complained to the Registrar of Companies that the said company was contravening the law which required every company to hold annual AGM every year. Mugambo Wa Gachocho Co. Ltd. had stayed for 3 years without an AGM i.e. years 2001, 2002 and 2003.

On the 14/7/2003 the directors of the Company wrote a hand written letter to the Registrar of Companies in which they accepted

that they had not held the meetings apologizing that they would not repeat the same in the future.

The Registrar of Companies acknowledged the director's letter of 14/7/2003 on the 26/8/2003 and ordered the company to hold the necessary AGMs not later than 30/9/2009. The Registrar General wrote to the company on 4/11/2003 complaining that the company was in default of conducting its AGMs. The Registrar General went further and authorized the dissatisfied members to call an extra ordinary AGM and promised to support their resolutions provided they followed the established mechanisms of the law Cap 486 Section 132 of the Company's Act. Mr. Chege explained that when finally the directors called for an AGM on 20/12/2003 the meeting was adjourned on grounds that the directors wanted to clear their income dues first and the meeting would be called later after this action.

The Plaintiff then went directly to the issue pertaining to this case which arose from the directors letter of 13/2/2004 which was written to the Registrar of Companies. The Plaintiff asserted the following.

The Directors informed the Registrar that I was 68 years old. He did not know what the directors wanted the Registrar to conclude from this statement. He concluded that it could only mean that he at 68 years old had diminished mental capacity and/or was not in the proper state of mind. That the Plaintiff is a dishonest person with malicious tendencies of a perennial vexatious litigant giving examples of his earlier cases; one case against his father one land Civil Appeal No. 35 of 1993 and his case against his former employer the University of Nairobi – Civil Appeal No. 144 of 1995. The Plaintiff did not see the reason why these two cases were brought into the activities of a private company and actually discussed. This was to defame him and make him unpopular within his peers. These cases have been given to this court showing the orders of the courts which give a different picture from the one the Directors were giving to the members i.e. that he lost the cases. The directors when challenged by the Plaintiff to produce alternative orders to the contrary were unable to do so.

That the Plaintiff had hatched plans to destroy the very company for which he is a subscriber. When challenged by the Plaintiff to give evidence to this effect they were unable to do so.

That the Plaintiff was campaigning for leadership **OF THIS COMPANY**. He challenged the Directors to produce evidence to show how many times he has shown interest since the inception of this company in 1974. The Directors were unable to produce this evidence to show the backdoor and/or unorthodox methods he used to try and occupy the leadership of this company.

That the Plaintiff was camping and/or moving from office to office while holding clandestine meetings with others in a bid to disrupt the operations of the defendant company. When challenged by the Plaintiff to produce evidence to their defamatory claim, they were unable to do so.

That the Plaintiff has been holding meetings with some company members and others who are not members in his home with full intentions to destroy the company. When challenged to produce evidence to prove these claims, the Defendant were unable. They were not able to give reasons as to why they did not alert security operations in the district, location or at village level for action to be taken against such illegal meetings. These meetings never in deed occurred.

In view of the above, this letter cannot escape its defamatory intentions given that it was being read to a general meeting where members are Plaintiff's peers, young, old, his children who have grown with him and who live in the same locality with him. The defendant knew all the time that the Plaintiff's actions would disclose the many irregularities that the defendants have been accused of in the operations of this company like not holding AGMs regularly, not preparing audited accounts taking irregular decisions concerning members and many others as has been established during the hearing of this case.

Both witnesses for the Plaintiff namely Nahason Kaguchia Kamiri and Phillis Waithera Karanja who are members of this company and who were present in the AGM held on the 28/02/2004, have confirmed to this court that this defamatory letter of 13/02/2004 was indeed read to the members during the meeting by one Mr. James Mwangi Gitau who is also the current Secretary to the Board of Directors of this company. Both concurred with the Plaintiff that the Defendants did not clarify what they meant by indicting to the Registrar of Companies that the Plaintiff at 68 had something disturbing him. They both further concurred with the Plaintiff that his two cases one with his father concerning the family ancestral land and his former employer – the University of Nairobi were extraneous matter which did not have any bearing to the case in court. These two should not have been raised during the hearing of this case.

When asked why they thought the Defendant was raising these extraneous issues, the two witnesses concurred with the Plaintiff that these were raised to show that the Plaintiff is a bad person and therefore his membership in this company should be annulled. They were inciting the membership to influence them have a vote of no confidence in Mr. Chege so as to remove him from the company. They agreed with the Plaintiff that the letter contained a lot of lies regarding the behavior of the Plaintiff who has never been interested in the leadership of this company since its inception in 1974.

They also agreed that at one stage during the meeting the Plaintiff was ordered to leave the meeting so that the members any freely discuss his case which the Plaintiff complied with. During his absence the directors to the defendant company influenced the members to pass a resolution to the effect that the plaintiff's membership to the company be cancelled, his share contribution and the balance of his dividends be paid to him within two weeks.

When the Plaintiff was called back to the meeting this decision was communicated to him by the chairman himself in the presence of all the members in attendance. The plaintiff requested the defendant management to put this decision in writing to him through the defendant lawyers.

The Registrar of companies agreed with the plaintiff that the first letter from the plaintiff to their office was dated 12/06/2003 this is the letter that raised the dispute which has resulted in this case. The witness further agreed that the dispute over failure of the defendants to call respective AGMs for years 2001, 2002 and 2003 which the witness did in fact confirm had not been held, this is why the Registrar of Companies allowed the aggrieved members to call an extra ordinary meeting of the company in her letter dated 04/11/2003

The Registrar General of Companies concurred with the plaintiff that the letter of 13/02/2003 which was written to the office was not written in good faith. It was treated as general complaint and the witness did not act on its since it had various issued that had nothing to do with the issues of the company like the mention of cases relating to the plaintiff and his family regarding their ancestral land and the issue relating to the former employer of the plaintiff. The witness concurred with the plaintiff that the letter was offensive to the plaintiff and that it was meant to block the plaintiff's moves to raise the patent issues regarding the failure of the defendants to call AGMs for several years. Finally, the witness agreed with the plaintiff that contents of the letter were defamatory.

The two other witness of the plaintiff are M/s Wallance Kioi Kaboro who is also the chairman of the defendant company. The plaintiff called him as his witness after he noticed that the defendants were unwilling to call him fearing cross examination by the plaintiff. The plaintiff did not expect this witness to cooperate but he wanted him to give facts relating to the defamation case. The plaintiff knew all the time that this witness being the chairman of the dependant company would be hostile a fact that was confirmed later after the witness denied having any knowledge of all the letters written by the Registrar General to this company and all those letters the plaintiff wrote to the company. At this juncture the presiding judge Hon. Justice Khamoni got annoyed and threatened to commit the witness to jail for lying to the court. It was not clear why the witness denied knowledge of all correspondence including those that have been written by the Registrar of Companies to him as the sitting Chairman of the defendant company.

The Plaintiff in his various communication had accused the defendants of lying. This indeed was confirmed by none other than the evidence of the chairman himself who continued to lie to this court.

The Chairman further agreed during his evidence in chief that the defendant company did in fact defame the plaintiff when he kept on answering this question that they read their letter to the Registrar General dated 13/02/2004 to the members in the AGM of 28/2/2004 to show the members that the plaintiff was a person of doubtful character, a bad person, to mudsling his name, to injure his character to discredit the plaintiff's reputation and bring his name into public scandal, odium, ridicule and contempt. These accusations were confirmed by none other than the current and the sitting chairman of the defendant company when giving his evidence. He did not deny any of these accusations but in fact confirmed them.

In most cases the chairman would hind behind the secretary Mr. James Mwangi Gitau who he claimed knows has the correspondence of all the issues related to the company.

The plaintiff is not challenging the authority of the registrar of companies to receive communications from companies that fall under his jurisdiction. The letter would not have been defamatory had it been shared with the Registrar of Companies only. The bone of contention is the fact that the letter was read to about 60 members who are members of the defendant company and who in deed are human and like all human beings shared the contents of the letter with other community members who are not necessarily members of the company. The plaintiff is born and lives in this community. Any such negative sentiments did indeed put his reputation to public ridicule.

On cross examination by the defendants advocates, the plaintiff pointed out to the court that at 68 he is a respected grandfather in the community with highly educated children two of who are reading for their master's degree and others in the University which makes his reputation important in the community that he lives in. The plaintiff pointed out to the court during cross examination by the defendant that since they (defendants did not clarify what they meant when they stated that they knew what was disturbing him at 68 years old, the two interpretations to this statements could only mean that he (plaintiff) was either of unsound mind or had lost some of his ability to reason both of which they were unable to prove. The defendant was not able to provide prove that he (plaintiff) had been holding meetings with people

who were not members of the company in order to disrupt the operations of the company. No evidence of this was adduced from witnesses or otherwise.

By defendants stating in their letter that they “did not wish to character assassinate anybody”, while they continued to do exactly that, it means that the defendants knew all the time that they were in deed defaming the plaintiff. As the letter was not copied to the plaintiff, they hoped the plaintiff would never have access to the contents of this letter even after reading the contents to the members of the public as the AGM since the company letters are kept confidentially by the Secretary of the company.

By introducing extraneous factors which have absolutely nothing to do with the issue at hand that is the family case the plaintiff had with his father regarding their land of 1993 and the case of the university of Nairobi his then employers of 1995, the defendant could not have had any other reason but to character assassinate his person which they have rightly owned in their letter of 13/2/2004.

The plaintiff further pointed out during cross examination that the defendant company went on to claim that he the plaintiff and few people were out to destroy the company to which he himself was subscribing to and that he wanted to occupy position of leadership by any means.

Plaintiff pointed out that he had been a member of this company since inception in 1974 and had never sought for any elective office in all the AGM's that have been held for the last 34 years even though he had a right to so if he so wished. The letter of 13/2/04 was to show the members at the AGM that he was a man of very bad character and incite the AGM members to remove him out of the company. The plaintiff having challenged the supremacy and illegal actions of the directors, he had to go.

Mr. Nahashon Kaguchia Kamiri who was witness of the Plaintiff and who was present when the letter of 13/2/2004 was read to the members during the AGM of 28/2/2004 collaborated every detail that the plaintiff had given in his evidence in chief. That he had heard the letter being read to the members present in the AGM including himself; that the letter was defamatory because it character assassinated the plaintiff by bringing personal issues that the company had nothing to do with, that at a certain juncture during the meeting, the plaintiff was ordered to leave the AGM so that members could discuss his issues; that the members were incited by the directors of the company to pass a resolution to remove and/or expel the plaintiff from the company; and that when the plaintiff was called back he was informed of this decision and advised to collect his final dues from the company advocate after 2 weeks from the date of the AGM. In his personal assessment, the letter was read to create bad blood between the plaintiff and other members of the company so that they could take the resolution they took. It showed the plaintiff as a person of bad character, unreliable and likely to cause trouble detrimental to the company operations.

The second witness to testify in favour of the plaintiff was M/s Phillis Waithira who is also a member of the defendant company. She too collaborated the evidence given by the plaintiff and the first witness Mr. Nahashon Kaguchia Kamiri that the letter of 13/02/2004 was read to the members of AGM; that there were extraneous matters that were mentioned which were not rated to the matters of the company that is, the plaintiff's personal case with his family and his case with his former employer the University of Nairobi. She collaborated the other two witnesses in all other details of evidence and concluded that the letter was read to the members at the AGM to show that the plaintiff was a bad and difficult person who was a liability to the defendant company and therefore should be expelled all together which was resolved and the plaintiff was indeed informed of this decision in the meeting by the Chairman of the dependant company. She too agreed that the letter was reformatory to the character and person of the plaintiff.

In her evidence in chief the State Counsel in the Department of the Registrar General M/s Marianne Wambui Mucheru representing the Registrar General confirmed that they had received all the letters of complaint from the Plaintiff regarding aborted Annual General Meetings (AGMs) by the company for a period of 3 years. She agreed that the office of the Registrar General did not have any records to show that the company had held these AGMs and that the defendant company did in fact agree that these meetings had not taken place in their hand written letter dated 14/7/2003. The Counsel further said that the office of the Registrar General had received the letter in invitation dated 13/02/2004 which is the basis of this defamation case. She observed that the letter in itself contains defamatory materials but it was the responsibility of the Registrar General to receive correspondences from the companies. Since the letter was read by the Registrar General and her staff and subsequent action taken, and the letter filed in the company file kept in the Registrar General Offices, the defamatory materials were not shared with any other parties and therefore the Registrar General did not defame the plaintiff.

She continued to tell the court that if however, the directors of the defendant company had shared the contents of the letter with the members of the public in the AGM of 28/02/2004 then, the plaintiff had the right to sue for defamation.

The next witness Mr. Wallace Kioi Kaboro had been the chairman and director of the defendant company since 1998. He was summoned by the plaintiff suspected that the defendants had avoided to call critical officials of the organizational (safe in the secretary/director) to defeat the cause of justice. The chairman of the Board of Directors of the company having been on the chair at all the material dates of the issues raised in this case is the best place to answer most of the questions from the plaintiff regarding the operations of the company. Unfortunately, the chairman appeared to either be uncooperative and/or unaware of what goes on in the company when giving his evidence in chief. His evidence was full of contradicting statements when he would deny knowledge of correspondences only to admit later on during questioning even though some of these letters were written by his own board. On got the impression that he did not know what goes on in the company. He is certainly not in control.

The plaintiff's understanding of the meaning, purported tenor of the letter of 13/2/2004 is that the defendants wrote and published these words in the knowledge and overt intention that they were libelous a fact confirmed by the chairman of the Board of Directors himself. The words were further published in pedestrian and casual manner with the overt intention to mudsling the plaintiff, and finally the words were published with the intentions that the Registrar General and staff will believe in the defendants defamatory words and act on them to the detriment of the plaintiff.

By the said words in their natural and ordinary meaning the defendants meant and were understood to mean:

- a) That the plaintiff being 68 years of age he had diminishing mental capacity and/or was not in proper state of mind.
- b) That the plaintiff was a dishonest person who had malicious tendencies of a perennial vexatious litigant.
- c) That the plaintiff was all bent to destroy the defendant company in which he subscribed as a member
- d) That the plaintiff was out to campaign and occupy the defendants company leadership through "backdoor" and or unorthodox methods.
- e) That he had "camped" an/or was moving from office to office while holding clandestine meetings with others in a bid to disrupt the operations of the defendant company.

It is in humble submission by the plaintiff that by publishing these words and sharing the same with members of the public, the plaintiff has suffered serious injuries in his name, credit and reputation and has been brought into public scandal, podium, ridicule and contempt among right thinking members of the society.

The chairman, of the defendant company allowed this publication to expose the plaintiff to odium amongst the members of the society. Mr. Kioi Kaboro does not see anything wrong with bringing in extraneous matters to issues at hand. The family case regarding distribution of the plaintiff's ancestral land and the plaintiff's case with his former employer the University of Nairobi had no relationship to the matters of the company. But the plaintiff's name had to be mudsling and malicious allegations made against him so that the directors of the company could achieve their objectives at any costs. That is why the chairman of the defendant company does not see anything wrong with the publication whatever loss or damage the plaintiff suffered.

The final witness for the plaintiff was Mr. Hezekiel Kariuki Wairegi who is also the Treasurer and Director of the company. Like the chairman above he is a critical witness of event that may have taken place during the material time. Like the chairman of the defendant company, the Treasurer confirmed that the directors did in fact write/publicize or caused published the letter in dispute dated the 13/02/2004 to the Registrar General of Companies and that of the contents of the letter was read to the members at the AGM held at Gachocho Primary School on the 28/02/04. He kept insisting that the information they were giving both the Registrar of Companies and the members of the company about the plaintiff was true and therefore not defamatory. This notion appears to be in the two witnesses mind that whatever they believed was true about someone could be shared with others whatever damages and injuries such information/words caused to the other party. Once the publication had been shared with over 60 members of the defendant company the Treasurer was not able to tell the court how the directors could have controlled the other members not to share the contents of the publication with the rest of the public.

Mr. James Mwangi Gitau is a director in the defendant company cum secretary since December 1992. He is the chief witness in this case since he keeps all the documents of the company, takes minutes in all the meetings of the company including AGM's and writes all the letters of the company as directed by the Board of Directors. Mr. J.M. Gitau had indeed been physically present in court all the time the case was going on in spite of the fact that he himself was to be a critical witness for the defendant. When the plaintiff raised this

issue/concern at the beginning of this case, he was informed by the court that this was perfectly legal. As indicated elsewhere in this submission, both the chairman Mr. Wallace Kioi Kaboro and the Treasurer, Hezekiel Kariuki Wairegi refused to answer a number of questions hiding behind this witness – Mr. James Mwangi Gitau – that since he kept all the company records, he was better placed to answer such questions. They would simply say “I do not know, ask Mr. Gitau this question when he comes here to give his evidence in chief.”

The chief witness of the defendant company Mr. James Mwangi Gitau based his evidence in chief on five letters written on 12<sup>th</sup> January 2004 (Plaintiff to Registrar); 15<sup>th</sup> January 2004 (by Registrar to Defendants); 19<sup>th</sup> January 2004 (Plaintiff to Registrar) with January 2004 (Registrar to Plaintiff) and 13<sup>th</sup> February 2004 (Defendants to Registrar) and which is the subject matter of defamation in this case). The letter was written and signed by the witness in chief himself. The witness Mr. Gitau and in deed all the other witnesses of the defendant do not see anything wrong with the letter of 13<sup>th</sup> February, 2004. He like all the others argue that in their letter of 13/02/2004, they were only confirming what the plaintiff had written about himself, to the Registrar of companies. The plaintiff has continued to point out that he has not sued the defendant company because they wrote a defamatory letter to the Registrar. He has sued the defendants because of uttering, publishing or causing to be published defamatory words with about 60 members (most of them peer to the plaintiff) of the defendant company in their AGM meeting held on the 28/02/2004. The defendant would like the court to believe the contents of the letter did not spread to the rest of the members of the society after the letter was read to the more than 60 members. Common sense however teaches us that a secret ceases to be a secret after it has been shared between two people. The embers at the AGM were not two; they were about 60. The defendants did not show the court the mechanism they had put in place to ensure that the information shared with them that day and in respect of this defamatory letter were not shared with the other members of the society. The witness could not do this because he knew it would have been an impossible task.

The claim by the chief defendant witness that the plaintiff had insulted himself in his correspondence in the five letters shown above was misplaced. He was unable to show the section in which the plaintiff had insulted himself in any one of these letters.

The chief witness does not dispute that he wrote the defamatory letter of 13/02/2004. He accepts this. But he continues to argue that the contents of the letter were not defamatory because they showed the character of the plaintiff. We all have our own characters. We all have our own weakness because we are human beings. We have not however authorized other parties to go sharing an announcing our weaknesses to others. Certainly, the plaintiff had not authorized the defendant company or its representative to do so. When asked what the defendant meant when they said in their letter: “We think we have now enough information of what is disturbing him at his old age of 68 years”, Mr. James Gitau was not able to state exactly what they thought was disturbing the plaintiff or what was meant by this statement. The Plaintiff interpreted this to mean that the plaintiff had diminished mental ability and/or not in proper state of mind. The letter continues to state:- “Although we do not wish to character assassinate anybody, we would like to reveal some things to you to be aware what sort of a person you are dealing with. Right from the onset, the directors of the defendant company knew that they were printing defamatory materials about the plaintiff.

When the chief witness of the defending company was asked what the ancestral land case between the plaintiff and his family had to do with the issues of the company he replied that the directors wanted the members to see what sort of a man they were dealing with. Mr. Gitau admitted that the two issues had no relationship. The witness gave a similar answer when asked about the relationship between the plaintiff’s case with his former employer – University of Nairobi – and the matters of the company. This is self admission to defamation. What other proof does the court require to find the defendants guilty of defamation?

The letter of 13/02/2004 continued to state that “We have brought this company this far despite our **LITTLE KNOWLEDGE** and members know that, except Mr. Chege and a few people who want to destroy this company by any means to occupy leadership.” The defendant by this statement admits that they have “little” knowledge and that “we may have not been conversant enough with all that is pertained in law”. That they have little knowledge in law and education. The plaintiff stated the same sentiments in his letter to the Registrar of 19/01/2004. What is the difference between the two statements? The two statements are true and correct. It does not reflect insults to the members either by the defendants or the plaintiff. All witnesses for the plaintiff and the defendant confirmed that the plaintiff has never sought for an elective position since the inception of the company in 1974. So, there was no proof at all that the plaintiff would wish to destroy the company he himself subscribed to occupy leadership. It was further scheme by the defendant to incite the members to dislike the plaintiff.

Concerning Paster Mwangi Wamuhu & Austino Kariuki Mundara, these last two witnesses are not original members of the defendant company. They became members after their parents died in the year 2002. These two did not look very conversant with the

operations of the company. Both of them did not answer the questions asked by the plaintiff under cross-examination. They continuously said they did not know the answers. Being none directors, these two are outside the decision-making centre of the company. They were not there when a decision was taken to write the defamatory letter. The defendant company avoided bringing credible witnesses from among the membership particularly the directors themselves whose number is 9 (nine)

The two witnesses had been recruited by the defendant company and put through a process of rehearsal so that they could only say what they had rehearsed. Their evidence was not credible and therefore the plaintiff does not wish to dwell very much on it. It should be discarded within total.

The chief witness claimed that the plaintiff is a litigant person. He himself (the chief witness) is a person of doubtful character. In a High Court ruling between himself and Mr. Julius Macharia Ndugire and others regarding running of Kamung'ang'a ACK Church where Mr. Gitau was lay leader and Mr. Macharia the vice-chairman, HCC 1767 of 2002 Mr. Gitau was defeated and was ordered through a court order never to appear in this church again in the future. Due to this shame, Mr. Gitau started his own church on his own land where he lives. He is a person who would stop at nothing to achieve his objective – gain fame and wealth. He is in deed a wealthy man though only a simple rural P3 teacher owning personal properties in Maragua District and in Nairobi. He has several other cases at the District Magistrate Court at Kigumo Law Courts. These cases have yet to be determined. In all this scenario Mr. Chege the plaintiff kept these outside issues out of company matters now in submission.

It is my submission that the defendants caused plaintiff to suffer further injuries and damages during the cause of the proceedings in this case. The plaintiff therefore prays the court to find the defendant guilty of causing the plaintiff to suffer further wrongs and grant the plaintiff compensatory damages as the court may find reasonable. A few examples and annexes thereupon will serve as proof.

- a) On 15<sup>th</sup> of March, 2006 the Hon Justice J. Mugo issued an order that the court shall grant me no further adjournments to the defendants. This order arose from the perennial tendencies by the counsel to the defendant to request for adjournments for various reasons every time the parties attended court. The Plaintiff was always ready to continue with the case and in some instances, witnesses for the plaintiff were in attendance only for the suit to be adjourned to a later date.
- b) On the 10<sup>th</sup> of January 2006, the plaintiff had to write to the court through the Deputy Registrar of the High Court complaining of mixed dates of his two cases HCCC 1135 of 2004 and HCCC 430 of 2004 involving both parties. Due to frustrations and distress the plaintiff was suffering in the hands of the two advocates he had to drop his own advocate and appear in person. This has been the position throughout the rest of proceedings with suit.
- c) By an order issue by Hon. Justice Khamoni dated 30/07/2008 the hearing of this suit had to start DEVONO. This critical decision arose due to the mistakes of the court itself which allowed the defendants to recall one of the plaintiff's witnesses for further cross-examination and in a language the plaintiff did not understand. The plaintiff's pleas to the then presiding judge the Hon Justice Osiemo were not granted forcing the plaintiff to complaint officially in his letter to the court dated the 23/06/2008 also copied to the Hon. The Chief Justice. The plaintiff humbly wishes to submit that this act alone shows un-apologetic behavior of the defendants causing further injuries and mental distress to the person of the plaintiff and claims further or aggravated damages. The plaintiff requests the court to consider the pain and suffering caused by this injury arising from the aggravation of the defendant subsequent conduct which resulted in the whole suit going into "devono".
- d) In case HCC 260 of 2008 formerly 430 of 2004 on transfer to Milimani Commercial court involving the same parties, the defendants have withheld the plaintiff's dividends for years 2001, 2002, 2003, 2004, 2005, 2006 and 2007, amounting to Kshs.120,280/= principal and Kshs.127,423/= earned interest (which is still rising with time). This led to an application under Certificate of Urgency dated the 14<sup>th</sup> of January, 2009 in Hon. Justice Khaminwa's court which was determined and a ruling issued on the 6<sup>th</sup> of May, 2009 in the favour of the plaintiff.

It is, the humble submission by the plaintiff that the conduct of the defendant company has all the time been calculated to ground the plaintiff financially so that he is disabled to pursue the two suits now in the High Court including HCC 1135 of 2004 thereby defeating the cause of justice. The plaintiff is a contributing member of the company entitled to annual dividends like all other members and the defendants have no jurisdiction at all to withhold payment of his earned dividends in reality or in legality.

This improper motive by the defendants is actuated by malice, ill-motive to cause the plaintiff pain and injury and the plaintiff feels

that he is entitled to compensatory damages from the defendant due to this uncalled for conduct case HCC 430 of 2004 (now HCC 260 of 2008) on transfer to commercial Court Milimani. The above fact is collaborated by the illegal intention by the same directors to change the name of the company through a Notice of Motion filed and determined by Hon. Justice Rainsely which the company won. The plaintiff appealed against this decision CA No. 272 of 2005 yet to be determined.

In the plaint dated the 7<sup>th</sup> October 2004, the plaintiff filed a defamatory case against the nine (9) directors of Mugambo wa Gachocho Co. Ltd. The plaintiff avers that the directors failed to defend the company against the suit. Only one director of the company, Mr. James Mwangi Gitau, the company secretary was summoned to defend the company against these accusations. The other witnesses who were summoned by the company (directors) were Paster Mwangi Wamuhu who joined the company in year 2003 to replace the mother who passed on the same year. The second witness, Mr. Augustine Kariuki Wamundara joined the company around year 1997 to replace his father who died the same year. Events leading to this suit cover period 1993 – 2004 when the current directors were elected in their present posts. The witnesses therefore fronted by directors of the company are not conversant with the events that took place during the period covered. Other than joining the company in later years, they have not been part of the management team of the company.

The plaintiff therefore asserts that the directors of the company failed to defend the company against the accusations in the plaint and tried to present a very weak defence through one of its directors Mr. James Mwangi Gitau while the other eight directors went into hibernation. Mr. James Mwangi Gitau presented a very weak defence for himself as a person when he did not stand accused. In the circumstances it is the humble submission by the plaintiff that the company stands accused of defamation as filed in year 2004 as it has failed to defend itself.

The plaintiff prays that the court finds the defendants guilty of defamation and prays for judgment in his favour with costs as spelled out in his PLAINT dated the 9<sup>th</sup> October, 2004 and in consideration of similar cases the plaintiff has produced as authorities in this case list of Document numbers 86 Civil Case No. 1067 of 1999 Kipyator Nicholas Kiprono Biwott vs Clays Limited; Little Brown Company (U.K) Limited and others and/or Johnson Evan Gicheru vs ; Andrew Morton and Others Civil Appeal 314 of 2000.

Will end here what the Plaintiff said and now turn to what the Defendant said. The Defendant's response was as follows:

On 9-12-2005 the parties filed AGREED AMENDED ISSUES which hinged upon the following:-

1. WHETHER the plaintiff had written letter to the Directors of the defendant company and to the Registrar General on diverse dates before and whether the letter written on 13<sup>th</sup> February 2004 to the Registrar was the response thereof?
2. WHETHER the members were entitled to be informed the contents of the letter dated 13/2/2004 and written to the Registrar General on their behalf on 28<sup>th</sup> February 2004 during their special General Meeting held at Gachocho Primary School as Maragwa District.
3. Did the plaintiff vide his letter dated 12/3/2004 protest the defendants alleged malicious allegations set out in the defendant alleged offensive letter of 13/2/2004 and seek for an appropriate apology from the defendants which apology was/has not been tendered to date?
4. What was the purpose of the letter dated 13/2/2004 and directed to the Registrar General?
5. What was the reputation of the plaintiff before 13/2/2004 and has there been any notable change or effect after that date among the right thinking members of the society?
6. Is the plaintiff of Genesis of the culture of writing complaint letters to the Directors of the company and the Registrar General instead of discussing and solving their disputes during their meeting and who has suffered loss and damage?
7. Who is to bear the costs of the suit?
8. WHETHER the company disputes should be taken directly to court or should be deliberated in the general meetings?

THAT the plaintiff prior to the date of the subject letter had written various letter both to the Registrar General and the Directors. Some of these letters relevant to this case are:-

Letter from the plaintiff to the Registrar DATED 12<sup>th</sup> January 2004 – About the Annual General Meeting of 20/12/2003.

The letter from the Registrar to the plaintiff dated 15/1/2004 – The gist was to inform the plaintiff that this complaints were being looked into.

Letter by the plaintiff to the Registrar General dated 19/12/2004 – This letter complained and accused the office of the Registrar

General having been **compromised** by the Directors of the defendant company. The letter was also accusing the office of the Registrar General for being **inefficient** and **incompetent**. The plaintiff in this letter criticized the Registrar General's office and its officials for not rendering the plaintiff **greater attention** having an Advanced age of 68 years as he claimed in his said letter. This was the letter which referred to the members of the defendant company as **IGNORANT** and **UNEDUCATED**.

It was in this letter the plaintiff complained of having been camping along the corridors of the Registrar General's offices and camping there having traveled from Maragua District.

The contentious letter criticized the Directors of the defendant company for not holding the Annual General Meeting for the year 2003 and colluding with the office of the Registrar General. Copy of the letter was posted to KIRAITU MURUNGI – MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS together with the PERMANENT SECRETARY – OFFICE OF THE PRESIDENT.

The letter written to the Registrar General on 13/2/2004 was a response to the letter dated 19/2/2004 written to the Registrar General by the plaintiff. (instead of 19/2/2004 should perhaps have been 19/1/2004)

The members of the defendant company were entitled as a matter of fact and obligation to know and be informed of every information and the on goings of correspondences as well as incidents concerning their company.

They were entitled to know the contents of the letters to and from the Registrar General and to and from their company.

The meeting on 28 /2/2004 was privileged occasion and officially convened to discuss and deliberate official matters touching on everyday running of the defendant company. The secretary of the defendant company has an interest or a legal and social duty to the members while the members together with the Registrar General has a corresponding interest and social duty to receive it, there was reciprocity.

The **Plaintiff's witness PW4 – MARY ANN WAMBUI** – the Registrar in her evidence admitted that the letter dated 13/2/2004 was written to the **Registrar General who had the responsibility of being informed** about the affairs of the Company. She denied publication of the letter when she said **'I can only state that this letter was not published as it was received by the personnel and forwarded to the Registrar General.'** Case of – **UNIVERSITY OF NAIROBI-VS-MBUTHIA – COURT OF APEAL AT NAIROBI – MADAN, LAW & MILLER JJA**. It was held that, 'Publication becomes 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. **PW4** – Admitted that the plaintiff had written various letters to the office of the Registrar General and especially that the letters dates **19/1/2004** and **13/2/2004** were received. However she denied the claims of the plaintiff that the office of the Registrar General had been **compromised** or **colluded** with directors of Defendant Company or has something very wrong with the office. The witness gave evidence to the facts that he Registrar by the letter dated 15/1/2004 had found **NO DEFAULT** with the Defendant companies holding of meetings.

From the foregoing we can state that the letter written on 13/2/2004 was **Justified as a response** to the various letters written to the Registrar General by the plaintiff complaining about matters touching on their differences with the Directors of the defendant company.

**PW5 – WALLACE KIOI KABORO** gave evidence on behalf of the plaintiff and states that members were entitled to know the correspondences exchanged between the company, the Registrar General and the plaintiff and denied that a letter dated 13/2/2004 was defamatory. He dismissed the plaintiff claims and stated the words complained of were **fair comments** and in the interest of the members of the defendant company who had the right to know them. He denied the letter was defamatory.

**PW6 – HEZEKIAH KARIUKI WAIREGI** was the plaintiff witness and he admitted the letter dated 13/2/2004 was read and that the members were entitled to know its contents. He dismissed the plaintiff claims as false and said that he said letter was justified s the statement therein were true and fair comment having been a response from the plaintiff earlier letters both to the Registrar General and the defendant company. He gave evidence that the plaintiff himself had notified them of his court cases with his father, the University of Nairobi as well as his 68 years of age.

The **defence witnesses;** (1) **JAMES MWANGI GITAU**- The secretary of the defendant company gave evidence that members were justified and entitled to know the contents of the letter dated 13/2/2004. He denied the letter was defamatory. He supported the contents of the letter as being fair comment with no malice or malicious intentions whatsoever. He gave evidence that it was the plaintiff who had started the culture of writing various letters. He referred to the letter dated 19/1/2004 which gave rise to the reply of the one dated 13/2/2004. He testified that the contents of the said letter of 13/2/2004 were true, justified and fair comments.

**Defendant witness 2 and 3 – Reverend ABSOLOM WAMUHU** and **AUGUSTINE KARIUKI MUNDARA** – concurred and agreed with the Defendants witness – (1) **James Mwangi Gitau** views, sentiments, finding ad evidence – that members were entitled to know the contents of the letter dated 13/2/2004 and that the said letter was **justified, of fair comments and truthful**.

**The plaintiff did not protest or demand an Apology**, the letter he claims to have written on 12/3/2004 was not delivered or received by the defendant company's secretary. During the plaintiff testimony he didn't prove delivery of the said letter nor did he read its contents for the court to see or hear it. An Apology is tendered and or offered when the complainant demands for it. In this case no demand

was made. The defendant witness (1) James Mwangi Gitau stated that he received the plaint that the defendant company had been sued and the company filed its defence on Justification and qualified privilege as the occasion was a members meeting during which time various letters were read to members including that of 13/2/2004.

The company secretary is the one who receives correspondence on behalf of the defendant company and the plaintiff letter dated 12/3/2004 was not received. Publication is denied as the members of the defendant company were not members of the public.

**The purpose of the letter dated 13/2/2004** was given out in that letter itself in paragraph 4 and 6. It reads, **‘Though we may not wish to character assassinate anybody, we would like to reveal so fair things to you to be aware what sort of a person you are dealing with’**. Paragraph 6 reads, **We feel we may not have been conversant enough with all that is pertained in law, but we are ready to learn and to be helped now to improve our company to reach to higher heights from where it is but not in the way Chege is doing it. We have brought this company .....**

From the two paragraphs, it is stated that the Registrar General was being informed what sort of a person the plaintiff was. The **defendant witness (1) James Mwangi Gitau** testified that the letter was to notify the Registrar General the **Character, demeanor** and history of **one of the company members**.

The Registrar General has a corresponding interest to know what kind of a person the plaintiff was and to the extent he could stretch to get or enforce his demands. Having received various letters from the plaintiff and especially the derogatory letter dated 19/1/2004, the defendant company was **Justified** to respond and write to the Registrar General to salvage and/or save the defendant company’s name/image in the eyes of the Registrar General and the person to do that was secretary through the letter dated 13/2/2004. This letter was written after the plaintiff has accused the Registrar’s office and staff of being **inefficient, compromised and colluding** with the Directors of the defendant company to frustrate the plaintiff. The Registrar General’s office and staff has refused to give greater attention to the 68 year old plaintiff.

Finally on **15/1/2004**, only four days before the plaintiff wrote his derogatory letter of 19/1/2004, the Registrar General had written a letter to the plaintiff notifying him that under **SECTION 131 (2)** of the Companies Act the Registrar can only intervene if there is **DEFAULT** in calling a meeting but in his case there was **NO DEFAULT**. A copy was Registrar General. The Directors of the company were also sent a letter on 15/1/2004 addressing them to put their house in order when the plaintiff wrote back the said letter dated 19/1/2004, the Directors had to reply and go further to portray the character of one of their member to the Registrar General. No **malice or ill intention** was intended or pre-meditated as the correspondences can speak for themselves. The letter was not to lower or discredit the dignity or reputation of a member to the Registrar General. It is for the interest of Justice and smooth running of the defendant company that the said letter dated 13/2/2004, was written. Members had a right to know the sequence of events and matters touching on their company. The letter was not defamatory but fair and justified comments but unfortunately and against the intention so the defendant company, the matter spilled to the courts.

**The Reputation of the plaintiff before 13/2/2004 as the same as of today.** No Notable change has been proved or pleaded by the plaintiff or particularized in his pleadings or plaint. The witnesses from the plaintiff’s side and the defendants witnesses did not specifically point out any notable change that has affected the plaintiff’s reputation the plaintiff is a common man. He was and still is a member to the defendant company. He was and still is a friend to the right thinking members of society. Carries on his life as before.

It was stated by all the witnesses from both sides that the reputation of the plaintiff has not undergone or suffered any notable change or effect after that date among the right thinking members or society as far as they knew. They come from the same village.

**The genesis of the culture of writing complaint letters** to the Directors of the company and the Registrar General instead of discussing and solving their disputes during their meeting was the plaintiff. He had written over **20 letters** to the Registrar General from 2003 to 2005. The last one being dated 16<sup>th</sup> March 2005 complaining that the company’s name is being changed. He had also written over 10 letters to the Defendant company. There was overwhelming evidence from **witnesses** from the plaintiffs and defendants side that to settle disputes, there is a procedure well known by all the members of the defendant company. It was therefore not proper for the plaintiff to write complaint letters to the Registrar General as he had the habit of doing it. The plaintiff was the author of the suit in court. Had he followed the laid down procedure he would have sorted out his grievances long ago.

As per the loss and damages, the plaintiff did not prove or plead loss and damage and what is not proved or pleaded cannot be granted. Loss and damage should be specifically pleaded and none of that was pleaded by the plaintiff. The plaintiff has prayed for General damages. This can only be possible in the event the court finds that he has a **prima facie** case but unfortunately he has none. He started the culture of writing derogatory letters. A letter in response which in itself was fair comment and justified response was sent to the Registrar General. He who invites danger and then in response danger visits him he should not be heard to scream. **The plaintiff came to court with dirty hands and should not therefore be allowed to pollute the clear waters of the fountain of justice.**

**The company disputes should be deliberated according to the procedure as set down by the members** in the running of their

company matters. The **PW2 and 3**, admitted in their evidence that, that procedure has been there and is the one which is being followed. **PW5 and 6** did concur, agree and gave the steps which are to be followed as follow:-

**THAT the complainant notifies the chairman of his complaint or problem. If the chairman cannot solve the problem. He summons the directors and the complainant is invited to spell out his problem or complaint. In the event of the problem is not solved by Directors it is referred to the special General meeting in front of the members of the defendant company. The plaintiff didn't follow that procedure.**

Finally the defendant summarizes the submissions that the words complained of comprised of fair report of the plaintiff and the things he had written and done. **Defendants witness James Mwangi Gitau** gave evidence and said that the defendant felt and feared that the plaintiff wanted to bring cases like the ones he had with his father and his former employer, the University of Nairobi. The report complained of was written contemporaneously with the various letters especially the derogatory letter dated 19/1/2004, the plaintiff had written to the Registrar General.

The defendants letter dated 13/2/2004 contained and constituted a fair and accurate and contemporaneous report of events that had taken place. The letter was written in members' interest.

The letter was read on an occasion of qualified privilege pursuant to **CAP 36 – The defamation ACT. Schedule E – Statements privileged subject to Explanation**. The secretary has a social legal duty towards the members as well as the Registrar General. The said letter was read on 28/2/2004 during a members meeting in a **Private Place** but not in a public place.

The words complained of were not at all defamatory. **The plaintiff does not disclose any cause of action nor the nature of the defamation complained of** and the **plaintiff's witnesses numbers 5 and 6** denied in particular that the plaintiff has suffered loss, damage, ridicule, odium, public scandal, contempt or injury to his name and reputation. Furthermore from the evidence given, the plaintiff did not prove any of them. This was corroborated by **defendants witnesses**. Therefore the plaintiff has not proved his case.

Further to the foregoing, the plaintiff case should be dismissed for failure to give full particulars of facts and matter which lead to inference of malice on the part of the defendant. Secondly in **reply to the defence, the plaintiff did not give the particulars of the alleged facts**. He merely states that the words were defamatory.

The pleadings of innuendo in the plaint was inconsistent with the provisions of – Civil Procedure Rules Order VI Rule 6 A (1) and (3) – For failure to give particulars of facts as observed in the case of; - **OTIENO versus NATION NEWSPAPER CIVIL SUIT NO. 124 OF 1999 – HIGH COURT AT KISUMU – TANUI J**. Failure to comply with the mandatory rules do render the plaintiffs suit **defective and invalid. This court cannot act on an invalid and defective suit and the same should be dismissed with costs**.

The Authority presented by the plaintiff CIVIL CASE NO 1067 OF 1999 – KIPYATOR NICHOLAS KIPRONO BIWOTT – does not in any way resemble or relate to the present suit. In the case No. 1067 of 1999, the defendants were commercial reporters who wrote for business and profit. The suit herein is a village group by name Mugambo wa Gachocho Company. The letter was not written for commercial purposes but for normal daily communication between members and the Registrar General and therefore it was not for profit. Justice ALNASHIR VISRAM observed **“No person should be allowed to sell another persons reputation for profit where he has calculated that his profit in so doing will greatly outweigh the damages at risk”**.

In the plaintiffs 2<sup>nd</sup> authority CIVIL APPEAL NO. 314 OF 2000, the same principle applies in that the defendants were commercial publishers and or reporters who capitalized on sales. Secondly, in the above authorities was read all over the world while in this suit **only members** of the same group were present during their meetings. Fourthly, in the provided authorities the readers or recipients had no social interest in the publicized material while in our suit there was reciprocity and common interest and duty. Fifthly, in the provided authorities, the publishers were corporations and men of means while in this suit the company and its members are of straw – villagers some of whom the court had the benefit to see their demeanor and that of the plaintiff. It is a pathetic sight with no comparison. Finally the provided authorities are in a class of their own – High flying birds and exorbitant compensations but in this suit the parties are of a different class.

In the other authorities quoted in the judgment are also inclusive of the above submission. They don't apply in the circumstances such as those found in this case.

It is my humble submissions that the suit is fatally defective and invalid for non-compliance as observed in Civil Procedure Rules **Order VI Rule 6 A (1) and (3)** – and as per the authority in OTIENO – VS- NATION NEWSPAPER LIMITED, where Justice TANUI observed that **“ These rules appear to be mandatory, a failure to comply with them would render the plaintiffs suit defective and invalid, and as there is no prayer for amendment of the plaint I have no option but to strike out the plaint as prayed which I proceed to do ....”** I do therefore in conclusion beseech the Honourable court to dismiss the plaintiff's suit with costs.

That concludes what was said on each side and the end result is that while the Plaintiff is saying he was defamed, the Defendant is saying the Plaintiff was not defamed. What is Defamation?

According to Catley on Libel and Slander, 9<sup>th</sup> Edition P.51 para 2.26,

**“Defamation is any imputation which tends to lower or adversely affects a person in the estimation of others, or adversely affects any aspect of his reputation in business, employment, trade, profession, calling or office carried on or held by him. The statement could be exposing the person to public hatred, contempt or ridicule or could be causing him to be shunned or avoided.”**

The “estimation of others” is taken to be the “**estimation of right thinking members of society generally.**” It is the objective test this one. That being the definition, was the Plaintiff defamed in the circumstances of this suit?

A member of the Defendant Company attending a Special General Meeting of members of the Defendant Company numbering about 60. The Special General Meeting of 28<sup>th</sup> February 2004 was called to discuss various affairs or problems affecting the Defendant Company including problems that had previously engaged the Plaintiff for more than three years, according to his evidence, in a line of correspondence between him, the Registrar General and the Defendant; some of those letters containing some unkind language; a situation in which the Plaintiff had even seen it fit to call another Special General Meeting which the Plaintiff subsequently had to cancel after learning of the meeting called for 28<sup>th</sup> February 2004 by the Defendant.

These are people from same village anxious to hear and know how their company is lawfully conducting its affairs in relation to the Registrar General’s Office and other offices such as the Kenya Revenue Authority as well as members. The meeting is held in a building at Gachocho Primary School attended by members of the Defendant Company only.

These were members who had a genuine interest or duty, legal or social or moral to know about their company and officials of the company such as Chairman, Directors and Secretary not only as members but also as officials of the Defendant Company, and that is more so when it comes to fulfilling legal requirements from the Registrar General’s Office and the Kenya Revenue Authority.

As it was said in the case of **UNIVERSITY OF NAIROBI VS MBUTHIA** by the Court of Appeal, Publication, of relevant information in such a meeting becomes qualified privilege.

Relevant here is what the Plaintiff has told this court at page 8 of his written submissions paragraph 12.5, middle and proceeding to paragraph 12.6

**“The Plaintiff has continued to point out that he has not sued the defendant company because they wrote a defamatory letter to the Registrar. He has sued the defendants because of uttering, publishing or causing to be published defamatory words about himself (plaintiff) and sharing the same defamatory words with about 60 members (most of them peer to the Plaintiff) of the defendant company in their AGM meeting held on 28/02/2004.**

**12.6 The Defendant would like the court to believe the contents of the letter did not spread to the rest of the members of the society after the letter was read to the more than 60 members. Commonsense however teaches us that a secret ceases to be a secret after it has been shared between two people**

**The members at the AGM were not two; they were about 60. The Defendants did not show the court the mechanism they had put in place to ensure that the information shared with them that day and in respect of this defamatory letter were not shared with the other members of the Society. The witness could not do this because he knew it would have been an impossible task.”**

All that clearly shows the Plaintiff is not concerned about contents of the letter dated 13<sup>th</sup> February 2004 reaching the Registrar General. His concerns are that contents of that letter reached his fellow members of the Defendant Company. He argues that by the members

getting that information, that was publication which amounted to defamation. Alternatively, even if it is argued that publication to members did not amount to defamation; nevertheless there was defamation because the Defendant did not show the court the mechanism the Defendant had put in place to ensure that the information shared with members of the Defendant Company that day in respect of the letter dated 13<sup>th</sup> February 2004 did not reach other people who were not members of the Defendant Company.

I think it should be realized that when we talk of publication of information in defamation, we mean publication of that information to people we can foresee, like in this suit, it is publication of the contents of the Defendant's letter dated 13<sup>th</sup> February 2004 to members of the Defendant Company at Gachocho Primary School on 28<sup>th</sup> February 2004. No other publication because if a member, after the special AGM, went and gave that information to someone else who was not a member in the special AGM, that would amount to a separate publication for which the Defendant cannot be responsible because it will not be the Defendant who would have done that publication. It means that if the Plaintiff is aggrieved following that second publication, and has good evidence to sustain a suit, he may in a separate defamation suit, sue that member who did the second publication.

Otherwise in so far as the Plaintiff is requiring this court in this suit to imagine and work on imagination, without evidence, that some members of the Defendant Company did, after the meeting, publish what they had been told at the meeting concerning the letter dated 13<sup>th</sup> February 2004, that requirement is not acceptable to this court, which, incidentally, does not even have any such evidence.

In the circumstance of this suit therefore the

**“right thinking members of society.....”**

Whose **“estimation”** this court is considering are and must be among members of the Defendant who attended the Special AGM held on 28<sup>th</sup> February 2004 at Gachocho Primary School as stated in the pleadings and evidence before me.

Those pleadings and the evidence, are all without dispute that the Defendant Company is a village company whose members are all Gachocho Village residents who know each other, not only as members of the Defendant Company, but also as Gachocho residents.

The land case the Plaintiff had with his father or in his family is a matter of common knowledge in the village. The case the Plaintiff had with the University of Nairobi as his employer is another matter of common knowledge in the village. If the Defendant's secretary, James Mwangi Gitau, included, that information in the Defendant's letter dated 13<sup>th</sup> February 2004 being complained of, that was no new information to members of the Defendant and therefore could not have amounted to defamation of the Plaintiff, firstly, because they already knew the information and secondly, because the existence of the two cases is a fact and truth which made the information in the letter a fair comment.

As for the age of 68 years, it is the Plaintiff himself who revealed it in his letter dated 19<sup>th</sup> January 2004 referred to earlier where in the 4<sup>th</sup> last paragraph he states:

**“At 68 years old I think I also require**

**Greater attention.”**

Mention of that age by anybody else thereafter could not constitute defamation especially when that mention was directed at the Registrar General and members of the Defendant Company as the letter complained of dated 13<sup>th</sup> February 2004 was.

The Plaintiff told the court he is not complaining about any publication to the Registrar General. But even if he were to so complain, evidence from that office as given by PW 4 Mary Ann Wambui is to the effect that the letter in question dated 13<sup>th</sup> February 2004

reached the Registrar General's Office and that that was proper because the Registrar General had the responsibility of being informed about the affairs of the company. He has a duty to receive any complaint from registered companies. The communication does not amount to publication since only the Registrar's staff or personnel has access to the communication. She said there were misunderstanding between members of the Defendant and the Registrar General requested for relevant information, the Plaintiff having written to the Registrar complaining about mismanagement of the company. The Registrar General performing her lawful duties in accordance with the law, there could be no defamation.

From the foregoing, I do not find that the Plaintiff in this suit was defamed as claimed in the Plaintiff's suit.

But if it were held that finding of mine is wrong and that indeed the Plaintiff was defamed and since this is libel actionable per se there being no need for the Plaintiff to specifically plead and prove loss and damage, I would, on the basis of case authorities cited on each side, have awarded the Plaintiff a sum of Kshs.1,500,000/= general damages plus cost.

I would have added interest on the decretal sum at court rate from the date of this judgment till payment in full.

However, I have found that the Plaintiff was not defamed. To conclude this judgment therefore, the Plaintiff's suit herein is hereby dismissed with costs to the Defendant.

To avoid doubt, the right to appeal is granted.

Dated at Nairobi this 5<sup>th</sup> day of February 2010.

J.M. KHAMONI

JUDGE

**Present**

Plaintiff in person

Mr. Kinuthia for the Defendant

Court Clerk: Kabiru