



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

**Civil Case 2253 of 1999 & 2254 of 1999 (Consolidated)**

**LAWRENCE NGINYO KARIUKI .....PLAINTIFF**

**V E R S U S**

**1. WANGETHI MWANGI**

**2. NATION MEDIA GROUP LIMITED .....DEFENDANTS**

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

The Plaintiff, LAWRENCE NGINYO KARIUKI, is a successful businessman, tea and coffee farmer, and professional golfer. He is truly a self-made man, having risen to his present status notwithstanding a very humble formal education. He has also been a politician for many years, aspiring particularly to be a Member of Parliament; but he has never been elected one, despite several attempts.

He has brought these two suits against the Defendants seeking compensatory and exemplary damages for libel on account of articles that appeared in the “**Taifa Leo**” and “**Daily Nation**” newspapers of 27<sup>th</sup> November, 1998. The former is a Kiswahili language daily while the latter is in English. The 2<sup>nd</sup> Defendant, NATION MEDIA GROUP LIMITED, was and still is the publisher of those newspapers. The 1<sup>st</sup> Defendant, WANGETHI MWANGI, is described in the complaints as the “**Group Managing Editor**” of both newspapers.

The substance of the offending articles (which are Exhibits P1 and P3) was that a number of politicians and business people and/or companies associated with them owed a Government-owned bank, the NATIONAL BANK OF KENYA LTD, huge sums of money in loans that they had taken apparently without the intention of repaying. The bank was then experiencing liquidity problems and was on the verge of collapse. It had to be bailed out by the Government which injected into it considerable sums of money. The imputation was that these politically well-connected individuals and companies had contributed to the near collapse of the bank; the further imputation was that these people and companies were essentially economically plundering the country.

In the article carried in “**Taifa Leo**”, “**Foursome Developers ya Nginyo Kariuki (Shs 218 milioni)**” was mentioned as one of the alleged defaulting debtors of the bank. The only word in that quote that needs translation into English is “**ya**” which translates to “**of**”. Accompanying the article published in the “**Daily Nation**” was a list of the alleged defaulting debtors of the bank and the sums owed. At number 18 of the list was:-

**“Foursome Developers Ltd: Shs. 218 m.**

**Directors: A/C J. K. Gitonga**

1. **Mr. L. N. Kariuki Nginyo**

2. **Mrs. S. K. Muigai**

3. **S. Kamwere”**

It is the Plaintiff’s case as pleaded that the names “**Nginyo Kariuki**” and “**L. N. Kariuki Nginyo**”, without a doubt, referred to him and were so understood by himself, his friends, business and golfing colleagues and the public at large. It is his further case that inclusion of his name among the alleged debtors of the bank was libellous of him because he was not the owner of or associated with “**Foursome Developers Ltd**”, and he did not owe the bank any money at all. His character, reputation and standing as a politician, business “**tycoon**” (to use his own word) and professional golfer had thus been seriously injured. The Plaintiff has also pleaded that the offending articles were published maliciously.

The Defendants duly entered appearance and filed a joint defence. They admitted publication but denied that they published the offending articles falsely and/or maliciously. They also denied that the articles were libellous, or that they referred to the Plaintiff, or that they portrayed him as pleaded in the plaint. The innuendo pleaded or implied in the plaint was also denied.

The Defendants also raised the defence of **qualified privilege** under **section 7(1) and (2)** of the **Defamation Act, Cap 36** and the Schedule thereto. They pleaded that the offending articles were published under a sense of public duty for public benefit without malice, and in the honest belief that the charges in the articles were true. The Plaintiff did not file any reply to defence giving particulars of the facts and matters from which the malice pleaded in the plaints is to be inferred as required by **Order 6, rule 6A (3)** of the **Civil Procedure Rules** (the Rules). The Plaintiff therefore cannot allege that the Defendants were actuated by express malice.

At the trial, only the Plaintiff testified. The Defendants did not lead or call any evidence. The learned counsels appearing chose to put in written submissions. I have carefully considered them, together with the authorities cited. I cannot find in the record any statement of issues, either agreed or filed by the respective parties. I consider the following to be the main issues to be determined in this suit:-

1. **Did the words complained of refer to the Plaintiff?**
2. **If so, were they defamatory of the Plaintiff?**
3. **What further defences, if any, are available to the Defendants?**
4. **If it is found for the Plaintiff on liability, what damages are due to him?**

1. **Did the words complained of refer to the Plaintiff?**

The Plaintiff testified that his name is **LAWRENCE NGINYO KARIUKI**. He further testified that though **KARIUKI** is a common Kikuyu name, **NGINYO** is not common. According to him he was at the material time the only prominent “tycoon” and politician in the country who had **NGINYO** in his name.

The article in “**Taifa Leo**” mentioned one **NGINYO KARIUKI** as one of the alleged dishonourable debtors of the National Bank of Kenya. The one in the “**Daily Nation**” referred to one **MR. L. N. KARIUKI NGINYO**. It is the Plaintiff’s case that the names **NGINYO KARIUKI** and **L. N. KARIUKI NGINYO** could only have referred to him, and would have been understood by any person, particularly his friends, business and golfing colleagues, to refer to him. The articles referred to politicians and business people. He was then, he testified, “**the only prominent politician and tycoon called Nginyo Kariuki**”. He was then building “**Nginyo Towers**” in Nairobi. He had to keep explaining to his friends that he did not owe the bank any money at all.

The Plaintiff's testimony in this regard is uncontroverted. There is no evidence on record of any other person with NGINYO as part of his name who was a prominent businessman. That the Plaintiff was at the material time a prominent businessman and professional golfer cannot be in doubt. He has testified on his business and golfing activities at the material time. His testimony is uncontroverted.

Even the Defendants appear to have accepted that the NGINYO KARIUKI and MR. L. N. KARIUKI NGINYO mentioned in the offending articles referred to the Plaintiff. After the Plaintiff wrote to the "Daily Nation" of 28<sup>th</sup> January, 1999 (Exhibit P6) and "Taifa Leo" of 30<sup>th</sup> January, 1999 to state that he did not owe the bank any money, nor was he associated with any company that owed the bank any money, the Defendants readily published his photograph to accompany the letters. They also included at the foot of the letter the words:-

**"Editor's note: The error is highly regretted."**

At the top of the letter were the words "Nginyo wrongly named" in large and bold font.

The Defendants offered further amends. They published a statement by the directors of the debtor company alleged to have been associated with the Plaintiff to the effect that he had never been a director or shareholder of the company. They also published a correction and clarification on 28<sup>th</sup> November, 1998. See Exhibits P7 and P8.

In these circumstances, it is clear that anyone who knew the Plaintiff who read the two offending articles would have no hesitation in concluding that the articles, in so far as they mentioned NGINYO KARIUKI and MR. L. N. KARIUKI NGINYO, referred to the Plaintiff. I am therefore satisfied on a balance of probabilities that the offending articles referred, and were understood to refer, to the Plaintiff. I so hold.

## **2. Were the offending articles defamatory of the Plaintiff?**

The sum effect of the offending articles was that the named politicians, business people and companies had borrowed large sums of money from a Government-owned bank without the intention of ever repaying the monies. As a consequence, the bank had suffered liquidity problems and was on the verge of collapse. The imputation was that these people, including the Plaintiff, were corrupt and unscrupulous, and had enriched themselves at public expense. These were no doubt allegations that, if untrue, would injure the characters and reputations of the persons concerned. As far as the Plaintiff is concerned, the offending articles were patently untrue. The Defendants did not at all attempt to justify the allegations. I am therefore satisfied upon a balance of probabilities that the offending articles were defamatory of the Plaintiff, and I so hold.

## **3. What further defences, if any, are available to the Defendants?**

The Defendants have pleaded qualified privilege under section 7 (1) and (2) of the Defamation Act. The defence is available in the case of a publication in a newspaper of any such report or other matter as is mentioned in the Schedule to the Act unless the publication is proved to be made with malice.

I have carefully read the Schedule to the Act. The articles complained of in this suit are not reports or matters as are mentioned in the Schedule. They are not statements, privileged without explanation or contradiction, under Part I of the Schedule as they are not fair and accurate reports of proceedings in public of the legislature of any part of the Commonwealth other than Kenya. They are also not statements, privileged subject to explanation or contradiction, under Part II of the Schedule, as fair and accurate reports of any proceedings in public of the legislature of Kenya. Such reports of any proceedings in public of Kenya's Parliament are not included in that part of the Schedule. Paragraph 9 of the Schedule cannot be expanded to include them. There is no reason why they were not specifically included in the Schedule if it was intended by the legislature that they be privileged.

And it is for a good reason that proceedings in public of the legislature of Kenya are not included in the Schedule. Politicians are liable to make all manner of allegations inside Parliament, protected as they are

under the **National Assembly (Powers and Privileges) Act, Cap 6**. Such allegations may be, and often are, injurious to persons who would not have the same forum to reply. Reports, fair or accurate, of proceedings in public of the Kenya legislature are thus not privileged under section 7 of the Defamation Act, and anyone publishing them does so at his own risk as to defamation. I so hold. The defence of qualified privilege is thus not available to the Defendants.

The Defendants have also pleaded that the reports complained of were published under a sense of public duty and for the public benefit. There cannot be any doubt that fair and accurate reporting of public proceedings of a country's legislature is a public duty of any publisher of newspapers, and such publication would be for the public benefit. In the present case the Defendants did not lead any evidence to show that the reports as published by them were accurate. The relevant Hansard reports of the relevant parliamentary proceedings were not produced. Indeed the Defendants did not call or lead any evidence at all.

What about fairness? The Defendants did not bother to contact the Plaintiff or any other relevant person before publication to find out if he was in any way associated with the alleged debtor company, Foursome Developers Ltd, or if he personally owed the bank any money. The reports were obviously defamatory of any named alleged debtor if indeed such persons did not owe the bank any money. The Plaintiff did not owe the bank any money; nor was he associated with any company that owed the bank money. Where then is the fairness of the reports as far as the Plaintiff is concerned? The publications were not fair and accurate reports published under a sense of public duty, and for the public benefit. I so hold.

On liability therefore I find for the Plaintiff. He has proved his case on a balance of probabilities. The publications referred to him as one of the many alleged dishonourable debtors of the National Bank of Kenya Ltd. He was in fact not a debtor of the bank; nor was he associated with any company owing the bank money. The publications were defamatory of the Plaintiff as the implication was that the alleged debtors had borrowed from the bank without the intention of repaying the loans on account of their political well-connectedness, thus leading to near collapse of the bank. The further implication was that they were corrupt and without integrity, and were in effect looting public coffers.

#### **4. What damages are due to the Plaintiff?**

Libel is actionable *per se*, and a plaintiff need not prove actual damage to his character and reputation. But the quantum of damages awarded will depend upon the actual damage to his character and reputation suffered by the plaintiff. It is therefore incumbent upon a plaintiff to place before the court such evidence as will enable it to assess such damage.

The Plaintiff herein has placed before the court, in the form of his own uncontroverted testimony, his very good standing in the business, farming and professional golfing world in Kenya. He was at the material time, and still is, a very successful businessman owning major business properties within the City of Nairobi. He was and still is a successful tea and coffee farmer owning two substantial farms. He is also an avid professional golfer enjoying good standing in that fraternity, given the various positions he holds, and has held, in various golf clubs.

As to his standing as a politician, there is not much evidence. He does not hold, and has not held, any post in any of the major political parties. He has vied many times, unsuccessfully, to be elected a Member of Parliament.

I have considered that “**Taifa Leo**” and the “**Daily Nation**” were, and probably still are, the leading daily newspapers in Kiswahili and English in Kenya, and probably in the wider Eastern Africa region, in terms of circulation. The wider the circulation of the offending publication, the greater the potential harm to a plaintiff's reputation.

But I must note that the Plaintiff did not call any business, farming or golfing colleague, or any other person, to testify as to how the Plaintiff's character and reputation may have been adversely affected in their eyes in light of the defamatory publications. Such evidence would have been useful to properly

assess damages.

I have also considered the conduct of the Defendants. They readily published the Plaintiff's disclaimer that he was not a debtor of the bank nor associated with any company owing the bank money. They also published a correction of their own in similar pages as those where the offending publications had appeared. They publicly regretted the error of the publications as far as the Plaintiff was concerned. It is true that they did not contact the Plaintiff before the publications to verify the truthfulness of the allegation contained in respect to him. But I do not find any evidence that the publications were driven by a cynical pursuit of the "**hot and sensational**" (to borrow the words of the Plaintiff's learned counsel) for purposes of profit. The publications did not concern the Plaintiff only. They concerned over 80 other persons.

I have already ruled elsewhere in this judgment that the Plaintiff is not entitled to allege that the Defendants were actuated by express malice on account of failure to file a reply to defence giving particulars of the facts and matters from which the malice is to be inferred, as required in mandatory terms by Order 6, rule 6A (3) of the Rules.

The Plaintiff is therefore entitled only to general compensatory damages. The purpose of such damages is to vindicate his reputation, and to assuage him for the distress, hurt and humiliation caused by the defamation. Damages in defamation cases are said to be **at large** and will depend upon the particular circumstances of each case. But for guidance I have looked at various recent cases of this court, such as the ones quoted in the Plaintiff's written submissions. In my respectful view awards in defamation cases have recently tended to be disparate and way too much on the higher side. Various learned judges of the High Court have in particular tended to award politicians and lawyers such generous damages in defamation cases as to set them apart as a special breed of people, notwithstanding the fact that they, particularly politicians, often thrive upon the free publicity they receive from newspapers. Damages in defamation cases must be kept at reasonable levels lest they impinge upon the freedom of expression and the citizens' right to information.

The Plaintiff, apart from being a successful businessman, farmer and professional golfer, is also a politician, though not a very successful one at that. He had a solid reputation as a successful businessman, farmer and professional golfer. That reputation was injured by the offending publications. As already observed, evidence by his colleagues in the business, farming and golfing world would have been useful in assessing the appropriate quantum of damages due to him. There was no such evidence. Apart from his say-so, there is no independent testimony that his aforesaid activities suffered to any significant extent as a result of the defamation. In the circumstances, and doing the best I can, I will award the Plaintiff the sum of KShs. 1,000,000/00 as general compensatory damages in each of the two cases. That makes a total of KShs 2,000,000/00. There will be interest at court rates upon this sum from the date of judgment until payment in full. The Plaintiff will also have the costs of this suit plus interest thereon at court rates from the date of suit until payment in full.

That will be the judgment of the court. It is so ordered.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 16<sup>TH</sup> DAY OF JANUARY, 2009**

**H. P. G. WAWERU**

**J U D G E**