



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 111 OF 2003

RAPHAEL GERVACE OTIENO KOPIYO.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITEDDEFENDANT

JUDGMENT

The Plaintiff in this suit represented by Mr. A. Otieno Weda of M/s. Odhiambo & Weda Advocates, and the Defendant represented by Mr. Wanyama of M/s. Mohammed & Muigai Advocates appeared before me for the hearing of this suit relying upon the Amended Plaintiff dated 18th February 2003 and the Defence dated 17th March 2003. From the Amended Plaintiff, the Plaintiff prays that judgment be entered against the Defendant for general, punitive and aggravated damages for the defamation specified as libel. The Plaintiff also wants costs of the suit and interest.

The Plaintiff called three witnesses including himself while the Defence adduced no evidence although Mr. Wanyama was present throughout the hearing and actively cross examined the Plaintiff and the witnesses.

From filed pleadings and his evidence, the Plaintiff is a man of impressive academic as well as business management background and experience. With all that therefore, between 1992-1997 he was a member of Parliament for Kasipul Kabondo Constituency on the Ford Kenya ticket, then an opposition party, and he was in the Public Investment Committee for two years, shadow Minister for Agriculture and shadow Minister for Environment. He sat on several other committees like Trade and Economic Committee, and Interparty Committee.

After 1997 he was not re-elected to Parliament but he participated in the year 2002 general election on the National Rainbow Coalition (NARC) Party ticket, seeking to be elected again as the member of Parliament for Kasipul Kabondo Constituency and starting with party nominations in that constituency.

He had been a founder member of the NARC Party and although he claimed to have been a member of the Party's Co-ordinating Committee, his witness Mr. Kalee said that the Plaintiff as a candidate could not be such a member. That party had the National Elections Board with the late Wanjala Welima as the chairman and the late Alex K. Muriithi as the Secretary and Director of Elections. The role of National Elections Board was to supervise and coordinate the NARC Party nominations for Party members seeking to participate in the Parliamentary and Presidential elections. Party nominations may in general also be

called Party Primaries.

In Kasipul Kabondo Constituency that time, there were nine NARC Party candidates, including the Plaintiff, participating in the NARC Party nominations for Parliamentary elections. Those Party nominations were held on 20th November 2002.

The Plaintiff who got 15,897 votes was subsequently declared the winner by the Returning Officer Mr. Peter Ochako who had a number of assistants. Second to the Plaintiff was Mr. Patrick Ahenda with 12,680 votes while Mr. Peter Owidi came third with 4,460 votes among the best three candidates.

Following those results the Returning Officer is said to have sent the relevant returns to the National Elections Board of NARC at Mwenge House in Nairobi and Mr. Washington Otieno Kalee who gave evidence as PW2 told the Court that in his capacity as a member of the National Co-ordinating Board of NARC, he was present at Mwenge House with other members of the Board when those returns were received showing that the Plaintiff had won the party nominations in Kasipul Kabondo Constituency having polled the highest number of votes.

When therefore on 22nd November 2002 the Plaintiff went to Mwenge House, Nairobi, to collect his NARC Party Nomination Certificate, he found Mr. Kalee (PW2) present together with other members of the Board. They processed the Certificate and issued it to the Plaintiff. It was Nomination Certificate No.2324 dated 22nd November 2002 duly signed by the Chairman Mr. Welima and the Secretary Mr. Muriithi both of the Board. Copy is exhibited at page 23 of the Plaintiff's Bundle of documents produced as exhibit 1 which at page 38 contains Mr. Peter Otieno Ochako the Kasipul Kabondo Constituency Returning Officer's Certificate of Acceptance of Results. It contains signature of each candidate's agent.

The Plaintiff's evidence including that of Mr. Kalee is that the Board issued the Nomination Certificate aforesaid to the Plaintiff during the day in the afternoon before 3.00 p.m. and that when the Plaintiff went there, he did so in order to collect that Certificate, and not to raise a protest concerning the party nominations in his constituency as he had no reason to protest and never heard of any such protest from any of the other NARC Party Parliamentary candidates in the Constituency and did not find any of those candidates at Mwenge house during that time.

The Plaintiff and his two witnesses who include Mr. Jack Barasa Barasa who gave evidence as PW3, told the Court that they never heard of any repeat NARC Party nominations for Parliamentary candidates in Kasipul Kabondo Constituency after the November 20th 2002 nominations and up to the 25th November 2002 when the National Multiparty Nominations for Parliamentary Candidates was done by the Election Commission of Kenya and as a result the Plaintiff presented his NARC Party Nomination Certificate aforesaid to the Returning Officer for Kasipul Kabondo Constituency who was acting on behalf of the Electoral Commission of Kenya at Agoro Sare High School within the time allowed and paid the mandatory nomination fee of Kshs.5,000/= for which he was issued with a receipt EC 038301 copy at page 40 of Exhibit 1 and was declared nominated to stand for election to Parliament in the general election.

That having been done and as the Plaintiff was preparing for the general election, he learned subsequently that his name was omitted from Ballot papers the Electoral Commission of Kenya (ECK) had printed for Parliamentary election in Kasipul Kabondo Constituency. The Plaintiff believes his name was replaced by that of another candidate Mr. Peter Owidi who, according to the Plaintiff, had been beaten by the Plaintiff to number three. The Plaintiff did not therefore participate in that general election and did not know how and why Mr. Peter Owidi, who participated in the general election, replaced him. Mr. Kalee as a member of the NARC National Coordinating Board also told the Court he did not know how and why Mr. Peter Owidi replaced the Plaintiff as the Kasipul Kabondo, Constituency NARC candidate for Parliamentary election that year.

I have also read this Court's ruling dated 20th December 2002 delivered by Rimita J in an application

filed by the Plaintiff herein for leave to file an application for judicial review to challenge the Plaintiff's replacement by Mr. Peter Owidi as Kasipul Kabondo Constituency NARC Parliamentary election candidate. It comes out from that ruling that the Plaintiff's name was missing from the Kenya Gazette Notice which published, names of Parliamentary candidates nominated by the ECK to stand for the general election on 27th December 2002. Instead of the Plaintiff's name appearing, it was the name of Mr. Peter Owidi which appeared. True as the Plaintiff said his name must also have missed from the ballot papers but that was to be a subsequent event which took place when he was already complaining in Court. Before Justice Rimita, like in this case, it was not known why the Plaintiff's name had been replaced. But having read the NARC Party Constitution, the learned Judge found and pointed out that:

“It was the prerogative of the Party to nominate the candidate the Party wanted to sponsor as its candidate”

and that therefore the ECK acted within its jurisdiction

“by nominating the candidate NARC preferred,”

the Party having issued nomination certificates to two different candidates. The Judge, however lamented the way both institutions, the NARC Party and the ECK, acted, calling it

“the mess”

and also

“ashame to all those cry and pretend to uphold the principles of Democracy in Kenya.”

Although the learned Judge went on to advise, as it has been said in many other cases, that the issue of primary elections or nominations should be revisited when the new Parliament convenes, and that was to be at the beginning of the year 2003, to-date, nothing has been done and the situation is as worse as, seen from the December 2007 general election. Thus no body cares to correct or remove what is harmful or wrongful yet everybody suffers and cries from the harm and wrong when done. That will be the day we Kenyans will learn to do such corrections/removals timely and effectively.

All that having happened already; on the 1st of December 2002 the Defendant came up with information which added a new dimension to what was already obtaining then. The Defendant published in its Sunday edition words as follows:

“Tales Of Party Graft And Simmering Turf Combats:”

As the National Rainbow Coalition primaries began country wide on November 20, in one constituency in Nyanza Province, one of the Candidates already had his Narc nomination certificate tucked away in his brief case. And on Friday, November 22, Mr. Otieno Kopiyo, seeking to recapture his seat he lost in 1997, was at the Narc headquarters in Mwenge House, Nairobi, armed with his certificate and insisting that he was party's Kasipul Kabondo nominee.

But on Sunday, election went on in the constituency and Mr. Paddy Ahenda won. However, the following day, it was Mr. Peter Owidi who was cleared by the Electoral Commission as the Narc Candidates for Kasipul Kabondo.

The Narc elections representative in Nyanza Mr. Ochieng Mbeo said; ‘I don't know where Mr. Kapiyo got his certificate from. The Narc Provincial Office even didn't have his name._____’

The Plaintiff having read those words feels he was defamed saying he was not involved in any form of craft which means corruption as suggested in the publication. He says that as a founder member of NARC he had to be involved in organizing a successful party and what the Defendant said about him was wrong. The Defendant never checked the facts with him for clarification.

That the publication was one week after the close of Party Nominations and presentation of nomination certificates and relevant papers to the Electoral Commission of Kenya which took place on 25th November 2002.

Defamation has been variously defined but for the purpose of this case, Mr. Otieno Weda, the Plaintiff's Counsel in his written submissions quoting Lord **Wesley in Pamiter –vs- Complant 1840/6 Maw.105** cited in the case of **Joseph Leo Ochieng and Others –vs- The Standard Ltd HCCC No.1760 of 2002** says that defamation is:

“a publication, without justification or lawful excuse, which is culculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule.”

On the other hand, Mr. Peter Wanyama, the Defendant's Counsel would adopt the definition that defamation are words which:

“in their natural and ordinary sense tend to lower the reputation of the Plaintiff in the eyes of right thinking members of society.”

I have no doubt that each of those two definitions mean defamation.

Looking at the passage complained of as quoted herein above, the Plaintiff's complaint is first directed at the title.

“Tales of Party graft.”

A reasonable reader including viewers and listeners will always be attracted by the title before going further to read or listen or view. In as much as it may be said that that title was not so much about the Plaintiff because it was about the Party known as NARC, it cannot be said that a name of any person mention soon thereafter as it was done with the name of the Plaintiff, in the whole publication complained of, cannot be associated with what that title is meant to convey namely a galore of corruption within the Party. The person so mentioned is pinned down as one of those who have been major players in the graft or corruption in the Party.

As the reasonable reader or viewer or listener gets into the contents of the publication under that title, his opinion of the person being mentioned becomes more and more negative. He learns of a person who:

“already had his Narc Nomination certificate tucked away in his brief case”

before the NARC Party Nomination day and without having participated in such Party Nomination, yet it was the successful nominee of the Party Nominations only who was eligible to obtain a Narc Nomination Certificate. The Publication would therefore add in the mind of the reasonable reader, viewer or listener that the person mentioned went to Mwenge House, Nairobi, the Narc headquarters, not to obtain the Narc Nomination Certificate because that was the only place where such certificates were obtainable, but went there already:

‘armed with his certificate.....insisting that he was the Party's Kasipul Kabondo Nominee.’

Why did he have to do that if he already had the nomination certificate and remained only with a simple duty of presenting it to the ECK Returning Officer at Agoro Sare High School in Kasipul Kabondo Constituency on 25th November 2002 being the National Multiparty Parliamentary Nomination day?

No doubt the reputation of the person mentioned would go down sinking in the mind of the reasonable reader, viewer or listener and that is what happened in this case, and it cannot be said that the reputation of the Plaintiff was not injured. He was displayed as a pretender to democracy who had colluded with others and was corruptly issued with a nomination certificate or by forgery obtained one prior to the Party nomination process from which he ought to have legitimately become eligible to be subsequently issued

with a legitimate certificate at the Narc headquarters Nairobi.

From the evidence the Plaintiff was displayed in bad light and I do find that the allegation was defamation of the Plaintiff.

That is the position and the reading of the whole publication or the viewing or listening to it by the reasonable reader, viewer or listener would not, in my view, change the position. Even if the whole NARC Nominations process was inherently corrupt as the Defendant claims, that defamatory publication directed at the Plaintiff by the Defendant cannot be obliterated. The duty the Defendant has to inform the public on matters of great public interest in as much as it is something welcome in any civilized society, does not remove that defamation. The media must inform the Society truthfully, correctly and responsibly. The case of **Jameel v Wall Street Journal Europe** and the case of **Reynolds v Times Newspapers Ltd** apply only in very special circumstances and are therefore not relevant in this case. Further the issue of malice has not been pleaded in this matter and therefore has nothing to do with this case.

Otherwise this was a case where the Defendant ought to have adduced evidence to be cross examined to convince the Court there was no defamation. The Defendant did not and from what is before me, I cannot be persuaded there is no defamation. I find the Defendant liable.

Having come to that conclusion, what amount of damages do I award the Plaintiff? I have looked at the authorities cited on both sides concerning the quantum of damages.

I will adopt definitions from Black's Law Dictionary (8th Edition at pages 417 and 418. General damages are:

“damages that the law presumes to follow from the type of wrong complained of.”

Punitive damages are:

“damages awarded in addition to actual damages when the Defendant acted with recklessness, malice or deceit. It is damage assessed by way of penalizing the wrong done or making an example to others.”

In this matter I do find that the Defendant while defaming the Plaintiff acted with deceit or was reckless. This is a Defendant who even refused to publish an apology when the Plaintiff demanded that apology. The Defendant had not made even an attempt to contact the Plaintiff to counter check the information he was to publish and subsequently published about the Plaintiff. Come the hearing of this suit, the Defendant does not care to bring any evidence to explain the basis of its publication. Is that not the conduct of a party acting with impunity?

In the circumstances, I do hereby enter Judgment for the Plaintiff against the Defendant whereby the Plaintiff will pay the Defendant:

- (i) General damages in the sum of Kshs.3,500,000/=.
- (ii) Punitive/exemplary or aggravated damages in the sum of Kshs.500, 000/=.

The Defendant to pay costs of this suit and interest to the Plaintiff.

Dated and Delivered at Nairobi this 7th Day of March 2008.

J.M. KHAMONI

JUDGE