



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Case 833 of 2000

JOSEPH RADING WASAMBO..... PLAINTIFF

VERSUS

THE STANDARD LIMITED.....DEFENDANT

JUDGMENT

This is a defamation case arising from two articles published in the East African Standard of 17th and 18th October, 1999. The offending words are reproduced in paragraphs 4 and 5 of the plaintiff's plaint as follows:

'4. On or about the 17th of October 1999 the Defendant, in its issue of the African Standard falsely and maliciously wrote and published and further caused to be written and published to the general public at large of and concerning the plaintiff an article entitled "Kisumu State Lodge Land Grabbed", which was concerning the plaintiff the words following:

" A plot which is reserved as part of the Kisumu State Lodge has been allocated to a senior Ministry of Education official, the Standard has learnt. The land, parcel number 409 which is approximately 1.134 hectares in Block 7 was allocated to the Nyanza Provincial Education Officer (PDE), Roselyn Onyuka and one Joseph Rading Wasambo on September 1st. However, the same plot has been allocated to Multiline Millers Limited of Eldoret and a Certificate of Lease title number Kisumu Municipality/Block 7/409 issued. Onyuka's Certificate of Lease title also has the same information. The allocation was revealed by Citizen Coalition Against Corruption (CCAC) and the Futa Magendo Group both Civil Society Groups committed to eradication of corruption. The group officials, Dave Ochieng (Chairman) a lecturer at Masemo University, Billy Ng'ong'a (secretary) and Gai Moja (futa magendo), presented the documents to the press in Kisumu."

'5. On or about the 18th October 1999 the Defendant in its issue of the East African Standard falsely and maliciously wrote and published and further caused to be written and published to the general public at large of and concerning the plaintiff yet another article entitled "Grabber use Kisumu state Lodge to secure Shs.5M Barclays Loan" which was concerning the Plaintiff in the words following:

"The Kisumu State Lodge Land grabbing saga yesterday took a new twist when it was revealed that the parcel of land had been used to secure a bank loan. The land was allocated to Multiline Millers Limited on July 1, 1996 and to Mrs Onyuka and

a Joseph Rading Wasambo on September 1 this year. The Certificate of Lease has similar details of the land. The scandal was revealed by the Citizen Coalition Against Corruption (CCAC) AND THE Futa Magendo Group both Civil groups committed to eradication of corruption The land grabbing is a clear testimony of corruption in the Provincial Education Office which we have always fought against, said Billy Ng'ong'a a Masemo University College Don.”

The plaintiff took exception to the two articles. He maintained that the words and/or statements in their natural and ordinary meaning were understood to mean of and concerning the plaintiff, inter alia: - that he is a liar and conman and thrives on unworthiness; that he is a grabber of public utility land and is unethical and unscrupulous; that he is a fraudulent person, a crook and a criminal; that he had not actually been allocated the land known as Kisumu Municipality/Block 7/409 by the Government and that he had illegally and fraudulently grabbed the said land; that he is dishonest and should be shunned by all right – thinking members of society. It was the plaintiff's case that the contents of the two articles were false, malicious and defamatory of him and that in publishing the articles the defendant was actuated by extreme malice and spite and that the same were calculated to injure the plaintiff in his personal and professional image, hence this suit.

When the suit came up for hearing before me on 1.04.05, the plaintiff was represented by learned counsel, Mr. A.N. Thangei while the defendant was represented by learned counsel, Mr. P. Saende.

Plaintiff's counsel informed the court that judgment had already been entered against the defendant on the issue of liability and that what was outstanding was the issue of quantum of damages. The court record shows that there is indeed a judgment entered on 04.10.01 against the defendant on liability, following the defendant's admission that it published the offending article with “no basis at all” and further following the defendant's apology ;in the following terms:

“We therefore take this early opportunity to apologise to Mr. Joseph Rading Wasambo for the wrongful implication created by our said articles on his character, credit and reputation and for the embarrassment caused to him.”

Arising from the defendant's above admission and apology, the High Court (Aluoch, J) found there were no triable issues in the defence filed and the Learned Judge proceeded to dismiss the said defence with costs. She entered judgment for the plaintiff as prayed in his plaint and directed the matter to proceed to formal proof. The proceedings before me on 11.04.05, 03.05.05 and 19.05.05 were, therefore, confined to formal proof on the issue of damages.

In his testimony before this court, the plaintiff said he was the proprietor of, inter alia, Paramount Investments Ltd registered in 1976 to deal in real estate business throughout Kenya. It was his evidence that at all material times the Government gave him land to subdivide and sell. That on 01.07.97 he entered into an agreement to sell a piece of land known as Kisumu Municipality/Block 11/90 measuring 0.9599 hectares to Arvin Kumar C. Patel, Hemansu Suryakant Amin and Dipak Vallabhadas Kotecha of Kisumu and that the deal never went through because of rumours that the plaintiff was a land grabber. That on 02.09.95 the purchasers wrote Exhibit 1 to him asking for refund of all payments made to him. that the purchase price had been agreed at Kshs.15 million. That after discussions the plaintiff and purchasers agreed that instead of the plaintiff refunding the deposits he received, he should get the purchasers alternative land on the same terms. That the alternative land was Kisumu Municipality/Block 7/409 and that the deal on the alternative land never went through because of the Standard newspaper articles of 17th and 18th October, 1999 that he, the plaintiff had grabbed Kisumu State Lodge Land. The plaintiff denied “grabbing” the subject land and averred that it was rightfully given to him. He did not, however, indicate what consideration he offered to get the land. The plaintiff also complained that while the Government gave him land which he subdivided and gave subdivisions to Maseno University SACCO Ltd, the deal never went through because of rumours that the plaintiff had grabbed that land as well. He contended that deal with Maseno University SACCO, which was 3 – 4 months prior to the Standard newspaper articles as well. According to the plaintiff, the Maseno deal involved land of about 50 acres which he subdivided into about 700 plots of approximately 0.035 acres each and that he had been offered

Kshs.120,000/= per plot but the deal never went through because of rumours that he had grabbed the land, which he denied.

The incident the plaintiff cited in the series was that he also got plot L.R. 24810 which he offered to Tropical Institute of Community Health. Development Registered Trustees for Ksh.4,325,625/=; that the trustees for Kshs.4,325,625/=; that the trustees who were senior people respected in society had said that if the plaintiff gave them his title deed, they would release the balance of the purchase price; but that the said trustees did not honour the bargain, claiming that the land was most likely also grabbed. Plaintiff said his company, paramount Investments Ltd took the trustees to court vide HCCC No.1667 of 2001 and obtained judgment against them. The plaintiff produced a copy of the decree in HCCC No.1667 2001 as Exhibit 2 in this case.

The plaintiff reiterated the prayers in his plaint filed on 30.05.2000, except that prayer 1 calling for an unqualified apology and wide publication thereof was spent in that an apology has been duly tendered, publicized and accepted.

During cross-examination, the plaintiff acknowledged that he did not bring anyone to court to testify about the damage to his reputation. He also conceded that he supplied no particulars of special damages as he had undertaken to do vide prayer (b) in his plaint. The plaintiff also conceded that he did not furnish audited accounts of his Paramount Investments Ltd business prior to or after the publication complained of.

Counsel for both parties asked to be allowed to file written submissions and subsequently give oral highlights thereof. He request was granted and the written submissions are on record.

In giving oral highlights of his written submissions, plaintiff's counsel submitted that in assessing damages, the court should consider four factors: plaintiff's position in society; mode/extent of publication; apology offered and at what time of the proceedings, and conduct of defendant from time of publication until time of judgment. In this regard, counsel referred to Gatley on Libel & Slander at page 600 (edition not indicated) and said the plaintiff had demonstrated his position as a professional real estate developer and agent; that his deal with Maseno University SACCO involved Kshs.27 million, etc; that the offending publications concerning land went to the root of his means of livelihood and that the said publication led to his potential customers treating him with suspicion. Counsel referred to page 1382 of Gatley on Libel & Slander and submitted that anticipated pecuniary loss includes loss of bargain; and that the plaintiff lost a Kshs.15 million transaction because of the subject publications 3 months after entry into the transaction. Plaintiff's counsel asked for an award of Kshs.5 million as damages for loss of bargains.

Turning to the issue of aggravated damages, plaintiff's counsel pointed out that at the time of the offending publications, land grabbing was an issue of public concern; that the articles ran on two days, i.e. 17th & 18th October 1999; and that the banner "Kisumu State Lodge Land 'grabbed'" spoke volumes of what the public thought of the plaintiff as a result of the articles. Counsel asked for an award of Kshs.3 million as aggravated damages for defamation.

Regarding general damages, plaintiff's counsel referred to various court decisions annexed to his written submissions. These are:-

- a) HCCC No.1067 of 199, Kipyator Nicholas Kiprono Biwott -vs- Clays Limited & 3 others consolidated with HCCC No.1068 of 1999, Kipyator Nicholas Kiprono Biwott -vs- Dr. Ian West & Chester Stern where the High Court (Visram, Commissioner of Assize – as he then was) awarded against the defendants jointly and severally compensatory damages of Kshs.15 million and exemplary damages of Kshs.15 million.
- b) HCCC No. 4856 of 1990, Waruhiu & Muite -vs- Philip Ochieng & Kenya Times Media Trust Ltd where the High Court (Visram, J) awarded against the defendants general damages of Kshs.8 million and aggravated damages of Kshs.2 million.

c) HCCC No.85 of 1992, George Oraro -vs- Barak Eston Mbajah where the High Court (Pall, J – as he then was) awarded against the defendant general damages of Kshs.1.5 million.

Plaintiff's counsel asked for general damages of Kshs. 6 million.

On the other hand, defendant's counsel adopted his written submissions and gave oral highlights thereof under three points. Firstly, he pointed out that while the plaintiff described himself as a businessman, he tendered no evidence of the extend of his business other than what he himself said. That he produced no audited accounts or record of consistent business and produced no evidence of a third party who knows him. Secondly, defendant's counsel noted that the plaintiff claimed loss of bargains. In defendant's counsel's view, loss of bargains is in the nature of special damages and must be pleaded and proved with particularity, which the plaintiff did not do. Defendant's counsel urged the court to deny any award for loss of bargains. Thirdly, on the issue of aggravated damages, defendant's counsel pointed out that a proper apology was tendered by defendant in which the defendant admitted the two publications were false and malicious. Defendant's counsel urged that if any award is given as aggravated damages, an amount of Kshs.200,000= should suffice.

Defendant's counsel relied on the following authorities:-

a) The Defamation Act (Cap.36

b) HCCC No.612 of 1996, J.P. Machira t/a Machira & Co. Advocates - vs - Kamau Kanyanga & The Standard Ltd where the High Court (Kihara Kariuki, J) awarded against the defendants jointly and severally general damages of Kshs.1,250,000/= and aggravated damages of Kshs.250,000/=

c) High Court Civil Appeal No.772 of 2001, The Standard Ltd -vs - Scholastica Omondi & Another where the High Court (Visram, J) reduced the award of damages gi8ven by the lower court from Kshs.480,000/= to Kshs.200,000/=.

d) HCCC NO. 3181 of 1995, Hon. Abdi Mohammed Sheikh -vs- Nation Newspapers Ltd where the High Court (Aluoch, J) awarded against the defendants nominal damages of Kshs.200,000/=.

e) HCCC No.257 of 1999, Alson Retreading & Co. Ltd & 3 others -vs- Stan Luchebeleli & The People Ltd where the High Court (gacheche, J) made different awards to the plaintiffs as follows:-

i. To the 1st plaintiff, Kshs.100,000= by way of aggravated damages and a further Kshs.100,000= as exemplary damages;

ii. To the 2nd plaintiff, Kshs.300,000/= for damages to his reputation, Kshs.150,000/= by way of aggravated damages and a further Kshs.100,000/= as exemplary damages;

iii. To the 3rd plaintiff, Kshs.150,000/= for damage to his reputation, Kshs.150,000/= by way of aggravated damages and a further Kshs.100,000/= as exemplary damages.

iv. To the 4th plaintiff who lived outside Kenya where the People Newspaper was not proved to be in circulation, Kshs.50,000/= for loss of reputation, Kshs.50,000 by way of aggravated damages and Kshs.50,000/= as exemplary damages.

f) HCCC No.6393 of 1996, Zablon Owigo Olang - vs - The Standard Ltd where the High Court (Mbogholi – Msagha, J) awarded against the defendant damages of Kshs.500,000/=.

g) HCCC No.2055 of 1991, Albert Kariuki Kanake - vs - Nthumbi Mwaniki & Nation Newspaper Ltd where the High Court (Githinji, J – as he then was) awarded against the defendant Kshs.1 million being the statutory minimum for libel in respect of an offence punishable by death as provided for under section 16 A (1) of the defamation Act.

I have duly considered the rival submissions of counsel for both parties including the authorities cited by them. I wish to commend both counsel for their thorough research on the applicable law.

What emerges from the authorities cited is a clear message that while there are general guiding principles on the subject of assessment of damages, the actual quantum to be awarded in a given case depends heavily on the facts of each case.

In the present case, the plaintiff said he was the proprietor of Paramount Investments Ltd registered in 1976 to deal in real estate business in Kenya. His counsel said the plaintiff had demonstrated his position as a professional real estate developer and agent. I note in this regard that no evidence was tendered before this court as to what professional qualifications the plaintiff held. The plaintiff did not call anybody else to testify regarding the land deals he says were adversely affected by the offending articles of 17th and 18th October, 1999. It is not, of course, the law in this country that a fact in issue must necessarily be proved by the evidence of more than one witness. However, in the case at hand it is quite clear that the plaintiff's case would have been enhanced by evidence from those who pulled out of the subject land deals if they came to give direct evidence that their pulling out was influenced by the offending articles. The plaintiff inflicted harm to his claim for high damages by not bothering to call even one person to provide a direct link between the offending articles and the failure of the land deals to materialize. Failure to produce evidence such as of audited accounts or record of good business prior to publication of the offending articles and evidence of a decline in the business after publication of the articles was a significant omission on the plaintiff's part. I also take cognizance of the fact that the defendant owned up to its error of publishing the two articles without a basis and duly apologized and published a correction. The apology constitutes admission of wrong-doing and counts towards mitigation but does amount to full atonement for the wrong done. It must be appreciated that damaging another's reputation is a serious matter indeed.

As was stated by the Court of Appeal of England in John -vs- MGN Ltd [1996] 2 ALL ER 35 (at page 47):

“The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sums as will compensate him for the wrong he has suffered. The sum must compensate him for the damage done to his reputation; vindicate his own good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused.”

I accept the above principles as a good guide in assessment of damages.

I am also of the persuasion that the legal process must, for its own credibility, strike a proper balance between demands made by litigants and what is fair and reasonable in given circumstances. In the latter regard, I also adopt as a good guide the following observations found in Thompson -vs- Commissioner of Police of the Metropolis and HSU -vs- Commissioner of Police of the Metropolis [1997] 2 All ER 762 (at page 771):

“ ‘ Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much not too little No other result can be accepted as just But it serves no public purpose to encourage the plaintiffs to regard a successful libel action, risky though the process undoubtedly is, as a road to untaxed riches. Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike’ “

The plaintiff complained that the offending articles portrayed him, inter alia, as a fraudulent person, a crook and a criminal and that he had not actually been allocated the subject land known as Kisumu Municipality/Block 7/409. that would put the plaintiff in the category of one who obtained the subject land or secured the deposits he received in respect thereof by false pretences and fraudulently. This is a criminal offence attracting 3 years imprisonment under section 313 of the Penal Code (Cap. 63). Section 16 A (1) of the Defamation Act provides, inter alia, as follows:

“16 A (1) In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just: Provided that where ... the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”

Having considered all relevant factors and the applicable law in this case, I make the following awards against the defendant:-

1. General damages - Kshs.1,200,000/=
2. Aggravated damages - Kshs. 250.000/= Total - Kshs.1,450.000/=
3. Costs of this suit
4. Interest on land 2 above at court rates from the date of this judgment until payment in full.

Orders accordingly.

Delivered at Nairobi this 17th day of June 2005.

B.P. KUBO

JUDGE