REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2143 OF 1999

KIPYATOR NICHOLAS KIPRONO BIWOTT …….. PLAINTIFF

VERSUS

GEORGE MBUGUSS AND KALAMKA LTD ……. DEFENDANTS

R U L I N G

The plaintiff, Kipyator Nicholas Kiprono Biwott, sued George Mbuggus and Kalamka Limited, jointly and severally seeking

1. **"General damages",**

2. **"Damages on the fooling of aggravated and exemplary damages"**

3. **"An injunction restraining the Defendant and each of them by themselves, their agents or servants or otherwise publishing any such libels of and concerning the plaintiff",**

4. **"Costs and interest".**

The plaintiffs cause of action appears in para 5 of the plaint. It reads,

> **"On 10th March, 1999 the defendants printed and published or caused to be printed and published the following words which are defamatory of the plaintiff on the front page of the issue of the said People News paper headlines,**
>
> > ***"The untold story on Moi-Nyachae", First forward to Moi era: Nyachae has been promoted by Moi and he is now Chief Secretary. The government is contemplating putting up a mega hydro-power plant by damming the Turkwel River. A French construction firm is keenly interested in getting the multi -billion Turkwel Gorge project and is willing to bend ba ckwards to lay its hands on the lucrative project.***
> >
> > ***But there is a small snag. Some officials in the Office of the President, including Nyachae, feel that a professional feasibility study must be done before the government can commit itself on a project of such magnitude. Senior officials at Treasury led by the then permanent secretary Harry Mule and the European Economic Community (as it was then called) suggest that a feasibility study is paramount before the Government can make any commitments on the Tu rkwel Gorge project. They get backing on the need for a feasibility study from the Chief Secretary, Nyachae.***

Nicholas Biwott, then a Minister in the Office of the President, is not amused by the "unnecessary" delay of his pet project just because of "some useless feasibility studies". Consequently, he (Biwott) hope into a place together with Prof. George Saitoti (then holding the Finance portfolio) and off they go to parts to get things moving on the "crucial" project.

Throwing all protocol to the dogs, B iwott and Saitoti meet in a hotel room with the French construction firm chasing the Turkwel Gorge project and, in a flash, the contract is signed. Why waste precious time on "useless feasibility studies when you can quickly get things moving the good old fashioned way? Why indeed!

When Biwott and Saitoti came back to Nairobi, the EEC, Senior Officers at the Treasury and the Chief Secretary are on their case. The two are put to task on why they rushed to commit the government to such an expensive project without waiting to get the results of the feasibility study. A bitter argument ensues between Biwott and Nyachae. This is not the first time that the two are arguing.

Moi, apparently concerned that the quarrel between two of his lieutenants may get out of hand, summons the pair to State House where he placates them and they seem to buy their hatchets. But things start happening in a strange way. A few days later, Biwott is transferred to Ministry of Energy (to take charge of the Turkwel Gorge project without interference from Nyachae?). On his part, Nyachae starts seeing a change of attitude from his boss. Subtly, the Chief Secretary is being sidelined. In the meantime, James Mathenge has been replaced as the Permanent Secretary in charge of internal s ecurity by Hezekiah Oyugi who appears to be getting backing from Moi and Biwott to establish a parallel power base and gradually erode the influence of the office of the Chief Secretary".

In para 6, the plaintiff gave a list of what according to him was,

The natural and ordinary and/or innuendo meaning of the said article or publication, and that is that,

(a) "that the plaintiff colluded with a French construction firm which was keenly willing to bend backwards to lay its hands on the said project in order to corruptly award it the contract".

(b) "the plaintiff in breach of his oath to the office as a Minister in Government threw to the dogs or ignored all protocol and corruptly got the said contract signed in a hotel room in France",

(c) "the plaintiff dishonestly and fraudulently committed the Government on the said project without waiting to get the results of the feasibility study",

(d) "the plaintiff committed the offences or corruption both in his private capacity and/or in his office as a Minister in the Government of Kenya".

In paragraph 7 of the plaint, the plaintiff lamented Thus,

"By reason of the publication of the said words, the plaintiff has been seriously injured in his character, credit and reputation and has been brought into public scandal, odium and contempt".

The plaintiff outlined his claim for aggravated damages in para 8 of the petition. In the defence of 30th December, 1999, the defendant said the following in para 4,

"without prejudice and in the alternative the defendants admit that they publ ished the subject matter of complaint in para 5 of the plaint and that the same refers to the plaintiff. The

defendants, however, deny that the said article containing the said words was falsely, maliciously or negligently published as alleged and particu larized or at all. <u>The defendants aver that the said words were true and fair comment on a matter of public interest</u> " (the above underlining is mine).

The plaintiff did on 11th July, 2000, file an application grounded on Order VI R 13(I)(b) of the Civil Procedure Rules, praying for orders:-

1. "That paragraphs 3,4,5,6 and 10 of the Statement of Defence be struck out",

2. "That judgement be entered in favour of the plaintiff against the defendants on liability",

3. "That the costs of this application be provided for".

The grounds for the application were outlined on the body of the application.

In support of the application was the affidavit of the plaintiff sworn on 11th July, 2000 and filed in court the same day. In the affidavit, the plaintiff denied the contents of para 5 of the plaint as false and charged that the same

"was published maliciously by the defendants without making any attempt to contact me so as to confirm the veracity of the factual matters in the said article".

The plaintiff then went a head in paragrph 5 to explain that the Turkwel Hydro-Electric Power Project was a Government development project, and

"all decisions concerning the study, funding, construction and implementation of the project was taken by the established Government machin ery with the approval or under the direction of the Cabinet".

The plaintiff continued at para 6 to explain how he,

"applied to the Government for permission to declassify from the secret category the documents relating to this project so as to enable me to obtain evidence to prove my claims as pleaded herein against the defendants……."

Para 7 of the affidavit is on the "Feasibility Studies" undertaken on the project and paragraph 10 is on the **"DECISIONS AS TO FUNDING, CHOICE OF CONTRACTOR AND IMPLEMENTATION OF THE PROJECT".** This is covered in paragraphs 11,12,13,14 and 15.

Paragraph 16 is on the **"SIGNING OF CONTRACT"** and paragraph 17,18,19,20 and 21 are on the **"COST OF PROJECT".** The plaintiff explained in paragraph 8 of the affidavit that the reports were,

"very voluminous and cannot conveniently be photocopied and annexed to this affidavit in their entirety. I have photocopied and annexed hereto pages containing the conclusions and recommendations from the Norconsult report of 1997, the World Bank Report of 1982 and the European Economic Commission funded report of Preece Carden and Rider Consultants prepared in 1994".

The application was served on Counsel for the defendants on 13th July, 2000 and in answer thereto, the advocate filed grounds of opposition under Order L R 16 of the Civil Procedure Rules.

There was no replying affidavit filed and when the application came to court for hearing, Mr. Gathaiya for defendants started off by making the following submission as the records shows,

"I have not been able to file a replying affidavit because my client says that the document

attached to the supporting affidavit were formerly classified as secret, and the same was declassified in June, 2000, and the report annexed thereto are extracts and do not contain the main report of Feasibility Study. If I could have the entire report to be done at my clients' costs I would be able to file a replying affidavit to answer the averments contained in the supporting affidavit in full".

Mr. Oyatsi submitted that this being libel case, the applicant wishes to strike out certain paragraphs of the plaint because the law requires the defendant to,

"have known and to have pleaded the facts in support of the serious allegations made against the plaintiff before pub lishing them or before the defence of justification and fair comment is pleaded. In the defence, no facts are pleaded to support the defence of fair comment. The defendants cannot be allowed to give evidence by affidavit or orally in support of their def ence as it stands. It is not for the plaintiff or any one else to provide the defendant with the information which the defendant seeks. They should have verified the information either with the plaintiff or the authorities before they published it……".

Mr. Oyatsi submitted further that the request by Mr. Gathaiya in court for the full texts of the documents on the Turkwel Gorge Project at this stage is misplaced and misconceived because this cannot help the defendant who should have had all the facts on this project before publishing the story. He referred the court to the plaint filed, and the defence which is the answer to it.

Mr. Gathaiya for the defendant, however, interjected by submitting that the grounds on which the court is being asked to strike out certain paragraphs of the defence is that the documents annexed to the affidavit of Hon. Nicholas Biwott are true and this makes the story written by the defendant's libelous, but Mr. Oyatsi maintained that even if he did not use the documents annexed to the affidavit of Hon. Biwott he could still rely on the provisions of Order VI r 6A (2) of the Civil Procedure Rules, on "Particulars in defamation action". The Rule reads,

"Where in an action for libel or slander the defendant alleges that, in so f ar as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of facts and of the facts and matters he relies on in support of the allegations that the words are true".

Mr. Oyatsi also relied on the case of **ASSOCIATED LEISURE LTD & OTHERS vs ASSOCIATED NEWSPAPERS LTD [1970] 2 ALL** ER where I was referred to page 757 at letter H, where Lord Denning MR. Adopted and or restated the rule that,

"A defendant should never place a plea of justification on the record unless he has clear and suffi cient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages".

Mr. Oyatsi recalled that the story printed by the defendants had four allegations against the plaintiff i.e that there was lack of Feasibility Study before the project was undertaken, secondly, that it was the plaintiff and not the Government which made the decision of funding, choice of contractor, and thirdly, that the contract documents were signed in a hotel room in Paris at the plaintiff's request, and finally, that the costs of the project was inflated to the detriment of the people of Kenya.

According to Mr. Oyatsi, the affidavit answered all the charges and there were even letters annexed to the affidavit confirming that the choice of contractor and contractual documents was co-ordinated and approved by the Cabinet and the signing of the actual documents was done by the Ministry of Finance and the French Ambassador to Kenya. This evidence Mr. Oyatsi submitted demonstrated that there was no truth in the allegations on the article published by the defendants. The above submissions prompted Mr. Gathiaya to reply that as the plaintiff had not replied to the defence, it was asumed that the facts were

admitted. However, Mr. Oyatsi referred the court to Order 6 R 10 which reads,

"If there is no reply to the defence, there is a joinder of issue (denial) on that defence".

I find the pleadings in this case to be fairly straight forward and self explanatory. The only point for consideration is whether the defendants had facts to support the article they published about the plaintiff, especially since they said that the words were "true and fair comment".

In the defence the particulars are not given and there is no replying affidavit filed. In fact, I was surprised that what Mr. Gathaiya filed in answer to the application was Grounds of Opposition which is no longer part of the Rules of Practice and Procedure. He filed Grounds of Opposition under Order L R 16 yet that Rule has been deleted by the latest amendment to the Civil Procedure Rules. The amendment is found in Legal Notice No.36 of 2000, which came into effect on 5th May, 2000. The amendment reads,

"Order L of the Civil Procedure Rules is amended by deleting Rule 16 and inserting a new rule as follows:-

"16(1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit if any, not less than 3 clear days before the date of hearing".

The new sub-rule 3 to Rule 16 then provides,

"If a respondent fails to file a replying affidavit the application may be heard ex parte".

According to the court records, the defendant's counsel was served with the application which had the supporting affidavit and annextures on 13.7.2000. It was shown clearly that the application would be heard on 24th July, 2000. I find that the defendant's counsel had sufficient time to obtain from the plaintiff's counsel the documents he though he required to enable him file replying affidavit before the date of the hearing of the application. What I understood Mr. Gathaiya to be saying in his submissions is that he needed to look at the full text of the documents now produced by the plaintiff to know whether what his clients printed was true or not. This is not acceptable in a situation where the defendants have pleaded that the words are true and fair comments. He was basically looking for evidence from the plaintiff.

The defendants did not file a replying affidavit and this could have been on the advise of their lawyer, whom as I have already said, was not aware that there is a new rule which brought a new mandatory requirement of filing a replying affidavit not less than 3 days before the hearing date.

From the facts and the law I have analysed in this case, I do not find that the defendants have any defence to this suit having not given particulars of "truth and fair comment" pleaded in the defence, as required by the law, and further, having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I therefore have no alternative but to strike out paragraphs 3,4,5,6 and 10 of the defence, and enter Judgement for the plaintiff on liability. I will also award the plaintiff the costs of the application dated 11th July, 2000.

Dated at Nairobi this 3rd day of August, 2000.

JOYCE ALUOCH

PUISNE JUDGE