



Kisumu Water & Sanitation Company Ltd (KIWASCO) v Royal Media Services Ltd & another (Civil Case E016 of 2023) [2025] KEHC 426 (KLR) (20 January 2025) (Judgment)

Neutral citation: [2025] KEHC 426 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E016 OF 2023
RE ABURILI, J
JANUARY 20, 2025**

BETWEEN

KISUMU WATER & SANITATION COMPANY LTD (KIWASCO) PLAINTIFF

AND

ROYAL MEDIA SERVICES LTD 1ST DEFENDANT

MARY MUOKI 2ND DEFENDANT

JUDGMENT

1. Vide a Complaint dated 15th day of October, 2024 and filed in court on 23rd October, 2023, the Plaintiff filed this suit against the Defendant seeking the following prayers:
 - a. a declaration that the impugned video report and commentary produced by the Defendants was defamatory of the Plaintiff;
 - b. a declaration that the Defendants were not entitled to use the Plaintiff's images and videos of its facility in the impugned video report and commentary;
 - c. general damages and the footing of aggravated or exemplary damages;
 - d. an injunction restraining the Defendants and each of them from further publishing or causing to be published the video report and commentary defamatory of the Plaintiff;
 - e. damages in lieu of apology;
 - f. costs of the suit, interest and any further or other relief as this court deems fit to grant.
2. The Defendants filed their joint defence dated 15th December, 2023, on the same date raising, among others, the defences of public interest, privilege, fair comment on a matter of public interest and the constitutional defence under Articles 33 and 34 of the *Constitution* on the freedom of expression and freedom of the media to impart information to the public.



3. Parties filed documents in support of their respective cases. The hearing took place by way of viva voce evidence. Only the plaintiff called a witness who testified and produced the documents earlier filed, as exhibits, in support of its case.
4. After hearing the parties on 4th November, 2024, this court gave directions on the filing of submissions. The parties were directed to file and exchange their respective 6 – page submissions within 14 days. Both parties complied by filing submissions albeit the 6-pager directive was not adhered to. This court will nonetheless consider each of the submissions as filed, taking into account the fact that submissions are not evidence.

The plaintiff’s case

5. In support of the pleaded facts, the plaintiff’s case is supported by the testimony of its one witness PW1 Hilda Aketch Odongo who testified on oath adopting her witness statement dated 28th October, 2024 and produced the documents filed as exhibits 1 to 11.
6. The plaintiff’s case essentially is that on or about the 26th day of June, 2023, the 2nd Defendant, being a journalist employed by the 1st Defendant published on Citizen TV a libellous and malicious video report and commentary headlined ‘Water too is stolen; Counties lost billions of shillings in graft,’ which video report and commentary was aired during the 1st Defendant’s Citizen TV 9.00 p.m. English news bulletin and subsequently uploaded and/or streamed live on the 1st Defendant’s YouTube channel, Facebook, Twitter and Instagram pages.
7. It was asserted that the Defendants published a report that the Auditor General through a Report had noted and raised concerns of massive corruption, malpractice and poor management in Water and Sanitation Companies across various counties in the Country.
8. The 2nd Defendant is further accused of publishing in the video report and commentary to the effect that the private companies in collaboration with corrupt county officials had been engaging in malpractices and embezzling the (47) Forty-Seven Counties in excess of Forty-Seven Billion Shillings in lost revenue.
9. While reporting on the alleged malpractices and/or embezzlement done by other water companies and in publishing the video report and commentary, the 1st and 2nd Defendants allegedly used the Plaintiff’s known and identifiable logo, signage, building and treatment plant images and videos.
10. The witness testified that the story as aired painted the plaintiff as corrupt, which information was still in the social media platforms. (The link to accessing the story in question as produced in evidence was availed to court and played out live on the court screen and the court saw the logo, signage and buildings for the plaintiff being shown among other infrastructure. The court also observed that the report mentioned some counties that were said to have been involved in corrupt practices and embezzlement but the plaintiff was not mentioned). She stated that the defendants never contacted the plaintiff before using the plaintiff’s company name in the airing of the story.
11. According to the plaintiff’s witness, they were never contacted by the Ethics and Anti-Corruption Commission (EACC) on alleged corruption. She stated that the plaintiff is audited by the Auditor General annually and that albeit the story did not criticise the plaintiff company, they are open to criticism for their growth and improvement.
12. In cross examination, the witness for the plaintiff stated that she was familiar with all the documents filed in this matter. That she had worked for the plaintiff company since 2012 and that the company provides water and sanitation services. She stated that the plaintiff company is registered under the



Companies Act as well as the Water Act, 2016. She stated that the company's annual turnover was Kshs 84 million but had risen to Kshs 93 million per month. She stated that she watched the impugned publication in the morning of 27/6/2024 as per the plaint. She stated that Kisumu County was not mentioned but other counties were mentioned. She also stated that there are reports on Yu tube as played in court using the link provided.

13. The witness stated that she was aware that EACC wrote to the Kisumu County on matters water generally, setting out 10 alleged malpractices. She also acknowledged the Hansard Report and the attendance by the Governor of Kisumu Country and the Managing Director of the plaintiff company, to answer to the queries raised by the Auditor General.
14. The witness maintained that although the plaintiff was not named in the publication, the defendants used the photographs of the plaintiff's installations, signages and staff in the whole story of corruption in the water sector. She stated that the plaintiff is a public company wholly owned by the County Government of Kisumu and that their image was negatively affected.
15. On the competence of the plaint and verifying affidavit, she stated that the two documents are dated 11/11/2023 and 10/11/2023 respectively. She stated that she had the authority to file suit and to appear in court although she had not filed the authority and Board resolution, stating that, that was an operational issue.
16. She stated that the affidavit was sworn by the CEC Finance, County Government of Kisumu. She acknowledged that an audit query was raised by the Auditor General but that they are usually given time to submit documents. She denied that EACC questioned them. She stated that all audit queries were answered although she did not have the responses to the said queries.
17. She confirmed that the verifying affidavit was sworn by the Managing Director of the plaintiff and that exhibit 11 was the CR 12 a registration under the Companies Act, 2015.
18. In re-examination, she confirmed that the document filed at page 99 of their exhibits shows that the Auditor General confirmed receipt of the documents. She denied there being any adverse report to the plaintiff company by the Senate or the Auditor General.
19. The parties then by consent, agreed and produced the certificate of electronic evidence for the links and aired story as an exhibit 2 for the plaintiff and the plaintiff's case was marked as closed.
20. The defendants did not call any witness to support their defence and produce the documents filed into court. They closed their defence on account that they were unable to get the witness for the defence.
21. Parties filed written submissions.

The Plaintiff's submissions

22. In support of its case, the plaintiff framed the following issues for determination and made arguments supported by caselaw.
 1. Whether the Defendants' publication was defamatory and caused harm to the Plaintiff's reputation?
 2. Whether the Plaintiff, as an incorporated water and sanitation provider, has the standing to bring a defamation suit in light of the Derbyshire principle?
 3. Whether Plaintiff is entitled to Damages?



1. As to whether the Defendants' publication was defamatory and caused harm to the Plaintiff's reputation?

23. The Plaintiff submitted reiterating its pleadings and evidence and argued that the Defendants' publication was defamatory and caused substantial harm to its reputation, both as a commercial entity and as a public service provider in Kisumu County. That the Defendants' report directly linked the Plaintiff to allegations of corruption and mal-administration without factual basis or justification, causing serious reputational damage.
24. Counsel for the plaintiff defined what defamation is generally and its ingredients and submitted that all the elements of defamation were proved to the required standard in the instant case. He relied on the cases of *Phineas Nyagah v. Gitobu Manyara* [2013] eKLR, where the court held that publication of defamatory content through a public platform constitutes actionable defamation. In this case, the publication was accessible on multiple platforms, amplifying its reach and impact; *J.P. Machira t/ a Machira & Co Advocates v. Wangethi Mwangi & another*[1998] eKLR where it was stated that a statement is defamatory if it would tend to lower the Plaintiff in the estimation of right-thinking members of society or make them shun or avoid the Plaintiff. He argued that in this case, the portrayal of the Plaintiff as corrupt and incompetent would reasonably lead viewers to perceive the Plaintiff as dishonest, untrustworthy, and unworthy of public confidence or support.
25. Further, that the inclusion of the Plaintiff's identifiable images in the report constituted innuendo, implying by association that the Plaintiff was among the entities engaged in corrupt practices aligns with the principle in *Nation Media Group Ltd & 2 Others v. John Joseph Kamotho & 3 Others* [2010] eKLR, where it was held that defamatory innuendo can arise from context and association, particularly where images or specific identifiers link the plaintiff to negative allegations. It was argued that the Defendants' selective use of the Plaintiff's visuals conveyed a damaging message to the public, implicating the Plaintiff in corrupt activities.
26. The plaintiff maintained that the Defendants' report, as particularized in the Plaintiff, falsely suggested that the Plaintiff was implicated in significant corruption, malpractices, and financial mismanagement. Statements such as "Counties lost billions of shillings in graft" and "massive corruption, malpractice, and poor management in water and sanitation companies" were presented alongside images of the Plaintiff's logo, building, and treatment facilities, directly associating the Plaintiff with these allegations.
27. According to the plaintiff, it had suffered significant harm to its reputation, a critical factor in defamation cases. That the Plaintiff relies on public confidence, stakeholder relationships, and donor trust to operate effectively and that the publication's insinuation of corruption led to a foreseeable consequence of the public, stakeholders, and donors would question the Plaintiff's integrity and operational transparency. Reliance was placed on *Joseph Njogu Kamunge v. Charles Muriuki Gachari** [2016] eKLR where the Court recognized that defamation need not cause direct financial loss but can harm one's professional or business reputation, indirectly impacting financial performance. The plaintiff argued that the defamatory allegations made against it by the defendants in their publication/ story created an environment of distrust that could discourage potential partners and stakeholders from engaging with the Plaintiff.
28. It was submitted that the publication of a false statement to a third party was proved in that the Defendants broadcasted the report on Citizen Television and further disseminated it across social media platforms, including YouTube, Facebook, Twitter, and Instagram, to millions of viewers. That this wide-reaching dissemination established a substantial audience, among whom were the Plaintiff's



customers, stakeholders, and members of the public who would reasonably identify the Plaintiff as the subject of the allegations. Reliance was placed on the case of Phineas Nyagah v. Gitobu Imanyara [2013] eKLR, which laid down the principle that the element of publication is met if the defamatory statement is communicated to a third party.

29. It was submitted that by portraying the Plaintiff as a corrupt and mismanaged entity, the publication affected the Plaintiff's goodwill, damaging relationships with both existing and potential customers and partners. Reliance was placed on the case of SMW v. ZWM [2015] eKLR, where the court noted that the injury to goodwill and public trust is a vital consideration in awarding damages in defamation cases, as these factors directly impact the entity's ability to function and succeed in its mission.
30. The plaintiff's counsel further submitted that there was fault- malice and recklessness in the said publication without verifying the truth of the allegations. He cited *The Standard Ltd v. G.N. Kagia t/a Kagia & Company Advocates* [2010] eKLR and submitted that in the instant case, the Defendants failed to verify the allegations or offer the Plaintiff an opportunity to respond, despite the gravity of the claims. That the Defendants' reliance on unverified reports, combined with the omission of the Plaintiff's side, points to recklessness and a lack of professional due diligence. That the Plaintiff's identifiable logo and facilities were used in a context that would lead viewers to associate it with corruption, without the Defendants presenting evidence or qualifying the Plaintiff's alleged involvement.
31. The plaintiff further lamented that the Defendants' continued circulation of the publication on social media platforms long after the initial airing exacerbates the harm caused, showing a disregard for the truth and the Plaintiff's reputation. That this continued publication despite notice of the harm caused is indicative of malice, as recognized in *Phineas Nyagah v. Gitobu Imanyara* [2013] eKLR, where failure to retract defamatory statements despite complaints was found to have constituted malice.
32. The plaintiff's counsel submitted that the publication which was defamatory caused harm to the Plaintiff's character, reputation, and goodwill, as specified in the *Plaint* and we highlight the same as hereunder:

Reputation Damage: That the Plaintiff's reputation as a trustworthy public utility provider was undermined. That the public and stakeholders who viewed the report would likely associate the Plaintiff with the alleged corruption, lowering its esteem and damaging its reputation in the eyes of right-thinking members of society.

Loss of Goodwill and Stakeholder Confidence: That the Defendants' publication raised doubts about the Plaintiff's integrity, thereby damaging its goodwill. Relying on the case of *SMW v. ZWM* [2015] eKLR, it was submitted that in the above case, it was held that loss of goodwill is significant in defamation cases involving businesses or entities that rely on public trust, as it impacts long-term sustainability.

Potential Financial Impact: that although direct financial loss need not be proven in defamation cases, the indirect financial implications are foreseeable. That the Plaintiff's reputation with donors, stakeholders, and customers has been compromised, leading to potential revenue loss due to damaged public trust, a factor acknowledged in *Joseph Njogu Kamunge v. Charles Muriuki Gachari* [2016] eKLR.



2. As to whether the Plaintiff has the standing to bring a defamation suit in light of the Derbyshire principle?

33. It was submitted that the Defendants in their Statement of Defence relied on the case of Derbyshire County Council v. Times Newspapers Ltd. [1993] AC 534 and Nairobi County Government v. John Kamau & Anor. [2017] eKLR, arguing that the Plaintiff lacks the legal right to bring a defamation claim, as it allegedly functions as a public authority or a subsidiary of the Kisumu County Government.
34. In countering the above defence, the plaintiff's counsel submitted that the plaintiff is a distinct legal entity with corporate status, capable of sustaining a defamation action, and that the Derbyshire principle does not apply to it. This, it was argued, was because the Plaintiff is an incorporated company, is independent from government entities and the fact that it performs services on a commercial basis hence it is entitled to bring forth a defamation action to protect its reputation and public trust.
35. It was submitted that the Derbyshire principle, which specifically applies to governmental bodies to protect the public's right to criticize their governing bodies without fear of defamation suits was not applicable to this case.
36. The plaintiff's counsel cited several decisions where the principle was applied and where the principle was inapplicable namely:
- i. Nairobi City County Government v. John Kamau & Another [2017] eKLR, where the court applied the Derbyshire principle, holding that the Nairobi County Government, as a public authority, lacked the capacity to sue in defamation because such actions would conflict with public policy interests that prioritize transparency and accountability.

It was argued that the Plaintiff in the present case is not a government entity but a corporate entity operating under corporate governance and subject to market competition, with a commercial and statutory mandate that is separate from government functions.
 - ii. Kenya Tea Development Agency Ltd v. Nation Media Group Ltd & 3 others [2005] eKLR, where the Court held that a corporation, despite performing public functions, retains the right to protect its reputation from unjustified defamatory attacks, as it operates with corporate autonomy and is commercially oriented. It was argued that the plaintiff herein similarly operates in a commercial capacity, providing water and sanitation services to generate revenue, which confirms its standing to bring a defamation action.
37. Further, that the Plaintiff's Articles of Association and Memorandum of Incorporation establish it as a company limited by shares with a legal personality as evidenced through the Company Search (CR12) produced as Plaintiff Exhibit 12, a status, supported by the Companies Act, affording the Plaintiff legal capacity to sue and be sued in its own name.
38. The plaintiff's counsel further argued that the Plaintiff's mandate, as outlined in the Water Act, emphasizes its responsibility to provide water services independently, manage its financial affairs and engage in commercial activities, which attributes, it was argued, align it more closely with a commercial corporate entity than with a public authority, setting it apart from entities under the Derbyshire rule.
39. It was submitted that the principle in the Derbyshire case was based on public interest considerations, barring a government body from suing in defamation because this would hinder freedom of expression and public scrutiny. It was therefore argued that in contrast, the Plaintiff, by virtue of being a corporate entity, is entitled to protect its reputation from harmful falsehoods, especially when these affect its



commercial relationships and public trust, which entitlement aligns with the court's view in *Kenya Tea Development Agency Ltd v. Nation Media Group Ltd & 3 others* per Serگون J [supra].

40. Counsel for the plaintiff maintained that Kenyan courts have held that commercial entities, even those performing public services, have a right to protect their reputations in the market, which right is critical, as reputational harm directly impacts a corporation's viability, stakeholder relations, and public trust.
- iii. *J.P. Machira t/a Machira & Co Advocates v. Wangethi Mwangi & another* [1998] eKLR, where the Court of Appeal emphasized that the protection of reputation is a fundamental right, even for corporate bodies, when their business or public standing is attacked hence the Plaintiff, by being an identifiable, separate corporate entity, enjoys the right to defend its reputation. It was argued that allowing the Plaintiff to pursue a defamation claim aligns with the [Water Act](#), which establishes a regulatory and service provision framework, emphasizing accountability, transparency, and operational independence for water companies. That the Act's framework allows entities like the Plaintiff to act as both service providers and corporate actors, meriting protection of their reputational and commercial interests.

3. As to whether the Defence of Fair comment is available to the Defendants

41. It was submitted that when the defense of fair comment is applied, it generally protects opinions based on true facts, especially if they concern matters of public interest. In this case, it was argued by the plaintiff that using a plaintiff's image in a report, especially one related to corruption, without mentioning the plaintiff directly but implying their involvement, falls outside the purview of fair comment. Further, that this practice distorts the true meaning of fair comment by creating implicit associations rather than overt, opinion-based statements.
42. It was argued that Fair comment requires a direct and factual basis and that if a defendant uses an image of the plaintiff in a corruption report but the text of the report does not mention or implicate the plaintiff, the defense of fair comment cannot stand because there is no factual comment to base the opinion on. That instead, this tactic can be viewed as misleading or defamatory by implication, given that it subtly directs the reader to draw connections that may harm the plaintiff's reputation.
43. Counsel relied on *Lennon v. Daily Herald Ltd* [1970] 1 QB 171, where the English courts held that fair comment must rest on facts that are clear and directly stated. He argued that an image can convey a strong implied message; when used without accompanying context, it can create an impression that the plaintiff is involved in the scandal, which would be false and defamatory. English law also highlights that a defense of fair comment cannot protect a defamatory implication created indirectly.
44. Further reliance was placed on *Lewis v. Daily Telegraph Ltd* [1964] AC 234, where the House of Lords highlighted those defamatory insinuations through indirect associations cannot be shielded under the fair comment defense. That even if an individual is not explicitly named, a report can still defame if it implies involvement in wrongdoing by association. The court found that the public could interpret implied messages as factual claims about an individual, regardless of whether they were specifically mentioned in the report. It was argued that therefore, using an image alongside a corruption story would likely lead readers to believe that the plaintiff was connected to the alleged corruption, regardless of the absence of direct statements.

4. On whether failure to file Board Resolution was fatal to the plaintiff's case

45. On whether failure to file the Board resolution was fatal to the plaintiff's case, it was submitted that the Defendant did not plead in its defence that the suit was filed without a resolution or authority. That this was raised in cross examination and the submissions. The plaintiff relied on the case of *Eye Company*



(K) Limited v Erastus Rotich t/a Vision Express, that parties are bound by their pleadings and that in as much as parties can ask any questions in cross examination, such answers in cross examination do not constitute a defence or built up a defence case. That there was no preliminary objection raised to the competency of the suit on account of a resolution or authority.

46. Further reliance was place don Autoports, Nairobi Freight Terminal Limited and Compact Freight System Limited -Versus- Cabinet Secretary, Ministry of Roads& Transport Cabinet Secretary, Ministry Of Industrialization, Trade And Enterprise Development & others as was stated by this court in the case of *Diesel Inject Services v Shajand Holdings Ltd (Civil Appeal 53 of 2020)* [2024] KEHC 4902 (KLR) (28 March 2024) that:

“....., the provisions in the Civil Procedure Rules that require the filing of a company’s resolution to institute a suit was not meant to curtail Corporations’ right to access to justice. It was meant to bar persons purporting to act on behalf of such Corporations, and who did not have authority to bind the Corporations, from instituting unauthorized suits. It sought to safeguard companies from being dragged into unnecessary suits which resulted in heavy expenses by way of costs that are appurtenant to litigation.

Those provisions did not intend to regulate the internal affairs of companies. They sought to bar abuse of process by either a section of directors or shareholders of companies in lodging unnecessary and unauthorized law suits. In this regard, I find and hold that the only competent person to rely on the provision for filing of resolutions authorizing filing of suits should be a member or director of the company and not 3rd parties.”

47. It was thus submitted that the authority to institute suit on behalf of the company can be express or implied and, in this case, as is supported by the many decisions cited by the learned Judges as quoted above noting that the Verifying Affidavit was executed by the Managing Director of the Plaintiff.
48. It was submitted that therefore, it was sufficient for the authorized person (the Managing Director) to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority.

5. As to whether the Plaintiff is entitled to Damages

49. The Plaintiff’s counsel submitted that seeking for an award of damages of Kshs 25,000,000 in general and aggravated damages from the Defendants for the significant substantial reputational damage caused to the Plaintiff, which was associated with corruption, financial mismanagement and dereliction of duty. He relied on the Court of Appeal decision in *Johnson Evan Gicheru v. Andrew Morton & another* [2005] eKLR, where it was stated that defamation damages should reflect the gravity of the harm caused by the defamatory publication, considering both the immediate and lasting effects on the Plaintiff’s reputation and *Kenya Tea Development Agency Ltd v. Nation Media Group Ltd & 3 others* [2005] eKLR, where courts have awarded substantial damages of Kshs 20,000,000 when defamatory statements harm the entity’s commercial reputation and public trust. In *Nation Media Group Ltd & 2 Others v. John Joseph Kamotho & 3 Others** [2010] eKLR, the court awarded Kshs 15,000,000, taking into account the reputational harm and the reckless and persistent nature of the publication. In *Johnson Evan Gicheru v. Andrew Morton & another* [2005] eKLR, the Court of Appeal awarded Kshs 6,000,000 to reflect the plaintiff’s standing and the impact of the defamation.



50. In light of these comparable awards, the Plaintiff submitted that Kshs 25,000,000 is an appropriate award, which reflects the seriousness of the defamatory statements, the extensive reach of the publication, the Plaintiff's standing, and the aggravating conduct of the Defendants.

The Defendants' submissions

51. The defendants submitted relying on their defence as filed. They also relied on the documents which they filed in court including the Hansard report of 28th February, 2023 where the plaintiff and the Governor appeared before the Committee to respond to the Audit queries raised by the Auditor General against the plaintiff company. Further submission was that there are no further documents filed by the Plaintiff showing that indeed it responded to the said Audit Queries or that it was cleared by the said Senate Committee. Further, that at the trial, it was shown that indeed the issues raised by the said Senate Committee touched on all the 47 County Governments and that in fact, a lot of money was embezzled by some of these water companies.
52. I must however caution that submissions cannot be substitute for evidence. Where evidence is not adduced on oath and exhibits produced, a party cannot rely on evidence not adduced and subjected to cross examination or documentary evidence produced as exhibits. However, submissions on points of law will be considered.
53. On behalf of the defendant, it was submitted that the court record also shows that no accounts have been filed by the Plaintiff Company to show the loss/ damage suffered as a result of the alleged publication. That no evidence was also tendered to show the loss of business suffered as a result of the alleged publication.
54. It was submitted that there was no proof of the facts relied on by the plaintiff, PW1 having stated that indeed in the current year, the Plaintiff had made a profit in its business. The Defendants urged this court to study the court record and reach the conclusion that there was no defamation/ malicious/ injurious falsehood as alleged.
55. On the law, it was submitted that first, the lack of a Board Resolution authorizing the filing of this suit on behalf of the Plaintiff Company was fatal to the plaintiff's case and contrary to the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules, which mandates that where the Plaintiff is a corporation, the Verifying Affidavit shall be sworn by an officer of the Company duly authorized under the seal of the Company to do so.
56. It was submitted that as the Verifying Affidavit before this court indicates that it was sworn a day before the Plaintiff was prepared, it begs the question whether indeed there is a valid affidavit verifying the contents of a Plaintiff before this court. Further, that the same was not sealed by the Company.
57. Counsel for the defendants relied on the case of Kutima -v- *Royal Media Services Ltd & another (Civil Case E001 of 2021)* [2022] KEHC 596 (KLR) (10 June 2022) (Judgment) where Musyoka J dismissed a suit which had an affidavit that did not comply with the provisions of 4 Rule 1 (2) of the Civil Procedure Rules.
58. The Defendants submitted that as the Plaintiff Company had not filed a Board Resolution authorizing the filing of this suit hence the suit must be dismissed as was held in *Directline Assurance Company Limited -v- Tomson Ondimu* [2019] eKLR.
59. Further, that the County Government of Kisumu being the majority shareholder in the Plaintiff Company, as per the CR – 12 attached to the Plaintiff's Further List of Documents dated 24th May,



2024, with 4,997 of the 5,000 allotted shares in the Plaintiff Company, there is no evidence that the said County Government authorized the filing of the suit.

60. The defendants relied on the rule in Failure to call Independent/ Third Party Witnesses and submitted that in defamation cases, the evidence of independent/ third party witnesses is crucial to prove defamation in the eyes of 3rd parties. They relied on the case of Registered Trustees of The Sisters of Mercy T/A Mater Misericordiae Hospital –v- Jacinta W. Maina & another [2014] eKLR.
61. On the Law on defamation viz a vis injurious falsehood, it was submitted relying on Kings Wear Limited -v- Registered Trustees of the Sisters of Mercy [2019] eKLR, and argued that there was no evidence of any loss as a result of alleged defamation and that there was no pleading for special/ actual damage which is an element of the tort of malicious/ injurious falsehood. The Defendants submitted that in the absence of special/ actual damages, this suit ought to be dismissed.
62. On Justification, the defendants submitted that they were justified in the publication and that the Law of Defamation Act has expanded the common law defense of justification as set out in section 24 of the Law of Defamation Act. The Defendants submitted that the gist/ truthfulness of the complained defamatory words had been proved through the documents filed and the evidence given. That the Plaintiff, therefore, has no cause of action against them. They submitted that they have proved the sting of the alleged defamation.
63. On Privilege, the Defendants submitted that the said publication was justified and based on parliamentary reports and recommendations from both the Senate and the EACC. They contended that the Plaintiff has no cause of action against them as the material published is protected by the defence or truth/ justification within the meaning of Section 14 of the Law of Defamation Act.
64. On Public Interest, it was submitted that the alleged publication complained of touched on transactions touching all the 47 County Governments. The Defendants therefore submitted that the issues reported in the alleged publication were issues of immense public interest and importance.
65. On the Constitutional defence under Articles 33 and 34 of the Constitution on the freedom of expression and freedom of the media to impart information to the public, relying on the case of Jacob Mwando Wangora –v- Hezron Mwando Kirorio [2017] eKLR, it was submitted that in cases of defamation/ malicious/ injurious falsehood, this court has to do a balancing act between the right to reputation and the right of the media to impart information under Article 33 of the Constitution. That Courts have grappled with this balancing act and placed more weight on the freedom of expression. The Defendants urged this court to uphold the media’s right to impart information.
66. The Defendants submitted that the injunction sought is too broad a prayer to be granted and that if granted, it would be a complete impairment of freedom of expression and public interest. They relied on the case of John Ntoiti Mugambi Alias Kamukuru –v- Moses Kithinji alias Hon. Musa [2016] eKLR, wherein it was stated that in defamation cases, it is not possible to issue such boundless injunction which restrain any and all persons from saying anything about the Applicant; that will be a complete impairment of freedom of expression and public interest that truth should be out. An injunction in such cases must be specific in order to prevent such impairment or impediment of freedom of free speech and expression. Care should be taken, therefore, not to issue injunctions which will rapture the law and the Constitution.
67. Further reliance was placed on Janto Construction Company Ltd -v- Enoch Sikolia & 2 Others [2020] KLR, where it was stated that in the event the injunction is granted as sought then that will be a complete gag to the Defendants in discharging their duties.



68. It was submitted that the Defendants have already demonstrated that they are not liable in defamation and hence the Plaintiff is entitled to nil damages. That since the Plaintiff did not offer any evidence of damages, were its case to succeed, it is entitled to only a small amount or nominal damages. The case of *Nation Newspapers Limited –v- Peter Baraza Rabando* [2016] eKLR was cited.
69. However, it was submitted that in the event that this court is to differ with the Defendants and find that the plaintiff was defamed, then it should find that the plaintiff is only entitled to nominal damages of Kshs. 400, 000/- for the tort of injurious falsehood as provided by Section 16A of the *Defamation Act*.
70. The Defendants urged this court to find that the recorded testimony of the Plaintiff's witness is bare of any specific evidence of the actual damage sustained out of the publication of the alleged defamatory publication.
71. The Defendants further relied on the decision in the case of *Nation Newspaper Ltd –v- Gilbert Gibendi* [2002] eKLR where the court stated that in order to be awarded damages for defamation, it is not enough to establish only the defamation. The Plaintiff must lead evidence of actual damage to his reputation and character in order to enable the court to assess an appropriate award.
72. Further submission was that the absence of proof of malice substantially mitigates the general damages awardable. That the law of defamation is not meant for commercial advancement but to fairly compensate for injured feelings/ lost business/ damage.
73. As to whether aggravated and exemplary damages are deserved, the Defendants submitted that the Plaintiff is not entitled to the same. Reliance was placed on the case of *The Nairobi Star Publication Limited -v- Elizabeth Atieno Oyoo* [2018] eKLR where it was stated that exemplary damages should be awarded only in cases within the following categories: - oppressive, arbitrary or unconstitutional action by servants of government; conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or cases in which the payment of exemplary damages is authorized by statute..... In my assessment of the evidence before the trial court, I find nothing to indicate that the offending publication was intended for a specific profit. I therefore hold that the plaintiff is not entitled to an award of exemplary damages.
74. For the foregoing reasons, the Defendants urged this court to dismiss the plaintiff's suit with costs or make an award of Kshs. 400, 000/- as sufficient damages for malicious/ injurious falsehood.

Analysis and determination

75. I have considered the pleadings filed by both parties, the evidence adduced by the plaintiff and the detailed submissions and arguments derived from the authorities relied on by counsel for the parties. The issues for determination are:
 1. Whether the suit herein is maintainable in view of:
 - i. The plaintiff being a public company wholly owned and a subsidiary of the County Government of Kisumu
 - ii. The verifying affidavit having been sworn before the filing of an action
 - iii. There being no resolution filed to authorise the filing of the suit in court
 - iv. There being no resolution by the County Government of Kisumu as the majority shareholder in the plaintiff company, to file this suit.
 2. Whether the impugned article was defamatory of the plaintiff



3. Whether the publication was motivated by ill will and/or malice
 4. Whether the words complained of in the article are true so as to afford the defendant a defence of justification, fair comment, public interest and or the constitutional defence under Article 33 of the Constitution on the freedom of expression
 5. Whether the plaintiff is entitled to general and aggravated damages
 6. What orders should this court make
 7. Who should bear the costs of the suit?
76. The first issue is in my view, very important because it will determine whether this court will proceed to determine the other issues as framed hereinabove. It is an issue that hinges on capacity or legal standing to sue by a party alleging to have been defamed.
77. Therefore, as to whether the suit herein is maintainable in view of the plaintiff being a public company owned by majority shareholding of the County Government of Kisumu, the defendant contended, relying on the case of Nairobi City County Government v John Kamau & another [2017] eKLR where Njuguna L. J, citing the case of Derbyshire County Council versus Times Newspaper Limited (1993) 1 All ER 1011 where it was held that a government should be open to public criticisms and therefore cannot maintain an action in defamation, with the same argument being advanced in the case of PTC Vs. Modus Publications (PVT) Limited 1997 (2) ZLR 492 where it was held that a state should not maintain any action in defamation; and the case of Kerajaan Negeri Trengganu & 3 Others Versus Dr. Syed Azman Syed Ahmad Namawi & 3 Others HCCC No. 23 NCvC-106-12/2011 Malaya at Kuala Lumpur where the same position was advanced that a government cannot sue for defamation. In the Kenyan case of Nairobi City County Government v John Kamau & another, L.Njuguna J and held that the Government in that case, the Nairobi City County Government could not maintain a case of defamation against the defendant.
78. The plaintiff on the other hand maintained in its submissions that it had the capacity to sue and maintain the suit for defamation against the defendants as it was an incorporated public company independent of the County Government of Kisumu and that whereas it was open to public criticism as a public company owned by the County Government of Kisumu being the majority shareholder, the defendants had no right whatsoever to publish falsehoods concerning the plaintiff hence it was entitled to sue. Reliance was placed on the case of Kenya Tea Development Agency Ltd v. Nation Media Group Ltd & 3 others [2005] eKLR, where Seron J stated, as paraphrased by the plaintiff's counsel, that a corporation, despite performing public functions, retains the right to protect its reputation from unjustified defamatory attacks, as it operates with corporate autonomy and is commercially oriented.
79. It was argued that the plaintiff herein similarly operates in a commercial capacity, providing water and sanitation services to generate revenue, which confirms its standing to bring a defamation action.
80. Further argument by the plaintiff was that the Plaintiff's Articles of Association and Memorandum of Incorporation establish it as a company limited by shares with a legal personality as evidenced through the Company Search (CR12) produced as Plaintiff Exhibit 12, a status, supported by the Companies Act, affording the Plaintiff legal standing in this matter.
81. What is this court's judicial opinion on this issue of whether the plaintiff herein, being a public incorporated company can bring an action for defamation against the defendants herein?
82. It is now widely accepted that a government cannot sue for defamation. This point was aptly determined by Njuguna J in the above quoted case of Nairobi City County Government v John



Kamau & another. The position above was taken from the Derbyshire County Council v Times Newspapers Ltd. [1993] AC 534 (HL) case. However, this is not a unanimous view, depending on whether it is the government or government enterprise bringing the suit for defamation. It is for that reason that Seron J determined in the case of Kenya Tea Development Agency Holdings Limited v Nation Media Group Ltd & 5 others [2021] e KLR as follows and I quote the learned judge verbatim, as opposed to the paraphrased holding contained in the plaintiff's counsel's submissions:

- “ 10. Having traversed the arguments of the respective parties, I find that the issue to be determined by this court is whether the Plaintiff has the legal capacity to maintain a suit for defamation. I have considered the Defendants/Applicants' argument that the Plaintiff being a Public body does not have the legal capacity to sue for defamation as the same should be open to public criticisms.
 11. The Plaintiff relied on the fact that it was incorporated under the Companies Act and that it was owned by small tea farmers who joined the membership and that its status was changed to a public company Limited by shares pursuant to Section 3(1) of the Kenya Tea Development Authority (Revocation) Order 1999, and that the Government has no control over KTDA and that it does not operate in close cooperation with the State
 12. Whereas this court recognizes the constitutional and legislative rules governing the right to sue and be sued by a corporation, it also recognizes the unique facts of this case. The Plaintiff in this case is a Limited Company with its own Articles of Association that governs it, as well as shareholders who hold it accountable if something goes wrong. It is not sponsored by the government or centralized money, but by small-scale farmers therefore it is a public entity as espoused under Article 227 of the Constitution therefore capable of being defamed.
 13. I do therefore find that the Plaintiff is not a public Company and wish to rely on the American Book Co. v Gates where the Court held that when a Corporation is so defamed as to lose the confidence in its customers in its product, the corporation may maintain action without an allegation of special damages.[emphasis added]
83. From the above decision which the plaintiff submits is the authority that counters the Derbyshire decision, it is clear that the learned judge heard arguments for and against the contention that the plaintiff had no legal standing to sue for defamation on account that it was a public company and that the learned Judge found, from the material placed before him, that the plaintiff was not a public company. He found that the plaintiff company was owned by small scale coffee farmers and not sponsored by the government or centralized money, but by small-scale farmers.
84. From a reading of the ruling of the learned judge, having found that the plaintiff company was not a public company, therefore not a public entity as espoused under Article 227 of the Constitution, he concluded that the company was capable of being defamed and could therefore sue to recover damages for defamation, noting that as was held in the American Book Co. v Gates, when a corporation is so defamed as to lose the confidence in its customers, in its product, the corporation may maintain action without an allegation of special damages.
85. Thus, comparing the above decision to this case, one can distinguish the unique circumstances prevailing in each of them. I will revert to this aspect later.



86. Needless to say, that the extent to which the bar to governmental defamation actions applies to government-owned enterprises remains not very clear, going by the decisions in this jurisdiction.
87. Elsewhere, in the reported cases which I will allude to shortly, whereas some courts have allowed defamation cases to be proceeded by corporations with close nexus to the government, other courts have rejected defamation actions by government-owned commercial enterprises.
88. In the South African case of *Die Spoorbond v South African Railways* 22 1946 AD 999, the Appellate side of the Supreme Court of South Africa set aside the judgment that had allowed a state corporation to sue for defamation and stated as follows- per Schreiner JA, who reasoned that neither the Crown's ability to bring various kinds of delictual actions against its subjects nor the assumed ability of other corporations to sue for defamation compelled the conclusion that the Crown could sue for defamation. The learned Judge took issue with the view of Blackwell J that considerations of fairness and convenience required allowance of defamation actions by the Crown. Schreiner JA appreciated that the Crown, in so far as it took part in competitive trade, might enjoy a reputation, damage to which could be calculated in money. He however believed that considerations of fairness and convenience weighed distinctly against recognition of a right in the Crown to sue a subject for defamation. He stated:

“The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the State's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the State, actions for defamation will lie at their suit. But subject to the risk of these sanctions and to the possible further risk...of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country....Quite a number of Government departments...indulge in some form of trading on a greater or a lesser scale. Moreover, the Government, when it raises loans, is interested in the good or bad reputation that it may enjoy among possible subscribers to such loans. It would be difficult to assign any limits to the Crown's right to sue for defamation once its right in any case were recognised.”

89. In *City of Prince George v British Columbia Television System Ltd* (1978) 85 DLR (3d) 755, [1978] 3 WWR 12 (BCSC), *aff'd*, (1979) 95 DLR (3d) 577, [1979] 2 WWR 404 (BCCA), a city claimed that a television station libelled it by broadcasting words 'intended to mean that the plaintiff, through its Council and its other servants and agents, had been corrupt, dishonest, fraudulent, inefficient and unfit to discharge its duties'. Primarily on the authority of the Queen's Bench Division] *Bognor Regis Urban District Council v. Champion* [1969 B. No. 2070] case, Toy J rejected the defendant's application to dismiss the libel action. He stated, giving judgment for the council, that a local government corporation had a "governing" reputation which they were entitled to protect by a defamation action.
90. The above *City of Prince George v British Columbia Television System Ltd* decision was affirmed by the British Columbia Court of Appeal. One ground was that the plaintiff had a statutory power to bring suit and nothing in the legislation excluded the plaintiff from suing for defamation, as other corporations could. However, the principal judgment also endorsed the conclusions reached in the *Bognor Regis* case and rejected the defendant's argument that to allow a municipality to sue for libel



would unduly encroach upon the right of the public to speak freely about municipal affairs. Aikins JA stated:

“In my opinion, it is beyond question that municipal corporations have reputations....The way in which a municipality legislates and the way in which it administers the legislation it enacts and conducts itself in relation to activities which it lawfully undertakes cannot but create a municipal reputation, be it good, bad or indifferent. I can see no basis in principle for holding that a municipal corporation, empowered by statute to sue in its corporate name, cannot maintain an action for libel. To hold otherwise would leave municipalities the helpless victims of all those who choose to publish untrue imputations which injure their reputations.”

91. As for the argument invoking freedom of speech and contending that allowing a municipal corporation to sue for libel would give municipalities the power to suppress criticism by threats of legal proceedings, (similar argument made by the defendants in this case), the court gave a short answer by stating that:

“The short answer...is simply that the right [to speak freely about municipal affairs], under our law, must be exercised subject to the law of defamation which affords everyone protection against injury to reputation by untrue imputation....[T]he law of defamation makes adequate provision by the principle adopted in respect of fair comment to protect those who make legitimate critical comments on matters of public interest.”

92. In *Windsor Roman Catholic Separate School Board v Southam Inc*, (1984) 46 OR (2d) 231, 9 DLR (4th) 284 (HC), the court sustained a libel action by a school board for articles published in a newspaper. ‘Fortified’ by the judgments in the *Bognor Regis* and *Prince George* cases, DuPont J decided that a non-profit corporation could maintain a defamation action, that the school board had statutory power to do so, and that it had a reputation that could be damaged by defamation. He stated thus:

“The Board’s reputation for honesty, probity, fairness and decency must, of necessity, play an important role in the performance of its duties and responsibilities. Libels on its reputation would not only interfere in the performance of these duties and responsibilities, but would act to deter people from taking part in the Board itself. To deprive the Board of the expertise and skill of the leading members of the community could only further derogate from its responsibilities and duties.”

93. The House of Lords’ decision in *Derbyshire County Council v Times Newspapers Ltd*. [1993] AC 534 (HL) broke away from the above holdings. In the said case, which was relied on by the defendants herein, the ‘Sunday Times’ had published articles on ‘bizarre’ and ‘suspicious’ ‘share deals’ involving investment of shares of the Derbyshire County Council’s superannuation fund in companies controlled by a ‘media tycoon’, primarily at the instigation of the Labour Party leader of the council. The business ‘tycoon’, the Council leader and the Council sued for libel. Morland J, accepting as correct the decisions of Browne J in the *Bognor Regis* case and the British Columbia Court of Appeal in the *Prince George* case, decided that a local authority could sue for libel ‘in respect of its governing or administrative reputation’.

94. The House of Lords, however, unanimously held that a local authority had no right to seek damages in a defamation action. The speech of Lord Keith, with which the other judges agreed, apparently accepted that non-trading corporations generally could sue for defamatory statements injurious to



their reputations. But that ‘there were ‘features of a local authority which may be regarded as distinguishing it from other types of corporations, whether trading or non-trading’.

95. The court further stated as follows, material to this case:

“The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.”

96. The speech of Lord Keith also quoted a passage from *City of Chicago v Tribune Company*, 307 Ill 595, 607-608, 139 NE 86, 90 (1923) case including:

“While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticize the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions...It follows, therefore, that every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.”[emphasis added]

97. The speech also quoted at length from the judgment of Schreiner JA in *Die Spoorbond v South African Railways*, (supra) including the statement that:

“[I]t would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State’s subjects, could be used to launch against those subjects, actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country.”

98. Lord Keith stated that it was of ‘some significance’ that a number of departments of the central government were corporations created by statute and that if a local government could sue for libel, there would appear to be no reason in logic for holding that those departments were not also entitled to sue. But there were rights available to private citizens which institutions of central government and local authorities are not in a position to exercise unless they can show that it is in the public interest to do so. He added that:

“In both cases, I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech.... The conclusion must be...that under the common law of England, a local authority does not have the right to maintain an action for damages for defamation.” [emphasis added]



99. In the wake of the Derbyshire County Council case, courts in several countries decided that a local government authority could not maintain an action for defamation. The most important of these decisions is that of the New South Wales Court of Appeal in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (CA) where the plaintiff, Ballina Shire Council, was a statutory corporation whose members were elected by the public. The action arose from the defendant's issuance of a press release which, the council alleged, accused it of secret and unlawful disposal of sewage into the ocean and falsification of an environmental impact statement relating to sewage treatment works. The court's decision to reject defamation actions by a local government was 2-1, with each of the judges delivering a judgment of some length. Gleeson CJ discussed the relevant case law up to the House of Lords' decision in *Derbyshire County Council v Times Newspapers Ltd*, which he regarded as 'strongly persuasive' although not binding authority.
100. Decisions of the High Court of Australia, finding in the Commonwealth Constitution a guarantee of free speech in relation to governmental and political matters, reinforced the persuasive effect of the *Derbyshire County Council* case.
101. Gleeson CJ added:
- “The idea of a democracy is that people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the expectation that this process will improve the quality of the government. The fact that the institutions are democratically elected is supposed to mean that, through a process of political debate and decision, the citizens in a community govern themselves. To treat governmental institutions as having a ‘governing reputation’ which the common law will protect against criticism on the part of citizens is, to my mind, incongruous. I regard the matter as turning upon the concept of reputation, and the nature of the reputation which the law of defamation sets out to protect. I understand that concept in its application to individuals (including individual politicians), trading corporations and other bodies, but I have the greatest difficulty with the concept in its application to the governing reputation of an elected governmental institution....[T]o maintain that an elected governmental institution has a right to a reputation as a governing body is to contend for the existence of something that is incompatible with the very process to which the body owes its existence.”
102. Kirby P on his part cautioned that one role of the law of defamation is to correct and redress abuse of power by the media. He stated:
- “....The law of defamation is one of the comparatively few checks upon their great power. Care must be taken in releasing, or reducing, such checks on power which defamation law provides. Once removed, it may be difficult to secure their replacement....”
103. However, he regarded the reasoning of the House of Lords in *Derbyshire County Council* and the South African Appellate Division in *Die Spoorbond* as ‘compelling’. He added his support to the above two decisions by stating that the conclusion that a local authority could not sue for defamation was, in his view, not a radical departure from common law principles, and that it was attractive because it conformed to international human rights principles found in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Kirby P observed that a local government could respond to criticism by means other than litigation. It could issue media releases, convene meetings and conduct public hearings and investigations. It might publish statements protected by privilege.



104. In Canada, court decisions subsequent to the Derbyshire County Council case have rejected defamation actions by local government bodies. This is primarily because of the enactment of the Canadian Charter of Rights and Freedoms, which provides in Section 2(b) that everyone has ‘freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication’. The common law was thus to be interpreted in a manner consistent with the principles of the Charter. The learned Judges concluded that it would be inconsistent with the principles of Section 2(b) to allow a government body to sue a citizen for expression of critical statements about the government because in a democratic society, people must be free from the threat of defamation actions by a government, which would chill expression. See the cases of *Corporation of the Township of Montague v Page* (2006) 79 OR (3d) 515 (SCJ); *Corporation of the Town of Halton Hills v Kerouac* (2006) 80 OR (3d) 577, 270 DLR (4th) 479 (SCJ); *Dixon v Corporation of the City of Powell River* 2009 BCSC 406, 94 BCLR (4th) 106, 310 DLR (4th) 176. Cf *Wilson v Switlo* 2011 BCSC 1287, aff’d sub nom *Wilson v Williams* 2013 BCCA 471, 52 BCLR (5th) 86, 368 DLR (4th) 253 (village band council exercising powers similar to municipal corporation).
105. Nonetheless, the reasoning of *Derbyshire County Council v Times Newspapers Ltd* and the majority judgments in *Ballina Shire Council v Ringland* was also dominant, especially in *Township of Montague v Page* (2006) (supra) (criticism of town fire service) and *Town of Halton Hills v Kerouac* (supra) (allegation of corruption). See also *Niagara Peninsula Conservation Authority v Smith* 2017 ONSC 6973, 45 CCLT (4th) 146, 13 CPC (8th) 361 (regional conservation authority, whose members were appointed by municipalities of region).
106. In *Alberta Health Services v Johnston*, 2023 ABKB 209, 482 DLR (4th) 725, the court held that under the common law, defamation actions could not be maintained by unelected ‘government actors’ (‘public entities functioning as government’)—in that instance, the body established by statute as the sole provider of health care in the province.
107. In *New South Wales Aboriginal Land Council v Jones* (1998) 43 NSWLR 300 (CA), the majority decision in *Ballina Shire Council v Ringland* was applied to bar a defamation action by an Aboriginal Land Council, which performed what were regarded as local government functions and whose membership was indirectly elected by Aboriginal persons living within local Aboriginal land council areas.
108. In India, in *Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632, 650, AIR 1995 SC 264, 277, the Supreme Court of India has stated that ‘local authority and other organs and institutions exercising governmental power’ cannot maintain a suit for defamation damages.
109. In South Africa the reasoning of the *Die Spoorbond* case, in which it was decided that the ‘Crown’ had no action for defamation, has been extended to defamation actions by a municipal government. The prohibition of defamation actions was applied, as municipalities performed governmental functions and were part of the State.
110. In Zimbabwe, where the law of defamation is similar to the law of South Africa, the Supreme Court of Zimbabwe followed the judgments in *Die Spoorbond* and *Derbyshire County Council* and held that a defamation action cannot be maintained by an ‘organ of the State’. The court did not agree with the proposition that a local government was part of the central government. But it did agree that a defamation action was not available to a local government—because it was part of the ‘governance’ of the country. See *Minister of Police v Silvermoon Investments* 145 CC [2020] ZAKZDHC 10, 2020 (6) SA 586 (KZD).



111. In *Moyane v Lackay* [2017] ZAGPPHC 1262, a court in South Africa rejected an attempt by the South African Revenue Service to distinguish its position from that of other organs of the State on the ground of its critical function of collecting revenue and its 'dependence on the credibility of its service and people' in order to function properly.
112. The recent decision in *Minister of Police v Silvermoon Investments* (supra), confirms that the bar to defamation actions by a governmental plaintiff applies to an application for an interdict (injunction) prohibiting publication of defamatory matter as well as to an action for damages.
113. The influence of the House of Lords' decision in *Derbyshire County Council* to the present time cannot be underestimated. This is so, because, from my exploration, courts in all reported cases world over, have rejected defamation actions by a government, excepting only the courts of Malaysia. This is now the position in Australia under the uniform defamation statutes enacted in 2005 and 2006.
114. The first reported case on defamation actions by a government-owned business enterprise comes from Zimbabwe in the case of *Posts and Telecommunications Corporation v Modus Publications (Pvt) Ltd.* 1997 (2) ZLR 492, 1998 (3) SA 1114 (ZSC), aff'g 1996 (2) ZLR 707 (HC) where the plaintiff, the Posts and Telecommunications Corporation (PTC), was established by statute and was the sole provider of postal and telecommunications services in the country. It claimed that three articles published in a weekly newspaper had damaged its reputation. The articles allegedly imputed to the PTC illegal wiretapping and unlawful conduct with respect to tenders for cellular phone service. The newspaper's publisher contended that the PTC was an alter ego of the State and as such, could not sue for defamation. The PTC denied that it was a department, agent, organ or other part of the State.
115. According to McNally JA, who delivered the judgment of the Zimbabwe Supreme Court, the basic proposition was that 'the right to sue for defamation is not available to those artificial persons which are part of the governance of the country' and that whether the entity was a legal persona separate from the State was of very limited relevance. McNally JA gave more weight to other criteria, especially the degree of ministerial control over the entity, the extent of its financial autonomy, whether the entity provided essential services traditionally provided by government, and whether it effectively was a monopoly provider of these services. Under these criteria, the court held that the PTC was an 'organ of the State' and could not sue for defamation.[with emphasis added]
116. Devittie J, in the High Court, had reached the same conclusion, applying similar criteria. However, he preferred a 'policy-based approach' to one that made an autonomous statutory corporation's ability to sue for defamation depending essentially on the degree to which it was subject to government control. The relevant policies were those expressed in the *Die Spoorbond*, *Derbyshire County Council* and *City of Chicago* cases, so that there be freedom to criticise government bodies, without the inhibiting effect of a potential defamation action, and that the wealth of the State, derived from its citizens, should not be used to fetter criticism.
117. The court observed that with the trend to privatise corporations owned by the State and have them compete with others, the degree of State control may become an 'elusive test' and result in permitting defamation actions where public policy considerations dictated denial of the right to sue.
118. Devittie J further held that when a statutory corporation was subject to State control, the court would deny it the right to initiate a defamation action unless there were 'compelling policy considerations' in favour of allowing an action. In that case, the court held that denial of a defamation action was justified because the PTC had a virtual monopoly in its field of trade, so a dissatisfied citizen could not take his custom elsewhere. The court stated that the only recourse was to voice criticism, which should not be inhibited by the threat of a civil action. It was found that the PTC could receive a government subsidy



when it had a deficit, so the plaintiff's wealth was derived from the citizens of the country and should not be used to fetter the right of citizens to criticise it.

119. The above Zimbabwean Supreme Court case is on all fours and in pari materia, with the instant case. The plaintiff concedes that it is an incorporated public company owned by the County government of Kisumu which is the majority shareholder. The plaintiff is the sole provider of water and sanitation for the citizens of Kenya residing within the jurisdiction of the County Government of Kisumu, in the urban part of the county.
120. In the plaintiff's own documents filed in support of its case and which are contained in the list of documents dated 11th November, 2023, which documents were produced as exhibits, the plaintiff filed an Annual Report and Financial Statements for the year ended 30th June, 2022 as audited by the Auditor General CPA Nancy Gathungu, CBS dated 8th September, 2022 and copy of the Hansard Report for special seating before the County Public Investment and Special Funds Committee. The audit was undertaken pursuant to the provisions of the [Public Audit Act](#) and Article 229 of the [Constitution](#).
121. In the Annual Reports and Financial Statements, at page 156, the principal activities of the plaintiff are stated as: to provide and distribute a constant supply of water for commercial, industrial and domestic purposes within the jurisdiction of Municipal Council of Kisumu and to be responsible for the provision and maintenance of water and sewerage services within the jurisdiction of the Municipal Council of Kisumu.
122. At page 179 of the said document produced as an exhibit, on the notes to the Financial Statements Note 13, it is stated as follows, inter alia:

“.....Related parry referred to here is the County Government of Kisumu formerly Municipal Council of Kisumu(MCK). Kiwasco is a wholly owned subsidiary of the County Government of Kisumu and supplies water to various institutions and premises owned and operated by the County Government of Kisumu.”
123. The above information is also found and replicated in the Memorandum of understanding between the plaintiff and USAID dated 21/3/2023 at pages 54 to 63 of the documents produced as exhibits and as filed into court. The plaintiff is described as follows:

“ Kisumu Water and Sanitation Company (KIWASCO) is a water service provider that begun its operations in July 2003 under the [Companies Act](#). It is a wholly owned subsidiary of the Government of Kisumu with the main responsibility of providing, managing water and sanitation services in Kisumu urban area while the asset holding body, Lake Victoria South Water Works Development Agency (LVSWWDA) is charged with the responsibility of developing the water and sewerage infrastructure...”
124. At page 158 of the Report of the Auditor General, the plaintiff was being audited in accordance with Article 229 of the [Constitution](#) of Kenya and Section 35 of the [Public Audit Act](#). A private company cannot be audited by the Auditor General.
125. The Office of Auditor General is established under Article 229(1) of the [Constitution](#). The functions of the Auditor General as far as the plaintiff herein is concerned are stated in the same Article 229(5) which provides that the Auditor-General may audit and report on the accounts of any entity that is funded from public funds. Section 35 of the [Public Audit Act](#) stipulates as follows:

35. Annual financial audits



The Auditor-General shall conduct audits of financial statements under Article 229 of the Constitution for State Organs and public entities and report annually to Parliament and relevant county assembly.

126. At page 150 of the said Annual Report, the plaintiff received a grant from the Government to cushion it from the effects of Covid 19 pandemic, which led to the rise in profitability.

127. Finally, at page 132 in the chairman’s statement to the Annual Report and Financial Statements, this is what the Chairman, Mr. Vinod Patel had to say:

“Provision of water is not a business to make money but a necessity and service to every citizen and this has been enshrined in the Constitution of Kenya 2010. You simply don’t buy a car to fuel it but fuel is required for you to move from one place to another. similarly, we don’t operate to make money, but money is required as a resource for us to move from where we are to where we want to be....”

128. I have gone to great lengths to explore the Annual Report and Financial Statements document for the plaintiff because it is what can inform this court to determine whether the plaintiff’s claim raises compelling policy considerations to allow a government, in this case, a county Government enterprise to bring a suit for defamation of character, even assuming that it was defamed by the publication as impugned, even without delving into the merits of the alleged defamation for a merit determination.

129. From the detailed exposition by Hugh Roff Professor of Law Emeritus of the University of Oklahoma in his article titled Defamation Of Governments And Government Enterprises, Research for the article conducted in part at the Max Planck Institute for Comparative and International Private Law, and in which he extensively provides an analysis of this subject, quite authoritatively, supported by caselaw which includes the Derbyshire principal and other recent cases in the commonwealth, including all the cases that I have referred to in my exposition herein above, the author gives an analysis of the subject and reaches the conclusion, though not binding on this court, and supported by caselaw well analysed, that corporations which receive public funding and are monopolies owned by the Government have no cause of action in defamation.

130. In his analysis, the author gives the Policy and pragmatic considerations and guides that in the absence of clear direction from authoritative precedent, judges deciding the viability of defamation actions by government-owned enterprises are likely to be influenced by the identification and weighing of relevant policy and pragmatic considerations which relevant policy considerations can readily be identified. He suggests that those supporting the position that a government-owned enterprise which is distinct from the government itself can bring a defamation action include:

- i. such an enterprise has a reputation that is separate from that of the government;
- ii. its reputation can be seriously damaged by defamatory statements;
- iii. considerable financial loss as well as loss of public or business confidence in the enterprise could be caused;
- iv. defamatory false statements and insinuations about such enterprises would be deterred by the possibility of a defamation claim;
- v. the public may benefit if fewer false statements were published or enterprises damaged by them could receive compensation.”



131. The author however acknowledges that against the above policy considerations, which are persuasive, is, essentially, the strong policy that recognises the right of any ‘citizen’ (including a commercial publisher) to criticise the government, and views such criticism as very important to the public interest and democracy and seeks to avoid the deterrence of criticism that a risk of defamation claims would create. This position, according to the writer, is applicable to governmental commercial enterprises because they are established or owned by the government in order to fulfil the government’s objectives, including the provision of public or commercial services and therefore are considered a part of the country’s government; and they are subject to government control or influence.
132. Thus, according to Prof Hugh Roff, it would depend on whether the enterprise is a monopoly or has competitors. If it has competitors, he argues that the inability to sue for defamation could put the enterprise at a disadvantage. That it might even be subject to strategic defamatory statements by competitors. If on the other hand the enterprise is a monopoly, as is the case with the plaintiff KIWASCO herein, this would not apply, and dissatisfied ‘citizens’ could only protect their interests or the public interest by criticism of the enterprise.
133. Again, applying the above principles to this case, though persuasive, and which principles can be said to have been applied in the South African Railways and Zimbabwe’s Posts and Telecommunications Corporation which involved monopolies, the plaintiff in the instant case has no competitor within its jurisdiction with private water and sanitation companies. This is evidenced by the licence certificate issued on 16th December, 2022 by the Water Service Regulatory Authority, granting the plaintiff the license and exclusive rights and obligations to provide water and sanitation services under section 90 of the [Water Act](#) and powers of enforcement against third parties as stipulated in section 146 of the [Water Act](#). The license is for a period of eight years from the date of issue. The plaintiff is wholly owned and controlled by the County Government of Kisumu and therefore as stated above, “fulfils the government’s objectives, including the provision of public or commercial services and therefore are considered a part of the country’s government; and they are subject to government control or influence.”
134. Adopting the persuasive holding in the Zimbabwean case by Devittie J, I find and hold that when a statutory corporation is subject to State control, the court would deny it the right to initiate a defamation action unless there were ‘compelling policy considerations’ in favour of allowing an action.
135. I further hold that in this case, denial of a defamation action is justified because the plaintiff Kisumu Water and Sewerage Company (KIWASCO) has a virtual monopoly in its field of trade, so, a dissatisfied citizen could not take his custom elsewhere. The only recourse is, in my humble opinion, to voice criticism, which should not be inhibited by the threat of a civil action for defamation.
136. Additionally, the plaintiff, from the Annual Audited Financial Report and Financial Statements produced in court as exhibits, which audit was undertaken by the Office of the Auditor General, a Constitutional body, it must be appreciated, receives and it did receive a government subsidy when it has/had a deficit, and in this case, it received such subsidy by way of a grant to cushion it against the covid-19 pandemic. It follows that the plaintiff’s wealth was derived directly from the citizens of this country and should not be used to fetter the right of citizens to criticise the plaintiff Company.
137. Furthermore, the criticism against the plaintiff herein by the defendants, though not so pronounced loud enough as was the case with the other named counties, in essence, emanated from the audit queries raised by the Auditor General concerning all the 47 counties and although the plaintiff was not specifically named in the impugned report, save for the use of the buildings, signage and staff by the reporter, which, off course, cannot be an excuse in defamation cases, other counties were specifically named and accused of embezzlement and corruption leading to loss of water.



138. The plaintiff produced as an exhibit, the Annual Audit Report and Financial statements as audited by the Auditor General which contained a qualified opinion on the management of the plaintiff.
139. From the Hansard Report produced as an exhibit, the person who was summoned to answer to the queries raised by the Auditor General was the Governor himself as the Chief Executive Officer of the County Government of Kisumu which owns the plaintiff Water and Sewerage Company. He personally appeared before the Senate Committee with his team including the Managing Director of the plaintiff Company and from all the proceedings, the Senate was asking the Governor to respond to the queries raised by the Auditor General then the Governor would call upon his technical team starting with the Managing Director of the plaintiff Company to respond on his behalf.
140. This position resonates well with the decision in the case of *Alberta Health Services v Johnston*, 2023 ABKB 209, 482 DLR (4th) 725, where the court held that under the common law, defamation actions could not be maintained by unelected ‘government actors’ (‘public entities functioning as government’)—in that instance, the body established by statute as the sole provider of health care in the province.
141. No doubt, the plaintiff Water and Sewerage Company is an artificial person duly incorporated but is part of the County Government of Kisumu and therefore part of the governance of the County Government of Kisumu. That is the reason for the Governor being summoned to answer audit queries concerning the plaintiff company. Accordingly, I am in agreement with and fully so, with McNally JA, of the Zimbabwe Supreme Court, in the case of *Posts and Telecommunications Corporation v Modus Publications (Pvt) Ltd* 1997 (2) ZLR 492, 499, 1998 (3) SA 1114, 1122 (ZSC), for making the basic proposition that ‘the right to sue for defamation is not available to those artificial persons which are part of the governance of the country’ and that whether the entity was a legal persona separate from the State was of very limited relevance.
142. Further, I have no hesitation in finding and holding that the criteria set by the above Zimbabwe Supreme Court case by McNally JA, especially the degree of ministerial control over the entity, the extent of its financial autonomy, whether the entity provided essential services traditionally provided by government, and whether it effectively was a monopoly provider of these services are relevant to this case making the plaintiff company an ‘organ of the State’, ‘State’ here loosely used, meaning the County Government of Kisumu, and could not sue for defamation.
143. In the end, I find that the plaintiff herein Kisumu Water and Sewerage Company (KIWASCO) being a public incorporated legal entity and an enterprise wholly owned by the County Government of Kisumu, in the circumstances of this case, had no legal standing, though registered under the [Companies Act](#), to sue for defamation. I am satisfied that the risk of a defamation suit would inhibit exercise of the right of citizens to freely criticise governments and government bodies. This right prevails and where the enterprise wishes to correct the information which it considers untrue or defamatory, it could respond to criticism by means other than litigation. It could issue media releases, convene meetings and conduct public hearings and investigations and might publish statements protected by privilege.
144. To do otherwise would in my view, inhibit the right of citizens to criticise an inefficient or corrupt government for fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved, he shall have the right to speak his mind freely.



145. I further find that to treat governmental institutions as having a ‘governing reputation’ which the common law will protect against criticism on the part of citizens is, to my mind, incongruous. I say so because any capacity of the law of defamation to deter or remedy politically damaging falsehoods will be through the actions that can be brought by other plaintiffs including specific individual officials of the state enterprise who may have been defamed and not the enterprise itself.
146. Accordingly, having found that the plaintiff could not maintain an action for defamation, I shall not delve into the other issues identified for determination.
147. In the end, I find that the plaintiff had no cause of action against the defendants herein. The suit is hereby struck out with an order that each party shall bear their own costs of the suit, observing that the defendants did not call any witness.
148. This judgment to be uploaded on the Case Tracking system forthwith and published on the e-portal.
149. This file is closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY FROM NAIROBI VIA MICROSOFT TEAMS
THIS 20TH DAY OF JANUARY, 2025.**

R.E. ABURILI

JUDGE

