



**Wakhayanga v Kiplagat & another (Civil Suit E040 of 2024)
[2025] KEHC 121 (KLR) (Civ) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 121 (KLR)

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

CIVIL

CIVIL SUIT E040 OF 2024

RC RUTTO, J

JANUARY 17, 2025

BETWEEN

JUMA OLUNGA WAKHAYANGA PLAINTIFF

AND

SAM KIPLAGAT 1ST DEFENDANT

NATION MEDIA GROUP LIMITED 2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated 27/2/2024, the Plaintiff seeks the following reliefs:
 - a. General damages for libel;
 - b. Exemplary, punitive and/or aggravated damages;
 - c. Compensation for loss of business suffered due to the defamatory statements;
 - d. An order that the Defendants make a full and unqualified apology, amend and withdraw the said publication and such an apology, amendment or withdrawal be given the circulation similar to the complained of publications in the alternative to prayer (d) hereinabove a proportionate monetary compensation in lieu of the apology, amendment or withdrawal.
 - e. Costs of the suit.
 - f. Interest on (a) and (b) above at court rates.
 - g. Any further or alternative relief as this Honourable court may deem fit and just.
2. The Plaintiff states that on 23rd October 2023, the Defendants, with the 1st Defendant being an author for the 2nd defendant, a limited liability company specializing in publishing Business Daily newspaper,



published an article in both the print edition of the newspaper and on their online platforms, titled, "Court Orders Seizure of 12 Vehicles in Narcotics Investigation." It is alleged that the article, outlined below, contained defamatory statements concerning the Plaintiff.

"Court orders seizure of 12 vehicles in narcotics investigation.

The High Court has allowed a state agency to seize 12 vehicles suspected to be proceeds of crime, pending the conclusion of investigations into the source of the cars.

Justice Nixon Sifuna further allowed an application by the Assets Recovery Agency (ARA) prohibiting Juma Olunga Wakhanyanga from withdrawing or transferring Kshs 2.5 million from one of his personal accounts, pending the conclusion of the probe.

The Judge directed the Director-General of the National Transport and Safety Authority (NTSA) to register caveats on the vehicles.

He also directed Mr Wakhanyanga to take the high-end vehicles to the Directorate of Criminal Investigations (DCI) headquarters on Kiambu Road, where they will be held until the case is determined.

"I am satisfied that this is a case that warrants the preservation orders as sought", the judge said.

The agency, through Mohammed Adow, said they conducted investigations on the man after his brothers, Hussein Otita and Daniel Got were charged with trafficking in narcotic drugs.

Mr Adow informed the court that they suspect that the Motor Vehicles are part of the proceeds and Mr Wakhanyanga might be involved in the syndicate that deals in narcotic drugs.

He said they investigated his bank accounts and discovered large sums of money being credited to his personal account. When asked to explain the source of the funds, the suspect said they were from his salary, savings and consultancy fees but failed to give supporting documents.

The Court heard that between May last year and September 19, 2023, the said account had been credited with Kshs 63.4 million and debits of Kshs 60.9 million. The case will be mentioned on January 23, 2024."

3. The Plaintiff claims that the article purportedly reported on court proceedings held on 19th October 2023, involving an ex parte application brought under a Certificate of Urgency by the Assets Recovery Agency, (ARA) dated 18th October 18 2023, before Hon. Justice Nixon Sifuna. According to the plaintiff, the proceedings of October 19, 2023, were as follows: -

Before Hon. Justice Prof (Dr.) Sifuna (J)

C/A- Adan

Court:

The Application by the Asset Recovery Agency dated 18/10/2023 coming before me today, 19/10/2023, for hearing under a Certificate of Urgency, orders are hereby issued as follows:

1. The Application is hereby certified as urgent.



2. Upon reading the Application's prayers and grounds as well as the Supporting Affidavit of Duncun Odhiambo, the agency's investigating officer, I am satisfied that this is a case that warrants preservation orders.
3. Preservation orders are therefore hereby granted in terms of prayer (2), prayer (3), prayer (4), prayer (5) and prayer (6) of the Application
4. These preservation orders shall subsist for ninety (90) days from today.

This matter shall be mentioned on 23/1/2024

4. The Defendants, despite being served, failed to enter appearance within the stipulated time and upon request by the plaintiff's advocates an interlocutory judgment was entered on 2nd July 2024 and the suit proceeded for formal proof.
5. The Plaintiff testifying as PW1, adopted his witness statement as his evidence in chief. He described himself as a qualified and licensed Orthopedic and Trauma Surgeon employed by the Kiambu County Government and stationed at Tigoni Level 4 Hospital. He also serves as a consultant for various private hospitals. He stated that he received a phone call from one Dr. Festus Ndunda Mutunda, who informed him about the publication by the Defendants. That the publication was disseminated on all the Defendants' social media platforms, including X (formerly Twitter), and their website. The Plaintiff contends that the publication subjected him to shame, disgrace, and disrepute among his colleagues, friends, family and villagers. He stated that during a gathering he hosted in his village on 25th December, 2023, one Mr. David Okama Malala informed him that rumors were circulating about his alleged involvement in illegal drug trafficking.
6. The Plaintiff avers that the publication falls short of a fair and accurate report of the court's proceedings in Nairobi High Court Anti-Corruption and Economic Crimes Miscellaneous Application No. E037 of 2023. That the same was false and actuated by malice, recklessness and not based on any factual considerations but meant to disparage the plaintiff's reputation.
7. He sets out the following particulars of malice and recklessness; obtaining and reporting private ex-parte proceedings contrary to the established principles of law, fabricating the proceedings of the court, falsifying and or inaccurately reporting the proceedings of the court to paint him in bad image as a person involved in drug trafficking; failing to verify the reports accuracy before publication; aggravating the defamation by publishing the statement through the online page post with considerable public exposure.
8. The Plaintiff testified that the Defendants' statements were intended to harm his professional reputation and practice as a reputable Orthopedic and Trauma Surgeon. That the statements amounted to serious libel and have caused him irreparable harm, distress, and embarrassment among his family, professional peers, and the community. Further, that the publication has raised concerns about his ethical standing within his professional circle, resulting in him receiving a notice to show cause letter from one of the hospitals where he consults, as well as a reduction in his income.
9. The Plaintiff called two other witnesses. PW2, Dr. Festus Ndunda Mutinda, an Orthopedic and Trauma Surgeon, who testified that he came across the publication under the "Crime" section, bearing the banner headline: "Court orders seizure of 12 vehicles in narcotics investigation." He stated that he raised concerns about the content of the publication with the Plaintiff, describing it as demeaning and undeserving of someone of the Plaintiff's stature in society. According to his testimony, the allegations of involvement in drug trafficking severely damage a person's reputation among colleagues, making it unlikely for any hospital to associate with such a practitioner.



10. The third witness, PW3, Mr. David Okana Malala, a long-time acquaintance of the Plaintiff, testified that he knew the Plaintiff as a reputable Orthopedic and Trauma Surgeon of good character and standing in society, whose integrity is beyond reproach. He stated that on 25th December 2023, during a celebration hosted by the Plaintiff, as is his annual tradition, he overheard some attendees gossiping that they were there to enjoy the illegal money the Plaintiff allegedly earned from narcotics trafficking, in collaboration with his brother. Upon confronting them, one of the villagers browsed the internet and directed him to the publication. PW3 further testified that the publication has significantly harmed the Plaintiff's reputation, portraying him as someone unable to account for the source of his wealth.
11. The Plaintiff also relied upon their submissions are dated 2/9/2024 in which they set out three issues for determination:
 - (a) whether the publication is defamatory to the Plaintiff;
 - (b) whether the publication constitutes fair and accurate reporting of court proceedings; and
 - (c) whether the Plaintiff is entitled to the remedies sought.
12. On the issue of whether the publication is defamatory to the Plaintiff, relies on the cases of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR and *Elisha Ochieng Odhiambo v Booker Ngesa Omole* [2021] eKLR to define a defamatory statement. He submits that, in discharging his burden of proof on defamation, he called two witnesses to testify. He further contends that the defamatory words were published in both the print edition of *Business Daily* on 23rd October 2023, and across all the Defendants' online platforms. The Plaintiff asserts that the publication referred to him by name, and that his colleagues, friends, and family members readily identified him as the person mentioned in the article.
13. On the issue of whether the publication constitutes fair and accurate reporting of the court proceedings, the Plaintiff relies on Section 6 of the *Defamation Act*, Cap 36, Laws of Kenya. He submits that the defense of absolute privilege, is unavailable to the Defendants since the publication does not confine itself to the proceedings and pleadings before court on the 19th October 2023 and that the publication contained false and inaccurate information that was malicious and deliberately intended to reign the Plaintiff name and image.
15. He relies on the case of *Rodgers Abisai t/a Abisai & Company Advocates v Wachira Waruru & Another* [2006] eKLR to urge that the defense of absolute privilege does not apply when additional information is obtained through other means than the argument.
16. The Plaintiff urges that the integrity of the publication must be measured against the evidence. He submits that the claim that the court directed him to take high-end vehicles to the Directorate of Criminal Investigations (DCI) headquarters is false, as the vehicles in question are small cars used for taxi business, not luxury vehicles as reported; that the amount subject to the court order was Kshs 2,483,219.90 and not Kshs 2.5million reported; that the statement asserting that the agency, through one Mohammed Adow, conducted investigations on him after his brothers, Hussein Otita and Daniel Got, were charged with trafficking narcotic drugs, is false. He emphasizes that there is no record in the court proceedings showing that a person identified as Mohammed Adow was on record for the agency, and that the only one of the persons charged with drug trafficking was his brother.
17. Additionally, the Plaintiff disputes the publication that when asked to explain the source of the funds, he stated they were from his salary, savings, and consultancy fees but failed to provide supporting



documents. He clarifies that the matter was heard *ex parte*, and he did not have the opportunity to explain the source of the funds. He asserts that the funds in question were payments made to him as consultancy and surgeons' fees by various hospitals.

18. On the issue of whether he is entitled to the remedies sought, the Plaintiff urges the court to consider that; the defendants acted maliciously and recklessly which affected his standing as an orthopedic and trauma surgeon; no apology has been offered; the publication damaged his repute and he received a notice to show cause letter from one of the hospitals he consults for; he has lost business with some of the hospitals he consulted for leading to reduced income and that the defamatory words continue to be accessed through the online platform.
19. He also urged the court to be guided by the case of *Ken Ododi & 2 others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR. In light of this, the Plaintiff prays that this court grants the claim as prayed and award general damages of Kshs 20,000,000 and aggravated damages of Kshs 5,000,000.

Analysis and Determination

20. I have reviewed the plaintiff's pleadings by the plaintiff, the evidence presented in support of the case and submissions made in favour of the case, I identify two issues for determination namely: -
 - a. Whether the published article was defamatory
 - b. Whether the Plaintiff is entitled to the orders sought
21. In addressing these issues, I note that, although the case is undefended, the plaintiff still bears the burden of proving their case on a balance of probabilities as outlined under sections 107, 108 and 109 of the *Evidence Act*. Thus, the burden of proof lies with the person who wishes the court to believe in the existence of a particular fact, and that he who asserts a fact must prove it. In this case, therefore, the burden of proving that the alleged publication was defamatory rests on the Plaintiff.
22. The test to determine whether a statement is defamatory is an objective one which depends on what a reasonable person on reading the statement would perceive. Halsbury's Laws of England 4th Edition Volume 28 states at Page 23 states:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”
23. The elements of defamation have been outlined in numerous cases. I am therefore guided by Court of Appeal in case of *Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008* as well as the authority referred to me by the Plaintiff in his submissions that is, *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR all of which provide a summary of the essential elements required to establish a suit based on defamation. These are;
 - (i) The statement must be defamatory.
 - (ii) The statement must refer to the plaintiff.
 - (iii) The statement must be published by the defendant.
 - (iv) The statement must be false.



24. Applying these principles to the facts of the present case, it is the Plaintiff's uncontroverted position that the Defendants are the known authors of the publication alleged to be defamatory. The genesis of the alleged defamatory statement is the publication arising out of the court proceedings in Nairobi High Court Anti-Corruption and Economic Crimes Miscellaneous Application No. E037 of 2023 which the plaintiff avers fell short of a fair and accurate report of the court's proceedings.
25. To support its claim, the appellant has produced a newspaper print out 23rd October 2023 of the alleged publication titled court order seizure of 12 vehicles in narcotics investigation. Also produced is a letter to the Deputy Registrar dated 7th February 2024 requesting for the perusal of HCCACEMISC E037 of 2023 (Nairobi) Assets Recovery Agency vs Juma Olunga Wakhayanga as well as the Asset Recovery Agency's (ARA) Notice of Motion Application dated 18th October 2023.
26. While the letter requests a perusal of the court file, the Plaintiff has failed to produce evidence to confirm the actual proceedings that took place in court on the alleged dates. Furthermore, the copies of the notice of motion application produced as part of the Plaintiff list of documents No. 7, neither references an allocated court file number nor indicates that it was derived from the court's actual proceedings.
27. Be it as it may, a keen perusal of the Notice of motion application shows that the ARA filed its application under certificate of urgency, seeking the orders summarized as;
 - a. preservation orders for Kshs.2,483,219.91 held in account 01108042621500 in the name of the plaintiff herein;
 - b. preservation orders prohibiting the sale, transfer or disposing off or other dealings of 12 listed motor vehicles;
 - c. the surrender of original log books of the listed motor vehicles;
 - d. surrender of the listed motor vehicles to be assembled at the DCI headquarters;
28. The grounds supporting the application included; two suspects were charged with the offence of trafficking in narcotics and drugs contrary to section 4(a)(ii) of the Narcotic Drugs and Psychotropic Substance (control) Act and the motor vehicle seized with drugs was registered in the plaintiff's name; ARA suspected the plaintiff to be part of the syndicate involved in trafficking of narcotics and psychotropic drugs; that the ARA investigated the plaintiff pursuant to warrants to investigate issued and found that the plaintiff held a personal savings account at cooperative bank limited which received large sums of credits from unknown source(s) and the plaintiff could not give a clear description of the sources of funds as he only stated that the funds are from his salary, personal savings and consultancy fees which he has not produced any evidence to support; that the account received suspicious funding; there was massive suspicious credits, withdrawals and transfers in suspicious complex money laundering schemes; there are reasonable grounds to believe that the plaintiff's accounts are of a questionable nature and the motor vehicles are being used as conduits of money laundering in an effort to conceal and disguise the nature, source, disposition and movement of the illegitimately acquired funds.
29. From the evidence, the Plaintiff does not deny the existence of the investigations or the case in which his brother is associated with dealings in narcotics. It is also evident that the subject of the proceedings is the Plaintiff's assets being the account held at cooperative bank and several motor vehicles. The point of departure and which aggrieves the Plaintiff is that the reporting contains some falsehoods including the description of the vehicles as high end, and the Plaintiff's failure to justify the source of income,



which the Plaintiff maintains is from his practice as a surgeon and consultant and the identity of the person who acted for ARA towards obtaining the preservation orders.

30. The court is not privy to the status of the proceedings in HCCACEMISC E037 of 2023 (Nairobi) Assets Recovery Agency vs Juma Olunga Wakhayanga. The court nevertheless notes that there are active proceedings before a court of concurrent jurisdiction. This court is therefore not in a position to call for the file, review or in any manner take action in respect of proceedings before another court. However, on a balance of probabilities, the fact that a preservation order was issued points to a prima facie case having been established by the ARA.
31. Based on the foregoing, this court finds that ARA in the course of investigating a syndicate involving narcotics drugs moved the court seeking to preserve properties associated with the plaintiff and that the publication was carried out in the normal course of the defendant's operation and are not defamatory as alleged by the plaintiff. Without trivializing the need for responsible journalism and the sanctity of the court proceedings and record at all times, the sensationalisation and or misreporting as alleged by the Plaintiff of the court process is a matter that can be best handled by the court seized with the actual facts. In the premises, the Plaintiff remains at liberty to pursue the same before that court.
32. In *James Karuga Kiiru v Joseph Mwamburi & Others* [2001] eKLR

“...The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. ...I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious.. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.”

33. In my view, making a conclusive finding of defamation over matters that are subsisting elsewhere before a legal process at this stage will not only be premature but may result in an unnecessary absurdity with a potential embarrassment of the proceedings before the Anti-Corruption and Economic Crimes Division of the High Court. There remain avenues through which the Plaintiff can assuage his grievance at the appropriate time. As the Plaintiff rightly noted, the case was at the ex parte stage. This means that at the opportune time, each of the parties including the Plaintiff will have the opportunity to clear the air and put the facts right before the court with the possibility of absolving the Plaintiff altogether.

I therefore find that the Plaintiff has failed prove its case on a balance of probabilities, and proceed to dismiss the claim.

34. However, in the event that I would have agreed with the Plaintiff and found in his favour, what would be may assessment of damages? The Plaintiff sought Kshs.20,000,000 in general damages and Kshs.5,000,000 in aggravated damages. In defamation cases, the Court of Appeal, in *Standard Limited V G.N Kagia T/A Kagia & Company Advocates*, Civil Appeal No.115 of 2003, set out the following principles to be applied in awarding damages:-

- “1) In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or



publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages.

- 2) The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.”

35. In the case of *John v MGM Ltd (1997) Q.B 586* the English Court of Appeal said in part at page 607 paragraph held:-

“In assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.”

36. I note that the Plaintiff described himself as a qualified and licensed Orthopedic and Trauma Surgeon employed by the Kiambu County Government and stationed at Tigoni Level 4 Hospital. He also serves as a consultant for various private hospitals. In looking at the above parameters the Plaintiff stated that he not only lost standing in his home area where he regularly hosts guests, but he also among his colleagues. The Plaintiff pointed out that the publication still subsists online where it remains accessible at all times. Taking this into account the circumstances and guided by the case of *Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR* where an Kshs.5,000,000 was awarded as general damages, I would award the same figure.

37. As for aggravated damages, I am guided by the edict in *John v MG Limited [1997] QB 586*:

“Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.

38. Consequently, I would have been disinclined to award aggravated damages particularly in view of the stage at which the suit was instituted and the extent of falsehoods as reported. In the end, I do not find merit in the suit and proceed to dismiss the same with no order as to costs, the Defendants not having participated.

Orders accordingly

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF JANUARY 2025

RHODA RUTTO

JUDGE

For Plaintiff:

For Defendants:

Court Assistant:

