



REPUBLIC OF KENYA



Mutua v Mbuti (Civil Case 97 of 2010) [2024] KEHC 3679 (KLR) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3679 (KLR)

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

CIVIL CASE 97 OF 2010

AN ONGERI, J

APRIL 2, 2024

BETWEEN

ERICK KYALO MUTUA PLAINTIFF

AND

STEPHEN KING'OO MBUTI DEFENDANT

JUDGMENT

1. The plaintiff in this case filed the plaint dated 17/2/2010 seeking the following remedies against the defendant;
 - i. General damages defamation.
 - ii. Aggravated and exemplary damages
 - iii. Costs of the suit and interest.
2. The plaintiff avers in the plaint dated 17/2/2010 that on or about 26th January 2010 the Defendant falsely, maliciously, contemptuously and disparagingly printed and published of and concerning the Plaintiff the following words and or statement;

“I have taken the necessary pains to follow this issue analytically and I have come to the conclusion that Mr. Eric Kyalo Mutua (the lawyer) is the main suspect and he should be appropriately investigated and arraigned in a court of law..... At that time Mr. Mutua knew that MRI- did not have 5000 acres to sell to the government as all the MRI land had been allocated to individual members. Mr. E. K. Mutua paid his company E. K. Mutua & Co. Advocates a legal fees of Kshs.28,000,000/=..... Mr. E. K. Mutua drew a brokerage agreement between Gateways Logistics Ltd and MRI whereby MRL was to pay Gateway Logistics Ltd. Sales commissions of Kshs.286,000,000Mr. E.K. Mutua paid the three directors of MRI- the Kshs 143,600,000/= which they are alleged to have embezzled



I get the impression that there was a collusion between Mutua, Gateway Logistics People, other government officials e.g. the AG Chambers officials, the 3 PSS, some Kamba M.P. . .

3. The Plaintiff further averred that he would at the hearing of this suit seek leave of the court to produce the said letter, for its full effect, meaning and tenor.
4. In the particular of malice and falsehood, the plaintiff averred in the plaint as follows;
 - a. That the Defendant wrote the said letter well aware that it contained misleading and false information.
 - b. That the Defendant had on several occasions written other defamatory letters on the same subject matter.
 - c. That the Defendant and others had filed HCCC NO. 2 OF 2010 MACHAKOS seeking to stop the sale of the subject matter but failed to prosecute it. The Plaintiff applied on behalf of Mañili Ranch Ltd for security and costs in the said suit.
 - d. That the said statement in its entirety is deliberately and well calculated to inflict the greatest possible harm, damage, injury and ridicule, contempt and hatred on the Plaintiff both in his own personal capacity and in his calling as an Advocate.
 - e. That the statements have no basis in fact.
 - f. That the Defendant's interest was to have fresh elections held for the Directors of Malili Ranch Ltd where he could have an opportunity to contest.
5. The plaintiff also averred that the said letter was published to the Director of CID, Hon. Kibaki, Hon. Raila, Hon. Mutula Kilonzo, Religious Leaders, Hon. Kalonzo Musyoka, Hon. Ngilu, Hon. Amos Wako, the Law Society of Kenya, The Kenya Anti-Corruption Commission The Police Commissioner and members of Malili Ranch Ltd.
6. Further that on their natural and ordinary meaning the aforesaid complained of statement and publications meant and were understood to mean inter alia that;
 - a. The Plaintiff is a dishonest lawyer.
 - b. The Plaintiff is a fraudulent person.
 - c. The Plaintiff had committed a criminal offence.
 - d. The Plaintiff was guilty of professional misconduct and had knowingly defrauded the Government of the Republic of Kenya.
 - e. The Plaintiff was morally unfit to hold any office and could not be trusted to deal honestly in his practice as an Advocate.
7. Further or in the alternative and without prejudice to the foregoing the said words meant and were understood to mean by way of insinuation and innuendo that;
 - a. The Plaintiff had conspired with the directors of M/S Malili Ranch Company Ltd to defraud its shareholders.
 - b. That the Plaintiff had facilitated the embezzlement of the company's funds by its directors.



- c. That the Plaintiff had unjustly enriched himself from monies belonging to the shareholders of M/S Malili Ranch Company Ltd.
8. By reason of the aforesaid the Plaintiff's reputation, integrity, personality and credibility both personally and as an Advocate in his calling and office has been seriously and irreparably injured and he has suffered considerable distress, and extreme embarrassment, and he has also been brought to public scandal, hatred, contempt, suspicion, odium and the Plaintiff claims aggravated, exemplary and general damages against the Defendant.
 9. Further, the Defendant published the said words calculating thereby to cause maximum damage to the Plaintiff's professional career and standing by circulating the same to numerous public officials which offices the Plaintiff interacts with in the course of his legal practice, including the Law Society of Kenya, The Minister for Justice and Constitutional Affairs, The Police Commissioner, The Director of Criminal Investigations Department, The Kenya Anti-corruption Commission, The Minister for Water, The Vice-President, Prime Minister and the President of the Republic of Kenya, with a view to soiling the Plaintiff's professional standing in the eyes of the concerned public officials.
 10. The defendant filed a defence dated 9/5/2013 denying the plaintiff's claim.
 11. The case proceeded for hearing on 30/8/2016. The plaintiff who testified as PW 1 adopted his witness statement dated 21/1/2011 as his evidence.
 12. The plaintiff said in his written statement that on the 26h January, 2010 the defendant falsely, maliciously and contemptuously printed and published defamatory information on and concerning him.
 13. That the said information insinuated that the plaintiff had acted dishonestly and unscrupulously in his practice as an advocate in a matter involving his client Milili ranch Limited.
 14. The information further stated that the plaintiff had colluded with Gateway Logistics' personnel, some government officials and some Kamba Members of parliament to defraud the government of Kenya.
 15. Further that the defendant was opposed to the sale of the land in question and he made several attempts in trying to stop the said sale, for instance he and others filed HCC NO. 2 of 2010 MACHAKOS seeking to stop the sale but he was not able to prosecute it and therefore the sale was effected.
 16. That the defendant was interested in the leadership of Milili Ranch Ltd and was looking for an opportunity to contest as one of the directors.
 17. The plaintiff produced a bundle of documents as exhibits and said in his evidence in court that he is an advocate of the High Court of Kenya having been admitted to the bar in 1995.
 18. He said at that time of filing this suit, he had practiced for 22 years and he was the immediate president of Law Society of Kenya.
 19. At the time of testifying he was the president of the Panafrican Lawyers Union (PALU) and a council member of Legal Education.
 20. The plaintiff said the defendant authored the impugned letter dated 26/1/2010 which the plaintiff produced as Pexh 1.
 21. He also produced a plaint in Machakos HCCC no. 2 of 2010 and a ruling delivered in Nairobi CMCC No. 2141 of 2009 and a sale agreement dated 7/6/2009.
 22. The plaintiff said the defendant said in the letter that the plaintiff committed criminal offences.



23. Further that the defendant alluded that the plaintiff had unlawfully made payments to various 3rd parties and that he had colluded with the directors of Malili Ranch and with three permanent secretaries and some unnamed Kamba leaders to defraud Malili Ranch.
24. The plaintiff said Malili Ranch was his client and that he acted for them in the sale of the Ranch and he distributed the proceeds of the sale transaction as instructed by his client.
25. The plaintiff said the offending letter was written to the late president Mwai Kibaki, Raila Odinga, the late Hon. Kilonzo, Hon. Kalonzo Musyoka, Hon. Charity Ngilu, Hon. Amos Wako, KACC, the police commissioner and LSK.
26. The plaintiff said Malili Ranch did not make any allegations against him.
27. He said the letter was also dropped in his office and it gave him a lot of pain.
28. In cross examination the plaintiff said he was acting for the sellers of the land Malili Ranch.
29. He said the land was measuring 5000 acres and it was sold for 1 billion.
30. He denied colluding with the directors to fraudulently sell the land. He said he had no idea that the land been allocated to individual members.
31. The plaintiff further said in cross examination that the purchase price was paid in two instalments ksh.400,000,000 and ks.600,000,000.
32. He said the case challenging the sale was still pending in court at the time he filed this suit.
33. The plaintiff further said in cross examination that the allegation that the sale was fraudulent was the subject of HCCC 2 of 2010.
34. He said two directors were acquitted in CMCC no 2141 of 2009.
35. He said his services were terminated by Malili Ranch Ltd.
36. The plaintiff denied that he paid Kamotho Waiganjo any money.
37. The defendant testified as DW1 and said in his evidence in court that he is a member of Malili Ranch Limited(MRL).
38. He said they bought a piece of land measuring 22,686 acres in Makueni County from major Joyce, a white settler in 1976.
39. That the members of Malili Ranch Ltd elected a board of directors to run the ranch.
40. That the affairs of the ranch started to nose dive because of corruption.
41. He said that the directors stole the money of the ranch and used it for their own interests.
42. In 2004, DW1 said they held an AGM where they passed a resolution to have the land subdivided and shared out and do away with the directors.
43. In 2006, the whole shamba was subdivided and each member was allocated a plot.
44. Each member was given 7.8 acres agricultural plot and a commercial plot measuring 80ft x 100ft.
45. DW1 said that they were given allotment letters with plot numbers and that they were physically shown their specific plots.



46. On 17.6.2009, Eric Kyalo Mutua(the plaintiff herein) and 2 directors signed a sale agreement with the Ministry of Information and Communication for a sale to it of 5,000 (five thousand) acres. DW1 produced a copy of the agreement which was marked as DExh.1.
47. He said that the members of MRL do not know where the 5,000 acres came from yet the whole shamba had been subdivided and given to 641 members and that it was a fraudulent sale.
48. DW1 said that the sale for over one (1) billion shillings, was done without the knowledge and consent of the 641 members.
49. The aforesaid amount was paid in two instalments. The first payment of Kshs 400 million was made in June 2009 and the second payment of Kshs 600 million was paid in January 2010.
50. A court order was obtained in January 2010 stopping further payments, but since the order was not served, the money was paid out.
51. After receiving the one billion shillings, Mr Mutua colluded with other directors to pay the members whose land was fraudulently sold.
52. Mr Mutua told those people that the land had been compulsorily acquired, and therefore they had an option to take the money or leave it.
53. DW1 also said that his nephew Stephen Musinga was given only Kshs 300,000/= instead of Kshs 1,500,000/=.
54. The land is the one called Konza ICT Center (city).
55. DW1 said he wrote a letter to the director CID accusing Mr Mutua. This prompted Mr Mutua to file this defamatory suit.
56. DW1 admitted that he spoke the words stated in paragraph 4 of the plaint and that he got a 16 page report from the CID which proved that he was right.
57. DW1 said he told the whole truth and he gave the details of the case in his letter dated 27.1.2018 written to the DPP and he produced the letter as Dexh.2.
58. He said a criminal case 2141/2009 was preferred against some directors, but Eric Kyalo Mutua was not charged in the case.
59. DW1 asked the court to dismiss this case as it lacks basis in law and he asked for the costs of the suit.
60. The defendant called two witnesses, DW2, Stephen Mutuku Masaku and DW3, Philip Muli Munyaka who testified in support of his case.
61. DW2 said he was also a member of MRL and he produced documents which were given to him by Malili Ranch Ltd namely;
 - i. Allotment dated 27.7.2006.
 - ii. Copies of cheque for (a) Kshs 900,000/= dated 5/2/2010. The cheque was issued by Eric Kyalo Mutua & Co Advocates. (b) Kshs 200,000/= dated 5/2/2010 also issued by the same law firm of Eric Kyalo Mutua & Co Advocate.
 - iii. Share certificate of Malili Ranch Ltd.
62. DW2 said that the plaintiff was the company advocate for MRL while he, (DW2) was a shareholder.



63. DW2 also said that the plaintiff colluded with the company directors and sold MRL land without involving the shareholders.
64. DW2 was allocated 7 ½ acres and that they were just told to go and collect money.
65. He said that they were told the government had offered to purchase the land at kshs 200,000/= per acre.
66. He said he ought to have been paid kshs 1,560,000/= for 7 ½ acres.
67. DW 2 further insisted that there was a fraud notwithstanding, he was underpaid by the advocate by Kshs 460,000/=-, and that he and other shareholders decided to sue the government in an on-going case.
68. DW2 said that they were threatened by the directors that if they do not take the money, they would equally lose the land.
69. Upon cross-examination, DW 2 stood by his evidence that Malili Ranch was fraudulently sold by the directors without the consent of the shareholders.
70. DW3, Philip Muli Munyaka said that he comes from Kangundo in Machakos district (County) and further that he is member No.2499 in Malili Ranch Ltd.
71. DW3 said that the shareholders of Malili Ranch Ltd passed a resolution in 2004/05 to have the farm registered as Malili Ranch subdivided and given to members.
72. In 2006 the land was subdivided and allotted to all members.
73. DW3 with other members moved to their plots to carry out individual developments.
74. Later, they were told that the land had been sold by the directors in collusion with their advocate Eric Kyalo Mutua.
75. In 2009 they were called for an extraordinary meeting to discuss issues relating directors who were fighting in court.
76. After directors namely Peter Kanyi (Chairman) and Julius Kilonzo (Secretary General) were released from custody on bail they called for a meeting where they told shareholders that the land had been sold to the government.
77. We were told that 5,000 acres were sold at 200,000/= per acre totaling to Kshs one billion.
78. The directors gave them the cheque of kshs 400,000/= as part payment for the purchase of the land.
79. DW3 said they were also shown a cheque for kshs 9.18 million paid to the former chairman (Munuve).
80. The former secretary had received kshs 16 million.
81. They told them they were arrested because of those cheques.
82. The director told them that the money was deposited in the account of Eric Kyalo Mutua.
83. They passed a resolution to sack Eric Mutua as their company advocate and also passed a resolution that the balance of Kshs 600 million should not be released.
84. DW3 said that they filed a case in court led by Stephen Kingoo Mbuti and the court issued injunctive orders halting further payments.
85. We further filed a complaint with the DCI and realized that the money had been released.



86. DW3 said that they appointed Stephen Kingoo Mbuti to lead us. He has not defamed Eric Mutua, but has instead told the truth.
87. Upon cross examination DW 3 stated that the order they had obtained against the government was not served and hence the money was released to Eric Mutua.
88. DW 3 said that though they were disappointed in Mr Alphonse Mutinda advocate who had represented them, they did not file any complaint against the said advocate.
89. The parties filed written submissions as follows; the plaintiff submitted that it is not in dispute that the letter dated 26/1/2010 was published by the defendant and that it refers to the plaintiff as it mentions him by name. the defendant did not deny publishing the letter but raised a defense of truth and justification.
90. The plaintiff argued that by calling for him to be investigated by the Directorate of Criminal Investigations (DCI) and arraigned in a Court of law; and, insinuating collusion between the Plaintiff and other third parties in the transaction. The letter was defamatory in that the words in the letter were construed by the ordinary person that;
 - a. The Plaintiff was possibly a dishonest lawyer;
 - b. The Plaintiff was possibly a fraudulent person;
 - c. The Plaintiff had possibly committed a criminal offence;
 - d. The Plaintiff was guilty of professional misconduct and had knowingly defrauded the Government of the Republic of Kenya;
 - e. The Plaintiff was morally unfit to hold any office and could not be trusted to deal honestly in his practice as an Advocate.
91. On whether the offending words were false or maliciously written by the defendant, the plaintiff argued that the impugned letter itself and more so the comments made addressed to the people copied to the letter concerning the Plaintiff was done in a sensational manner.
92. Further, that the language used was disproportionate to the facts. The defendant did not seek the plaintiff's comments or his side of the story before writing the offending letter. The Defendant's action or conduct in writing the offending letter was punctuated with malice which can be inferred from language used and implication of the said words.
93. The plaintiff noted that to date, the Plaintiff has never been charged with any criminal offence in connection with the sale of 5000 acres by Malili Ranch Limited to the Ministry of Information and Communication wherein he acted for the company; or at all.
94. Further, that the Plaintiff has never been sanctioned at all by the Law Society of Kenya or any other professional body in relation to his conduct in the transaction mentioned. Therefore the defendant failed to substantiate his allegations pursuant to section 107 of the Evidence Act.
95. In support the plaintiff cited the case of Hon. Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR where the Hon. Lady Justice Rawal J (as she then was) observed the information that causes the



defamation, will be assumed to be untrue until the defendant proves otherwise. The learned judge held that:-

“....While taking defence of justification or qualified privilege in the Defamation Case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the Defendant.....”

96. The plaintiff submitted that the test of whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it. The Plaintiff has repeatedly uttered the words that the Plaintiff “is corrupt and he stole Billions of shillings” intended for the Members of Malili Ranch Limited. The words complained of were copied and read by other persons besides the Director of Criminal Investigations to whom the letter was addressed.
97. The plaintiff submitted that a reasonable man reading the letter would have understood that the Plaintiff is a dishonest lawyer, a fraudulent person, morally unfit to hold any office and could not be trusted to deal honestly in his practice as an Advocate and that he conspired with the directors of Malili Ranch Limited to defraud shareholders, embezzlement of the Company’s funds by its directors and he unjustly enriched himself from monies belonging to the shareholders of Malili Ranch Limited.
98. The plaintiff contended that he is therefore entitled to General, exemplary, aggravated and punitive damages. On general damages the plaintiff proposed an award of Kshs 10,000,000 and in support cited among others Nation Media Group Ltd & 2 Others vs. John Joseph Kamotho & 3 others (2010) eKLR wherein Kshs. 6,000,000.00 was awarded as general damages and Kshs. 1,000,000.00 as aggravated damages.
99. On aggravated punitive and exemplary damages the plaintiff proposed an award of Kshs 3,000,000 and in support cited the case of Nation Media Group v Chirau Ali Mwakwere [2009] eKLR to submit that an award of aggravated damages in the sum of Kshs. 1,000,000.00 is sufficient given the circumstances.
100. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
101. The issues for determination in this suit are as follows;
 - i. Whether the defendant defamed the plaintiff in the impugned letter dated 26/1/2010.
 - ii. Whether the defendant has a valid defence against the plaintiff’s claim.
 - iii. Whether the defendant is liable to pay the plaintiff the damages he is seeking.
102. On the issue as to whether the defendant defamed the plaintiff, the elements of defamation are as follows;
 - a. That the statement tends to lower the Plaintiff’s reputation in the estimation of right-thinking members of society generally either in their natural and ordinary meaning or by innuendo;
 - b. That the statement refers to the Plaintiff;
 - c. That the statement was published by the Defendant; and
 - d. That the statement is false and/or malicious.
103. The plaintiff said that the impugned letter was published to the Director of CID, Hon. Kibaki, Hon. Raila, Hon. Mutula Kilonzo, Religious Leaders, Hon. Kalonzo Musyoka, Hon. Ngilu, Hon. Amos



Wako, the Law Society of Kenya, The Kenya Anti-Corruption Commission The Police Commissioner and members of Malili Ranch Ltd.

104. However, the plaintiff did not call any witnesses to confirm that the letter was indeed sent to them by the defendant.
105. The defendant did not deny that he wrote the impugned letter dated 26/1/2010 and that it referred to the plaintiff.
106. The defendant and his two witnesses maintained that the contents of the letter dated 26/1/2010 are true.
107. The defendant having admitted that he wrote the impugned letter and having raised the defence of justification is duty bound to prove that he has a valid defence against the plaintiff's case.
108. The defendant said that he was seeking help in having the matter of the sale of Malili Ranch investigated by relevant agencies.
109. There is evidence that the directors of Malili Ranch were arrested in connection with the sale of the land without the knowledge of the members and that the plaintiff was acting for the directors.
110. The defendant together with his two witnesses said that the plaintiff colluded with the directors to sell the land belonging to Malili Ranching Ltd where they were members.
111. The plaintiff was the one who paid the members the proceeds of the sale and there is evidence that some of the members were underpaid and further that they were not consulted over the said sale of their property.
112. The defendant and his two witnesses maintained that there was a fraud and that the plaintiff was the main suspect in perpetrating the said fraud.
113. DW 2 in his evidence in court insisted that there was a fraud and that he was underpaid by the plaintiff by KShs 460,000/=, and that he and other shareholders decided to sue the government in an on-going case.
114. The defendant and his witnesses raised the defence of justification.
115. The defence of justification is raised when the words complained of are true in substance and in fact (see *Associated Leisure Ltd (photographic Equipment Co Ltd) v. Associated Newspapers Ltd* [1970] 2 QB 450 pg 456.
116. In the case of *Machira t/a Machira & Co. Advocates vs. East African Standard* (2001) KLR 638, the Court stated at page 644 as follows;

“...A Defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true in fact or substantially so. He cannot be allowed to set out a version . . . For him to rely on justification, he must accept the Plaintiff's version of the statement or a statement which is in sum identical with the Plaintiff's version”.
117. In the case of *Hon. Uhuru Muigai Kenyatta vs. Baraza Limited* [2011] eKLR Judge Rawal DCJ (as she then was) held as follows;

“While taking the defence of justification or qualified privilege in the defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified



privilege does not insert the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.”

118. I find that the land had been allocated to the individual members as at the time it was sold and that is why the plaintiff wrote the letter in an attempt to seek redress.
119. I find that there is evidence that it was the members who asked the defendant to assist them in seeking redress.
120. There is admission by the plaintiff that he was the advocate representing the directors of Malili Ranch Ltd in the controversial sale of the ranch. However, there is no indication that the plaintiff carried out due diligence to ensure that a resolution had been passed before selling the land.
121. The defendant had a good reason to suspect that the plaintiff was involved in the fraudulent activities being perpetrated by the directors of Malili Ranching Ltd.
122. I therefore find that the defendant has a valid defence against the plaintiff’s case and that this defamation suit was filed to gag the defendant from seeking justice.
123. I find that the plaintiff has not proved his case to the required standard and I dismiss it with costs to the defendant.
124. Had the plaintiff proved his case to the required standard, this court would have awarded him ksh.2,000,000.
125. No exemplary damages would have been payable since the said general damages would have been sufficient.
126. However, I find that the defendant has proved that he has a valid defence of justification against the plaintiff’s claim and the plaintiff’s case is accordingly dismissed with costs to the defendant.

ORDERS TO ISSUE ACCORDINGLY.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND DAY OF APRIL, 2024.

.....
A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

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