Ideal Locations Limited v Nakumatt Holdings Limited (Under Adminitsration) & 3 others (Civil Suit 69 of 2018) [2024] KEHC 6813 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6813 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 69 OF 2018

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

IDEAL LOCATIONS LIMITED ..... PLAINTIFF

AND

NAKUMATT HOLDINGS LIMITED (UNDER ADMINITSRATION) .... 1ST DEFENDANT

PETER OBONDO KAHI ..... 2ND DEFENDANT

PKF CONSULTING LIMITED ..... 3RD DEFENDANT

ATUL SHAH ..... 4TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of the Plaint dated 27th August 2018 seeking the following reliefs against the Defendants:

    i. An Order fir the retraction of the statements, publications and/or utterances made by the 1st, 2nd, 3rd and 4th Defendants.

    ii. An injunction restraining the Defendants by themselves or their agents from defaming or in any other way reporting or publishing the said defamatory words.

    iii. General Damages for Defamation

    iv. Aggravated and Exemplary Damages

    v. Interest

    vi. Costs of the suit

2. The Plaintiff averred that the Plaintiff entered into a sublease agreement with the 1st Defendant over a space owned by the Plaintiff on City Mall, Nyali Mombasa on 9th June 2014 and as the 1st Defendant underwent financial difficulties could not honour the terms of the sublease agreement.

3. Further, that owing the breach of the sublease, the Plaintiff filed a suit in ELC No. 400 of 2017 against the 1st Defendant and obtained an eviction order which it enforced against the 1st Defendant after which the Defendants immediately uttered malicious and defamatory statements by their publication.

4. The Plaintiff averred that on 7th March 2018, the 1st and 2nd Defendant maliciously and without justifiable cause published false and defamatory information about the Plaintiff vide their media release as follows:

> "The attention of the Nakumatt Holdings Ltd "Nakumatt" Administration has this afternoon drawn to a regrettable and highly contemptuous action following the unliteral eviction of Nakumatt Nyali from its operating premises. This action is an absolute contempt of court as Nakumatt is currently under a court sanctioned Administration.
>
> The action by Ideal Locations Limited (the landlord) by any shade or form in draconian and occasions further unnecessary losses to a business already under Administration.
>
> I therefore take this opportunity to remind all Nakumatt's creditors of the business status of while pointing them to the provisions of the *Insolvency Act* 2015. All creditors are therefore notified and warned that they will be held responsible for the damages and contempt of court for any action taken in the clear knowledge of the matter explained above. In this instance, I shall be swiftly moving to surcharge and effect the recovery of the lost destroyed goods and property earlier housed at Nyali City Mall and valued at more than Kshs. 300 Million."

5. It was also averred that the medial release was subsequently published via the 1st Defendant's twitter handle @ Nakumatt (UA) which has around 111,200 followers.

6. On 10th March 2018, further published inter alia as follows:

> "...City Mall have resorted to executing the defective court orders to ransack goods and throw them on the streets and that despite being paid rent for February 2018..."

7. The Plaintiff averred that the contents of the article was widely circulated and was understood to mean that the Plaintiff:

   a. Was engaging in contemptuous activities

   b. Was acting contrary to the law

   c. Was not applying lawful and legal orders to evict Nakumatt.

   d. Breached his employment contract

8. It was further averred that Defendants uttered the words recklessly knowing them to be false and on publication caused embarrassment and was misleading.

9. It was the Plaintiff's averment that Bethlam Properties intended to invest over Kshs. 200,000,000/- into the premises at City Mall but the same was not forthcoming as a result of the defamatory publication.

10. The Defendants filed their joint statement of Defence denying all the allegation in the Plaint.

11. The Defendants admitted there having existed a tenancy agreement between the Plaintiff and the 1st Defendant and a suit in Mombasa ELC No. 400 of 2017.

12. The Defendants averred that the words were in good faith and a fair comment and as such were not defamatory.

Evidence

13. At the hearing, the Plaintiff's witness, PW1 relied on his statement dated 27th August 2018. The Plaintiff also relied on the documents in his Bundle of Documents dated 27th August 2018 and Supplementary Bundle of Documents dated 6th December 2019 and filed in Court. He produced the documents therein in evidence.

14. On cross examination, he confirmed the existence of an Order in ELC No. 400 of 2017 and that he was not aware whether the Order had been served.

15. It was the further testimony if the witness on cross examination that indeed the goods were carried out from Nakumatt on 7th March 2018 and were left on the road and were not ransacked.

16. It was his case that the Plaintiff was not unable to secure a tenant, the Carrefour as a result of the defamatory statements.

17. On the part of the Defendants, they called DW1, Peter Obondo Kahi who was also the 2nd Defendant. He relied on his witness statement dated 19th November 2019 and the list of documents dated 2nd December 2019 which he adopted in evidence. On cross examination, he confirmed that he issued the words and used the work draconian and that the action was in contempt of court.

18. It was his case that he was in charge of the affairs of the 1st Defendant being the Administrator, following its Insolvency.

Submissions

19. The Plaintiff fled submissions dated 7/3/2024 where submitted that the statements were published and were defamatory to the Plaintiff. According to them a defamatory statement is defined as is the publication of a statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him they relied on Halsbury's Laws of England and John Patrick Machira Vs Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996 and Gatley on Libel and Slander)

20. It was also submitted for the Plaintiff that the ingredients of a defamatory statement are well settled in the case of Jacob Mwanto Wangora v Hezron Mwando Kirorio [2017] eKLR and were proved herein. That the court set out the following elements:

    a. That the Defendant made a defamatory statement to a third person.

    b. (2) That the statement was false.

    c. That the defendant was legally at fault in making the statement; and

    d. That the plaintiff suffered harm.

21. It was the Plaintiff's further submissions that the words used by the Defendants and allegations made therein were untrue and defamatory. The Defendants maliciously published and uttered false and defamatory statements concerning the Plaintiff which led to damage on its business reputation and

loss of a potential investor. Reliance was placed inter alia on the case of Hon. Uhuru Muigai Kenyatta v Baraza Limited (2011) eKLR

22. The 2nd, 3rd and 4th Defendant filed submissions dated 15th March 2024. They submitted that while the 2nd Defendant has admitted publishing the media release of 7th March 2018 and the administrator's report of 10th March 2018, they have stated that the words published were fair comment and were not published maliciously.

23. They relied on the Court of Appeal of John Oriri Onyango-vs- Standard Group Limited & Others (Civil Appeal No.214 of 2018), as follows;

> " Explicit from the language of Section 15 is that for the defence to be available in the first instance, the words must be partly allegations of fact and partly an expression of an opinion. An allegation of fact alone is not eligible for the defence of fair comment. It bears repeating the words of Lord Nicholas in TSE WAI Chun "the comment must be recognizable as district from an imputation of fact..."

24. The Defendants also submitted the court to be persuaded by the words of Lord Denning MR stated in Fraser v Evans &others (1969) All ER 6:

> " There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away.

25. It was submitted that there was no malice in the publication. They relied on Phineas Nyagah -vs- Gilbert Imanyara (2013) eKLR. I was urged to dismiss the suit.

Analysis

26. The issue before me for determination is whether the impugned publication by the Defendants, in the circumstances of this case, was defamatory as to entitle the Plaintiff to the reliefs sought.

27. I understand the fundamental rationale of the protection against defamation is of constitutional and human rights imperative. I therefore inevitably proceed with a rider to balance the provisions of Articles 33, 34 and 35 of *the Constitution*. The said provisions respectively deal with the fundamental right to the freedoms of expression, media and access to information. Consideration also is to be inevitably granted to Article 28 in respect of the inherent dignity of every person which dignity must be respected and protected.

28. The freedom of the media is guaranteed by Article 34 of *the Constitution* as follows:

> " Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2)."

29. Consequently, under Article 33(2)&33(3) of *the Constitution*, every person has the right to freedom of expression which does not extend to, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that- constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4) and that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

30. On the right to access information and the freedom of expression, Lord Denning MR stated in Fraser v Evans &others (1969) All ER 6:

> " There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away."
>
> Lord Coleridge, CJ in Bernard & another v Perriman (1891-4) ALL E.R 965had previously stated that:
>
> > "the right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed."

31. What then is defamation? As succinctly put by this Court in S M W vs. Z W M [2015] eKLR:-

> " A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

32. Similarly, Windeyer J. In Uren John Fair Fax & Sons Pty Ltd 117 CLC 115 at 115 stated.

> " Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person."

33. On the other hand, Halsbury's Laws of England defines a defamatory statement as:

> " A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

34. In effect for a statement to be defamatory it must tend to lower the standing of a person. However, if it is true in fact or a fair comment, even where reputation is lowered, it is an adjustment to its true position. A scoundrel could be having a reputation that appears impeccable. However, when so discovered, his character should be adjusted to its true north. The court stated as follows in the case of John Patrick Machira Vs Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996 that: -

A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him

35. It follows that the common thread in the definition for a defamatory statement or utterance is one that if published tends to lower the estimation of the person it refers to in the opinion of the right-thinking members of the community and may cause them to shun the person away.

36. I note from the Plaint that the Plaintiff alleged and particularized the words pleaded to constitute defamation. Under Order 2 Rule 7 of the Civil Procedure Rules, particulars in defamation actions are to be laid as follows:

1. Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

37. My duty is also to establish whether the Plaintiff has proved his case on a balance of probabilities within the meaning of Section 107-109 of the *Evidence Act*.

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

38. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J, as he was then, in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

39. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

40. It should be recalled that defamation is specifically provided under Order 2 Rule 7 (1) of the Civil Procedure Rules: -

(1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

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

(3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.

(4) This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant.

41. In a nutshell, the burden of proof lies on a party alleging. In this case, it is the plaintiff. It should be recalled, even defamatory words can only injure the character of the person defamed. If there was nothing to be done by the person defamed then, there is no defamation. If for example one calls x as a son of a prostitute, the defmamtion is on the mother and not the person or the father. This odes not however lessen the burden of proof. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

42. The words leading to the controversy in this case were stated as follows:

> " The attention of the Nakumatt Holdings Ltd "Nakumatt" Administration has this afternoon drawn to a regrettable and highly contemptuous action following the unliteral eviction of Nakumatt Nyali from its operating premises. This action is an absolute contempt of court as Nakumatt is currently under a court sanctioned Administration.
>
> The action by Ideal Locations Limited (the landlord) by any shade or form in draconian and occasions further unnecessary losses to a business already under Administration.
>
> I therefore take this opportunity to remind all Nakumatt's creditors of the business status of while pointing them to the provisions of the *Insolvency Act* 2015. All creditors are therefore notified and warned that they will be held responsible for the damages and contempt of court for any action taken in the clear knowledge of the matter explained above. In this instance, I shall be swiftly moving to surcharge and effect the recovery of the lost destroyed goods and property earlier housed at Nyali City Mall and valued at more than Kshs. 300 Million."

...

> "...City Mall have resorted to executing the defective court orders to ransack goods and throw them on the streets and that despite being paid rent for February 2018..."

43. In his pleadings, the Plaintiff averred in material that the publication would, in its ordinary sense, mean that the Plaintiff:

    a. Was engaging in contemptuous activities

    b. Was acting contrary to the law

    c. Was not applying lawful and legal orders to evict Nakumatt.

    d. Breached his employment contract

44. There is no dispute that the alleged words were published. I wish to establish first whether the words if not true ,could be taken to mean the ordinary sense of the words as pleaded. I consequently start by establishing whether the content was defamatory. It is clear that the words actually mean what is set out in a, b and c above. The words meant that the plaintiff was acting on a defective court order, was unlawfully evicting and much more.

45. Use of a defective order is not an act for the Plaintiff but the court. The plaintiff did not issue the order in question. In the circumstances the defect on the order cannot be attributed to the Plaintiff. No right thinking member of the society will think the Applicant had issued a defective order.

46. The second statement was that the goods were ransacked on a basis of a defective order. For purpose of this proceedings we shall proceed as if the order was lawful. This is because it has been litigated upon. However, are the words true as published. In other words are they a fare comment. In this case I find and hold that what the Plaintiff was engaged in was not eviction but thuggery. The same was without a lawful court order. The order was to the effect that the defendant was to move and in default of so moving, eviction to issue.

47. The thugs moved in to throw out the goods worthy millions of shillings when only a measly amount of rent was due. There was no service of notices as required for forceful eviction. The order they pupated to use was unlawfully used. It did not authorize the eviction. Eviction done without following internationally recognized procedure is unlawful.

48. Secondly the 1st respondent had been put in protected status by the high court. The company was under insolvence. All execution porceess against it were thus stopped. The Plainitff proceeded in contempt of the order placing the 1st defendant under protection.

49. In the circumstances there was no defamation. It is the 1st efednant though its i

50. The order was issued ex parte in one day and executed the following day. There was no service of the order. The Plaintiff moved next to the default, there was to be no defamation.In the case of John Ward v Standard Limited [2006] eKLR the court stated as follows: -

> " A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -
>
> The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false."

51. The Court of Appeal in Nation Media Group & Another vs. Hon. Chirau Mwakwere –Civil Appeal No. 224 of 2010 stated that a Claimant in a defamation suit ought to principally establish in no particular order:

i. The existence of a Defamatory Statement;

ii. The Defendant has published or caused the publication of the defamatory statement;

iii. The Publication refers to the Claimant.

52. In the Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined as follows:

> " 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.

53. Whereas the position of the Plaintiff is that the words were defamatory, the Defendants' case is that the words constituted a fair comment without malice.

54. It is my considered view that the first publication named the Plaintiff and the follow up publication referred to City Mall as the actioning person. Further, during the evidence and testimony of the parties, it was the common position of the parties that there was a court order issued in Mombasa ELC No. 400 of 2017 For the 1defendant to move out or be evicted.

55. At the same time, the 1st Defendant was undergoing administration under the *companies Act* after the high court in Nairobi Milimani High Court Insolvency Cause No. 10 of 2017 inter alia prohibiting attachment, and execution against the assets of the 1st Defendant.

56. The publication also referred to other creditors of the 1st Defendant. As was held in the case of Onama v Uganda Argus Ltd [1969] EA 92, the Learned Judges of the Easter African Court of Appeal set out inter alia that:

> " In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to general public, but also to all those who have greater or special knowledge of the subject matter..."

57. On the face of the words, it is clear that anyone who read the caption, would understand the words to mean that the Plaintiff had evicted the 1st Defendant from City Mall Nyali and to warn other creditors of the 1st Defendant from adversely claiming the assets of the 1st Defendant that were not protected by an order of court. The statement also proceeded to state that the eviction was in contempt of the court orders stopping the attachment of the 1st Defendant's goods and the eviction order was defective.

58. I note also that the Court Orders in Nairobi High Court Insolvency Cause No. 10 of 2017 was granted on 28th August 2017 and the acts leading to the eviction of the 1st Defendant are said to have been done subsequently in March 2018. To this end, I find that the words depicted circumstances that were then prevailing and were a fair comment on the eviction of the 1st Defendant and claims by other creditors of

the 1st Defendant's assets. The words were published by the 2nd Defendant who was the Administrator of the 1st Defendant. In the case of Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR, the court stated as follows:

> " In finding that there was actionable libel, the British Columbia Supreme Court (appeal dismissed) wrote:-
>
> > "(Defamation is where) a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution), (or) a shameful condition (he has smallpox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition (of defamation) is words tending to lower the plaintiff in the estimation of right-thinking members of society generally."
> >
> > Another authority often cited as definitive on defamation is Gatley on Libel and Slander who wrote this, as was adopted in Thomas v CBc as follows:-
> >
> > > "The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory.

59. Whereas the Plaintiff pleaded and submitted that words were not truthful, I find and hold that the Defence of a fair comment cannot be defeated only by reason that the truth of every allegation is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. This is the purport of Section 15 of the *Defamation Act* as follows:

In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

60. Therefore, the statements alleged to be defamatory in this case were premised on a basis of fact and being a fair comment cannot be said to have defamed the Plaintiff. In the case of Nation Media Group & Another v Alfred N. Mutua [2017] eKLR where the court defined the scope of the defence of fair comment thus;

> " To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest [see Gately on Libel and Slander, 8th edition, 1981 (Sweet & Maxwell) at paragraph 692 at page 291)

61. The Plaintiff also pleaded and testified that the words were maliciously published. To the contrary, I equally do not find basis to infer malice in the said words.t a lawful process of eviction and administration. Any loss the plaintiff incurred was self-inflicted.

62. It is not true that there were investors. The truth appears that the 1st defendant was an anchor tenant and by their insolvency, the Plaintiff because despondent and had to unlawfully throw the 1st defendant in contempt of orders issued in in Nairobi High Court Insolvency Cause No. 10 of 2017 was granted on 28th August 2017. It is only an imbecile who will believe the cock and bull story that the tenant did not know that the 1st Defendant was undergoing administration.

I also find and hold that the plaintiff had participated with other creditors in the suit prior to the unlawful eviction. Therefore, obtaining an order, the way they did was fraudulent. They concealed the existence of in Nairobi High Court Insolvency Cause No. 10 of 2017 was granted on 28th August 2017. When a party conceals the status quo, then the words of Lord Denning delivering the opinion of the Privy Council at page 1172 (1) in Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, comes in handy.

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

63. Long before the illegal forceful eviction being carried out against the 1st defendant, Justice Isaac Lenaola , as he then was in the case of Ayuma & 11 others (Suing on their own Behalf and on *Behalf of Muthurwa Residents) v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kothari (Interested Party) (Petition 65 of 2010*) [2013] KEHC 6003 (KLR) (Constitutional and Human Rights) (30 August 2013) (Judgment) while addressing forceful evictions in informal settlement stated as follows: -

I must lament the widespread forced evictions that are occurring in the county coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands, Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. I believe time is now ripe for the development of eviction laws and the same sentiments were also expressed by Musinga J (as he then was) while considering the issues in this matter at an interlocutory stage, where he sated as follows;

> "The problem of informal settlements in urban areas cannot be wished away, it is here with us. There is therefore need to address the issue of forced evictions and develop clear policy and legal guidelines relating thereto".

64. The words were a natural and same reaction to thuggery and madness visited upon the Defendants by the plaintiff. The behaviour of the plaintiff clearly depicted a desire to circunvenent the law. Carrying forceful eviction in the most reckless manner in a business premises does not call for reward but punishment. In the Halsbury's Laws of England Fourth Edition Vol 28 pg 45 para 145, the authors state;

> The defences of both fair comment and qualified privilege are defeated by proof that the defendant published the words complained of maliciously. In both cases proof that the defendant's sole or dominant motive in publishing the words was improper will establish

malice. The fact that the defendant did not believe that what he said was true is usually conclusive evidence of malice to rebut the defence of qualified privilege; and in fair comment it is usually conclusive evidence of malice to show that the defendant did not honestly hold the opinion expressed. If a defendant publishes untrue defamatory matter recklessly, without considering or caring whether it is true or not, he is treated as if he knew it to be false.

65. Having found no defamation, it is equally difficult for me to find malice on the part of the Defendants. Consequently, on a balance of probabilities, I find that the Plaintiff has not established its case against the Defendants as to be entitled to compensation.

66. As to the General Damages, the Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> ...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it...

67. Similarly, in the case of Butler –V- Butler (1984) KLR 225 the court held: -

> " The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision."

68. Consequently, if I were to find defamation, I would have only awarded nominal damages assessed at Kshs.20,000/= since there was no damage. The term "nominal damages" was defined in the case of Kanji Naran Patel V. Noor Essa & Another, (1965) E.A. 484 while referring to the case of The Mediana (1900) AC 116, as follows:

> " Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damage that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

69. The Plaintiff's suit is therefore devoid of merit. It is accordingly dismissed As regards costs, section 27 of the *Civil Procedure Act* provides as follows: -

> " (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the

costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

70. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

71. In the circumstances the defendants are entitled to costs. I award a sum of Ksh 1,050,000/= in costs on the basis of the subject matter disclosed in the dismissed suit.

Determination

72. I make the following orders: -

a. The Plaintiff's suit is dismissed.

b. The 2nd, 3rd and 4th Defendants shall have costs of the suit assessed at Kshs. 1,050,000/.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Khadija for the Plaintiff

Mr. Kimani for 2nd – 4th Defendants

No appearance for 1st Defendant

Court Assistant - Jedidah