



**Benja Investments Limited v George & 4 others (Civil Suit 67 of 2003)  
[2024] KEHC 9605 (KLR) (Civ) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9605 (KLR)

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

**CIVIL**

**CIVIL SUIT 67 OF 2003**

**CW MEOLI, J**

**JULY 15, 2024**

**BETWEEN**

**BENJA INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**GARETH GEORGE ..... 1<sup>ST</sup> DEFENDANT**

**KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**WANGETHI MWANGI ..... 3<sup>RD</sup> DEFENDANT**

**NATION NEWSPAPERS LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**NATION MEDIA GROUP LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This suit was filed on 24.01.2003 by Benja Investments Limited, (hereafter the Plaintiff) against Gareth George, Kenya Commercial Bank Limited, Wangethi Mwangi, Nation Media Group Limited and Nation Newspapers Limited (hereafter the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendant/Defendants, respectively) and is founded on the tort of defamation.
2. The Plaintiff sought several reliefs including a permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, by themselves or jointly or through the 2<sup>nd</sup> Defendant's directors, officers, managers, agents from broadcasting, airing, printing, disclosing, disseminating or continuing whether by issuing public statements, releasing boards papers or any other confidential material concerning the Plaintiff to the print and electronic media and non-media members or whether by letter, circulars, statistics or advertisements; a permanent injunction to restrain the 2<sup>nd</sup> Defendant its agents and or servants from disclosing or threatening to disclose any confidential information in its possession or threatening to advertise, sell and or in any other manner adversely deal howsoever with the Plaintiff's land parcels



- known as L.R No. 12445 and 12550 situate in Nairobi and charged to the 2<sup>nd</sup> Defendant and from dealing adversely with any information in its custody without the consent of the Plaintiff; an order that the 2<sup>nd</sup> Defendant stop exaggerating the loan balance meant to incite the public against the Plaintiff or to give false impression that the Plaintiff had not secured its loan selectively; certain declarations, orders and general and exemplary damages, among other reliefs .
3. As against the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants, the Plaintiff further sought inter alia a permanent injunction to the effect that the said defendants, their servants, agents and nominees be jointly and severally be restrained from publishing any information of and concerning the Plaintiff's accounts with the 2<sup>nd</sup> Defendant; general and exemplary damages; and interest at the commercial rate of 36% per annum.
  4. The gist of the Plaintiff's lengthy pleadings is that it had not authorized the 2<sup>nd</sup> Defendant or its agents or servants to disclose any of the Plaintiff's confidential and or financial matters with the 2<sup>nd</sup> Defendant and any such information released by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants and or third parties had no consent express or implied nor any authority from the Plaintiff , was unauthorized, unlawful and in breach of contract, representations and in contravention of Section 31 as read with Section 49 of the Banking Act.
  5. It was further averred that the Defendants jointly and severally maliciously, unlawfully and falsely wrote, printed and published and or caused to be maliciously, unlawfully and illegally written, published, printed and distributed, defamatory words of and concerning the Plaintiff on Pg. 1 of section 2 of the "Daily Nation" "Business Week" pullout dated 07.05.2002, under the banner headline "Big Names Owe KCB Billions". By reason of which the Plaintiff company has been injured in its credit and reputation and has been brought into public scandal, odium and contempt.
  6. That in the alternative and without prejudice to the above, in breach of the its duty and contractual obligations of a bank, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants negligently and or maliciously and in breach of trust, disclosed and released confidential information about the Plaintiff's loan account and misstated the facts to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, third parties and the public at large and hence 1<sup>st</sup> & 2<sup>nd</sup> Defendants are jointly and severally liable for negligence.
  7. On 12.03.2003 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed an equally lengthy statement of defence denying the key averments in the plaint, and meanwhile raising the 2<sup>nd</sup> Defendant's counterclaim against the Plaintiff for the sum of Kshs. 121,660,000/-, together with compound interest thereon at the rate of 17% p.a, with effect from 31.07.2002 until payment in full, which sums were asserted to be due and owing to the 2<sup>nd</sup> Defendant on account of the subject loan. It was further averred that despite demand having been made, the Plaintiff had failed, refused and or neglected to pay the said amount or any part thereof to the 2<sup>nd</sup> Defendant.
  8. On 27.02.2003 the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed a statement of defence denying the key averments in the plaint and averred that they published the statements complained of pursuant to the information supplied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, honestly and without malice towards the Plaintiff, as fair information on a matter of public interest, namely the financial position of the 2<sup>nd</sup> Defendant and the outstanding debts owed to it. It was further averred that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants published the articles bona fide and under a sense of duty and common interest with the public over a matter of legitimate public concern. Hence the publication was one of qualified privilege at common law. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants further averred that if any liability were to attach, it would only be against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who supplied the information.
  9. The Plaintiff thereafter filed a reply to defence to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants statements of defence wherein he joined issues with their respect statement of defence and reiterated the averments



in his plaint. He also filed a defence to the 2<sup>nd</sup> Defendant's counterclaim wherein he denied the key averments in the 2<sup>nd</sup> Defendant's counterclaim.

10. On 31.01.2011, Mwera, J. (as he then was) adopted as an order of the court, a consent filed on 22.11.2010. The consent, between the Plaintiff and 1<sup>st</sup> & 2<sup>nd</sup> Defendants, was to the effect that the case between the said parties was marked as settled. The consent will be revisited later in this judgment.
11. During the trial, Geoffrey Chege Kirundi testified as PW1. Identifying himself as a legal practitioner since September 1977 and a director of the Plaintiff company, he testified that the dispute arose in 2002 following the grant of a facility in the sum of Kshs. 27 million to the Plaintiff, then a customer of the 2<sup>nd</sup> Defendant, by the latter which facility was in arrears by 1998. He asserted that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants thereafter published an article to the effect that the Plaintiff took a 'political' loan without security and that the loan was personal to him and his wife – Lucy Wamaitha Kirundi. It was his further evidence that on the contrary, the loan was secured by two (2) properties.
12. Having adopted his witness statement filed on 20.09.2011 as his evidence-in-chief, PW1 produced the documents appearing in his list of documents dated 08.10.2014 as P. Exh.1-15. He confirmed having settled the suit between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Further stating that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants did not seek his comment prior to publishing the subject defamatory article and maintained that the said article adversely affected him. Meanwhile his business statement was incorrectly stating that he had borrowed Kshs. 236 million, which was untrue. It was his evidence further that he neither had any political affiliation nor engaged in politics and has always practiced as an advocate.
13. Under cross-examination, he confirmed that the instigator of the suit was the Plaintiff and not himself and that his wife was not a party to the suit. He stated that he and his wife filed separate claims in a series of suits, three of which related to the same cause of action but confirming that the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was settled by a consent filed in court. Stating in that regard that he paid the latter Kshs. 20 million which was outstanding, contrary to the balance captured in the newspaper article. Asserting that the consent was relevant to the suit because what was paid was Kshs. 20 million and not Kshs. 236 million as claimed by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. Admitting however that the details of the settlement did not form part of his bundle of documents and that indeed the Plaintiff did owe the 2<sup>nd</sup> Defendant money at the time the article was published, but not the alleged political loan in the sums purported in the article.
14. He equally confirmed not having produced the Plaintiff's certificate of incorporation (CR12) to prove that he was a director of the Plaintiff. That the decree dated 16.05.2011 in the instant suit confirms that the Plaintiff fully and finally settled its debt with the 2<sup>nd</sup> Defendant, and hence the figures in the newspaper were exaggerated. Admitting however that he did not produce the Plaintiff's loan statement in evidence. He stated that the article complained about was published by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants on 11.05.1998 and referred to the Plaintiff company in which both he and his wife were directors.
15. He went on to state that the Plaintiff was involved in real estate and owned several assets and had a loan and that that the Plaintiff's reputation was affected by the publication. Despite the loan which he termed as maliciously exaggerated in the publication being secured by prime properties. He confirmed that in the material period he was also serving as a director of the 2<sup>nd</sup> Defendant. He maintained that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' statement of defence does not deny publication of the article and confirmed that the government held shares in the 2<sup>nd</sup> Defendant. And while admitting the public interest involved, stated that notwithstanding the public's right to be informed, the newspaper had no right to publish false information. He said that the impugned article carrying the imputations pleaded in the plaint was



published without verifying the information with him or at all. Asserting further that the settlement between the Plaintiff and the 1<sup>st</sup> & 2<sup>nd</sup> Defendants was in the sum of Kshs. 25 million and no payment was made in respect of the Plaintiff's pleaded breach of confidentiality and unauthorized release of information by the bank.

16. Admitting further that no books of accounts were produced, or character witness called in respect of the Plaintiff despite allegations that the damage to the Plaintiff's reputation reduced its creditworthiness. He however confirmed that the 2<sup>nd</sup> Defendant issued a letter of apology concerning disclosure of his information to the media. Moreover, the publication resulted in his removal from the board of directors of the 2<sup>nd</sup> Defendant. He reiterated that imputation in the article was that he abused his position as a director of the 2<sup>nd</sup> Defendant to obtain 'political' loans.
17. In re-examination, he said that the bone of contention was the exaggerated loan amount in the impugned article and the fact that his comment was not sought prior to the publication thereof.
18. On the part of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, Muna Wahome testified as DW1. He identified himself as a journalist, who at the material time worked for the 4<sup>th</sup> Defendant. Adopting his witness statement dated 08.06.2012 as his evidence-in-chief, he said the impugned article as captured in the Plaintiff's pleadings referred to PW1, his wife and the Plaintiff who were directors of the Plaintiff. Referred to Pp. 105 – 128 of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' list of documents, which he produced as D. Exh. 1, he stated that the 2<sup>nd</sup> Defendant's board paper therein constituted material he obtained through a source in the course of this work as a journalist. Further citing Pg. 120 being information regarding the Plaintiff's loan owing, loan overdue, balance and arrears and the directors of the Plaintiff. That he believed the board papers to be true on account of the same having been presented to Parliament.
19. He further stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' statement of defence at para. 15 referred to D. Exh.1 and at para. 51 admits to the accumulation of the Plaintiff's debt, outstanding at Kshs. 100 million. He pointed out that the 2<sup>nd</sup> Defendant's counterclaim at para. 72, sought the sum of Kshs. 121,660,000/- from the Plaintiff. Noting further that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' original article at pp. 92-93 of their list of documents which he produced as D. Exh.2 differed with the contents of the article as pleaded by the Plaintiff at para. 20 of the plaint, due to the latter's omission of some contents in the original article. Referring to the apology letter in the Plaintiff's bundle of documents, he stated that it confirmed that the media obtained information on the Plaintiff's loan from the 2<sup>nd</sup> Defendant. Hence no defamatory imputation could arise in the article which was based on the information directly obtained from the latter. He maintained that the subject matter was of public interest. He therefore urged that the Plaintiff's suit be dismissed.
20. During cross-examination, he conceded that D. Exh.1 was a document intended for the 2<sup>nd</sup> Defendant's Board of which he was not a member. He further confirmed that whereas the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' board paper was titled and serialized as Board Paper 84, D.Exh.1 did not contain such particulars on its face to indicate that it was actually a Board Paper. He said that he did not request for D.Exh.1 from the 2<sup>nd</sup> Defendant and did not contact anyone, including the Plaintiff concerning it.
21. The witness further asserted that while the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's apology did not refer to D. Exh.1, it addressed the breach of confidentiality resulting in media reports based on leaked information. He further stated that he did not review any bank statements prior to publication of the article and that his knowledge of the activities of the Plaintiff's directors was based on Parliamentary records. Reiterating that his article was premised on D. Exh.1 and Parliamentary proceedings, the latter being privileged. However, could not confirm if the Plaintiff was accorded an opportunity to defend itself against allegations leveled against it.



22. He admitted that journalists must exercise due diligence prior to publishing information by inter alia seeking prior comments from the parties involved. He denied that D.Exh.1, was a fabrication, citing the contents of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's defence statement at Para 15 & 51 as confirmation of the information concerning the sums owed by the Plaintiff. And stating that he did not know that the loan amount settled by the Plaintiff pursuant to the consent was Kshs. 25 million which reflects a much lower sum than asserted in the impugned article. He concluded by confirming that the Board Paper was a private document for the 2<sup>nd</sup> Defendant Board's consumption.
23. During re-examination, DW1 reiterated that D.Exh.1 indicated that the 2<sup>nd</sup> Defendant was to review the loan upon receipt of a payment proposals; that the last sentence of the extracted article captured in para. 20 of the plaint compares word for word with item 34 at pg. 120 of D.Exh.1.; and that D.Exh.2, accords with the extract of the article as captured at para. 20 of the plaint. Finally asserting that he did not have any details as to how the settlement between the Plaintiff and 1<sup>st</sup> & 2<sup>nd</sup> Defendants was arrived at; that he did not contact the Plaintiffs before writing the article because this it was not new information, given existing records of Parliamentary proceedings; and that he also believed the authenticity of D.Exh.1.
24. At the close of the trial, the parties filed written submissions. The Plaintiff's submissions addressed the twin issues of liability and damages. On the question whether the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants published malicious, false and unlawful information about the Plaintiff, counsel posited that there was no dispute about the publication admittedly premised on information supplied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Citing the case of Otieno Migore v South Nyanza Sugar Co. Ltd [2019] eKLR, counsel argued that the evidence tendered by the Plaintiff demonstrates that the loan taken by the Plaintiff was secured, contrary to the publication by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. That the loan sums asserted in the article were not authenticated and hence the publication was not justified and could only have been actuated by malice. Counsel further argued that the statement published by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants was intended to expose the Plaintiff to hatred, contempt or ridicule and or to convey disparaging and injurious information against the Plaintiff.
25. Regarding the defence of justification, it was asserted that the burden of proof was on the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, counsel stating that DW1's assertion that he obtained the information from an undisclosed source was testament to the fact that the said source was privileged and confidential. While calling to aid the decision in Civil Appeal No. 115 of 2003, Standard Limited v G.N Kagia t/a Kagia & Co. Advocates, counsel further submitted that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants had a duty of care to verify facts by seeking commentary from the Plaintiff before publication. Counsel contended that neither the defence of justification or privilege could lie as publication of the impugned article in the newspaper did not constitute reporting.
26. Concerning whether the Plaintiff is entitled to the reliefs sought it was argued asserted that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants failed to ascertain the authenticity of its publication; that a right thinking member of society reading the article would arrive at the conclusion that the Plaintiff had no intention of repaying the loan and that the Plaintiff's directors were shrewd and could not be trusted; that on account of the 2<sup>nd</sup> Defendant's apology, publication of the article by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants was malicious; as demonstrated by the insinuation in the article that the loan advanced was 'political' was reckless and malicious, the loan having been secured by two properties; and that the figures published represented a false, and fabricated impression of the Plaintiff's accounts. Therefore, the Plaintiff was entitled to the reliefs as sought for in its pleadings. The cases of Macharia t/a Macharia & Co. Advocates v The East African Standard [2001] KLR and Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR were relied on in the foregoing regard.



27. Regarding quantum of damages, counsel anchored his submissions on the decisions in *Nation Media Group & 2 Others v Joseph Kamotho & 3 Others* [2010] eKLR and *Mary Kemunto Mariera v Standard Group Limited* [2019] eKLR to submit that the Plaintiff is entitled to general damages and exemplary damages, in the sum of Kshs. 6 million, as a minimum. Having established that the publication was false, and reckless, and in the absence of an apology or retraction despite a formal demand by the Plaintiff's advocates. In conclusion, the Court was urged to allow the suit with costs.
28. On the part of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, counsel equally addressed the twin issues of liability and damages. Concerning whether the publication was malicious, unlawful and defamatory, counsel relied on *Gatley on Libel and Slander*, 6<sup>th</sup> Edition, the English decision in *Hayward v Thompson & Others* [1981] 3 ALL ER and *Musikari Kombo v Royal Media Services Ltd* [2018] eKLR to submit that the impugned article was not of and or concerning of the Plaintiff but rather a mere description of PW1 and his wife.
29. As to whether the publication was defamatory, counsel cited the decision in *SMW v ZWM* [2015] eKLR to posit that the test whether a statement is defamatory is an objective one as it is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. That PW1 despite stating that the publication affected the Plaintiff's reputation and creditworthiness failed to adduce in support of the assertion. It was further contended that by his evidence, PW1 did not distinguish between himself and the Plaintiff, the latter of which was the initiator of the instant suit. And that PW1's confirmation that both he and his wife had filed other suits buttressed the fact that their grievances concerned them individually and not the Plaintiff. The decision in *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR cited here.
30. On whether the defences of qualified privilege and justification were available to the Defendants, counsel relied on Section 7 of the *Defamation Act*, Article 34 and 35 of *the Constitution*, the English decision in *Fraser v Evans & Others* (1969) All ER 6, the decision in *Kagwiria Mutwiri Kioga & Another v The Standard Limited & 3 Others* [2015] eKLR and *Nation Newspaper Ltd v Gibendi* [2002] KLR. To support the submission that the 2<sup>nd</sup> Defendant was a public company whose financial operations were the subject of Parliamentary debate therefore a matter within the public domain. Therefore, the members of the public had a right to information concerning the activities of the bank. Adding that the Plaintiff failed to establish that the article was malicious while the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' information concerning the state of the bank's debt register was fair.
31. As regards justification, counsel argued that the information in the impugned article was derived from the 2<sup>nd</sup> Defendant's Board Paper hence the article was true in substance and fact. Counsel here pointing to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' pleadings concerning the outstanding amount owed by the Plaintiff. Which fact, notwithstanding the consent between the Plaintiff and 1<sup>st</sup> & 2<sup>nd</sup> Defendants, amounted to an admission by the Plaintiff that it indeed owed the 2<sup>nd</sup> Defendant certain sums of money and which debt was amicably settled. Thus, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants had proved the defence of qualified privilege and justification, and on account of the Plaintiff's failure to prove that the article was defamatory, the suit ought to fail.
32. Regarding quantum of damages, counsel while urging an award of Kshs. 500,000/- argued that the Plaintiff failed to tender financial records, books of accounts or to ascertain loss of business occasioned by the alleged injurious publication to the Plaintiff's reputation. The decisions in *Sankale Ole Kantai v Nyamodi Ochieng & Another* [2012] eKLR, *Hon. Amb. C.A.M v Royal Media Services Ltd*, HCCC No. 57 of 2005, *Kenya Tea Development Agency (KTDA) v Benson Ondimu Masese t/a B.O Masese & Co. Advocates* [2008] eKLR and *George Oraro v Barrack Weston Mbaja*, HCCC No. 85 of 1992 were relied on in this regard. In conclusion, the Court was urged to dismiss the suit with costs.



33. In a rejoinder to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' submissions, counsel for the Plaintiff reiterated that there was no accuracy in the publication and the source of the said information had not been disclosed. Counsel maintained that all the ingredients of defamation as espoused in *John Ward v Standard Limited* had been established and the defence of justification was unavailable to the Defendants.
34. The Court has considered the evidence on record and the parties' respective submissions. The overarching question for determination is whether the Plaintiff has proved its case on a balance of probabilities and if so, the appropriate awardable damages. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:
- “[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”
35. Pertinent to determination of the issues are the pleadings. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, addressed itself to the issue as follows: -
- “We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”
36. The pertinent facets of the parties' respective pleadings have already been set out elsewhere in this judgment. The suit herein was inter alia founded on the tort of defamation. Following the consent filed on 22.11.2010 and adopted as an order of the Court by Mwera, J. (as he then was) on 31.01.2011, the Plaintiff's claim based primarily on breach of contract and trust as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was settled. The consent order gave rise to the preliminary decree dated 16.05.2011 which was in the following terms;-
- “1. That the case as against the First Defendant and Second Defendant is hereby marked as settled.
  2. That the Plaintiff and the Third, Fourth and Fifth Defendants do take hearing dates on priority basis.
  3. The Plaintiff do pay the Second Defendant Kenya Shillings Twenty Million (Kshs. 20,000,000/=) in full and final settlement of all its liabilities to the Second Defendant Kenya Commercial Bank. The Second Defendant acknowledges receipt in cleared funds of the aforesaid sum of Kshs. 20,000,000/=.



4. The Second Defendant, Kenya Commercial Bank Limited do forthwith discharge and reconvey the Plaintiffs properties, LR. No. 12445 and L.R. No. 12550 and return to the Plaintiff all title documents, original mortgages, original personal guarantees by the Plaintiff's directors Geoffrey Chege Kirundi and Lucy W. Chege, as evidence of full, final, complete discharge of all obligations due from the Plaintiff to the Second Defendant.
  5. The Plaintiff on its own behalf and on behalf of its directors, Geoffrey Chege Kirundi and Lucy W. Chege hereby confirm unequivocally that they have no claims whatsoever against the Second Defendant.
  6. The injunction order issued by this honorable Court on 29<sup>th</sup> July, 2008 against L.R. No. 12445 and L.R. No.12550 be and is hereby raised.
  7. That each party to this suit shall bear its own costs of the suit.
  6. That in view of the above orders, this matter be and is hereby marked as fully settled." (sic)
37. Pursuant to the consent above, the suit against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants founded on the tort of defamation proceeded to hearing.
38. The rationale behind the law of defamation. The Court of Appeal had this to say in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR:
- “The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:
- “The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...’ Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. ‘The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”
39. Actions founded on the tort of defamation surface the tension between private interest and public interest. Article 33(1) of *the Constitution* guarantees every person’s right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”. Article 34 guarantees the freedom of the media while Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*.



40. Contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & Others* [1969] 1 ALLER 8; -

“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed.”

41. According to *Gatley on Libel and Slander* 6<sup>th</sup> Edn.:-

“A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another”.

42. In *Selina Patani & Another vs Dhiranji V. Patani* [2019] eKLR the Court of Appeal held that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:

“In rehashing, we note the ingredients of defamation were summarized in the case of [\*John Ward v Standard Ltd. HCC 1062 of 2005\*](#) as follows:

- 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.”

43. The particulars of the publication asserted against the the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were pleaded at para. 17 and 20 of the Plaintiff’s pleadings. Though not specifically challenged by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, the publication cited at para. 17 was alleged to have been published on 11.05.1998, is manifestly caught up by statutory limitation, the suit having been filed on 24.01.2003. See;- Section 4 (2) of the [\*Limitation of Actions Act\*](#) and the Court of Appeal in *Wycliffe A Swanya v Toyota East Africa Ltd & another* [2009] eKLR. Thus, for the purposes of this judgment the subject is the alleged defamatory article published on 07.05.2002.

44. That said, and concerning the ingredients spelt out in *Selina Pattani’s* case (supra), the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants by their statement of defence at Para. 3 denied publishing the impugned words. However, DW1 in his adopted witness statement admitted that the impugned words were indeed published in the 4<sup>th</sup> Defendant’s, “Daily Nation Business Week” pullout dated 07.05.2002, thus settling ingredient (iii) of defamation above. As to whether the impugned article referred to the Plaintiff, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants asserted that the subject article did not concern the Plaintiff. However, a cursory review of the article reveals that it equally refers to the Plaintiff, in addition to PW1. Thus, the impugned article was of and or concerning the Plaintiff, and ingredient (ii) of defamation above is settled.

45. Consequently, the issues in dispute relate to the remaining ingredients of defamation, namely, whether the article was defamatory and false and or whether the defences of qualified privilege and justification under Sections 7 and 14 of the [\*Defamation Act\*](#) are available to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Court proposes to deal with these issues concurrently.

46. From the Plaintiff’s pleadings and evidence, it is undisputed that prior to the offending publication, the Plaintiff had taken out a financial facility with the 2<sup>nd</sup> Defendant which was in arrears at the time of the publication and was subsequently settled in the course of the instant proceedings. The Plaintiff’s



grouse as against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants appears to hinge upon the assertion that the latter's reporting regarding the sums outstanding on the facility and attendant collateral amounted to an exaggeration, and therefore defamatory and false. It is useful to set out in extenso the contents of the article in question.

47. Interestingly, the Plaintiff's list of documents dated 08.10.2014 produced as P. Exh.1-15, encompassing P. Exh.6 which constituted Newspaper cuttings from the Daily Nation, did not include the article published on 07.05.2002. A copy of the impugned publication was produced by DW1 and marked D.Exh.2. The relevant facets of the printed article published by 4<sup>th</sup> Defendant in the Daily Nation", "Business Week" pullout dated 07.05.2002 read as follows: -

"Big names owe KCB billions

George pours out his frustration to board as term up for review

By Muna Wahome

"Gareth George's contract comes up for renewal this month, with his two-year stint at Kenya Commercial Bank still dogged by historically bloated dud assets.

Even as the bank reported the shrinking of its quarterly profitability into a trickle of Sh15 million and the International Monetary Fund upped the pressure on non-performing assets, the CEO was pouring out his frustrations in loan recoveries to the board.

According to Board Paper Number 84/2002 presented by Mr. George last month, a huge amount of the loans remain problematic.

And predictability, some of the most notable companies and individuals are politically influential. In a good number of instances, however, the declining economy can easily be read.

.....

Lawyer Chege Kirundi and his wife, directors of Benjo Investments are marked as Sh118 million in arrears, with a similar balance. The loan indicated as overdue may be re-evaluated following proposals for payment." (sic)

48. To address ingredient (i) in Selina Patani (supra), namely, whether the words referring to the Plaintiff were defamatory, the test to be applied was spelt out in the case of the Onama v Uganda Argus Ltd (1969) EA by the East African Court of Appeal was that:-

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

49. The Court stated in Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the "probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published."-Clerks & Lindsell on Tort 17<sup>th</sup> Edition 1995-page 1018."

50. The printed articles published on 07.05.2002 employed words and phrases such as "Big names owe KCB billions" "frustrations in loan recoveries" "huge amount of the loans remain problematic" "politically influential" and "in arrears". From a wholistic reading of the article, the gist of the article



was as follows. The 1<sup>st</sup> Defendant's contract with the 2<sup>nd</sup> Defendant was due for renewal, and a major concern was the 2<sup>nd</sup> Defendant's large number of non-performing loans in its debt portfolio, involving companies and individuals (some of whom were named therein) purportedly owing the 2<sup>nd</sup> Defendant large sums of money.

51. The Court understands the Plaintiff's pleaded complaint regarding the article in question to be that the article was false and malicious because the Plaintiff did not owe the exaggerated sum of monies stated in the article while its debts were properly secured, and secondly that the words used in the article were defamatory in their natural and ordinary meaning, and or by innuendo as pleaded in the plaint

52. In Halsbury's Laws of England 4th Edition Vol. 28 paragraph 10- a defamatory statement is defined as follows:

“....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”.

See also the Court of Appeal definition of a defamatory statement in *SMW v ZWM* (2015) eKLR.

53. The Court of Appeal in *Musikari Kombo* (*supra*) stated that:

“The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:

“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.”

54. As rightly contended by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, it was the duty of the Plaintiff to adduce evidence that an ordinary reasonable person who knew the Plaintiff before, would upon reading the said publication, view the Plaintiff differently, or in other words, that the article, whether believed by such reader or not, had the tendency to lower the credit reputation of the Plaintiff in the reader's eyes. It was further asserted that despite PW1 stating that the publication affected the Plaintiff's creditworthiness failed to adduce evidence to support the claim, while conflating the Plaintiff and himself, despite the former being the instigator of the present suit, and a separate entity. The Plaintiff by its submissions did not address the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant contestation. As stated in *Hezekiel Oira v Standard Limited & Another* [2016] eKLR the successful claimant in a defamation cause must tender evidence not only that the publication complained of bore falsehoods, but also that the published words had the tendency to lower his reputation, causing right thinking members of society to shun or avoid it or to treat it with contempt.

55. The only person who testified in support of the Plaintiff's case was PW1. Defamation involves imputations that tends to cause injury to the reputation of a person, and a successful plaintiff must demonstrate that this as a key ingredient of defamation, and not merely rely on his own estimation of himself and the effect of the defamatory statements to that estimation. Here, as director of the Plaintiff was testifying on its behalf, and not as a third party or as a character witness. Indeed, it seemed that



the testimony of PW1 was more concerned with the witness' own reputational injury than that to the Plaintiff. What was required to prove defamation was not the evidence of the Plaintiff but the evidence of a third party, the ordinary person who reading the article perceived it to convey the defamatory imputations alleged.

56. In *SMW v ZWM* (2015) eKLR, the Court of Appeal observed that:-

“

“ 15. Black's Law Dictionary 8th Edition defines defamation as the act of harming the reputation of another by making a false statement to a third person. (emphasis added). 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: see *Gatley on Libel and Slander* (10th edition). A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result. ...

19. The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant's witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.

The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is not what defamation is in law. The appellant himself further testified before the trial court that nothing had changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent...” (Emphasis added).

57. The above holding was reiterated in *Patani's case* (supra), where the same Court stated that: -

“

“ 26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury, or damage suffered to their reputation.



27. The evidence on record is the testimony by the 2<sup>nd</sup> appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant's character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellant's reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation. (Emphasis added)

See also *Daniel N. Ngunia v K.G.G.C.U. Limited* (2000) eKLR and *Hezekiel Oira v Standard Limited & Another* (2016) eKLR.

58. Similarly, in this case, the Plaintiff did not tender evidence through other witnesses showing that the words in the article complained of caused or had the tendency to cause injury to the Plaintiff's credit, reputation by way of public ridicule, hatred or even being shunned, or that it tended to lower the Plaintiff's esteem in the mind of right-thinking members of society. While the article in question may be barely flattering to the persons named therein as indebted to the 2<sup>nd</sup> Defendant, the test to be applied is that of the reasonable ordinary man; it is not the Plaintiff's view through PW1, of itself that matters, as stated in *Musikari Kombo* (supra). Here, there is no evidence to demonstrate the defamatory imputations pleaded by the Plaintiff in respect of the impugned article, the Plaintiff seemingly relying on its own view of itself.
59. Equally, the burden lay upon the Plaintiff to prove the falsity of the contents of the article, specifically, its key complaint through PW1 that it was not indebted to the 2<sup>nd</sup> Defendant to the tune of Kshs. 118 million and or obtained the loan facility through 'political' favour as portrayed in the article. The pleadings before this Court particularly by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants reveal that the 2<sup>nd</sup> Defendant counterclaimed as against the Plaintiff the sum of Kshs. 121,660,000/- being allegedly due and owing to the 2<sup>nd</sup> Defendant on account the facility advanced to the Plaintiff. (See. P. Exh.1 and P. Exh.2).
60. The 2<sup>nd</sup> Defendant's claim pleaded in the counterclaim against the Plaintiff was for Kshs. 121,660,000/- which sum appears to have been compromised as reflected in the preliminary decree dated 16.05.2011, coming eight (8) years after institution of the suit. Here, notwithstanding the sensational headline, the substance of the article was that non-performing loans outstanding to the 2<sup>nd</sup> Defendant from various individuals and entities including the Plaintiff, affected the 2<sup>nd</sup> Defendant's performance as a bank in the material period. PW1 while admitting that the Plaintiff's loan with the 2<sup>nd</sup> Defendant was in arrears at the material time and dismissing the figures in the article as exaggerated eschewed producing loan statements or other financial records in proof of the actual sums owed.
61. The compromised settlement in the sum of Kes. 20,000,000/- is just that. It cannot be taken, considering the counterclaim, as the actual amount owing at the material time from the Plaintiff to the 2<sup>nd</sup> Defendant. Moreover, the details surrounding the compromise were not disclosed to the Court then, or during the hearing, and PW1 appeared rather defensive and or evasive whenever the question was put to him. The material time here was the time of publication of the article, well before the suit was filed and before the compromise with the 2<sup>nd</sup> Defendant. Not after the compromise. Whether the



debt was secured or not, it was outstanding at the material time and in the absence of details showing the exact sums then owing, where is the evidence of falseness of the article?

62. In the absence of proof of the defamatory and false nature of the statements complained of, it is difficult to see how the claim founded on defamation could be sustained, even if the defence of qualified privilege and justification were unsustainable. As stated in the case of Wareham t/a A.F. Wareham & Others (supra), if the evidence tendered does not support the facts pleaded, the party bearing the burden of proof should fail. In the result, the Court finds that the Plaintiff has failed to prove all the requisite ingredients of defamation. The suit must fail and is hereby dismissed with costs to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Plaintiff: Mr. Were

For the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants: Mr. Opundo h/b for Mr. Michuki

C/A: Erick

