



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 2 OF 2010

NELSON MUTURI DUMBENYA T/A REBNEL LIMITED.....PLAINTIFF

-VERSUS-

BARAZA LIMITED T/A KENYA TELEVISION NETWORK.....1ST DEFENDANT

ALI MANZU.....2ND DEFENDANT

JUDGMENT

1. The plaintiff in the present instance founded a suit vide the plaint dated 4th January, 2010 in which he sought for the following reliefs against the 1st and 2nd defendants:

- a. General damages for libel, nuisance and trespass.
- b. In the alternative and without prejudice to prayer (a), general damages for malicious falsehood.
- c. Exemplary/aggravated and other punitive damages.
- d. Costs of the suit.
- e. Interest on damages and costs.
- f. Any other and further reliefs that the court may deem fit to grant.

2. The plaintiff pleaded in his plaint that he was at all material times the registered proprietor of all the land known as Ngong/Ngong/14475 situated in Ongata Rongai (“*the subject property*”) consisting of 3 and 4-bedroomed houses which he had let out to tenants for monthly rent.

3. The plaintiff pleaded that on 9th January, 2009 at about 3.00 p.m the tenants in total contravention of a term of the lease agreement permitted the defendants’ servants/agents to enter the subject property under the guise that they were guests or in the alternative, the defendants, through their servants/agents trespassed onto the subject property to conduct an interview with a person unknown to the plaintiff.

4. It was pleaded in the plaint that the defendants’ filmed sections of the subject property and defied orders for them to cease doing so and leave the subject property.

5. According to the plaintiff, the defendants then proceeded to publish the news item on 10th January, 2009 in their lead news items at 1.00p.m, 4.00p.m, 7.00p.m and 9.00p.m with photos of the plaintiff and the subject property in the following words:

“That the plaintiff, a prominent lawyer, had violently assaulted his tenant and caused his disappearance without trace and

that the plaintiff had locked up six young children inside a house since December, 2008 and that the young children could not be allowed to go to school. That the plaintiff had stationed many guards on the property who could not allow the tenant's children and wife to access and leave the property and that the plaintiff's servants and/or agents were demanding bribes in the sum of Kshs.500/ to Kshs.1,000/ every time the tenant's wife accessed or left the property since December, 2008."

6. The plaintiff also pleaded that the 1st defendant through its 7.00p.m news broadcast posed the following question:

"Mzozo wa upangaji nyumba waripotiwa Ongata Rongai. Je, kamati ya kushughulikia wapangaji inchini ipo au la?"
loosely translated to mean:

"A tenancy dispute is reported in Ongata Rongai. Is the committee which is supposed to serve tenants in the country there or not?"

7. It was further pleaded in the plaint that the news items were published maliciously and falsely despite the matters in issue being the subject of pending court proceedings, the result of which the plaintiff suffered injury to his reputation and financial loss.

8. Upon service of summons, the 1st and 2nd defendants entered appearance and put in a joint statement of defence to deny the plaintiff's claim.

9. In their defence, the defendants denied ever trespassing the subject property or gaining access to it in any other unlawful manner.

10. The defendant admitted conducting interviews with the plaintiff's tenants upon receiving information regarding a rent dispute in which some persons were denied the right to freedom of movement.

11. It was pleaded in their defence that the defendants were granted access to the subject premises by the tenants and that the interview was conducted with the consent of and in the presence of the plaintiff, which interview was subsequently published.

12. In their defence, the defendants denied that the publication made was false and malicious to the plaintiff or that the words published could in their ordinary sense be understood to bear the meanings pleaded in the plaint.

13. The defendants pleaded the defence of fair comment on a matter of public interest.

14. At the hearing, the plaintiff gave evidence and summoned two (2) other witnesses to back his case. The defendants closed their case without calling any witnesses.

15. The plaintiff being PW1 adopted his signed witness statement and list and bundle of documents as P. Exh 1.

16. In cross-examination, the plaintiff testified that he did not file any documents to show he was the owner of the subject property, neither did he have any transcript versions of the publication made.

17. The plaintiff also testified that he did not produce copies of the proceedings in CMCC NO. 11 OF 2009 which he deemed to be the pending case involving him and the tenant(s).

18. The plaintiff further stated that he told the tenant in question that he could not leave the subject property until the outstanding arrears in rent were cleared and further stated that the tenant had a wife and children.

19. According to the plaintiff, he was not given an opportunity to contribute to the filming exercise or tell his side of the story.

20. Renee Musimbi Kitagwa who was PW2 adopted her signed witness statement and testified that she is a Magistrate at Kibera Law Courts and the wife to the plaintiff. No questions were put forward to this witness in cross-examination.

21. Lawrence Oduor Omollo in his evidence as PW3 similarly adopted the contents of his witness statement during

chief examination.

22. On being cross-examined, it was his evidence that he worked for the plaintiff at all material times and that when a tenant vacates the subject property, he or she must have a clearance certificate.

23. Upon conclusion of the hearing, this court directed the parties to put in written submissions. On his part, the plaintiff submitted that even though he was not referred to by name in the publication, the same was calculated at disparaging his reputation and standing in society since his photograph accompanied the news item.

24. The plaintiff also submitted that the defendants did not call any evidence to refute his claims and cited the case of **Ndirangu Githuga v Sophie Musembi Njue HCCC No. 2412 of 1987** in which the court held that pleadings are not evidence and the court cannot take into account the averments made in a statement of defence if such averments are not supported by evidence.

25. It was the contention of the plaintiff that the publication was both malicious and false, and that though the plaintiff failed to produce a copy of the video broadcast as evidence, this does not automatically go to show that he did not prove his case against the defendant. In so submitting, the plaintiff relied on the following decision by the Court of Appeal in the case of **Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR**:

“...we find nothing to suggest that all wireless broadcasts are either from recorded tapes or are reduced into some form of a document and that in order for a plaintiff to prove publication of a wireless broadcast he must tape record it and produce the tape record in court as evidence. That proposition is not realistic as it would require people to always have in their possession devices for recording and dwell in constant and vigilant anticipation of being defamed.”

26. The plaintiff argued in his submissions that further to the foregoing, the defendants did not seek his side of the story before making the publication, neither did they give him the opportunity to reply to the contents of the said publication, thereby demonstrating the malicious and reckless nature of the publication.

27. On quantum, the plaintiff sought for a sum of Kshs.20,000,000/ on general damages for allegations that he had caused the disappearance of a tenant; a further Kshs.10,000,000/ on general damages for allegations that he had violently assaulted his tenant; Kshs.10,000,000/ on general damages on the basis of allegations that he had locked up six (6) young children; Kshs.5,000,000/ on general damages for allegations of extortion; general damages for trespass and nuisance in the sum of Kshs.5,000,000/; aggravated and exemplary damages in the respective sums of Kshs.5,000,000/ and finally, general damages for failure to apologize or make amends to the extent of Kshs.5,000,000/ giving rise to an aggregate award of Kshs.65,000,000/.

28. The plaintiff relied on various authorities in respect to the award of damages and I will only cite a select few.

a. In the case of **Christopher Ndarathi Murungaru v John Githongo [2019] eKLR** this court awarded a total award of Kshs.27,000,000/ on damages for defamation.

b. **Musikari Kombo v Royal Media Services Limited [2018] eKLR**: in this case, the plaintiff was awarded a total sum of Kshs.6,000,000/ under a similar head.

c. **Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR** wherein the plaintiff was awarded general damages for defamation at Kshs. 5,000,000/ on appeal.

29. In reply, the defendants submitted that it matters not whether they called a witness or not; the burden of proof rests with the plaintiff to prove the existence of the facts asserted as provided for under **Section 107 of the Evidence Act**.

30. The defendants went on to argue that the plaintiff has not proved the ingredients of defamation in that the plaintiff has not shown that the publication made was defamatory as described in the case of **Odero O. Alfred v Royal Media Group Limited [2015] eKLR** in the following manner:

“In libel cases, plaintiff must present evidence of the publication by the defendant. Failure to so provide, the allegation of publication is deemed to be no more than bare assertion. See. GANTLEY ON LIBEL AND SLANDER (SUPRA) AT

PARAGRAPH 34.7.”

31. According to the defendants, the publication as pleaded in the **plaint** is not a reproduction of the publication broadcasted by the defendants but a paraphrase of the same and in any case, the defamatory words were not set out verbatim like they ought to have been.

32. It was the contention of the defendants that the plaintiff equally did not prove malice on the part of the defendants, with the defendants submitting that the plaintiff was given a chance to present his views before the publication was made.

33. The defendants submitted that should this court find that the plaintiff has proved his case for defamation, then the defences of justification and/or qualified privilege and/or fair comment would become available to them.

34. In that respect, the defendants argued that the contents of the publication were based on facts which were substantially true.

35. It was the submission of the defendants that whereas the plaintiff did make a claim for trespass, he did not at all prove it.

36. On quantum, the defendants proposed to this court a sum of Kshs.3,000,000/ on general damages and borrowed from the judicial authority of **Phinehas Nyagah v Gitobu Manyara [2013] eKLR** where a similar award was made.

37. Furthermore, the defendants urged this court to dismiss the claim for aggravated, exemplary and/or punitive damages for the reason that the plaintiff did not prove malice or show that the defendant aggravated the damage to his reputation.

38. I have considered the evidence tendered alongside the contending submissions and authorities relied upon. The following are the issues arising for determination:

- i. Whether the plaintiff proved his claim for trespass and/or nuisance.**
- ii. Whether the plaintiff proved that the publication in question is defamatory against him;**
- iii. If so, whether the defences of justification, qualified privilege or fair comment are available to the defendants; and**
- iv. Whether the plaintiff is entitled to the reliefs being sought.**

39. In addressing the first issue, I note that whereas the plaintiff pleaded trespass/nuisance in his **plaint**, he did not advance any evidence in that regard neither did he seek to establish the ingredients associated with either of the two (2) torts, including bringing forth evidence to show that he was the registered proprietor of the subject property. This reasoning is supported by the holding in the case of **James Mwangi Gatundu v Mastermind Tobacco (K) Ltd [2019] eKLR** thus:

“The court is of the view that the tort of trespass to land involves some form of unlawful interference with one’s proprietary rights. A plaintiff must demonstrate some violation of his proprietary rights such as ownership or leasehold rights. As the Plaintiff has failed to demonstrate his pleaded claim of ownership, the court finds that the alleged trespass has not been proved to the required standard.”

40. Without dwelling too much on this issue therefore, I find that the defendant did not prove his claim against the defendants under either of the torts.

41. In addressing the second issue, I wish to first list the ingredients of a defamatory claim as laid out by the Court of Appeal in the case of **Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR** cited in the respective parties’ submissions 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.

42. In respect to the second and third ingredients which I wish to begin with, I note that the defendants did not deny that it made a publication arising out of the circumstances pleaded in the plaint. In close reference to this, it is apparent from the evidence tendered before this court that though the publication did not mention the plaintiff by name, the plaintiff's photograph was placed alongside the publication, which can therefore be inferred to mean that the plaintiff was associated with the publication in question.

43. This brings me to the ingredient to do with whether the publication was defamatory. Upon considering the pleadings and the evidence presented by the plaintiff, I observed that the actual publication was not availed to this court for purposes of examining its contents.

44. The plaintiff on the one hand testified and submitted that the defendants neglected and/or refused to produce the transcripts of the impugned publication(s). Going by the submission of the plaintiff which I have considered, the mere absence of the transcripts does not automatically disqualify his case.

45. Nonetheless, I note that the plaintiff through his pleadings and evidence admitted that the wording of the publication was paraphrased by himself which means that this court is unable to truly ascertain which aspects of the publication are defamatory against the plaintiff in view of a denial by the defendants of the paraphrased version. Put another way, I am of the view that the plaintiff did not prove the particulars of defamation as pleaded in his plaint or link the publication to the particulars of innuendo pleaded in his plaint.

46. The plaintiff in his oral evidence admitted that he did not have copies of the court proceedings to support his statement that the publication discussed issues which were pending before the courts.

47. Further to the foregoing, upon considering the evidence of the plaintiff's witnesses, I concluded that there was no credible evidence to demonstrate in specific terms the manner in which the plaintiff's reputation suffered injury as a result of the publication.

48. On the subject of malice, it is apparent that the plaintiff on the one part testified and argued that the publication was made recklessly and in total disregard of his views, while the defendants on the other part stated that they gave the plaintiff an opportunity to respond to the interview which preceded the publication. In the absence of an excerpt of the actual passage, I can only come to the conclusion that the plaintiff did not prove malice against the defendants.

49. In respect to the ingredient to do with whether the publication was false, I note that in the evidence of the plaintiff and PW3, there were admittedly some challenging experiences with a particular tenant.

50. Be that as it may, in the absence of the actual content of the publication in question, I have no basis on which to find that the said publication was false.

51. In view of the foregoing, I am of the view that the plaintiff did not prove the claim for defamation against the defendants. Having determined so, I see no need to delve into the defences relied upon.

52. However, I am still enjoined by law and practice to assess the damages I would have awarded had the plaintiff succeeded in his claim for defamation.

53. I note that the plaintiff proposed awards under various heads in his submissions. In my view, damages in a claim of such nature are meant to vindicate a plaintiff and not to necessarily enrich him or her. I would therefore have awarded an overall sum of general damages.

54. The plaintiff testified that he was at all material times a lawyer by profession. In awarding general damages therefore, I would have considered damages previously awarded to persons of equal or close societal standing to the

plaintiff coupled with the gravity of the wording of the publication, the extent of circulation and the injury suffered to his reputation as a consequence of the publication.

55. A majority of the authorities cited by the plaintiff either entailed persons of slightly higher standing in society or were decided years ago, while the plaintiff in the authority of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** quoted in the defendants' submissions was not a member of the legal profession like the plaintiff herein.

56. I however find relevance in the case of **Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR** quoted in the plaintiff's submissions in which the Court of Appeal upheld an award of Kshs.5,000,000/ under this head. Also, in the case of **Rumba Kinuthia v Judith A. Achar & another [2016] eKLR** decided not too long ago the plaintiff who was an advocate was awarded general damages in the sum of Kshs.4,000,000/.

57. Having weighed the above, I would have awarded the plaintiff a reasonable sum of Kshs.5,000,000/ under that head.

58. On aggravated damages, I would have considered the fact that the publication was severally aired and that no apology was offered by the defendants. Having done so, I would have awarded the plaintiff a sum of Kshs.1,000,000/ borrowing from a similar award made in the **Miguna Miguna** case (supra).

59. In the absence of any extenuating factors, I would not have awarded punitive or exemplary damages to the plaintiff.

60. In the end and based on my analysis above, I hereby dismiss the plaintiff's suit with costs to the 1st and 2nd defendants.

Dated, signed and delivered at Nairobi online via Microsoft Teams this 6th day of May, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st and 2nd Defendants