



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

(Coram: A. C. Mrima, J.)

CIVIL SUIT NO. 9 OF 2018

JANTO CONSTRUCTION COMPANY LTD.....PLAINTIFF

-VERSUS-

ENOCK SIKOLIA..... 1ST DEFENDANT

CITIZEN TV2ND DEFENDANT

ROYAL MEDIA SERVICES LTD.....3RD DEFENDANT

JUDGMENT

Introduction:

“Lago: Good name in a man or woman, dear my lord, is the immediate jewel of their souls. Who steals my purse steals trash; 'tis something, nothing: Twas mine, tis his, and has been slave to thousands; But he then filches from me my good name Robs me of that which not enriches him; And makes me poor indeed.”

-William Shakespeare in O the LLO, Act 3 Scene 3, 155 – 161.

1. The Plaintiff herein, *Janto Construction Company Ltd*, commenced this suit through the filing of a Complaint dated 14/11/2018. The Complaint was filed in Court on 15/11/2018. The Complaint was later amended. The Amended Complaint was filed in Court on 04/12/2018.
2. Contemporaneously with the filing of the Complaint was a Notice of Motion under certificate of urgency. The application was dated 14/11/2018. It was supported by the Affidavit of the Plaintiff's Managing Director, *Mr. Ernest Omondi Owino*. The application urged the Court to issue an order of injunction restraining the three Defendants herein from airing defamatory articles on the Plaintiff pending the hearing of the suit.
3. The application was heard *ex parte* and interim injunctive orders issued. The Defendants were duly served for the *inter-partes* hearing of the application, but they did not appear. The application was heard and allowed. The interim orders were confirmed pending the determination of the suit. That was on 26/11/2018.
4. The Defendants entered appearance on 10/12/2018. However, the appearance for the 2nd Defendant, *Citizen TV*, was under protest. A joint statement of defence on behalf of the Defendants was filed on 10/12/2018. The defence was dated 07/12/2018.
5. The suit was later heard by way of *viva-voce* evidence. The Plaintiff called its Managing Director as its witness. The 1st Defendant, *Enock Sikolia*, testified on his behalf and on behalf on the rest of the Defendants.

The Plaintiff's Case:

6. The Plaintiff's case was based on a publication made by the Defendants on 13/11/2018. The Plaintiff claimed that the Defendants jointly and maliciously aired a defamatory article of and concerning it to the following effect: -

EACC probes 23 firms linked to Obado in Sh. 2.5bn graft scandal amongst them Janto Construction Company that was used by Governor Obado to defraud Migori County Kshs. 2.5bn. That Janto Construction Company was unfairly paid KShs.16.8 Million through its KCB account for constructing Nyabisawa-Jumbo road despite the account being frozen by court.

7. The Plaintiff posited that the forgone article was false, malicious and without justifiable cause. It further posited that the article in its natural and ordinary meaning was understood to mean that the Plaintiff was incorporated purposely to work with the Migori County Government to siphon and steal public funds.

8. The Plaintiff averred that the Defendants ought to have known that it was a reputable firm with a wide clientele base which was instead incorporated in 2011 way before the establishment of Migori County Government.

9. The Plaintiff further averred that it was not part of the 23 entities which the Ethics and Anti-Corruption Commission (hereinafter referred to as '**the EACC**') had instituted a suit against for fraudulent acquisition of funds in Migori County Government through fraudulent and fictitious contracts.

10. It was the Plaintiff's further averment that it lawfully transacted with the Migori County Government and that all its activities were above board.

11. The offending article was contended to have been aired in a prominent and sensational manner during the EACC's raid on the Migori County Government Governor's house in Nairobi. The Plaintiff further contended that at the time of airing the article, any association with the Governor of Migori County Government was meant to disparage a person's or an entity's character.

12. The Plaintiff claimed that before the malicious reporting it enjoyed good social status and respect from the society but immediately after, it lost business.

13. Punitive and aggravated damages for libel, general damages, an apology in terms and texts of its approval, permanent injunction restraining further airing, costs of the suit and interests were sought by the Plaintiff as suitable remedies.

14. For the purposes of this judgment I will refer to the Plaintiff's Managing Director, one *Mr. Ernest Omondi Owino* to as '**Ernest**'.

15. Ernest testified that he was the sole Director of the Plaintiff. He generally reiterated the averments contained in the Amended Plaintiff. He also adopted his written statement dated 14/10/2018 and filed on 18/10/ 2018 as part his evidence. He also produced various exhibits.

16. As regards a suit filed by EACC against the Plaintiff and others, Ernest stated that indeed such a suit existed. It was **Nairobi Anti-Corruption and Economic Crimes Division Misc. Application No. 79 of 2017 EACC -vs- Jared Peter Odoyo & 10 Others**. The matter had been instituted by way of an Originating Motion. I will hereinafter refer to it as "**the preservatory application**".

17. Ernest further clarified that the Plaintiff herein was the 2nd Respondent and Ernest (himself) was the 5th Respondent in the preservatory application. Ernest further disclosed that the 7th Respondent in the preservatory application was also a Company associated with him.

18. Ernest was not sure if any demand notice had been served upon the Defendants prior to the institution of the suit. Ernest stated that the Plaintiff was out to clear its name because it had been adversely affected by the article and it was no longer getting business the way it used to get between the year 2011 and 2017. Ernest however clarified that the Plaintiff still got contracts from Migori County Government.

19. The Plaintiff clarified that it was not seeking any damages in the suit but only needed an apology. Ernest reiterated that an apology would suffice for the Plaintiff.

20. Regarding the preservatory application, Ernest stated that the Plaintiff had been long cleared by EACC and enjoyed a clean bill of health before the publication was made. According to Ernest the Plaintiff was vindicated *vide* a ruling delivered on 08/11/2018 in the preservatory application whereas the false publication was done on 13/11/2018.

21. The Plaintiff filed written submissions dated 16/12/2019. The submissions were evenly dated.

22. The Plaintiff enlisted three issues for determination in its submissions. The issues were whether the publication on television was defamatory, whether there was malice on the part of the Defendants and whether the defence of justification could be applicable.

23. On the issue of publication, the Plaintiff referred to the scholarly works of *Gatley on Libel and Slander 6th Edition* and *Halsbury's Laws of England*.

24. The Plaintiff also referred to the *Halsbury's Laws of England 4th Edition Vol. 28* in defining 'defamation' as follows: -

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

25. The Plaintiff submitted that the test for whether a statement was defamatory was an objective one. On that submission the Plaintiff referred to the *Halsbury's Laws of England* (supra) at page 23 thus: -

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 any circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in defamatory sense.

26. The Court of Appeal in SMW vs. ZWM (2015) eKLR was also referred to in defining the tort of defamation.

27. Applying the foregoing to the facts, the Plaintiff submitted that in its natural and ordinary meaning, the publication was understood to refer to the Plaintiff as being linked to the Migori County Governor 's graft scandal and that the Plaintiff is one of the companies used to siphon funds from the County coffers.

28. The Plaintiff further submitted that the Defendants were aware of the ruling in the preservatory application hence the reporting was false and malicious. Buttressing the point, the Plaintiff relied on Phineas Nyagah -vs- Gilbert Imanyara (2013) eKLR where the Court held that: -

Malice herein does not necessarily mean spite or ill will but recklessness itself may be evidence of spite. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts...Courts should however be slow to draw the inference that the Defendant was so far actuated by improper motives as to deprive him of the protection or privileges unless they are satisfied that he did not believe that what was said or wrote was true or that he was indifferent to or falsity.

29. Submitting that the defence of qualified privilege did not apply to the Defendants, the Plaintiff relied on the House of Lords in Reynolds -vs- Times newspaper [1999] 4ALL ER 609. The decision set the criteria for determining whether a publication is subject to qualified privilege.

30. The Plaintiff urged this Court to find that it had proved its case against the Defendants for infringement and violation of its right to dignity as enshrined in **Article 28** of the **Constitution**. As such the Plaintiff prayed for judgment in terms of an apology and a permanent injunction.

The Defendants' Case:

31. The Defendants averred in their appearance and the Statement of Defence that the 2nd Defendant, *Citizen TV*, was not a body corporate capable of being sued.

32. In their joint defence the Defendants denied broadcasting the information as alleged by the Plaintiff. They also denied the particulars and contended that there was no imputation to the effect that the Plaintiff worked with the Migori County Governor to steal public funds.

33. The Defendants however averred that if there was any publication of the alleged article, then the same was published in good faith, in public interest and without malice or intention to injure the Plaintiff. The Defendants posited that the alleged publication, if any, was a fair comment on a matter of immense public interest. The Defendants relied on the defences of justification, qualified privilege and fair comment.

34. It was further averred by the Defendants that under **Article 33** and **34** of the **Constitution** the public was entitled to know and have information about major events and occurrences in the country and that such duty was on the media. The Defendants therefore further relied on the said constitutional underpinning and the Rule in New York Times -vs- Sullivan 376 US 254 (1964).

35. As said, the 1st Defendant herein, *Enock Sikolia*, (hereinafter referred to as '**Enock**' or '**the 1st Defendant**') testified on behalf of the other Defendants. He stated that the 3rd Defendant was his employer. Enock adopted his Statement dated 30/04/2019 and filed on 02/05/2019 as part of his evidence. He also produced various documents as exhibits.

36. In his evidence before Court, Enock admitted that the Defendants broadcasted an article on the Plaintiff and the Migori County Government. He however contended that the contents of the article were true.

37. Enock was emphatic that the Defendants consulted EACC which institution was probing the scandal involving massive theft of public funds at the Migori County Government. He further stated that it was EACC which gave them the information on the investigations and that he learnt of preservatory application as well.

38. The 1st Defendant further testified that EACC informed the Defendants that the Court had granted preservation orders against, among others, the Plaintiff's bank accounts at the Kenya Commercial Bank in Migori. Enock also stated that the Defendants confirmed the status in the Court file in the preservatory application.

39. Enock admitted the publication but denied vehemently the Plaintiff's translation in the Amended Plaintiff. He contended that the translation was skewed to favour a desired outcome whereas the truth of the publication was to the contrary.

40. As regards airing of the story Enock maintained that the story was credible and that the matter was of public concern.

41. The Defendants filed their written submissions dated 18/02/2019 on 19/02/2019.

42. The Defendants drew the Courts attention to the fact that the Plaintiff had categorically stated that he did not wish to be paid any compensation. It urged the Court therefore not to consider that the prayers of general, punitive and exemplary damages.

43. It was also submitted that the 2nd Defendant was not a legal person capable of being sued. Relying on **Nairobi HCCC No. 607 of 1999 Maurice Ooko Otieno -vs- Mater Misericordiae Hospital** (unreported) the Defendants prayed that the 2nd Defendant be struck out of the suit.

44. The Defendants further contended that the suit was a non-starter as the alleged defamatory article was not set out verbatim in the Plaintiff. They submitted that in such a state of affairs the Court was not able to determine the veracity or otherwise of the alleged article. The Defendants referred to *Gatley on Libel (10th Edition)* where the learned author stated that: -

The words used are material facts and they must, therefore, be set out verbatim in the particulars of the claim. ...It is not enough to describe their substance, purport of effect.

45. Reliance was further placed in **Meru HCCC No. 117 of 2005 Kariunga Kirubua T/a Kariunga Kirubua Company Advocates -vs- LSK & Others** (unreported) where the Court made reference to the decision in *Dr. Lucas Ndungu Munyua -vs- Royal Media Services* where it was held that: -

... neither the Plaintiff nor in the evidence were the exact words reproduced so that the Court was handicapped in finding whether the words published were in fact defamatory

46. The decision in *Veronica Wambui vs. Michael Wanjohi Mathenge (2015) eKLR* was also relied upon.

47. The Defendants raised several defences as well. One of them was the defence of justification. The Defendants made reference to Salmon on the Law of Torts 17th edition where it was stated that “no action will lie for publication of a defamatory statement if the defendant pleads and proves that it is true”.

48. The Defendants also referred to **Sections 14 and 24 of the Defamation Act, Cap. 36** of the Laws of Kenya, *Carter-Ruck on Libel and Slander, 5th Edition*, and *Gatley on Libel and Slander 10th Edition* (supra).

49. The defences of absolute privilege and fair comment were also raised. The Defendants relied on **Section 6 of the Defamation Act, Cap. 36** of the Laws of Kenya. They contended that the alleged publication touched on pending Court proceedings and was not actionable. To that end they relied on **Nairobi HCCC No. 89 of 2011 Musikari Kombo -vs- Royal Media Services Ltd (2014) eKLR**.

50. The Defendants also submitted that the suit was not proved as required in law since there was no independent witness to prove defamation in the eyes of third parties. In support of the contention the Defendants relied on *Wycliffe A. Swanya vs. Toyota East Africa Ltd & Another (2009) eKLR*, *Selina Patani & Another vs. Dhiranji V. Patel (2019) eKLR* and *Registered Trustees of the Sisters of Mercy t/a Mater Misericordiae Hospital vs. Jacinta W. Maina & Another (2014) eKLR*.

51. The Defendants further submitted on the need by the Court to balance between the right to reputation and the right to media to impart information under Article 33 of the Constitution. To that end reference was made to *Jacob Mwando Wangora -vs- Hezron Mwando Kirorio [2017] eKLR* where the English decision of *Fraser -vs- Evans & Another [1969]* was quoted as follows: -

there are some things which are such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and make fair comment on. This is an integral part of the right to free speech and expression. It must not be whittled away... in this matter there is a matter of public concern. They admit they are going to injure the reputation of the Plaintiff but they say they are only making a fair comment on a matter of public interest.

52. The decision in *Lange vs. Australian Broadcasting Corporation (1997) 4 LRC 193* was also relied on.

53. On the remedies, the Defendants submitted that the suit could not stand in law and as such it was for dismissal. It was however submitted that if the suit succeeded then the Plaintiff was not entitled to any damages since it had so clearly stated as such.

54. In respect of the prayer for permanent injunction, it was submitted that this Court should not issue the order as it will be a complete impairment of the freedom of expression and public interest. The authority of **John Ntoiti Mugambi alias Kamukuru -vs- Moses Kithinji alias Hon. Musa [2016]** was relied on where it was held: -

it is not possible to issue such boundless injunction which restrain any and all persons from saying anything about the Applicant. that will be a complete impairment of the freedom of expression and public interest that the truth should be out. ..if this order was granted as prayed, what yardstick will a person confronted with the order use to know or discern which interviews, articles, or comments and or words are libelous or injurious falsehood or are similar words defamatory of the plaintiff.

55. Finally, the Defendants submitted on the issue of failure by the Plaintiff to issue a demand notice prior to instituting suit. They stated that the omission ought to be visited adversely on the Plaintiff on the award of costs.

56. All in all, the Defendants submitted that on a balance of probabilities, the Plaintiff had failed to prove its case and urged this Court to dismiss the claim with costs.

Issues for Determination:

57. I have carefully considered the pleadings in this suit, the Witness Statements, the documents produced as exhibits, the evidence as tendered during the trial as well the detailed written submissions on record.

58. I must acknowledge the fact that the Counsels for the parties herein have rendered detailed submissions covering all aspects of the tort of defamation and the Law of Defamation in general. To that end I salute them.

59. Since there was no consensus on the issues to be determined by this Court, I will consider the following issues in this discussion: -

- i. The legal standing of the 2nd Defendant;
- ii. Whether the entire suit is a non-starter for want pleading verbatim the words complained of;
- iii. The status of Misc. Application No. 79 of 2017 O.S. (the preservative application);
- iv. Whether the impugned publication lowered the reputation of the Plaintiff in the estimation of right-thinking members of society generally;
- v. Whether the defences raised by the Defendants are holding in this suit and if not, whether there was malice in the publication of the disputed article;
- vi. Whether the Plaintiff proved its case and if so whether it is entitled to any remedies;
- vii. Costs.

Analysis and Determinations:

60. I will henceforth deal with the above issues as under: -

i. The legal standing of the 2nd Defendant:

61. The Defendants entered appearance and filed the defence on behalf of the 2nd Defendant under protest. The reason being that the 2nd Defendant was not a legal person capable of suing and being sued.

62. The issue was also raised in the Defendants' submissions.

63. The Plaintiff did not respond to the issue.

64. A claimant has a duty of ascertaining the legal status of a party intended to be sued. The reason being that it is only those entities which are either natural or legal persons which can successfully sue or be sued. Instituting legal proceedings against a non-legal entity renders the suit a non-starter.

65. The Court in **Maurice Ooko Otieno -vs- Mater Misericordiae Hospital** (supra) rightly captured the foregone legal position.

66. In this case had the Plaintiff ascertained the status of the 2nd Defendant it would have found out that indeed *Citizen TV* is not a legal entity.

67. As a result of the foregone, the suit against the 2nd Defendant cannot stand. It is hereby struck out accordingly.

68. The further analysis herein will henceforth centre on the 1st and 3rd Defendants.

ii. Whether the entire suit is a non-starter for want pleading verbatim the words complained of:

69. The Defendants strenuously submitted on this issue. They also referred to some decisions.

70. The Plaintiff did not respond to that submission.

71. The issue has however been a subject of consideration in some judicial pronouncements. The notable one is the Court of Appeal in **Civil Appeal No. 286 of 2016 Raphael Lukale v Elizabeth Mayabi & Another [2018] eKLR** where the Court had the opportunity to consider the impact of failure of a party to present verbatim English literal translation in a defamation claim.

72. The dispute in the said case was first heard by the High Court where the Plaintiff, a School Headmaster was the subject of a programme called "*Akomwitala*" in Mulembe FM, a Luhya dialect radio station. It was the Plaintiff's case that the host of the programme falsely and maliciously broadcasted to the public words in the Luhya language the effect of which were understood to mean that he was a "*dishonest person and had taken advantage of a naive widow to misappropriate the widow's dues from her late husband's retirement benefits, his posho mill and farm*" and that he "*should be dismissed from his employment as a teacher.*"

73. On the issue of whether the reproduced words were the ones spoken by the Defendant and disseminated by radio station, the High Court observed that failure by the Plaintiff to present the English literal translation certificate for the words complained of was fatal to his claim.

74. The learned Judge dismissed the evidence of the Plaintiff's witnesses on the basis that they only heard the words in Luhya language and could not vouch for the verbatim English translation. The Judge observed as follows: -

...the plaintiff did not prove that the words in fact, as uttered by Mayabi the first defendant are the ones which were reproduced in the Plaint at paragraph 7 as per his literal English translation, and not those ones which Mayabi stated that were broadcast

.... I am unable to find that the plaintiff has, on a balance of probabilities proved that the defendants did utter or broadcast the words that are reproduced in paragraph 7 of the plaint.

75. Aggrieved, the Plaintiff appealed to the Court of Appeal where the Court interrogated at the Respondents' witness statements as well as their oral evidence before the trial court and made the following observation: -

We have keenly looked at the respondent's version paraphrased above and that contained in the appellant's plaint and are of the view that there is no substantial distinction in the overall import of the two. Because there is no dispute that the story was aired, the question to be determined is whether the learned Judge misdirected herself in insisting that, without a recording of actual words, the appellant did not prove that the words in question were the same ones which were reproduced in paragraph 7 of the plaint; whether she further misdirected herself in finding that the appellant did not prove actual publication of the words and that they were indeed defamatory of him; whether she erred by holding that those words, in the absence of a literal English translation certificate could not be said to be defamatory...

76. The Court went to say that: -

The specificity and detail with which the story was told left no doubt, to those who knew the appellant, as to who was at the heart of the story. Not only was his name disclosed, but specified also was the fact that he was a headmaster of a known school. The appellant and his witnesses testified that they heard the 1st defendant broadcast the said words through Mulembe FM Radio Station and that the said broadcast was in the Luhya language, which they understood and spoke, the English version of which was reproduced in the plaint.

77. The Court found fault of the trial Court's insistence of verbatim translation in the following manner: -

All the law requires is that the Plaintiff must try as much as possible to reproduce the words used in a defamation claim. See Gately on Libel and Slander, 11th Edition at 28.17 page 973 "...If the exact words cannot be pleaded, the words must at least be set out with reasonable precision."

We entertain no doubt whatsoever, therefore, that the words used in the story were not only published but intended to bring the appellant into hatred, contempt or ridicule by the right-thinking members of society generally. The appellant's reputation was indeed injured as explained by his witnesses and he was brought into hatred, contempt and ridicule by those who knew him and heard the allegations that he, a whole school headmaster had eloped with the wife a professional colleague, took advantage of the relationship to impoverish his children, by colluding with her to sell the deceased's posho mill, use his land for personal enrichment and embezzle the funds in the deceased's bank account

...The appellant in our considered opinion pleaded the words complained of with reasonable precision and the 1st respondent largely agreed with the English translation of those words.

78. In this case the Plaintiff did not plead verbatim the words complained of. It only pleaded an English translation of the words complained of. The Defendants however produced recordings of the publication as exhibits. I had an occasion and listened to the recordings.

79. The Plaintiff's name was clearly mentioned in the publication. The roads which the Plaintiff had constructed were also mentioned. It was the Nyabisawa-Jumbo road. The recordings also explained the nexus between the Plaintiff and the theft of Kshs. 2.5 Billion at the Migori County Government spearheaded by the County Governor. It was also clear that the Plaintiff was one of the many firms used by the Governor to fraudulently siphon public funds.

80. I hence find and hold that although the Plaintiff did not quote the exact words complained of it however pleaded the words complained of in the English translation with reasonable precision and the translation largely agreed with the aired publication.

81. The issue is answered in the negative.

iii. The status of Misc. Application No. 79 of 2017 (the preservatory application):

82. The preservatory application was instituted sometimes on 30/11/2017 by EACC. It was *vide* an Originating Motion under **Section 56(1), (2) and (3) of the Anti-Corruption and Economic Crimes Act, 2003** (hereinafter referred to as '**the ACECA**'). The preservatory application sought for preservatory orders against several bank accounts and parcels of land. The accounts included the Plaintiff's account number 1132259770 at the Kenya Commercial Bank Migori Branch.

83. The matter was against 11 Respondents. They included the Plaintiff herein as the 5th Respondent. Ernest was sued as the 2nd Respondent.

84. The Court in the first instance issued the preservative orders for 6 months.

85. In view of the centrality of the preservative application I will reproduce the **Section 56 of the ACECA**. The provision states as follows: -

56. Order preserving suspect property, etc.

(1) On an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct.

(2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.

(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.

(4) A person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss the application.

(5) The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.

(6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.

(7) In this section, "corrupt conduct" means-

a) conduct that constitutes corruption or economic crime; or

b) conduct that took place before this Act came into operation and which -

i) at the time, constituted an offence; and

ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

86. At the lapse of the 6 months EACC applied for the extension of the preservative orders. That was through another Originating Motion which was dated 18/05/2018. The motion was heard and allowed. The preservative orders were extended for a further 4 months in a ruling delivered on 21/06/2018.

87. The Plaintiff alongside other three Respondents filed a Notice of Motion dated 23/10/2018 on 24/10/2018. The motion sought an order of discharge, discharging the preservative orders.

88. The application was heard and determined in a ruling rendered on 08/11/2018. The Court allowed the application and discharged the preservative orders which the Court had issued on 30/11/2017 and extended on 21/06/2018.

89. The preservative application was hence disposed of by the ruling of 08/11/2018. The effect of the ruling was that the Plaintiff's bank account was unfrozen. The Plaintiff was then at liberty to freely transact the said account.

90. It is of essence to note that out of the investigations by EACC some 7 natural persons and 16 companies were sued in **Milimani Anti-Corruption and Economic Crimes Division ACECA No. 32 of 2018 (O.S)** by EACC on 29/10/2018. I will hereinafter refer to the matter as '**ACECA No. 32 of 2018**'. The suit is still pending and seeks various orders on forfeiture of several properties on account of being unexplained assets and the refund of over Kshs. 1.9 Billion.

iv. Whether the impugned publication lowered the reputation of the Plaintiff in the estimation of right-thinking members of society generally:

91. As a starting point, it is important to note that the **Constitution of Kenya** provides for rights and freedoms which have a bearing on the law of defamation. Those constitutional provisions have been so rightly and well expounded in many judicial decisions including the case of **Phineas Nyagah v. Gitobu Imanyara** (supra) and **Gideon Mose Onchwati v. Kenya Oil Company Ltd & Another (2015) eKLR** among others.

92. In the case of **Phineas Nyagah v. Gitobu Imanyara** (supra) my brother **Odunga, J.** had the following to say on the issue; of which this Court fully agrees with: -

15. ... Under Article 32(1) of the Constitution, it is clear that every person has the right to freedom of conscience, religion, thought, belief and opinion and further provides that the freedom to express one's opinion is a fundamental freedom. Under Article 33 (1)(a) every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment under the Law of Defamation Act but has been given a constitutional underpinning as well. In a claim predicated on the tort of defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which public affairs are being administered with the right to protect the dignity and reputation of individuals.

93. And, on an equal footing, **Aburili, J.** in **Gideon Mose Onchwati v. Kenya Oil Company Ltd & Another** (supra) rightly stated that: -

...the court in deciding defamation cases must balance the provisions of Articles 33, 34 and 35 of the Constitution, dealing with the freedoms of expression and media freedom and the individual's right to access information on one hand and Article 28 in respect of the inherent dignity must be respected and protected...

94. From the reading of **Articles 33, 34 and 35** alongside **Article 28** of the **Constitution**, it is clear that the freedom of expression and of the media as guaranteed is not absolute. Clearly those rights are subject to limitations.

95. That therefore brings me to the arena of what exactly defamation is all about. Again a lot has already been captured by the Counsels for the parties in their submissions.

96. At the risk of repetition, I will refer to two decisions.

97. In the case of **Phineas Nyagah v. Gitobu Imanyara** (supra) the Court stated that '.... defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right-thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the Plaintiff attributing him to any form of disgraceful conduct such as crime, dishonesty, cruelty and so on...'

98. **Kuloba J** (as he then was) in **J. Kudwoli & Ano. v. Eureka Educational & Training Consultants & 2 others (1993) eKLR** in a very comprehensive judgment on the tort of defamation delivered on 11th March 1993 had the following to say: -

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 tends to make them shun or avoid that person....

.....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....

99. I believe I have said enough on what the tort of defamation is all about. However, if one is in still doubt, the holding of the British Columbia Supreme Court in **Murphy v. Ha March (13 DLR 3d 484)** settles it in the following manner: -

Defamation is where a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful cause of action (he lives on the avails of prostitution) or a shameful condition (he has small pox). Such words are considered defamatory because they tend to bring the man 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 the society generally.

100. There are two types of defamation; **libel** and **slander**. Libel, which is defamation crystallized into some permanent form, is actionable *per se* and is also a criminal offence whereas slander, which is normally conveyed by some transient method of expression, is only a civil wrong. However, both libel and slander are meant to protect one's reputation from false and derogatory remarks.

101. The elements of the tort of defamation are equally well settled. For a litigant to succeed in a claim of defamation, the following elements must be proved in the affirmative: -

- a. That the statement tends to lower the Plaintiff's reputation in the estimation of right-thinking members of society generally either in their natural and ordinary meaning or by innuendo;
- b. That the statement refers to the Plaintiff;
- c. That the statement was published by the Defendant;
- d. That the statement is false and/or malicious.

102. I have already reproduced the contents of the impugned publication in the foregone parts of this judgment. It is now for the Court to determine whether the publication had the effect of lowering the reputation of the Plaintiff in the eyes of the right-thinking members of the society generally.

103. In a case of libel, like the one before Court, a Court has to fully address its mind on the entire publication complained about and attempt to see that publication through the eyes of a reasonable right-thinking members of the society as a third party. Unless in cases where *innuendo* has been pleaded in the pleadings, a Court has to attach the ordinary and natural meaning to the words used in a publication in determining whether such a publication is injurious to the reputation of the Plaintiff.

104. **Kuloba, J.** in the **Kudwoli's case** (supra) rightly so dealt with the applicable standard of who a reasonable person is in the context of a defamation claim. The Learned Judge expressed himself as follows: -

This standard rules out extremes at either poles; embracing neither a genius nor an idiot, neither a fanatic nor a faddist, neither a walking encyclopedia nor an illiterate. He is simply a fair-minded person and not one with a morbid or unduly suspicious mind which must discover defamatory imputation in everything published. One with impervious intellect is excluded. The test of reasonable which guides and directs the court in deciding whether the matter carries a defamatory imputation requires involving ordinary intelligence, not the intelligence of persons setting themselves to work to deduce some unusual imputation might succeed to discover. In applying this test: -

“the judge ought not to take into account any mere conjectures which a person reading the document might possibly form” (per Lord Selborne in *Capital and Counties Bank v. Henty* (1882) 7 App. Cas 741; and see per Brett, J in *Hunt v. Goodlake* (1973) 43 LJCP 54 at p. 56.)

The court will reject meanings which can only emerge as the product of some strained or forced or unreasonable interpretation (See Lord Morris in Jones v. Sixelton (1963) 1WLR 1362 at P. 1370; And,

“It is unreasonable that, where there are a number of good interpretations the only bad one should be seized upon to give a defamatory sense to the document” (per Brett, LJ in *Capital and Counties Bank v. Henty* (1880) 5 CPD 539 at p. 54”).

If words conveyed a defamatory imputation to those to whom they were published, but would not have done so to a reasonable man, they are not defamatory. The mere fact that the hearers or readers understood the matter in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it.....

.....In looking for the meaning of the matter complained of, there is always one rule to follow. It is this, that it is necessary to consider not only the very matter of which the plaintiff complains alone; it is necessary to take into account the context of the matter as a whole, and the mode of publication. The entire writing, conversation, or picture, must be construed in its setting as a whole. Thus, a plaintiff cannot be allowed to select an isolated passage or a picture in a publication out of its context and complain of that alone if other parts or the rest of the publication threw a different light on the matter sieved upon. You must look at the whole publication to see whether it was calculated to injure the plaintiff's reputation....

... The question is always whether the whole publication, taken together, is injurious to the reputation of the plaintiff. The defamatory string of a matter may be removed by that which surrounds it.... As the wise say, the bane and antidote must be taken together....

...A publication may be defamatory upon the face, or it may carry a defamatory meaning only the reason of extrinsic circumstances or facts passing beyond the general knowledge of those who may receive it. Some words or pictures may mean nothing or are innocent to one having only a general knowledge. Extrinsic facts coming to light may cause the matter to give a meaning to those who know them which is not the one appearing on the face of it....

105. Going back to the impugned publication, it is a fact that the publication was made on 13/11/2018. There is no doubt that the impugned publication referred to the Plaintiff. Further, there is no doubt as to who published the article. The article was published by the 1st and 3rd Defendants.

106. By placing the impugned publication on one hand and the undisputed facts in this case on the other hand, the following issues can be settled as *inter alia* true on their face value: -

- i. The Plaintiff was investigated by EACC over its dealings with the County Government of Migori;
- ii. EACC obtained preservative orders against the Plaintiff's bank account at the Kenya Commercial Bank Limited Migori Branch through the preservative application;
- iii. Out of the investigations EACC sued those who were culpable in ACECA No. 32 of 2018;
- iv. The Plaintiff was not one of those sued in ACECA No. 32 of 2018;
- v. The ACECA No. 32 of 2018 suit was filed in Court on 29/10/2018;
- vi. The Plaintiff successfully applied for the discharge of the preservative orders. The orders were discharged on 08/11/2018;
- vii. By the time the publication was made by the Defendants the Plaintiff was not under any investigations by the EACC neither were any preservative orders against it.

107. I have severally listened to the impugned publication as recorded. The recordings were produced as exhibits in this case by Enock. The Plaintiff reproduced an English translation of the publication which was run in Kiswahili and English. The translation is in tandem with the publication.

108. A cursory look at the translation and on hearing of the publication verbatim the following issues about the Plaintiff come to the fore: -

- i. The Plaintiff was among the 23 firms probed by EACC over links with Obado (County Governor) in Kshs. 2.5 Billion graft scandal;
- ii. The Plaintiff was part of the firms used by Obado to defraud Migori County Government of Kshs. 2.5 Billion;
- iii. The Plaintiff was unfairly paid Kshs. 16.8 Million through its frozen account at the Kenya Commercial Bank Migori Branch for allegedly constructing Nyabisawa-Jumbo road;
- iv. When the payment of Kshs. 16.8 Million was made the Plaintiff's account had been frozen by the Court.

109. By juxtaposing the issues arising from the publication and the undisputed facts in this case the following are countenanced in the eyes of a reasonable and right thinking person as at 13/11/2018 when the publication was made: -

- a. There was massive fraud and theft of public funds at the Migori County Government spearheaded by the County Governor H.E. Obado;
- b. The Migori County Government lost over Kshs. 2.5 Billion in fraudulent dealings and outright theft;
- c. The fraud and theft was committed through use of 23 firms;
- d. The Plaintiff was among the 23 firms used in the fraudulent dealings aimed at stealing public funds;
- e. The Plaintiff was under investigations by EACC over the alleged fraud and theft;
- f. The Plaintiff is of questionable character and cannot carry out any honest works;
- g. The Plaintiff is of no moral standing in the society;
- h. The Plaintiff is so shrewd that money was deposited in its account despite a Court order freezing the account.

110. I must also state that the Defendants confirmed that the Citizen TV station was the most preferred television station in the country. According to Enock a recently-conducted research placed the station in the fore with 26% countrywide viewership. Enock was sure that the impugned publication reached and was heard by many people.

111. I will now deal with an issue which was raised by the Defendants on the nascence of the testimony of third parties. It is true defamation suit deals with the reputation of persons or entities.

109. It is also true that the evidence of at least an independent witness is mandatory to prove defamation. I therefore fully agree with the Court of Appeal in Wycliffe A. Swanya vs. Toyota East Africa Ltd & Another (supra) and Selina Patani & Another vs. Dhiranji V. Patel (supra).

112. Unlike the natural claimants in Wycliffe A. Swanya vs. Toyota East Africa Ltd & Another (supra) and Selina Patani & Another vs. Dhiranji V. Patel (supra) the Plaintiff in this suit is a limited liability company.

113. As is settled in law a limited liability company is a distinct legal entity from its shareholders or directors. This legal principle was well encapsulated in the much-celebrated case of Salmon vs. A. Salmon & Company Ltd (1896) UKHL1, (1897) AC 22.

114. Closer home the Court of Appeal in Civil Appeal No. 247 of 2005 Victor Mabacha & Another vs. Nurtun Bates Limited (2013) eKLR held as follows: -

Mediacom (a company), as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and (sic) agents unless there are factors warranting a lifting of the veil.

115. The Court of Appeal re-affirmed the position in Civil Appeal No. 329 of 2013 Charles Ray Makuto vs. Almakony Limited & Another (2016) eKLR, Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Another (2014) eKLR among others.

116. The Plaintiff was hence at liberty to call any witness in the world to testify. The Plaintiff settled on Ernest who was also the sole director of the company.

117. Ernest testified that he was among the people who heard and watched the publication both at 01:00pm and 07:00pm. He so testified before Court. He also confirmed that many other people who knew the Plaintiff watched the publication. He was categorical that the

publication was about the Plaintiff and not himself.

118. In this case therefore the Plaintiff called an independent witness. The witness was Ernest. The witness testified on how in his assessment as a reasonable person the Plaintiff's integrity was adversely affected by the impugned publication. That was the conclusion formed by Ernest from the publication. I hence find that there was an independent witness in this case which was called by the Plaintiff. Respectfully, the decisions of the Court of Appeal referred to by the Defendants are distinguishable in this case.

119. With such a state of affairs the Defendants' contention that the Plaintiff did not avail any independent witnesses falls by the wayside. Ernest was the independent witness.

120. With the foregone I will endeavour to finally answer this issue after dealing with the next issue on the defences.

v. Whether the defences raised by the Defendants are holding and if not, whether there was malice in the publication of the disputed article:

121. The Defendants admitted airing the publication. They however raised three defences to the effect that the publication was not defamatory as alleged by the Plaintiff.

122. The defences were justification, fair comment and qualified privilege. I reiterated how the Defendants demonstrated the applicability of the defences in their submissions.

123. The *Black's Law Dictionary 10th Edition* defines the word "**justification**" at page 997 as follows: -

A lawful or sufficient reason for one's acts or omissions; any fact that prevents an act from being wrongful.

A showing, in court, of a sufficient reason why a defendant acted in a way that, in the absence of the reason, would constitute the offence with which the defendant is charged.

124. At page 998 '**justification defence**' is defined as follows: -

a defence that arises when the defendant has acted in a way that the law does not seek to prevent

125. The Court of Appeal in **Raphael Lukale v Elizabeth Mayabi & Another** (supra) had the opportunity to discuss the defence of justification with particular reference to the tort of defamation. While making reference to *Regulation 22* of the Kenya Information and Communication Regulations, 2009 the Court stated as follows: -

Statements that are potentially defamatory ought to be ascertained and verified before they are released to the public. **Regulation 22** of the Kenya Information and Communications (Broadcasting) Regulations, 2009 requires verification of information by a broadcaster before public dissemination as follows:

22. Unconfirmed reporting:

A licensee shall ensure that—

(a) reports or broadcast from its station are based on fact and that are not founded on opinion, rumour supposition, or allegation unless the broadcast is carried out in a manner that indicates these circumstances clearly;

(b) it does not broadcast any report where there is sufficient reason to doubt its accuracy and it is not possible to verify the accuracy of the report before it is broadcast.

126. While making a finding that the defence of justification was not available to the Respondents, the Court of Appeal observed that: -

The respondents claimed that the defence of justification was available to them. That defence is (sic) justification available if the truth in the offending statement is proved. On the other hand, fair comment, on which the respondent also relied, is proved if the statement complained of is an expression of opinion made as fair comment.

127. The Court of Appeal in the foregone case also dealt with the defence of fair comment. It stated that fair comment is proved '*if the statement complained of is an expression of opinion made as fair comment.*'

128. The *Black's Law Dictionary* (supra) at page 713, defines '**fair comment**' as follows: -

A statement based on the writer's or speaker's honest opinion about a matter of public concern.

Fair comment is a common law defence on the tort of libel or slander. For a statement to be considered a fair comment, it must be based on facts truly stated, it must be free from the imputation of corrupt or dishonourable motives on the part of the person whose conduct is criticized, and it must be the honest statement of the writer's or speaker's real opinion.

129. **Carter-Ruck** on *Libel and Slander*, 5th Edition, Butterworths, stated as follows:

To state accurately and clearly what a man has done and then to express an opinion is comment which cannot do any harm or work injustice. For the defence of fair comment to succeed it must be proved that the subject matter of the comment is a matter of legitimate public interest; that the facts upon which the comment is based are true and that the comment is fair in the sense that it is relevant to the facts and in the sense that it is expressed of the honest opinion of the writer. A writer is not entitled to overstep those limits and impute sordid motives not warranted by the facts.

(emphasis added).

130. The defence of qualified privilege is well appreciated upon the definition of the term *privilege*. The *Black's Law Dictionary* (supra) at page 1390 defines the word '*privilege*' as follows: -

a special legal right, exemption or immunity granted to a person or class of persons; an exception to a duty.

a privilege grants someone the legal freedom to or not to do a given act. It immunizes the conduct that, under ordinary circumstances, would subject the actor to liability.

131. At page 1391, the term '*qualified privilege*' is defined as follows: -

a privilege that immunizes an actor from suits only when the privilege is properly exercised in the performance of legal or moral duty.

132. The Dictionary makes further reference to the book *Salmond on the Law of Torts 165* (17th ed. 1977) which defined the term in the following manner: -

qualified privilege... is an intermediate case between total absence of privilege and the presence of absolute privilege.

133. The basis and categories of occasions which the defence of qualified privilege would be applicable was discussed in *Halsbury's Laws of England 4th Edition Reissue Vol. 28* at Para 109 as follows: -

On grounds of public policy, the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are:

- 1. Limited communications between persons having a common and corresponding duty or interest to make and receive the communication,**
- 2. Communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to a public attack.**
- 3. Fair and accurate reports, published generally, of the proceedings of specified persons and bodies....**

134. **Gatley** on *Libel and Slander* 8th Edition page 441 paragraph 442 discusses the statements to which the defence of qualified privilege should apply. They are:

- i. Statements made in the discharge of a public or private duty.**
- ii. Statements made on subject-matter in which the appellant has a legitimate interest.**
- iii. Statements made by the appellant to obtain redress for a grievance.**
- iv. Reports of parliamentary proceedings.**
- v. Extracts from, or abstracts of, parliamentary reports, papers, votes, or proceedings published by the authority of parliament.**

135. By applying the different criterion on the defences to the facts in this case the result comes up as follows: -

- i. There was no justification in the publication since the Defendants did not prove the truth in the offending publication. The publications were indeed a skewed version far from the truth.
- ii. The defence of fair comment did not apply as the publication was not expressed as an opinion of the Defendants but as proven facts.

iii. The defence of qualified privilege failed in that the publication was not a **fair and accurate report of the matters as were before the EACC, the Court in Misc. Application No. 79 of 2017 and the ACECA No. 32 of 2018.**

136. Having so found, I will now ascertain whether there was malice in the publication.

137. The Court of Appeal in **Raphael Lukale v Elizabeth Mayabi & Another** (supra) dealt with the issue of malice and recklessness in the following manner: -

Malice can be inferred from a deliberate or reckless ignoring of facts. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. See Godwin Wachira v Okoth (1977) KLR 24 and J P Machira v. Wangethi Mwangi, Civil Appeal No. 179 of 1997.

138. In **Phineas Nyagah case** (supra) the Court discussed malice as follows: -

18. the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference or malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice. See Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mwangi (supra).

(emphasis added)

139. Enock testified that he was assigned to cover the EACC's raid on Governor Obado's house in the morning of 13/11/2018. The raid was in Nairobi. He proceeded as directed and covered the unfolding events. The story was to be aired that very day otherwise the news would have been stale.

140. Enock obtained Court documents from EACC on the graft scandal at the Migori County Government. He also interviewed some unnamed officers at the EACC. He further stated that part of the 3rd Defendant's team proceeded to Court and perused the preservatory application.

141. EACC was aware of the ruling in preservatory application which was delivered on 08/11/2018. It was also aware that it had filed ACECA No. 32 of 2018 and that the Plaintiff was not among the Respondents therein. Had Enock and his team truly interviewed the EACC officers in respect to the allegations against the Plaintiff herein the correct position would have been yielded.

142. It was further stated by Enock that part of his team was in Court and perused Misc. Application No. 79 of 2017, but they did not come across the ruling rendered on 08/11/2018. There was no evidence of who actually perused the file. Further, Court files usually contain the hand written or typed proceedings of the official business of the Court. In this case the file contained the proceedings of 08/11/2018 when the ruling was delivered. If the record was truly perused and even in the absence of the physical copy of the ruling in the Court file one would have readily noted that the Court delivered a ruling on 08/11/2018. That revelation would have prompted the Defendants to seek and ascertain the contents of the ruling for appropriate and balanced reporting. However, that was not the case.

143. Further, there was no reason given why the Defendants did not peruse ACECA No. 32 of 2018. Even if the Defendants were not informed of the said case by EACC they were duty bound to find out if there was any such case filed in Court. A simply enquiry at the Court registry would have brought ACECA No. 32 of 2018 to the fore. Again, the Defendants did not see such need.

144. To me, the Defendants were in such a hurry so as to air the hot news of the day. Chances are that the Defendants did not have time to ascertain the true and correct position from the Court records. Alternatively, it was a case of the Defendants having known the truth but recklessly disregarding it so as to spice up the news content with what may be more appealing to the public but far from the truth.

145. As I have said above, I have severally watched the recordings of the publication. From the factual position of the matters in this case and the manner in which the publication was made one cannot miss out that the language used by the Defendants was utterly beyond or disproportionate to the facts. There was a sustained and calculated move to portray the Plaintiff in the negative.

146. On the basis of the foregone I find and hold that the Defendants' publication was malicious.

147. In the end I find and hold that the words used in the story were not only maliciously published but intended to bring the Plaintiff into hatred, contempt or ridicule by the right-thinking members of society generally. The Plaintiff's reputation was indeed injured as explained by Ernest. The Plaintiff was brought into hatred, contempt and ridicule by those who knew it and heard the allegations that the Plaintiff was among the 23 firms used by Governor Obado to steal Kshs. 2.5 Billion from the public coffers. There is no doubt that the Plaintiff was portrayed in bad light and as a corrupt outfit; a total social misfit.

148. I therefore answer issue (iv) in the affirmative. The first part of issue (v) is answered in the negative and the second part answered in the affirmative.

vi. Whether the Plaintiff proved its case and if so whether it is entitled to any remedies:

149. Having considered the matter carefully and on the analysis of the facts and the law I hereby return the finding that the Plaintiff proved its case on a preponderance of probability.

1150. The Plaintiff is now entitled to appropriate remedies. The Plaintiff was however categorical that it only required an apology from the Defendants and not any monetary awards in the form of damages.

151. There was also a prayer for a permanent injunction. It was prayer (d) of the Amended Plaintiff. It stated as follows: -

A permanent injunction to restrain the Defendants, servants and/or agents from airing or continuing to air articles defamatory to the Plaintiff now or in the near future.

152. I read and was persuaded by the decision of **John Ntoiti Mugambi alias Kamukuru vs. Moses Kithinji alias Hon. Musa** (supra) on how Courts ought to deal with requests for permanent injunctions in defamation claims. This is what the Court stated: -

The way the orders sought are styled - borrowing from the words of Justice Ringera - is a net cast too wide over a large body of water, and out of all the lake or sea, it will catch all manner of creatures. In defamation cases, it is not possible to issue such boundless injunction which restrain any and all persons from saying anything about the Applicant; that will be a complete impairment of freedom of expression and public interest that truth should be out. An injunction in such cases must be specific in order to prevent such impairment or impediment of freedom of free speech and expression. Care should be taken, therefore, not to issue injunctions which will rupture the law and the Constitution.

If this order is granted as prayed, what yardstick will a person confronted with the order use to know or discern which interviews, articles, comments and or words are libelous or injurious falsehood or are similar words defamatory of the Plaintiff? On this subject, see what Mabeya J said in the case of FRANCIS ATWOLI & 5 OTHERS =V=AZUNGU KAMBI & 3 OTHERS NAIROBI HIGH COURT CIVIL DUTY NO. 666 OF 2015, that;

One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid; the order sought was too general to have any precise meaning.

153. An injunction order must be directed on specific acts complained of. In this case the injunctive order sought by the Plaintiff referred to current and future contemplated defamations.

154. The Plaintiff has for a long time dealt with the Migori County Government. Infact it is on record that despite the events of 13/11/2018 still the Plaintiff is in good business with the devolved unit. The Migori County Government is a public entity. It is subject to audit. It must comply with the **Constitution** just like the Plaintiff.

155. EACC is one of the investigative agencies in this country. It is mandated to carry out investigations on institutions and even individuals. That is a public duty. Even with the determination of Misc. Application No. 79 of 2017 and more so given that the Plaintiff still deals with the devolved unit in service provision EACC remains at liberty to institute or continue with any investigations touching on the Plaintiff and the devolved unit. On the other hand, the Defendants have rights which are provided for and protected by the **Constitution**.

156. In the event the injunction is granted as sought then that will be a complete gag to the Defendants in discharging their duties. How are the Defendants supposed to discern which articles will be defamatory to the Plaintiff? Will the Defendants be able to deal with any matter involving the Plaintiff without the Plaintiff accusing them of defamation? Granting an order in the manner sought will be an impediment to the freedom of expression and against public interest. I therefore decline the invitation by the Plaintiff.

157. On costs, in view of the Plaintiff's position that it was not interested in damages I believe the reasonable order in the unique circumstances of this case would be for each party to bear its own costs of this suit.

Conclusion:

158. In the end I hereby enter judgment for the Plaintiff jointly and severally against the 1st and 3rd Defendants as follows: -

a. The Plaintiff's suit against the 2nd Defendant herein, *Citizen TV*, is hereby struck out.

b. As a result of the defamatory publication on the Plaintiff aired by the Defendants on 13/11/2018 the Plaintiff is entitled to an apology. To that end the parties herein shall: -

(i) Agree on the contents of the apology;

(ii) Agree on the manner in which the apology shall be carried out;

(iii) The parties shall settle (i) and (ii) above within 30 days of this judgment and file such consent or agreement in Court. The consent or agreement shall form part of this judgment;

(iv) In the unlikely event of not reaching a consensus on (i) and (ii) above, the parties shall file their respective proposals on the content and the manner in which the apology shall be carried out within 30 days of (iii) above;

(v) The Court will thereafter determine the issue.

c. Each party shall bear its own costs of this suit.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 05th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. reyobach@gmail.com for Messrs. H. Obach & Partners Advocates for the Plaintiff.

2. kamaukuriacompanyadvocates@gmail.com for Messrs. Kamau Kuria & Company Advocates for the Defendants.

3. Parties are at liberty to obtain hard copies of the judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE