REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 332 OF 2013

PATRICK NYAGA.....1ST APPELLANT

RENTOKIL INITIAL (K) LIMITED.....2ND APPELLANT

VERSUS

SANITAM SERVICES (E.A) LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi by the Hon C Obulutsa dated 14th May 2013 in CMCC No 6289 of 2008)

BETWEEN

SANITAM SERVICES (E.A) LIMITED.....PLAINTIFF

VERSUS

PATRICK NYAGA.....1ST DEFENDANT

RENTOKIL INITIAL (K) LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. In his judgment delivered on 14th May 2013, the Learned Trial Magistrate, C Obulutsa, Ag Chief Magistrate entered judgment in favour of the Respondent herein for general damages in the sum of Kshs 7,000,000/= together with costs and interest of the suit.

2. Being dissatisfied with the said judgment, the Appellants lodged their Memorandum of Appeal dated 14th June 2013 on the same date. They relied on six (6) Grounds of Appeal. Their Written Submissions were dated 16th May 2018 (**sic)** and filed on 15th May 2018. Those of the Respondent's were dated 14th May 2018 and filed on 15th May 2018. The Respondent also filed further Written Submissions dated 16th April 2018 and filed on 17th May 2018.

3. When the parties appeared before this court on 23rd May 2018, they requested it to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANTS CASE

4. In their Defence filed on 26th November 2018, the Appellants denied ever having written defamatory letters as had been contended by the Respondent and added that if such letters were written, then the same were just and an honest representation of the prevailing circumstances at the time and were only aimed at clearing confusion that had been brought about by the Respondent's misrepresentation contained in its letters to their clients.

5. It was emphatic that the Respondent did not establish the necessary ingredients of the tort of defamation and that the Learned Trial Magistrate erred when he acted in excess of his pecuniary jurisdiction of Kshs 4,000,000/= and awarded the Respondent general damages in

the sum of Kshs 7,000,000/=.

6. They therefore urged this court to allow their Appeal as prayed.

THE RESPONDENT'S CASE

7. The Respondent contended that it filed suit against the Appellants herein following a letter dated 18th July 2008 that was written by the 1st Appellant, who was a Managing Director of the 2nd Respondent, to various entities.

8. It stated that it was the registered proprietor of Patent Number AP 773 regarding sanitary bins and that the Appellants were its business competitors in the sanitary services markets.

9. It added that the sum of Kshs 7,000,000/= that was awarded to it was not inordinately high so as to have warranted interference by this court. It was categorical that at the material time, the Learned Trial Magistrate had pecuniary jurisdiction to enable him make an award of Kshs 7,000,000/=.

10. It therefore urged this court to dismiss the Appeal herein with costs to it.

LEGAL ANALYSIS

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

12. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

13. Having considered the submissions by the parties herein, it appeared to this court that there were three (3) issues that had been placed before it for determination. The same were as follows:-

> **1. Whether or not the Respondent proved on a balance of probability that it was the registered proprietor of Patent number AP773;**
>
> **2. Whether or not the Learned Trial Magistrate had jurisdiction to award the Respondent general damages in the sum of Kshs 7,000,000/=; and**
>
> **3. Whether or not the award of Kshs 7,000,000/= was so inordinately high so as to warrant interference by this court.**

14. The court therefore dealt with the same under the following separate heads.

I. PROOF OF THE RESPONDENT'S CASE

15. Grounds of Appeal Nos (1), (2) (3) and (6) were dealt with under this head as they were related.

16. To support their submission that the Respondent did not discharge its duty to prove the tort of defamation, the Appellants referred this court to the case of **Samuel Ndung'u Mukunya vs Nation Media Group Ltd & Another [2015] eKLR** in which it was held that on a suit founded on defamation, a Plaintiff must prove:-

> **i. That the matter of which the plaintiff complains was defamatory in character.**
>
> **ii. That defamatory statement or utterance was published by the Defendants; publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.**
>
> **iii. That it was published maliciously.**

17. They submitted that the foregoing ingredients must be present for a claim of defamation to succeed but that in this particular case, ingredients (i) and (iii) were absent herein. It was their contention that the letters they sent to their clients were merely to correct a misrepresentation by the Respondent and were not sent maliciously.

18. They added that the letters did not demean the Respondent or lower him in the estimation of right thinking members of society or expose it to public hatred, contempt or ridicule or cause it to be shunned or avoided as was held in the case of **Miguna Miguna vs Standard Group Ltd & 4 Others [2014] eKLR.** He also relied on the cases of **Phineas Nyaga vs Gitobu Imanyara [2013] eKLR** and the Treatise on **Libel**

and Slander 6th Edition by Gatley at **Page 2 Paragraph 3** where the import was that the law of defamation is concerned with the protection of reputation.

19. On its part, the Respondent relied on the case of **Martha Karua vs Nation Media Group & Another [2016] eKLR** where the ingredients of defamation were restated as follows:-

a. There must be a publication of the words to a third party.

b. The words as published must refer to the Plaintiff.

c. The words must be false.

d. In slander there must be proof of resultant damage.

e. The Plaintiff must demonstrate that the words were published maliciously.

f. It was its contention that all the ingredients of the tort of defamation were present. In this regard, it referred this court to the definition of defamation in **Winfield on Torts** as:-

"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"

20. It referred this court to a decision that was made by Kimaru J in the case of **HCCC No 702 of 2008 Rentokil Kenya Ltd vs Sanitam Services (EA) Limited** where he held as follows:-

"In the present application, it is clear that the Plaintiff (meaning the Appellants herein) is infringing the patent of the Defendant by offering to the market sanitary bins similar to the one patented by the Defendant. The Plaintiff has made no effort to patent what it considers to be a different invention to that of the Defendant. The Court of Appeal made a determination on the issue. The Plaintiff cannot re-litigate the issue regarding the sanitary bin it is offering to the market. I therefore hold that the Plaintiff has failed to establish that its sanitary bin is different and dissimilar to the one which the patented to the Defendant. Under Section 54 (1) of the Industrial Property Act the owner of the patent has a right to preclude any person from exploring a protected invention."

21. A perusal of the Plaint shows that on various dates between April and August, the year was not given the 1st Appellant wrote a letter whose contents were as follows:-

"I also wish to point out that Sanitam Service have approached many of our customers with similar warnings in the recent past with clear intent to acquire business through unscrupulous ways. I am however happy to report that this illegal approach has yielded no results and is untenable. I hope this clarifies the matter. I will be happy to provide you with more information should you find it necessary and assure you of utmost honesty in all our business dealings and also assure you of a consistent premium service that you have contracted us to offer to you".

22. Despite being asked by the Respondent to tender an apology, the Appellants declined to do so and instead wrote similar letters with the same content to other clients.

23. In their Defence, the Appellants admitted that the Respondent had obtained Patent No AP 773 from the African Regional Industrial Property (ARIPO) but that the patentability was pending in the courts and Industrial Property Tribunal.

24. They pointed out that they wrote the letters to correct a misrepresentation to its clients by the Respondent. The particulars of misrepresentation particularised in their Statement of Defence were as follows:-

a. That the sanitary/litter bins provided by the 2nd Defendant to its client were similar and confusable with those patented to the Plaintiff and an infringement of its patent No. AP 773;

b. That by using the sanitary/litter bins provided by the 2nd Defendant to them, the clients were infringing on the Plaintiff's patent No. AP 773;

c. That the 2nd Defendant's were liable to civil action for the alleged breach unless they stopped using the sanitary/litter bins supplied to them by the 2nd Defendant.

25. A reading of the last paragraph of the letters from the Appellants appeared to this court to have been laced with malice. The insinuation and/or innuendo was that the Respondent was intent on acquiring business through unscrupulous ways. This was intended to demean the Respondent. The addition that the Respondent's illegal approach had yielded no fruits and was untenable was a mockery of the Respondent. It was *mala fide*. Its intention was to lower the standing or reputation of the Respondent in the eyes of right thinking members of the society who would look at it as a dubious company.

26. In fact, the mere use of the word "illegal" without any substantiation was sufficient for this court to have been persuaded that the publication was defamatory in character. It was malicious and it referred to the Respondent. This is because the Appellants had in their subject letters admitted that litigation on the patentability was pending before the courts and the Tribunal. Consequently the Appellants could not have purported that the Respondent's actions were illegal.

27. Bearing in mind that the Appellants did not deny that the issue of patentability had already been determined by the High Court and Court of Appeal as had been pointed out by Kimaru J in the case before him as aforesaid, this court came to the firm conclusion that the Respondent proved the tort of defamation on a balance of probability.

28. Indeed, this court agreed with its submissions that the publication by the Appellants insinuated that it used illegal means to acquire business which, reputation would cause right thinking members of the society to shun or avoid doing business with it. As a result, there was a possibility of it suffering loss.

29. In the circumstances foregoing, Grounds of Appeal Nos (1), (2), (3) and (6) were not merited and the same are hereby dismissed.

II. JURISDICTION OF THE LEARNED TRIAL MAGISTRATE

30. Ground of Appeal No (5) was dealt with under this head.

31. The Appellants referred this court to Section 5 of the Magistrate's Court Act Cap 10 (Laws of Kenya) that capped the pecuniary jurisdiction of the magistrate's court to Kshs 4,000,000/=.

32. The said Section 5 of the Magistrate's Courts Act stipulates as follows:-

> **"A magistrate's court shall be subordinate to the High Court and shall be duly constituted when presided over by a chief magistrate, a senior principal magistrate, a principal magistrate, a senior resident magistrate or a resident magistrate".**

33. They also relied on the case of **Owners of the Motor Vessel "Lillian S vs Caltex Oil (Kenya) Ltd [1989] KLR 1** where the Court of Appeal held that:-

> **"… Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."**

34. They also relied on the cases of **Joseph Muthee Kamau & Another vs David Mwangi Gichuru & Another [2013] e KLR** and **Armitral Bagwanji Shah vs Mash Express Ltd & Others Nairobi HCCC NO 1095 OF 2005**(unreported) to buttress their argument that jurisdiction must have been present at the commencement of the case.

35. On its part, the Respondent submitted that the Learned Trial Magistrate commenced the proceedings herein in his capacity as an Acting Chief Magistrate whose jurisdiction was Kshs 7,000,000/= which it stated it had brought to the attention of the Trial Court by attaching the Statute Law (Miscellaneous Amendment Act 2012) that conferred pecuniary jurisdiction to various magistracy levels.

36. A careful perusal of the proceedings shows that the hearing commenced on 22nd January 2013 and that judgment was delivered on 14th May 2013. By this time, the Statute Law (Miscellaneous Amendment Act, 2012) had become operational. It was assented to on 6th July 2012 and given 12th July 2012 as the date of commencement.

37. It was therefore clear from the amendment that the Learned Trial Magistrate who was at the time acting as a Chief Magistrate had pecuniary jurisdiction to award a sum of Kshs 7,000,000/=. The Appellants submissions that he had no jurisdiction at the commencement of trial fell by the wayside. In any event, the Learned Trial Magistrate was not divested of jurisdiction merely because he could not have awarded a sum of Kshs 7,000,000/=. This is because he had pecuniary jurisdiction to hear and determine a matter where the value of the subject matter **did not exceed** (emphasis court) Kshs 7,000,000/= and could have awarded any lower figure than Kshs 7,000,000/=.

38. In the premises foregoing, this court did not find any merit in Ground of Appeal No (5) and the same is hereby dismissed.

III. THE AWARD

39. Grounds of Appeal No (4) was dealt with under this head.

40. The Appellants did not address this court on what would have been reasonable quantum had this court found that the Respondent proved its case. On its part, the Respondent submitted that the award was not inordinately high so as to have warrant the intervention of this court.

41. A perusal of the judgment of the Learned Trial Magistrate also showed that whereas the Respondent had proposed Kshs 7,000,000/= as having been adequate compensation, the Appellants did not make any counter proposal. The Learned Trial Magistrate considered the case of **Masese vs KTDA [2005] eKLR** to assist him in arriving at the figure of Kshs 7,000,000/=.

42. This court had due regard to the cases of **Hahn vs Singh 1985 EA 716** and **Idi Ayub Omari Shaban vs City Council of Nairobi CA No 52 of 1984** where the court cited with approval the decision in **Butt vs Khan Civil Appeal No 40 of 2017** that were referred to by the

Respondent herein.

43. In the case of **Hahn vs Singh** (Supra), the Court of Appeal held as follows:-

> **"Before the appellate court could come to a different conclusion from that reached by the High Court judge, it had to be satisfied that the advantage enjoyed by the trial judge of seeing and hearing the witness was not sufficient to explain or justify his conclusion".**

44. In the case of **Butt vs Khan**, Law JA stated as follows:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at figure which was either inordinately high or low".**

45. This court also had due regard to the principles set out in the case of **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727** at page 703 which addressed the question of when an appellate court can to interfere with the finding of a trial court. In the said case it was held that:-

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the court only if it satisfied that the trial court applied the wring principles (as by taking into account some irrelevant factor or leaving out of account some relevant) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an erroneous estimate."**

46. It must be understood that money can never really compensate a person who has sustained any injury, loss or damage. No amount of money can remove the pain that a person goes through no matter how small an injury, loss or damage may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with injuries, loss or damage that a person has sustained. General damages is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered such injury, loss or damage as a result of accident, loss of business, breach of contract or for any tort.

47. Bearing in mind that the maximum pecuniary jurisdiction that the Learned Trial Magistrate had was Kshs 7,000,000/=, he ought to have justified why he found it proper to award the maximum amount a Chief Magistrate could have awarded.

48. This court was therefore of the view that this was a good case where it could intervene as the award of damages appeared to have been manifestly excessive more so as the Respondent did not demonstrate what loss it suffered following the publishing of the words therein. Taking inflationary trends into consideration it was the considered opinion of this court that a sum of Kshs 2,000,000/= was adequate compensation.

49. In arriving at the said figure, this court had due regard to the cases of **Joseph Njogu Kamunge vs Charles Muriuki Gachari [2016] e KLR**, where Mativo J upheld a judgment where the trial court had awarded the respondent therein damages in the sum of Kshs 1,500,000/= and the case of **Ken Odondi & 2 Others vs James Okoth Omburah Ha Okoth Omburah & Co Advocates [2013] e KLR** where the Court of Appeal reduced the award of general damages in the sum of Kshs 7,000,000/= to Kshs 4,000,000/=.

50. In the premises foregoing, this court was persuaded to find that there was merit in Ground of Appeal No (4) and the same is hereby allowed.

DISPOSITION

51. For the foregoing reasons, the upshot of this court's decision was that the Appellants Appeal that was lodged in court on 16th June 2013 was partly successful as aforesaid.

52. Accordingly, the award of Kshs 7,000,000/= general damages for defamation is hereby set aside and/or vacated. In its place, it is hereby ordered that judgment be and is hereby entered in favour of the Respondent against the Appellants in the sum of Kshs 2,000,000/= general damages together with costs and interest of the suit herein.

53. As the Appeal was partially successful, each party will bear its own costs of the Appeal herein.

54. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **19th** day of **September** 2018

J. KAMAU

JUDGE