



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL CASE NO. 9 OF 2014**

**BENEDICT MAURICE OMOLLO OLWENYO.....PLAINTIFF**

**VERSUS**

- 1. MIGORI COUNTY GOVERNMENT**
- 2. STANDARD GROUP LIMITED.....DEFENDANT**

**=CONSOLIDATED WITH=**

**CIVIL CASE NO. 10 OF 2014**

**BENEDICT MAURICE OMOLLO OLWENYO.....PLAINTIFF**

**VERSUS**

- 1. MIGORI COUNTY GOVERNMENT**
- 2. NAIROBI STATE PUBLICATION LTD .....DEFENDANT**

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- 1. MIGORI COUNTY GOVERNMENT**
- 2. NATION MEDIA GROUP LIMITED.....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 make me poor indeed.”*

**-William Shakespeare in Othello Act 3 Scene 3, 155 – 161.**

1. Following some public notice advertisements placed by Migori County government in that local daily newspapers effective that on Benedict Maurice Omollo Olwenyo, the Plaintiff herein, had ceased to be an employee of the Migori County Government, the Plaintiff filed three separated suits each against Migori County Government and the respective media company newspapers carried out the notice.
2. The three suits are Migori High Court Civil Cases No. 09 of 2014, No. 10 of 2014 and No. 11 of 2014 against Migori County Government, Standard Group Limited, Nairobi Star Publication Ltd and Nation Media Group Limited respectively.
3. The suits are claiming General Damages, Aggravated Damages, withdrawal apology to the Plaintiff, costs and interest hereon jointly and severally against the Defendants arising from the said publications which the Plaintiff claimed were defamatory of him
4. The suits were consolidated by an Order of this court for purposes of hearing with Migori High Court Civil Case No. 09 of 20154 being the lead file. Following the consolidation the Defendants henceforth appeared as Migori County Government, Standard Group Limited, Nation Media Group Limited and Nairobi Star Publication Ltd respectively.
5. The case then proceeded for hearing.

**The Suits:-**

6. The three suits, although distinct in law, arose from the same cause of action which were the public notice advertisements carried out jointly and severally by the defendants.
7. The public – notice forming the basis of Migori High Court civil Suits No. 09 of 2014 was carried out in the Standard Newspapers on 28<sup>th</sup> September, 2014 . The advertisements which became the basis of Migori High Court Civil case no. 10 of 2014 was carried out in the Star Newspaper on 26<sup>th</sup> September, 2014 whereas the advertisement that led to the jointing of Migori High Court Civil case No. 11 of 2014 was carried out in the Nation Newspaper also on 28<sup>th</sup> September, 2014.
8. The Notice were similar in content and carried the Plaintiff Coloured passport photograph with the following words below the photograph.

***“This is to notify the public that Benedict Maurice Omollo Olwenyo identification number 3787507, is no longer an employee of Migori County Government. Omolo, who worked at the county as Chief Officer, Finance, ceased to be staff of the county Government from September 11, 2014.***

***He is, therefore, not authorized to transact any business on behalf of Migori County Government. Any liabilities incurred by him will not be honoured by Migori County Government.”***

9. All the three suits were defended upon instructions upon service. In Migori High Court Civil Case No. 09 of 2014, Migori County Government filed a statement of Defence and a Counter-claim seeking the dismissal of the case and or enter judgment against the Plaintiff for General damages, withdrawal apology and costs in what it also believed that the plaintiff had defamed it. The Standard Group Limited filed a Statement of Defence. The Plaintiff then filed a Reply to Defence. In Migori High Court Civil Case No. 10 of 2014, Migori County Government equally filed a statement of Defence and a counter-claim just like in the earlier case whereas Nairobi Star Publication Limited filed a Statement of Defence.
10. In Migori High Court Civil Case No. 11 of 2014, Migori County Government just like in the previous two suits filed a statement of Defence and counter claim whereas Nation Media Group Limited filed a Statement of Defence and the plaintiff filed a Reply to Defence.

11. Alongside the pleadings parties filed respective witnesses Statements, List of Witnesses and Lists of Documents. As there was no concurrence on the agreed issues to determine by the court each party filed his own separate issues accordingly.

12. For purposes of this judgment, I shall refer to the parties as follows:- Benedict Maurice Omollo Olwenyo shall be “**the Plaintiff**”; Migori County Government shall be “**the First Defendant**”; Standard Group Limited as the “**Second Defendant**,”

### **The Plaintiff's Case**

13. The Plaintiff testified and called one witnesses in support of his case. He adopted and relied on his statement dated 23/10/2014 as well as the Documents contained in the List of Documents early dated 23/10/2014 was briefly taken through examination – in – chief and was cross – examined and re-examined accordingly.

14. The plaintiff's credentials and status as contained in his Curriculum Vitae were not controverted. He is an accomplished Accountant by profession having began his carrier in 2003 when he was employed as an Accountant of the Revolving Fund at the Ministry of Home Affairs (Prison Department). In 2009 the Plaintiff was transferred to and became the Provincial Steward of the then Government District within the same Ministry. In 2009, the plaintiff moved to the Ministry of finance and became the Head of District Treasury at Uriri District. He held that position upto February, 2013 when he was seconded to the Transition Authority as the Transitional Principal Officer for Migori County. The Plaintiff was then employed by the 1<sup>st</sup> Defendant in Devolution 2013 as the Chief officer in the Finance & Economic Planing Department which position he held until August 2014 when he tendered his resignation to the 1<sup>st</sup> Defendant and was recalled to and took over the duties of a Senior Assistant at the Ministry of Finance headquarters todate.

15. Having scored a C+ Mean grade in Kenya Certificate of Secondary Examination (KCSE) examination in 1994, the plaintiff trained in Business Administration for a Diploma in 1998 to a Masters of Science in Commerce (Finance and Accounting Option) in 2013. He prides himself of processing a strong combination of training and experience in Accounting, Human Resource Management and Customer Care with Superior communication skills, and enjoys working in a multi-cultural dynamic work environment where teamwork is upheld. The Plaintiff is married.

16. It is the plaintiff's case that he was employed by the 1<sup>st</sup> Defendant as its Chief Officer, Finance and Economic Planing for a period of five years. He underwent the recruitment process though the 1<sup>st</sup> Defendant's County Public Service Board. The appointment was effective 09/12/2013.

17. According to the Plaintiff's Statement dated 23/10/2014 and filed in court on 09/11/2014, the Plaintiff voluntarily resigned from the Defendant by his letter dated 25/08/2014 pursuant to Section 45 (6) of the County Government Act which recognition o f the 1<sup>st</sup> Defendant accepted and indeed went ahead to notify the Ministry of Finance, National Treasury that he had so resigned by the letter dated 26/08/2014. To t he plaintiff, he had served the 1<sup>st</sup> Defendant with utmost loyalty and had no complains thrown to him as at the time of tendering his recognition. The plaintiff was hence surprised to see the public notice advertisements in the three local dailies with the largest circulation in Kenya and the intent informing the public that he had ceased employment with the 1<sup>st</sup> Defendant almost one month later.

18. He was seriously hurt by the advertisement as he had a good working relationship with the 1<sup>st</sup> Defendant during his tenace and could not understand why the 1<sup>st</sup> Defendant was informing the public that he was not authorized to transact any business on behalf of the 1<sup>st</sup> Defendant and that any liabilities made by him would not be honoured by the 1<sup>st</sup> Defendant. The Plaintiff contended that the publication of his photograph alongside the words was articulated by malice and was calculated to disparage his character and as a result the publication caused serious injury to his character and reputation as a Accountant.

19. It was still contended in the statement by the Plaintiff that as a result of the publication, the plaintiff received many calls enquirers from his friends, fellow accountants and relatives inquiring about the article and the allegations contained therein including whether he had been sacked, whether he had been involved in any corruption as or unlawful actions in the employment and generally about his professional and work ethics as an Accountant and in person. The Plaintiff further wondered why the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants never bothered to call him or seek any clarification from him before the publication.

20. The Plaintiff decided to file the three suits against the Defendants as they all jointly and severally refused to retract the notice and offer an apology to him. He also reiterated the contents of the Plaint as part of his statement.

21. For purposes of clarity of the plaintiff's case, I will reiterate paragraph 5 to 13 inclusive of the Plaints ( which are all similar in the three suits) which were on the effect of the publication to the Plaintiff:-

***“5. The Plaintiff states that the publication of the notice alongside the words and the photograph was calculated to disparage and did disparage the character of the Plaintiff in his profession and duties as in their natural and ordinary meaning meant and was understood to mean that the plaintiff, both as an accountant and in his person:-***

***a) Was corrupt and crooked.***

***b) Incurred liability on behalf of the 1st Defendant***

***c) Was a person who could not be trusted with public finances***

***e) Was undeserving and unfit to hold any office and unworthy of his standing in society***

***f) was wanting in gratitude, dishonest and extremely unreliable.***

***g) had committed a criminal offence***

***h) Was a complete social misfit***

***i) Was a scoundrel and rascal.***

6. The Plaintiff states that the Defendants falsely and maliciously printed and published the notice, the words while knowing fully well that the allegations therein would disparage and harm the Plaintiff's character.

7. The plaintiff avers that the above statements have brought his person and his family to public scandal. Odium, ridicule, hatred and contempt and has caused him to be shunned and avoided, and has in this regard injured him in his office and calling.

8. The plaintiff avers that he has suffered considerable distress and embarrassment, and his reputation and person has as a result suffered.

9. The Plaintiff avers that the said words towards him were not only actuated by malice, contempt and spite but were also calculated to and did in fact injure, discredit and cause his reputation to be shunned by right thinking members of the society and has exposed him to hatred, contempt and ridicule.

10. The Plaintiff avers that the said words were maliciously and recklessly published and indifferent of the plaintiff.

### **PARTICULARS OF RECKLESSNESS, FALSEHOOD, MALICE AND SPITE**

**a) Failure / Refusal by the 2nd Defendant to contact the Plaintiff for clarification prior to publishing of the said article.**

**b) Failure / Refusal by the 1st Defendant to publish the fact that the Plaintiff had resigned and his resignation accepted by the 1<sup>st</sup> Defendant.**

**c) Failure / Refusal by the 1<sup>st</sup> Defendant to publish the fact that the Plaintiff had been recalled and now works at the National Treasury (National Government).**

**d) Failure / Refusal by the 1<sup>st</sup> Defendant to publish the fact that the Plaintiff's resignation was voluntary and was not associated with any financial misappropriation or investigation.**

**e) Failure / Refusal of both Defendants to retract the publication upon demand by the plaintiff.**

11. The publication has caused the Plaintiff to suffer loss and damage to his reputation especially since at the time of the publication of the article, the Plaintiff had already ceased being an employee of the 1st defendant after he had been recalled, resigned and redeployed to the Ministry of Finance, Treasury, Nairobi a fact well known to the 1<sup>st</sup> Defendant.

12. The Plaintiff states that the 2<sup>nd</sup> Defendant did not seek any clarification from him before the publication

13. The Plaintiff states that despite demand and notice being sent to the Defendants, the Defendants have not issued an apology or admitted liability. Rather, the Defendants have in blatant disregard to the notice, failed to make good of the demand by the Plaintiff hence making this suit necessary.

22. When the Plaintiff was led by his counsel Mr. Muriithi's in examination -in – chief he stated that he was not aware of any disciplinary issues against him as he had voluntarily resigned. He also denied receipt of any of the letters contained in the 1<sup>st</sup> Defendant's List of Documents filed on 17/11/2014. The Plaintiff further contended that the 1<sup>st</sup> Defendant intentionally passed erroneously information to the public. He in particular took issue with the date of resignation appearing in the impugned notice as 11/09/2014 whereas he had resigned long before and even reported back to the National Treasury. The Plaintiff further contended that whereas he never transacted any business on behalf of the 1st Defendant upon the acceptance of resignation on 26/08/2014 the 1st Defendant still went ahead and mounted a notice to the effect that the Plaintiff was incurring liabilities on behalf of the 1st Defendant and that the same will not be honoured. To that end, his integrity and professionalism was brought into disrepute.

23. On being cross – examined by Mr. Agure Odero Counsel for the 1st Defendant, the Plaintiff reiterated that he never received any correspondences on the alleged disciplinary Proceedings and that he resigned out of his own volition and not otherwise. He further denied even appearing before the 1st Defendant's County Assembly and acting in an disrespectful and unprofessional manner. He admitted that to position of a Chief Officer of Finance was such a senior position and it would accordingly be authorized to the press. The Plaintiff was aware that by the time the Publication was made the position of the Chief Officer had a holder but he was not aware if the holder had also been put up in the press. The Plaintiff remained emphatic that although the impugned notice did not state that he was a criminal, the same sent all the meaning signal in telling the public not to transact with him despite his heavy responsibility at the National Treasury.

24. Upon being cross – examined by Mr. Nyamurongi Counsel for the 2nd Defendant the Plaintiff stated that the reason why he had sued the 2nd Defendant was that it had published the impugned notice negligently and without the courtesy of contacting him to clarify the contents thereof given that he was a person of a high position, responsibility, credibility and status. The plaintiff admitted that it is a normal thing for people to leave employment for any reason and that there is no fast rule or law that people of such status as the Plaintiff had to be contacted before such a publication is run.

25. The Plaintiff further admitted that by the time the advertisement was made he was no longer an employee of the 1st Defendant and that the decision to resign was both a private as well as a public affair. The Plaintiff confirmed that he did not publish any notice informing the public that he had resigned from the 1st Defendant's employment. As a senior employee of the 1st Defendant, the Plaintiff admitted that the discharge of his duties had a great implication on the 1st Defendant.

26. It was made clear by the Plaintiff that upon ceasing employment with the 1st Defendant he lost the authority to transact for and on behalf of the 1st Defendant and that if he even transacted any business thereafter such would not bind the 1st Defendant.

27. While being cross-examined by Misses Stausi, Counsel for the 3rd Defendant, the Plaintiff admitted that the discharge of his duties at the 1st Defendant would bind the 1st Defendant although his duty was to implement policy as delegated to him by the county Executive Nominee Member for Finance and Planning to whom he was reporting to. He equally admitted that the impugned publication was the same across all the three newspapers and that as a result of the publication he was called by his friends and family members who were wondering what the plaintiff had done. The Plaintiff further admitted that he did not have any SMS's or emails to confirm that his friends and family members called him on the publication.

28. The plaintiff also confirmed that he had initially been seconded to the Transition Authority and after resigning from the 1st Defendant he was recalled to the National Treasury where he was discharging very heavy responsibilities including heading District Treasuries, preparation of reports to the National Treasury, guiding the District Tender Committee Nationally among other duties. The Plaintiff also admitted that his enrollment at the 1st Defendant were higher than what he was then earning at the National treasury and that when he was recalled to the National Treasury he resumed his very job group he was at the time of the secondment to the Transition Authority.

29. When asked on the reasons why he resigned from the 1st Defendant by the counsel for the 3rd Defendant the Plaintiff declined to disclose the same holding that it was based on issues of principles.

30. As Mr. Agure Odero who appeared for the 1st Defendant also held brief for the Counsel for the 4th Defendant, the Plaintiff was then re-examined by his counsel. He then agreed to disclose that the reason why he resigned were that the Governor would make unsubstantiated demands for money without following procedures and that the 1st Defendant was deeply embedded in corruption. He said he was even ready to swear an affidavit on the rot in the 1st Defendant.

31. Plaintiff also clarified that his concern on the publication was on the contest note he would not incur any liabilities on behalf of the 1st Defendant but only the Governor and that decisions to which liabilities were made collectively and not inordinately.

**32. BONIFACE OGENO OBONYO** testified as PW2. He relied on the statement dated 30/07/2015 and filed to court on 06/05/2015 which he adopted as his evidence – in – chief. PW2 stated that he was an Environmentalist by profession and had known the Plaintiff for a period of 24 years. He knew the Plaintiff personally and professionally as well as his family. PW2 confirmed that he saw a public notice in the Star Newspaper on 26/09/2014 which indicated that the Plaintiff was not authorized to transact any business on behalf of the 1st Defendant as he was no longer working for the 1st Defendant. The notice had the Plaintiff's photograph as well as his national identification card number 13787507.

33. It was the evidence of PW2 that when he saw the notice concerning the Plaintiff he wondered what had happened to him and why his name was in the newspapers since he knew the plaintiff as a good man of good morals and of high standing Accountant. PW2 formed the view that the plaintiff was a criminal who should not be allowed to hold any office and that was why the notice had been published in order to warn the general public of his conduct.

34. On being cross-examined by Mr. Agure Odero Counsel for the 1st Defendant, PW2 conferred that he had never worked with the Plaintiff although the plaintiff was his schoolmate and a friend. PW2

reiterated that the wording of the notice portrayed the plaintiff as a criminal and that it would make people think that the Plaintiff had been engaged in criminal actions. PW2 remained aware that the 1st Defendant was not a duty to publish its dealings.

35. When PW2 was cross -examined by Mr. Nyamogi he confirmed that he also saw the publication that was run in the standard newspapers on 26/09/2014 which also carried the plaintiff's photograph. PW2 did not know why the plaintiff had ceased employment with the 1st Defendant. PW2 was aware that whenever an employee ceases employment then that employee loses he authority to transact any business for and on behalf of the employer and that any liability among therefrom would not be honoured by the employer.

36. PW2 revealed that he was a confidant to the plaintiff on being cross – examined by Miss Stausi, Counsel for the 3rd Defendant. Although the plaintiff did not disclose to PW2 the reasons for his resignation, PW2 had complained to him about unprocedural dealings at his workplace and appeared very concerned.

37. PW2 had earlier on seen the public notice when the plaintiff was seconded to the Transition Authority and he was happy for him although he could not recall seeing such a public work when the plaintiff was appointed as the Chief Officer by the 1st Defendant. PW2 admitted that civil servants interact a lot with he public and that there was no problem in carrying out an advertisement that such a civil servant had ceased to be an employee but his concern was that the impugned publication jeopardized the Plaintiff's future employment prospects as such future employers will be forced to seek the Plaintiff's employment history from the 1<sup>st</sup> Defendant. PW2 remained aware that once an employee ceased employment then such an employee is not authorized to transact for and on behalf of the employer.

38. On being re-examined PW2 reiterated that the notice was unfair as it warned the public from engaging with the plaintiff and that negatively potrayed the plaintiff.

39. With the evidence of PW2, the plaintiff closed his case.

### **The First Defendant's Case**

40. The 1st Defendant called its County secretary who testified for and on its behalf. He was one **CHRISTOPHER ODHIAMBO RUSANA**. He also adopted the contents of his twin statements filed on 17/11/2014 and 25/06/2015 respectively as well as the documents contained in the list dated 14/11/2014 and as well as those filed on 04/04/2016. This witness equally reiterated the contents of the 1st Defendant's Statement of Defence and the Counter-claim.

**41. CHRISTOPHER ODHIAMBO RUSANA(hereinafter referred was “the County Secretary”)** gave the history of the plaintiff's terms with the 1st Defendant as its Chief Officer, Finance and Economic Planning. He stated that the plaintiff was appointed on 04/12/2013 to the position on terms and conditions contained in a letter of appointment and that the plaintiff accepted and took offer as from 09/12/2013.

42. The plaintiff discharged his duties well when sometimes in March 2014 when he was summoned before the 1st Defendant's County Public Service Board (“the Board”) to respond to some allegations relating to the discharge of his work. That the plaintiff was issued with a Notice to Show Cause by the Board but he ignored to appear and show cause why no disciplinary action ought not to be taken against him. The Board took action and extended the plaintiff's probationary period for a further six (6) months effective 06/06/2014 to accord him an opportunity to improve on his performance.

43. According to the filed Statements of the County Secretary the plaintiff again found himself in trouble with the 1st Defendant's County Assembly Members. He stood out of the Assembly Chambers without the permission on the Chairman and forcefully knocked he main door and forced himself out. This was the highest show of disrespect to the authority, insubordination, rudeness, moral and moral decay, the

County Secretary reiterated. The County Secretary further stated that sometimes in July 2014 the County Assembly summoned the plaintiff on allegations of gross misconduct but he ignored to appear before the House and the matter was referred to the Board for action whereof the Board terminated the plaintiff's employment contract and advised the County Secretary to notify the plaintiff accordingly. According to the County Secretary the termination was effective on the date he was to convey the Board's decision to the plaintiff.

44. The County Secretary insisted that as the plaintiff knew that his employment life with the 1st Defendant had almost come to an end, he in a cleverly way to beat the process, purported to and tendered his resignation by the letter dated 25/08/2014. To him that letter was done in bad faith. The plaintiff having resigned from the employment with the 1st Defendant, the 1st Defendant pursuant to the constituted and statutory requirements ..... informed the general public of the plaintiff's exist from its employment and that the publication were normal and did not attack or injure the integrity and reputation of the plaintiff or at all.

45. It was the 1st Defendant's prayer that the plaintiff's suits against it be dismissed with costs and that judgment be entered for the 1st Defendant as against the plaintiff as prayed for in the Counter-claim.

46. When the County secretary was cross-examined by Mr. Muriithi Counsel for the plaintiff, he informed the Court that he was employed as such in July 2014 and that the 1st Defendant had given instructions that the publication be carried out with a view of informing the general public that the plaintiff was no longer an employee of the 1st Defendant and as such did not possess any authority to transact any business for an d n behalf of the 1st Defendant. Consequently, any liabilities which will be incurred by or as a result of the plaintiff's engagement were not going to be honoured by the 1st Defendant. He also admitted hat the notice stated that the plaintiff had ceased employment as from 11/09/2014 although he was aware of the plaintiff's letter on resignation dated 25/08/2014.

47. The County Secretary further informed the court that when he received the letter from the Board on the plaintiff's termination of his contract of employment he personally forwarded that decision to the plaintiff vide a letter which he could not manage to avail to court. The County Secretary admitted that the County Assembly operated a Hazard which was a new of all proceedings of the House and that if there was any scuffle between the plaintiff and the County Assembly members the Hazard was the best evidence to that end.

48. On the infringed morale, the County Secretary explained that the last paragraph was only a cow eat although he was aware that the plaintiff had not transacted for and on behalf of the 1st Defendant side the time he tendered his resignation letter. It was the testimony of the County Secretary that there was bad blood between the plaintiff and the 1st defendant as the plaintiff certainly carried himself dishonourably and that he had pending disciplinary proceedings and that the relationship between the plaintiff and the 1st defendant was indeed frosty. He confirmed that the 1st defendant had not offered any apology to the plaintiff since according to the 1st defendant, it was the plaintiff to do so. He also confirmed having bought all the newspapers that carried out the publication.

49. Mr. Nyamurongi Counsel for the 1st defendant also had an opportunity of cross – examining the County Secretary . It was readily admitted that the 1st defendant gave instructions to the 2nd defendant to publish the impugned notices and that the 1st defendant ran an account with the 2nd defendant on publications. The publication was presided by an Advertisement Order dated 25/09/2014 duly signed by the 1st defendant that order did not certain the circumstances surrounding the employment of the plaintiff and the 1st defendant and that such facts remained within the knowledge of the 1st defendant. The County Secretary further emphasized that the notice was by the 1st Defendant and not the 2nd defendant and the 2nd defendant was only a conveyor of the notice and that the truth or otherwise of this contents of the notice could only b e volunteered by the 1st defendant.

50. To the County Secretary the impugned notices were not defamatory at all and were the normal onces run in the press especially in employment matters relating to public bodies. The notices were just plain without any hidden meaning at all.

51. As the County Secretary was taken through the cross-examination by Miss Stausi, Counsel for the 3rd defendant, he equally confirmed that the 1st defendant gave instructions to the 3rd defendant to publish the notice through its letter dated 25/09/2014 which the 1st defendant addressed to the 3rd defendant. The letter contained what was to be published and that the 3rd defendant merely responded to what the 1st defendant had asked it to publish. The County Secretary also confirmed that the 1st defendant issued an indemnity to the 3rd defendant on any liability that was likely to arise out of the publication at hand and that the indemnity Form was part of the court record.

52. Mr. Agure Odero wrapped up the County Secretary's evidence on re-examination. The County Secretary clarified that the defendant's letter dated 26/08/2014 to the National Treasury was erroneous as it stated that the plaintiff was on secondment to the 1st defendant whereas the correct position was that the plaintiff had been seconded to the Transition Authority after which he was finally employed by the 1st defendant. The County Secretary also re-emphasized that the notices did not in any way and content or intent on the part of the plaintiff's and that there had been no need to file any of the suits in the first place. He also explained that the 1st defendant decided to publish the notice after the completion of the disciplinary proceedings against the plaintiff and not before and that is why there was the time lapse between the plaintiff's resignation and the publication of the notices.

53. The 1st defendant closed its cases.

### **The Second, Third and Fourth Defendant's Cases:**

54. The 2nd, 3rd and 4th defendants closed the respective case without calling any witnesses. They however indicated to tender their submissions accordingly.

The Parties Submission

#### **a) The Plaintiff**

55. The plaintiff filed his comprehensive submissions on 24/05/16 when he submitted that he had proved each of the three cases as required in law. That indeed the plaintiff was defamed in his character as the statements as contained in the impugned notices were malicious, untrue, recklessly and negligently made without having to establish the truth and that they were intentionally calculated to injure the plaintiff's auditing character and reputation.

56. The plaintiff further submitted that the allegations by the 1st defendant on the plaintiff's alleged misconduct at work remained immaterial as the same were not proved at all but also even if they would be true, do not tie without the premises of the suits, but as labour dispute.

57. It was the plaintiff's submission that the 1st defendant intentionally relayed false information to the public that the plaintiff had ceased being its employee as at 11/09/2014 while it clearly knew that to be untrue as indeed the plaintiff had resigned much earlier on 25/08/2014 and the resignation accepted by the 1st defendant letter dated 26/08/2014.

58. It was also contended that the statements by the 1st defendant informing the public that the plaintiff is not authorized to transact any business on behalf of the 1st defendant was clothed in an immoderate to the effect that the plaintiff was transacting business on behalf of the 1st defendant; a fact the 1st defendant knew. Otherwise as the plaintiff was only intended with policy formation. Submissions were further made that equally the statement that the plaintiff was incurring liabilities on behalf of the 1st defendant were untrue since all liabilities by the 1st defendant are subject to approval by the County Assembly under Section 103 of the County Government Act and as such the plaintiff would not incur any liability without the approval and consent of the 1st defendant. The plaintiff contended that the 1st defendant failed to tender evidence that he even dealt with the public in his day to day work.

59. As to the effect of the notices on the plaintiff, it was submitted that the same disparaged the plaintiff by portraying destroying his character, credibility and reputation and that in their natural meaning the

notices meant that the plaintiff was not honourable, was unprofessional, guilty of transacting unlawful business and could not be trusted with friends and that the position was confirmed by the numerous calls and enquires to the plaintiff received from his friends and family members on the matter. He relied on the case of **Phineas Nyagah v. Gitibu Imanayara (2013) e KLR** in buttressing the argument that his reputation was disparaged in the eyes of the right thinking members of the society.

60. On the submission that the impugned notices were published maliciously the plaintiff relied on the said **Phineas Nyagah supra** and further submitted that the period of one month taken by the 1st defendant to run the impugned notices was a further demonstration of such malice. The plaintiff equally submitted that the allegations that the plaintiff had been taken through a disciplinary process revealed the strongest evidence of malice. Further submission were made that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were equally malicious when they did not come to confirm the contents of the notices with the plaintiff upon to their publication. The case of **Daily Nation v. Mukindi & Ano' (1975) EA 311** as questioned in Gideon **Mose Onchwati vs. Kenya Oil Co Ltd & Ano (2015) e KLR** was cited in support of those submissions.

61. The plaintiff also submitted that as a result of the defamation he suffered he was entrusted to dangers in the sum of Kshs. 5,000,000/= on each case action, Kshs. 5,000,000/= on each case as exemplary damages and Kshs. 500,000/= in lieu of an apology also against each defendant. The plaintiff referred to the decided cases of **Ken Odondi & 2 others v. James Okoth Ombwah t/a Okoth Ombwah & Company Advocates (2013) e KLR** as quoted in the **Gideon Mose Onchwati case (supra)**, **Arthur Papa Odera v. Peter O. Ekisa (2016) e KLR** and that of **Naqui Syed Qamar v. Paramount Bank Ltd & Ano (2015) e KLR**, as a base of the damages he claimed.

#### **b) The 1<sup>st</sup> Defendant**

62. The 1st defendant equally filed extensive submissions in opposing all the plaintiff's claims against it. In a nutshell the 1st defendant's position remained that the impugned notices did not defame the plaintiff either as alleged or otherwise as the same contained very true information.

63. It was argued that the 1st defendant carried out the notices in very good faith and as its calling under the Constitution of Kenya and the County Government Act to uphold transparency in its public dealings and to disseminate such necessary information to the public. The 1st defendant also made references to the Penal Code in demonstrating that it was privilege to disseminate the information to the public.

64. The 1<sup>st</sup> defendant denied that the plaintiff had ever demonstrated that it cited maliciously in authorizing the ..... of any of the impugned notices and further that no damage to the plaintiff's reputation was proved as he continued enjoying a very high profile job in the National Treasury. The cases of **Ambabali vs. Electoral Commission (2007), 1EA LR 182 2006** and that of **Miguna Miguna v. The Standard group Ltd & 4 others 2016) eKLR** were also cited.

65. The 1st defendant then prayed that the case be dismissed with costs accordingly.

#### **c) The 2<sup>nd</sup> Defendants**

66. The 2nd defendant likewise filed substantive submissions in calling for he dismissal of the plaintiff's claim against it.

67. It was submitted that the plaintiff failed to prove that the statements contained in the impugned notices were defamatory as they were indeed truthful in material particulars and to the extent that the plaintiff's employment with the 1st defendant had ceased and as such the plaintiff had no authority to transact any business on behalf of the 1st defendant and that because the plaintiff's authority to transact on behalf of the plaintiff had ceased, any liability issued by him would never be honoured by the 1st defendant.

68. The 2nd defendant contended that the words to the notice were true in substance and as such they

cannot be said to have honoured the plaintiff's reputation. It was further submitted that PW2 was a personal friend to the plaintiff and was therefore a special class of people and cannot be deemed to constitute "right-minded persons" as to represent this general public. The case of **J. Kudwoli & Ano. v. Eureka Educational & Training Consultants & 2 others (1993) e KLR** was referred to in support of that argument.

69. The 2<sup>nd</sup> defendant further submitted that the notice contained plain words and statements that did not trigger the need for clarification by the plaintiff and that is why even the plaintiff himself confirmed that this notice was then accordingly published by an employer. It was also submitted that the notice ought to be looked at as a whole and not to pick part of it and co... a suitable meaning from it. The 2<sup>nd</sup> defendant submitted that the words "***Any liabilities issued by him will not be honoured by Migori County Government***" ought to be constituted within the context of the entire publication and not to isolation.

70. The case of **Phineas Nyaga (supra)** was once again referred in the submission that the plaintiff failed to prove malice against the 2<sup>nd</sup> defendant as the words in the notice were not worthy beyond or disappointment to the facts and that the notice was an ordinary one in such circumstances.

71. The 2<sup>nd</sup> defendant made further submissions that despite the plaintiff having failed to prove its case against it, still damages ought to be assessed. To that end the 2<sup>nd</sup> defendant referred to several cases in-arguing that only nominal general damages would be awarded. The cases referred to were **Ruba Kimithra v. Radio Africa Ltd t/a The Star (2016) e KLR, Johnson Evans Gicheru vs. Andrew Morton & Another (2005) e KLR, Wangethi Mwangi & Ano' v. J. P. Machira t/a Machira & Co Advocates, Court of Appeal Civil Appeal No. 148 of 2003 (unreported) and Nation Newspapers Ltd vs. Gibendi (2002) eKLR.**

72. It was also submitted that the court makes a declaration in the event it enters judgment in favour of the plaintiff against the 2<sup>nd</sup> defendant that any such issues are renewable from the 1<sup>st</sup> defendant by dint of the indemnity that was filed and admitted by the 1<sup>st</sup> defendant.

73. The 2<sup>nd</sup> defendant called the court to find a healthy balance between private individual rights and the public interest with respect to information on the manner in which affairs are being conducted in public bodies. It called for the dismissal of the plaintiff's case against it with costs.

#### **d) The 3<sup>rd</sup> Defendant**

74. The 3<sup>rd</sup> defendant didn't file any submissions in the matter.

#### **e) The 4<sup>th</sup> Defendant**

75. Counsel for the 4<sup>th</sup> defendant also filed quite external submissions in urging the court to dismiss the plaintiff's case against it.

76. It contended that the plaintiff did not prove that the publication in issue was defamatory and that the cause of action was far-fetched and only meant to mislead the court. It was submitted that the right-thinking member of society can easily draw the difference between stating that the "***plaintiff is not allowed to carry out any business on behalf of Migori County as any liabilities incurred by him will not be honoured by Migori County Government***" and stating that "***the plaintiff has transacted business on behalf of Migori County and has issued liabilities yet to be is no longer employed by Migori County***".

77. It was also submitted to plaintiff's contention of a the words used in the notice did not tally with the plain and ordinary meaning of the words and that the words were truthful. Further the 4<sup>th</sup> Defendant submitted that the discrepancy in the date when the plaintiff resigned and when appeared to the notice did not injure the plaintiff's reputation as the truth was that by the time the notice was published the

plaintiff had ceased being an employee of the 1st defendant. The case of **Wycliffe A. Swanya vs. Toyota East Africa Ltd & Another (2009) e KLR** and provisions of the Defamation Act were referred to in support of the foregoing arguments. The 4th defendant first referred to extracts for the book entrusted **Gatley on Libel and Slander, 12<sup>th</sup> Edition, paragraph 16, 17** in buttressing the argument no liability would attach on a government authority by didn't of qualified privilege. The cases of **Shah v. Uganda Argos (1972) EA 80** and **Nation Newspapers Ltd vs. Gibendi (2002) 2 KLR 406** were also referred to in disposing the plaintiff's claim against the 4th defendant.

78. The 4th defendant was categorical that the plaintiff was not entitled to any damages as he had failed to prove his case in law. It referred to the case of **Miguna Miguna vs. Standard Group Limited & 4 Others (2016) e KLR** and that of **Mburu Njuguna Thungu vs. Ayub Waignajo Noroge Civil Appeal No. 215 of 2008 (unreported)** where the plaintiffs failed to prove damage accordingly. It was however submitted that if any liability is attached to the defendants too as lump-sum award of Kshs. 500,000/= for costs general and exemplary damages would suffice and that because the 1st defendant had executed an Indemnity Form with the 4th defendant, fresh sums, if found to be payable, ought to be borne by the 1st defendant only.

79. The 4<sup>th</sup> defendant however called for the dismissal of the plaintiff's case with costs.

### **Analysis and Determination**

80. I have carefully considered the pleadings filed by all the parties in supportive of their respective cases, the Witness Statements filed, the evidence as tendered during the trial as well the detailed written submission filed by the parties in this case.

81. Since there was no commencement on the issues for determination by this court, I humbly frame the issues for determination in the matter as follows:-

*i) Whether the impugned public notices published on the 26<sup>th</sup> September, 2014 and 28<sup>th</sup> September, 2014 respectively of and ..... the plaintiff are defamatory of the plaintiff either in their rational and ordinary meaning;*

*ii) Whether malice was proved in publishing the impugned notice;*

*iii) Whether the plaintiff proved his case and if so whether he is entitled to any remedies;*

*iv) Whether the 1st Defendant Counter-claim against the plaintiff was proved and if so whether the 1st defendant is entitled to any remedies;*

*v) Costs.*

82. I will henceforth deal with each of the above issues separately and as under:-

#### **i) Whether the impugned notice defamed the Plaintiff**

As a starting point, it is important to note that the Constitution of Kenya provides for rights and freedom which have a bearing on the law of defamation. Those constitutional provisions have been well expounded in many judicial decisions including the case of **Phineas Nyagah v. Gitobu Imanyara (2013) e KLR and that of Gideon Mose Onchwati v. Kenya Oil Company Ltd & Anor (2015) e KLR** among others,

84. In the case of **Phineas Nyagah (supra)** my brother Learned Judge G. V. Odunga 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.***

85. And, on an equal footing Hon. Aburili, J in Gideon Mose (supra) rightly stated that:-

***“...the court in denting defamation cases must balance the provisions of Article 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....”***

86. From the reading of the Article 33 and 34 of the Constitution as read together with Article 27 (a) of the Constitution, it is clear that the freedom of expression and of the media is guaranteed is not absolute. Clearly those rights are subject to clear limitation as spelt in law.

87. The foregone then truly calls for a Court of law when dealing with an aspect of defamation to act a fulcrum in balancing the two aspects of the constitutional expectations.

88. That therefore brings us to the arena of understanding exactly defamation is all about. Again a lot has been said in scholarly writings as well in decided judicial decisions on the subject of defamation and courts can today say with precision that defamation is a tort that is define as the publication of a statement which tends to hurt a person in the estimation of the right- thinking members of the society generally or which tend to make him be shunned or avoid.

89. Odunga, J in the case of Phineas Nyagah (supra) stated that ***“The 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”*** Kuloba J (as he then was) in the case of J. Kudwoli (supra) in a judgment delivered on 11th March 1993 had the following to say about the tort of defamation:-

***“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 mem'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....”***

90. On the other hand, Halbury's Laws Vol. 28 4th Edition paragraph 10 P7 defines a defamatory statement as:-

***“Is a statement which tends to low a person in the estimation of right – thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or imputation to him in his office, profession, calling, trade or bushiness.”***

91. 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 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 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 is the estimate of right thinking members of the society generally.”***

92. 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 present one's reputation from false and d..... remarks.

93. 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 is defamatory;**

**b) That the Statement refers to the Plaintiff;**

**c) That the Statement was published by the Defendant;**

**d) That the Statement is malicious.**

94. At this point in time, I will deal with the first three elements and that issue of malice shall be dealt with later in this judgment.

95. I have already reproduced verbatim the contents of the notices which the plaintiff claim to have defamed him in the foregone parts of this judgment. It is now for the court to determine whether to said statements had the effect of lowering the reputation of the plaintiff in the eyes of the right thinking members of this society generally. In a case of libel, like the one before court, a court has to fully address its mind on the entire Statement(s) complained about and contempt to see that statements (s) though the eyes of reasonable right-thinking members of the Society generally. Unless in cases who immendo has been pleaded in the pleadings, a court has to attach the ordinary and natural meaning to the word in the Statement in determining if or not such Statement(s) as injuries to the reputation of the Plaintiff.

96. Hon. Kuloba, J (as he then was) in the Kudwoli's Case dealt with the aspect of who a reasonable man is in the context of a defamation claim. The Learned Judge expressed himself, and so rightly, that:-

***“This Standard rules out extremeness at either pole; embracing neither a genius nor an idiot, neither a fanatic nor a faddist, neither a walking enlopedia nor an illiterate. He is simply a fair – minded person and not one with a morbid a unduly suspicious mind which must discover defamatory imputation in everything published. One with impervious inteller is excluded. The test of reasonable which gushes and directs the court in deciding whether the matter carries a defamatory imputation requires involving ordinary intelligence, nor the intelligence of persons setting th... to work to deduct some unusual imputation might succeed to discover. In applying this test:-***

***“the judge ought not to take into account among mere conjectures which a person reading the document might possibly form (PW Lord Selborne in Capital and Conus Bank b. Henty (1882) 7 App. (as 741; and see Pw Brett, J in Hent 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 with pretation (See Lord Moris in Jones v. Sixelton (1963) 1WLR 1362 at P. 1370; And,***

***“It is unreasonable that, where there are a number of good interpretation the only bad one should be sieved upon to give a defamatory sense to the document” (per Brett, LJ in Corporal and Countries Bank v. Herty (1880) 5 CPD 530 at P. 54”***

***If word 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 hearses 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 contest 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 generalized to select an isolated passage or a positive in a publication out of its context and complain of that alone if other parts or the rest of the publication issued 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 injuries 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 extracts circumstances or facts passing beyond the general knowledge of those who may sense it. Some words or picture may mean nothing or are innocent to one hang only a general knowledge. Extract 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.”***

97. Going back to the impugned notices, the plaintiff was cross-examined by all the Defendant's Counsel at length on their contents. There is no doubt that the notices referred to the plaintiff and that the plaintiff's photograph and his national identity card number appeared as well. Further, there is no doubt as to who published the notices. The 1st Defendant's witness was very clear that the notices were authorized for publication by the 1st defendant at a cost.

98. When the Plaintiff was cross – examined by Mr. Nyamurongi Counsel for the 2nd Defendant, he stated partly as follows:-

***“...It is usual for people to cease employment. Standard Group was to get in touch with me because of my position, cadre and credentials. There is no standard rule that people of my cadre ought to be contacted before publication unless it touches on one's integrity. The publication was carried out in the Standard newspaper on 28/09/2014. It is true that by then I was no longer an employee of the 1st Defendant. It is true that I ceased to be an employee of the 1st defendant. My resignation was a public as well as a private affair. I did not publish any notice that I had ceased working with the 1st Defendant. All my duties were collative at the 1st defendant and I agree that I was a Senior employee at the 1st defendant and my discharge of the duties had great implication on the County Government. On leaving employment I lost authority to transact on behalf of the 1st defendant. It is true that if anyone transacted with me after I left employment with the 1st defendant in relation to the business of the 1st defendant, that will not bind the 1st defendant....”***

99. On being cross examined by Miss Stausi Counsel for the 3rd Defendant, the plaintiff stated in part that:-

***“It is the Governor who is the CEO and is the one accountable. My discharge of the duties would bind the County Governor. The 1st defendant dealt with many stakeholders..”***

100. In further response to the 1st defendant's Counsel, the plaintiff stated that:-

***“It was indeed unfair for the 1st defendant to publish my name after I left. That is unusual as it had malice thereto. I resigned on 25/08/2014 and I was formally released by the CEO Member of Finance on that very day. I understand that by the time of the publication there was a holder of office as a Chief Officer – Finance .... Although the publication did not state that I am a criminal. Telling the public not to transact with me sent all the wrong waves despite my heavy responsibility at the National Treasury...”***

101. The plaintiff then clarified his real contention on the impugned notices on re-examination as follows:-

**“My concern on the advertisement is on the content.....”**

102. By planing the impugned notice on one hand and the foregone examinations of the plaintiff on the other hand, the following issues can be settled as true on their false value:-

- a) That by the time the notices were published the plaintiff had ceased being an employee of the 1st defendant;***
- b) That since the plaintiff had ceased to be an employee of the 1st defendant, he had lost the authority to transact any business on behalf of the 1st defendant.***
- c) That the plaintiff having lost the authority to transact on behalf of the 1st defendant any liability incurred by him would not be honoured by the 1st defendant.***

103. The Plaintiff however contended that the impugned notices injured his reputation on two main grounds being:-

- a) That it was not true that he was in a position to incur liabilities on behalf of the 1st defendant on his own;***
- b) That telling the public not to transact with him sent wrong signals despite his heavy responsibility at the National Treasury.***

104. As to whether the plaintiff was in a position to incur liabilities on behalf of the 1st defendant, I will first revisit the contents of this Letter of Employment with the 1st defendant so as to ascertain his duties. The said letter which is dated 04/12/2013 spelt out the plaintiff's duties and responsibilities as follows:-

### ***“3. Duties and Responsibilities***

***As Chief Officer, you will be responsible to the respective County Executive Committee Member for:-***

- The Administration of Finance Economic Planning Department***
- Implementation of Policies and Development Plans***
- Development and implementation of strategic plans.***
- Formulate and implement effective programs to attain Vision 2030 and Setting goals.***
- Promote National Values and principles of governance and values and principles of public service.***
- Any other duties that will be assigned to you by your Supervisor from time to time.***

105. The plaintiff was very categoric when he was examined -in -chief and stated that he only used to discharge policy at the 1st defendant's Finance and Economic Planning Department as well as theatric areas. However even a casual look at the duties and responsible as contained in the Letter of

Employment clearly reveals that the plaintiff dealt with other duties over and above the policy discharge. For instance he was further in charge of the administration of the Finance and Economic Planning Department, he was to implement development plans, to develop and implement strategic plans, to formulate and implement effective programs to attain Vision 2030 and its selective goals, to promote national values and principles of governance and values and principles of public service among other duties to be delegate to him by his superior.

106. From the nature of the duties and responsibilities which the plaintiff was called to discharge by duty, it is open that the plaintiff was in a position to incur liabilities. That would happen in many ways including but not limited to failure of the plaintiff to properly administer the Department; failure to implement policies and development plans; failure to develop and implement strategic plans, .....

107. Whereas the principal of collective responsibility operates within a corporate like the 1st defendant, the nature of the plaintiff's employment went further to place personal responsibility on the plaintiff such that the failure to filing and appropriately discharge those responsibilities would make not only 1st defendant to main liabilities but also the plaintiff. I say so being alive to the Constitutional expectations placed upon every State officer in public office under the current Constitutional dispensation.

108. Further, some of the plaintiff's duties were in a such a manner that one cannot say with provision that they would cease immediately the plaintiff resigned from the 1st defendant's employment. In saying so I have in mind causes of imputation of programs, policies and development plans moreso in respect to those relating at dealing with the public at large. An example would be a situation where the plaintiff developed and was in the process of implementing a certain programs to attain say Vision 2030 or any of the set goals immediately before tendering his resignation. In such a situation, not all those involved in such a programme would be aware of the plaintiff's resignation and the possibility of the public continuing to deal with the plaintiff despite his resignation cannot be said to be remote. That is also to say that the possibility of the plaintiff continuing to incur liabilities on behalf of the 1st defendant even after such resignation cannot be said to be that remote. It has to be ..... noted that this court is not attempting to say that the plaintiff indeed went ahead to main such liabilities on behalf of the 1st defendant after his resignation but that from the State of affairs at the 1st defendant's Finance and Economic Planning Department and the position held by the plaintiff, such possibility cannot be said to be in abstract.

109. This court hence funds that from the duties and responsibilities bestowed upon the plaintiff and the effective discharge thereof, then plaintiff was in a position to make the 1st defendant main liabilities even after tendering his resignation.

110. As to whether informing the public not to transact with the plaintiff sent signals despite the plaintiff's heavy responsibility at the National Treasury, this court settles that issue in the negative. One basis of that finding has been land on the proceeding issue on the liabilities. Further the notice was very clear that it was and dealt with dealings at the 1st defendant and not otherwise. I am not therefore persuaded that the notices were a general calling to the public not to deal with the plaintiff at all since the same was limited to affairs within the 1st defendant.

111. I will now determine whether or not the plaintiff suffered any injury to his reputation. It is not in doubt that the plaintiff is a highly accomplished Accountant and a holder of a very serious position at the National Treasury. As I stated elsewhere above, the contents of his curriculum vitae remains uncontroverted. At the National Treasury the plaintiff deals with national matters as opposed to when he was in employment with the 1st defendant. For instance the plaintiff is now heading all the District Treasuries Countrywide ; prepares reports to the National Assembly Convenes the present Tender Committee nationally among many other responsibilities

113. The plaintiff confirmed in evidence that his recall to the National Treasury after resigning from the 1st defendant's employment did not occasion him any harm as he still held his job group before his Secondment to the Transition Authority.

114. The plaintiff also contended that upon the publication of the impugned notice his family members, friend and professional colleagues inquired from him as to what was wrong. The plaintiff however did not bring any of his family members or professional colleagues to so testify. On cross-examination the plaintiff also admitted that he had no such SMS or emails in confirmation thereof.

115. But there was PW2 who was the plaintiff's friend and as former school mate. He was an Environmentalist and had known the plaintiff for 24 years. Having known the plaintiff as a hardworking man and a very dedicated Accountant, he wondered why he had been put up in the newspapers and according to him the notice having stated that the plaintiff was not authorized to transact any business on behalf of the 1st defendant paraded him as a criminal would be shunned and not allowed to hold any office.

116. PW2 had also known that the plaintiff was not comfortable at his workplace as he had earlier on complained to him about several things which were not done in the right manner and amounted to mega corruption scandals. That was confirmed by the plaintiff on re-examination. .... with such background, it was very easy and possible for PW2 to read and deduce more from the notice other than someone who knew nothing about the plaintiff's employment background with the 1st defendant. PW2 however agreed that the plaintiff had a duty to publish its dealings and that whenever an employee ceases employment such an employee loses the authority to transact any business on behalf of the employer and as such any liabilities that may arise would not be incurred by the employer.

117. Although PW2 did not see any problem with the carrying out of an advertisement that the plaintiff, as a civil servant, had ceased employment with the 1st defendant, to him the notices jeopardized the plaintiff's future employment prospects as some employees would refer to the notice and doubt the plaintiff's credibility. As I have already dealt with the issue as to why the 1st defendant was justified to inform the public of the plaintiff's exit from its employment more so because of the plaintiff's unique position and given that the plaintiff retracted a lot with the public and other stakeholders, the contention by PW2 that the notice would make future employers to doubt the plaintiff's credibility may be fetched. I say so because the trend nowadays when it comes to retirement of staff especially in Senior positions involve very robust audit of such persons in all arenas of life. That means whether or not a notice is put up in the public about a person having ceased employment, still any prospects employee would, more certainly, check up with the former employers.

118. Hitherto, PW2's deduction was more speculation and without any reasonable basis as no evidence was even tendered to that effect or to demonstrate that at least the plaintiff had been taken through a certain process or was taken task by his current employer own the publication. As I earlier on noted PW2 read much more from the publication because of the special knowledge he had of the relationship between the plaintiff and the 1st defendant but I highly doubt that any other person without such background information may easily come up with such an opinion. According to Hon. Kuloba, J in the Kudwoli's case (supra), PW2 may properly fit the description of those in a special class of persons as opposed to with general knowledge.

119. My attention was further drawn to the provisions of Sections 7 (1) and 9 of the Defamation Act. Section 7 (1) of the Act states as follows:-

***“Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule of this Act shall be privileged unless such publication is proved to be made with malice.”***

Section 9 (Scheduled 1) of the Defamation Act so states that:-

***“A copy of fair and accurate report summary of any notice or other matter issued for the information of the public by or on behalf of any department of the government, Minister, local authority or gazetted police officer.”***

120. I have carefully addressed my mind to the totality of the contents of the impugned notices

alongside the evidence and the law. There is no doubt that from the face of the impugned notice and as confirmed by the plaintiff and PW2, the said notices were truthful and would normally be published whenever an employee ceases to work with an employer. The notices were hence true in substance and would be easily understood as such by the general public. That being so and in view of the fact that the 1st defendant is called up by the Constitution to entrance national values under Article 10 of the Constitution including transparency in its operations and given that the plaintiff occupied a very Senior position with heavy responsibility and interacted with the public and other stakeholder so closely, I find that there was a reasonable justification in the 1st defendant so informing the public of what had transpire between the plaintiff and eh 1st defendant, which it did through the publication.

121. A wholistic look of the statements in the impugned notice and in the ordinary and general meaning of the words used would lead one to find some difficulty that the notices had not effect of paraging the plaintiff as a criminal, crooked and corrupt, one who would not be trusted with public finances, was guilty of transacting unlawful business, was undeserving of holding any public office, nor wanting in gratitude, a social misfit or a scoundrel and a rascal. I think when one decides to make any of such deduction from such notices in view of the foregone evidence them such a person may either not be honest with him/herself or may be aware of the employment relationship between the plaintiff and the 1st defendant. However a reasonable and right-thinking member of the general public is not likely to attach such negative connotations to the impugned notices.

122. In crystallizing the finding that the contents of the impugned notices were not defamatory of the plaintiff's reputation, I am in full agreement with the Learned Judges of the Court of Appeal for Eastern Africa in the case of **Shah =vs= Uganda Argos (1972) EA 80** that:-

***“... there is a moral and public duty to publish government accountants, provided that the matter concerned is of public interest and for the public benefit and that the handing was correct and the article on the whole reasonably accurate paraphrase of the account...”***

123. Suffice to say that in Kenya today, the foregone duty to the public is in the Constitution and not by dist..... as long as such a duty is discharged within the constitutional parameters.

**ii) Whether there was malice in publishing the impugned notice.**

124. When I was considering the first element of the tort of defamation, I listed down the ingredients of the tort of defamation in paragraph 93 above which ingredients included that of malice. Whereas the issue of malice would ordinarily be considered alongside the other elements, I have decided to deal with it separately in this judgment due to the weight it carries in Clause of defamation.

125. In so doing, I start by reproducing what my brother Odunga, J said in the **Phineas Nyagah Case (supra)** which position I fully concur with:-

***“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 led to an inference or 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).”***

126. The plaintiff contended that the 1<sup>st</sup> defendant acted malicious in publishing the impugned notice and had a clear notice to disparage the plaintiff. To demonstrate that, the plaintiff argued that the 1st

defendant intentionally ignored following facts:-

- a) That the Plaintiff had resigned on 25th August 2015 and the County Government had accepted his resignation.**
- b) The Plaintiff was not involved in incurring liabilities for the County Overpayment.**
- c) The Plaintiff had not incurred any liability for the County Government after he had resigned and neither had the County Government received any claim by a third party of any liability incurred through the Plaintiff. Mr. Rusana confirmed that the County Government did not receive any claim by a third party as a result of the Plaintiff's.**
- d) That the County Government had not communicated the decision to terminate the Plaintiff's probation by the time of the publication.”**

127. It was the plaintiff's further contention that malice was demon started on the part of the 1st defendant in taking close to one month after the resignation of the plaintiff to publish the impugned notices further to the position that the plaintiff was involved in disciplinary issues that led to chaos in the County Assembly which issues were a fabrication of the 1st defendant. The plaintiff further glared malice from the 1st defendant's witness insistence that there was bad-blood between the 1st Defendant and the plaintiff which issue remained unknown to the plaintiff and untrue and that the 1st defendant even denied the existence of some letters written by its officers.

128. The 1st defendant denied acting maliciously in any way in handling the issue incon.... I will however agree with the plaintiff that the 1st defendant failed to prove that there were any disciplinary proceedings against the plaintiff or at all and that the 1st defendant indicated the date of the plaintiff's resignation as 11/09/2014 instead of 25/08/2014. That being so the plaintiff admitted and so informed the court that his working relationship with the 1st defendant was not cordial as the 1st defendant's Governor ran the affairs of the 1st defendant as such haphazard manner and another regard to law and procedure further to engaging in massive corruption dealings of which the plaintiff was not prepared to swear an affidavit. The plaintiff then regarded on matters of principle. It is no doubt that the plaintiff must have come into logger heads with not only the 1st defendant's Government but also with any such officer who would have endeavoured to support the 1st defendant's Government in his way of discharging his duties as such. The plaintiff may have ended up making enough “enemies” so to say going by his allegation that the 1st defendant's Government had employed so many of his relatives without regard to the law and procedure.

129. From that background, this court is not convinced that the 1st defendant's giving of a wrong date of resignation and alleging that there were discrepancy proceedings against the plaintiff were a demonstration of malice. Whereas those relationship between the plaintiff and 1st defendant had broken down ; it remained a fact that the plaintiff had truly resigned by the 11/09/2014 and in all reasonable doubts I find it difficult to hold that the giving of an incorrect date when the plaintiff ceased employment with the 1st defendant to a demonstration of malice. I also take a similar position in respect to the period the 1st defendant took in publishing the notice. The period was almost one month. The 1st defendant is a body corporate in law and a government under the Constitution. This Court therefore takes judicial notice that the 1st defendant it has elaborate systems in coordinating all its affairs and good practice call for adherence thereto. I do not find that the period of one month is such inordinate bearing it in mind that the institution of the 1st defendant had to organize and get all articulations and clearances, liase with the publishers and sign contracts of indemnity prior to running of the publication in the print media.

130. Since the other issues on the plaintiff concerning liabilities have already been devolved, I find that the totality of the foregone to be that the plaintiff has failed to demonstrate that the 1st defendant acted with malice in dealing with the issue at hand.

131. As against the 2nd, 3rd and 4th defendants, the plaintiff submitted that each of the defendants acted

maliciously, recklessly and negligently in not seeking to establish the truth or otherwise of the allegation or the statements contained in the matters before the publications having already decided that the notices contained true statements and the plaintiff and PW2 having confirmed that such notices were ordinarily issued and published in such circumstances as those that prevailed between the plaintiff and the 1st defendant, I find that there was indeed nothing to trigger the defendants at any of them carry out an inquiry or reconfirm the Statements with the plaintiff put to publishing them. Further the language used in the business was untruthful beyond or disappointment threat to the facts. Lastly, there is no evidence that the defendant's and each of them knew that the Statements as contained in the impugned notices were false and that they did not care to accuracy if truly that was the case. I hence find the 2nd, 3rd and 4th defendants in guilty of malice as well.

**iii) Whether the Plaintiff proved his case as against the defendants and/or any of them.**

132. The foregoing analysis and findings are very clear that the plaintiff has not demonstrated the elements of defamation in his favour. The plaintiff has failed to prove any of his three cases against the Defendants or any of the defendants. Each of the plaintiff's cases is hereby dismissed.

**iv) Whether the 1st defendant proved its counter-claim against the plaintiff**

133. The 1st defendant filed its statements of Defence and Counter-claim in all the causes of action. The Counter-claim is hinged on the contents of paragraph 9 of the Statements of Defence and Counter-claim where the 1st defendant pleaded as follows:-

“9. The 1st defendant denies the contents of paragraph 11 & 13 of the plaint, the Notice was made in good faith as stipulated in the constitution on matter of public interest, it's the plaintiff whose action in dragging the 1st Defendant in court actuates malice.

**Particulars of malice by the Plaintiff**

*a) Failure to disclose the facts that there were earlier cases, against him whereas office of the county public board in exercise of the powers conferred on them invoked Section 59 (1) (b) and Section 59 (1) (c) of the County Government Act, 2012 read together with articles 235 (1) (b) and 235 (c) of the constitution of Kenya, 2010, whereas, the Board terminated the probation period of the plaintiff, which aggravated the resignation thereof.*

*b) Failure to disclose the fact that there were anticipated disciplinary action against the plaintiff whereas Migori County Assembly invoked consequently albeit session no. 39 under Order 8 and the plaintiff was arrested by the Sergeant – At – Arm when the plaintiff kicked the main door and forced himself out.*

*c) The plaintiff wants to portray the 1st defendant in bad light and demand for compensation unfairly.*

134. The 1st defendant then proceeded on to pray for judgment against the plaintiff for the following:-

*a) Unconditional apology to 1st defendant*

*b) General Damages*

*c) Costs of the suit*

*d) Any other relief this court deem fit to grant in the circumstances.*

135. The 1st defendant through the additional Statements of its witness one Christopher Odhiambo Rusana filed on 25/06/2015 in furtherance of the above stated as follows:-

**“14. That having read paragraph 6b of the statement of Boniface Otieno Obonyo fails to meet the threshold because at the time of recording it he was not privy to what had earlier transpired between the plaintiff herein and the 1st defendant more particularly the issues of earlier gross misconduct because a person of good moral must work intenderm with chapter 6 of the Constitution.**

**15. That Plaintiff ought to apologize, to the 1st defendant for failing to disclose the material facts to court hence be compelled to compensate the 1st defendant with general damages.”**

136. The said 1st defendant's witness further reiterated the foregone when he testified before court and pray for judgment against the plaintiff as prayed in the counter- claim.

137. This court has elaborately dealt with the ingredients of the tort of defamation hereinabove at length. I have in particular dealt with the types of defamation and that they are two of them being slander and libel. By looking at the 1st defendant's contention, this court fails to understand which type of defamation the 1st defendant based its claim on. Whereas the claim is not libelous, it is equally not slanderous since the 1st defendant was very clear that the basis of its cause of action is that the plaintiff **“... ought to apologize to the 1st defendant for failing to disclose the moral facts to court hence be compelled to compensate the 1st defendant with general damages.”**

138. With the greatest respect to the 1st defendant, the foregone is and cannot be a basis of a cause of action on defamation. One of the obvious reasons being that defamation deals with the publication of untrue statements that tended to lower the reputation of a person. Going by the 1st defendant's position it goes without say that if at all the 1st defendant was defamed, then it was so defamed through the plaintiff's pleadings in court and not in anyway before that.

139. The 1st defendant has hence not satisfied any of the ingredients of the tort of defamation against the plaintiff in any of the Causes of action and equally its counter-claim fail.

140. Having found that none of the suit s in the matter are successful, the law still requires me to assess damages I would have awarded the parties had they or any of them succeeded.

141 In the words of **Ochieng, Ag. J in the case of MIKIADI vs. KHAIGAN and Ano. (2004) e KLR 496**, the J has the following to say:-

**“A successful plaintiff in a defamation action is established to remain as general compensation damages such as will compensate him for the wrong he has suffered. That such must compensate him for the damages to his reputation, vindicate his good name and take account of the distress, ...and limitation which the defamatory publication has caused. The court must take the necessary precaution to ensure that whatever award it gives to a successful plaintiff is generally in the costs that courts have been awarding....”**

142. The Court of Appeal has also and on several instances added its sound voice to the issue of assessment of damages in defamation claims. To put only but the cases of **Johnson Evan Gicheru vs. Andrew Muton & Ano'**, CA No. 314 of 2000 (UR) which decision has been widely followed not only by the Court of Appeal but also by the High Court, the Court of Appeal held that:-

**“The latitude in awarding damages in an action for libel is very wide, the case of TANGANYIKA TRANSPORT CO. LIMITED versus EBRAHIN NOORAY (Supra) PRAUD versus GRAHAM 24 Q.B.D. 53, 55 that in an action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider what this conduct has been before action, after action and in court during the trial”; the case of BROOM VERSUS CASSEL & CO (1972) A. C. 1027 where in the House of Lords stated that:-**

**“In action of defamation and in any other actions where damages for loss of reputation are**

*involved, the principle of restitution in integrum has necessarily an even more highly subjective element such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel driven underground emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by slander of the baselessness of the charges; lastly the case of UREN VERSUS JOHN FAIRFAX & SONS PTY LIMITED 117 C.L.R. 115, 150: Where in Windeyer J made observation that:-*

*“It seems to me that, properly speaking a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways-as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here as solatium rather than a monetary recompense for harm measurable in money.”*

143. The Court further .... the factors for consideration regarding quantum of damages as follows:-

*“1.The Objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.*

*2. The Subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.*

*3. Matters ending to mitigate damages, such as the publication of an apology.*

*4. Matters tending to reduce damages.*

*5. Vindication of the plaintiff's reputation past and future.”*

144. Again the law in further guidance to the assessment of damages in defamation claims states in Section 164 (1) of the Defamation Act as follows:-

*“16A (I) in any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:*

*Provided that where ..... the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”*

145. The plaintiff submitted that this court is to assess damages in respect to each suit as each publication constitutes a separate and distinct cause of action. Plaintiff relies on main decision and prayed for the sum of Kshs. 5M on general damages, Kshs. 5M on account of exemplary damages and Kshs. 500,000/= in lieu of an apology in each suit with costs and interest. The second defendant also relied on several decision and proposed a global award of Kshs. 40,000/= as minimal damages without any aggravated damages as no basis had been laid. The forth Defendant submitted that the sum of Kshs. 500,000/= would suffice as both general and exemplary damages.

146. I have considered the submissions on quantum with care and caution as well many other persons decisions on the matter and in taking into account the circumstances of the cases as well as the status and reputation of the plaintiff and the 1st defendant, I would have assessed damages as follows:-

**a) To the Plaintiff**

- A global sum of Kshs. 6,000,000/= on general damages.
- A global sum of Kshs. 2,000,000/= on exemplary damages;

- Costs of each suit

**b) To the 1st defendant**

- A global sum of Kshs. 500,000/= on general damages.
- Costs of each suit

146. For avoidance of doubt, had the plaintiff surrendered in its claim against the Defendants, I would have however entered judgment against the 1st defendant only on account of the Indemnity the 1st defendant executed in favour of each of the 2nd, 3rd and 4th defendants regarding the publication which is the subject of these suits. Needless to say the Indemnities are part of the record and were indeed properly and truly admitted to by the 1st defendant's witness when he testified before court.

**Disposition:**

147. The above analysis renders this court to make the following first orders in the matters:-

*a) The plaintiff's suits Migori HCCC No. 99 of 2014, HCCC No. 10 of 2014 and HCCC No. 11 of 2014 be and are hereby dismissed;*

*b) The 1st defendant's Counter-claim in the three suits Migori HCCC No. 99 of 2014, HCCC No. 10 of 2014 and HCCC No. 11 of 2014 be and are hereby dismissed.*

*c) Since the plaintiff's suits as well as the 1st defendant's Counter-claim have been unsuccessful, the plaintiff and the 1st defendant shall each bear their own costs of the the three suits.*

*d) The plaintiff shall however bear the costs of the three suits in respect to the 2nd, 3rd and 4th Defendant herein.*

These are the orders of this court.

**Dated and SIGNED at MIGORI this 24<sup>th</sup> day of January, 2017.**

**A. C. MRIMA**

**JUDGE**