



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 811 OF 2003**

**PAUL MULI & STELLA KANINI**

**MUTISYA T/A STEPAL DRESSMAKING AND DESIGN.....PLAINTIFF**

**V E R S U S**

**NATION MEDIA GROUP LIMITED.....DEFENDANT**

**JUDGEMENT**

The Plaintiffs are husband wife have brought this suit against the Defendant seeking compensatory, exemplary and aggravated damages for libel on account of an article that appeared in the “**Daily Nation**” newspaper of 10<sup>th</sup> June, 2003. The Defendant, NATION MEDIA GROUP LIMITED, was and still is the publisher of that newspaper.

The substance of the offending article was that a number of business people and/or companies including the Plaintiff’s Stepal Dress Making sold land gazetted as forest land in Ngong’ Forest to a Parastatal, the KENYA PIPELINE COMPANY LTD, at an inflated cost of Kshs. 5.6 Million. This, according to the article, led to loss of huge sums of money belonging to Kenya Pipeline Company and it was later discovered that the plots were yet to be de-gazetted. It went on to note that the matter was under investigations by the Criminal Investigations Department (CID). The imputation was that these politically well-connected individuals and companies through a ‘well connected former Cabinet minister in the Moi regime’ and Kenya Pipeline Company faced the prospect of losing the huge amount of money spent on the deal; the further imputation was that these people and companies were essentially economically plundering the country.

It is the Plaintiff’s case as pleaded that the names “**Stepal dressmaking & Design (the firm)**” without a doubt, referred to Paul Muli and Stella Kanini Mutisya the proprietors of the firm and were so understood by themselves, their friends, church associates and the public at large. It is their further case that inclusion of the firm’s name among the alleged vendors of the land was libellous because it was malicious and false information calculated to injure their reputation and cause them to suffer and be exposed to public scandal, odium and contempt in the eyes of right thinking members of the public. This the Defendant did without seeking the truth of the matter as the firm did not own any forest land nor did it sell that land to Kenya Pipeline Company. Their characters, reputations and standing as respectable members of the society and virtuous leaders of their Church had thus been seriously injured. The Plaintiffs also pleaded that the offending articles were published maliciously.

The Defendant duly entered appearance and filed defence. They admitted publication but denied that they published the offending articles falsely and/or maliciously. They also denied that the articles were

libellous, or that they portrayed the Plaintiffs as pleaded in the plaint. The innuendo pleaded or implied in the plaint was also denied.

The Defendants also raised the defence of **fair comment on a matter of great public interest made in good faith**. They also sought to rely on **section 12, 13 and 15** of the **Defamation Act, Cap 36** and the Schedule thereto. They pleaded that the offending articles were published under a sense of public duty for public benefit without malice and in good faith. The Defendant gave particulars of the facts and matters from which the malice pleaded in the plaint is to be inferred as required by **Order 6, rule 6A (3)** of the **Civil Procedure Rules** (the Rules).

The Plaintiffs filed reply to defence where they joined issue with the Defendant on his defence.

At the beginning of the trial, an objection was raised on admissibility of the Plaintiff's evidence relating to injury to their reputations as individuals as opposed to injury to the reputation of the firm. This was on the basis that in defamation claims in partnerships, the law allows the partners to sue jointly for words defamatory to the partnership as a body. Therefore the partners cannot recover damages for injury to the individual members of the firm. The issue was reserved for final determination. During the trial, Paul Muli (PW1), Rodah Kaluki Makau (PW2) and Jane Njoki Mangara (PW3) testified. The Defendants did not lead or call any evidence. The learned counsels appearing chose to put in written submissions.

I have carefully considered them, together with the authorities cited. I cannot find in the record any statement of issues, either agreed or filed by the respective parties. At the outset, I am required to consider whether it is Paul Muli and Stella Kanini whose reputations were injured or it is that of the firm, Stepal Dressmaking and Design. It is imperative to note that the publication complained of refers to the firm and not to the individual proprietors. Being a partnership, the suit was naturally instituted by the firm as the Plaintiff and the proprietors would not have sued in their individual capacity.

The question on whether evidence of PW1, PW2 and PW3 should be taken into account, Gately on Libel and Slander page 190, paragraph 8.25 states thus –

**“Although in English law a partnership is not a person separate from its members an action may be brought in the firm's name for damage suffered by the firm. Hence partners can sue jointly for defamatory words calculated to injure the firm as a body. But they cannot in such joint action recover damages for any injury caused by the words to an individual member of the firm.”**

It is my considered view therefore that it is the firm that was referred to by the publication and not the partners in their individual capacity. The correct Plaintiff is therefore Stepal Dressmaking and Design.

I consider the following to be the main issues to be determined in this suit:-

**1. Were the words complained of defamatory of the Plaintiff?**

**2. If it is found for the Plaintiff on liability, what damages are due to it (the firm)**

**1. Were the words complained of defamatory of the Plaintiff?**

The sum effect of the offending article was that the named companies and firms had sold to a parastatal forest land which had not been gazetted with the intention of defrauding it of public money. As a consequence, the parastatal lost funds. The imputation was that these companies, including the Plaintiff, were corrupt and unscrupulous, and had enriched themselves at public expense. These were no doubt allegations that, if untrue, would injure the characters and reputations of the persons concerned. As far as the Plaintiff is concerned, the offending articles were patently untrue. The Defendant did not at all attempt to justify the allegations.

In **Godwin Wanjuki Wachira v Okoth [1977] KLR 24**, the court had this to say –

**‘I may go further and hold that failure to check records to ascertain the true position may very well be negligence on their part... the defendants must be deemed to have acted recklessly in publishing the distorted story... I hold that the author published the defamatory statement complained of... with reckless indifference as to whether it was just or unjust.’**

It is therefore clear from the foregoing that the Plaintiff has satisfied the Court that the notice published by the Defendants was not only reckless and negligent but also malicious. As pointed out earlier, as the Defendants did not adduce any evidence to prove any truth in the contents of the public notice it is deemed to have been malicious. I am therefore satisfied upon a balance of probabilities that the offending articles were defamatory of the Plaintiff, and I so hold.

The Defendants have also pleaded that the reports complained of were published under a sense of public duty and for the public benefit. There cannot be any doubt that fair and accurate reporting of public proceedings of a country’s public corporations and other agencies is a public duty of any publisher of newspapers, and such publication would be for the public benefit. In the present case however, the Defendants did not lead any evidence to show that the publication was accurate. The source of the information that led to publication of the article was not revealed nor were the titles from the Ministry of Lands availed to Court for interrogation. Indeed, the Defendant did not call or lead any evidence at all.

What about fairness? The Defendants did not bother to contact the Plaintiff through its partners or any other relevant person before publication to find out if the Plaintiff firm was in any way associated with the land in question. The publication was obviously defamatory of any named company if indeed such companies did not own the land in question. Where then is the fairness of the publication as far as the Plaintiff is concerned? The publication was not a fair and accurate report published under a sense of public duty, and for the public benefit. I so hold.

On liability therefore, I find for the Plaintiff. It has proved his case on a balance of probabilities. The publication referred to it as one of the many alleged dishonourable companies/firms dealing in forest land and selling it to KENYA PIPELINE COMPANY, a public body. The publication was defamatory of the Plaintiff as the implication was that the alleged vendors had sold the land to the parastatal with the intention of defrauding it as they well knew that the land they were selling had not been de-gazetted on account of their political connections. The further implication was that they were corrupt and without integrity, and were in effect looting public coffers.

### **What damages are due to the Plaintiff?**

Libel is actionable *per se*, and a plaintiff need not prove actual damage to his character and reputation. But the quantum of damages awarded will depend upon the actual damage to the character and reputation suffered by the plaintiff. It is therefore incumbent upon a plaintiff to place before the court such evidence as will enable it to assess such damage.

Apart from saying that the Plaintiff firm was closed due to the injury to its reputation no other evidence was tendered to show how it suffered for example reduction in the orders for dress-making prior to its closure and or a comparison of the profits it was making before and after the publication and the disparities.

I have considered that the **“Daily Nation”** was, and probably still is, the leading daily English newspaper in Kenya, and probably in the wider Eastern Africa region, in terms of circulation. The wider the circulation of the offending publication, the greater the potential harm to a plaintiff’s reputation.

But I must note that there were no witnesses called, for example employees, to testify as to how the Plaintiff’s character and reputation may have been adversely affected in their eyes in light of the defamatory publications. Such evidence would have been useful to properly assess damages.

I have also considered the conduct of the Defendant. They did not readily publish the Plaintiff’s disclaimer that it was not involved in that transaction. It is true that they did not contact the Plaintiff

before the publications to verify the truthfulness of the allegation contained in respect to him. But I do not find any evidence that the publications were driven by a cynical pursuit of sensational news for purposes of profit. The publications did not concern the Plaintiff only. They concerned over 14 other firms.

The Plaintiff is therefore entitled to general compensatory damages. The purpose of such damages is to vindicate its reputation, and to assuage the partners for the distress, hurt and humiliation caused by the defamation. Damages in defamation cases are said to be **at large** and will depend upon the particular circumstances of each case. But for guidance I have looked at various recent cases of this court.

In **Kisumu Civil Appeal No. 84 of 2009 Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR** the court of appeal set aside an award of Kshs. 7,000,000/= general damages and substituted it with a sum of Kshs. 4,000,000/= general damages for libel.

In **Civil Appeal No. 221 of 2012 Mwangi Kiunjuri v Wangethi Mwangi & 2 others [2016] eKLR** the Court of Appeal declined to disturb the award of Kshs. 5,000,000/- awarded by the trial Judge as it was not manifestly excessive.

The cases quoted above involved political leaders, senior civil servants and Advocates whose reputations, character and standing needed a lot more protection. That is not to say that the Plaintiff in this case did not have a reputation to uphold but, being a very private dress making firm, a fewer number of people would be captivated by the public notice published.

In my respectful view awards in defamation cases have recently tended to be disparate and way too much on the higher side. Various learned judges of the High Court have in particular tended to award politicians and lawyers such generous damages in defamation cases as to set them apart as a special breed of people, notwithstanding the fact that they, particularly politicians, often thrive upon the free publicity they receive from newspapers. Damages in defamation cases must be kept at reasonable levels lest they impinge upon the freedom of expression and the citizens' right to information.

In the circumstances, and doing the best I can, It is my considered view that Kshs. 1,000,000/= (one million) is adequate compensation for the Plaintiff in this case. There will be interest at court rates upon this sum from the date of judgment until payment in full. The Plaintiff will also have the costs of this suit plus interest thereon at court rates until payment in full.

**Dated, signed and delivered at Nairobi this 6<sup>th</sup> Day of April 2017.**

**A. MBOGHOLI MSAGHA**

**JUDGE**