



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 71 OF 2012**

ELVIS MUTAHI GITHINJI ..... PLAINTIFF

V E R S U S –

JAMES MUTITU MWORIA.....1<sup>ST</sup> DEFENDANT

DAVID CHEGE MWORIA..... 2<sup>ND</sup> DEFENDANT

NATION MEDIA GROUP ..... 3<sup>RD</sup> DEFENDANT

**JUDGEMENT**

1. **Elvis Mutahi Githinji**, the plaintiff herein, sued, **James Mutitu Mwanja** and **David Chege Mworja** and the **Nation Media Group** vide the plaint dated 17<sup>th</sup> February 2012 in which he sought for judgement in the following terms:

*a. General damages*

*b. Damages on the footing of aggravated or exemplary damages.*

*c. A permanent injunction restraining the defendants, their agents, or servants or otherwise from further printing, circulating, distributing allegations that the plaintiff is not a director of Autoscope Ltd or that he has sought to defraud members of the public.*

*d. Costs.*

*e. Interest*

*f. Any other relief that this honourable court deems fit and just to grant.*

2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a common statement of defence while the 3<sup>rd</sup> defendant filed its own defence to deny the plaintiff's claim.

3. The brief summary of the plaintiff's case is that on 24<sup>th</sup> January 2012, the defendant's jointly published a notice in the 3<sup>rd</sup> defendants newspaper, the **Daily Nation** where they published the plaintiff's passport sized photograph and proceeded to notify the general public that the plaintiff was no longer an employee of **Autoscope Limited** and as such he cannot transact any business on its behalf. The plaintiff claims that at the time of the publication of the notice, he was and still remains the director of Autoscope Limited together with four others including the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He claimed that he has never been an

employee of Autoscope limited since he is one of the Directors. The plaintiff claimed that the said published article was defamatory and the defendants had malicious intentions against him by publishing the notice yet the allegations contained therein were false.

4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' case, is that they were not actuated by malice as the publication was justified and made in good faith to protect unsuspecting members of the public from future reliance on operations of the company as a result of the plaintiff registering another company known as Autoscope International limited.

5. When the suit came up for hearing, the plaintiff who was the only witness testified in summary as follows: that he incorporated Autoscope Ltd on 22<sup>nd</sup> October 2009 which he holds 20% of the shares together with other directors, who included **James Mutitu Mworja**, **David Chege Mworja** and **James Ngochi Waweru**. He said that **David Chege Mworja** admitted that he placed the notice in the newspaper which prompted him to send a demand letter demanding an apology. He further claimed that as a result of the published notice, he has suffered loss of business, he's been prejudiced by his church congregants since he is a pastor. He added that the board of directors of the company did not meet to make a resolution to publish the advert. He further said that Autoscope Limited Company is a sister company to Autoscope International Company Limited, which companies carried out the business of transport. He further claimed that they decided to wind up the company when they discovered that the 2<sup>nd</sup> defendant committed fraud against the company, which company he resigned from. He however, insisted that he did not resign as a director from Autoscope Ltd, which company still files its annual returns.

6. On their part, the 1<sup>st</sup> defendant tendered the evidence of **James Mutitu Mworja DW1**, whose evidence I have summarised as follows: That he, the 2<sup>nd</sup> defendant, a **James Waweru** and the plaintiff incorporated a new company known as Autoscope Ltd. He claimed that they appointed the plaintiff as operations manager and **James Waweru** was incharge of logistics. He stated that dispute arose in 2011 when they realised that the plaintiff was mixing personal business with company business. He admitted that he and David Mworja placed an advert in the newspaper when they discovered that the plaintiff and James Waweru had changed the name of the company to Autoscope International Ltd where they were the only directors of the company and carrying the same business as Autoscope Limited. He stated that a decision was made by the board of Directors of Autoscope Ltd to have the advert published for purposes of informing their clients of the new dimension in the company. He further admitted that he had no minutes of the board meeting that made a resolution to have the plaintiff's name and photograph published in the Daily Nation. He denied that there was a resolution to wound up the Autoscope Ltd.

7. At the close of evidence, the learned counsels appearing in this case were invited to file written submissions which they did. I have considered both the evidence and the rival submissions. The plaintiff highlighted 12 statements of the agreed issues, however they may be summarised as follows:

*i. Whether there is defamation*

*ii. What is the quantum of damages payable.*

8. On the question of whether the plaintiff was defamed or not, the defendants admit that they had the advert published by the 3<sup>rd</sup> defendant. They however claim that they were justified since the plaintiff together with one James Waweru registered a company known as Autoscope International Limited to the exclusion of the 1<sup>st</sup> and 2<sup>nd</sup> defendants who were also directors of Autoscope Limited, which company was used by the plaintiff to divert business from Autoscope Ltd to Autoscope International Limited hence enhancing competition between the two companies. It is the submission of the defendants that the plaintiff admitted to being a pastor which name 'pastor' was included in the advert notice to imply 'alias' since he is so known by the public. They insisted they were not actuated by malice in doing so. The defendants further pointed out that despite the fact that the plaintiff was a director he drew a salary from the business since he was incharge of operations. The defendants also argued that the plaintiff failed to adduce evidence to show that the publication had injured his character and that it had occasioned him numerous queries from the public.

9. I have already outlined the plaintiff's arguments. From the outset, the defendants admit to having published the offending advert notice in the Daily Nation Newspaper. The plaintiff served the 3<sup>rd</sup> defendant with a demand letter where he demanded for an apology. The defendant did not honour the plaintiff's demands. Under Section 13(1) (a) of the Defamation Act, it is clearly stated that where a person publishes words said to be defamatory to another, that person, may if he claims the words were published innocently in relation to the plaintiff make an offer for amends and if the offer is accepted by the plaintiff and is performed that no proceedings for libel shall be taken out. In my estimation the defence that the publications were unintentional, did not refer to the plaintiff and was without malice are no longer available to the defendants in view of the aforementioned provision.

10. The defendants have argued that the publication was without malice. The plaintiff complained to the defendants about the publication vide a demand letter but they did not take steps to tender an apology as envisaged under Section 12 (2) of the Defamation Act. The defendants cannot therefore plead the defence of justification yet despite the demand, they failed to take the necessary steps to correct the article through in the least, publishing an apology. Furthermore, failure to correct the error after discovering through the demand letter that they had published a public notice yet the person therein is a director of the company, which person had not resigned from such post, is detrimental to their plea of the absence of malice.

11. The defendants have further pleaded the defence of justification.

The evidence tendered to establish the above defence is not water tight. There was no justification on the part of the 1<sup>st</sup> and Defendant since the Plaintiff was still one of the Directors of the Company and could not in any way have been sacked. If the 1<sup>st</sup> and 2<sup>nd</sup> Defendant felt strongly the need to remove the Plaintiff from their Company due to the alleged competition, there is a procedure provided by Law to do so. There are remedies in Law, including but not limited to winding up of the Company. The advertisement to oust one of the Directors through an advertisement is not justified at all. The 3<sup>rd</sup> Defendant on its part also claims it was privileged and that it was a fair comment. It further claims that it should not bear liability since it merely published what it were told to publish by the 1<sup>st</sup> Defendant. The question arising therefore is whether or not the 3<sup>rd</sup> defendant can be held liable since it claims that it only published the public notice as instructed by the 1<sup>st</sup> and 2<sup>nd</sup> defendant and it was not aware of the infighting between the directors. It is my view that the 3<sup>rd</sup> defendant owes a duty of care to the public in general. It ought to have carried out due diligence before publishing the notice which would definitely cause harm if it is untrue. The 3<sup>rd</sup> defendant given the nature of its work in informing the public and its wide coverage ought to be careful on what it publishes. It is not enough to collect money and proceed to advertise without establishing whether whatever it's about to advertise would be libellous or scandalous so as to damage someone's reputation. If the published information is libellous, then the publishing house should be held liable. In the case of **Daily Nation vs Mukundi and Another (1975) EA 311, the Court of Appeal of Eastern Africa** held that:

***"The second defendant had claimed indemnity and contribution from the first defendant, on the ground that it had published the notice at the request of the first defendant. The trial judge dismissed the claim. I think that the trial judge was right. The second defendant, in my view, was an independent contractor; it could, at its own complete discretion, either have accepted or refused to accept the notice for publication. When it accepts any item for publication, it has the right and indeed the duty to see whether such item contains seditious or libellous matters, and it always publishes at its own risk unless of course express arrangements to the contrary are made between it and the customer."***

12. Moreover, while the law recognizes that there may be occasions in which freedom of communication without fear of an action for defamation is more important than the protection of person's reputation and such occasions are to be privileged, the published information must for all intents and purposes be true. As I have stated above, the notice published was far from the truth and as such the 3<sup>rd</sup> Defendant is equally liable. The defences put forward by the 3<sup>rd</sup> Defendant in this case are not convincing.

13. Upon conclusion to the effect that the defence put forward by the defendants cannot stand. The next step would be to establish whether the plaintiff has adduced evidence to show that he was indeed defamed. Defamation involves a false derogatory statement that is made by a particular person against another without lawful justification. Such statement must be one that harms a person's reputation, causes disrespect and reduces the confidence inspired by others towards such person.

14. In this case, the offending notice was reproduced in the plaintiff's plaint on paragraph 7 which notice read:

*AUTOSCOPE LIMITED*

*(PASSPORT PHOTOGRAPH OF THE PLAINTIFF)*

*(Pastor) ELVIS MUTAHI GITHINJI P.P. NO. 1224350*

*This is to inform our clients and the general public that the person whose photograph appears above is no longer an employee of AUTOSCOPE LTD. He is therefore NOT authorised whatsoever to transact any business on our behalf and under any circumstance, we shall not be held responsible for his actions henceforth.*

*We would also wish to advise that AUTOSCOPE INTERNATIONAL LTD, a company incorporated by the person targeting unsuspecting members of the public is not in any way related to AUTOSCOPE LTD.*

By Board of Directors

Call 020 3525210 or email [info@autoscope.co.de](mailto:info@autoscope.co.de) for more details.

15. In their ordinary meaning, the published words and photograph was meant to be understood that the plaintiff is merely an employee of Autoscope Ltd and not a director. The publication was also understood to mean that the plaintiff had been sacked from the company hence a former employee which employee was defrauding members of the public using a company called Autoscope International Limited. The publication generally depicted the plaintiff as a criminal, who was defrauding Autoscope Ltd. The evidence tendered by both the plaintiff and the defendant shows that the plaintiff was still a director of Autoscope Ltd at the time the defamatory notice was published. Infact the 1<sup>st</sup> defendant admitted when adducing his evidence that he and the 2<sup>nd</sup> defendant agreed to have the notice published without consulting the other two directors, being the plaintiff herein and one James Waweru. There was no resolution to that effect neither were there minutes to illustrate the decision of the directors of the company.

16. Furthermore, no evidence was adduced by the Defendants to show that the plaintiff ceased at any moment to be a director of Autoscope Ltd. Evidence of minutes was annexed to show that the 2<sup>nd</sup> defendant David Chege Mworira resigned as a director of Autoscope Ltd. It is therefore apparent that the Board of Directors would normally have meetings and record the proceedings of the meeting. They however did not extend the same courtesy to the plaintiff before publishing the notice. Given that the plaintiff was still a director of Autoscope Ltd, I have concluded that the plaintiff rendered plausible evidence to show that the publications were false, wrongful and defamatory. Furthermore, I hold the view that, as a result of the publications, the plaintiff was exposed to public ridicule, embarrassment and contempt.

17. As stated above even the 3<sup>rd</sup> defendant cannot escape liability as It ought to have carried due diligence and ensure before putting up the notice, that the plaintiff was actually sacked from being an employee of the company it at all. It should have asked for the necessary documentation to ensure that the employee no longer worked for the company. I therefore find that on a balance of probabilities, the tort of defamation was established against the defendants and I hold them jointly and severally liable.

18. On the issue of quantum, the 3<sup>rd</sup> defendant urged this court to find that they did not act in any negligent manner, especially given that the plaintiff did not call any witness. It cited the case of **Emmanuel Omenda vs Safaricom Ltd (2012) eKLR** where it proposed a sum of ksh. 500,000/= to be awarded as general damages. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not submit on the quantum. The plaintiff on his part urged the court to award a sum of kshs.7,000,000/= for general damages. They further submitted that a sum of kshs.2,000,000/= will be sufficient damages on the aggravated or exemplary damages. They did not cite any case law to support their claim on award payable.

19. There are ample authorities which have set out the principles to be considered in assessing damages in defamation cases.

In the case of **Ole Kaparo vs Standard Ltd & Others (2009)2 EA 360**

*a) The award must be sufficient to convince those who knew of the defamation that the plaintiff was wrongly accused.*

*b) The award must cover the injure feelings, the anxiety and uncertainty undergone in the litigation.*

*c) Failure to contradict the libel, insistence of defences of justification and absence of apology will aggravate damages.*

*d) The conduct of the defendants at the time of publication and thereafter will also be a factor.*

I will apply these principles in assessing damages in this case.

20. The plaintiff tendered evidence showing that he was one of the directors of Autoscope Limited that carried out transport business. The plaintiff further informed the court that as a result of the negative publication, he suffered great business loss and prejudice from his church members. I am convinced that such publication paints the plaintiff in bad light and his reputation was dented. Though the plaintiff was the only witness to tender evidence for his case, it is obvious that his congregants and clients seeing the published advertisement must have become suspicious of him. Any reasonable person reading that public notice, gets a message that the plaintiff's services were terminated and he no longer works for the company for the reason that he carried out some fraudulent dealings by transferring the business of Autoscope Ltd to Autoscope International Ltd whilst working as an employee of Autoscope Ltd, which is not the case. The published notice injured the reputation of the plaintiff lowering him in the estimation or right thinking members of society. The defendants are jointly and severally liable.

21. I therefore enter judgment in favour of the plaintiff against the defendant in the following terms:

1. The defendants are ordered and directed to apologise, retract and publish the retraction of the defamatory notice published in the Daily Nation of the 3<sup>rd</sup> defendant within a period of 30 days.

2. General damages for defamation of kshs.1,500,000/=

3. Exemplary damages for defamation of kshs.2,000,000/=

4. Additional damages under Section 7(A) (6)

of the Defamation Act kshs.400,000/=

Total **kshs.3,900,000/**

Dated, Signed and Delivered in open court this 9<sup>th</sup> day of September, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

..... for the 3<sup>rd</sup> Defendant