



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.788 OF 2007

MURIITHI MUGOPLAINTIFF

VERSUS

PETER NJOROGE.....1ST DEFENDANT

DAVID MWANGI T/A MWANGI WAMBUGU

AND COMPANY ADVOCATES.....2ND DEFENDANT

JUDGMENT

1. In his plaint dated 21st November 2007 and filed in court on 23rd November 2007, the plaintiff herein Muriithi Mugo claimed in paragraph 4 thus:

“On the 15th day of June 2007, the second defendant purportedly acting on the instructions of the first defendant published a letter of and concerning the plaintiff and addressed to the Chairman of the Institute of Surveyors of Kenya, and the letter read on the relevant part thus:-

“Our client is in the process of having a parcel of land being LR No. KIAMBAA/RUAKA/2040 subdivided for purposes of disposing of the same “ In the circumstances ...advise whether the above named M. Mugo is a licensed surveyor with valid practicing certificate and whether it is indeed procedural for the mutation forms(copies attached for ease of reference) to be signed and sealed in blank purportedly certifying that the work is done by his assistant under his personal direction and supervision while indeed nothing has been done on the ground.....

Yours faithfully

For Mwangi Wambugu & Co. Advocates

DAVID MWANGI”

2. The plaintiff claimed that the above contents were false, malicious, intended to spoil the good relationship that existed between the plaintiff and the Institute of surveyors of Kenya and the office of Director of Surveys at Ardhi House Nairobi and therefore the plaintiff had been defamed by the false words.

3. The plaintiff particularized defamation in paragraph 5 thus:

PARTICULARS OF DEFAMATION

- a. *The above words taken in their ordinary meaning within the contents of the plaintiff's business operations meant and were understood to mean that the plaintiff was hawking signed mutation forms:*
- b. *Mwangi Wambugu Advocates knew the words and the contents of their letter dated 15th June 2007 were false and were capable of defaming the plaintiff's character and lead to financial loss and he would suffer damage.*
- c. *The first and second defendants knew that land parcel No. LR KIAMBAA /RUAKA/2040 had already been subdivided by the 15th June 207 and the two knew quite well and moreso the second defendant that the parcel of land as quoted did not require the mutation forms copies of which were alleged attached for the Institute of Surveyors of Kenya.*
- d. *Whether the forms were signed and sealed in blank purportedly certifying that work is done by his assistantwhile indeed nothing has been done on the ground, these words were false respecting L.R. No. KIAMBAA/RUAKA/2040 as the plaintiff had long concluded the subdivision of this parcel of land and new titles been issued so by 15th June 2007 no work was remaining and the advocates knew that fact and reported its falsehoods.*
- e. *The second defendant purportedly wanted information from the Institution of Surveyors of Kenya in order to advise their client Mr Peter Njoroge while they knew as professional lawyers that their client would not have benefitted from such information as the land parcel No. LR. KIAMBAA/RUAKA/2040 did not exist as at 15th June 2007.*
- f. *In the same vein the second defendant knew that their client Peter Njoroge did not own the land parcel L.R. No. KIAMBAA/RUAKA/2040 and therefore was not in a position to give any instructions on the same and he must have been planted there as a ghost client for the defendants to perfect their ill motives against the plaintiff."*

4. The plaintiff also pleaded in paragraph 6 of the plaint that:

"By a letter dated 26th July 2007 the Institution of Surveyors of Kenya wrote to the plaintiff relying on the letter earlier dated 15th June 2007 from the two defendants and also another letter from the Director of Surveys and which was addressed to the Secretary Land Surveyors Board and the plaintiff was given 7 days to give a comment after which the relevant disciplinary committee would be instructed to deal with the "professional misconduct."

- i. *The defendant knew and ought to have known they had a duty to do enquiries and to discover the land has already subdivided.*
- ii. *The two defendants knew the action to be taken against the plaintiff was serious one which would forever bar the plaintiff from exercising professional skills as a licensed surveyor .*
- iii. *The defendants knew the plaintiff's license would be cancelled and would lead to the closure of his office.*
- iv. *By a letter dated 19th July 2007 the Ministry of Lands confirmed the receipt of the second defendant's letter of 15th June 2007 and wrote to the Secretary Land Surveyors Board saying,*

" this is a very serious professional misconduct and the Government cannot afford to be selling mutation forms for speculation on the streets" " By a copy of this letter the Government will stop selling mutation forms to GEOESTATE DEVELOPMENT SERVICES until the case is investigated and determined.

- v. *The plaintiff was unable and would not access to mutation forms which he requires to do his professional work and continues to suffer embarrassment and ridicule when colleagues refer to him as a hawker of mutation forms.*

- vi. *The mutation forms serial No. 251307 are the ones used for subdivision of LR KIAMBAA/RUAKA/2040 and subsequent registration of new titles was a process that the two defendants knew had been completed on 15th May 2007 and the registration documents were paid for on 14th May 2007 vide receipt No. 8163061 and the District Surveyor Kiambu confirmed the same.*
5. By reasons of the foregoing, the plaintiff claimed that he had been defamed and had suffered loss and damages and continues to suffer. Further, that despite demand and notice of intended sue the defendants had refused to apologize and/make admission or in whatever manner address the plaintiff's claim hence necessitating the suit. The plaintiff prayed for judgment against the defendants jointly and severally for:
- a. General damages for defamation (through libel)
 - b. Exemplary damages.
 - c. Costs of the suit.
 - d. Interest on (a), (b) and (c) at court rates.
6. In a joint statement of defence dated 21st February 2008 the defendants denied all the specific allegations leveled against them by the plaintiff. In addition, the 1st defendant in paragraph 2 of the defence, admitted instructing the 2nd defendant to write the impugned letter and the 2nd defendant too admitted being the author thereof and publishing the letter whose contents were set out in paragraph 4 of the plaint but averred that the letter and the contents thereof were authored under privileged occasion. The defendants further contended in paragraph 5 of the defence that the defendants and the Institute of surveyors of Kenya and Director of Surveys had a corresponding interest in the subject matter and publication of the said words which did not bear nor were they capable of bearing or being understood to bear the meaning inferred to them in the plaint or any meaning defamatory to the plaintiff.
7. Further, the defendants stated that they were under a legal and or social and moral duty to publish the said letter to the Institute of Surveyors of Kenya and Director of Surveys who also had a corresponding duty to receive the letter and investigate the matters raised. The defendants denied that in publishing the said words they were actuated by any malice and maintained that the publication was bonafide in respect to the subject matter and the contents thereof were true and fair representation of the facts of the subject matter and or the plaintiff's conduct.
8. The defendants also maintained that they had no control over the actions of the Institute of surveyors of Kenya and Director of Surveys in respect of the plaintiff and were not party to the disciplinary proceedings against the plaintiff for selling mutation forms for speculation on the streets" and neither were they responsible for or liable for his loss of license to practice since the irregularity on the part of the plaintiff was apparent hence the disciplinary action for professional misconduct against him by the institute of surveyors of Kenya and Ministry of Lands declining to sell him mutation forms was justified in the circumstances. They denied the alleged loss and damages suffered by the plaintiff. The defendants also denied receiving any demand and or notice to sue. Finally, the defendants contended that the suit is incompetent and incurably defective and should be struck out.

The evidence

9. Both parties filed witness statements and lists and bundles of documents which they relied on at the trial. The plaintiff testified as PW1 and stated on oath that he was at all material times to this suit a Land Surveyor duly registered, having qualified on 16th November 1997 as such. He claimed in his statement adopted as evidence in chief that the 2nd defendant wrote and published false and malicious words to the effect that he had signed blank mutation forms for the 1st defendant Peter Njoroge, and alleging that the 2nd defendant's client was in the process of disposing of land parcel LR KIAMBAA/RUAKA/2040. The said letter was drawn by the 2nd defendant on the alleged instructions of the 1st defendant. It was addressed to the Chairman

- Institute of surveyors of Kenya and copied to Director of Surveys and that when the plaintiff went to the Lands office Registry, he was denied service on account that there was a directive by the Director of Surveys that the plaintiff should not be allowed to purchase the mutation forms. He testified that he had been given an assignment by Janet Wambui and James Kihui over LR KIAMBAA/RUAKA/2040 but later he received a letter circulating and alleging that he had not completed his work. The letter came from the 1st defendant Peter Njoroge yet he had already completed the work and handed over titles to his two clients joint owners of the said land. He produced 3 certificates of searches for the subdivision of KIAMBAA/RUAKA/2040 dated 3rd June 2011 which subdivision was concluded in May 2007. These were marked as P exhibit 1(a), (b), (c).
10. The plaintiff read to the court the letter which he received from Director of Surveys as authored by the defendants dated 15th June 2007. He denied that the 1st defendant owned the land which he had subdivided. He stated that when he went to the Institute of Surveyors of Kenya he received the impugned letter dated 15th June 2007 yet Peter Njoroge had not instructed him to do the work and neither was he the owner of the land he had surveyed. As a consequence of the said letter the plaintiff claimed that his license was suspended and he could neither buy nor process any mutation forms to any office.
 11. According to the plaintiff, the letter was defamatory because he had no client by the name Peter Njoroge and that he had completed the work one month earlier hence the letter was false and malicious. He claimed for damages for defamation and denial of livelihood for 7 months. The plaintiff also produced mutation form No. 251307 and all other documents as filed as his exhibits.
 12. On cross examination by Mr Narangwi advocate for the defendants, the plaintiff stated that he was a full member of Institute of Surveyors of Kenya and a licensed surveyor and estate agent. He admitted that any member of the public can get information about him from Institute of surveyors of Kenya by writing a letter seeking for information. He stated that albeit the impugned letter was an inquiry, it was on the wrong subject and Peter Njoroge was not his client and that he had completed the work concerning the named plot. He admitted that mutation No. 253369 was not filled up albeit signed and sealed. He also admitted that from the blank mutation form, there was nothing he had certified to have supervised but stated that he was not aware that it is that blank mutation that subjected him to disciplinary proceedings before the Institute of surveyors of Kenya, his professional body of which he was a member. The plaintiff also stated that he had not appealed against the punishment imposed upon him by the Institute of surveyors of Kenya following the disciplinary proceedings. He maintained that his clients were Janet Wambui Mugo, James Kihui Njoroge and Janet Wangui who had not sold the land up to 2012. He stated that Gitari was his approved Survey Assistant and although a qualified surveyor, he was not licensed but attached to the plaintiff who was a licensed surveyor but that Gitari received his own clients directly, independent of the plaintiff. The plaintiff confirmed that from the blank mutations, Gitari is purported to have done the work. He stated that the letter of 26th July 2007 was malicious because it did not connect documents with the work. He conceded that the impugned letter was an inquiry which never asked that he be disciplined and neither did it suggest that he was hawking mutation forms. The plaintiff admitted that blank mutation forms were not in order as they did not show any work done. He conceded that he was disciplined by his peers and he had an opportunity to defend himself. He stated that the ill motive was that reference on the blank mutations was wrong.
 13. In re-examination by Mr Mogire the plaintiff stated that Gitari was not mentioned in the letter subject of this suit as well as in the Institute of Surveyors' of Kenya letter of 15th June 2007. The plaintiff stated that he had not seen Peter Njoroge and also stated that the blank mutations had no land reference (title number and he did not know how those blanks reached Peter Njoroge.
 14. Asked by the court, the plaintiff stated that all clients were his but he supervised Mr Gitari who had no license, to have independent clients. He then stated that Mr Gitari had an independent office away from him and dealt with clients under the plaintiff's suspension.
 15. At the close of the plaintiffs case the 2nd defendant David Mwangi testified on oath and told the court that he was an Advocate of the High Court of Kenya and adopted his written statement as his evidence in chief. He admitted knowing the plaintiff and 1st defendant, the latter being his client who on 15th June 2007 went to his office and gave him a history of

having purchased land from Janet Wambui Muhu which was excised from **KIAMBAA/RUAKA/2040** and wanted to sell it after subdivision that he had given Mr Gitari of Geoestate Survey to complete the subdivision and transfer the plot but it had delayed despite numerous follow ups and that he was given blank mutation form to sign by Mr Gitari and when he asked why it had taken long, Gitari became rude and when he perused the blank mutations he found them signed by a Mr Mugo that the survey work had been done in his office by his assistant - Gitari under his personal direction. His client the 1st defendant became suspicious and sought legal advice hence the writing of the impugned inquiry letter to the Institute of Surveyors of Kenya on 15th June 2007. He denied that the letter he wrote was defamatory of the plaintiff and stated that it was a genuine and honest request for information and clarification made in good faith and in no way meant to injure the plaintiff's reputation. That the contents were true and no malice could be imputed there from that is why the Institute of Surveyors of Kenya on investigating the matter, found the plaintiff guilty of misconduct after according him an opportunity to be heard. He produced his bundle of documents as filed as exhibits, urging the court to dismiss the plaintiff's claim against him.

16. In cross examination by Mr Mogire, the 2nd defendant restated that Peter Njoroge was his client and that he the 1st defendant had received Summons to Enter Appearance on behalf of his client as well. That the said Peter Njoroge only showed him the original title whose proprietor was Janet Wambui Muhu, mutation forms and copy of agreement for sale which he did not have as he was not involved in the transaction and since his client's instructions to him were limited to the letter of 15th June 2007. He stated that the information on the impugned letter was correct. He admitted attaching copies of the blank mutations to his letter to the Institute of Surveyors of Kenya and denied ever receiving any further instructions after informing his client Peter Njoroge of the response by the Institute of Surveyors of Kenya.
17. In re-examination the 2nd defendant maintained that his letter talked of instructions from his client and it was an inquiry. The 1st defendant did not testify.

Submissions

18. At the close of the parties' respective testimonies they agreed to file written submissions. The plaintiff filed submissions on 28th February 2015 whereas the defendants filed theirs on 21st April 2015.
19. According to the plaintiff, the impugned letter to the Institute of Surveyors of Kenya was false and defamatory of him because Peter Njoroge was never the owner of the title LR **KIAMBAA/RUAKA /2040**. That the said letter exposed the plaintiff to ridicule, contempt, hatred and disparaged him in his office, profession, calling, trade or business in that the 2nd defendant, on being instructed by the 1st defendant should have verified the facts from the plaintiff before publication and that they refused to retract despite demand. He relied on **Scott vs Sampson [1882] & QBD 203**. Further, that the statement by the 1st defendant that the plaintiff gave him blank forms was false. That no evidence was tendered to show that Peter Njoroge was the registered owner of the land. That the defence of fair comment did not lie and that the contents of the letter and evidence by 2nd defendant varied in that he testified that the land belonged to Janet Wangui yet the said Peter Njoroge was the owner thereof which was false. That the sale agreement was not produced and that no instructions letter was shown to have been given by 1st defendant. He stated that under Section 33(4) of the Survey Act, he could retain an Assistant like Gitari to work for him or under his supervision, not independently.
20. In the plaintiff view, the defence colluded to pass unsolicited information to the Institute of Surveyor of Kenya regarding the plaintiff leading to his suspension by the professional body, based on unverified malicious information whose alleged source was doubtful. The plaintiff maintained that the 2nd defendant never had any client by Peter Njoroge since he never filed any statement to show his ownership of the land hence the plaintiff's evidence was uncontroverted. He relied on **CAT Lipumba V Mzee [2004] EA 105** where the court held that the defence of fair comment is concerned with protection of comment and on the falsity of the letter, he relied on **Ntagoba V Editor in Chief the New Vision Newspaper [2004] 2 EALR**

243.

21. On quantum of damages for defamation the plaintiff relied on **HCC 847/2005 Nairobi Grace Wangui Ngenye vs Winfred D. Kibaro & NMG Ltd** where Rawal J awarded kshs 2 million general damages and 1.5 million aggravated damages. He also relied on **HCC 1354/2004 George Nthenge v NMG** where the plaintiff was awarded 5,000,000 general damages and 2 million exemplary damages for defamation. The plaintiff proposed an award of 1 million general damages and kshs 2 million exemplary damages. He also prayed for costs of the suit.
22. The defendants in their submissions contended that the letter as written contained truth, was not false or malicious of the plaintiff and neither did it mean to defame him. Further, that the plaintiff had failed to prove his claim on a balance of probabilities and urged the court to dismiss the suit. The defendants also answered 6 issues.
 - i. On issue No. 1, on whether the plaintiff was a registered and licensed surveyor and a member of the Land Surveyors Board of Kenya, the defendants submitted that the plaintiff was a registered and licensed surveyor and member of Land Surveyors Board of Kenya and since the accusation is not that he was not a licensed surveyor, there was no defamation. That the letter inquired of the plaintiff's standing with his professional body and the latter body had a duty to give information sought.
 - ii. On issues 2 and 3 of whether the letter of 15th June 2007 was defamatory it was submitted that it was not, as it only sought clarification on the plaintiff's status whether he was a licensed surveyor and procedure of his work. That if Peter Njoroge had no interest in the land then Gitari, the plaintiff's Assistant could not have given him blank mutations signed and sealed by the plaintiff purporting that survey work had been done and completed by J.G. Gitari under the plaintiff's supervision and direction. That the plaintiff admitted that it was unprocedural to issue blank mutations and that there was nothing wrong with one making inquiries concerning actions of a surveyor to direct such queries to the surveyor's professional body. Further, that the letter of 15th June 2007 was factual and authored to recipients on a privileged occasion and on a matter of genuine concern based on information given to the 2nd defendant without any malice or ill will as it was not a complaint against him and neither did it seek that he be punished by his professional body.
 - iii. On issues 4 and 5 whether the plaintiff was denied sale and use of mutation forms as a result of the defendants' letter dated 15th June, 2007 and whether the plaintiff had suffered loss and damages, the defendants submitted that they were not liable as the loss and damage came as a consequence of the plaintiff's professional misconduct after due process was followed and no appeal was made challenging the punishment meted out on him by the disciplinary committee of the Institute of Surveyors of Kenya and that the defendants had no control over that process or decision since they were not even called as witnesses.
 - iv. On issue 6 whether defence of qualified privilege was available to the defendants the defendants submitted that it was, since they had sufficient interest in the matter and had a legal and moral duty to inquire and ascertain whether the process of surveying land was being done by qualified professionals and in the right manner and that concurrently, the Institute of Surveyors of Kenya had a corresponding interest and legal duty to receive the inquiry and respond or deal in accordance with their laws of the profession. They relied on **CA 20/79 UON V Mbutia [1985] KLR 821**, and **Nicholas Ombija V KCB Ltd [2009] KLR** on definition of and ingredients of defamation. The defendants urged the court to dismiss the suit by the plaintiff with costs.

Determination of issues

23. I have carefully reviewed the pleadings by the parties, the evidence as adduced on oath by both the plaintiff and 2nd defendant and 2nd defendant and the documents relied on as well as the able rival submissions filed by both parties' advocates. This being an action for defamation, the first question and issue to be considered is whether or not the plaintiff was defamed by the defendants and second is what would be the consequences of the answer to the first question above.

24. The defendants admitted writing the impugned letter to the plaintiffs professional body making inquiries as to whether he was a registered surveyor and if it was in order for blank mutation forms to be given out, duly signed and sealed without any works having been done.
25. The plaintiff in his evidence in chief complained that as a result of that letter, his license was suspended and he could not buy or process mutations forms from any office and that the letter was defamatory because he had no client called Peter Njoroge; that the land was not registered in Peter Njoroge's name; no title or sale agreement was produced; he had completed the work for his client; that the defendant never verified before writing the letter; and the letter was false. In cross examination the plaintiff stated clearly that a member of the public would get information from the Institute of Surveyors of Kenya or Land Surveyors Board concerning him and his practice or get such information from the Kenya Gazette or from office of Director of Surveys. Further, that the letter was an inquiry but on the wrong subject. He also admitted to signing and sealing blank mutation forms No. 253369. He admitted that the inquiry letter did not suggest that he be disciplined; admitted that he was disciplined by his peers for hawking blank mutation forms and that due process was followed. He also admitted that it was wrong to have signed and sealed mutation forms like the ones subject of this case, confirming that work had been done when no such work had been done.
26. On the other hand, the 2nd defendant is an advocate of the High Court of Kenya. He admitted writing the impugned letter. However, his defence is that he wrote it on instructions from his client the 1st defendant, to inquire on the matter from the plaintiff's professional body. He denies that the letter had any defamatory content and contends that it was written on a qualified privileged occasion. Further, that it was fair comment, contained the factual truths and that him and his client, and the Institute of Surveyors of Kenya had legal, social or moral duty to seek and or receive such information genuinely.
27. In a defamation suit, be it libel or slander, and based on the locus classicus case of **Joseph Kudwoli v Eureka Educational and Teaching Consultants & 2 Others HCC 126/1990**, the plaintiff must prove that:
- The matter of which he complains was published by the defendant.
 - It was published of and concerning the plaintiff.
 - It is defamatory in character.
 - It was published maliciously; and
 - In slander, subject to certain exceptions, that he was thereby suffered special damages.
28. As I have stated above, the publication of the letter and the fact that it concerned the plaintiff is not in dispute. What is disputed is the allegation that the letter was defamatory in character and that it was published maliciously. In this case, it is clear from the impugned letter that, the relationship between the 2nd defendant and the 1st defendant and even from the plaintiff's plaint, was that of between advocate and client. It is a fiduciary relationship which is protected under the law and therefore communication by the advocate on behalf of his client is protected by dint of Section 134 and 137 of the Advocates Act Cap 76 Laws of Kenya. In addition, that communication was made as an inquiry by the advocate on behalf of his client, to the Institute of Surveyors of Kenya, a plaintiff's professional body responsible for keeping the standards of registered and licensed surveyors in Kenya who then wrote to the Land Surveyor's Board and copied it to the Director of Surveys. The Institute of Surveyors of Kenya responded to the 2nd defendant's letter thanking him for bringing of the matter to their attention.
29. For the words complained of to be defamatory, they must tend to lower the plaintiffs reputation in the estimation of right minded persons or must cause him to be shunned or avoided. The said words or publication must also be false. In this case, the evidence shown by the blank signed and sealed mutations by the plaintiff speak for themselves and he did not deny that fact. Secondly he admitted that it was wrong to have blank signed and sealed mutations portraying the work was done, to the contrary. Third, he admitted that he was disciplined by his professional body based on those blank signed and sealed mutation forms and that due process was followed. Lord Coleridge CJ in **Bernard & Another v Periman (1891-4) ALL ER 965** held that:

“ The right of speech is one which is for the public interest that individuals should

posses, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed.”

30. In the instant case, I find that the letter written by the advocate on behalf of his client the 1st defendant enjoyed absolute privileged communication and secondly, the matter complained of or the substance therein was the issuance of blank signed and sealed mutation forms which was the truth and further, it was truly admitted by the plaintiff that it was wrong to issue such blank signed and sealed mutation forms. It therefore follows that the disciplinary action that was taken against the plaintiff by his professional body was justified in view of his professional misconduct. There is no evidence that the plaintiff challenged that conviction for his wrong doing and the punishment meted out on him by the Institute of Surveyors of Kenya. It would appear that he sought to challenge it through these proceedings, which I find an abuse of the court process.
31. Lord Denning MR In **Frazer V Evans & Others [1969] ALL ER 6** stated:

“ There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment on it. This is an integral part of the right of speech and expression. It must not be whistled away.”

In my view, the matters which were raised in the impugned letter were not defamatory. They were matters which the public deserved to be protected against and an inquiry regarding the matter, which inquiry led to disciplinary action against the plaintiff, cannot translate into defamation especially where the complaint was found to have substance and the plaintiff disciplined accordingly. Furthermore, the said words having stated the truth upon which the plaintiff was disciplined, the plaintiff's reputation could therefore not have been disparaged or lowered in the estimation of right thinking members of the society generally. It was not proved that the words were unjustified and therefore maliciously published. Malice can be inferred from a deliberate or reckless or even negligently ignoring of facts, which was not the case here. Although the plaintiff alleged that it was false to state that the 1st defendant was his client or that the said defendant owned the land, the truth of the matter that led to his conviction by the plaintiff's professional body and suspension was on account of him signing and sealing blank mutation forms and which was found to be a professional misconduct. The blank mutation form produced in court spoke for itself and therefore there was in my view, no recklessness or negligently ignoring facts. In addition, the language used in the letter was indeed an inquiry language which was not disproportionate to the facts.

32. The plaintiff did not prove any malicious intention on the part of the defendants in publishing the impugned letter. Malice may also be inferred from the relations between the parties before or after the impugned publications itself, or in the conduct of the defendant in the conduct of the proceedings. In this case, the plaintiff never adduced evidence that he had any relationship with the defendants prior to the publication of the impugned letter. The 2nd defendant only came to learn of the plaintiff's existence from the blank signed and sealed mutation forms. What then would be the motivating factors for the defendants to seek to defame the plaintiff? There was no evidence that the words complained of were false or that the defendants intended to fix the plaintiff in a bid to settle past scores or differences (See **Phineas Nyaga vs Gitobu Imanyara [2013] e KLR**).
33. Albeit the plaintiff attempted to state that the 1st defendant was a fictitious party, one would wonder why a plaintiff would sue a nonexistent or unknown party and only hope to catch that party through another person sued jointly with a fictitious party. Additionally, this court finds that the 1st defendant had no obligation to defend this suit or adduce evidence, if the evidence adduced in this case did not even point to him as the person who authored the offending letter to the Institute of Surveyors of Kenya. The burden of proving the plaintiff's case on a balance of probabilities lay on the plaintiff who alleged, even if this suit was not defended or even if it proceeded by way of formal proof. The evidence on record, taken as a whole vindicates the defendants from allegation that they connived to perfect their ill motives against the plaintiff.

I must also mention that under Order 2 Rule 7(3) of the Civil Procedure Rules-

“2 Rule 7(3) where, in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not, in his plaint give particulars of the facts in which he relied in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest, or were published on a qualified occasion and the plaintiff intends to allege that the defendant was actuated by express malice he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.

34. In this case, the plaint did not provide any particulars of malice. The plaintiff only stated the particulars of defamation and in his testimony he maintained that he was defamed and that the letter was malicious. It therefore follows that pursuant to Order 2 Rule 7(3) of the Civil Procedure Rules above, the defendant having raised the defence of fair comment on a matter they were under a social, legal or moral duty or inquire about and that the letter was published upon a privileged occasion at paragraph 5 b and c of the defence, the plaintiff should have filed a reply thereto giving particulars of facts and matters from which the malice is to be inferred. This was not done. Whereas I do not find that omission to have been fatal to the plaintiff's suit, I nevertheless find that there was no evidence that the publication was actuated by any express malice or ill will. Surveyors are professionals. They are governed by the law in their practice whether in public or private sphere. They are regulated by public as well as private entities like Institute of Surveyors of Kenya and or Land Surveyors Board. Just like lawyers whose practice is governed by the Advocates Act and the professional body Law Society of Kenya a statutory body, it cannot be expected that a member of the public who inquires about their professional standing with the bodies that regulate their practice, is actuated by malice. If that were to be the case, then members of public would suffer in the hands of quacks or unlicensed professionals who are not accountable to anyone without a remedy. Each profession espouses integrity, professionalization, transparency and accountability as their core values. It would be a travesty of justice and a violation of those core values and principles which are even recognized by Article 10 of the Constitution, for this court to overthrow or sacrifice those principles and core values at the altar of protection of an individual's reputation and earnings.
35. To crown it all and nail this suit to the cross, the impugned letter was written in the ordinary course of the advocate's duties. That letter enjoyed both absolute and qualified privilege. It is not actionable in defamation. It is for those reasons that I dismiss the plaintiff's claim against the defendants jointly and severally for failure by the plaintiff to discharge the burden of proving his case against the defendants on a balance of probabilities.
36. I must however, determine what damages I would have awarded the plaintiff had he succeeded in proving his case against the defendants on a balance of probabilities. The plaintiff claimed for general damages and exemplary damages. He relied on decided cases in asking for kshs 2 million and kshs 1 million for general damages and exemplary damages respectively. The court is entitled to award damages for injury to reputation even though the claimant is unable to prove any financial loss. Distress damages act as a vindication rather than merely compensatory in the ordinary sense and they also serve as an effective deterrent. What the claimant seeks in an action for defamation is to vindicate his reputation, to clear his name considering that reputation has value, once tainted by unfounded allegation, it can be damaged forever and that is why it is also protected under the Constitution.
37. On exemplary damages, the court is entitled to look at the whole conduct of the defendant from the time libel or slander was published down the time the verdict is rendered. In this case, the defendants were served with notice but they did not respond. In my view they were not entitled to respond or even offer an apology as there was no defamatory malicious falsehood peddled against the plaintiff demonstrated, upon which they would be required to offer such apology or explain why the letter was written since it speaks for itself as an inquiry.
38. An award of damages should not enrich a party but restore him to the position he was in before the injury if any. In **John V MGN Ltd [1997] QB 586** the court held:

“ In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality the more serious it is likely to be the extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.”

39. Further, awards in past decisions are mere guides and each case depends on its own circumstances. This court appreciates the authorities cited by the plaintiff’s counsel being **HCC 847/2007 Nairobi Grace Wangui Ngenye v Wilfred D. Kibarp & NMG Ltd** where Rawal J awarded shs 2,000,000 as general damages and kshs 1,500,000 as aggravated damages to the plaintiff who was a magistrate and in **HCC 1354 of 2004 Nairobi George Nthenge v NMG** Kshs 5,000,000 general damages and kshs 2,000,000 exemplary damages were awarded to the plaintiff who was a politician. He urged the court to award him kshs 2 million general damages and kshs 1 million exemplary damages. Combining the above decisions to the one before me and doing the best I can, and based on **Patrick Nyoike V People Ltd [2013] e KLR** where a Permanent Secretary in the Ministry of Energy was awarded kshs 4,000,000 general damages and kshs 100,000 aggravated damages, I would have awarded the plaintiff kshs 1,000,000 general damages and kshs 200,000/-exemplary damages, as the purported publication was only made once to the Institute of Surveyors of Kenya and there was no claim or proof of any misconduct by the defendants before, during and at the time of hearing and or rendering of this decision. However, as the case was not proved, I award the plaintiff nothing.
40. In the end, I dismiss the plaintiff’s suit against the defendants jointly and severally. I award costs of this suit to the 2nd defendant only as the 1st defendant never testified or participate in the proceedings although his defence was on record jointly with the second defendant.

Dated, signed and delivered in open court at Nairobi this 1st October 2015.

R.E. ABURILI

JUDGE

1/10/2015

Coram R.E. Aburili J

C.A. Adline

Mr Naragwi for the defendants

Plaintiff Muriithi Mugo present in person (says his advocate went to Limuru for an urgent matter)

Court- Judgment read and pronounced in open court as scheduled.

R.E. ABURILI

JUDGE

1/10/2015

COURT- Judgment to be typed and supplied to the parties upon payment of requisite fees.

R.E. ABURILI

JUDGE

1/10/2015