REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E032 OF 2023

ABRAHAM BALUSI MANYANYI ..... APPELLANT

- VERSUS -

SAMUEL MUHATI LIGUYANI ..... RESPONDENT

(Being an appeal from the judgment/decree of the Honourable W. Onkunya (SRM) delivered on 15/02/2024 in Kisumu CMCC No. 140 of 2017 between Abraham Balusi Manyanyi v Samuel Muhati Liguyani)

J U D G M E N T

1. The appellant, **Abraham Balusi Manyanyi**, an advocate of the High Court of Kenya, by a plaint amended on **2/10/2020** sought general damages for defamation against the respondent for alleged disparaging remarks contained in a statement of defence dated **20/5/2016** filed by the respondent.

2. The respondent entered appearance and filed his statement of defence dated **2/5/2017** in which he denied the allegations made by the appellant and pleaded absolute priviledge against the appellant's claim as the alleged defamatory documents were filed in court with the intention to assist and/or aid the court to arrive at a just conclusion.

3. By a judgment delivered on the **15/2/2023**, the trial court found that the appellant failed to prove that the publication was actuated by malice or that the said publication lowered his reputation in the opinion of right-thinking members of the community. The trial court dismissed the appellant's claim with costs.

4. Aggrieved by the said decision, the appellant preferred this appeal vide a Memorandum of Appeal dated **20/2/2023**. He set out eight (8) grounds of appeal which can be summarized as follows: -

    a) ***That the trial court erred in both law and fact by arriving at conclusions that were perverse, based on a misapprehension of the evidence on record and/or unsupported by the established facts.***

    b) ***That the trial court erred in law by rendering a judgment that failed to comply with the preemptory provisions under Order 21 rule 4 of the Civil Procedure Rules 2010.***

    c) ***That the trial court erred in law and fact by dismissing the plaintiff's suit with costs.***

5. This being a first appellate court, it is its duty to re-assess, re-evaluate and analyse the evidence afresh and come to its own independent conclusions and findings but at all times having in mind that it did not see the witnesses testify. See **Selles & Another –vs- Associated Motor Boat & Co. Ltd & Others (1968) EA.**

6. The plaintiff testified in support of his case as **Pw1**. He adopted his witness statement dated **29/5/2017** as his evidence in chief and produced his documents as **PExh1 – 10**. The appellant's case was that he was employed in his professional capacity as an advocate by one **Paul Mbwabi** to represent him in Employment & Labour Relations Court Suit **Number 63 of 2016** against the respondent.

7. That in his response to the claim, the respondent in **paragraphs 8, 9, 14 and 15** of his statement of defence filed in the labour court, made utterances that were false, malicious and made with the object of disparaging the appellant in his profession. That he was the respondent's tenant for about a year.

8. On his part, the respondent testified as **Dw1** and adopted his witness statement dated **5/5/2017** as his evidence in chief. He told the court that the appellant was his tenant for about a year. That he did not defame the appellant in his court documents but rather the documents filed in court were meant to aid the court arrive at a just decision. That he made reports to the police of the appellant's attempt to defraud him. That the appellant had threatened to teach him a lesson following a dispute over rent deposit.

9. It is on the foregoing evidence that the trial court dismissed the appellant's claim for defamation.

10. *Black's Law Dictionary* 8th Edition defines defamation as "***the act of harming the reputation of another by making a false statement to a third person***."

11. In **John Ward v Standard Limited [2006] eKLR,** it was held as follows: -

> ***"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:***
>
> ***(i) the statement must be defamatory***
>
> ***(ii) the statement must refer to the plaintiff***

(iii) the statement must be published by the defendant

(iv) the statement must be false."

12. In **Halsbury's Laws of England 4th Edition Vol. 28 at page 23,** the learned authors opine: -

> ***"In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense."***

13. In **S M W v Z W M [2015] eKLR**, the Court of Appeal held: -

> ***"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."***

14. As earlier stated, the appellant alleged defamation on the part of the respondent in paragraphs 8, 9, 14 and 15 of his statement of defence filed in the Employment & Labour Relations Court **Suit Number 63 of 2016**. The said paragraphs provided as follows: -

> ***"8. Still further the respondent avers that the claimant met his advocate herein at the said rental premises where the said advocate was a tenant and this claim is consequentially instituted at the instigation of the said advocate on account of a surcharge in the rent deposit to***

the tune of Kshs. 1,700/= on account of an unreasonable worn out lock discovered at the time of the advocate's surrender of his previous rented premises.

9. The Respondent further avers that on account of the foregoing paragraph, the said advocate for the claimant herein had expressly averred to, albeit teach him, the respondent, a hard lesson by setting him up and the respondent apprehensively believes these proceedings and claim are contemplated lesson and set up.

14 The respondent further observes and avers that the claim herein is purely an intricate and well-choreographed masterpiece of conspiracy poised to defraud him and draw him to liability that is neither existent nor justifiable and the claimant is put to strict proof of the contrary.

15. The respondent still further avers that in the circumstances, the claimant is merely used as a decoy to merely conduit the vengeance with which his advocate currently on record desires to serve against the said respondent and the claimant is thus put to strict proof of the contrary."

15. At this point it is not disputed that the alleged defamatory words were made by the respondent and that the said words referred to the appellant. What is in dispute is whether the said words were defamatory.

16. The respondent pleaded the defence of absolute priviledge as the said statements were made in a pleading filed in court with the intention to assist and/or aid the court to arrive at a just conclusion.

17. ***Section 6 of the Defamation Act*** provides the defence of absolute priviledge for newspapers reporting on any of proceedings heard before any court exercising judicial authority within Kenya. It provides as follows: -

> "***A <u>fair and accurate</u> report in any newspaper <u>of proceedings</u> heard before any court exercising judicial authority within Kenya shall be <u>absolutely privileged</u>; provided that nothing in this section shall authorise the publication of any blasphemous, seditious or indecent matter."*** (Emphasis supplied).

18. In **<u>Khasakhala v Aurah (1995-1998) 1EA 112,</u>** it was stated, *inter-alia*, that unlike qualified privilege which requires explanation, absolute privilege would be enjoyed by a defendant who has made a fair and accurate report in his newspaper provided that such a report does not contain blasphemous, seditious, or indecent matter.

19. The question this court has to determine is whether absolute priviledge applies to documents lodged in court.

20. In English defamation law, absolute privilege provides a complete defense, meaning a person cannot be sued for defamation even if a statement is false or malicious. This privilege applies in very specific contexts, such as statements made during parliamentary debates, judicial proceedings, and fair and accurate contemporaneous reports of court proceedings. It is a complete bar to a claim

and is granted to allow individuals in these roles to carry out their public functions without fear of legal repercussions.

21. In **Barnardiston v Soame (1674) 89 E.R. 321,** the court highlighted the need for absolute privilege to protect judges from fear of reprisal, allowing them to perform their duties without fear of being sued. The case of **Bottomley v Brougham [1908] 1 K.B. 584** affirmed that judges are immune from claims of malice for statements made in their official capacity, reinforcing the importance of judicial independence.

22. Finally, in **Watson v M'Ewan [1905] AC 480**, the House of Lords established that witness immunity for statements made in court can be extended to statements made outside of court, as long as those statements were made with a view to giving evidence.

23. In view of the foregoing, this Court is inclined to agree with the holdings of the English courts. The need for absolute privilege as a complete defence against defamation for parties filing cases before court is necessary as it ensures that individuals are not deterred from giving full and frank evidence or making fearless arguments for fear of being sued, which is crucial for the proper functioning of the justice system.

24. Accordingly, I find that the contents of paragraphs 8, 9, 14 and 15 in the statement of defence filed by the respondent in Employment & Labour Relations Court Suit Number 63 of 2016 cannot found an action for defamation.

25. Accordingly, the appellant failed to prove the elements of defamation on a balance of probability against the respondent.

26. The appellant further impugned the trial court's judgment on account of its failure to comply with the provisions of ***Order 21 rule 4 of the Civil Procedure Rules 2010***. ***Order 21 Rule (4) of the Civil Procedure Rules 2010*** provides thus: -

> ***"4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."***

27. In **South Nyanza Sugar Co. Ltd v Omwando Omwando (2011) eKLR, Makhandia J** (as he then was) stated thus: -

> ***"Ordinarily and in law, a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of Order 21 rule 4 of the Civil Procedure Rules which provides that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. … The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and apportionment thereof … Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it."***

28. I have perused the impugned judgment by the trial court. That judgment is in compliance with the provisions of ***Order 21 rule 4 of the Civil Procedure***

Rules. It sets out a concise statement of the case, points for determination, the decision thereon and reasons for such decision. Consequently, this limb of the appeal fails.

29. Finally, the appellant impugned the trial court's judgment on account that the suit was dismissed with costs.

30. The general rule is that costs follow the event. The power of the court to award costs is grounded in statute. Section 27(1) of the *Civil Procedure Act* (Cap 21) provides:

> ***"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge for good reasons otherwise order."***

31. In **Farah Awad Gullet v CMC Motors Group Ltd [2017] eKLR,** the Court of Appeal held: -

> ***"… it is our finding that the position in law is that costs are at the discretion of the Court seized of the matter with the usual caveat being***

that such discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning."

32. In the present case, it has not been demonstrated by the appellant that the trial court, in awarding costs, exercised its discretion capriciously without sound reasoning or at whim. This limb similarly falls.

33. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with no orders as to costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **7th** day of **November**, **2025**.

A. MABEYA, FCI Arb

JUDGE