

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. E249 OF 2021**

**CYTONN INVESTMENTS MANAGEMENT PLC.....PLAINTIFF**

**-VERSUS-**

**WYCLIFFE M. SHAMIAH.....1<sup>ST</sup> DEFENDANT**

**CAPITAL MARKET AUTHORITY .....2<sup>ND</sup>**  
**DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 06.10.2021, **Cytonn Investments Management PLC** (*hereafter the Plaintiff*) sued **Wycliffe M. Shamiah** and **Capital Markets Authority** (CMA) (*hereafter the 1<sup>st</sup> & 2<sup>nd</sup> Defendant/Defendants*) for alleged defamation and sought judgment as against the Defendants by way of -; a permanent injunction restraining the Defendant either itself or its servant from publishing the said defamatory statement, articles, utterances and reports or any other statements containing the allegations concerning them; general, exemplary and aggravated damages; suitable apology and retraction; interest on general, exemplary and aggravated damages; costs of the suit; and any other or further relief that this honorable Court shall deem fit to grant.
  
2. The Plaintiff avers that 1<sup>st</sup> Defendant as Chief Executive Officer (CEO) of the 2<sup>nd</sup> Defendant, the latter owns the website by the name “Capital Markets Authority” and that the former either by himself in the capacity of a CEO of the latter through its website have been

uttering, making and publishing statements that are defamatory against the Plaintiff injuring their business.

3. The Plaintiff went on to aver that on 20.04.2020, the 1<sup>st</sup> Defendant released to the media malicious utterances against the Plaintiff on the NTV YouTube Channel vide link <http://youtu.be/WXRdDdCrQs6k> which utterance sought to lend credence to a false viral video by someone who is not even the Plaintiffs client, alleging that the Plaintiff had stolen from them. That further on 17.06.2021, another press release was released titled-;

**“CMA cautions investors against investing in unregulated products offered or promoted by unlicensed firms or unapproved entities”**

**“The Authority confirms that Cytonn Investments is not a licensed and approved entity”**

4. That the release promoted confusion in the market whereby the 2<sup>nd</sup> Defendant did not distinguish between regulated and or unregulated products but rather made a blank statement implying that the larger Plaintiff Company or rather Cytonn itself was acting contrary to the law whereas there is no requirement for Plaintiff's investments “in private offers to be licensed by the 2<sup>nd</sup> Defendant”.
5. It was averred that the 1<sup>st</sup> Defendant utter vide the NTV YouTube Channel, link <http://youtu.be/WXRdDdCrQs6k> the following words-;

**“Given that Cytonn Investments Management was not our license in law what happens next is we go to police and report this is a criminal offence. Someone doing something that is more or less raising money from the public without approval. We did communicate that to Cytonn very clearly. Around 2018-2019 we did insist that they had to stop because if it is like they were actually accessing money from the public this is not allowed. And the choice we gave them because we were looking at it as in if they are already clients how they can have an option”**

6. The Plaintiffs goes on to say that only Cytonn Asset Manager Limited (CAML) deals with the public and that Cytonn Investments Management (CIM) does not deal with the public. To wit, the 1<sup>st</sup> Defendant's misleading presentation to the Committee on Finance and National Planning of the National Assembly, at Pg. 8 and 9, mentions that they were unable to bring the Plaintiff's unregulated products under regulation hence their forwarding the complaint to the Capital Markets Financial Investigations Unit (CMFIU), which is totally false and malicious.
7. That Cytonn High Yields Solution (CHYS) has been in operation since 2014 and within the knowledge of the Defendants, with the latter on numerous occasions attempting to ensure that Cytonn High Yields Solution (CHYS) is operating in accordance with the **Capital Markets Act and The Capital Markets (Securities) (Public Offer, Listing and Disclosures) Regulations, 2002**. It was averred that in their plain, ordinary meaning and by necessary implication, the above reports, statements, utterances and publications meant and could only be interpreted by imputation to be false, malicious, injure and discredit the Plaintiff, bring it into public scandal, odium & contempt and as such defamatory of the Plaintiff
8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed a statement of defence dated 27.02.2023 admitting to owning the website "Capital Markets Authority", publication of the words "*CMA cautions investors against investing in unregulated products offered or promoted by unlicensed firms or unapproved entities*" and those on NTV YouTube Channel link <http://youtu.be/WXRdDcrOs6k>, meanwhile denied in totality the key averments in the plaint and states that the publication in respect of the latter was true and factual.

9. The foregoing thus formed the state of pleading prior to hearing of the suit.
10. At trial on behalf of the Plaintiff, **Adamskey Dudi** testified as **PW1**. He began his evidence by identifying himself as a Legal Manager of the Plaintiff meanwhile proceeded to adopt his witness statement filed on 23.09.2024 as his evidence in chief and adduced into evidence the documents appearing in the Plaintiff's list of documents dated 06.10.2021 and further list of documents dated 23.09.2024 as **PExh.1-11**. The gist of his evidence was that the Plaintiff's good reputation had painstakingly been built over seven (7) years thereby attracting thousands of investors and clients. He states that Cytonn Investments Management as a brand offers both public and private products for investors through its subsidiaries including; Cytonn Asset Managers Limited and Cytonn High Yield Solutions (CHYS) both of which are duly registered and independent of each other.
11. That while public offers are regulated by the Capital Markets Authority, private offers are exempted from such regulations by **Section 20 of The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations** as such private offers, albeit unregulated, remain legally acknowledged. He states that by dint of the Defendants publications on 20.04.2020, 17.06.2021, NTV YouTube Channel and The Report to the Committee on Finance and National Planning of the National Assembly, they were meant to injure reputation, good standing of the Plaintiff in the eyes of right-thinking members of the public while malicious knowing very well that there was no single accuracy of the statements published. Meanwhile, the Plaintiff was sanctioned by law and the Defendants by dint of **PExh.5, 6, 7, 9 & 10**.

12. It was his testimony that there was no telling of the undoubtedly huge damage the defamatory article had and continues to cause with no proper defence being advanced by the Defendants. He states that as a result of the Defendants reckless remarks, investors pulled out of one of the Plaintiff's subsidiaries, Cytonn High Yield Solutions (CHYS), causing it to suffer loss and the said subsidiary placed under liquidation vide ruling delivered on 30.11.2023 in Nairobi IP Petition No. E063 of 2021 Cytonn High Yield Solutions LLP (In administration) v Official Receiver. Therefore, the words as published by the Defendants other than being malicious and reckless were indifferent to the Plaintiff.
13. On behalf of the Defendants, **Daniel Warutere** testified as **DW1**. He began by identifying himself as the Director Market Operations at the 2<sup>nd</sup> Defendant. He too proceeded to adopt his witness statement dated 31.05.2024 as his evidence in chief meanwhile adduced into evidence the documents appearing in the Defendant's list of documents dated 16.10. 2023 as **DExh.1-5**. The kernel of his evidence was that the 2<sup>nd</sup> Defendant is a statutory body whose mandate is derived from the **Capital Markets Act** and includes the function of protecting investor interests by ensuring that securities are traded in a fairly and orderly manner in the market whereas it is also an independent agency under the National Treasury and Economic Planning whose mandate is to license and supervise activities of capital market intermediaries.
14. It was his evidence that the 2<sup>nd</sup> Defendant in publishing the press release on 17.06.2021 was executing its duty of promoting investor education whereas the notice in question made a general statement advising the general public to invest in only licensed and approved

entities and further went on to clarify the licensing status of Cytonn Investment group whereby the only licensed entity is Cytonn Asset Management Ltd.

15. Further, the notice in question was published after issuance of conditions or directions on compliance towards registration of Cytonn High Yield Fund (CHYS), after investigations revealed that the Plaintiff was engaging in the business of fund management without a license and after issuance of a notice to show cause to the CEO of the Plaintiff and failure to respond to the latter, concerning several queries on its operations.
16. He went on to state that the YouTube publication was in relation to Cytonn High Yield Solutions (CHYS) of which the 1<sup>st</sup> Defendant utterances therein were true, justifiable and without malice given that the only regulated and licensed affiliate of the Plaintiff to carry out business of fund management at the time was Cytonn Asset Managers Limited. The 2<sup>nd</sup> Defendant having received redemption delay complaints and other numerous complaints totaling Kshs. 350 million, as at the end of 2021, forwarded the complaints on Cytonn High Yield Fund (CHYS) to the Plaintiff for resolution. Therefore, the Defendants acted truthfully by advising investors to invest through licensed and approved entities, if they were to be afforded protection by the 2<sup>nd</sup> Defendant. In summation he confirmed that Cytonn High Yield Fund (CHYS) was placed under liquidation by dint of ruling emanating in Nairobi IP Petition No. E063 of 2021 Cytonn High Yield Solutions LLP (In administration) v Official Receiver.

17. At this juncture it would be pertinent to state that the respective counsel for the parties had an opportunity to cross-examine and re-examine the witnesses.
18. That said, upon the close of the trial, parties filed submissions, of which, the Court has duly considered alongside the authorities relied in support thereof.
19. Having set out the above, the overarching question for determination is whether the Plaintiff has on a balance of probabilities made a case for defamation as against the Defendants. And if so, whether the relief(s) as sought in the plaint ought to be granted.
20. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. Concerning the latter, the Court of Appeal in **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91** observed that-

***“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”***

21. Further, the applicable law as to the burden of proof is found in **Section 107, 108 and 109 of the Evidence Act**. In **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** the Court of Appeal stated that:

**“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”**

22. In so far as the tort of defamation is concerned, the rationale behind the law of defamation was spelt out by the Court of Appeal in **Musikari Kombo v Royal Media Services Limited [2018] KECA 801 (KLR)**, wherein it was stated that;

**“The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:**

**“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporary sanction ...’**

**Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”**

23. Further, according to **Black’s Law Dictionary, 9th Edition at Pg. 479** defamation is defined as:

***“The act of harming the reputation of another by making a false statement to a third person.”***

24. It must also be remembered that when it concerns the tort of defamation, there exists competition between the private and public interest. The current constitutional dispensation at **Article 33(1)** of the Constitution guarantees the freedom of expression by way of seeking, receiving or imparting information. Corollary of the forestated, is **sub-Article (3)** which provides that in exercise of the right of freedom of expression, every person shall respect the rights and reputation of others.

25. Considering these competing rights **Lord Denning MR** stated in English Case of **Fraser v Evans & Others [1969] 1 ALL ER 8; -**

***“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed.”***

26. The Court of Appeal in **Patani & another v Patani [2019] KECA 480 (KLR)** while addressing itself to the purport of the law of defamation stated that: -

***“In rehashing, we note the ingredients of defamation were summarized in the case of John Ward v Standard Ltd. HCC 1062 of 2005 as follows:***

- 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.”***

See also-; **Swanya v Toyota East Africa Ltd & another [2009] KECA 379 (KLR)**

27. In this case, ingredient (ii) & (iii) above have not been contested, as the Defendants readily admit to publishing the words in question at

Paragraph 5 & 7 of their statement of defence statement. The two (2) questions in dispute and to be considered contemporaneously are whether the publications were defamatory & or false; and or whether they were truthful and made in the public interest.

28. At the risk of repetition, it is undisputed that there was publication of the impugned articles on 20.04.2020, 17.06.2021, in NTV YouTube Channel and The Report to the Committee on Finance and National Planning of the National Assembly of and or concerning the Plaintiff. However, what I garner from the Defendants pleadings, aside from the earlier discussed preliminary issues, is that the impugned publications were published, in the course of the 2<sup>nd</sup> Defendant discharging its duty whereas the said statements were based in facts and truthful in the circumstance. Therefore, the publications were not defamatory, reckless or malicious as assailed by the Plaintiff.
29. The Plaintiff's case hinges on the fact that by dint of the publications, the same occasioned the Plaintiff great prejudice on accord of the imputation drawn therefrom, to wit, excerpts of the impugned NTV YouTube Channel video was played before Court with the words in respect of the impugned publication pleaded in the plaint.
30. That said, the undisputed facts are the Plaintiff is a registered company in the Republic of Kenya that is in the financial investment sector/space. It is not in dispute that the 1<sup>st</sup> Defendant at all material times relevant to the instant suit was the CEO of 2<sup>nd</sup> Defendant whereas the latter is an independent public agency established pursuant to the **Capital Markets Act**, charged with the prime responsibility of supervising, licensing and monitoring the activities of market intermediaries, including the Stock Exchange and the Central Depository and Settlement Corporation (CDSC). It also

regulates all licensees under the Capital Markets Act, including Online Forex, Commodities and Regulated Exchanges.

31. The 2<sup>nd</sup> Defendant's objectives are further encapsulated in **Section 11** of the **Capital Markets Act** to constitute (a) the development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises; (b) to facilitate the existence of a nationwide system of securities commodities market and derivatives market and brokerage services so as to enable wider participation of the general public in the securities commodities market and derivatives market; (c) the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent; (d) the protection of investor interests; (e) the facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and (f) the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.

32. The CMA Chief Executive Mr Wycliffe Shamaih advised investors to only through licensed and approved entities who offer and promote regulated products, to enable them get protection offered by the authority through the capital markets legal and regulatory framework. Investors who invest in unregulated products offered or promoted by unlicensed and unapproved entities risk loss of their investments with no recourse afforded to them under the capital markets regulatory frameworks.

***Following numerous enquiries regarding the licensing status of the Cytonn investment Group, Mr Shamiah said “The authority confirms that the Cytonn Investments is not a licensed and approved entity. He further stated that “Investors who are affected by investing in unregulated should report to the Capital Market Fraud Investigation Unit”.***

CMFIU which is the police unit attached to the Capital Markets Authority. CMFIU is currently investigating the issue for criminal violations for investors in the Cytonn High Yield Solutions (CHYS). He reiterated the Authority on 20<sup>th</sup> April 2020 communicated this same information to the public.

CMA has licensed Cytonn Asset Management Limited, which is licensed as a fund Manager managing the following regulated funds: Cytonn Money Market Fund; Cytonn Balanced Fund; Cytonn Equity Fund; Cytonn Africa Financial Services Fund; Cytonn Money Market Fund (USD); and Cytonn High Yield Fund. So far CMA has not received any complaints on these regulated products.

Investors are advised to confirm the names of the licensed and approved entities offering services in the capital markets industry from the CMA website [www.cma.or.ke](http://www.cma.or.ke) members of the public who have been affected or have come to be aware of such illegal entities are advised to report to the Authority or to the Capital Markets Fraud Investigation Unit.

33. That said, to ascertain as whether the words referring to the Plaintiff were defamatory, the test to be applied is spelt out in the case of the

**Onama v Uganda Argus Ltd (1969) EA** by the East African Court of Appeal was that:

***“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those “who have a greater or special knowledge of the subject matter”.***

34. Having quoted the publications that are the main contention in this suit which is readily available in the YouTube, I now turn to my analysis to confirm if indeed these publications meet the threshold of defamation as set out in the Act and common law.

35. **Section 30(b) of the Capital market Act and regulations 21** of the Capital Markets Regulations 2002 states and I quote **Section 30 A(b);**

***“An offer shall not be considered as a public offer if otherwise being a private concern of the person receiving the offer and the person making the offer @***

**Regulation 21 of the capital Markets Regulations, 2002;**

***“ For purposes of these regulations, an offer for securities shall be regarded as private offer and accordingly shall be deemed not to be an offer to the public in Kenya if to the extent that the Otis made to persons in Kenya under the following conditions-***

- a) The securities are offered to not more than one hundred persons***
- b) The securities are offered to the members of a club or association (whether or not incorporated) and the members can reasonably be regarded as having a common interest with each other and with the club or association in the affairs of the club or association and in what is to be done with the proceeds of the offer;***
- c) The securities are offered to a restricted circle of persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer;***

- d) The securities are offered in connection with a bonafide invitation to enter into an underwriting agreement with respect to them;***
- e) the securities are of private company by that company to Members or employees of the company Members of the families of my of such members or employees or; The securities are offered to a restricted circle of persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer,***
- f) The minimum subscription for securities per applicant is not less than Ksh 100000;***
- g) The securities result from the conversion of convertible securities and a prospectors relating to the convertible securities was approved by the Authority and published in accordance with these regulations.***
- h) The securities of a listed company are offered in connection with a takeover scheme approved by the authority***

36. The above statutory regulations have been drafted in mandatory terms and public officers are expected to abide it. The 2nd Defendant role in regulation is crucial and sensitive because there is a delicate balance between public interest and way of doing business. Certainly, the plaintiff is not the only unregulated entity in the market and this raised standard of care upon the Defendant on other to protect other entities lest they loose business yet their activities are legally sanctioned by the act. From the provisions of the law above, it is clear that the Unregulated entities have a predetermined discourse between it and its clients including their family members. A reading of these provisions may lead one to conclude that it is more of a contract between the entity and their clients.

37. It is undisputed that CHYS was duly registered by the Defendant. This means that the Plaintiff was its creature and that the defendants

were well aware of the existence of the plaintiff within the parameters of the law. This is buttressed by a letter dated the 14th day of April 2016 which was a reply to the Plaintiff's inquiry on its status or the position of unregulated entity. The defendant reiterated in its reply that the regulations of capital Market set above was applicable.

38. The excerpt in NTV is plain and clear. The first sentence states that the plaintiff was not their licensee which in fact is true but the next set of words, that is "... we go to police and report this is a criminal offense "is a clear departure on what the law provides as set out in the section quoted above which recognizes unregulated entities. The defendant has no capacity to make or amend the law and by calling the existence of the Plaintiff as "criminal", he essentially struck out the section that breath life to the legality of the plaintiff and besides this statement is not factual because the plaintiff is registered and by invoking police, the defendant created an impression that the plaintiff was flouting the law and committing a criminal offense. This statement depicts the respondent's disapproval with private entities yet the only thing he can do is to recommend to the legislatures that it be scrapped and not "scare" members of the public against it. It may be taken to mean that the defendant is desirous to have control of all entities. In fact, the Defendant went ahead to urge affected members of the public to report to capital markets fraud investigations unit. I would not have any problem with urging members of the public to report the matter to fraud investigation unit because the Defendant would be acting in public interest but someone listening to the whole excerpt is likely to have a deeper conviction that the Plaintiff was

committing fraud. This is synonymous to a situation where an OCS says a certain person is a thief and urges others who might have more evidence of crime by the said person to report to it because by calling a person a thief, he can be believed more because his work entails arresting thieves and secondly if he calls out for evidence of other “theft incidences” by the “thief”, members of the public would readily avail any evidence even “suspicions” because the man has already been branded a thief by police. The defendant is a key regulator who is tasked with the role of protecting the public from being scammed by rogue entities and what it says in the media has deep ramifications on the response by members of the public and entities doing legal business. The defendant cannot only defend the public but also those who engage with the public because one cannot exist without the other. The defendant alluded to an earlier warning to the Plaintiff and a decision to report the matter to police and what this means is that, the members of the public or those who have invested in the Plaintiffs business would then have a few or no option but to shun the plaintiff because if a regulator decides to report to police that the Plaintiff is involved in fraud, who can invest with the plaintiff? and what happens to the Plaintiff's client? The Defendant appeared to have made some conclusion that the Plaintiff was a fraud even before investigation by police and condemned the Plaintiff unheard. At the time when this statement was made, there was no credible prove that the plaintiff was a fraud because otherwise he could have given instances or evidence. Notably, if the Plaintiff was a fraud, why is the 1<sup>st</sup> Defendant calling for investigations or going to report to Police? The mere mention of a possible criminal offense largely affects investors or clients and the common test to

apply is how a person listening to this expose would say about the reputation of the plaintiff- certainly that the plaintiff is a criminal entity that should be shunned; a clear ingredient of defamation.

When the Defendant was accorded an opportunity to testify, it did not call a single member of the public who was defrauded. This significantly waters down the statement made in the NTV and converts them into falsehoods and heavy weather. The burden to prove the incriminating allegations in the NTV statement laid with the Respondent and has not been purged by the defendant to justify the defence of fair comment

39. From **PW1**'s documentary evidence tendered before this Court, being **PExh.1-11**, the purported press release as pleaded in the plaint did not form part of the exhibits adduced by the Plaintiff despite being captured as one of the exhibits it intends to rely on per its list of documents dated 06.10.2021. The same was only availed to the Court by the Defendants as **DExh.5** per the latter's list of documents. To the foregoing end, the press release by the 2<sup>nd</sup> Defendant, captures in part and I quote-;

***“.....Following numerous enquiries received by the Authority regarding the licensing status of the Cytonn Investments Group, Mr Shamiah said, “the” only licensed entity is Cytonn Asset Management Limited, which is licensed as a Fund Manager and a Real Estate Investment Trust (REIT) manager. The funds managed by the entity under the approval collective Investment Scheme are Cytonn Money Market Fund; Cytonn Balanced Fund; Cytonn Equity Fund; Cytonn Africa Financial Services Fund, Cytonn Money Market Fund (USD); and Cytonn High Yield Fund***

***Investors are advised to check correctly the names of the licensed and approved entities”***

This is a fair statement by the defendant and does not connote any form of defamatory words. The advice to the public was merely to check names of licensed and approved entities which is proper, and in fact it clarified entities that are duly licensed. This is my opinion ought to have been in the NTV clip.

40. Defamation can be proved per se, without calling a third party. I do not agree with the submissions by the defence that by failing to call a third party, this suit should be dismissed. NTV is generally viewed by a considerable population and it would not make sense to call viewers at the time. That the news was broadcasted is not contested.

**Remedy in case of fraud;**

Private entities are not left out in instances where fraud is committed. Capital Market Authority's investigative and enforcement powers have broad powers to investigate both public and private entities where there is disorder in the market or fraud and it is mandated by section 11(3) of the CMA act to suspend, impose sanctions or compensate deserving cases. Other relevant sections are 13b and 30g which have investigative powers to issue directions. The investors also have powers to file civil or criminal suits against directors of a private entities. The first defendant is the director of the second defendant who has the role of administration, accounting officer, running of day to day activities, implement the decisions of the board or basically to run the Authority. The CMA investigative and enforcement powers have institutional powers like investigations, regulate markets intermediaries, impose sanctions or issues directions which are not personal to the CMA CEO (the 1<sup>st</sup> Defendant). By issuing a press release in NTV that the

Defendant is committing a criminal offence or that is raising money without approval and that they must stop is akin to a conclusion of the outcome of intended investigation yet the investigative part of the CMA is supposed to be independent from interference so that justice can be served. The CMA investigative unit is bound to deliver justice not only to the members of the public but also to the Plaintiff. It cannot be lopsided. A referee who is presiding over a crucial match must be very careful in what he says lest the fans consider the match as already decided. If a referee comments or says something like “one team will score a goal against the other”, the fans or those who have already placed their bet or intending to do so will certainly switch sides and worse is when the game is between Manchester United and Arsenal. The CEO of CMA is certainly the overall boss and his utterances weigh heavily on the investigative unit that as a matter of law fact must be independent. It would be likely that with the utterances in the NTV, the investigative unit is likely to be biased.

41. The conclusion of the above is that the utterances by the 1st defendant on behalf of the second defendant amount to recklessness, unwarranted, defamatory and is bedecked with falsehood. On the issue of the press release in the 2nd Defendant website, parts of the words used may raise evidence albeit feeble that support defamation. In the web, investors are warned not to invest in private entities yet the law provides for private entities investment and in particular only the plaintiff is singled out as for example where in the second last sentence, the CEO warn members “who are aware of such illegal entities” to report to authorities. One can only believe this to mean that he was referring to the plaintiff because it is the only private entity he said is under

investigation for criminal violations yet even when given an opportunity to testify, the defence did not prove 'such illegal' activities that the plaintiff committed. Ingredients of defamation have been met in this case.

## **Damages**

42. I have read relevant authorities under this limb and taken into account relevant factors and proceed to award general damages and aggravated damages. I have considered that that the media that published the defamatory words has a large following. The Defendant did not procure an apology or pull down / edit their web to remove misleading information. The information relayed in the media by a CEO of the Second Defendant has high potential of affecting the Plaintiff's business. The defense alluded to the fact that there are other pending cases between the Plaintiff and the defendants. I have no capacity tell how far these cases have gone or if there are currently directions issued against the Plaintiff. To this end and to ensure that I do not issue an order that might embarrass ongoing cases, I shall only restrict myself to an award of general and aggravated damages that arose from the defamation in this matter. The Plaintiff suits succeeds and is awarded the following;

- 1. General damages Ksh 10,000,000**
- 2. Aggravated damages Ksh 500,000**
- 3. Costs of this suit.**

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 11<sup>TH</sup> DAY  
OF MARCH 2026.**



**HON L P KASSAN  
JUDGE**

**In the presence of;**

**Ogada for Plaintiff**

**Gichuhi for 1<sup>st</sup> & 2<sup>nd</sup> Defendants**

**Carol – Court Assistant**

**RIGHT OF APPEAL 30 DAYS STAY**



**HON L P KASSAN  
JUDGE**

ORIGINAL