Braeburn Limited v Nairobi City Council & another (Civil Appeal 275 of 2018) [2023] KECA 541 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 541 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 275 OF 2018

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

MAY 12, 2023

BETWEEN

BRAEBURN LIMITED .... APPELLANT

AND

NAIROBI CITY COUNCIL .... 1ST RESPONDENT

NATION MEDIA GROUP LIMITED .... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (J. K. Sergon, J.) delivered on 6th April 2018 in H.C.C.C No. 1034 of 2004)

JUDGMENT

1. On October 3, 2003, the 1st respondent, the then Nairobi City Council, placed or caused to be published on page 50 of the 2nd respondent's "Daily Nation" newspaper a notice under the *Rating Act* (cap 267) in which it stated that the appellant, Braeburn Limited, was indebted to the 1st respondent in the sum of Kshs 1,272,503/40 on account of rates arrears in respect of the property known as LR No 3734/1013 situate in the Lavington area of Nairobi.

2. A similar notice was published in "the East African Standard" on September 30, 2003. By the two notices, the 1st respondent demanded payment by the appellant of the amount stated in the two notices.

3. In response to the notices, the appellant wrote to the 1st respondent's Town Clerk on October 16, 2003 pointing out that they (the appellant) were not in arrears of rates as publicly notified; and that the public notices were "defamatory in character and injurious to their reputation as a reputable body corporate;" that, following that publication, they had suffered prejudice, and that their esteem in the estimation of right-thinking members of society had been lowered; and that they had, over the years, timely paid rates as demanded in respect of the said property, but for the mistake, failure and/or negligence of the 1st respondent to credit their rates account with the amounts paid for the year 1993.

4. By their letter aforesaid, the appellant demanded the immediate and unequivocal retraction by the 1st respondent of the said advertisements together with a public apology for the defamation to be published prominently in the same pages of the said newspapers as the ones in which the advertisements appeared. On December 2, 2003, the appellant sent to the 1st respondent a reminder of its demands that were yet to be met.

5. On February 16, 2004, the 1st respondent, through its City Treasurer, wrote to the appellant requiring them to furnish the 1st respondent with photostat copies of the receipts issued to them in proof of payment of rates for the month of March 1993 to enable them reconcile their account. The appellant complied and, by their letter dated March 3, 2004, submitted to the 1st respondent a copy of a banker's cheque issued by its bank as proof of payment of the rates due in March 2003.

6. In a demand notice dated March 18, 2004, the appellant wrote to the respondents asserting that the advertisements aforesaid were defamatory. They demanded immediate and unequivocal retraction thereof within fourteen (14) days, failing which they would take appropriate legal action.

7. In response to the appellant's demand, the 2nd respondent wrote to the appellant on April 28, 2004 confirming that they were aware of the advertisements, and advised the appellant to address their concerns to the 1st respondent. In their reply on May 10, 2004, the appellant drew the 2nd respondent's attention to the principle that the printer and/or publisher of a defamatory material was jointly and severally liable as and with the editor, client or advertiser. They notified them that they would institute civil proceedings within seven (7) days next following.

8. The East African Standard tendered their apology sometime in June 2004 in terms as accepted and approved by the appellant *vide* their letter dated June 15, 2004 thereby acceding to its publication as drawn.

9. By a plaint dated September 30, 2004 and amended on July 21, 2009, the appellant sued the respondents jointly and severally for, inter alia: an apology to be placed prominently in the same newspaper and on the same day as the one in which the advertisement appeared; general damages for defamation; and costs of the suit and interest at court rates.

10. In its defence dated November 29, 2004, the 1st respondent contended that the appellant was in arrears as notified; that it was a habitual rates defaulter; that no defamation or business injury was occasioned to the appellant by the advertisement; that the 1st respondent did not intend to offer any public apology to the appellant or to place any advertisement in the same newspaper in that regard as demanded; that the appellant's suit was defective as it contravened mandatory provisions of law; and that the same should be dismissed with costs.

11. In reply to the 1st respondent's defence on December 3, 2004, the appellant reiterated that they have never been in arrears on account of rates; that they were not habitual defaulters; that their suit was properly before the court; and that the 1st respondent's defence should be struck out with costs.

12. On its part, the 2nd respondent filed a defence dated November 4, 2004 admitting having published the advertisement in issue, and contending that the words complained of were incapable of bearing any meaning defamatory meaning/content to the appellant. They denied that the appellant had suffered any loss or damage and prayed that their claim be dismissed with costs.

13. In their reply dated November 9, 2004, the appellant maintained that the words in the advertisement in issue were defamatory to the appellant thereby rendering them to suffer loss and damage; that the 2nd respondent's defence did not disclose a reasonable defence; and that it was an abuse of the court process. They prayed that it be struck out with costs.

14. In its judgment delivered on April 6, 2018, the High Court (J. K Sergon, J) dismissed the appellant's suit with costs to the respondents. In the words of the learned Judge:

> " 12. .... In the end, I find that on a balance of probabilities, the tort of defamation was not established as against the defendants. The defence of qualified privilege is a complete defence to an action founded on defamation. In the circumstances, I find that the plaintiff was not entitled to the reliefs sought in the plaint. Liability not having been established then quantum cannot be awarded. However, if quantum was to be awarded, I would have given a global figure of Kshs 1 million as general damages."

15. Aggrieved by the decision of Sergon, J. the appellant moved to this court on appeal on 13 grounds set out in its memorandum of appeal dated August 8, 2018. The appellant faults the learned judge for erring in law and in fact: by failing to appreciate that the appellant did not owe the 1st respondent any land rates at the time of the advertisement; by failing to find that the 1st respondent had a duty to prove the truthfulness of the advertisement; in failing to find that the contents of the advertisement were false as regards the appellant; by failing to find that the respondents portrayed malice before, during and after the defamatory publication; by misapplying the legal principles relating to the defence of qualified privilege of newspapers; in holding that the defence of qualified privilege is a complete defence to an action founded on defamation; in failing to find that the publication was defamatory; in determining the appellant's case against the weight of evidence on record; in finding that the appellant was not entitled to the relief sought; and in assessing the quantum of damages at a low and inadequate amount in the circumstances of the case.

16. In support of the appeal, learned counsel for the appellant, M/s Mugambi Mungania & Company, filed written submissions dated April 14, 2019 citing the cases of *Musikari Kombo v Royal Media Services Limited* [2018] eKLR highlighting the principle that the law on defamation protects a person's reputation, i.e, the estimation in which he is held by others; *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR where the court held that evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts; *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR where the court held that defamation law puts the burden of proving the truth of alleged defamatory statements on the defendant rather than the plaintiff; and *Johnson Evans Gicheru v Andrew Morton & another* [2005] eKLR where the court observed that, when assessing damages in an action for libel, the trial court is entitled to look at the whole conduct of the defendant from the time libel was published down to the time verdict is given.

17. On their part, learned counsel for the 1st respondent, M/s Koceyo & Company, filed written submissions dated February 8, 2019 relying on two judicial authorities, including the case of *Chirao Ali Makwere v Nation Media Group Limited & another* [2009] eKLR highlighting the principle that "an occasion is privileged where the maker of the communication has interest or a duty, legal, social or moral to make it to the person to whom it was made had the person to whom it is so made had a corresponding interest to receive it."

18. For the 2nd respondent, learned counsel M/s Okulo & Company filed written submissions dated April 2, 2019 citing the cases of *E. L Hoarse & others v Eric Jessup* [1965] EA 218 for the principle that "in an action for damages for a joint libel, in which the defendants rely upon qualified privilege, proof that one or more of them were actuated by express malice, will not render liable the defendants against whom such malice was not proved;" *Shah v Uganda Argos* [1972] EA 80 highlighting the public and moral duty to publish government announcements, provided that the matter concerned is of a public concern and for the public benefit; and *Stephen Thuo Muchina v Daily Nation Group Newspaper Limited & 2*

others [2012] eKLR submitting that qualified privilege though it also protects the maker of an untrue defamatory statement does so only if the maker of the statement acted honestly and without malice.

19. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that (See *Selle v Associated Motor Boat Co Ltd & others* [1968] EA 123).

20. In *Makube v Nyamiro* [1983] eKLR, this court stated thus:

> "A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

21. Having considered the record of appeal as put to us, the grounds on which it is anchored, the written and oral submissions of learned counsel for the parties, and the cited judicial authorities, we form the view that the appeal stands or falls on our findings on the following main issues, namely: whether the appellant was indebted to the 1st respondent as notified in the impugned notice; whether inclusion of the appellant's name in the impugned notice was justified; whether publication by the respondents of the notice containing the appellant's name as a defaulter was defamatory; whether the defence of qualified privilege was available to the respondents or to either of them; whether the appellant was entitled to compensation as claimed; and what orders ought we to make in determination of the appeal, including orders as to costs.

22. On the 1st issue, the appellant's case was that it was not indebted to the 1st respondent in the amount claimed or any part thereof. On the other hand, the 1st respondent labels the appellant "a habitual defaulter". Our examination of the record as put to us reveals otherwise. The fact is that the appellant did not owe the 1st respondent the amount claimed. The sum of Kshs 1,272,503/40 comprised of the principal amount of Kshs 153,950 due in 1993, and which was paid to the 1st respondent but not credited to their account resulting in accumulated interest over the years up to the year 2003. In their letter dated October 1, 2003 addressed to the 1st respondent, the appellant had this to say of its rates account:

> "... Kindly note that on or around March 18, 1993, we paid the amount of Kshs 166,795.00 *vide* our cheque No AJ 0xxxx7 (copy of the front and back of the cheque obtained from our bank and showing that the cheques was indeed presented for payment, is enclosed) which comprised of Kshs 153,950.00 being the rates for that year for the abovementioned property and Kshs 12,845.00 being rates for LR No 330/183. However, the Council did not credit, and has never credited, the said amount to our rates account. Consequently, the said rates account for the property herein has over the successive years reflected arrears which arrears has continually accumulated as a result of interest charged thereon leading to the current figure of Kshs 1,272,503.40 whose payment is allegedly being demanded."

23. That letter was preceded by two others dated May 22, 2003 and March 3, 2004. We consider it necessary to replicate excerpts thereof as hereunder. The letter of May 22, 2003 read:

> "In 1997, upon some investigations being carried out, it was discovered that the said amount of Kshs 166,795.00 was never credit in our rates account, a fact acknowledged in your letter dated May 13, 1997 a copy of which is similarly enclosed herewith for your ease of reference, by which you undertook to investigate the cause why the said amount was not credited, and

also pledged to reverse the interest charged since 1993 to date. However, to date, we have never been notified of the outcome of the matter nor has the amount aforesaid been credited in our account. Please note that this amount has continually attracted interest over the years.

We shall now appreciate if you could credit the said amount to our principal rate account and waive the interest that has accrued as it was not our fault that the account was not credited with the said amount of Kshs 166,795.00."

24. The 1st respondent's response *vide* their letter of May 13, 1997 undertaking to investigate the reasons why that payment was not credited, and to reverse or waive the accrued interest, was just that – a mere undertaking without more.

25. As events progressed, the appellant wrote yet another letter dated March 3, 2004 touching on the status of its rates account and the agreed withdrawal of proceedings against them in Nairobi RMCC No 44 of 1997 on the grounds that no rates were due and payable by the appellant. That letter read:

> "However, you will note payment has never been an issue, since your department acknowledged this fact *vide* your letter dated May 13, 1997, a copy of which is also enclosed for ease of reference. This was after some investigations were carried out by your department, whereby they discovered that the amount was never credited in our account. In fact, it is on the strength of this that you withdrew proceedings in Nairobi (City Court) RMCC No. 44 of 1997. To date, we are at a loss to understand why the sums have never been credited and the cumulative interest reversed.
>
> Kindly therefore credit the said amount and waive the interest that has accrued as it was not our fault that our above account was not credit with a sum of Kshs. 143,950, more so, since you have unequivocally admitted liability."

26. We find nothing on record to contradict the appellant's foregoing summary of the state of the affairs relating to their rates account with the 1st respondent. They did not owe the 1st respondent any money on account of land rates. That settles the 1st issue and, by extension, the 2nd. In effect, inclusion of the appellant's name in the impugned notice published in the 2nd respondent's newspaper was not justified. That leads to the 3rd issue as to whether that publication was defamatory in the circumstances.

27. According to the appellant, the advertisement falsely and maliciously alleged that they were indebted to the 1st respondent in the sum of Kshs 1,272,503/40 on account of rates arrears for the property known as LR No 3734/1013. The appellant contended that, at the time of the advertisement, they did not owe the 1st respondent the amounts stated; that they had timely and dutifully paid rates on an annual basis when the same fell due for payment; that the advertisement for non-existent arrears was defamatory in character as it portrayed the appellant as an entity that refuses, neglects and/or was unable to fulfil its financial obligations; and that the advertisement was prejudicial to the appellant as it eroded the business trust of the appellant.

28. It is noteworthy that the appellant's suit was prompted by the 1st respondent's refusal, failure or neglect to reconcile the rates account in issue. Instead, it persisted in denial as evidenced in its defence dated November 29, 2004 contending that the appellant was in arrears as notified, and that they were habitual rates defaulters. It also denied that the advertisement occasioned any defamation or business injury to the appellant. In the same vein, the 2nd respondent contended that the words in the advertisement in issue were incapable of bearing any meaning defamatory to the appellant.

29. The respondents' defences aforesaid were raised in disregard of previous correspondence between the appellant and the 1st respondent showing that no sums were in fact due on account of rates as demanded

and advertised in the impugned notice. In particular, the three letters dated May 22, 2003, October 1, 2004 and March 3, 2004 are on point and speak for themselves. The decisive question is whether, viewed against the sequence of events and correspondence, publication of the impugned notice was defamatory.

30. In its judgment delivered on April 6, 2018, the High Court (J. K Sergon, J) concluded that the appellant had not proved the tort of defamation as against the respondents, and that the defence of qualified privilege availed to them.

31. The events leading to publication by the 2nd respondent of the impugned notice and, in particular, the above-mentioned letters addressed to the 1st respondent by the appellant clearly demonstrate the casual manner in which the 1st respondent treated the appellant's effort to clear their name from the list of rates defaulters. Their blatant disregard of the appellant's plea to have their rates account reconciled to reflect the position that they did not owe the amounts stated in the notice can only spell malice, negligent conduct and abdication of discretion to the appellant's prejudice. Whether or not the 1st respondent's reckless conduct, and the subsequent publication of the demand notice in disregard of the state of the affairs of the appellant's rates account, established tortuous liability in defamation is a question of both law and fact.

32. The learned author, P. H Winfield, in *A Textbook of the Law of Tort* (5th ed 1950) 72 at 242 defined defamation as

> "...the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally."

33. To our mind, a publication is defamatory if the article complained of conveys a defamatory imputation to a hypothetically reasonable person – the ordinary citizen, whose judgment must be taken as the standard (see Winfield & Jolowicz on Tort (8th edition) 1967 at p 255). Placing emphasis on this, *Gatley on Libel and Slander* (Tenth Edition) at p.91 quoted the words of Villiers, CJ. in *Rudd v De Vos* (1892) 2 CTR 384 where the court had this to say:

> " The mere fact that the hearers [or readers, as the case may be] understood the language in a defamatory sense does not make it defamatory unless they are reasonably justified in so understanding it."

34. As the old adage goes, a book, however good or bad it is, cannot read itself. Only its readers can tell how good or bad it is. The appellant's case was that the impugned publication portrayed the appellant as an entity that refuses, neglects and/or was unable to fulfil its financial obligations; and that the advertisement was prejudicial in that it eroded the appellant's business trust.

35. This was compounded by the 1st respondent's contention that the appellant was "a habitual defaulter," even though that contention was expressed in its defence and not in the publication complained of. Be that as it may, the contention goes a long way in demonstrating the 1st respondent's intent to portray the appellant as a habitual defaulter against the grain of clear evidence to the contrary. That was, in our view, an assault on the appellant's reputation.

36. The test as to whether the demand notice depicting the appellant as a rates defaulter was defamatory is objective. As observed in *Halsbury's Laws of England* (4th Edition) Vo 28 at P.23 –

> " 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."

37. Likewise, this court in *S M W v Z W M* [2015] eKLR had this to say on the issue as to when a publication is viewed as defamatory:

> "In determining the meaning of words for purposes of defamation, the court does not employ legal construction, it will consider the layman's understanding of the same. The question is not what the defendant intended. The mere fact that the hearers understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it. The words complained of should be considered in their natural and ordinary meaning: see *Gatley on Libel and Slander* (8th edition) paragraphs 88-93."

38. With regard to a company, as is the appellant, *Gatley on Libel and Slander* (8th Ed) at para. 954 observed:

> "A trading corporation or company has a trading character, the defamation of which may ruin it. It can maintain an action for libel or slander for any words which are calculated to injure its reputation in the way of its trade and business, and this without proving special damage. Thus an action will lie for an imputation that a trading company is in an insolvent condition ...; and if a statement made as to the mode in which a trading company conducts its business, such as to lead people of ordinary sense to the opinion that it conducts its business in a dishonest, improper or inefficient manner, the law is the same as in the case of an individual, and the company can maintain an action without proof of special damage ...."

39. To our mind, the respondents' publication of the notice in issue was undoubtedly an attack on the appellant's trading character likely to injure its reputation in the way of its trade and business. On the other hand, if the publication complained of does not reflect on the trading reputation of the company, no action for defamation would lie. In effect, a company cannot sue either for libel or slander unless it is defamed in the way of its business. If it is, it would be entitled to redress without proof of special damage.

40. In the same vein, Lord Bingham of Cornwall in the House of Lords decision in *Jameel & others v Wall Street Journal Europe Sprl* [2006] UKHL 44, held that:

> "26. First, the good name of a company, as that of an individual, is a thing of value. A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their corporate images. I find nothing repugnant in the notion that this is a value which the law should protect. Nor do I think it an adequate answer that the corporation can itself seek to answer the defamatory statement by press release or public statement, since protestations of innocence by the impugned party necessarily carry less weight with the public than the prompt issue of proceedings which culminate in a favourable verdict by judge or jury. Secondly, I do not accept that a publication, if truly damaging to a corporation's commercial reputation, will result in provable financial loss, since the more prompt and public a company's issue of proceedings, and the more diligent its pursuit of a claim, the less the chance that financial loss will actually accrue."

41. Having considered the record as put to us, the impugned judgment, the written and oral submissions of the parties and the cited judicial and other authorities, we find and hold that the publication in issue was defamatory, and that the learned judge erred in concluding that the appellant had not proved the tort of defamation. That settles the 3rd issue as to whether inclusion of the appellant's name in the demand notice published in the 2nd respondent's newspaper was defamatory. Having found that it was, we now turn to the 4th issue as to whether the defence of qualified privilege was available to the respondents or to either of them.

42. The defence of qualified privilege was considered in the case of *Chirau Ali Mwakere v Nation Media Group Ltd & another* (2009) eKLR where Khamoni, J. (as he then was) defined a privileged occasion in the following words:

> "An occasion is privileged where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive it".

The elements of qualified privilege were also enunciated in *Halsbury's Laws of England* (4th Edition) Reissue vol 28 at para 109 where the basis of the defence of qualified privilege is explained. The learned author lists some categories of occasions in which the defence would be applicable and asserts as follows:

> "On grounds of public policy, the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are:
>
> 1. Limited communications between persons having a common and corresponding duty or interest to make and receive the communication,
>
> 2. Communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to a public attack.
>
> 3. Fair and accurate reports, published generally, of the proceedings of specified persons and bodies...."

43. We take to mind the fact that the law only affords protection on certain occasions, including those listed above, to a person acting in good faith and without any improper motive. We cannot, by any stretch of imagination, conclude that the 1st respondent included the appellant's name in its notice to defaulters in good faith and without any improper motive.

44. While the 1st respondent was under a statutory duty to collect land rates with power, *inter alia*, to issue and publish notices of the defaulting rates payers, the defence of qualified privilege did not, in our considered view, avail in its favour in relation to the published notice including the appellant as one of the defaulters. Causing the impugned notice to be published in complete disregard of the appellant's letters dated 22nd May and October 1, 2003, and March 3, 2004, drawing its attention to the status of its rates account dispossessed the 1st respondent of the right to raise the defence of qualified privilege.

45. On the other hand, the defence of qualified privilege was available to the 2nd respondent, and for good reason. This is because the 2nd respondent was not privy to the correspondence between the appellant and the 1st respondent concerning the status of the appellant's rates account. Neither did the appellant disclose to the 2nd respondent that status in its demand letter dated March 19, 2004.

In the circumstances, it is safe to conclude that the 2nd respondent received from the 1st respondent and published the impugned notice in good faith and without any improper motive. In effect, the 1st respondent was liable to the appellant in defamation.

46. Turning to the 5th issue as to whether the appellant was entitled to compensation, our answer is in the affirmative. What then would be reasonable compensation?

In making an award for compensatory damages in a claim for defamation, the court must take into consideration the damage the article complained of had on the respondent's reputation even though the claimant need not prove special damage to warrant compensation. In other words, the appellant in this case was not bound to prove actual financial loss to merit an award of general damages. As Lord Bingham in *Jameel & others v Wall Street Journal Europe Sprl* (supra) observed –

> " 27. I do not on balance consider that the existing rule should be changed, provided always that where a trading corporation has suffered no actual financial loss any damages awarded should be kept strictly within modest bounds."

47. We find nothing on the record to suggest that the appellant suffered actual financial loss in consequence of the defamatory notice. At the trial, the appellant had asked for Kshs 100,000,000 in damages while, on appeal to this court, they propose an award of "a modest and reasonable sum of Kshs 10,000,000. On their part, the 1st respondent makes no proposal on the basis that the tort of defamation has not been established. In the 2nd respondent's view, the amount proposed by the appellant is "farfetched and has no basis in fact or in law".

48. There being no evidence of actual financial loss on the part of the appellant, we are obligated to keep damages within modest bounds. We take note of the fact that the learned judge had assessed damages at Kshs 1,000,000 in 2018.

49. The basis on which an appellate court will interfere with an award in general damages were set out in *Butt v Khan* [1978] eKLR thus:

> " An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...."

50. Similarly, in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m Lubia and Olive Lubia* [1982 –88] 1 KAR 727 at p 730 Kneller, J.A stated:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be that either that the judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage." [emphasis added]

51. In our considered view, the amount of Kshs 1,000,000 as damages assessed by the learned judge five years ago is inordinately low by today's standards. Accordingly, we consider an award of Kshs 2,000,000 to be reasonable and within modest bounds. In conclusion, we hereby order and direct that:

   a. The appellant's appeal be and is hereby allowed as against the 1st respondent;

b. The judgment and decree of the High Court (J. K Sergon, J) be and is hereby set aside;

c. The 1st respondent do pay to the appellant damages hereby assessed in the sum of Kshs 2,000,000; and

d. The appellant's costs of the appeal be borne by the 1st respondent; and

e. The 2nd respondent do bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

NG'ENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR