IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 193 OF 2013

BETWEEN

NDUNG'U NJOROGE & KWACH ADVOCATES................1ST APPELLANT

PAUL NDERITU NDUNGU...2ND APPELLANT

AND

THE STANDARD LIMITED..1ST RESPONDENT

MANAGING EDITOR, EAST AFRICAN STANDARD....2ND RESPONDENT

PATRICK MATHANGANI...3RD RESPONDENT

KENYA NATIONAL ACADEMY OF SCIENCES.............4TH RESPONDENT

PROF. THOMAS R. ODHIAMBO.......................................5TH RESPONDENT

PROF. FESTO A. MUTERE..6TH RESPONDENT

PROF. R. M. MUNAVU..7TH RESPONDENT

PROF. N. O. BWIBO..8TH RESPONDENT

PROF. JOSEPH MARO...9TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Odunga, J.) dated 5th October 2012

in

HCCC No. 117 of 2004

Consolidated with HCCC No. 52 of 2005)

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JUDGMENT OF THE COURT

This appeal arises from the judgment and decree of the High Court of Kenya at Nairobi, ***(Odunga, J.),*** dated 15th October 2012 by which the learned judge dismissed claims for damages for libel brought by the two appellants, ***Ndung'u, Njoroge & Kwach Advocates*** and ***Paul Nderitu Ndung'u.*** The learned judge found that the publication complained of was protected by qualified privilege. However, had the appellants' claims succeeded, the learned judge indicated that he would have awarded each of them ***Kshs 5,000,000***. On costs, he directed the appellants to bear the costs of the 4th to the 9th respondents in this appeal, whom he found not to have instigated or induced the publication of the material complained of.

By way of background, the ***2nd appellant, Paul Nderitu Ndung'u***, is an advocate of the High Court of Kenya of long standing, having signed the roll of advocates in or about 1969. Other than being a partner in the ***1st appellant, Ndungu, Njoroge & Kwach Advocates***, one of the prominent law firms in Kenya, the 2nd appellant is also a member of the Law Society of Kenya, and served as the chair or convenor of the Society's ***Conveyancing and Property Committee***, as a member of the Task Force appointed by the Government to review and make recommendations on the ***Government Lands Act***, and as a member of the ***Commission of Inquiry into the System of Land Law in Kenya (the Njonjo Land Commission)***. At the time of the publication complained of, the 2nd respondent was serving as the chairperson of the ***Commission of Inquiry into Illegal/Irregular Allocation of Public Land*** commonly known as ***"the Ndung'u Commission".***

It is apposite to start by setting out the background to the publication that aggrieved the appellants and impelled them to commence libel proceedings in the High Court. The 4th respondent, ***the Kenya National Academy of Sciences (the Academy)***, is a duly registered society under the ***Societies Act***. It is established under the auspices of the ***National Council for Science & Technology***, which in turn is established by the ***Science & Technology Act, Cap 250***. With the President of the Republic as its patron, the Academy's mandate is to co-operate with the Government, other scientific organisations and the public in general, in the mobilization of the scientific community in Kenya for promotion of scholarly application of science and technology for national development. The 5th to the 9th respondents are all fellows of the Academy and were at one time or another its office bearers.

At all material times the Academy was the registered owner of a property known as ***LR. No. 209/13422***, measuring approximately 10 hectares and situate in the South C area of Nairobi. The Government granted that land to the Academy, which intended to construct its Headquarters thereon and towards that end, had commissioned preliminary surveys and architectural drawings and designs, before embarking on the construction.

In or about 1997, the ***Commissioner of Lands*** proposed to the Academy through the ***Permanent Secretary, Ministry of Research Technical Training & Technology***, that it should consider swapping its South C property with another property known as ***LR No. 21015*** located in the upmarket area of Gigiri in Nairobi and registered in the name of a company known as ***Stanmore International Limited (Stanmore)***. The Academy found the offer attractive and agreed to the exchange, subject to Stanmore refunding to it the sum of ***Kshs. 7,453,959***, which it had already expended on its South C property.

On the surface all looked well. The Academy surrendered its land, which was registered in the name of Stanmore. The latter paid the Academy the agreed sum of Kshs. 7,453,959 and purported to register LR No. 21015 in the name of the Academy. After a lot of toing and froing concerning identification of the beacons of LR No. 21015 and its handover to the Academy, it eventually came to light that the parcel that Stanmore was purporting to exchange with the Academy's property was in fact illegally excised from ***Karura Forest***, a Government Forest, and that the Academy could not lawfully take possession of that property.

There is a major dispute regarding the role of the 1st appellant in the failed transition. According to the appellants, the 1st appellant only acted as the lawyers for ***Trust Bank Limited*** from which Stanmore had borrowed the Kshs 7, 453,959 to pay the Academy. According to their narrative, the role of the 1st appellant was limited to facilitating payment of the said amount to the Academy in furtherance of which it merely gave professional undertaking to the Academy's lawyers, ***M/s Lumumba & Ojwang Advocates,*** and ultimately honoured the undertaking and the Academy was duly paid and acknowledged payment. The 1st appellant maintained that it had nothing to do with the registration of LR No 21015 in the name of Stanmore, the exchange agreement between Stanmore and the Academy, or the purported registration of LR No 21015 in the name of the Academy.

The Academy, on the other hand contended that the 1st appellant expressly represented to it that Stanmore was its client and was actively involved in the transaction, which it knew or ought to have known, was fraudulent and calculated to steal the Academy's property in South C. From the evidence on record there is no controversy that the 2nd appellant was not personally involved in the transaction; the same was handled by one of his partners, ***Raphael Kamau Ng'ethe***.

As we have already adverted, at that point in time the 2nd appellant was chairing the Ndung'u Commission, having been appointed by the President in July 2003. The terms of reference of the Ndung'u Commission were, among others, to inquire into the allocation of public lands or lands dedicated for research for public benefit to private individuals or corporations; to collect all evidence and information available from ministry-based committees or from any other sources, relating to allocation of such lands; to prepare a list of land unlawfully and irregularly allocated, specifying particulars of the land and of the persons to whom they were allocated, the date of allocation, particulars of all subsequent dealings in the land concerned and their current ownership and development status; and to make recommendations on the necessary legal and administrative remedial measures.

In the discharge of its mandate, the Ndung'u Commission issued a public notice inviting any member of the public with information regarding unlawful or irregular allocation of public land, whether developed or undeveloped, to submit the same to the Commission. The Commission ultimately completed its work and presented its report to the President in June 2004. Not surprising, LR No. 21095 that Stanmore was purporting to exchange with the Academy's land was found to have been illegally or irregularly excised from Karura, a public forest.

After the fraud that had been played on it became apparent, the Academy, on 26th April 2002, wrote a bitter letter to the Commissioner of Lands explaining in detail the history of the transaction and what eventually had transpired. It sought the intervention of the Commissioner in the recovery of its South C property. It also wrote another letter, in more or less similar terms, to the ***Minister for Lands*** & ***Settlement*** on 30th January 2003. On 29th October 2003, the 9th Respondent, who was then the chairman of the Academy, wrote a letter to the Ndung'u Commission, bringing to its attention the fraudulent acquisition of its land. He forwarded in that letter the complaint that the Academy had sent to the Commissioner of Lands and requested the Commission's assistance with investigations.

The Academy's complaint ultimately found its way to the hands of ***the 1st respondent, The Standard Limited,*** and its reporter ***Patrick Mathangani (the 3rd respondent).*** The 3rd respondent maintained that he obtained the information, which he subsequently published, from a confidential source within the Ndung'u Commission and not from the Academy or any of its office bearers. On 17th January 2004, the 3rd respondent telephoned the 2nd appellant and informed him that he was writing a story on the 1st appellant's alleged facilitation of the theft of

the Academy's land. The two met the next day when the 2nd appellant explained to the 3rd respondent that his partner, Mr. Ng'ethe, had handled the transaction in question and that the 1st appellant had no role in the exchange of the properties between the Academy and Stanmore. The 2nd appellant then handed over to the 3rd respondent copies of the relevant correspondence touching on the transaction.

Two days later, on 20th January 2004, the 1st respondent published in the *East African Standard* newspaper an article on the front and page 11, captioned ***"Land probe boss and irregular deal"*** and ***"Land probe boss at centre of row"*** respectively. Verbatim, the rather long article read as follows:

> *"The head of the presidential commission investigating irregular land allocations could be forced to resign following allegations involving him in an irregular land deal.*
>
> *The National Academy of Sciences claims that Ndung'u Njoroge and Company Advocates, where the commission Chairman is a partner, conspired with "powerful conmen" to grab the land between 1997 and 2000.*
>
> *The Academy has now asked the commission to investigate the case, putting Ndungu's future leadership of the team in jeopardy, the East African Standard has learnt.*
>
> *However, when contacted, Ndungu hit back at the Academy's top managers and absolved the law firm of any wrongdoing.*
>
> *Confirming that it indeed acted for Stanmore, he denied that the firm was involved in the negotiations that caused the institution to lose its land. He told the East African Standard at the law firm's offices:*
>
> *"I don't take allegations lightly. Why pick on me for blame" This issue will certainly not end here. Bigger names than you think were involved in the fraudulent transaction. They now want to malign my name and protect themselves."*
>
> *Documents forwarded to the commission by the Academy's Chairman, Prof. Joseph Malo, claim that Ndungu's firm, while acting for a city firm called Stanmore Investments Limited, facilitated the allocation of the land measuring about eight hectares.*
>
> *Malo alleges that through Ndungu's Law firm, Stanmore entered an agreement to swap its plot situated in Karura Forest, with the one belonging to the Academy.*
>
> *But during the final stages of the transaction, Academy officials realized they had been duped into surrendering their land while the one at Karura was non-existent, documents presented to the commission claim.*
>
> *Headquarters*
>
> *The lost land where the academy planned to construct its headquarters, was situated in Bellevue area, off Mombasa Road in Nairobi's South C.*
>
> *In his letter to the commission dated last October 29, Malo attaches an earlier one to Lands Minister Amos Kimunya asking him to intervene. Says the letter to Mr. Kimunya:*
>
> *"Between 1997 and 2000, there emerged very powerful conmen who through a long sequence of events managed to illegally grab this plot from KNAS ... immediately the KNAS realized foul play, both the company and their lawyers went underground."*
>
> *Malo told the commission:-*
>
> *"We hope and trust that the commission will speedily investigate this matter and advise the Government accordingly. The public is very interested to see how you will deal with this particular case."*
>
> *By remaining the commission's Chairman Ndungu while digging up the secrets of the shady transaction would in effect be investigating his own law firm.*
>
> *Conduct*
>
> *Commission rules require that a member steps down if his or her conduct and interests are found to compromise investigations.*
>
> *It means that if members formally discuss their chairman's involvement in the case as stipulated by the rules, he could be pushed to leave.*
>
> *Ndung'u however, said investigations by the commission indicated that the swap involved the then Commissioner of Lands, Mr. Wilson Gachanja, and the then Permanent Secretary in the Ministry of Research, Technical Training and Technology, Mr. Wamatu Njoroge.*
>
> *Ndung'u and his team were appointed by Kibaki last year to inquire into irregular allocation of public land.*

On whether or not he could resign, Ndungu said that none of the commission's members had raised the issue.

He declined to reveal the "big names', which he claimed were powerful people in the former government.

They would, however be exposed after a report was handed to President Kibaki on completion of investigations, he said.

The commission's mandate expires on Friday.

Yesterday, our investigations at the Registrar of Companies established that Stanmore shareholders own a firm known as Proshare Limited.

Ndungu said the Karura Plot was one among nearly 100 others which were irregularly allocated to individuals in the 1990s"

On the next day the 1st respondent published at the back page of the *East African Standard* an article headed ***"Law firm: We didn't negotiate the deal"*** in which it was explained that the 1st appellant had denied involvement in the fraudulent transaction. The appellants were aggrieved by the publications and on 21st January 2004 sent to the 1st, 2nd and 3rd respondents a letter demanding an apology and admission of liability for defamation. The 1st respondent explained in reply that it had published the 1st appellant's position on the transaction on 21st January 2004. On 27th January 2004, the appellants put up paid advertisements in both the *East African Standard* and the *Daily Nation* reacting to the publication of 20th January 2004 and denying involvement in the fraudulent deal.

On 22nd February 2004, the appellants made good their threat and filed ***High Court Civil Suit No. 117 of 2004*** against the 1st, 2nd and 3rd respondents, seeking special damages of ***Kshs 103,208.00***, general damages for libel, aggravated and exemplary damages, an injunction to restrain the said respondents from publishing any words or statements similar to those complained of, and costs and interest. A day before the expiry of one year since the publication complained of, the appellants, on 19th January 2005, filed another suit, namely, ***High Court Civil Suit No. 117 of 2005,*** against the Academy and its office bearers, seeking similar reliefs as in the first suit, the difference being special damages of Kshs 129,581.20. The second suit was based on the contention that the Academy and its office bearers instigated and supplied the allegations that were published by the 1st, 2nd and 3rd respondents.

In their defence to the first suit, the 1st, 2nd and 3rd respondents admitted publication, but pleaded that the same was not defamatory of the appellants. In the alternative they pleaded privilege and denied any malice or recklessness on their part. They also pleaded that they had duly carried the appellants' rejoinder to the publication. For their part, the Academy and its office bearers, in their amended defence to the second suit, denied supplying to the 1st, 2nd, or 3rd respondents the basis of the publication complained of, or causing its publication. They further pleaded that the publication complained of was not defamatory of the appellants and that in any event the communication to the Ndung'u Commission was made in defence of the Academy's public property and the Ndung'u Commission had a corresponding obligation to investigate the fraudulent loss of the land. Accordingly, they pleaded that the occasion was privileged and further or in the alternative, the communication was a fair comment on a matter of great public interest.

After consolidating the two suits, Odunga J. heard a total of 5 witnesses and upheld the defence of qualified privilege as we earlier alluded. The appellants were aggrieved and filed this appeal, in which they impugn the judgment of the High Court for holding that they had failed to discharge the burden of proof; by upholding the defence of qualified privilege; by elevating the defences of privilege and fair comment on a matter of public interest over their private rights, dignity and reputation; by unlawfully expanding the scope of the said defences; by failing to hold that the respondents were liable for libel which is actionable *per se*; and by absolving the 1st, 2nd and 3rd respondents from liability even after finding that they were not thorough in their investigations.

Prosecuting the appeal, ***Mr Kahonge***, learned counsel, compressed the appeal in his written submissions into three issues, namely, whether the defence of qualified privilege was available in the circumstances of the case; whether the learned judge erred by elevating public interest above the appellant's private interests or right to reputation underpinned by Article 32(3) of the Constitution and whether the appellants had proved their case on a balance of probabilities.

On qualified privilege, counsel submitted that the learned judge found that the 3rd respondent had not carried out thorough investigations before publishing the article which aggrieved the appellants, as a result of which he denied the 1st, 2nd and 3rd respondents costs. He contended that the 2nd appellant had requested the 3rd respondent to wait until he had crosschecked their files, but the latter rushed to publish the offending material and refused to carry a proper apology. He therefore urged us to find that in the circumstances, the publication was not honest and in good faith and that privilege was also not available to the respondents due to recklessness, lack on diligence and improper use of privileged occasion. In support of those propositions the appellants relied on the judgments of the High Court in ***Machira v. Mwangi & Another*** ***[2001] eKLR*** and ***Daniel Musinga t/a Musinga & Company Advocates v. Nation Newspapers Ltd*** ***[2001] eKLR*** and the judgment of this Court in ***J P Machira t/a Machira & Co. Advocates v. Wangethi Mwangi & Another*** ***[1998] eKLR***.

As regards the defence of fair comment on a matter of public interest, the appellants relied on ***Campbell v. Spothiswoode*** ***[1863] 3B*** & ***S. 769*** and submitted that the defence of fair comment was not available to the respondents because their alleged fair comment consists of allegations that the appellants were actuated by corrupt or dishonest motive, without reasonable basis for the allegations. It was submitted that there was no reasonable basis for making the allegations against the 2nd appellant.

Turning to the second ground on public interest and their right to reputation, the appellants submitted that the learned judge erred by holding that in some occasions freedom to communicate without fear of an action is more important than protection of personal reputation. Relying on Articles 33, 34 and 35 of the Constitution, the appellants submitted that freedom of expression and freedom of the media must be balanced against the right of individuals to their dignity and reputation and that the Constitution expressly provides that freedom of expression does not extend to vilification of others. In this case, it was submitted, the learned judge failed to strike the proper balance and expanded the defences of qualified privilege and fair comment in a manner that trashed the appellants' rights and reputation contrary to the dictates of the Constitution.

Lastly, the appellants submitted that a re-evaluation of the evidence on record shows that the learned judge erred by concluding that the appellants had not discharged their burden of proof. They contended that the evidence shows that the publication of the article complained of was not honest, but was instead actuated by ill will or bad motive, and further that the court upheld the defences of fair comment and privilege at the expense of the appellant's reputation which is guaranteed by the Constitution. They therefore urged us to allow the appeal and award them damages beyond the quantum that the learned judge indicated he would have awarded them had their claims succeeded. On the authority of ***Koigi wa Wamwere v. Attorney General [2015] eKLR*** they submitted that this Court is not bound by the quantum of damages that the trial court would have otherwise awarded. Unfortunately the appellants did not give any indication of the quantum of damages we should award should the appeal succeed.

Mr Echessa for the 1st, 2nd and 3rd respondents opposed the appeal and urged us to dismiss the same as unmeritorious. He started by complaining that the Managing Editor, East African Standard, is not a legal person and cannot be sued. We do not intend to waste time on the issue because the same was never raised before the trial court and it did not pronounce itself on the matter, nor is there a cross-appeal on the issue.

On a more properly grounded basis, the said respondents submitted that section 7 of the Defamation Act recognizes the defence of qualified privilege, which is available where publication is made without malice. They added that the trial court did not make any finding that they were actuated by malice and contended that lack of thorough investigation of itself is not evidence of malice. It was their further contention that from the evidence on record, they had made great effort to verify the facts before publication, including talking to the 2nd respondent, which negates bad faith or dishonesty. The said respondents urged us to find that there was no recklessness on their part in publishing the article in dispute and that the learned judge did not err in upholding the defence of privilege. They relied on the decisions in ***Slim v. Daily Telegraph [1968] 1 All ER 497*** and ***Kagwiria Kioga & Another v. The Standard Limited & Others [2015] eKLR.***

Turning to the issue of public interest and the appellant's rights and reputation, it was submitted that the appellants had mischaracterised the issues because the learned judge appreciated the constitutional underpinnings of the law of defamation and did in fact balance freedom of expression and freedom of the media with the right to privacy and reputation, after which he concluded that the defence of privilege was, in the circumstances, available to the respondents. It was therefore the view of the 1st, 2nd and 3rd respondents that the learned judge did not sacrifice, as alleged by the appellants, their rights and reputations on the altar of public interest.

Finally, we heard Mr. Wachira for the Academy and its office bearers. These respondents contended that, as pleaded, the cause of action against them was that they had instigated or supplied the allegations, which were published by the 1st, 2nd and 3rd respondents in the article complained of. They added that the part of the article that was attributed to them was how they were conned of their land and their request to the Commission to investigate the matter, which in itself was not defamatory of the appellants, and in any event was in exercise of their freedom of expression guaranteed by ***Article 33(1)(a)*** of the Constitution, which should not be whittled away. They cited ***Fraser v. Evans & Others [1969] All ER 6,*** in support of the argument.

These respondents also submitted that they had a private and a public duty to communicate to the Commission regarding the unlawful dispossession of their land and the Commission, which was specifically appointed to inquire into unlawful or irregular acquisition of public land, had a corresponding public duty to receive their complaint. They added that no malice was proved on their part as regards their complaint to the Commission and therefore the learned judge properly found that the defence of privilege was available. They cited the decision of the High Court in ***Phines Nyaga v. Gitobu Imanyara [2013] eKLR***, ***Uhuru Muigai Kenyatta v. Baraza Ltd [2011] eKLR*** on qualified privilege and malice.

Lastly the Academy and its office bearers submitted that their communication to the Commission was protected by the defence of fair comment on a matter of public interest. They contended that the Academy was a public body and its communication was to a Commission established under the law.

We have carefully considered the record of appeal, the judgment of the High Court, the submissions by learned counsel, the authorities cited by the parties and the law. In our view, this appeal raises only one fundamental question, namely whether in the circumstances of this case, the learned judge erred by holding that the defence of qualified privilege was available to the respondents.

Qualified privilege, like its more exalted sibling, absolute privilege, finds basis in public policy and common convenience, common good, or welfare of society. In ***Henwood v. Harrison [1872) LR 7 CP 606, Willes J***. stated the proposition thus:

> ***"The principle on which these cases are founded is a universal one, that the public convenience is to be preferred to private interests and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice notwithstanding that they involve relevant comments condemnatory of individuals."***

And in ***Gerhold v. Baker [1918] WN 368*** it was explained thus:

> ***"It is in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of common interest."***

(See also ***Toogood v. Spyring [1834] 1 Cr M & R 181).***

The privilege is therefore not intended to protect the defendant *per se*, but rather the occasion, when it is deemed, for reasons of public policy, that a person should be able to speak without risking an action on defamation. Unlike in the case of absolute privilege, the defence of qualified privilege is destroyed if it is proved that the respondents were actuated by malice.

Starting with the case against the Academy and its office bearers, the appellants' action, as pleaded in HCCC No. 117 of 2005, was that the

Academy had instigated and supplied the to the 1st, 2nd and 3rd respondents the allegations that were ultimately published on 20th January 2004 and which the appellants contended were defamatory of them. The appellants did not complain that the Academy's communication to the Ndung'u Commission was defamatory; what they complained of was what the 1st, 2nd and 3rd respondents published from the Academy's communication to the Commission.

In their evidence before the trial judge, the Academy and its office bearers admitted having sent their complaint to the Ndung'u Commission, but flatly denied having given it to the 1st, 2nd and 3rd respondents, leading to the publication which aggrieved the appellants. For his part, the 3rd respondent, who wrote the story complained of, exonerated the Academy and its office bearers from blame, testifying that he had obtained the Academy's complaint from a source within the Ndung'u Commission itself, whose identity, from the norms of his profession, he was not at liberty to disclose. The learned judge, who had the benefit of seeing and hearing all the witnesses as they testified believed the evidence that the Academy did not disseminate its complaint to the 1st, 2nd and 3rd respondent. Having carefully re-evaluated the evidence on record as we are duty bound to do as the first appellate court, we are satisfied that the learned judge did not err in that finding, because other than mere suspicion, the appellants did not adduce any evidence on the basis of which it could have been concluded that the Academy's complaint reached the 1st, 2nd and 3rd respondents from the Academy's offices rather than from the Ndung'u Commission.

But even if the appellants had complained that the Academy's complaint to the Ndung'u Commission was defamatory, we are not persuaded from the circumstances of this case and the evidence on record that such an action would have been sustainable in view of the defence of qualified privilege, which the Academy had raised. It is common ground that the Academy is a publicly funded body. It lost its land in an elaborate fraudulent scheme in which Stanmore, alleged to be a client of the 1st appellant, falsely represented that in exchange for the Academy's land in South C, it would give the Academy good title to a parcel in an upmarket location of Nairobi. The Academy's communication was to the Ndung'u Commission, also a public body, appointed specifically to inquire into irregular or illegal allocation of public lands and to receive evidence and information from any source. It is common ground too that the land, which Stanmore was purportedly offering to the Academy, was irregularly or illegally excised from a public forest. In those circumstances it is trite that the Academy had a duty to communicate to the Ndung'u Commission the fraudulent loss of public land in South C and the illegal and irregular allocation of the forestland. The Ndung'u Commission on the other hand had a corresponding duty to receive and inquire into the Academy's complaint. It was neither pleaded, nor proven that in sending its complaint to the Ndung'u Commission, the Academy was actuated by malice. Clearly the appeal as regards the Academy is totally bereft of merit.

As regards the 1st, 2nd and 3rd respondents, the appellants contend that the publication of the article in question was not covered by the defence of qualified privilege because the 2nd appellant was not personally involved in the transaction; that there was malice on the part of those respondents because the publication was reckless and without waiting for full information from the appellants; that malice could also be implied or inferred from the language of the article, and that the said respondents had failed to carry an equally prominent response when requested to by the appellants.

For their part, those three respondents invoked the defence of qualified privilege contending that the article complained of was on a matter of general public interest and that they had not been actuated by malice. The public interest arose because the Academy was complaining about the loss of its land in a transaction in which the law firm of the chairman of the Ndung'u Commission, appointed specifically to inquire into illegal or irregular allocation of public land, was alleged to have acted for Stanmore which had defrauded the Academy of its land and was also the beneficiary of land illegally or irregularly excised from a public forest. They added that before publication of the article, they contacted and heard the appellants' side of the story and also carried their rejoinder after the article was published.

It is important to bear in mind the changes that the Constitution of Kenya, 2010 wrought as regards freedom of expression. Under the former Constitution, the media did not enjoy any freedom as the media. It only enjoyed the freedom of expression that was guaranteed to all persons under section 79, which was subject to a host of claw-back provisions. Under the Constitution of Kenya, 2010, freedom of expression and freedom of the media were protected as separate and distinct freedoms under Articles 33 and 34 respectively. The background to that protection is given in detail in the judgment of the Supreme Court in ***Communications Commission of Kenya & 5 Others v. Royal Media Services Ltd & 5 Others*, SC Petition No. 14 of 2014.**

In ***The Standard Limited & 2 Others v. Dr Christopher Ndarathi Murungaru*, CA No. 187 of 2014**, this Court rejected the argument that the distinct protection of freedoms of the media under Article 34 had the effect of proscribing defamation actions in courts. It cited, among other decisions, the Supreme Court of the USA in ***Gitlow v. New York* (1924) 69 L Ed 1138**, where it was stated:

> ***"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."***

Nevertheless, this Court appreciated that granted the centrality of expression in a democratic polity, where the Constitution has expressly recognised freedom of the media, courts must be loath to uphold unjustified invasion of that freedom. As was held in ***Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127**, the press and the media have a general obligation to communicate important information on matters of general public interest and the public has a right to receive such information. (See also ***Jameel v. Wall Street Journal Europe SPRL* [2006] 4 All ER 1279)**. Consequently, publication of a matter of public interest to the general public is protected by qualified privilege unless it is shown that the publication was irresponsible. That, in our view is also the essence of the protection of freedom of the media under ***Article 34*** of the Constitution. In that background and light therefore, most of the pre-2010 judgments on defamation must be evaluated.

That is so because although the defamation complained of in this appeal arose in 2004, by the time the suit was heard and determined, the Constitution of Kenya, 2010 was in force for two years. In ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR** the Supreme Court considered, among others, retrospective application of the provisions of the Constitution and expressed itself thus:

> ***"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as***

ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution."

In the circumstances of this case, we do not see any basis for the non-application of the Constitution of Kenya, 2010. The provisions of Articles 33 and 34 were meant to re-engineer the freedom of expression landscape in Kenya and do not in any way divest any of the parties of legal rights that had accrued before the promulgation of the Constitution. Indeed, the appellants themselves have liberally invoked the provisions of the Constitution of Kenya, 2010 in support of their appeal.

The evidence on record is clear that the 2nd respondent was not personally involved in the transaction that led to the loss of the Academy's land. Nevertheless he was a senior partner in the 1st respondent. On its part, the 1st respondent has attempted to downplay its role in that transaction and to restrict it to merely acting for Trust Bank Ltd, which entailed giving a professional undertaking to the Academy's advocates regarding the top-up amount that Stanmore was to pay the Academy. But with respect, the evidence on record is replete with correspondence from the 1st appellant where, without any reservation, equivocation, or qualification, it refers to Stanmore as its clients. For example in a letter dated 6th January 1997, the 1st appellant advised the Academy thus:

> ***"We are acting for Stanmore Investments Limited and for Trust Bank Limited. We are on behalf of Stanmore Investments Limited forwarding to the Commissioner of Lands the Original Grant No. I.R 66497 for the purpose of surrender by our client of its above-mentioned piece of land."*** (Emphasis added).

On the same day, the 1st appellant wrote to the Commissioner of Lands in the following terms:

> ***"We write on the instructions of Stanmore Investments Limited and refer to your letter to our client dated 19th December 1997. We enclose herewith the original Grant No. I.R. 66497 for the purpose of surrender by our client of LR No. 21095 in exchange for LR No. 30188/XIV/76."*** (Emphasis added).

In yet another letter dated 8th June 1998, under the reference: ***Exchange of L.R. No. 21095 for 209/13422, Stanmore Investments Limited and Kenya National Academy of Sciences,*** the 1st appellant advised the Academy's advocates thus:

> ***"We have now obtained title over L.R. No. 209/13422 in the name of our client and effected transfer of L.R. No. 21095 in favour of your client." (Emphasis added).***

Several similar letters were produced in evidence in which the 1st appellant described Stanmore as its client. It was the 1st appellant who forwarded to the Academy the fake title to LR No. 21095 and who dealt with the issue of identification of beacons and handover to the Academy of the illegally obtained land. In view of the evidence on record, the 1st appellant cannot, with seriousness, claim that Stanmore was a stranger to it or that the 1st, 2nd and 3rd respondents were malicious or reckless in associating it with Stanmore.

Before the publication in issue, the 3rd respondent called the 2nd appellant regarding the article he was about to publish. The latter explained his position and the role of the 1st appellant in the transaction in which the Academy lost its land, restricting the involvement of the 1st appellant to acting for Trust Bank Ltd only. He also gave the 3rd respondent copies of some documents. He contends that the 3rd respondent should have waited to be given more information before publishing the article. In his view the 1st, 2nd and 3rd respondents were reckless and malicious.

Having carefully reviewed the evidence on record, and in particular the overwhelming documentary evidence in which the 1st appellant confirmed that Stanmore was its client and the efforts made by the 3rd respondent to hear out the appellants before publication, we do not think there was any recklessness that would have destroyed the privilege enjoyed by the 1st, 2nd and 3rd respondents as the press or media. The involvement of the law firm of the Chairman of the Commission of Inquiry into illegal or irregular allocation of public land in a transition where a public body lost its land in exchange for a parcel illegally excised from a public forest, was a matter of public interest that the respondents could legitimately report on without fear of a defamation law suit. Their expression was duly protected under Article 34 and in the circumstances of this appeal, the learned judge cannot be said to have upheld freedom of the media at the expense of the appellants' right to privacy or reputation.

We have come to the conclusion that we have no basis for interfering with the conclusion by the learned judge. Accordingly this appeal is dismissed with costs to the respondents. It is so ordered

Dated and delivered at Nairobi this 25th day of May, 2018

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR