



REPUBLIC OF KENYA



KENYA LAW
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Muturi v Sifuna (Civil Case 104 of 2016)
[2025] KEHC 1263 (KLR) (Civ) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1263 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 104 OF 2016

JN NJAGI, J

FEBRUARY 27, 2025

BETWEEN

NELSON HARUN MUTURI PLAINTIFF

AND

DAVID KINISU SIFUNA DEFENDANT

JUDGMENT

1. The plaintiff herein filed this suit against the defendant in a plaint dated 4th April 2016 seeking general, aggravated and exemplary damages for defamation and malicious injurious falsehoods arising from the defendant's publication of an affidavit sworn before a Commissioner of Oaths and which was presented to the Law Society of Kenya and the Advocates Disciplinary Tribunal. It was the contention of the plaintiff that the affidavit was defamatory to him in the way of his office and occupation.
2. The plaintiff claims that the statements made by the defendant were reckless, negligent, false and malicious and were calculated to lower his standing in the estimation of the Commissioner of Oaths, the Law Society of Kenya and the Advocates Disciplinary Tribunal and thereby cause the plaintiff to be shunned, avoided and disbarred as an Advocate of the High Court of Kenya.
3. The cause of action arose in the defendant's affidavit dated 9th February 2016 which is sworn before a Commissioner of Oaths in Kitale, one Benson W. Milimo. The plaintiff captured the defamatory words at paragraph 5 of the plaint as follows:
 - i. That I became worried with the behavior of the advocate for I thought that he could reason, that the agreement between me and Emily Mulaya was being frustrated by matters beyond my control and that he could give me assurance in a form of an undertaking but this was not the case. This prompted me to sue both Emily Mulaya and Mr. Nelson Harun Dumbeya Advocate in the Environment & Land Court Civil Suit No. 280 of 2015



- ii. That in addition, I also filed a complaint with the Law society of Kenya (LSK) for I felt that Mr. Nelson Harun Dumbeya was not acting professionally due to the following:-
 - a. Threatening to execute and convert my property namely Subdivision No. 9967, Original No.969017 Section 1 Mainland North whereas as an advocate, he knew very well or ought to have known that by reason, that all agreements stated herein had been frustrated by reasons beyond my control, he lacked basis to do so, which is true for the plaintiff still holds the defendants title and he has refused to release to date.
 - b. Failure to understand the unfolding circumstances and instead writing arrogant, demeaning and offensive letters.
 - c. Being in possession of a title to wit Trans/Nzoia.Kapomboi/193 registered in the name of Mr. Henry Wanyama Khaemba and releasing the same to me without the consent of Mr. Henry Wanyama Khaemba.
 - d. Giving me false assurance that the title and the power of attorney were free from any challenge and/or encumbrances leading to me committing my funds in the transaction and which turned out not to be the case.
 - e. Failing to involve his for-client Mr. Henry Wanyama Khaemba in a serious transaction such as a sale of land involving myself and thus causing a lot of pain both to me, to Mr. Henry Wanyama Khaemba and Emily Mulaya. I have reasons to believe that this unnecessary pain and troubles could have easily been avoided had the said lawyer acted professionally and transparently.
 - f. Holding a title in his possession of the property described as Trans/Nzoia.Kapomboi/193 as lien for untaxed cost of his fees and without informing the said Mr. Henry Wanyama Khaemba of the consequences in respect thereof.
 - g. Processing a power of attorney in a negligent manner resulting into high consequences for innocent parties such as myself.
 - h. Attacking other advocates who are not to this matter namely Prof Tom Ojienda Advocates & Eric Mutua Advocate the current president of the Law Society of Kenya.
 - i. Being involved in other fraudulent activities touching on other people's title which is unprofessional to the laid down ethics governing Advocates.
4. The plaintiff sought for reliefs as stated above.
5. The defendant denied the claim in a defence dated 17th May 2016 in which he raised the defences of truth, justification and privilege.

Plaintiff's Case

6. The plaintiff testified in the case and did not call any witness. He however filed several documents that he made reliance on in the case.
7. It was the evidence of the plaintiff that he is an advocate of the High Court of Kenya of 24 years of practice at the time when the matter herein arose. That in the course of his practice he had offered legal services to a couple known as Mr. Henry Wanyama Khaemba and Mrs. Emily Kivali Mulaya. That they were owing him a sum of Ksh.5.5 million in legal fees and had deposited title deed for land parcel No.Trans-Nzoia/Kapomboi/193 (herein referred to as the Kitale land) as lien for unpaid legal fees.



That under their instructions, he prepared a Power of Attorney to Emily Mulaya to enable the couple sell the land and pay back his money.

8. That without his knowledge, Emily Mulaya entered into a sale agreement over the land with the defendant pursuant to the Power of Attorney that he had prepared. The defendant then learnt that he, the plaintiff, was holding the original title deed and he reached out to him. He informed the defendant that he was holding the title deed as lien for unpaid legal fees. The defendant then undertook to pay the Kshs.5.5 million to the plaintiff. Against this undertaking the plaintiff released to the defendant the Kitale land title deed and the defendant in turn handed to the plaintiff an alternative title deed for defendant's parcel of land in Mombasa to be held as security by the plaintiff. The defendant then caused the Kitale land to be registered in his name. Unfortunately, a family dispute ensued between Emily Mulaya and her husband over the Kitale land.
9. Kitale land was the case for the plaintiff that the defendant was to hold the title deed and not transfer the land until he had paid the full consideration. However, that the defendant transferred the title deed into his name before he paid him his sum of Kshs. 5.5 million. That the defendant then devised a devious scheme intended to shake off the plaintiff from both the Kitale title deed and the Mombasa title deed through malicious complaints and demanding by menace or through threats and intimidations to return the Mombasa title. As a result, he complained about the power of attorney prepared by the plaintiff yet the donee of the power of attorney affirmed the authenticity of the power of attorney.
10. It was the case for the plaintiff that the defendant instead of walking out of the Kitale title transaction and returning the title deed to the plaintiff and demand a refund of his deposit from the donee of the power of attorney, the defendant waged on a totally unnecessary war against him.
11. According to the plaintiff, it is after these turn of events that the defendant swore an affidavit before a Commissioner of Oaths at Kitale making various allegations against him. Among the allegations is that he, the plaintiff, negligently prepared a Power of Attorney to land parcel No. Trans/Nzoia/Kapomboi/193 resulting to high consequences to innocent parties such as himself (defendant).
12. That the defendant further made allegations in the impugned affidavit that the plaintiff was involved in other fraudulent activities touching on other people's titles. The defendant used the affidavit to lodge a complaint against him with the Advocates Disciplinary Tribunal. He also presented a copy of it to the Law Society of Kenya.
13. It was the evidence of the plaintiff that he was highly offended by the allegations that he had fraudulently dealt with other people's title deeds. That he wrote a letter to the defendant demanding for particulars of persons whose titles he had fraudulently dealt with but the defendant declined to comply. It was the case for the plaintiff that the contents of the affidavit were highly defamatory to him. The defendant refused to apologize to him and he filed suit.
14. The plaintiff contends that the defamatory words were published by the defendant to the Commissioner of Oaths, to the Law Society of Kenya and to the Advocates Disciplinary Committee. That the words in their natural and ordinary meaning meant and were understood to mean by right thinking members of the Law Society of Kenya, the Commissioner of Oaths and the Advocates Disciplinary Tribunal that:
 - i. The plaintiff is a fraudster who fraudulently dealt with other people's titles in an unprofessional manner.
 - ii. The Plaintiff was an unreasonable person.



- iii. The Plaintiff was an Advocate who prepared legal documents such as a power of attorney negligently and incompetently.
 - iv. The Plaintiff was an Advocate who offered legal services in a dishonest manner and misled the consumers of his legal services.
 - v. The Plaintiff was an Advocate who handled his client's title documents in a manner inconsistent with his client's instructions and against his client's interest.
 - vi. The Plaintiff unlawfully held onto his client's title deed as an alien for costs that were untaxed implying that alien could be exercised only when costs are taxed or costs were only payable if taxed.
15. The plaintiff contends that the statements by the Defendant were reckless, negligent, false and malicious and were calculated to lower his standing in the estimation of the Commissioner for Oaths, the Law Society of Kenya and the Advocates Disciplinary Tribunal and cause him to be shunned and avoided and disbarred as an Advocate of the High Court of Kenya through disciplinary action. He prayed for damages.

Defendant's Case

16. The defendant was the only witness in his case. It was his evidence that in the years 2013 to 2017 he was serving as the Speaker of the County Assembly of Trans Nzoia. That an estate agent at Kitale called Eliud Wasike introduced him to a lady called Emily Mulaya who was selling land parcel No. Trans/Nzoia/Kapomboi/193 through a Power of Attorney. The Power of Attorney was prepared and registered by the plaintiff herein and it is on the strength of the Power of Attorney that he instructed Kidiavai & Co. Advocates who advised him that the transaction was proper. He proceeded to sign an agreement and paid Kshs. 2,000,000/= to the vendor, Emily Kivali Mulaya.

The seller undertook to give the original title deed on 24th December 2013. The vendor was however unable to hand over the title to him. She then disclosed that the title deed was with the plaintiff. He contacted the plaintiff on his cell phone and he agreed that he had the title deed. The plaintiff told him that he was holding it as lien over unpaid fees of Kshs.5.5 Million. They arranged for the plaintiff to travel to Kitale for a discussion on the matter. The plaintiff travelled to Kitale. They agreed for the plaintiff to release the title to the defendant and the defendant would pay the sum owed by the vendor of Ksh.5.5 million upon the defendant depositing a title deed of his Mombasa title as security.

17. Later, the defendant deposited his Mombasa title with the plaintiff and the plaintiff released the Kitale title to him. The plaintiff gave him 12 months to pay the money. The defendant thereafter transferred the title of the Kitale land under his name. Later, the husband to the vendor, one Henry Wanyama Khaemba, emerged and alleged that the title was stolen. Criminal charges were commenced against Emily Mulaya and a restriction was placed on the land at the lands registry.
18. It was the evidence of the defendant that as a result of these turn of events, he was harassed by journalists who accused him of stealing the land from Henry Wanyama Khaemba. That he then requested Ms Mulaya to accompany him to the plaintiff's office to seek for an undertaking that the plaintiff would not interfere with the defendant's Mombasa property. They went to the plaintiff and made a request. The plaintiff agreed and told him to go back to his office after 2 weeks to collect the undertaking. However, when he went back after the lapse of 2 weeks he was given a letter by the plaintiff's secretary indicating that an undertaking cannot be given in a vacuum. Thereafter the plaintiff threatened to sell his property in Mombasa necessitating him to file a suit in the High Court and lodged a complaint with the LSK. He asserted that filing a suit at the High Court and making a complaint to LSK does



not amount to defamation. That the plaintiff was found guilty by the Advocates Disciplinary Tribunal of negligently preparing the Power of Attorney but the plaintiff has challenged the decision with the Constitutional Court. That the matter is still pending with the said court.

19. The defendant further testified that the correspondence between him and the LSK does not amount to publishing. That appearing before a commissioner of oaths to take an oath does not amount to publishing any matter contained therein to demean the person. That he had interacted with the plaintiff on many occasions and tried to settle the matter with him but he has been difficult.
20. The defendant further testified that plaintiff also filed a complaint against him with the LSK but the same was dismissed. That his (defendant's) suit with the ELC was dismissed for non-attendance but he made an appeal on the same. The defendant urged the court to dismiss the suit with costs.

Plaintiff's Submissions

21. The plaintiff submitted that the defendant is obligated under Article 33 (3) of *the Constitution* to respect the rights and reputation of others. That whereas disciplinary processes or complaints in any organization may enjoy legal protection from an action in defamation, probably qualified privilege under the doctrine of the right to receive information and the reciprocal duty to act on the information; the test in law is whether the information on the face of it is justifiable or truthful. Where the disseminated information is false or recklessly disseminated the defense of qualified privilege if any in such circumstances dissipates. The plaintiff relied in the case of *Eric Gor Sungu v George Odinga Oraro* (2011) eKLR, *Benson Ondimu Masese v KTDA* (2004) eKLR in support of his claim.
22. The plaintiff also submitted that the discipline of advocates is governed by the *Advocates Act*. That the complaint is supposed to be by a way of affidavit to the advocates Disciplinary Tribunal and not to the Law Society of Kenya. The affidavit of complaint exhibited is on the face of it shown as having been published and received by both the Advocates Disciplinary Tribunal and the LSK, therefore the affidavit published to the LSK was not privileged and hence defamatory.
23. The plaintiff submitted that the decision by the defendant to seek the disciplinary action against the plaintiff without an investigation by the Advocates Complaints Commission was a by-pass which resulted to the malicious intent by the defendant hence arrogating himself the role of the investigator, prosecutor and judge by making defamatory allegations against the plaintiff with finality that is malicious.
24. The plaintiff also submitted that the information relayed to the LSK should be truthful, credible and should not be actuated by spite, ill will, hatred, opprobrium or malice or personal interests. That the motive of the defendant was to secure his title.
25. It was submitted that the complaints to the LSK was actuated by hatred, ill will, spite and malice. That the defendant's actions were not intended to achieve the objective of why complaints or disciplinary proceedings are instituted against advocates.
26. The plaintiff submitted that the defendant is subjecting him to the hardships of costs and expenses in a civil suit in the High Court and simultaneously seeking that the plaintiff be disciplined by his professional body and also gallivanting over the prospects of the plaintiff being prosecuted in a criminal court by celebrating an irrational and unreasonable decision to recommend the plaintiff's prosecution.
27. The plaintiff also submitted that the defendant has subjected him to psychological and mental anguish over the continued allegations about fraud and criminality and illegality against him.



28. The plaintiff submitted further vide reply to the defendant's submissions that the dispute between himself and the defendant can be narrowed to one single fact which is that the defendant picked up false allegations about Power of Attorney submitted to the police in course of a criminal investigation and passed them as the gospel truth and used the false allegations to author a malicious complaint against him with the LSK and the Advocates Disciplinary Tribunal and decided to add his own other allegations such as accusing the plaintiff of fraudulently dealing with other people's title.
29. According to the plaintiff, the defendant wants to push an argument that the LSK and the Advocates Disciplinary Tribunal are one and the same thing when the fact is that the two bodies are mutually exclusive bodies with power to sue and to be sued separately.
30. The plaintiff further submitted that the argument about absolute privilege does not apply in the circumstances herein for reasons that absolute privilege is ordinarily granted by statute.
31. On quantum the plaintiff submitted that he sought Kshs.10 million in general damages and Kshs.5million in aggravated/exemplary damages.

Defendant's Submissions

32. The defendant submits that proceedings before any court, including proceedings before quasi-judicial bodies and tribunals are absolutely privileged and cannot be the foundation of a claim for defamation. That the purpose of the absolute privilege for judicial proceedings is to guard against a situation where a judge, tribunal member, commissioner, litigant, witness and an advocate involved in such proceedings is accused of defamation for words or publications made in the course of such proceedings. He in that respect relied on the case of *Amos K.C. Kale & Another v Rebecca Gesora & Another* [2017] eKLR where the court cited the Westlaw's Canadian Encyclopedic Digest, under "Defamation" [2010]: that:

“No action of libel or slander lies, whether against judges, counsel, witness or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. Those statements are absolutely privileged, the immunity resting upon grounds of public policy and convenience, with the object of securing the free and fearless discharge of high public duty in the administration of justice.”

33. The court further quoted *MJ v DV*, Justice Jackson on the Saskatchewan wherein the Court of Appeal stated;

“absolute privilege exists not to protect persons who have made malicious statements, but to protect those involved in the justice system from necessity of having to weight their words for fear of an action in defamation, it is designed to encourage freedom of speech and communication in judicial proceedings, and its need is born out, at last in part by necessity;

34. The defendant submitted that tribunals also enjoy qualified privilege by virtue of Schedule 1 of part II of the *Defamation Act* Cap 36 Laws of Kenya which provides for “statements privileged subject to explanation.” Clause 7 of the said provides that:

A fair and accurate report of the proceedings at any meeting or sitting in Kenya of—(a)any local authority or committee of a local authority or local authorities;(b)any commission, tribunal, committee or person appointed for the purpose of any inquiry by or under the provisions of any written law;(c)any person appointed by a local authority to hold a local inquiry in pursuance of any written law;(d)any other tribunal, board, committee or body constituted by or under, and exercising functions under, any written law, not being a



meeting or sitting admission to which is denied to representatives of newspapers and other members of the public.

35. The defendant cited the case of Charles Katiambo Musungu v Dorine Lusweti [2021] eKLR where it was held that:

Qualified privilege may apply where the matter is of public interest or concern. The defence of qualified privilege is available when the defendant shows.

- a. The statement is made in the discharge of a public duty.
- b. Statement made on a subject matter in which the defendant has legitimate interest.
- c. Statement made by a defendant to obtain redress for a grievance.
- d. Reports of parliamentary proceedings.
- e. Extracts from or abstracts of Parliamentary reports, papers, votes or proceedings published by the authority of Parliament. [See Gatley on Libel and Slander 8th Edition page 441].

36. It was submitted that the statements made in the affidavit were made on a subject matter in which the defendant had a legitimate interest and were made to obtain redress for grievance. The respondent submitted that qualified privilege was not contradicted.

37. The defendant relied on the case of Chirau Ali Mwakwere v Nation Media Group Ltd & another [2009] eKLR where the court cited Halsbury's Law of England, 4th edition reissue paragraphs 109 where it was stated as follows:

“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.”

38. The defendant submitted that the Advocates Disciplinary Tribunal was set up to determine disputes between advocates and members of the public. That the law does not envision a situation where such complains are deemed to be defamatory. That the law requires a complaint to be set out in an affidavit. That the defendant followed the legal procedure as provided under the *Advocates Act* to lodge the complaint. The parties went through the entire process until a finding was delivered and the plaintiff was convicted of professional negligence. Therefore, that the plaintiff has no basis to file a defamation suit against the defendant on the basis of issues that have already been deliberated upon and a finding reached and there has been no challenge by way of an appeal. That the plaintiff cannot use a defamation suit to clear his name of the conviction.

39. It was submitted that allowing parties to file defamation suits out of complaints lodged with a regulatory body such as the Advocates Disciplinary Tribunal will defeat the purpose for which such bodies were instituted.

40. It was submitted that communication forming the complaint to LSK did not amount to publication of defamatory words and neither does appearing before a Commissioner of Oaths and swearing an affidavit amount to publication. That a Commissioner of Oaths is an officer of the court. That communication to LSK and Advocates Disciplinary Tribunal are privileged and consequently, the claim of defamation cannot stand.



41. On the complaint that the defendant made an allegation that the plaintiff had fraudulently dealt with other people's lands, the defendant claimed that these other parcels of land involved cases that were pending before in court between the plaintiff and the defendant.
42. The defendant reiterated the defence of justification in that the plaintiff was convicted by the Advocates Disciplinary Tribunal and therefore the defendant was justified in making the complaint.
43. The defendant submitted that he was left with no other option but to seek legal redress by filing ELC NO. 280 of 2015 in which he managed to get an injunction against the plaintiff and stopped him from disposing off his Mombasa property. That he reported the matter to LSK and by extension to the Advocates Disciplinary Tribunal which has since found the plaintiff culpable and accordingly convicted him of the charges leveled against him.
44. It was submitted that the plaintiff responded by filling the necessary defenses in the High Court and counter-accused the defendant for professional misconduct and by writing to the Law society of Kenya and by extension the Advocates Disciplinary Tribunal.
45. The defendant further submitted that advocacy is a calling and one must be consistent in what one believes in and one cannot call an act wrong and use it as a basis in a court of law. That the plaintiff has not come to this court with clean hands. That the defendant was vindicated in an impartial and competent tribunal when the tribunal found the plaintiff culpable and convicted him. That the plaintiff is currently battling in the Constitutional Court Petition Number 485 of 2019 claiming that his rights were infringed whilst he has used the same tribunal to malign the defendant's name. That in the circumstances the plaintiff is not justified to reap from his own wrong doing.
46. The defendant also submitted that even before lodging the complaint before the tribunal, he made attempts to amicably find a solution with the plaintiff, necessitating the defendant to file a suit for injunctive orders and to lodge the complaint. That the complaint was based on necessity and not on any bad faith or ill motive.
47. It was submitted that the affidavit was a procedural means of communicating and corresponding duty before the tribunal. That the defendant had to particularize the complaint vide an affidavit as per the procedures under the *Advocates Act*. That the plaintiff had a corresponding duty to respond to the complaint. That the plaintiff herein has not cited any single judicial authority being a successful defamation suit emanating or arising from the filed documents, proceedings, pronouncements in respect of the Advocates Disciplinary Tribunal. That it is trite that advocates ought to observe the highest standards of conduct on both personal and at professional levels.
43. Therefore that the defendant followed the right legal procedures provided for in the *Advocates Act* under section 57. That filing of a complaint before the Advocates Disciplinary Tribunal does not amount to defamation and that the plaintiff cannot bring an action against him for defamation. Further, that the Tribunal found the plaintiff culpable of the complaint against him and the plaintiff did not file an appeal against the tribunal findings and his culpability still stands.
44. The defendants submitted that the plaintiff has failed in totality to prove his case for defamation and in lodging this case, he is attempting to have his name cleared albeit in a wrong forum.
45. Further, that the plaintiff has not proved that he suffered any substantial loss or any at all therefore the claim for damages is not merited and lacks basis, thus the suit ought to be dismissed in its entirety with costs.
46. The defendant further submitted that under the Organizational structure of the LSK, there is a department known as Compliance and Ethics Directorate that works closely with the Disciplinary



Tribunal as a receptor Registry for Tribunal Cases and/or Complaints as brought forward by the public. It also offers further technical assistance to the tribunal for smooth operations.

47. The defendant submitted that the complaints to the Advocates tribunal are channeled through the Law Society of Kenya and the information does not amount to publication of information to a stranger.

Reply to Defendant's Submissions

48. The plaintiff in reply to the defendant's submissions maintained that the Law Society of Kenya and the Advocates Disciplinary Tribunal are two mutually exclusive legal bodies with power to sue and be sued separately. He maintained that the published words were defamatory and the defendant's defence of truth, justification and privilege do not apply. The plaintiff submitted that one cannot raise the defence of privilege without first acknowledging the defamation. He submitted that malice destroys the defence of qualified privilege as was held in *Benson Ondimu Masese v KTDA, Kisumu HCCC No.75 of 2004*.
49. It was submitted that section 6 of the *Judicature Act* immunizes judges and magistrates against anything done in good faith and therefore there is no blanket immunity. Consequently, parties and advocates appearing before those judicial officers cannot enjoy immunity for acts not done in good faith which even judicial officers don't enjoy. It was submitted that malicious acts cannot be done in good faith. The plaintiff invited the court to hold that parties can no longer scandalize others in judicial and quasi-judicial proceedings without consequences.
50. It was further submitted that absolute privilege does not apply in this case as the same is ordinarily granted by statute but the defendant has not cited any provision of the law that stipulates that publication to regulatory bodies such as Advocates Complaints Commission and LSK are absolutely privileged.

Analysis and Determination

51. This being a civil matter, the standard of proof is on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was stated by Kimaru J. (as he then was) in *William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526* to be as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

52. The elements for the tort of defamation were set out by the Court of Appeal in the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR* to be as follows:

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove: -

“(i) That the matter of which the plaintiff complains is defamatory in character.



- (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- (iii) That it was published maliciously.”

53. It is therefore for this court to interrogate the facts presented in this case and determine whether or not the ingredients of the tort of defamation were proved. The issues for determination in the case are:

- (1) Whether the statement complained of was defamatory to the plaintiff
- (2) Whether the statement complained of was published
- (3) Whether the publication was done maliciously
- (4) Whether there was justification in the publication

Whether the statement complained of was defamatory to the plaintiff

54. Defamation is defined in the Halsbury’s Laws of England, 4th Edition, Vol. 28 as follows:

“A defamatory statement which tends to lower a person in the estimation of right-thinking members of the society or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”

55. Winfield on Tort gives the following definition;

“It is the publication of a statement which tends to lower a person in the estimation of the right-thinking members of the society generally or which tends to make them shy away or avoid that person”.

56. In *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, the Court of Appeal said the following on defamation:

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).

57. The plaintiff must therefore in a suit of defamation prove that the words complained of had the tendency to disparage him or her in the eyes of right-thinking members of the society.

58. The plaintiff in this matter complains that the defendant swore an affidavit before a Commissioner for Oaths which disparaged him in his profession and career as an advocate. In the said affidavit the defendant made several allegations about the plaintiff concerning land parcel No. Transzoia/ Kapomboi/193 and land parcel Sub-division No.9967, Original No.969017 section 1 Mainland North. He alleged that the plaintiff had attacked two advocates named in the affidavit who were not



involved in the matter between them and further that the plaintiff was involved in other fraudulent activities touching on other people's titles. The affidavit was used to lodge a complaint against the plaintiff before the Advocates Disciplinary Tribunal. The complaint was heard by the Tribunal which dismissed the allegations except one charge where the defendant was accusing the plaintiff of processing a power of attorney in a negligent manner resulting into high consequences to innocent parties such as himself. The Tribunal convicted the plaintiff of the said complainant and sentenced him. The appellant has filed a judicial review application over the conviction which application is yet to be determined.

59. It is the case for the plaintiff that the defendant defamed him to the Commissioner of Oaths before whom the affidavit was sworn, to the Kenya Law Society officials who received the affidavit and to the members of the Tribunal who heard the matter.
60. From the tone of the averments in the affidavit and the evidence adduced before the court, it is clear that most of the allegations made by the defendant in the impugned affidavit were without basis. In the first place, the defendant accused the plaintiff of unlawfully possessing the title deed of Mr. Khaemba and releasing it to him without the consent of Mr. Khaemba yet Mr. Khaemba had given power of attorney over the land to his wife, Emily Mulaya. There was then no basis to this allegation.
61. The defendant accused the plaintiff of unlawfully threatening to sell his Mombasa property, yet he is the one who had placed with the plaintiff the title deed to the said land as security in exchange of Mr. Khaemba's land in promise to pay him Ksh. 5.5 million that was owed to him by Mr. Khaemba and his wife. There was then no basis to the allegation.
62. The defendant accused the plaintiff of giving him assurance that the title to Mr. Khaemba's land and the power of attorney were free from challenge and encumbrances which led him to buying the land, yet the defendant entered into an agreement to buy the land with Emily Mulaya without the knowledge of the plaintiff during which time he was represented by his own lawyer who ought to have done due diligence on the land. The defendant instead of blaming his own lawyer for entering into a deal over the land without conducting due diligence passed the blame to the plaintiff without any just cause.
63. The defendant blamed the plaintiff for failing to inform Mr. Khaemba of the sale transaction yet the land was sold through a power of attorney signed by Mr. Khaemba. He at the same time accused the plaintiff of holding Mr. Khaemba's title as a lien for untaxed costs when in fact there was no dispute that the Khaembas owed him the sum of Ksh.5.5 million in legal fees nor was there dispute that they are the ones who gave him the title as lien.
64. There was no substance in the allegation of attacking other advocates named in the affidavit. The defendant was in his evidence in court unable to explain the allegation that the plaintiff had fraudulently dealt with other people's land. Neither could he give further particulars to the plaintiff on the allegation when he was challenged to do so.
65. In my view the above allegations were baseless and were dismissed by the Advocates Disputes Tribunal upon hearing the matter. The plaintiff was however convicted by the Tribunal of the charge of negligently preparing the power of attorney. The question is whether the statement made by the defendant was defamatory in view of the fact that the plaintiff was found guilty of one of the charges complained of by the defendant.
66. The fact that the plaintiff was convicted by the Tribunal of one of the charges complained of by the defendant renders the entire claim for defamation moot. When it comes to reputation, it is either that one is of good repute or of no repute at all. A conviction on a charge of professional misconduct rendered the plaintiff to be of no good repute. A convict cannot claim to be of good repute as to be entitled to damages for defamation. The end result is that the plaintiff has not proved that the statement



complained of was defamatory to him in face of the conviction by the Tribunal. The conviction vindicated the defendant that the complaints were to some extent justified.

Whether the statement complained of was published

67. The defendant admitted writing the words complained of vide an affidavit dated 9th February 2016 but argued that the same did not amount to publishing a defamatory statement.

68. An important element of the tort of defamation is that the statement complained of was published to a third party. The Black's Law Dictionary 9th edition defines publication as –

“The act of declaring or announcing to the public.”

69. In *Raphael Lukale v Elizabeth Mayabi & another* [2018] eKLR, the court cited the case of *Pullman v Walter Hill & Co* [1891] 1 QB 524 and stated that:

Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed....

70. The plaintiff complains that the defendant published the statement to the Commissioner of Oaths, to the Law Society of Kenya and to the Advocates Disciplinary Committee. He argued that the publication to the Law Society was unwarranted as the Society had nothing to do with the complaint raised against him as it is the Advocates Disputes Tribunal who had the mandate over the matter. That this was publication of a defamatory statement to a third party.

71. The defendant on the other hand argues that complaints to the Advocates Disciplinary Tribunal are channeled through the Law Society of Kenya and therefore this does not amount to publication of the information to a stranger. That in fact the plaintiff made a complaint against him to the Law Society of Kenya and followed the same procedure in lodging the complaint.

72. The *Advocates Act* provides three ways in which a complaint may be raised against an advocate. Firstly, a complaint may be lodged through the Advocates Complaints Commission as provided under section 53(4) of the Act. Secondly, the same may be raised through the Advocates Disciplinary Committee as established under Section 57 of the Act, and thirdly, through the Regional Disciplinary Committees as established under section 58A of the Act. In my view there is no provision under the Act requiring a complaint to be raised through the Law Society of Kenya. The Law Society of Kenya and the Advocates Disciplinary Tribunal are two distinct legal entities, see *Wilberforce Nyaboga Mariaria v The Law Society of Kenya* [2016] eKLR. I therefore find that there was publication of the complaint by the defendant by copying the complaint to the Law Society of Kenya. Publication of the statement to a third party, the Law Society of Kenya, was therefore proved.

Whether the publication was done maliciously

73. A plaintiff for defamation must prove that the publication was done with malice. Malice can be inferred from the facts of the case. In *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR, Mativo J. (as he then was) held that:

Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice.



74. The plaintiff argued that the allegations published by the defendant to the Law Society Kenya were false and malicious though the Tribunal unreasonably found him guilty of one of the charges. The defendant on the other hand argued that there was no malice in lodging the complaint as he was vindicated when the Tribunal found the plaintiff guilty of professional misconduct.
75. The fact of the matter in this case is that the plaintiff was found guilty of one of the charges complained against him by the defendant. The plaintiff was found guilty by a competent Tribunal exercising judicial powers. For this court to make a finding that the publication of the statement was actuated by malice as submitted by the plaintiff would amount to effectively overturning the decision of the Tribunal that the plaintiff was guilty of professional misconduct. The power to rule so or otherwise lies elsewhere in an appeal or review of the decision of the Tribunal. I am thereby not in a position to rule on whether or not the complaint was actuated by malice as this may end up contradicting the finding of the Tribunal. The finding of the Tribunal therefore stands until set aside in a manner provided by the law. Consequently, it is my finding that the plaintiff has not proved that the publication of the statement complained of was actuated by malice.

Whether there was justification in the publication

76. The defendant raised the defences of absolute and qualified privilege. He argued that proceedings before any quasi-judicial bodies and tribunals are absolutely privileged and cannot be the foundation of a claim for defamation. He relied on the decision in the case of *Amos K.C. Kale & Another v Rebecca Gesora & Another* [2017] eKLR where the court cited the Westlaw's Canadian Encyclopedic Digest, under "Defamation" [2010]: that:

"No action of libel or slander lies, whether against judges, counsel, witness or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. Those statements are absolutely privileged, the immunity resting upon grounds of public policy and convenience, with the object of securing the free and fearless discharge of high public duty in the administration of justice."

In *MJ vs DV*, Justice Jackson on the Saskatchewan court of appeal stated that absolute privilege exists not to protect persons who have made malicious statements, but to protect those involved in the justice system from necessity of having to weigh their words for fear of an action in defamation, it is designed to encourage freedom of speech and communication in judicial proceedings, and its need is born out, at last in part by necessity.

77. Section 58(5) and (6) of the *Advocates Act*, provides that proceedings before the Tribunal are akin to legal proceedings. The said section provides as follows: -

"(5) All proceedings before the Tribunal shall be deemed for the purposes of Chapter XI of the *Penal Code* (Cap. 63) to be judicial proceedings and for the purposes of the *Evidence Act* (Cap. 80) to be legal proceedings.

78. I have made a finding that the defendant published the statement to Kenya Law Society. The society does not enjoy any absolute privilege in a case of defamation. In the premises, the defence of absolute privilege would not apply to them.



79. On the defence of qualified privilege the defendant cited the case of Charles Katiambo Musungu v Dorine Lusweti [2021] eKLR, where the court said the following on the defence of qualified privilege:

Qualified privilege may apply where the matter is of public interest or concern. The defence of qualified privilege is available when the defendant shows:

- a. The statement is made in the discharge of a public duty.
- b. Statement made on a subject matter in which the defendant has legitimate interest.
- c. Statement made by a defendant to obtain redress for a grievance.
- d. Reports of parliamentary proceedings
- e. Extracts from or abstracts of Parliamentary reports, papers, votes or proceedings published by the authority of Parliament. [See Gatley on Libel and Slander 8th Edition page 441].

80. In the same case, the court held that:

“For a statement of qualified privilege to be available the defendant must show that the statement was made (a) in good faith and (b) without any improper motive. Where the Plaintiff establishes that the Defendant acted in bad faith and was given improper motives then the defence of qualified privilege would have been demolished.”

81. In Halsbury’s Law of England 4th Edition Vol. 28 at Paragraph 109 the rationale for the defence of qualified privilege is explained 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 communication between persons having a common and corresponding duty or interest to make and receive the communication.
2. Communication to the public at large or to a Section of the Public made pursuant to a legal, social or moral duty to do so in reply to a public attack.
3. Fair and accurate reports published generally or proceedings of specified persons or bodies.

82. In Dorcas Florence Kombo v Royal Media Services [2014] eKLR it was stated that:

“--- qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or the use of the privileged information for an improper purpose. “

83. A defendant may therefore raise the defence of qualified privilege where the matter involves public interest and concern; statement made on a subject matter in which the defendant has legitimate interest and statement made by a defendant to obtain redress for a grievance. In this case the defendant had a legitimate interest in the matter that was the subject of the statement. The statement was apparently



made so as to obtain redress for a grievance against the plaintiff. However, a defence of qualified privilege may be defeated by proof that there was malice in the publication of the statement. In the circumstances of this case, I cannot say that the statement was not made in good faith nor that there was improper motive in making the statement in face of the conviction of the plaintiff over the charge of professional misconduct. Consequently, I cannot say that the defence of qualified privilege was not available to the defendant.

Disposition

84. In view of the foregoing, it is my finding that though the plaintiff has proved that the defendant published the impugned statement to a third party, he has not proved that the statement was defamatory of him. Neither has he proved that the publication was actuated by malice. In the premises, the claim for defamation does not lie against the defendant and is for dismissal and is so dismissed.
85. The law requires me to assess the amount of damages I would have awarded the plaintiff had his case succeeded. The plaintiff had proposed an award of Ksh. 10 million in general damages and Ksh.5 million in aggravated/exemplary damages. He relied on the following authorities that involved awards made to his peers in the legal profession for defamation: Miguna Miguna v The Standard Group Limited [2017] eKLR where the court awarded the plaintiff Ksh.6,000,000/= in general damages; Benson Ondimu Masese v Kenya Tea Development Agency Limited, HCCC N0.75 of 2004, Kisumu, where Ksh.7 million was made in general damages and Ksh.3 million in exemplary damages for a claim that a law firm was filing fraudulent claims. The award was however reduced by the High Court to Ksh.1.5 million on the ground that the complaint was limited to the Advocates Complaints Commission and that the respondent had only been in practice for a period of 8 years; Rossely Olivia Adero Otieno & another v Devki Steel Mills Limited and another, HCCC No.41 of 2003, Nairobi, where Ksh.4,000,000/= was awarded in general damages for defamatory allegations; and Eric Gor Sungu v George Odinga Oraro [2014] eKLR where Ksh.5 million was awarded in general damages and Ksh.4 million in aggravated damages for defamation.
86. Taking into consideration the above authorities and the fact that the plaintiff was at the material time a practicing lawyer of 24 years' standing, I would have awarded him Ksh. 5,000,000/= in general damages and Ksh.1,000,000/= in exemplary damages.
87. However, the plaintiff having failed to prove his case against the defendant, the suit is dismissed with costs to the defendant.

DELIVERED VIRTUALLY, DATED AND SIGNED AT GARSEN THIS 27TH DAY OF FEBRUARY 2025

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Plaintiff

No appearance for Defendant

Court Assistant - N/A.

