



REPUBLIC OF KENYA



**Ruthi v Nation Media Group Limited & 2 others (Civil Case 92 of 2012)  
[2024] KEHC 624 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 624 (KLR)

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

**CIVIL**

**CIVIL CASE 92 OF 2012**

**DAS MAJANJA, J**

**JANUARY 31, 2024**

**BETWEEN**

**DAVID GEORGE KATIBA RUTHI ..... PLAINTIFF**

**AND**

**NATION MEDIA GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BARCLAYS BANK (K) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH M. GIKONYO T/A GARAM INVESTMENTS ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a further amended Plaint dated 02.10.2017, the Plaintiff filed suit against the Defendants seeking damages arising out of publications of advertisements in the 1<sup>st</sup> Defendant's newspaper issues of 06.06.2011 and 18.07.2011 stating that the Plaintiff's properties were to be sold by public auction on 24.06.2011 by the 3<sup>rd</sup> Defendant ("the Auctioneer") on instructions of the 2<sup>nd</sup> Defendant ("the Bank") who claimed that the Plaintiff had an outstanding loan with it. The Plaintiff states that these advertisements were defamatory to himself and his business and were actuated by malice ill-will and spite on the part of the Defendants as the Plaintiff claims that he had no outstanding loan with the Bank and that the advertisements were done in the full knowledge by all the Defendants that there was an order prohibiting the sale.
2. The Defendants opposed the suit. The 1<sup>st</sup> Defendant denied the Plaintiff's claim and averred that the advertisements, though published by it, were in fact authored by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on whose instructions they were published but that the advertisement of 18.07.2011 were subsequently cancelled on 19.07.2011 upon the instructions of the Bank and the Auctioneer. It also averred that the suit was barred by limitation as it is not filed within one year from the date the cause of action accrued.



3. On their part, the Bank and the Auctioneer state that the Plaintiff is yet to settle an outstanding amount of Kshs 1,199,946.30 and that the loan was never cancelled and subsists to date. They state that they rightly exercised their statutory power of sale by issuing the requisite notices to sell the charged properties for auction and that they lawfully advertised the same for sale in the 1<sup>st</sup> Defendant's newspaper.
4. The Bank and the Auctioneer admit that the Plaintiff in Murang'a PMCC No 135 of 2011 obtained a court order dated 23.06.2011 restraining them from exercising the Bank's statutory power of sale until determination of the suit, however, that this order was issued after the charged properties had already been advertised in the 1<sup>st</sup> Defendant for sale. The Bank and the Auctioneer aver that they applied for and obtained the order setting aside of the injunction order on 29.07.2011 but they denied that the hearing of the application in the aforementioned suit determined the issue of the outstanding loan owed by the Plaintiff to the Bank as the main suit is yet to be concluded.
5. The Bank and the Auctioneer state that they mistakenly handed over the old advertisement for sale of the Plaintiff's property to the 1<sup>st</sup> Defendant on 18.07.2011 and that the Auctioneer notified the Bank of the same and thereafter ran a cancellation of the advertisement the following day on 19.07.2011 in the 1<sup>st</sup> Defendant's newspaper. In sum, the Bank and Auctioneer averred that the advertisements did not defame the Plaintiff and that they portrayed statements of fact in relation to the Plaintiff and that they were true in substance and in fact.
6. The Bank and the Auctioneer aver that the Bank granted loan facilities to the Plaintiff which facilities were secured by a Charge dated 01.11.1994 created over Title Number Loc.10/Wanjengi/1193 to secure a sum of Kshs 350,000.00, a Charge dated 24.01.1997 created over Title Number Murang'a/Municipality Block 3/368 to secure a sum of Kshs 150,000.00, a Charge dated 06.03.1997 created over Title Number Loc.11/Maragi/4271, 4272, 4273, 4274, 4275 and 4276 to secure a sum of Kshs 900,000.00 all registered in the name of the Plaintiff. The Bank and the Auctioneer assert that the advertisements of the Plaintiff's charged property were therefore a factual and accurate portrayal of the Plaintiff, who to date has failed and/or refused to liquidate the outstanding debt in the sum of Kshs 1,199,946.30.00 owed to the Bank. For these reasons, the Defendants deny that they are liable to the Plaintiff as alleged and urge that the suit against them be dismissed.
7. The matter was then set down for hearing, where the Plaintiff testified as PW1, called his friend, John Wainaina Mwati (PW2) and his accountant, Martin Mwangi (PW3). The 1<sup>st</sup> Defendant did not call any evidence. The Bank called its counsel for legal recovery, Samuel Njuguna (DW1) while the Auctioneer (DW2) testified on his own behalf. After the hearing, the parties supplemented their arguments through oral and written submissions. Since the basic facts are not disputed as the parties gave evidence along the lines I have already highlighted above, I do not wish to rehash the same but I will make relevant references in my analysis and determination below.

### **Analysis and Determination**

8. The 1<sup>st</sup> Defendant has raised a fundamental objection to the suit. That it is statute barred under the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) as it was filed beyond the time limited by statute. Section 4(2) thereof provides that:
  - (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:  
  
Provided that an action for libel or slander may not be brought after the end of twelve months from such date. [Emphasis mine]



9. It is not in dispute that the advertisements complained of were published on 06.06.2011 and 18.07.2011 hence the suit ought to have been filed latest by 18.07.2012 in respect of the last advertisement. The suit was however filed on 30.01.2012 hence it was filed within the limitation period.
10. Turning to the merits of the case, the Plaintiff's claim against the Defendants is for damages on account of alleged defamatory statements as contained in the advertisements that ran on the 1<sup>st</sup> Defendants publications of 06.06.2011 and 18.07.2011 for the sale of the Plaintiff's charged properties.
11. In Joseph *Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR, Civil Appeal No 42 of 2014, Mativo. J.,(as he was then) stated as follows on the tort of defamation:

A plaintiff in a defamation case must prove that the words were spoken or written by the defendant, that those words refer to him/her, that those words are false. That the words are defamatory or libelous and that he/she suffered injury as a result, that is, his/her reputation was injured as a result.

12. The Court of Appeal, in *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR summarised the law of defamation as follows:

Author Patrick O'Callaghan while discussing the subject of defamation in "*Common Law Series: The Law of Tort*" at paragraph 25.1 says:

"The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: "As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ..." Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..." (emphasis added).

It was held in *Knupffer v London Express Newspaper Limited* [1944] 1All ER 495 that:

"The only relevant rule is that in order to be actionable, the defamatory words must be understood to be published of and concerning the plaintiff".

This Court while dealing with an appeal in a defamation case held in *SMW v ZWM* [2015] eKLR:

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

It has been held in various cases in Kenya and elsewhere that the test whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it - See the English case of *Mortgage & Investment Society Limited v Odhams Press Limited* [1941] KB 440.



In the 4th Edition Vol. 28 of *Halsbury's Laws of England*, the following statement appears at page 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".

The "reasonable man" was explained in *Winfield & Jolowicz on Tort* 8th Edition at P. 255 as:

"The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard".

Tunoi, JA, in *Johnson Evan Gicheru v Andrew Morton & another* [2005] eKLR held that in an action for libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. Further, that the trial court may consider what the defendants' conduct has been before the action, after the action and in court during the trial.

13. It was not disputed that the Bank instructed the Auctioneer to run the advertisements in the 1<sup>st</sup> Defendant's newspaper for the sale of the Plaintiff's properties. There is therefore no doubt that the words contained in the adverts were written by the Bank and the Auctioneer and that they referred to the properties in the Plaintiff's name. The main question for the court's determination is whether the information in those advertisements were false and whether a reasonable person reading the 1<sup>st</sup> Defendant's newspaper would be likely to understand them in a defamatory sense.
14. The question of whether the information therein was false is a question of fact which if proved to be so, would likely make one conclude that the Plaintiff is a defaulter and as such lower his reputational standing. As stated, the advertisements ran as part of what the Bank claimed was its exercise of its statutory power of sale on a loan it claims the Plaintiff owes it. The Plaintiff disputed this assertion by the Bank and stated that it advised him in early August 2000 that its internal insurance which was used to come up with a 10% deposit of the Kshs 1.2 million overdraft facility which the Plaintiff had always deposited on the 1<sup>st</sup> of every year as a condition for renewal of the overdraft facility had settled the total outstanding loan. In short, the Plaintiff's position is that he had no loan with the Bank that warranted it to advertise his properties for sale in the exercise of its statutory power of sale as the loan was written off by the Bank.
15. In his testimony, DW1 stated that whereas the Bank had written off the Plaintiff's debt as at 04.07.2002, he stated that the term "written off" was an accounting term made when the Bank realizes that chances of recovery of the debt are slim or negligible but that the customer is never informed that the debt is forgiven. DW1 told the court that he was not aware that the Plaintiff had been told his loan had been written off and that there was no position to reverse the account as he was still expected to pay the loan.



The Court of Appeal, in *Nicholas Mahibu Muriithi v Barclays Bank Kenya Limited* NRB CA Civil Appeal No 340 of 2012 [2018] eKLR explained the effect of a debt write-off as follows:

From the evidence presented by the respondent in the form of the Central Bank of Kenya Prudential Guidelines, we are indeed persuaded that in banking terms, debts are classified into categories depending on their performance. They are either: normal debts, watch debts, substandard debts, doubtful debts or loss. The latter, in which the appellant's debt fell, constitutes, as the name implies, a loss to the bank, which are considered uncollectible or of such little value that their continued recognition as assets is of no use to the bank.

Because the debt in this dispute was a loss to the respondent, at that stage it wrote it off. Was the appellant absolved from his obligation under the charge or loan agreement? A bad debt that has been written -off does not suggest the absence of a legitimate claim against the debtor whose debt is being written-off. It is done for purposes of taxation and bookkeeping and only if there are no or only slim chances of recovering the debt. See *Mohammed Gulambussein Farzal Karmali and another v C.F.C. Bank Limited and another* (2006) eKLR. But if the debtor's financial status improves, nothing stops the creditor from pursuing and recovering the debt.

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It follows therefore that by writing- off the debt owed to it by the appellant, the respondent did not absolve the former from liability and the respondent was not barred from following up recoveries. [Emphasis mine]

16. The above exposition lends credence to DW1's testimony that the writing off of the Plaintiff's debt by the Bank was only for administrative purposes and did not absolve him from his liability. Since the outstanding loan remained due and payable, the Bank retained the right to pursue and recover the debt as it deemed fit including selling the charged securities by way of sale by public auction. One of the pre-requisites for exercise of the statutory power of sale was for the Auctioneer to advertise the property, which was done in the 1<sup>st</sup> Defendant's newspaper on 06.06.2011 and 18.07.2011. The Bank admitted that the latter advertisement was published in error as the date the auction was to take place had since passed and that there was an order stopping the auction already in place.
17. As to whether this advertisement was actuated by malice and ill-will, Odunga J.,(as he was then) held in *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR that:

Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice. .... Malice may also be inferred from the relations between the parties.... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn. [Emphasis mine]
18. The advertisement of 18.07.2011 contained the same information as the one of 06.06.2011. This error in the advert was not so disproportionate as the Plaintiff was still indebted to the Bank and it had the right to sell the secured properties in exercise of its statutory power of sale. The Plaintiff cannot therefore claim that he was defamed as the fact that he was still indebted to the Bank remained. Further, I cannot infer any malice of the part of the Defendants as the advert of 18.07.2011 was cancelled a day later. In my view, it was an honest mistake. PW2, who stated that he saw the advertisement of 18.07.2011 also admitted that he saw the cancellation the following day, thus it can be stated that the situation was neutered and people such as PW2 who could have seen him in a different light reputation-wise did not change this perception after the cancellation. In any event, the Plaintiff admitted in his evidence that he had no evidence of the loss he had suffered as a result of the publication.



19. Having found that the Plaintiff was indebted to the Bank and that it had a right to exercise its statutory power of sale by way of public auction through the Auctioneer as it did, it follows that the information contained in the advertisement of 06.06.2011 and 18.07.2011 was not false. Consequently, I find and hold that the advertisements published in the 1<sup>st</sup> Defendant's newspaper were not defamatory.

**Disposition**

20. The Plaintiff's suit against the Defendants lacks merit. It is dismissed. The Plaintiff shall pay the Defendants costs of the suit.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**D. S. MAJANJA**

**JUDGE**

