



REPUBLIC OF KENYA



**Boiwo v Star Publication Limited & another (Civil Case 1 of 2019)
[2024] KEHC 2054 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL CASE 1 OF 2019
RB NGETICH, J
FEBRUARY 29, 2024**

BETWEEN

FRANK KIPTOO BOIWO PLAINTIFF

AND

THE STAR PUBLICATION LIMITED 1ST DEFENDANT

JOSIAH NYANDORO 2ND DEFENDANT

JUDGMENT

1. The Plaintiff, Frank Kiptoo Boiwo, filed this suit through plaint dated 13th December, 2019 against the 1st and 2nd defendant seeking the following Plaintiff prayers: -
 - i. General damages for defamation;
 - ii. Aggravated damages for defamation;
 - iii. An order that the Defendants do publish an unqualified apology through the same medium as prominently and in the same page and in similar manner as the offending article;
 - iv. Cost of this suit;
 - v. Interest on a) and b) above at court rates;
 - vi. Any other relief that this Honourable Court may deem fit.
2. From pleadings, the plaintiff is an advocate of the High Court of Kenya whereas the defendant is a limited liability company in the business of broadcast and newspaper print and circulation within the Republic of Kenya and the 2nd Defendant, Josiah Nyandoro, is the County Director of the National Environment Management Authority (NEMA) in charge of Baringo County.



3. Record show that interlocutory judgement against the 2nd defendant was entered on 13th March 2020 for non-appearance and final judgment was delivered by justice Weldon Korir on 24th May 2022. Thereafter, the 2nd defendant filed an application dated 29th June 2022 to set aside the interlocutory judgement entered on 13th March 2020 and the final judgement delivered on the 24th May 2022 as against the 2nd defendant in this suit and all consequential orders on ground of improper service by the Plaintiff. The 2nd Defendant also sought to be granted leave to file his statement of defence. The Plaintiff responded to the said application dated 29th June, 2023 vide a Replying Affidavit dated 14th July, 2022.
4. By ruling delivered on the 20th December, 2022, the Court allowed the 2nd defendant's application dated 29th June, 2023 on the following conditions:-
 - i. That the judgment herein dated 24th May, 2020 as regards the 2nd defendant only is hereby set aside with all the consequential orders.
 - ii. That the 2nd defendant to pay to the Plaintiff a sum of Kshs 500,000/= within 30 days from the date of the ruling and in default, prayer (a) be discharged.
 - iii. That the balance of Kshs 500,000/= to await the outcome of the suit between the Plaintiff and the 2nd Defendant.
 - iv. That the 2nd Defendant to file and serve his defence within 14 days from the date of the ruling.
 - v. Costs of the application to the Plaintiff.
5. The 2nd Defendant complied with the above conditional orders and as a result this suit was set down for pre-trial directions and thereafter fixed for hearing on the 26th September, 2023 where both the Plaintiff and the 2nd defendant testified and produced their respective documents in support of their case.

Plaintiff's Evidence

6. Plaintiff adopted his witness statement dated 13th December 2019, all his documents contained in the list and bundle of documents dated 13th December, 2019 together with his initial oral evidence as was taken in the proceedings by Justice Weldon Korir.
7. The plaintiff's argument is that on the 5th September, 2019, the 2nd defendant at the instance of the 1st defendant published and/or caused to be published an article captioned "Baringo lawyer defies Nema Order and build house in old cemetery at page 30 of the Star Newspaper where at paragraph 2 the 2nd Defendant caused the following words to be published thus:

"He excavated and exhumed human fossils from the 'grabbed public land'. Boiwo then engaged masons in unlawfully putting up permanent structures at the 50ft by 100ft plot situated opposite Marigat Sub -County Hospital."
8. The Plaintiff contended that the 2nd defendant also caused the following words to be published at paragraph 6 thus:

"He only submitted fake site architectural drawing stamped by a nameless Marigat Sub County Public Health Officer on 2nd August, 2019".



9. The Plaintiff testified that the publication was false, malicious and was calculated to discredit him in the eyes of the right-thinking members of society and by extension the legal profession. He stated that the article as captioned was defamatory by innuendo and implied that he was dishonest, a forger of public documents, a criminal, of low moral standing, a land grabber and lacked integrity considering his standing in the society and in the legal profession.
10. And as a result of the said publication, his standing, reputation and character amongst the right-thinking members of the society and in the eyes of his colleagues in the legal profession was seriously damaged, eroded and as such he had suffered mental anguish, psychological torture, distress and embarrassment which further compromised his security and infringed on his dignity occasioning him irreparable loss and damage.
11. The Plaintiff in his evidence denied claims by the 2nd defendant that he had exhumed human fossils from a public grabbed land as published under paragraph 2 of the article neither did he present a fake site architectural drawing with respect to the development of his plot as indicated in paragraph 6 of the impugned article.
12. The Plaintiff testified that he was the beneficial owner of the 50ft by 100ft plot situated opposite Marigat Sub County Hospital, which he had purchased for value from Jane Kamuren vide a sale agreement dated 30th March ,2007.
13. It was his evidence that the said plot was formally allotted to Jane Kamuren by the defunct County Council of Baringo, which was a legitimate public body through the minutes of 28th February, 2001 and of 27th April, 2001 and that the said allocation has never been revoked to date.
14. He further testified that before the purchase of the said plot, Jane Kamuren had showed him where the land was situated and that the said plot was already beaconed and upon purchase of the said plot, in the process of developing the plot, he began the process of obtaining requisite approvals from the County Government of Baringo, County Director of Physical Planning and other related departments as was required of him and on the 2nd August, 2019, he personally presented his architectural designs to Marigat Sub County Health Officer who approved and stamped the documents.
15. He further stated that he presented an Environment Impact Assessment Report (EIA) Report to the 2nd defendant as per the requirement under EMCA and by a letter dated 16th August, 2019, he was also asked by the 2nd defendant to provide proof of land ownership alongside architectural and structural plans for the proposed development approved by Public Health Office, Physical Planner, Town Engineer and Public Works Office.
16. The Plaintiff testified that he responded to the said letter dated 16th August, 2019 by the 2nd defendant, where in the letter dated 29th August, 2019, he provided the 2nd defendant with copies of allotment letter dated 22/3/2007 in the name of Jane Kamuren, receipt dated 22/3/2007, Sale Agreement dated 30/3/2007 entered into between him and Jane Kamuren over the same plot and copies of architectural design duly approved by Marigat Sub County Health Officer dated 2nd August, 2019.
17. He averred that even after responding to the 2nd defendant's letter and supplying him with all the ownership documents and architectural designs, which he had sought for from him, the 2nd defendant still proceeded to publish and /or caused to be published the impugned article and more particularly that he had presented a fake architectural drawing stamped by a nameless Marigat Sub County Health Officer on 2nd August, 2019 for approval at paragraph 6, wherein, the same was not true.



18. Aggrieved by the publication of the impugned article dated 5th September, 2019, the Plaintiff sent a demand letter dated 1st November, 2019 to the 2nd defendant through his advocates on record and demanded for immediate apology to the offending article. However, despite receipt of the said demand letter, the 2nd defendant did not respond to the same nor offered any apology prompting the Plaintiff to institute this suit against him jointly with the 1st defendant for defamation.
19. On cross examination, the Plaintiff confirmed that through a letter dated 25th July, 2019, which was produced by the 2nd defendant as (NEMA 2), the 2nd defendant acknowledged receipt of his Environmental Impact Assessment Report (NEMA 1) and indicated to him that he would review the same and communicate its findings to him in due course.
20. That additionally, the Plaintiff confirmed that he received a letter from the 2nd defendant dated 16th August, 2019 (NEMA 6) where he was asked to provide proof of ownership of the plot, architectural and structural plans for the proposed development approved by Public Health, Physical Planner, Town Engineer and Public Work office and in his response, he clarified through a letter dated 29th August, 2019, (NEMA 7) addressed to the 2nd defendant that the allotment letter in the name of Jane Kamuren was the one which he had and had furnished to his office together with a sale agreement dated 30/3/2007 which showed that he had purchased the plot from Jane Kamuren for value; that he also furnished the 2nd defendant with his architectural designs duly approved and stamped by Marigat Sub County Health Officer dated 2nd August, 2019 as per the request letter.

2nd Defendant's Evidence

21. The 2nd Defendant stated that during the time of the activities that led to the instant case, he was the NEMA County Director of Environment for Baringo County and had served from the year 2018 to 18th December 2019 when he was transferred to his current station, Homabay NEMA County Office.
22. He testified that in respect to Plaintiff's Project, Baringo NEMA County Office received an Environmental Impact Assessment (EIA) Report as envisaged under section 58 of *Environmental Management and Coordination Act (EMCA)*, 1999 and the EIA Report was dispatched to lead agencies for their comments; and in response, their office received comments from the National Land Commission and Baringo County Government. He said both National Land Commission and Baringo County Government stated that the land was not available for development or allocation as it was reserved for public purposes as an existing public cemetery and therefore not available for allocation.
23. He said in his capacity as the County Director of Environment, and while discharging his mandate under sections 58 and 117 of *EMCA*, he visited the Plaintiff's land where development project was being undertaken by the Plaintiff without the requisite Environmental Impact Assessment (EIA) License, contrary to the provisions of section 58 (1), *EMCA*; and the cover page to the attached EIA report submitted to NEMA on 25th July 2019 carries a photo of the parcel of land with the building already started.
24. He said he directed the Plaintiff to stop any further developments and reminded him of the provisions of section 138 of *EMCA*, to wit: Offences relating to Environmental Impact Assessment; and during his site visit at the Plaintiff's project for inspection, the general public at Marigat town also gathered at the site and it attracted media persons.
25. He said after the inspection, a reporter from the 1st defendant herein one Joseph Kangogo followed the 2nd defendant to his office and inquired about the Plaintiff's project and in light of the provisions of section 3A, *EMCA* on access to information and section 123 *EMCA* on public access to records



transmitted to the Authority, he informed him of the status of the land, as advised by the National Land Commission and the County Government and the other data already in record, as follows:-

- a. That the subject land on which the Plaintiff intended to carry out the development was earmarked for cemetery as the "site had been zoned under class 48 under Existing Old Cemetery" and therefore not available for development, as advised by the National Land Commission in its letter of 7th August 2019;
 - b. That the architectural drawings provided were signed by an unnamed public health officer. The 2nd defendant had interacted with such documents before in the course of his work and his capacity as NEMA County Director of Environment;
 - c. That there was no change of user from cemetery to commercial, as no copies of change of user permit had been supplied to the 2nd Defendant as required under the physical planning laws;
 - d. That the Building plans lacked approval from the physical planning office and the County Government; and
 - e. That there was no EIA License for the project that had been issued yet.
26. He said all these documents were not being requested for out of malice but in line with the provisions of *Physical and Land Use Planning Act*, No 13 of 2019, and especially under the third Schedule therein and this information was, to the best of his belief true as it was supported by the documentation that was in his possession at the time.
27. Upon the close of both the Plaintiff's and the defence case, parties filed their respective written submissions.

Plaintiff's Written Submissions

28. The Plaintiff contends that the following are the issues for determination by this Honourable court.
- i. Whether the publication of the impugned article was defamatory of the Plaintiff.
 - ii. Whether the Plaintiff has suffered any loss or damage as a result of the said publication and if so whether he is entitled to the reliefs sought.
 - iii. Who to bear the costs of this suit.
29. On whether the publication of the impugned article was defamatory of the Plaintiff, the plaintiff submit that the publication of the impugned article has met all the criteria of a defamatory statement. That in the case of *SMW v ZWM* (2015) eKLR, the court of appeal defined what constitutes a defamatory statement and further in the case of *A. Swanya v Toyota East Africa & another* (2009) eKLR where the Court of Appeal laid down essential elements a Plaintiff must prove in order to succeed in an action for defamation.
30. The plaintiff submit that that there is no doubt that the impugned article was published by the 1st Defendant on the 5th September, 2019 as it was confirmed by evidence of DW1 and DW2 who testified on behalf of the 1st Defendant and the defamatory publication is published at paragraph 2 and 6 particularly as follows:-

“Plaintiff excavated and exhumed human fossils from a grabbed public land ” and submitted fake architectural drawings stamped by a nameless Marigat Sub County Public Health Officer on 2nd August, 2019.”



31. Plaintiff submit that at paragraph 4 of the 1st defendant's Statement of Defence, the 1st defendant admitted to publishing the article as referred to in paragraph 5,6 and 7 of the Plaintiff and the 1st defendant confirms that information as published at paragraph 2 and 6 of the article was relayed to it by the 2nd defendant and the 1st defendant's defence in regard to the words published at paragraph 6 of the impugned article was that its reporter (DW1) quoted the 2nd Defendant verbatim on the 24th May, 2020.
32. Plaintiff further submit that while adducing evidence, the 2nd defendant denied uttering the said words at paragraph 2 and 6 and/or causing the same to be published by the 1st Defendant but he did not adduce evidence to discredit the same and/or challenge the evidence of DW1 and DW2 which is on record.
33. That in his cross examination, the 2nd defendant Mr. Nyandoro confirmed that when the said article was brought to his attention by the Plaintiff, he did not make any attempt to disassociate himself from the same or by prompting the 1st defendant to correct the said publication if indeed the utterances at paragraph 2 and 6 of the said articles did not portray the true information which he had relayed to it.
34. Further that the 2nd defendant confirmed that he did not reach out to the Plaintiff to clear the issue surrounding the publication of the impugned article at the first instance when demand for apology and retracting of the article was sought by the Plaintiff through a demand letter dated 1st November, 2019.
35. Plaintiff further submit that the context under which the publication of the article of 5th September, 2019 was made by the defendants was to lower and/or injure the reputation of the Plaintiff and therefore the 2nd defendant cannot therefore deny the same and if 2nd defendant had not uttered the said words to the 1st defendant's reporter, the said words could not have been published.
36. The plaintiff reiterated that plain and obvious language of the publication particularly at paragraph 6 where the 2nd defendant was quoted verbatim implied that the Plaintiff was a criminal, lacked integrity, was a dishonest person, a forger of public documents and of low moral standing; that the article was gross defamatory and was made with intention to disparage the Plaintiff's reputation who is an Advocate of the High Court of Kenya of over 15 years of legal standing and as a result, the article exposed him to hatred, ridicule, scandal, odium and contempt.
37. It is the plaintiff's submission that the 2nd defendant was motivated by malice in publishing false words at paragraph 6 and cited the case of *Phineas Nyagah v Gitobu Imanyara* (2013) eKLR, and *Grace Wangui Ngenye v Wilfred D. Kiboro & another* (2019) eKLR.
38. Further that in his defence, the 2nd confirmed that he could not offer any apology to the Plaintiff and failure by the 2nd defendant to offer an apology upon demand by letter dated 1st November, 2019 being issued by plaintiff showed malice on his part and submit that Plaintiff is entitled to reliefs sought.
39. That taking into account the Plaintiff's standing as an Advocate of the High Court of Kenya of 15 years and as a proprietor of Boiwo and Company Advocates and the sadistic damage to his reputation and his law firm through a publication which was widely circulated in Kenya, East Africa and beyond through internet and recklessness in which the publication was made and further considering that the publication imputed criminality on the Plaintiff's character as a criminal, forger of public documents, low moral standing and lacked integrity and considering the magnitude of the publication, Justice Korir entered for plaintiff against the 1st defendant on the 24th May, 2020. He proposed an award of Kshs 1,000,000/= for general damages as being fair and reasonable and urged this court to award the said amount.



40. On the issue of aggravated damages, the plaintiff submit that the 2nd defendant's failure to apologies even after confirming during his testimony that the said utterances were not true is indeed an aggravating factor which entitles the Plaintiff to aggravated damages in the circumstances and urged this court to award a sum of Kshs 2,000,000/= as aggravated damages.
41. Plaintiff further submit that in view of the fact that the plaintiff failed to apologies on demand for apology being issued by plaintiff and further stating in court during hearing that he had no apology to make, he urged this court to award a sum of Kshs 1,500,000/= in lieu of apology together with costs and Interest at Court rates.

2nd Defendant's Written Submissions

42. The 2nd defendant in submissions listed the following as issues for determination: -
- i. Whether the second defendant uttered the words attributed to him;
 - ii. Whether the second defendant had malice aforethought in discharging his duties;
 - iii. Whether the Plaintiff has proved his case against the 2nd defendant, and if so, whether plaintiff is entitled to any remedies; and
 - iv. Who should bear the costs of the suit?
43. On whether he uttered the words attributed to him, the 2nd defendant maintains that he only communicated the information as contained in the documents available, as a public officer, but did not in any way dictate to the reporter on how to report the same, or at all instruct the publisher to publish the said information as alleged and the reporter did not have any voice recording devices to record what he had been told by the 2nd defendant.
44. That looking at the evidence of Mr. Joseph Kangogo, the 1st defendant's witness as captured under page 23 of the typed proceedings, he acknowledges that he was approached by stakeholders to follow up the story and in no way indicates that the 2nd defendant approached him to give an interview.
45. That during re-examination, as captured under page 24 of the typed proceedings, Mr. Kangogo clearly indicated that the documents he produced before the court were the ones that he relied on to publish the impugned article. That he also indicated that he stated that the land was grabbed public land after looking at the statements of the stakeholders; that he acted on the documents submitted to him and he had no reason to doubt the contents of documents he relied on and the did not doubt the information from the stakeholders.
46. They submit that the testimony of 1st Defendant's witness, Mr. Francis Mureithi Gatiru, is also relevant. That during cross-examination, at page 26 of the typed proceedings, Mr. Gatiru's stated as hereunder:-
- “being a cemetery and there being excavation for construction is what led to the statement that he exhumed human fossils. I did not see him exhume human fossils. It is a good practice to get the story of the other side but it depends on the context and the source of the story. This case was based on court documents and in such cases we do not contact the other side. The court ruling was part of what Mr. Kangogo had.”
47. He submits that the foregoing quotations from the 1st defendant's witnesses clearly show that in coming up with the story, they relied on their own interpretation of the documents that they had obtained from the 2nd defendant, court documents and the information that they had obtained from



- the stakeholders; further that the allegation that they had obtained the published words directly from the 2nd defendant was an afterthought that should not be allowed to stand as true as it would be greatly unjust to the 2nd defendant considering that their testimony shows several sources which is because their own evidence in examination gives a different position, that is, they interpreted the documents given to them in their own words which the 2nd defendant had no reason to deny as per the provisions of EMCA and other information from stakeholders who had approached the reporter.
48. He further submits that a closer reading of the article in question reveals that the reporter indeed mined the said information from the documents in his possession and even quotes the authors of the letters from the lead agencies. That this is in support of the fact in their viva voce evidence, the 1st defendant's witnesses admitted to have relied on interpreting the documents supplied to come up with the article.
 49. The 2nd defendant's argument is that the Plaintiff has failed to prove that he stated or uttered the words mentioned under paragraphs 6 and 7 of the Plaintiff either while talking to the reporter or at any other time, particularly that the Plaintiff exhumed fossils from a grabbed land and that the Plaintiff submitted fake architectural drawings.
 50. That the demands for apology to the Plaintiff in the absence of proof of blame on the 2nd defendant would have been akin to admitting liability by the 2nd defendant.
 51. On whether the 2nd defendant had Malice Aforethought in discharging his duties, the 2nd defendant submits that he had no malice in his actions within the context of this case. He avers that he was discharging his statutory duties and shared any documents in his possession as a public officer, without any intention of having them used in a malicious manner and relied on the case of Phiness Nyaga v Gitobu Imanyara [2013 eKLR].
 52. That the 2nd defendant spoke to the reporter based on the documents in his possession from the other lead agencies. All that he told him was not utterly beyond or disproportionate to the facts and could be verified from the said documents. That even after the initial interaction with the Plaintiff, the 2nd defendant wrote to the plaintiff clearly outlining the documents he needed from him to enable him process the EIA report a clear indication that the 2nd defendant was acting in good faith in discharging his mandate under EMCA.
 53. On issue of title, the 2nd defendant argues that NEMA does not issue its EIA licences based on a letter of allocation and often requires more evidence of ownership and the inquiries into the title were therefore not based on any malice at all and without prejudice to the foregoing, the 2nd Defendant's act of sharing the requested documents by Mr. Kangogo, a reporter with the 1st defendant was also covered under qualified privilege as he was discharging a public duty.
 54. On whether the Plaintiff has proved its case against the 2nd defendant, he submits that the Plaintiff admitted in his testimony that he was neither present at the time of the said press statement by the 2nd defendant nor did he obtain or table any evidence that the 2nd defendant was recorded verbatim by the 1st defendant's reporter uttering the impugned words. That he relied on the word by the 1st defendant's witnesses, both of whom had inconsistent and contradictory evidence as to their sources of the published information. In the absence of tangible and non-contradictory evidence attributing the statement(s) to the 2nd defendant, the mere fact that the same was published by the Star newspaper who simply stated that they got the information from the 2nd defendant, and yet their testimony on record says otherwise, does not meet the threshold of proof on a balance of probabilities that the alleged offending parts of the publication was in actual fact done at the behest of the 2nd defendant.



55. Further that the Plaintiff and the 1st defendant's witnesses did not prove that the 2nd defendant was the source of the impugned words. Their evidence, which should not be ignored, was that they made their own interpretation of the documents in their custody, an information mining exercise that was not within the control of the 2nd defendant and submit that the Plaintiff is not entitled to any of the prayers sought in the Plaint and the case against the 2nd defendant should therefore be dismissed with costs.

Analysis And Determination

56. I have considered the pleadings on record, the evidence as given by the parties together with the submissions filed, the issues for determination in this matter are as follows: -
- i. Whether elements for defamation were proved on a balance of probabilities
 - ii. Whether the Plaintiff has suffered any loss or damage as a result of the said publication and if so whether he is entitled to the reliefs sought.

Whether elements for defamation were proved on a balance of probabilities against the 2nd defendant

57. The case of *Phinebas Nyagah v Gitobu Imanyara* [2013] eKLR, has been relied upon by both parties to outline the elements of defamation. In that case the Court stated the elements of defamation thus:

“ 16. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right-thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right-thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts.

58. Further in the case of *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR the court stated elements of defamation as follows: -

“The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other



persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

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 the defamatory words must be shown to have been published by the defendant.”

59. From decision by justice Weldon Korir, there is no dispute that the words complained of were published were published by 1st defendants. At the time of the trial, the 2nd defendant did not participate in the proceedings, and now that he has adduced evidence, I wish to consider whether the 2nd defendant played a role in publication of the said words and if so, whether his action was driven by malice.
60. Evidence show that the 1st defendant obtained information from the 2nd defendant; information which the 2nd defendant had gathered during the investigations. The plaintiff in his testimony stated that upon inquiry by the 2nd defendant, he supplied 2nd defendant information on how he acquired the property, approval by public health officer vide letter dated 29th August ,2019 it is evident that at the time publication by 1st defendant was done on 5th September 2019 the plaintiff had supplied information on ownership and public health approval to the 2nd defendant.
61. In view of the fact that the 2nd defendant had information on the plaintiff's part of the story, he had responsibility of giving side of the story to the reporters; he also had responsibility of verifying information before passing to reporter for publication. In my view failure to verify information before passing on to the reporter yet he knew the plaintiff's side of the story clearly demonstrate malice on the part of the 2nd defendant.
62. The 2nd defendant argues that the 1st defendant's reporter interpreted the documents which he had given to him but in view of the fact that he had interacted with the plaintiff before the said publication over the issues raised and plaintiff having explained his part of the story, the 2nd defendant had the responsibility of letting the reporter know the plaintiff's explanation on how he acquired the plot from a person who had been allocated the plot legally. Failure to communicate plaintiff's side of the story to the reporter despite the fact that he had information in my view, points at malice on the part of the 2nd defendant. Further even after receiving demand for apology, the 2nd defendant did not apologize which in my view show malice on his part.
63. On whether the publication lowered the Plaintiff's reputation in the estimation of right-thinking members of society, it is not in dispute that the plaintiff is an advocate of the High court of Kenya and there are high expectations from the society on how he is expected to conduct himself. Words suggesting that he grabbed land meant for cemetery and even dug fossils and forged government documents, no doubt lowers reputation of an advocate whom the society expect to be low abiding and honest in their dealings.
64. I agree with Justice W. Korir's view that Section 16(1) recognizes the fact that where a defendant offers an apology, the same is considered as a mitigating factor while awarding damages. The apology therefore counts for something otherwise it would serve no purpose for an offending party to offer an



apology when such an apology will amount to nothing. In view of the above there is no doubt that his move was driven by malice.

65. From the foregoing, I find that the plaintiff has proved his case against the 2nd defendant on a balance of probabilities.

ii) Assessment of damages

66. Having found that the plaintiff's reputation was lowered as a result of publication by the defendant, I find that he is entitled to damages. The plaintiff proposed an award of Kshs 1,000,000/= for general damages. Justice Weldon Korir in his judgement awarded Kshs 2,000,000/= as general damages; he was specific that this award is made against the two defendants jointly and severally and shall attract interest at court rates from the date of judgement till payment in full hence the issue of general damages was settled by the judgement of the court delivered on the 24th May, 2022.

67. The said judgment was set aside in respect to the 2nd defendant only. From evidence adduced, the 2nd defendant did not mitigate the loss by failing to offer an apology even after demand being made and was not apologetic even at the time of hearing. In my view, the plaintiff deserve aggravated damages and do award Kshs 500,000 to be paid by the 2nd defendant in addition to general damages which I assess at Kshs 1,000,000.00.

Final Orders: -

68. Judgment is hereby entered for the plaintiff against the 2nd defendant in the following and awarded damages assessed as hereunder

1. General damages of Kshs 1,000,000.
2. Aggravated damages Kshs 500,000.
3. Costs of this suit to be paid to the plaintiff by the 2nd defendant.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 29TH DAY OF FEBRUARY 2024.

.....
RACHEL NGETICH

JUDGE

In the presence of:

Ms Sakami holding brief for Maina for Defendant.

Mr Opar for Plaintiff.

Elvis/Sitienei – Court Assistants.

