THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO.351 OF 2007

1. FRANCIS LUKOOYA MUKOOME

2. SARAH BABIRYE==========PLAINTIFFS

VERSUS

1. THE EDITOR-IN-CHIEF OF BUKEDDE NEWSPAPER

2. THE NEW VISION PRINTING & PUBLISHING COMPANY

3. ISAAC MUKASA==========DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The plaintiffs' claim against the defendants is for general damages, aggravated damages, exemplary and/or punitive damage, an injunction, interest and costs of the suit for defamation. It is the plaintiffs' case that the three defendants jointly and severally printed and/or published or caused to be published false stories/news concerning the plaintiffs in different articles in Bukedde Newspaper at different times.

The 1st and 2nd defendants denied the allegations and contended that the publications were a fair comment without malice on matters which were of public interest and were not capable of conveying the defamatory meaning alleged.

At the conferencing the following facts were admitted:

1. The first plaintiff is LC 5 Chairman of Mukono District
2. The second plaintiff is an LC5 Councillor of Mukono District Council.
3. The 1st and 2nd defendants published the articles in question.

4. On 27/4/07 the first plaintiff was summoned to CID Headquarters pursuant to a complaint by one Isaac Mukasa.
5. The complaint by Mukasa was that the plaintiff had eloped with his wife, the 2nd plaintiff.
6. The second plaintiff filed a Divorce Cause (No.1 of 2007) in the Chief Magistrate's Court, Luwero
7. Pursuant to the said Divorce Petition, the purported marriage between the 2nd plaintiff and Isaac Mukasa was declared a nullity on 2/05/2007.
8. Pursuant to the order of the Chief Magistrate's court, Luwero, dated 2/5/07, Isaac Mukasa lodged a complaint to the Chief Registrar, Courts of Judicature alleging non-service of the petition upon him.
9. During the pendency of the suit, the 3rd defendant entered into a consent judgment with the plaintiffs.
10. Notice of an intended suit by the plaintiffs was served on the defendants in May 2007.

Issues:

1. Whether the articles/stories were defamatory of the plaintiffs.
2. Whether the publications complained of were true or fair comments on a matter of public interest.
3. Whether the plaintiffs suffered any loss, damage or injury of reputation.
4. Remedies, if any.

Counsel:

Mrs. Vennie Kasande Murangira for the plaintiffs

Mr. Thomas Ocaya for the 1st and 2nd defendants

General Principles:

1. **Proof.**

In law a fact is said to be proved when the court is satisfied as to its truth, and the evidence by which the result is produced is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that

party adduces evidence sufficient to raise a presumption that what he is asserting is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut that presumption. In the instant case the burden is on the plaintiffs to prove that the defendants defamed them. The standard of proof is on the balance of probabilities.

2. **Defamation**.

Defamation is something more than an insult or derogatory comment. It is not capable of exact definition. How far a person is affected by unkind words will depend not just on the words used, but also on the people who must then judge him. That is why communication to the plaintiff alone will not suffice.

Defamation is an injury to one's reputation and reputation is what other people think about a man and not what a man thinks about himself.

As indicated in **A.K. Oils & Fats (U) Ltd Vs Bidco Uganda Limited HCCS No. 0715 of 2005** (unreported), the history of this tort shows that at first the solution adopted by the courts was for the Judge to ask whether the statement was one which tended to bring the person 'into hatred, contempt or ridicule'. A different approach was, however, adopted by the House of Lords in **Sim Vs Stretch [1939] 2 ALL E R 1237** where court had to decide whether or not a suggestion that the plaintiff had been obliged to borrow money from his house maid was defamatory.

The plaintiff argued that this implied that he was not the sort of person to whom anyone ought to give credit. The defendant replied, in effect, that those words were just not reasonably capable of giving such a defamatory meaning. Lord Atkin put forward the following test:

"**The conventional phrase exposing the plaintiff to hatred, ridicule and contempt is probably too narrow. The question is complicated by having to consider the person and class of persons whose reaction to the publication is the test of the wrongful character of the words used--------I propose in the present case the test:**

would be the words tend to lower the plaintiff in the estimation of the right thinking members of society generally? (emphasis mine).

I consider Lord Atkin's test above to be fairly objective. I will, therefore, adopt it in the instant case.

3. **Fair Comment:**

This is a defence to an action for defamation that the statement made was fair comment on a matter of public interest. The facts on which the comment is based must be true and the comment must be fair. Any honest expression of opinion, however exaggerated, can be fair comment but remarks inspired by personal spite and mere abuse are not. The judge decides whether or not the matter is one of public interest.

Having set out the general principles above; let me now come to the specific issues for determination.

Issue No.1 **Whether the articles/stories were defamatory of the plaintiffs.**

Issue No.2: **Whether the publications complained of were true or fair comments on a matter of public interest**

I have decided to handle the **two** issues together because in my view they are interlinked. In other words, if the publications complained of were true or fair comments on a matter of public interest, then they were not defamatory of the plaintiffs.

From the evidence, the first plaintiff (PW1) is the Chairperson of Mukono District Local Government. He is a former RDC Wakiso district and one of the founder members of the NRM Party. He is married with children. His complaint is that the 1st and 2nd defendants wrote defamatory articles about him, the defamatory content being that he had eloped with the 2nd plaintiff. He testified that he was embarrassed and he felt perturbed and bad about the publications. He testified that his family members were disturbed and his sons in University asked him whether the articles were true. He testified that the articles were not true, that they were fabrications. Although, as seen in (2) above, defamation is an injury to one's reputation and reputation is what others think about a man and not what a man thinks about himself, implying that evidence was required in this case of what other people thought about him, the 1st plaintiff elected not to call any witness to this effect.

He testified that he only knew the 2nd plaintiff as a District Councillor and it was not true that he had a marital relationship with her. He admitted being a public figure, implying that what he does is of public interest. He testified that he had looked at the written statement of defence of the 1st and 2nd defendants, that they were saying that they got information from Isaac Mukasa who went to their offices and complained that his wife had eloped with him (the plaintiff) and that they (Mukasa and 2nd plaintiff) were married and had a marriage certificate. According to the plaintiff, all this was wrong, intended to cover up reasons why they (the two defendants) defamed him. For him nothing is true in those publications. According to the plaintiff further, he contends that what was published about him is lies because the 3rd defendant, Mukasa, made an oath and consent agreement in which he stated that all he said were lies instigated by politicians who wanted to use him (Mukasa) against the plaintiff. It is instructive to note that this consent agreement was negotiated between Mukasa and the plaintiffs during the pendency of the suit and behind the back of court and of his co-defendants, 1st and 2nd. In the said consent agreement Mukasa admits supplying the information to the co-defendants.

In the course of the hearing the 1st plaintiff was put to task to disclose whether he had at all been contacted by the Police in connection with Mr. Mukasa's complaint. He admitted that he was summoned to the CID Headquarters whereat he was questioned about having eloped with the 2nd plaintiff.
I have said 'put to task' because he had not alluded to any such summons in his evidence in-chief. I was of the view that the 1st plaintiff's evidence that he did not know that it was Mukasa who had made a complaint to police was false because in the consent agreement between them Mr. Mukasa indicated so. Also false was his evidence that he was summoned to police after the 30/4/07 publication, after he had read the story, when it is evident that he was summoned in writing around 27/4/07, before the impugned publications were made. By this he intended court to believe that police summons to him was in response to the impugned publications, whereas not. He earns no credit for peddling these obvious falsehoods on oath.

Turning now to the 2nd plaintiff, PW1 Babirye Kityo Sarah alias Sarah Mukasa alias Babirye Sarah, her evidence is that she is the District Youth Councillor and Chairperson Productions and Natural Resources Committee, Mukono District Council. She is also the Chairperson Youth Councillors, Central Region. The first plaintiff is her boss. She further testified that the publications were false, and that they had portrayed her as a woman of loose morals. She

testified that her parents were disappointed with her, that her friends outside the country sent her emails, her church wrote to her and she was stopped from attending church and suspended from choir. Like PW1 Lukoome, she did not adduce evidence of any witness to support her story of what other people thought of her.

She admitted petitioning for divorce in the Chief Magistrate's court, Luwero. She said that she served summons to Mukasa and that the marriage was declared null and void. Her case is that Mukasa was just her ex-boy friend and that they no longer related. Her case is further that the articles were written by her political enemy, a one Musoke who worked for Bukedde. She did not point out any such name in the publications. According to her, she was not married to Mukasa. He was only trying to forge the marriage. After the publications in which Mukasa and the two defendants claimed that there existed a marriage certificate, she went to Luwero court and filed there a case seeking nullification of that certificate because she was not his wife. Despite service, Mukasa did not appear and the court proceeded to declare the marriage null and void.

From her evidence, she started cohabiting with Mukasa at the tender age of 13 years in 1996 and they had 2 children.
With this evidence the plaintiffs closed their case.

I have already indicated that when a party adduces evidence sufficient to raise a presumption that what he is asserting is true, he is said to shift the burden of proof, that is, his allegation is presumed to be true, unless his opponent adduces evidence that rebuts the presumption. In the instant case, the defendants adduced evidence of DW1 Nankabirwa Harriet, a District Councillor in Mukono Dsitrict. She represents Buikwe and Najja Sub-counties.

According to this witness, she knew the first plaintiff from 1997 and more so in 2001 when she was his campaign Treasurer. And she knew the 2nd plaintiff from 2004 as Sarah Mukasa. Subsequently she came to be known as Babirye Sarah and now Babirye Sarah Kityo. She testified that she came to know her (the 2nd plaintiff) in 2004 when the 1st plaintiff appeared with her at a function where she sang a political song, 'Kisanja'.

Further, that the 2nd plaintiff launched a song in Entebbe whereat the 1st plaintiff asked her (the witness) to mobilize people to attend and she did. From her evidence, she regards the 1st

plaintiff as a brother to her and 2nd plaintiff as a sister in law to her. She knows him (PW1 Lukooya Mukoome) to have 3 wives, the 2nd plaintiff inclusive. She gave an impressive account of the relationship between the two plaintiffs. Her evidence is that when PW1 Mukoome was summoned to the CID Headquarters, she escorted him there. Later, he approached her to dispatch funds to 'kill' the intended publications and she did so. Despite the payment, the publications came out. Her evidence is that the publications are not defamatory of the plaintiffs because in Mukono where they all come from, the two (1st and 2nd plaintiffs) are known to share a marital relationship. She was emphatic that she was not the source of the stories to the 1st and 2nd defendants but had been actuated by the desire to tell the truth when the 1st plaintiff intimated to her that they were going to take Isaac Mukasa to the lawyers in order to withdraw the complaint he had made to police and then sue the publishers of the story for allegedly telling lies against them.

In the course of the hearing the plaintiffs made attempts to impute ill-will on her part. They brought documents which she was able to point out that they had been 'doctored' in an attempt to discredit her evidence. Although the plaintiffs had contended that the witness had been subjected to some disciplinary action, DW1 Nankabirwa denied it. She admitted that PW1 Mukoome had dropped her from his committee but insisted that she bore no grudge against him. When both parties started applying for incessant adjournments in a case that was already classified as backlog, court closed the proceedings in accordance with 0.17 r 4 of the Civil Procedure Rules.

I have already indicated that it is legal requirement that for a statement to be defamatory, it must be false.

From the evidence on record, the two defendants published stories indicating that one Isaac had lodged a complaint at CID Headquarters to the effect that PW12 Mukoome had eloped with his (Isaac Mukasa's) wife. From the evidence, Isaac Mukasa made that complaint. Therefore, the story about Mukasa making a complaint to the police was true. And from the evidence of PW1 Nankabirwa, PW1's relationship with PW2 was common knowledge in Mukono. This evidence has not been contradicted by any independent evidence provided by the plaintiffs. If the evidence of DW1 Nankabirwa is to be believed, and I have seen no reason to disbelieve it, the stories had no tendency to lower the plaintiffs in the estimation of

the right thinking members of Mukono District generally. Accordingly, this case does not meet the test laid down in **Sim Vs Stretch, supra.**

The story also indicated that Isaac Mukasa had complained to the police that PW2 Babirye was his wife. From the evidence on record, Babirye started cohabiting with Mukasa as long ago as 1996 and they had children together. It could of course as well be true that at the age of 13 years PW2 Babirye was incapable of contracting a valid marriage. Even then that wouldn't take away the fact that the two had lived together as "husband and wife" and that they had 2 children resulting from the illicit relationship. Learned counsel for the defendants has submitted that the impugned articles were clearly indicative of a complaint made by a one Mukasa who had contended that the 2nd plaintiff was his spouse and that she had eloped with the 1st plaintiff. From the evidence on record, this submission cannot be faulted. That the 1st plaintiff was summoned to CID Headquarters in respect of a complaint that he had eloped with the 2nd plaintiff cannot also be faulted.

From the evidence also the first plaintiff was summoned to CID Headquarters on 27/4/07. The first story about this matter came out on 30/4/07. The 2nd plaintiff claimed that on seeing the story in the paper on 30/4/07, she contacted the 1st plaintiff, Mr. Lukooya -Mukoome, and raised the issue with him. According to her, she first got to know about the existence of a marriage certificate upon reading the story much as she had heard a rumour that he (Mukasa) had forged marriage certificate. However, the purported marriage certificate is dated 17-2-2006, the purported marriage itself having been entered into on 17-11-2005 when PW2 Babirye was aged 25 years.

And although she claims that she first learnt of the purported marriage certificate from the story of 30/4/07, there is evidence that she swore an affidavit on 26/4/07 in which she stated:
"6. That later he wanted to go outside Uganda in United States and he was told to find a marriage certificate which he later on got from the CAO's office in Luwero".

7. That the marriage certificate was forged in a way that I personally was not called to celebrate the marriage officially and he coerced me to sign on the document without the legal implications (sic).

8. That I am now well informed that the conduct of the marriage didn't confirm (sic) the legal requirement under the Marriage Act and therefore is illegal"

The affidavit bears a stamp date of 26/04/07. However, the affidavit of service of Wandera Fredrick dated 23/4/2007 shows that he received summons from Babirye Sarah on 19/04/07 and that he proceeded to Mukasa Isaac's home for service of the same on 20-04-2007, implying that her application was not filed on 26/04/07 but long before then. From the evidence, therefore, it cannot be true that she learnt of the existence of the purported marriage certificate from the impugned publication of 30/04/07. By 30/04/07 her application to annul the marriage was already in court. It was disposed of on 2/5/07. It is trite that an affidavit in one proceeding is admissible in evidence a subsequent proceeding as proof of the facts stated therein, against the party who made such affidavit or against the party on whose behalf it was made, on it being shown that he knowingly made use of it.

See: Halisbury's Laws of England, Third Edition, Vol. 15 at p.397; also Panyahululu Co. Ltd Vs New Ocean Transporters Co. Ltd, HCCS No.0523 of 2006 (unreported).

In all these circumstances, the 2nd plaintiff cannot be called a credible witness when she contradicted herself on the document she personally authored on oath on April 26, 2007 that she was aware of the purported marriage certificate. It is a well known principle of law that a man (or woman) who swears the contrary of that which he/she stated on a previous occasion is not worthy of belief: **Kabenge Vs Mpalanyi Civil Appeal No. B56 of 1962 (MB 84/64).**

In view of all this evidence, court is inclined to accept the evidence of DW1 Nankabirwa, that the stories in question were not defamatory of the plaintiffs. She gave me the impression of a truthful and credible witness, a person who had sufficient knowledge of the private lives of the two plaintiffs and who bore no grudge against any of them. She accompanied PW1 Mukoome to Police Headquarters and even raised funds to hush up the matter with the press. She was in my view motivated by the desire to have the truth known, as she stated, and she said it all without fear or favour.

Court is satisfied that in the course of time the 2 plaintiffs were jointly able to hush up their hitherto major enemy, Isaac Mukasa, after allowing him custody of his 2 children. He has now fizzled out of the whole matter, thanks to the joint scheme of the 2 plaintiffs. It is trite that if the words are defamatory, the law presumes that they are false. It is for the defendant,

therefore, to plead and prove that the words he published were true. In other words, the onus of proving justification is on the defendant.

From my analysis of the evidence above, I have come to the conclusion that the 1st and 2nd defendants have discharged the burden of proof placed on them by law. They have demonstrated to court that what they published was not at all actuated by malice or ill-will towards the plaintiffs. Both plaintiffs are public figures. From the credible evidence of DW1 Nankabirwa, it cannot be true that the 1st plaintiff merely knows the 2nd plaintiff as a District Councillor. There is more to their relationship than meets the eye and this has been going on for a long time. For this reason I would hesitate to make a finding that they have come to court with clean hands. All in all they have failed to prove on the balance of probabilities that the articles complained of were defamatory of them. I would therefore answer the first issue in the negative and the 2nd issue in the affirmative. I have done so.

Having come to those two conclusions, I would also answer the 3rd issue in the negative and I have done so. Having found no merit in the case, I would dismiss it.

If I had found in their favour, I would have noted, regarding general damage, that they require no specific proof. The quantum of general damages is a matter which falls within the discretion of court, taking into account, obviously, the facts and circumstances of the two plaintiffs in society. Learned counsel for the plaintiffs has prayed for a heavy award of shs.100m for each plaintiff, inclusive of aggravated and exemplary damages. The position of the law is that once a person has been libeled without any lawful justification, the law presumes that some damage will flow from ordinary course of events from the mere invasion of his/her right to his/her reputation. This is the basis for orders of general damages in defamation cases. Premised on the opinion that a plaintiff who has proved a libel is entitled to a reasonable compensatory award of general damages, and that the Constitution enjoins courts to award adequate compensation to victims of wrongs (Article 126 (2) (c)), I would have awarded each plaintiff a sum of shs.50m in damages, inclusive of aggravated and exemplary damages, with interest at the rate of 25% pr annum form the date of judgment till payment in fall. Since I have not found in their favour, I rest my case.

As regards costs, the usual result is that the loser pays the winner's costs. This practice is of course subject to the court's discretion, so that a winning party may not necessarily be

awarded his costs. Thus in **Dering Vs Uris [1964] 2 ALL E.R. 660** the plaintiff sued the defendant in respect of a libel (in the book EXODUS). The jury, who were obviously not sympathetic to the plaintiff, awarded him contemptuous damages, of one half penny. The trial judge did not award the plaintiff his costs, even though they probably ran into thousands of pounds.

In the instant case, although the defendants knew the plaintiffs to be public figures in Local Government administration who deserved to put the record straight before being expected in the print media, they proceeded to publish the stories about them without first putting the matter to them for comment, for whatever it would be worth, in view of the credible stories they had about them. I am sure it is this conduct on the part of the 1st and 2nd defendants which actuated the plaintiffs, albeit unwittingly, to seek reliefs from court. In view of the peculiarities in this case and each party's unrelenting conduct towards each other, I am inclined to order each party to bear its own costs. I do so.

Dated at Kampala this 3rd day of November 2010.

Yorokamu Bamwine
JUDGE