



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 426 OF 2015

LILIAN OYWECH.....1ST PLAINTIFF

MICHAEL KING.....2ND PLAINTIFF

VERSUS

ECUMENICAL CHURCH LOAN FUND (KENYA).....1ST DEFENDANT

SAMMY KIPCHIRCHIR.....2ND DEFENDANT

FAITH MUTHONI.....3RD DEFENDANT

SAMUEL WANDETO KANYI.....4TH DEFENDANT

JUDGMENT

1. The Plaintiffs Lilian Oywech and Michael King instituted this suit against the Defendants seeking the following reliefs:

(a) Special damages as follows:

- i) Medical fees Ksh.4,500
- ii) Two (2) IMB laptops Ksh.120,000/=
- iii) A GoTV decoder Ksh.4,500/=
- iv) A 21 inch JVC television Ksh.25,000/=
- v) Two (2) computer mouse Ksh.5,000/=
- vi) Two (2) Lenovo adapters Ksh,12,000/=
- vii) Anti-interference Ksh.500/=
- viii) A blender Ksh.4,000/=

Ksh.175,550/=

(b) Damages on the footing of aggravated or exemplary damages.

(c) An injunction restraining the Defendants and each of them by themselves, their servants or agents or otherwise howsoever from further publishing or causing to be published words defamatory of the Plaintiffs.

(d) General damages.

(e) Costs of the suit.

(f) Interest on (a) and (d) above at such rates and for such period as this honourable court may deem fit to grant.

(g) Any other or such further relief as may to this honourable court appear fit and just to grant in the circumstances.

2. The 1st Defendant, Ecumenical Church Loan Fund (Kenya) is described in the plaint as a Ltd liability company which gives out loans and financial assistance to Self-Help Groups in return to periodical deposits from the members. The 2, 3 and 4th Defendants are described as employees of the 1st Defendant.

3. It is pleaded that the Defendants gained entry into the Plaintiffs' residential premises, ransacked the house and carted away some goods from therein on false and malicious allegations that the 1st Plaintiff had defaulted on loan repayments, thereby defaming the Plaintiffs and also breached their duty of care to the Plaintiffs.

4. The claim was denied as per the Defendants joint statement of defence. It is pleaded that the 2nd Plaintiff is non-suited and has no reasonable cause of action against the Defendants. That the 1st Plaintiff was indebted to the 1st Defendant and that the Defendants owed no duty of care to the Plaintiffs.

5. The 1st Plaintiff testified on the Plaintiffs side. She described herself as a business woman and stated that the 2nd Plaintiff was her husband. She adopted her witness statement as her evidence and produced her bundle of documents as exhibits. The statement states that the 2nd Plaintiff has also authorized the 1st Plaintiff to swear the same on his behalf. The 1st Plaintiff's evidence is that she was a member and a chair person of Cham Luchi Self Help Group (hereinafter Self-help Group).

6. The 1st Plaintiff further testified that on the material date the 2nd, 3rd and 4th Defendants while representing themselves as employees of Kenya Power & Lighting Company gained access to the Plaintiffs' home in a bid to recover purported loan arrears. That the children and the house-help who were the only people in the house were threatened and the following goods carted away by the 2nd, 3rd and 4th Defendants:

a) Two (2) IMB laptops worth Ksh.120,000/=

b) A GoTV decoder worth Ksh.4,500/=

c) A 21 inch JVC television worth Ksh.25,000/=

d) Two (2) computer mouse worth Ksh.5,000/=

e) Two (2) Lenovo adapters worth Ksh,12,000/=

f) Anti-interference worth Ksh.500/=

g) A blender worth Ksh.4,000/=

7. That the said properties worth Ksh.171,000/= are the subject of a pending criminal case against the 2nd, 3rd and 4th Defendants. That Cham Luchi Self-Help Group's Constitution provided for repossession of securities pledged when a member defaulted in payment. The 1st Plaintiff described the action of the 2nd, 3rd and 4th Defendants as grossly negligent in that assets which were not used as collateral were collected; excessive force used, procedure laid down in the Constitution not followed, the children and the house-help assaulted and traumatized and libelous utterances concerning the 1st Plaintiffs made thereby exposing the family to the risk of criticism and pouring scorn on the 1st Plaintiff's reputation thereby lowering her reputation in the estimation of the members of the Self-Help Group, the family and before the right thinking members of the society.

8. Faith Muthoni Burugu (DW1) testified on the Defendants' side. She adopted her witness statement and produced the Defendants' Bundle of documents as an exhibits. DW1 described herself as the Credit Officer with the 1st Defendant. Her evidence was that pursuant to a Loan Agreement dated 9th October, 2013, the 1st Defendant agreed to loan the 1st Plaintiff a sum of Ksh.95,000/= on the strength of the 1st Plaintiff being a member of the Self-Help Group. That contrary to the agreement the 1st Plaintiff defaulted in the repayment for several months, hence the attachment and carting away of the 1st Plaintiff's household goods in accordance with the loan agreement. That the recovery of the loan arrears was carried out professionally without the use of force, with due care and without any defamatory utterances.

9. I have considered the Plaintiffs' and the Defendants' case and the submissions filed by the respective counsel for the parties.

10. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8th Edition**, thus:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”

A defamatory statement, according to Gately on Libel and Slander 8th Edition by Phillips Lewis paragraph 4 page 5

discredits a man or tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.”

11. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:

“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 the 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.

(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”

12. It is not in dispute that the 1st Plaintiff obtained a loan from the 1st Defendant. The 1st Plaintiff in her evidence during cross-examination admitted having loan arrears at the material time. The 1st Plaintiff also conceded that the goods she had used as collateral for the loan were at her residence and that she had given a sketch map of her business and home to the 1st Defendant. Indeed the said sketch maps are on page 3 of the loan agreement exhibited herein.

13. The loan agreement on page 2 states that in the event of default by the borrower, Group or its agents or member (s), the 1st Defendant without further notice or with notice to the borrower can enter the land or premises and seize the collateral and sell the same or part thereof through a public sale or via public auction. It is further stated the 1st Defendant would not be answerable for any loss or expense occasioned thereof and that the proceeds can be utilized to offset the debt and if there is an balance to be given to the debtor through the Group.

14. The 1st Plaintiff admitted having moved house and stated that her sister who was also a member of the Group lead the Defendants to her house. Although the Plaintiff in her witness statement gave a list of the items that were seized, she did not itemize the same for the court to tell what items were used as a collateral and which ones on the list were not used as a collateral. The 1st Plaintiff however admitted in cross-examination that the goods seized were taken away by the police officers from the 1st Defendant for use in a criminal case. There is no evidence whether the goods were returned to the 1st Plaintiff or to the 1st Defendant by the police officers.

15. Although the 1st Plaintiff stated that she had some savings with the 1st Defendant and further stated that she had guarantors for the loan, she also stated that some of the Group members were in arrears and some dormant and others had left the group.

16. From the foregoing, it is abundantly clear that the 1st Defendant was in loan arrears,. The 1st Defendant through it’s employees acted in accordance with the agreement with the 1st Plaintiff when they seized the goods in question.

17. The 2nd Plaintiff did not testify. The 1st Plaintiff’s evidence essentially dwells on the matter between her and the Defendants. There is no claim that any of the goods belonged to the 2nd Plaintiff.

18. The house-help and the minors said to have been assaulted are not parties herein. The 1st Plaintiff was not present during the seizure and the evidence on what transpired at the scene remains mere hearsay. Other issues testified on by the 1st Plaintiff or submitted upon relating to whether the 1st Defendant was a licenced microfinance or a licenced Auctioneer and not anchored in the Plaintiffs’ pleadings.

19. All in all, this court’s conclusion is that the Plaintiffs have failed to prove their case on a balance of probabilities. If the Plaintiffs case was successful, I would have considered the circumstances giving rise to the suit and the limited circulation of the words complained about to the Group members and family of the Plaintiffs. I would have awarded nominal general damages of Ksh.250,000/= and awarded damages Ksh.50,000/= aggravated damages to each of the Plaintiffs making a total of Ksh.600,000/=.

20. Having found that the Plaintiffs’ case was not proved, I dismiss the same with costs to the Defendants.

Date, signed and delivered at Nairobi this 29th day of May, 2020

B. THURANIRA JADEN

JUDGE