



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 339 OF 2015

KINGS WEAR LIMITED.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF THE SISTES OF MERCY (KENYA)

T/A THE MATER MISERICORDIAE HOSPITAL.....DEFENDANT

JUDGMENT

The plaintiff herein moved this court by way of a plaint dated the 22nd day of September, 2015 which was amended on the 10th day of October, 2016, and further amended on the 24th day of November, 2016, in which it has sought damages for defamation of character, damages for loss of business, punitive and exemplary damages, a written apology, costs of the suit and interest, against the defendant.

The plaintiff's cause of action is based on the alleged negligent and malicious misrepresentation of facts by the defendant to a third party, namely Safaricom Limited, which the plaintiff averred cost it massive loss of business to the tune of millions, following suspension of its accounts with Safaricom Limited. The alleged misrepresentation is contained in an email communication sent to Safaricom Limited by defendant, on the 16th day of April, 2015 wherein they are notifying them of investigations of a possible fraud on the 2014 Mater Heart Run. In the said email, the defendant requested for some documents from Safaricom Limited that related to the quotations received from the plaintiff, a copy of the purchase order sent to the plaintiff, the invoices received from the plaintiff, a confirmation as to whether Safaricom Limited paid the same and documentary proof that the plaintiff was paid as per the invoice.

The plaintiff contended that the negligent and malicious misrepresentation of facts by the defendant was in its entirety either in its natural or ordinary meaning or by implication and innuendo meant, and was understood to mean, that the plaintiff was a liar and a cheat engaging in fraudulent business practices. It is the plaintiff's contention that the defendant falsely and maliciously distributed or caused to be written untrue information to Safaricom Limited while knowing fully well that the allegations of and concerning the plaintiff were untrue.

That as a result, the plaintiff has been greatly injured in character, reputation and has suffered massive loss of business as a result of the defendant's actions and has been brought to grave public ridicule, scandal, odium and contempt in the eyes of right thinking members of the society. The particulars of the said loss are set out in paragraph 19 of the plaint.

The defendant filed a defence on 30th November, 2016, in which it has denied the plaintiff's claim. It has averred that the plaintiff's suit is bad in law for the reason that the Plaintiff failed to take out and serve summons to enter appearance together with the plaint within 12 months of filing the plaint and consequently, the suit abated pursuant to Orders 5 Rule 1 (6) of the Civil Procedure Rules and therefore, there was no plaint to be amended.

The defendant admitted having written the subject email which requested for some information with respect to investigations of a possible fraud on the 2014 Mater Heart Run.

The defendant averred that the background to the inquiry was the findings of a Forensic Audit commissioned by the defendant into the financial affairs of transactions of the defendant's business that disclosed astronomical losses of money through fraudulent or corrupt practices by its management staff. It averred that the email communication dated 16th April, 2015 was factual and the same was communicated to Safaricom under a privileged occasion.

The defendant has denied that the communication in the email was defamatory of the plaintiff; it was actuated by malice; it was negligent or reckless or that the words used in their natural meaning or by innuendo are capable of having the alleged defamatory meaning attributed to them. The defendant averred that the plaintiff has not properly pleaded any claims or at all for award of damages for defamation and loss of business.

The plaintiff filed a reply to defence on the 7th day of December 2016 in which it has joined issues with the defendant in its entire defence

save what has been admitted.

At the hearing, each party called one witness in support of their respective cases.

Dickson Wang'ombe gave evidence as PW1. He is an accountant with the plaintiff and his work involves posting of invoices, reconciliation of creditors and debtors' accounts, posting of payments received from debtors and reconciliation of statements among others. He adopted his witness statement dated the 22nd September, 2015 as his evidence in chief.

In his evidence, he stated that in the year 2014 the plaintiff entered into an agreement with the defendant in which, the plaintiff was to supply merchandise for the 2014 Mater Heart Run. The same was in form of T-shirts for kshs. 5 million which they supplied on 19th March, 2014 through invoice number 01012664. The goods were supplied to Mater Hospital and they were received.

That they raised an invoice for the total amount of Kshs. 5 million in the name of Safaricom Limited and the same was received on 2nd April, 2014. This was because the invoice was supposed to be issued to Safaricom as the sponsors but the same invoice was stamped by the defendant as the recipients of the goods though the payment was to be made by Safaricom.

It was his further evidence that they issued another invoice number 01012663 to the defendant for kshs. 370,000/= which the defendant was supposed to pay as part of the merchandise supplied but which was falling outside sponsorship by Safaricom Limited. He stated that the invoices were also acting as delivery notes.

He further stated that after they supplied the goods, there was an overpayment which arose after they received payments from the defendant and Safaricom Limited for the same invoice. That they wrote an email on 21st July, 2014 to the defendant notifying them that there was an overpayment after invoice number 01012663 was paid by both of them. It was his evidence that he did a follow-up on the issue, on the 12th September, 2014 by way of an email to the defendant in which, he explained that invoice number 01012663 was not supposed to be in the defendant's books because the same was issued to Safaricom. He stated that invoice 01012664 had been issued to the defendant but they were only supposed to pay less what was charged to Safaricom Limited. That he advised the defendant to revise the wrong entry of invoice number 01012663.

He further testified that the defendant responded to the said email confirming that invoice number 01012663 was not supposed to be part of payment that was made. That it was agreed between them that they off set the amount of Kshs. 5 million with future supplies and they continue to supply the defendant with goods as they hold the payments.

That in the month of April 2015, the defendant informed them that Safaricom Limited had suspected the plaintiff had defrauded them to the tune of kshs. 5 million and that Safaricom would send investigators to their offices. On the 27th April, 2015, the investigators who were sent by the defendant visited the plaintiff and advised them to refund the money as the overpayment related to Mater Heart Run and not to the defendant's general operations following which, the plaintiff wrote cheques for the refund of the same. The investigators argued that the two accounts were separate and distinct.

That in the same month, as he was following their payments with Safaricom, he was informed that their account had been suspended following a report received from the defendant that the plaintiff had defrauded them but after a series of correspondences between the plaintiff and Safaricom Limited, their account was reinstated. It was his evidence that during the period their account was suspended between May to October, 2015, they lost business from Safaricom Limited. He averred that the said loss was as a result of misrepresentation of facts by the defendant in laying blame on the plaintiff while the blame was on the defendant.

John Mwanga Koki testified on behalf of the defendant. He is the head of security at the defendant. He adopted his witness statement dated the 27th November, 2018 as his evidence in chief. He produced the list of documents dated the 30th November 2018 and the email dated the 16th April, 2015. He confirmed that the plaintiff supplied merchandise to the defendant in form of t-shirts, for the 2014 Mater Heart Run, for a total of kshs. 5 million which amount was to be paid by Safaricom Limited.

That on 19/03/2014 the plaintiff raised two invoices, one addressed to the defendant and the other to Safaricom limited. That the invoice for Safaricom Limited was received 2nd April, 2014 and was settled on 9th July, 2014.

He stated that, on 9th June 2014, the plaintiff issued the defendant with a credit note number GRN01001390 worth Kshs. 5 million for extra purchases requested by the defendant but did not issue a credit note for the kshs. 5 million worth of merchandise they supplied towards 2014 Mater Heart Run but paid for by Safaricom Limited and Mater Hospital.

That on 23rd July, 2014, the plaintiff wrote an email to the defendant denying that they had raised an invoice of kshs. 5 million to the defendant but to Safaricom. That several correspondences in the form of emails were exchanged between the plaintiff and the defendant and on 16th April, 2015 the defendant wrote to Safaricom Limited after launching an internal investigation into a possible fraud with regard to the 2014 mater Heart Run in which, the plaintiff requested for some documents.

That in response to that inquiry, Safaricom confirmed having settled the invoice raised by the plaintiff and requested to be informed of the final outcome of the internal investigations and the extent to which the plaintiff was involved, if at all.

He further testified that on 4th May, 2015, forensic auditors carried out internal audit and in the process, visited the offices of the plaintiff following which, the plaintiff drew six cheques dated 4th May, 2015 amounting to kshs. 5 million in favour of the defendant. He stated that the defendant did not at any point write to Safaricom Limited asking them to stop engaging in business with the plaintiff.

At the conclusion of the hearing, parties filed their respective submissions. In their submissions, the parties set out the issues for determination but before this court can consider those issues, it is important for the court to first consider an issue that was raised by the defendant on whether the plaintiff's cause of action is based on defamation or malicious falsehoods. The answer to this question lies in the plaintiff's submissions, wherein, counsel for the plaintiff stated that he had decided not to pursue the cause of action in defamation and averred that the plaintiff's cause of action is on malicious falsehoods. As to whether the plaintiff has a valid cause of action in malicious prosecution, the same is discussed elsewhere in this judgment. In view of the above, the issues as set out by the parties will materially change and in my view, the following are now the issues for determination;

- 1) Whether the suit is bad in law for failure by the plaintiff to take out and serve summons to enter appearance together with the amended plaint dated 22nd September, 2015.**
- 2) Whether leave of the court was required to amend the plaint and to take out summons to enter appearance.**
- 3) Whether the defendant published false words about the claimant to a third party.**
- 4) Whether the publication was malicious.**
- 5) Whether the plaintiff suffered damage as a result of the publication and if so, the quantum of damages.**
- 6) Who is to bear the costs of the suit.**

On whether the suit is bad in law for failure to take out and serve summons together with the amended plaint, the plaintiff contended that summons were taken out and served on the 16th day of October, 2015. No defence was filed and interlocutory judgment was entered but when the suit came up for formal proof on the 20th September, 2016, counsel for the plaintiff made an oral application to set aside the interlocutory judgment and amend the plaint. That application was allowed by the court. The plaintiff submitted that the amended plaint dated 10th October, 2016, was served and the defendant entered appearance under protest. That the plaintiff filed a further amended plaint dated the 24th November, 2016 before close of pleadings.

On the issue, the defendant submitted that the matter was filed on the 24th September, 2015 and the summons to enter appearance were served on the defendant on the 3rd November, 2016. It was further submitted that the said summons are dated the 13th day of October, 2016, which was a confirmation that the same was prepared long after the filing of the suit. The defendant has urged the court to consider the suit as having abated pursuant to order 5 rule 1(6) of the Civil Procedure Rules, for failure to serve the summons.

The defendant further submitted that the plaintiff did not seek leave of the court to amend its pleadings to allow fresh summons and hence the pleadings were amended unprocedurally.

In regard to this issue, the court has perused the record of the court. It shows that interlocutory judgment was set aside on the 20th September, 2016 and leave was sought for to amend the plaint. The record further shows that summons to the amended plaint were issued on the 13th day of October, 2016. It is not clear when the same were collected but the court is able to confirm from the defendants submissions that, the defendant was served and it entered appearance on the 17th day of November, 2016.

In urging the court to declare the suit as having abated, the defendant has relied on order 5 rule 1(6) of the Civil Procedure Rules which provides;

“Every summons, except where the court is to effect service shall be collected for service within thirty days of issue or notification whichever is later failing which the suit shall abate.”

From that provision, a suit abates if summons are not collected within 30 days from the date of issue or notification, whichever is later. The court is able to ascertain the date of issuance of the summons but there is no evidence availed to the court to show when the plaintiff was notified about the issuance of the same. In the absence of such evidence, this court cannot invoke the provisions of Order 5 Rule 1(6) to declare the suit as having abated.

On the issue whether leave was sought, it is clear that it was sought on the 20th September, 2016 and the amended plaint filed on 13th October, 2016. A further amended plaint was filed on 25th November, 2016. As at that time, the defendant had not filed a defence to the amended plaint and therefore, pleadings had not closed. In my view, the plaintiff was within time to file a further amended plaint and it did not require the leave of the court to do so.

On the 3rd and 4th issue, the court has already stated that the cause of action being pursued by the plaintiff is that of malicious falsehood. In the book; ***“Unlocking Torts” by Chris Tuner 3rd Edition***, the writer states that;

“a cause of action in malicious falsehoods arises where false words are maliciously published in circumstances where they are calculated in the ordinary cause of things to produce and do produce, injury to a person in his trade, property or business, an action will lie for malicious or injurious falsehood.”

The cause of action is closely related to that of defamation and in many respects the similarities between the two torts are striking. Indeed it will commonly be the case that the same set of facts will give rise to the cause of action in both defamation and malicious falsehoods.

At common law, in order to succeed in an action for malicious falsehood, the claimant must prove that;

- a) ***The defendant published false words of the claimant whether orally, or in writing, to third parties.***
- b) ***That the publication was malicious***
- c) ***That damage was caused which was the natural and reasonable result of the publication.***

In the case of ***Radcliffe vs. Evans (1892) 2OB 254***, the court of Appeal distinguished the tort of malicious falsehood from the very specific requirements of defamation and decided that the tort could result in liability in respect of any malicious statement that resulted in damage even where defamation could not be shown.

The tort has its origins in action formerly referred to as slander of title. This was a very specific action based on the false questioning of a person's title to land with the result that it became less saleable or even unsaleable. In the 19th Century, the tort extended to include slander of goods, based on similar principles. More recently, the tort has developed in a more general sense as a protection of people's economic and commercial interests.

The test of remoteness of damage is based on reasonable foreseeability. In certain circumstances, there is no requirement for the claimant to prove special damage where the statement is in a written or permanent form and was calculated to cause a pecuniary loss or where the statement was calculated to cause a pecuniary loss to the claimant in respect of any office or profession, calling, trade, or business he is in, at the time of its publication.

According to ***Butter Worths Common Law series on the Law of Tort, 2nd Edition***, he opines that, the two causes of action ie. Malicious falsehood and defamation frequently overlap in relation to the same set of facts although not every case of malicious falsehood is a case of defamation. Defamation as a tort protects a person's reputation while malicious falsehood protects his interest in exploiting his business or commercial interests.

As the court of Appeal held in the case of ***G. K. Macharia vs. Lucy Macharia Civil Appeal Number, 85 of 1990*** thus;

"I have no doubt the appellant was taken by surprise by the introduction of the unpleaded cause of action at the hearing, but although his advocate protested he did in fact, to some extent, participate in the consideration of this new cause of action both by leading evidence and addressing the court with reference to it, and I am not satisfied that the procedural irregularities in the court below have in fact led to a failure of justice necessitating intervention of this court "

Drawing from that decision the defendant herein participated in the hearing and cross examined PW1 on evidence that basically reflected a cause of action in malicious falsehood.

Similarly in the case of ***Odds Jobs vs. Muhia (1970), EA 476 Lews*** the court stated;

"on the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the altitude adopted by this court is not as strict as appears to be that of the courts in India. In East Africa the position is that a court may allow evidence to be called, and may base its decision on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for its decision."

From the evidence on record and the pleadings, and considering the elements of the two causes of action, a cause of action in malicious falsehood has also been disclosed and evidence led on it. In the circumstances, I strongly opine that the plaintiff has disclosed cause of action in malicious falsehood.

The court has perused the documents that were produced as exhibits by both parties. In the email dated 21st July 2014, which was marked to the attention of Hellen, it reads

"Please find attached invoice number 01012663 amount Kshs. 5,000,000/= dated the 19th day of March, 2014 which was paid today as per the payment advise attached"

On the same day, Hellen Kitonga responded to the same and wrote;

Thank you so much Mr. Harish.

Kindly Issue us with a credit note for the same.

Another email which is of importance in this case is the one dated 12th September, 2014. The same is from the plaintiff to the defendant and was copied to Hellen Kitonga. In that email, the defendant was being notified of the payment of invoice number 01012663 for Kshs. 5,000,000/= which was raised to Safaricom Limited.

In the same email, the defendant was also notified that they have posted the same invoice (01012663) in their account which should not have been the case as the invoice was just meant for purchase department to receive the goods on behalf of Safaricom Limited.

The plaintiff also clarified the two invoices no. 01012663 and 01012664 to the effect that they had raised invoice for 15,000 pieces of T-shirts at kshs. 5,370,000/= and in the same invoice they had deducted 13,996 pieces of T-shirts at kshs. 5,000,000/= which was charged to Safaricom Limited being invoice No. 1012663.

On the same day, the defendant through a Mr. Austine Owili responded to that email confirming that invoice number 01012663 was not supposed to be part of the payments that they made and that they had received a credit note that was supposed to be the plaintiff's collection donation. Mr. Owili further stated that the effect of posting this invoice (01012663) is an overpayment on the plaintiff's account of kshs. 5 million. He suggested that a total of kshs. 1,618,876 which was supposed to be remitted to the plaintiff by the defendant be deducted leaving a balance of Kshs. 3,381,124/= as the overpayment. He asked the plaintiff to confirm that position and also advice on how soon the overpayment could be recovered.

In the letter dated 25th June, 2015, from the defendant, to the plaintiff, the defendant is informing the plaintiff about the forensic audit that they conducted to ascertain that their financial statements were free of material misstatements. The letter further states that during the audit, it was identified that the financial accounts of the plaintiff for the year ended the 31st December, 2014 had an overpayment to the plaintiff by 5 million. That this was brought to the attention of the plaintiff and the issue was discussed with them and in a meeting held in their premises, they acknowledged and paid back the kshs. 5 million to the defendant.

In April, 2015, the defendant wrote an email to Safaricom Limited in which they informed them that they were investigating a possible fraud on the 2014 Mater Heart Run and in which, they requested for some documents which included quotations, copy of the purchase order, invoices and documentary proof of payment to the plaintiff.

It is important to note that the last email to Safaricom Limited dated 16th April, 2015, was done after the plaintiff and the defendant had, in principle, agreed there was an overpayment to the plaintiff of the 5 million. This was vide the email done on 12/07/2014 and that of 12th September, 2014.

The letter dated 25th June, 2015 seems to suggest that the overpayment was discovered during the forensic audit and that it is the defendant who discovered the same and brought it to the attention of the plaintiff.

From the evidence available to the court, the forensic audit was done on the 27th April, 2015 which was after the email of 12th September, 2014 in which the plaintiff had already brought the issue of overpayment to the attention of the defendant.

In the premises I find that the publication dated 16th April, 2015 and the other one dated 25th June, 2015 were not a true reflection of the facts and were therefore false.

On whether the same were malicious, it is trite that malice can be express or can be implied from the circumstances. In the case of *Phineas Nyaga vs. Gitobu Manyara (2013) eKLR* the court held 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-----

Malice need not necessarily involve dishonesty on the part of the defendant, it does, however, involve the absence of just cause or of belief in the statement.

The court notes that by the time both the email dated 4th April 2015 and letter dated 25th June, 2015 respectively, were done, the defendant was aware of the over payment, the same having been brought to its attention by the plaintiff. It is my considered view that the defendant in writing them had a dishonest motive as it had knowledge of the overpayment. This is a strong indication of malice on the part of the defendant.

On whether the plaintiff suffered damages, it was the evidence of PW1 that the plaintiff's account with Safaricom Limited was suspended following the email by the defendant. That they could not supply or receive payments from them. He produced the supplementary list of documents filed on the 28th day of April, 2018 containing the ledger statements for Safaricom Limited, invoices issued to Safaricom and credit notes for the years 2014 and 2015. He stated that between the months of May – October, 2015 the plaintiff did not supply any goods to Safaricom.

It was his further evidence that there was an outstanding payment of Kshs. 11,158,956/= which was not paid after the suspension of the account. According to him, the amount of goods supplied for the period between May 2014 - October, 2014 was worth 3 million and the business was still growing and therefore in the year 2015, it could have been more than that. In his own estimation, they lost business worth kshs. 11,000,000/= during that period.

In its submissions, the plaintiff has urged the court to award Kshs. 2 million, 5 million and 1 million as general damages, damages for loss of business and punitive and exemplary damages respectively. It has relied on the case of *Great Lakes Transport Company Limited v. Kenya Revenue Authority (2009) eKLR* in which, the court of Appeal reiterated the powers of the courts to grant reliefs that arise out of the pleadings but not necessarily prayed for and that in some cases, appropriate reliefs flow from the pleadings and the evidence.

They have also relied on the case of *Bank of Baroda Kenya Limited vs. Timwood Products Limited (2008) eKLR* wherein the court of Appeal allowed an award of Kshs. 3 million for loss of business and profit in a case of negligence. The plaintiff also relied on the same case to support its claim for punitive and exemplary damages wherein, the court stated that such damages can be awarded where the defendant's action was calculated to procure a benefit not necessarily financial, at the expense of the plaintiff. They also cited the case of *Kenya Tea*

Development Agency Limited vs. Benson Ondimu Masese T/A B. O. Masese & Co. Advocates (2008) eKLR in which the court quoted the English case of Jones v. Pollard in assessing damages for defamation which the plaintiff submitted is also applicable in assessing damages for malicious falsehood.

On the part of the defendant, it was submitted that damages for loss of business are in the form of special damages and it is common place that special damages must be specifically pleaded and strictly proved. The defendant made reference to the case of Charles Sande vs Kenya Co-operative Creameries Limited civil Appeal number 154/1992 cited in the case of Robert Okeri Ombeki vs. Central Bank of Kenya (2015)eKLR in that regard.

It was further submitted that the plaintiff neither pleaded quantified amount nor proved the loss of business incurred as a result of the alleged email. That the ledger account statements did not prove with certainty the loss of business incurred by the plaintiff. That the plaintiff did not produce any invoices and delivery notes in support of its claim.

The court has considered the submissions with regard to the quantum of damages on loss of business claimed by the plaintiff. I have also looked at the documents relied on and produced as exhibits in this case but with regard to the defendant's submission that loss of business is in the class of special damages, in a tort of malicious falsehoods, though the plaintiff is required to show that he suffered actual loss, the loss need not be a particular loss of a specific customer. A more general loss as in a reduction in overall takings, is sufficient. The damage can include damage to property as well as a pecuniary loss.

As rightly submitted by the defendant, the ledger account statements did not, with certainty, show the loss of business incurred by the plaintiff.

Similarly, no invoices or delivery notes were produced in support of the claim for loss of business. The court also takes judicial notice of the fact that in business, profit and loss go together. The court, however, appreciates that there was loss of business as a result of the suspension of the plaintiff's account by Safaricom but not to the tune stated by PW1 in his evidence. In absence of specific proof of loss on the part of the plaintiff, I find that an award of Kshs. 1,000,000/= would be reasonable in the circumstances of this case. In arriving at the figure, I am guided by the decision of the court in the case of Raphael Karuu Gitau vs. Barclays Bank of Kenya Limited (Commercial & Admiralty Division) Civil Suit No. 18/2014 wherein a similar sum was awarded for loss of business.

On punitive and exemplary damages, there is no evidence on the basis of which the court can make an award under this sub head.

The general damages awarded herein shall earn interest from the date of this judgment.

The plaintiff is also awarded the costs of the suit.

Dated, Signed and Delivered at Nairobi this 19th Day of December, 2019.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Plaintiff

..... For the Defendant