



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 237 OF 2012

KENYA UNION OF SAVINGS & CREDIT

COOPERATIVES LIMITED (KUSCCO).....PLAINTIFF

V E R S U S –

NATION MEDIA GROUP.....1ST DEFENDANT

LINDA OGUTU2ND DEFENDANT

JUDGEMENT

1) The plaintiff herein, filed an action based on the tort of defamation against the defendants vide the plaint dated 17th May 2012 which plaint was amended and further amended on 5th October 2013. In the aforesaid Further Amended plaint, the plaintiff sought judgement to wit for *inter alia*:

I. Special damages in the sum of ksh.117,466,101/=.

II. General damages.

III. Punitive damages

IV. Aggravated damages

V. Exemplary damages

VI. Apology

VII. Mandatory injunction

VIII. Costs

IX. Interest

2) The claim against the defendants is for the alleged defamation based on two news articles published by way of broadcasting on 10th and 11th May 2012.

3) The defendants denied the plaintiff's claim by filing a joint statement of defence whereof they pleaded that the publications were made under the sense of public duty and without malice with the honest belief that the information published was true.

4) In the same defence, the defendants also averred that they published the information as public interest over what they termed as unprocedural and irregular disbursements from the National Youth Enterprise Development Fund.

5) The plaintiff further filed a reply to the defendants' statement of defence dated 21.11.2013. The plaintiff also prepared and filed witness statements of George Ototo (PW1), Veronica Muchiri (PW2) and Rosemary Nderitu (PW3) with consolidated list and bundle of documents.

6) The defendants did not file any witness statement nor Documents but they have pleaded the defence of **justification, fair comment** and

privilege without tendering any evidence to support the pleaded defences.

7) In a nutshell it is the plaintiff's contention that the publication was actuated by malice on the defendants' part and was meant to create the perception on the general public that the plaintiff was engaging in criminal activities, corruption and misappropriation of public funds at the expense of the Kenyan youths to the utter detriment of the plaintiff.

8) The plaintiff further stated that as a consequence of the publications there was a mass withdrawal of membership from the plaintiff as well as cash deposits held by the plaintiff on behalf of its members.

9) It is also the plaintiff's submission that it suffered huge financial loss as a consequence and that the publications continue to injure the plaintiff's business reputation to its members and the public at large.

10) When this suit came up for hearing, the plaintiff presented the evidence of three witnesses namely: George Ototo (PW1), Veronich Muchiri (PW2) and Rosemary Nderitu (PW3). The first two witnesses namely PW1 and PW2 gave the summary of the plaintiff's case as follows *inter alia*: first that the plaintiff was eligible as a channel of disbursement of the Youth Fund in its capacity as a Saving and Credit Cooperative (Sacco) Limited as a financial intermediary. The certificate of incorporation of the plaintiff was produced as an exhibit in evidence.

11) Secondly, that the plaintiff has the mandate to give loans and take deposits as per its Bylaws which was produced as an exhibit in evidence.

12) Thirdly, that pursuant to its Bylaws, the plaintiff applied to the National Youth Fund to partner with it in disbursing loans to youths who were the plaintiff's members through other saccos that were its members and had youths as members. In this respect the plaintiff produced a letter dated 19.11.2010 and a loan agreement dated 24.2.2011 as exhibits in evidence.

13) The plaintiff further stated that its application was subjected to the Fund's internal procedures before being accepted for the advancement a loan of ksh.300 million to be disbursed in four tranches of ksh.75 million each.

14) Fourthly, that aforesaid loan was guaranteed by the Cooperative Bank of Kenya in compliance with the terms of the loan agreement. The letters of guarantee were produced as exhibits in evidence.

15) Fifthly, that at the time of the publication of the alleged defamatory information, a sum of ksh.150 million had been disbursed to the plaintiff and the plaintiff had even begun making repayments and filing of the necessary reports, invoice reports and cheque payments.

16) Sixth, that the Youth Fund had not stopped loan disbursements to the plaintiff contrary to the allegations made by the defendants and that the recipients of the subject loans were verifiable from the various reports filed with the Youth Fund.

17) Seventh, the plaintiff further stated that the fund raised no complaint against the plaintiff and that is why it released the third tranche of ksh. 75 million to it in December 2013.

18) Eight, that the defendant went ahead to publish the defamatory statement without making any reference to plaintiff's response to the allegation through e-mail correspondence on 18.4.2012 and further that on 11.5.2012 the 2nd defendant spoke to George Ototo (PW1) the plaintiff's Managing Director in his offices.

19) Ninth, that the defendants' allegation that the plaintiff was being investigated by the Ethics and Anti-corruption Commission were false and unsubstantiated.

20) Then, the plaintiff produced various documents to show that as a result of the publication of the defamatory information some of its members withdrew their membership and cash deposits. The plaintiff named Stima Sacco., Hazina Sacco Society, EPZA Sacco society, COMOCO Sacco Society, Washonaji Sacco Society, K.C.I.T.I Sacco Society, SOCASS Sacco Society, Yetu Sacco Society, Tai Sacco Society and Besco Sacco Society amongst other to have withdrawn huge sums of money vide cheque payments.

21) The plaintiff also summoned rosemary Nderitu (PW3) to testify as a financial expert. PW3 presented a financial loss report dated 9th May 2013 as an exhibit in evidence. PW3's evidence is to effect that the plaintiff made financial loss to the tune of ksh.117,465,101/=.

22) PW3 assessed the aforesaid loss as follows:

i. Loss of net interest from withdrawal of

Deposits & C.F.C refunds ***ksh.35,389,176***

ii. Potential loss of income on foregone

Lending capacity on withdrawn deposits

& C.F.C refunds ***ksh.62,839,344***

iii. *Potential loss of income from YEDF*

Slowed down uptake *ksh.10,963,901*

iv. *Potential loss of income on foregoing*

Lending capacity of YEDF revolving fund *ksh.8,272,680*

Net loss claimed as special damage *ksh.117,465,101*

23) At the close of evidence, learned counsels were invited to file and exchange written submissions and authorities.

24) Having considered the evidence, the submissions and the authorities cited by the parties, the following issues arose for determination

i. Whether the publication made by the defendant were defamatory of the plaintiff.

ii. Whether the plaintiff suffered any loss as a result of the publication.

iii. What is the appropriate quantum of damages to be awarded.

iv. Who should pay costs of the suit.

25) On the first issue as to whether the publications made by the defendants were defamatory of the plaintiff, it is the assertion of the plaintiff that subject defamatory statements were published by the 1st defendant's own television network having a nationwide reach and known as NTV as well as its website and internet sites which have a worldwide viewership.

26) The subject matter which gave rise to this suit is the publication of an article titled **"Queries over unaccounted for Youth Fund Money"** by the defendants vide its national television network known as N.T.V. and internet publications carried out on 10th May 2012 as follows:

"Just days after the country was treated to a board room war that tore into superiority contest at NHIF another scandal is simmering at the youth development and enterprise fund. The fund is said to have disbursed ksh.150 million that is yet to be accounted for almost a year down the line. Sources tell NTV that the money was disbursed through an avenue that did not meet the eligibility standard and questions are being raised on just who authorized the payments. It is a scandal that could cost the youth in the country millions of shillings as many strive to survive in the harsh economic times.

Hopes of many young people have been shattered as the fund that would have come to their rescue is turned into a cash cow. Ksh.10 million in seven months disbursed to KUSCCO between April and October 2011..... Procedure of disbursement and the final destination of money has raised eyebrows.... NTV has established that there are two channels of disbursement of the fund. The constituency level where a committee decides on how the money is spend and then there is the financial intermediaries like banks and SACCO's.

Selection of KUSCCO as avenue of disbursement is unnerving. KUSCCO does not fall into any of the categories. In fact it has no mandate to give loans and take deposits. It had no basis to work as intermediary of the fund Within six months KUSCCO had exhausted ksh.75 million and applied to have further kshs.75 million. Request that it accounts for the initial 75 million was not honoured and instead the SACCO was issued with another cheque..... amount considered excessive for one financial intermediary.

.....That second disbursement sparked off a row at the Board ... a row that inadvertently stopped the disbursement of a further 150m and the matter referred to KACC. ... But who authorized payment to KUSCCO knowing very well it failed eligibility test.....

Why did KUSCCO refuse to account for the initial ksh.75 million... What basis was KUSCCO identified as an on lending situation, What platform did KUSCCO use to on lend these funds.... Who are the youths that benefitted from these funds. Can they be traced via addresses, phone numbers or e-mails.... Did KUSCCO on lend these monies to SACCOS..... which SACCOS are these and who are their officials.

NTV is yet to receive official response from the umbrella union since 18th April 2012. But on the ground many young people continue to languish in poverty in the increasingly harsh economic times still hopeful that they will be able to access the fund..... this latest scum casts a dark shadow on an otherwise noble idea."

27) The audio clip for 10th May 2012 was played and tendered in evidence as an exhibit. It is claimed by the plaintiff that the aforesaid statements were repeated on N.T.V 9 pm and late night 11 pm news on the same day and on 11th May 2012 during lunch hour news at 1 pm.

28) It is further alleged by the plaintiff that the defendants further published additional defamatory statements on 17.5.2012 titled

"Anti graft officials probes the Youth Fund officials" as follows:

“The ethics and anticorruption commission confirmed to NTV today that it is indeed investigating suspicious dealings at the national youth enterprise fund. NTV first sounded the alarm a week ago over the disbursements of the 150 million from the fund to KUSCCO which is the umbrella co-operatives organization. It has since emerged that there could be worse forms of corrupt dealings going on at the fund. The EACC says apart from the disbursements, it is investigating false financing claims made by officials going on since last year. KUSCCO has also been adversely mentioned in the scan but the EACC says it hasn't pointed its nasal in that direction yet....”

29) It is also stated by the plaintiff that the defendants continued in the publication of the defamatory statements on 23rd May 2012 by an article titled **“Youth Fund Chairman claims no money lost”** as follows:

“The chairman of the Youth Fund now says no money has been lost through the controversial disbursements to KUSCCO. James Gitau who was speaking for the first time on the saga said all the money given through the cooperatives organization was fully guaranteed. The statement came despite confirmation by the Ethics and Anti-corruption commission that it was investigation fraud allegations at the fund.a week after KACC confirmed that they were investigating alleged corruption at the fund officials finally came out.

This funds management has been reluctant to speak on camera since NTV brought the questionable disbursement involving umbrella co-operatives organization KUSCCO, but now the chairman says not a single cent has been lost.”

30) It is also stated by the plaintiff that the defendants despite having been served with an order of injunction continued to write and publish by way of broadcasting via NTV and internet of and concerning the plaintiff further articles titled **“Youth Fund Scam”** and **“Youth Groups demand action over scam”** on 27.5.2012 and 29.5.2012 respectively as follows:

“..... tomorrow night Ferdinand will be taking a closer look at how officials took shortcuts in tendering process. That will include direct tender award to the umbrella co-operative organization KUSCCO that never went through procurement oversight authority as required by law.... Amongst other things the fund is meant to disburse loans to existing microfinance institutions, registered NGO's involved in microfinance saving and lending and co-operative organizations for on lending to youth enterprises. And now this is one of the reasons why the partnership with KUSCCO was so controversial. The organisation is not a co-operative but an umbrella body for the co-operatives.....”

“.....NTV has exclusively been detailing the rot at the youth fund beginning with the questionable on lending contract worth ksh.150,000,000/= awarded to KUSCCO which is the umbrella body of the co-operative societies.... the audit report now reveals that the KUSCCO deal was among the financial partnership that did not pass the procurement test....All the partnership sampled for review did not pass through procurement i.e KUSCCO ... were sourced by direct procurement.... the direct procurement was not reported at the public procurement and disposal authority as required by law...”

31) It is not disputed that the defendants published the aforesaid statements. The question which remains to be answered is whether those statements were defamatory of the plaintiff.

32) The ingredients which must be present in order to establish the tort of defamation were restated by the Court of Appeal in the case of **Wycliffe A. Swanya =vs= Toyota East Africa Ltd and Another (2009) eKLR interalia** as follows

“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 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 damage.”**

33) It is the defendants' submission that the publications were an expression of opinion and are fair comments and fair information on the issue relating to alleged unprocedural and irregular disbursements from the Youth Enterprise Fund and the issue of alleged unprocedural and irregular application of public funds which are matters of public interest.

34) It is apparent from the proceedings before this court that the defendants pleaded the aforementioned defences but they failed to tender evidence to buttress the pleaded defences. The plaintiff reproduced the statements in its pleadings and were confirmed by PW1 and PW2 when the duo appeared to testify.

35) A video clip was played in court and produced as an exhibit in evidence. There is no doubt that the statements were published by the 1st defendant's own television network which enjoys countrywide coverage as well as its website and internet sites which sites have worldwide reach and viewership.

36) It was also stated at trial that the publications are still being hosted on the 1st defendant's website and other internet sites under its control.

37) A careful reading of those publications will reveal that the plaintiff was portrayed as being a party to unprocedural and unlawful disbursements of the Youth Fund.

38) The publications also suggest that the plaintiff has no mandate to give loans and take deposits.

39) The plaintiff was further depicted as having failed to account for the first tranche of the loan and that the Youth Fund stopped the loan disbursements to the plaintiff following the corruption allegations stated in the publications that the plaintiff is neither a cooperative society nor a sacco.

40) After a careful consideration of the evidence and the authorities by the parties I am convinced that the aforesaid publications in their natural and ordinary meaning are defamatory of the plaintiff. Those publications depicted the plaintiff as fraudulent, corrupt and of questionable credibility and integrity. The subject defamatory statements made reference to the plaintiff by its name acronym known as 'KUSCCO'.

41) The defendants while publishing the subject articles continuously showed pictures of the plaintiff's head office known as "KUSCCO" centre and bearing the full name of the plaintiff.

42) The other issue which needs to be determined is whether the aforesaid statements were false. I have already stated that the defendant claimed that the publications were not false but factual. It is unfortunate that the defendant did not deem it fit to present evidence to prove that the publications were not false.

43) The plaintiff on the other hand summoned witnesses which indicated that it was eligible as a channel of disbursement of the Youth Fund on the basis of a sacco thus qualifying to be a financial intermediary.

44) The plaintiff also tendered evidence showing that it has the mandate to give loans and take deposits. There was further evidence showing that the plaintiff's application was subjected to the Fund Internal Procurement Procedures and was approved for a loan of ksh.300 million to be disbursed in four tranches of ksh.75 million each.

45) Evidence was also presented showing that the plaintiff received by the time of the publication a sum of ksh.150 million and had even started making repayments as per the terms of the loan.

46) It is also clear that the fund did not at any time stop making disbursements to the plaintiff.

47) There was also no evidence to show that the plaintiff was investigated by E.A.C.C as alleged by the defendants.

48) I am convinced further that the publications made by the defendants were false and injurious to the plaintiff. It would appear the publications were deliberately done to disparage the plaintiff's reputation.

49) Having come to the conclusion that the plaintiff was defamed, let me now determine the issue as to whether the plaintiff suffered any loss and if yes what is the appropriate award on quantum. Issues no. (ii) and (ii) will be dealt with together.

50) It is the defendants' submission that the plaintiff's reputation was not tainted, damaged nor brought to ruin. It was argued that there was no evidence tendered to show that the plaintiff was exposed to public hatred, contempt or ridicule. The plaintiff on its part summoned witnesses to show that as a result of the publication it has had to experience a run of its members.

51) The plaintiff stated that the total amount of deposits withdrawn during the period of the publication of the defamatory statements was a colossal sum of ksh.317,729,478/=.

52) The plaintiff further argued that it was denied the benefit of new members who may have joined it but due to the negative publicity as a result of the publications declined to do so. The plaintiff urged this court to find that it suffered financial injury and loss of reputation.

53) The defendants argued that none of the saccos who are members of the plaintiff stated that they withdrew funds from the plaintiff as a result of the publications and that there was no evidence to show that the plaintiff was shunned, ridiculed, avoided or viewed differently as a result of the publication.

54) I have carefully considered the evidence presented by the plaintiff plus the submissions and the authorities cited by both sides.

It is not in dispute that during the period of the offending publication there was evidence that many saccos made huge cash withdrawals from their accounts held with the plaintiff.

55) It is apparent that the saccos which made withdrawals from their accounts held with the plaintiff did not expressly state that they were making withdrawals as a result of the publications.

56) It is also curious to note that during the period of the publications huge withdrawals to the tune of 317,729,478/= were made.

57) In my humble view, it was not a mere coincidence for such withdrawals to be made during the period of the publication. This court cannot help but can only infer that the panic spate of withdrawal, was, as a result of the publications thus the plaintiff was hit hard due to the unplanned withdrawals. I am satisfied that the plaintiff suffered as a result.

58) The next issue to determine is the question of quantum. The plaintiff has asked to be paid ksh. 30 million for general damages. The plaintiff cited the case of **Kipyator Nicholas Kiprono Biwott =vs= Clays Ltd & 5 others (2000) eKLR** in which the plaintiff was awarded ksh.30 million as general damages.

59) The defendant submitted that since the plaintiff had failed to tender evidence to prove that it suffered any loss of business or at all as a result of the publications it is not entitled to any award of damages.

60) The defendants have urged this court to find that the figure proposed by the plaintiff of ksh.30 million to be high and exorbitant. The defendants proposed that an award of ksh.2,000,000/= should be sufficient for general damages. They cited the case of **Kwacha Group of Companies & Another =vs= Tom Mshindi & 2 others (2011) eKLR** where the court awarded ksh.3 million as general damages. They also cited the case of **Ndungu Njoroge & Kwach Advocates & Another =vs= Standard Ltd & 2 others (2012) eKLR** where the plaintiff was awarded ksh.5,000,000/=.

61) I have considered the proposals of both sides. The proposal made by the plaintiff appear to be on the higher side while that of the defendants is inordinately low. There is no doubt that the plaintiff is in the business whose survival rely on trust unlike other businesses. Any slight loss of trust may trigger panic among its depositors leading to the collapse of such institutions. I think a sum of ksh.10 million is reasonable as general damages. Consequently the plaintiff is hereby awarded ksh.10 million.

62) The second prayer is for payment of ksh.117,465,101/= as special damages. The plaintiff pointed out that it suffered loss of the aforesaid amount as a result of the publication. The plaintiff summoned Rosemary Nderitu (PW3), a financial expert to tabulate the potential profit the plaintiff lost as a result of the publication.

63) The defendants urged this court to find that the plaintiff failed to lay a basis for the claim of kshs.117,465,101/= as special damage. The defendants further argued that the claim being a special damage, no particulars were supplied. It was pointed out that the loss was not actual but potential loss hence it should not be made.

64) It is not in dispute that the plaintiff specifically pleaded to be awarded ksh.117,465,101/= as special damage. PW3 prepared and tendered in evidence as an exhibit a financial loss assessment report dated 9th May 2013. In the aforesaid report PW3 was able to give the breakdown of the special damage of ksh.117,465,101/=. I am convinced that the tabulation of PW3 appear to make sense and the same is scientific.

65) On a balance of probabilities I find the award of ksh.117,465,101/= to have been pleaded and proved. Consequently, I award the amount to the plaintiff.

66) The plaintiff has also asked to be awarded both punitive and exemplary damages. The plaintiff relied on the case of **Kipyato Nicholas Kiprono Biwott =vs= Clays Ltd & 5 others (2000) eKLR** where the plaintiff was awarded ksh.15 million. The plaintiff urged this court to find that it is justified to make the award because the publications were driven by malice and that the defendants continued to make the same publication despite having been served with interim orders of injunction.

67) It is also argued that the defendants had ample time to tender an apology. The plaintiff beseeched this court to award it ksh.15 million.

68) The defendants urged this court not to make any award on these heads because there was no evidence that the publications were made for financial gain on their part. It was further pointed out that this is not a case fit to award punitive and exemplary damages.

69) Having considered the two competing arguments, it is clear in my mind that though the publications appear prima facie to have been meant to inform the public of the financial dealings between the Youth Fund and the plaintiff, it is apparent that the publications were so widespread and intense that the court is entitled to infer that there was malice on the part of the defendants. The information publicised impacted negatively against the plaintiff. There was no attempt on the part of the defendants to verify the facts from the plaintiff. There was no offer of an apology or retraction.

70) It is not disputed that an order for injunction was issued and served upon the defendants but that did not deter the defendants from continuing with its offensive publications. I am convinced that this is a case fit to award punitive damages. Taking into account the authorities cited, I am satisfied that an award of ksh. 2 million is sufficient as both exemplary and punitive damages.

71) The other prayer the plaintiff has sought is for an apology. I am convinced that the plaintiff is entitled to an apology. Consequently, the 1st defendant is directed to publish an apology to the plaintiff within 30 days from the date of this decision.

72) The plaintiff has also sought for both mandatory and prohibitive orders of injunction against the defendants. In the circumstances of this case I find it inappropriate to issue further injunctive orders. I therefore decline to grant the orders.

73) On the prayer for costs, costs follows the event, the same is awarded to the plaintiff plus interest.

74) In the end judgment is entered in favour of the plaintiff and against defendants as following:

a) General damages **ksh. 10,000,000/=**

b) Special damages ksh. 117,465,101/=

c) Exemplary & punitive damages ksh. 2,000,000/=

Net total ksh.129,465,101/=

d) Cost of the suit

e) Interest on (a-c) above at court rates from the date of judgement until full payment.

f) An apology to the plaintiff to be published within 30 days in default the defendant to pay ksh.2,000,000/= for want of apology.

Dated, Signed and Delivered in open court this 19th day of October, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

..... for the Defendant