



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 370 OF 2009

RURAL DISTRIBUTORS ENTREPRISES LIMITED.....PLAINTIFF

-VERSUS-

EXPRESS COMPANY LIMITED.....1ST DEFENDANT

SURAJ GOPINADHAH.....2ND DEFENDANT

JUDGMENT

In a plaint dated 30th day of June 2009 and filed in court on the 8th July 2009, the plaintiff sued the defendants for recovery of damages following words that it alleged were published in the first defendants letter dated 30th July 2008 addressed to the plaintiff. The words alleged to have been published are in the letter dated 30th July, 2008 and addressed to the Rural Distributors Enterprises Limited the Plaintiff herein particulars of which are:

REPLACEMENT OF OUR 180 POLES TAKEN BY YOU FROM GTI YARD IN GILGIL:

“we refer to the various telephone conversation we have had over the last one month on the above matter.

As you may be aware, we had a quantity of 5,175 pcs of Imported Treated Wood Poles IIMM that were stored in the yard of Gilgil Telecommunication industries in Gilgil since late last year. From March 2008 onwards we started collecting them and delivering to the stores of the Kenya Power & Lighting Co. Ltd, countrywide.

After we finished the exercise of collecting all the poles, we realized that the quantity of 180 poles was missing. Further detailed investigations revealed that; vide Goods issue documents of GTI bearing no. 19051 dated 4th March 2008 and 19065 dated 8th March 2008 a quantity of 100 poles and 80 poles respectively left the GTI yard using vehicles belonging to Rosoga investments Ltd (Reg. No. KAU-372C/ZC-2395 and KAH 258C/ZC 6192) and the poles were delivered to Nakuru (Lanet) Stores of KPLC using the Delivery Notes of your company, Rural Distribution Enterprises Ltd.

When we contacted you a month ago with this information, you admitted that the poles were, ‘taken by you on loan’ and intended to return them. According to us, this is ‘theft’ because if you are taking ‘goods on loan,’ you have to take our consent, which you have never obtained from us. You assured us that the 180 poles would be returned to us in two weeks’ time. In spite of your repeated promises, this has not happened so far.

Please note that we shall give you time until 7th August 2008 to return the 180 poles to our yard in Nairobi. Should you fail to return the poles within this date, we will be left with no option but to seek other means. We have already reported the matter to our Insurance Company (as the poles were covered under an insurance policy). The investigator appointed by the insurance company will first lodge a complaint with police, transporters, Rosogo Investment are reported to KPLC. Both the companies being independent suppliers of the poles to KPLC, this kind of report will have a negative effect on your standing with KPLC.

While we don't intend to go this far and cause legal and other problems for you, we will not hesitate to take the necessary action, if you do not cooperate. So in your own interest, please ensure that the 180 poles are returned to us by 7th August 2008."

It was pleaded that the above publication was defamatory to the plaintiff's reputation and has brought the plaintiff into scandal, Odium, contempt and ridicule among the right thinking members of the business community.

The plaintiff further averred that the contents of the said letter were incorrect in that the plaintiff had nothing to do with the alleged missing poles, that the plaintiff was not involved in the alleged theft of the poles, the plaintiff was never asked to replace the purported missing poles and that the reference to the plaintiff as having admitted taking the poles was totally untrue.

The plaintiff contended that the words in the letter dated 30th July 2008 in its natural and ordinary meaning meant that the plaintiff is fraudulent in its dealings and was engaged in the theft of poles, that the plaintiff is bogus, disgraceful and guilty of criminal activities, the plaintiff is corrupt in its dealings and can still manage to trade in, and supply poles to the Kenya Power & Lightning Company Limited.

The defendants filed a statement of defence and counter claim on the 17th day of August 2009, denying the plaintiff's claim but counter claimed for a sum of Ksh 2.5 Million being the value of the 180 poles and general damages for loss of business and disrepute in the eyes of its regular customers, particularly the Kenya Power and Lightning Company Limited.

In the said defence, the defendants avers that the plaintiff's claim does not disclose any cause of action against the defendants and that the suit as filed is a nullity. It is contended that the alleged letter refers to a factual position, it is true and they seek to rely on the defence of justification and truth. They denied that the plaintiff is entitled to damages as claimed. They have urged the court to dismiss the suit with costs but sought for Judgment in the counter claim.

The plaintiff filed a reply to defence and counter claim on the 26th August 2009 wherein it has joined issues with the 1st and 2nd defendants defence. It denied the contents of the counter-claim and averred that the same is false and an afterthought and urged the court to dismiss the same with costs.

When the matter came up for hearing, the plaintiff called two witnesses in support of its case. Abdul Osman who testified as pw1 is the executive officer of the plaintiff. He stated that the first defendant through its General Manager, the 2nd defendant wrote a letter dated 30th July 2008 alleging theft of 180 poles from Gilgil Telecommunication yard by the plaintiff. He denied any involvement of the plaintiff in the alleged theft.

It was his further evidence that the purported admission of theft on the part of the plaintiff as stated in the letter dated 30th July 2008 are untrue and was only intended to tarnish the good name of the plaintiff. He stated that Mr. Ndegwa to whom the defamatory letter was addressed is a stranger and he is unknown to the plaintiff and has never been an employee of the plaintiff and had no affiliation to the plaintiff and has never worked for the plaintiff in any capacity.

He further stated that the plaintiff never promised to return the 180 poles to the defendants as alleged in their defamatory letter dated the 30th July 2008. That by reason of the false allegations by the defendants,

the plaintiff has suffered damages and economic loss and that, its reputation was injured.

In cross examination he averred that the letter was copied to several parties some of whom are unknown to the plaintiff.

Benard Otwoli Momanyi testified as PW2. It was his evidence that between 4th March 2008 and 30th July 2008, he was the manager in charge of Gilgil Telecommunication industries (G.T.I) whose core business was treatment and transmission of power poles. He confirmed that both the plaintiff and the defendants were their customers. It was his evidence that in the course of their business, customers would bring their poles which the company would receive with all the documents. They don't mix the poles for different customers. He explained to the court the process that the company uses when a customer request for its poles which is that, the customer has to go with a document to show that they want their poles. Thereafter, the poles are loaded in the client's vehicle and such a client is issued with the delivery note which indicates the quantity of the poles dispatched, the date of dispatch, the name of the officer in charge of the dispatch and the signature of the client or his representative and the approval from the office.

He confirmed to have received the letter dated 30th July 2008 which was copied to him. That upon receipt of the letter, he carried out investigations to find out what the complaint was. He responded to the same and explained to the second defendant that it was the representative of the first defendant who took the 180 poles that they were referring to. He stated that his explanation was both in writing and in the meeting that he held with the chairman of the 1st Defendant who wanted to know how the poles left G.T.I. He gave the first defendant the invoice and the delivery notes as the poles were being loaded in the vehicle and that the representatives of the first defendant and that of G.T.I signed the necessary documents.

He stated that the claim by the defendants that the poles were taken by the plaintiff were incorrect. He could recall the name of the first defendant's representative whom he dealt with when the poles were carried, namely Robert Kingori and he was introduced to G.T.I by the first defendant. He confirmed that the delivery notes 19051 and 19065 were prepared by his staff and he is the one who signed 19051. He approved the dispatch of the 180 poles on 4th March 2008 and the said Robert Kingori put his signature and the I/D number. That the other delivery note no 19065 of the 180 poles was signed for by Ngoko J. N who was the assistant manager in charge of the pole plant. He signed for him while Robert Kingori signed as a representative of the first defendant.

He averred that the allegation of theft made by the first defendant against the plaintiff was false and he supplied the first defendant with all the documents proving that the allegation was not true. It was his evidence that if the poles were removed illegally, it is G.T.I that would have been responsible because they were the custodians of the poles. The first defendant did not demand any poles from them or the costs of the poles.

In cross examination he confirmed that the poles were for the first defendant but were dispatched on the 4/3/2008 and on 8/3/2008. He stated that once they release the poles, they do not follow up to know where the poles are delivered to. It is the customer who issues delivery notes to the person that they intend to supply the poles to.

The defence called one witness who is Suraj Gopinadhan who is the general manager of the 1st Defendant and who is also the 2nd defendant in the case. It was his evidence that the first defendant supplies poles to Kenya Power & Lightning Company Limited. That during the year 2006-2008, they had a huge consignment of 5175 poles which they had imported from South Africa and South America and which they had stored at G.T.I as they had an order from K.P.L.C but they had not been given the destination to deliver them.

It was his evidence that they had their representative called Robert Kingori who was authorized to do loading at GTI whom they would direct where to deliver the poles. They would write delivery to KPLC

and release the trucks and their representative would inform G.T.I who would issue a delivery note. That it was not the responsibility of G.T.I to know where they were delivered.

That in the month of March 2008 onwards, they got the destination where to deliver the poles and the exercise of removing the poles took more than 4 months and it involved many trucks and when they were through with the exercise, their records showed that there were about 180 poles still remaining in the store. That on engaging in the verification exercise, they discovered that two invoices Nos. 19051 and 19065 in the list of GTI were not appearing in their list. They realized that the poles did not get to KPLC. They reported the matter to Kenindia insurance company who appointed protectors investigators who found that the poles were delivered to KPLC on the 4/3/2008 and on 8/3/2008 and were delivered in the name of Rural Distributors Enterprises Limited. He testified that they contacted a Mr. Ndegwa whom he was told was the representative of the plaintiff and who said he was going to replace them and when nothing happened, he wrote the demand letter dated 30th July, 2008. He admitted that they copied the letter to Kenindia Insurance, Protectors Investigators Limited, Mr. Momanyi (PW2) and Rosogo Investments. The poles were transported by Rosogo Investments. He denied that the letter dated 30th July 2008 is defamatory.

In cross- examination he admitted that he never dealt with any director of the plaintiff and he never discussed the matter with any of them. He admitted that the poles were not collected by the plaintiff from GTI and the reasons why he connected the plaintiff with theft, are the documents from KPLC and the registration numbers for the vehicles that were used to transport the poles. He stated that their representative Robert Kingori made a report to the police in which he indicated the number of poles lost as 5,000 but the value of 2.4 million was correct. He confirmed that the directors of the plaintiff were not charged in court with the alleged theft. He stated that the vehicles that transported the poles belong to Rosogo investments and the vehicles carried the poles from GTI. It was his evidence that the deliveries were signed for by their representatives at GTI.

Parties filed their written submissions which I have duly considered together with the evidence on record.

In my view, the following are the issues for determination

1. Whether the publication was authored by the defendants and whether the words refer to the plaintiff.
2. Whether the publication was false and malicious
3. Whether it was defamatory of the plaintiff
4. Whether the defendant is entitled to Ksh 2.5 million as claimed in the counter claim.
5. Whether the plaintiff is entitled to general damages for Libel.
6. Whether the defendants is entitled to general damages for loss of business.
7. Who should bear the costs of the suits and the counter claim.

The plaintiff has sued for defamation. In Gatley on Libel and Slander 8th Edition, the tort of defamation is described as follows

“A defamatory imputation is one to a man’s reputation which tends to lower him in the estimation of the others or expose him to hatred, ridicule, contempt or to injure his office, trade, profession or to injure his financial credit.

In the case of **Odonkara Vs Astels (1970) E.A 374** a defamatory statement was described as;

“A statement is defamatory of a person of whom it is published if it is calculated to lower him

in the estimation of ordinary, just and reasonable men.

Another Authority often cited as definitive on defamation is that of **Thomas Vs CBC (1981) 4 WWR 289** as follows;

“The gist of the torts of Libel and slander is the publication of matter (usually words conveying a defamatory importation). A defamatory importation is one to a man’s discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt, ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit. The standard of opinion is that of right thinking persons generally. To be defamatory, an importation need not have actual effect on a person’s reputation. The law looks only to its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it. Conveying untruth alone does not render an imputation defamatory.”

The elements of the tort of defamation are well set out in the case of **J. Kudwoli Vs Eureka Educational and Teaching consultants & 2 others HCCC No 126/1990** which are;

1. The matter of which the plaintiff complains was published by the defendant.
2. The publication concerned or referred to the plaintiff.
3. That it was defamatory in character.
4. That it was published maliciously and
5. That in slander, subject to certain exceptions that the plaintiff has suffered special damages.

The same principles were repeated in the case of **Wycliffe A Swanya Vs Toyota East Africa Limited and Francis Massai (Nairobi CA 70/2008)**.

In the case before us, it is not in dispute that the defendants published the letter complained of and that it refers to the plaintiff. Indeed the letter was addressed to the plaintiff.

As to whether the publication was false and malicious, the plaintiff has relied on the case of **J. P Machira Vs Wangethi Mwangi & Another (1998) eKLR** and that of **Phineas Nyaga Vs Gitobu Imanyara (2013) eKLR**. In the case of **Phineas Nyaga, Justice Odunga** stated;

“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.”

The court has considered the contents of the letter dated 30/7/2008 and in the relevant part, it reads as follows

“... when we contacted you a month ago with this information you admitted that the poles were taken by you on loan and you intended to return them. According to us, this is theft because if you are taking “goods on loan” you have to take our consent, which you have never obtained from us.

.... the investigator appointed by the insurance company will first lodge a complaint with police, transporters, Rosogo investment have reported to KPLC. Both companies being independent suppliers of poles to KPLC, this kind of report will have a negative effect on your stand with KPLC.”

In the said letter the defendants have imputed that the plaintiff stole the 180 poles.

The evidence on record by the plaintiff is that it did not steal the said poles and it had nothing to do with the alleged theft. This evidence by PW1 is corroborated by PW2 whose evidence is very material to this case because the poles said to have been stolen by the plaintiff were in the custody of the GTI when they were stolen.

PW2, was very categorical that the poles were released with the knowledge and consent of the first defendant's representative whom, the first Defendant had introduced to them namely Robert Kingori who signed all the necessary documents on behalf of the first defendant. This fact was not denied by the defendants. In fact it was DW1's evidence that once the poles are released by GTI it is not their responsibility to know where they are delivered.

The letter dated 30th July 2008 was replied to vide theirs dated 8th September 2008 in which PW2 confirmed to the defendants that the delivery notes, invoices with respect to the 180 poles were duly signed for by GTI and the representative of the first defendant. In his evidence he confirmed that the plaintiff had nothing to do with the alleged theft of the poles and that if such theft ever occurred, the right entity to explain was G.T.I because the poles were in their custody yet the first defendant did not raise any issue with them.

In their defence, the defendants have relied on the defence of truth and justification. The defence of privilege has also been relied on. The defendants avers that the letter dated 30th July 2008 was written with the sole purpose of inquiry of the whereabouts of 180 missing poles. They have relied on the case of **Stephen Thuo Muchina Vs Wainaina Kiganaya & 2 others (2012) eKLR** and that of **Bedan Moses Kinyongu Mbae Vs Robinson Njagi Gachogu (2007) eKLR**.

The defendants have further submitted that in writing the letter, there was no malice on their part but rather, they were simply trying to communicate their displeasure. That the property belonging to the first defendant left the yard and they were within their right in trying to get an explanation from the plaintiff and that according to him, taking somebody's property without their consent or approval is theft.

In the defence mounted by the defendants, I find that they were unable to prove that the publication was true. DW1 who testified on his own behalf and that of the first defendant clearly admitted that their representative signed for the poles before they left G.T.I. He told the court that the reasons for connecting the plaintiff with the theft are the vehicles that were used to transport the poles and the documents that were presented to KPLC. No evidence was tendered before the court to connect the plaintiff with the theft.

Though DW2 told the court that he spoke with a certain Mr. Ndegwa who agreed to replace the poles, the plaintiff denied knowledge of the said person. What is important to note is that the said Mr. Ndegwa, if at all he existed, is neither a director of the plaintiff nor a senior person in the company. Assuming that DW1 ever dealt with a certain person who was an employee of the plaintiff as alleged, there is no evidence that it was agreed between them, that the poles would be replaced. Secondly, the said Mr. Ndegwa was not a director of the plaintiff and therefore he could not legally bid the plaintiff in anyway. The defendants ought to have carried out proper investigations with a view to establishing the correct position with regard to the disappearance of the said poles before writing the letter dated 30th July, 2008. It is also noted that the matter was reported to the police but no director of the first plaintiff was charged with theft of the said poles and therefore, for the 2nd Defendant to write the letter dated 30/7/2008 accusing the plaintiff of theft, there was malice on their part and the letter was defamatory of the plaintiff. I find the defendants liable for defamation.

On the defendants counter claim, I find that no evidence was lead in support of the same and in the premises, I find that it was not proven and I dismiss the same.

On damages, I have considered the submissions by the parties in that regard. The plaintiff has asked for ksh (100,000,000) one hundred million and has relied on a number of cases among them are **Johnson Evans Gicheru Vs Andrew Morton & Another (2005) eKLR** where a sum of ksh 6,000,000 was awarded. **Alnashir Visram Vs the Standard Limited (2016)** where a sum of ksh. 18,000,000 and ksh

8,000,000 for general and exemplary damages respectively were awarded, Kipyator **Nicholas Kiprono Biwott Vs clays Limited & 5 others (2000) eKLR** where Ksh. 15,000,000 and ksh 15,000,000 were awarded as general and exemplary damages.

The defendants did not address the court on the quantum of damages to be awarded to the plaintiff. I find that the figures suggested by the plaintiffs are too high. In my view a sum of ksh 5 million is reasonable as general damages. I also award ksh. 2 million for failure by the defendants to apologize even after a demand letter was written to them.

In conclusion, the plaintiff is awarded a total of seven (7) million as damages. The plaintiff is also awarded costs of the suit.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **20th** day of **December, 2017**

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....*for the Plaintiff*

.....**1st for the Defendant**

.....**2nd for the Defendant**