



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 1161 of 2000

ABINEL ARIGA OGAMBA.....PLAINTIFF

VERSUS

1. THE PEOPLE LIMITED

2. SHEM OIRERE.....DEFENDANTS

JUDGMENT

1. The Plaintiff's suit is in defamation. He seeks general damages and an appropriate permanent injunction.
2. The Plaintiff's case as set out in his plaint is that at the material time he was trading under the name and style of *Finaland Agencies*, and that he was libelled in two articles published in the 1st Defendant's newspaper, *The People Daily*, of 24th May, 2000 (at page 16) and 1st June, 2000 (at page 18). The articles were written by the 2nd Defendant.
3. The words alleged to be defamatory of the Plaintiff are pleaded in paragraphs 7 and 10 of the plaint as follows –

Paragraph 7:

“FARMERS LOSE SHS. 3.2B IN N SCANDAL

A SCANDAL involving the giant *Kisii Farmers Co- operative Union (KFCU)* and the *Co-operative Bank of Kenya, Kisii Branch*, resulted in coffee farmers from Kisii, Gucha and Nyamira losing Shs. 3.2 billion, it was alleged yesterday.

In a hefty and detailed memorandum to the Minister for Agriculture, Chris Obure, 501 farmers' representatives from the three Kisii Districts alleged that co-operative societies affiliated to the *KFCU* were coerced into buying condemned nylon bags for packing coffee.

The *Co-operative Bank*, according to the memorandum dispatched to the Minister, refused to grant credit facilities to primary co-operatives until they committed themselves into buying the bags using part of the money. *KFCU* is alleged to have bought 150,000 nylon bags at KShs. 45/00 each and which cost the society KShs. 6 Million from *Fina Land Agencies* associated with the current *KFCU Chairman Stephen Ogamba*.

According to the representatives, the nylon bags led to massive losses of the crop because of the quality of the bags which had earlier been condemned by the *Coffee Board of Kenya (CBK)* and the *Kenya Planters Co-operative Union (KPCU)*.”

Paragraph 10:

“... As affiliates of the union further allege that they were coerced into buying condemned nylon bags, which later made them lose KShs. 3.2 billion in spoilt coffee in addition to the Shs. 6 million they paid for them.

The 150,000 bags were allegedly supplied to the Kisii Farmers Co-operative Union stores by the current chairman, *Stephen Ogamba*, through *Fina Land Agencies* at KShs. 45 and which the farmers paid a total of KShs. 6 million...”

4. The Plaintiff pleads that the said words were published maliciously and were, in their natural and ordinary meaning, meant and were understood to mean:

- (a) That the Plaintiff is an unscrupulous businessman.
- (b) That the Plaintiff through his business is guilty of defrauding *Kisii Farmers Co-operative Union* (KFCU).
- (c) That the Plaintiff is a dishonest person and has used corrupt means to acquire business.
- (d) That the Plaintiff is guilty of supplying sub-standard and/or defective goods to KFCU thereby resulting in massive losses to the members of the said union.
- (e) The Plaintiff is connected to the current KFCU management and has corruptly used these connections to obtain fraudulent business deals with KFCU.

He further pleaded result of the said words he has suffered in his character and has been exposed to contempt, ridicule and public odium, and has thereby suffered loss and damage.

5. The Defendants filed a joint statement of defence and admitted publication of the words complained of but denied that the same were false or malicious as alleged. They pleaded that the words were an accurate and fair account of a letter written by members of societies affiliated to KFCU and *Gusii Farmers Rural Sacco* to the then Minister for Agriculture and Co-operative Development on 24th March 2000 detailing their complaints against Stephen Ogamba.

6. The Defendants further contended that the words were published on an occasion of qualified privilege and denied that the same were defamatory in any way. They denied that the Plaintiff had suffered any loss or damage as a result of publication of the said words.

7. The Plaintiff testified on his own behalf. He called no other witness. For the Defendants only the 2nd Defendant testified. I have considered their testimonies. I have also considered the written submissions made on behalf of the parties.

8. The Plaintiff testified that although the words complained of (admitted in evidence as **Exhibits P1** and **P2**) did not refer to him by name, they referred to his business, *Finland Agencies*, and that as proprietor of the same he was directly affected by them. He produced in evidence a certificate of registration of the business as Exhibit P3. He further testified that he was injured in his reputation by publication of the words complained of, and that his business was adversely affected because due to farmers' fury he had to close shop, thereby losing millions of shillings. The allegation of monetary loss was not supported by any evidence.

9. The 2nd Defendant admitted writing the words complained of. He however contended that he based both stories on a memorandum that was given to him by the members of the societies affiliated to KFCU who were complaining about the management of the Union at the time and wanted their grievances highlighted in the media.

The said memorandum dated 24th March, 2000 was produced in evidence as **Exhibit D1**.

10. A plaintiff in a suit founded on defamation must prove -

- (i) That the matter of which he complains was published by the defendant.
- (ii) That it was published of and concerning him.
- (iii) That it is defamatory in character.

11. It is not in contention that the words complained of were published by the Defendants. But, did they concern the Plaintiff? Were they defamatory in character, and did they injure the character and reputation of the Plaintiff? These are the main issues to be determined in this suit.

Did the words complained of concern the Plaintiff?

12. The story in the two articles concerned **Finaland Agencies** among others. The Plaintiff produced documentary evidence that he was the proprietor of this business name and was trading as such. It was his uncontroverted testimony that **Finaland Agencies** was his trade name and that this was known in Kisii where he traded. Anybody reading the stories would thus immediately know that in as far as the stories referred to **Finaland Agencies** they would be referring to the Plaintiff. The words complained of therefore indeed concerned the Plaintiff. I so hold.

Were the words complained of defamatory in character?

13. The essence of the words complained of was that Finaland Agencies (and therefore the Plaintiff) and others had swindled local farmers of millions of shillings through their coffee co-operative societies by selling to them at exorbitant prices, sub-standard sisal and plastic bags, leading to financial ruin of the societies and their members. Nothing could be more defamatory unless true. The Defendants pleaded justification. They did not even attempt to prove that the words complained of were true. I therefore hold that those words were defamatory in character.

14. The Plaintiff also pleaded that the words complained of were maliciously published. The Defendants asserted in the two articles that the Plaintiff had been involved in swindling farmers of millions of shillings. They did this without checking with the Plaintiff first to hear his side of the story. When the Plaintiff complained in a letter of demand they offered no apology or an opportunity for correction. The 2nd Defendant in his testimony in court repeated his defence of justification without offering any evidence. I am thus satisfied that the Defendants' intention in publishing the words complained of was to injure the character and reputation of the Plaintiff. The words were therefore written and published with malice.

Damages

14. Libel is actionable *per se*, and a successful plaintiff need not prove actual harm or damage to his character to be entitled to some damages. But the quantum of such damages will to a large extent depend on the actual harm proved in court by evidence. As already noted, the Plaintiff was his only witness. There was thus no independent evidence of harm to his character done by the words complained of. He could easily have called witnesses to testify in this regard if indeed his character and reputation had suffered great harm. He alleged that he had to close down his business because of hostility by farmers on account of the words complained of, and that as a result he suffered great financial loss. He produced no evidence of this loss.

15. A successful litigant in a defamation action is entitled to general compensatory damages. Such damages will assuage him for the damage to his reputation, and hopefully also vindicate his good name. In assessing such damages, the court will take into account the distress, hurt and humiliation which the defamatory publication has caused the plaintiff. The court will consider the gravity of the libel. The more

closely it touches the Plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious the libel is likely to be. See the case of **Johns –vs- MGN Limited [1996] All E.R 34**. It was further stated in this case as follows -

“The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the Plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologize, or cross-examines the plaintiff in a wounding or insulting way.”

16. The Plaintiff has also claimed exemplary and punitive damages. In the case of **Mikidadi –v- Khaigan and Another [2004] eKLR 496** Ochieng, Jheld, correctly in my respectful view, *inter alia* -

“Exemplary damages are only to be awarded in limited instances, namely (a) (where there is) oppressive, arbitrary or unconstitutional action by servants of government; (b) (where there is) conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or (c) (in) cases in which the payment of exemplary damages is authorized by statute.”

The Plaintiff's case does not fit into any of these categories.

17. It is trite that an award of damages should not enrich a party but restore him to the position he was in before the injury. Further, awards in past decisions are mere guides and each case will depend on its own circumstances. In this case I have considered the fact that the Defendants have remained unapologetic throughout, the extent of the publication, and the distress, hurt and suffered by the Plaintiff.

18. Doing the best that I can with the material before me, I will award the Plaintiff general damages of KShs 850,000/00 with interest at court rates from the date of judgment until payment in full.

19. A permanent injunction such as is sought is not deserved; nor is it necessary in the circumstances of this case, and I decline to grant it.

20. The Plaintiff will have costs of the suit. It is so ordered.

21. Delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thanks God I have now fully regained my health.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF
SEPTEMBER 2012**

**H.P.G. WAWERU
JUDGE**