



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2668 of 1993

SAMURA ENGINEERING LTD T/A

**SAMURA COMMUNICATIONS.....
.....PLAINTIFF**

VERSUS

JACK & JILL SUPERMARKET LTD.....DEFENDANT

J U D G M E N T

By way of a plaint dated and filed on 2nd July 1993 the Plaintiff brought this suit against the Defendant claiming damages for defamation.

The facts giving rise to this suit are largely incontestable and may briefly be stated thus.

The Plaintiff is a limited liability company trading in the style and firm name of **SAMURA COMMUNICATIONS** the holders of a franchise from **NITSUKO AUTOMATION** products. On or about July 1992 the Plaintiff supplied and installed for the Defendant at the Defendant's request at the Defendant's business premises at Nairobi Nitsuko by key telephone system model NX – L – 308 with a standard extension telephones for consideration. On or about 20th March 1993 the Defendant requested the Plaintiff to supply the Defendant with one expansion card for the said system at purchase price of Shs. 52,800/=. The Plaintiff installed the said expansion card but the Defendant delayed to pay for the same. On 5th April 1993 the Plaintiff sent his employee who removed the said expansion card and took it without informing the defendant. This rendered the whole telephone system inoperative. On discovering about the removal of the expansion card the Defendant on 15th April 1993 wrote the following letter to the Plaintiff:

SAMURA ENGINEERING

P. O. BOX 73346

NAIROBI

ATT. MR M. NGARUIYA

RE: THEFT OF EQUIPMENT FROM OUR PREMISES

This is to inform you that one of your employees has stolen in broad daylight one whole expansion card

which belongs to Jack & Jill Supermarket. We have also informed the Criminal Investigation Department (CID) of the same and we expect criminal charges to be brought against you and your agents. You should have realized that the property belongs to the company once it has been signed for and if there was any question regarding payment, the queries should have been through the right channels. But since you have taken this equipment without any authority or consent from us this is purely a theft. It is also good that there was no chance of mob justice otherwise he would have been a victim which would have been your responsibility.

You had no right to take this equipment which legally belongs to us unless there was a court order and since you have taken it you are going to be criminally charged.

You are also cheating people with your glamorous advertisements and we also are going to report this to your principals in Japan.

Not only that but we are going to expose those criminal activities of yours to them and also your competitors.

If this kind of thuggery is all you know, then you should come and remove all the equipment within seven days and refund back our money immediately.

We also suspect that there was conspiracy between your salesman and our people to inflate the cost of these equipment and we have already taken action against this employee.

We are also demanding that you restore within 24 hours our direct lines which have been made unoperational by your vandalism. This is resulting in loss of business for us and we are taking legal action against you.

By copy of this letter to your principals we are demanding that forthwith terminate your franchise and give to more responsible and mature businessmen who do not resort to thuggery and blackmail.

Yours faithfully

Schon Nooram

Chairman

Jack & Jill Supermarkets Ltd

And on 24th April 1993 the Defendant wrote yet another letter to Nitsuko Corporation as follows.

NITSUKO CORPORATION

JAPAN

Dear Sir,

Six months ago our officers were installed with Nitsuko telephone System by your local agent M/s Samura Engineering. We now have a very strong complaint against these agents who have not only given us very bad services but behaved in unbusinesslike manner. They have stolen extension card from our offices and have messed up the whole telephone system. We therefore ask you as principals to either hand over the agency to someone more competent or remove the system from our premises immediately.

On or about 20th April 1993 the Defendant the following letter to the Managing Director Kenya Post and Telecommunication.

The Managing Director

Kenya Posts and Telecommunication

Nairobi

Dear Sir,

RE: STRONG COMPLAINT

We demand to know how the above company has been authorized for installation and maintenance of telephone equipment. They have installed a telephone system at our business premises which does not work and is resulting in loss of considerable amount of business. They do not have competent technical staff nor do they have competent management and do not deserve to be licenced. We wonder how they obtained this authorization, may be by dubious means and this should be immediately looked into.

And on 24th May 1993 the Defendant yet again wrote another letter to Plaintiff which contained the following words.

MR M. NGARUIYA

SAMURA ENGINEERING

NAIROBI

Dear Sir,

RE: NITSUKO SYSTEM AT OUR PREMISES:

We are now asking you to immediately remove the above system from our premises as it is no longer giving us the service we want. Since you removed the expansion card by force, we are unable to expand the system to our needs and therefore we have no choice but to ask you to remove it. Due to your negligence we have experienced a lot of losses in our business and if this system is not removed all losses incurred in the future will be debited you and further legal action taken.

Besides that we are totally dissatisfied with your attitude and maintenance of the system and we no longer require your services.

We give you seven (7) days to remove this "takataka" rubbish system from our premises failing which we will take further action.

Yours faithfully

SOHON NOORAN

This letter was copied to

1. The Managing Director, KPTC
2. The Commissioner of Police
3. Nitsuko Corporation – Japan

The Plaintiff testifying through Ngaruiya told the court that the above published statements were defamatory and that in their material and ordinary meaning meant and were undertook to mean:- that the Plaintiff was guilty of theft; that the Plaintiff and the Plaintiff's servants and/or employees are unfit persons to be engaged in the Plaintiff's business; that the Plaintiff is guilty of other criminal activities; that the Plaintiff was engaged in cheating and trickery in its business; that the Plaintiff is practicing

thuggery; that the Plaintiff was guilty of conspiracy to defraud; that the Plaintiff franchise with Nitsuko Corporation- Japan should be terminated; that the Plaintiff is comprised of irresponsible business persons and guilty of blackmail; that the Plaintiff is incompetent; that the Plaintiff should not be allowed to conduct its said business; that the Plaintiff obtained its authorization to conduct its business by improper or irregular manner and that the business in which the Plaintiff is engaged is “takataka” rubbish.

The Plaintiff further testified that by reason of the above defamatory statements the Plaintiff has been greatly injured in its business, credit and reputation and has been brought into hatred, ridicule and contempt.

The Defendant testifying through admits to have published the words complained of but contends that they are true in substance and fact. The Defendant in its defence testified that the equipment ordered by the Defendant and having been delivered to the Defendants and having been installed at the Defendants premises the property in the goods had passed to the Defendant and its removal without the Defendant’s consent and without informing the Defendant was illegal and the Plaintiff had no legal right to do so.

The wrong of defamation consists in the publication of a false and defamatory statement respecting another person without lawful justification or excuse. A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule or contempt or which has a tendency to injure him in his office, profession or calling.

From the evidence by both the Plaintiff and the Defendant it is not in dispute that the Defendant had ordered expansion card from the Plaintiff and the same was delivered to the Defendant by the Plaintiff and installed at the Defendant’s premises.

The Plaintiff in his evidence testified that after the installation of the expansion card the Defendant had to formalize with the Kenya Posts and Telecommunication Corporation by filling in the necessary forms and payment of the necessary fees to them before they could come and connect the extra lines. He further testified that the removal of the expansion card had no effect because the card had not started working and that the card was as at that time useless to the defendant. This raises an interesting questions. How could the Plaintiff demand payment for the equipment before the same had been tested and found to be working? How could the Defendant ensure that the equipment could work before he could part with his money.

This was highly unprofessional. Usually in business practice an equipment is installed, tested and be found working before payment is made. I agree with the Defendant that the Plaintiff acted unprofessionally when he installed the expansion card at the Defendant’s premises and before it was tested to ensure that it works went secretly and removed it without informing the Defendant. This removal according to the Defendant rendered the Defendant’s telephone lines even those other that had existed inoperational.

I agree with the Defendant that the property in the card had passed to the Defendant and the Plaintiff had no right to remove the same from the Defendant’s premises without the consent of the Defendant and to make it worse without informing him about the removal. If payment had not been made it was a debt. This sparked a reaction by the Defendant the way he did by writing the letters which the Plaintiff alleges contained defamatory publication.

To me what the Defendant did was a natural reaction to what the Plaintiff had done when the Plaintiff removed the expansion card without informing him and rendering the Defendant’s telephone lines inoperative. Having perused the alleged publication I find nothing defamatory in the same. All what the Defendant did was to request that equipment be made functional or if not the same be removed from his business premises as the same could not be used and the reference to the equipment as “takataka” rubbish the Defendant meant the equipment and not the Plaintiff and if anything it could be the manufacturer who could feel offended by his product being called ‘takataka’ rubbish and not the dealer.

The Plaintiff has not established that the said statement which were published of him by the defendant

were defamatory and therefore his claim cannot succeed and the same must fail. Accordingly the Plaintiff's suit dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 17th day of October 2008.

J. L. A. OSIEMO

JUDGE