



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS  
Civil Case 832 of 2005**

**GLADYS CHEMUTAI BIEBEI .....PLAINTIFF**

**V E R S U S**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

**J U D G M E N T**

By her amended plaint dated 16<sup>th</sup> August, 2005 (the original plaint is dated 4<sup>th</sup> July, 2005) the Plaintiff herein, GLADYS CHEMUTAI BIEBEI, seeks the following reliefs against the Defendant, BARCLAYS BANK OF KENYA LIMITED:-

- (a) General damages.**
- (b) Damages “in the footing of aggravated or exemplary damages”.**
- (c) Special damages of KShs. 5,400/00.**
- (d) Costs of the suit.**
- (e) Interest on (a), (b), (c) and (d) from the date of filing suit till payment in full.**

Her case as pleaded is that she was at all material times a customer of the Defendant holding a savings account at the Defendant’s Hurlingham branch, Nairobi; that sometime in August and September, 2004 she applied for a visitor’s visa to enable her to visit the United Kingdom for a holiday; and that the Defendant, through its agent, official, servant and/or employee “falsely and maliciously informed and caused the British High Commission/Embassy in Nairobi to conclude and form an opinion defamatory of the Plaintiff”. The opinion is set out in paragraph 6 of the amended plaint. The alleged natural and ordinary meaning or innuendo of the alleged defamatory opinion is set out in paragraph 7 of the amended plaint.

It is further pleaded that by virtue of the said act of the Defendant’s servant, agent and/or employee the Plaintiff has been seriously injured in her credit and reputation, and has been brought into public scandal, odium and contempt in the estimation of right-thinking members of society, and that she has been subjected to mental anguish and agony.

The Plaintiff also pleads that the Defendant owed her a fiduciary duty of confidentiality and care which it breached by disclosing information on her bank account to a third party without her consent and to her detriment; and that in acting the way it did the Defendant curtailed and/or hindered the Plaintiff from

exercising her constitutional right and freedom of movement, in particular, to visit the United Kingdom.

The Defendant denied liability by its amended defence dated 23<sup>rd</sup> August, 2005 (the original defence is dated 4<sup>th</sup> August, 2005). It further pleaded that any information supplied to the British High Commission was given in good faith without negligence or malice and after exercise of reasonable care in the ordinary course of business; that the words complained of were neither made by the Defendant nor its agent and cannot therefore be attributed to it; and that in so far as the Plaintiff's suit is based on a claim for defamation, the same is fatally defective as she "has not cited any alleged words said to have been uttered or published by the Defendant."

The Defendant also pleaded in the alternative that by providing the British High Commission with a declaration form containing her bank statement, the Plaintiff impliedly gave her consent to the Defendant to disclose information relating to her account because she knew, or should have known, that the British High Commission would seek verification of the information supplied to it; and that whatever information was supplied to the High Commission was true as the signature on the visa application varied significantly from the Plaintiff's specimen signature held by the Defendant.

The Defendant denied that the words complained of can be construed either in their natural and ordinary sense or by innuendo or necessary implication in the manner or form pleaded in paragraph 7 of the amended plaint.

Finally, the Defendant pleaded that the Plaintiff acted in breach of her contract with the Defendant by "employing varied signatures from her specimen in a manner likely to cause confusion or facilitate fraud, and in breach of her duty of care owed to the Defendant", and that the Defendant was under a public duty of disclosure in the circumstances.

At the hearing the Plaintiff testified (as PW2) and called two witnesses, DR. JOE MICHAEL KIPRONO SANG' (PW1) and NELSON TANUI (PW3). The Defendant called one witness, TURANTA SOME (DW1). I have considered the testimonies of all these witnesses. I have also considered the written submissions of the parties and the authorities cited.

No agreed statement of issues or any statement of issues at all was filed. From the pleadings and the submissions of the parties I consider the following to be the issues to be decided in this suit:-

1. Whether the suit is defective for failure to set out in the plaint the exact words allegedly uttered or published by the Defendant and alleged to be defamatory of the Plaintiff, and whether there is a cause of action in defamation disclosed.
2. Whether the opinion of the British High Commission allegedly defamatory of the Plaintiff can be attributed to the Defendant.
3. Whether the words of the Defendant complained of were defamatory of the Plaintiff.
4. Whether the Defendant owed to the Plaintiff a fiduciary duty of confidentiality and care.
5. Whether, by the Plaintiff's act of giving her bank statement to the British High Commission, the information relating to her bank account ceased to be held in confidence by the Defendant, and whether, by the same token, the Plaintiff consented to release of information on her account by the Defendant to the British High Commission?
6. Whether breach of the Plaintiff's constitutional right of freedom of movement is properly pleaded and proved.
7. What damages are properly awardable to the Plaintiff, and what is the quantum thereof?

**1. Is the Plaintiff's suit defective for failure to set out in the plaint the exact words allegedly uttered**

**or published by the Defendant and alleged to be defamatory of the Plaintiff, and is a cause of action in defamation disclosed?**

The Plaintiff has pleaded thus at paragraph 6 of the amended plaint:-

**“The Defendant through its agent, official, servant and/or employee falsely and maliciously informed and caused the British High Commission/Embassy in Nairobi, to conclude and form the following opinion regarding the Plaintiff.....”**

The particular words alleged to have been uttered or published by the Defendant to the British High Commission are not set out. How then can the court assess whether those alleged words are defamatory of the Plaintiff? It is trite that in defamation cases the exact words uttered or published by the defendant and alleged to be defamatory of the plaintiff must be set out in the plaint. This was not done in the present case and by that reason only the Plaintiff's claim based on defamation must fail.

## **2. Can the opinion of the British High Commission allegedly defamatory of the Plaintiff be attributed to the Defendant?**

In this regard the Plaintiff's case as pleaded is that the Defendant, through its agent, official, servant and/or employee “falsely and maliciously informed and caused the British High Commission/Embassy in Nairobi to conclude and form an opinion defamatory of the Plaintiff”. So, the words alleged to be defamatory are not those of the Defendant but the conclusion and opinion of the High Commission. Can the conclusion and opinion of the High Commission be attributed to the Defendant? I think not. I do not see how one can be tortiously liable for the conclusions and opinions of another person. I respectfully agree with the learned counsel for the Defendant that there is no such cause of action as relates to defamation known in law.

## **3. Were the words complained of defamatory of the Plaintiff?**

The Plaintiff has complained of an opinion formed by the British High Commission in regard to her visa application as a result of the information allegedly passed to the High Commission by the Defendant. It transpired in evidence that the information passed by the Defendant was that the signature in the visa application did not agree with the specimen signature of the Plaintiff held by the Defendant. The High Commission therefore formed the opinion that the bank account whose statement accompanied the Plaintiff's visa application did not belong to her and that therefore she may not be able to maintain and accommodate herself in the United Kingdom; and that her misrepresentation of her financial status cast serious doubt on the overall credibility of her application, leading the High Commission to doubt that she would be a genuine visitor to the United Kingdom for a limited period, or that she intended to leave the country upon completion of her visit.

The complaint here is that by the information it passed to the High Commission the Defendant caused the Plaintiff to be defamed by the High Commission. That information, as already seen, was, or was to the effect, that the signature in the visa application did not agree with the Plaintiff's specimen signature held by the Defendant. The Defendant has pleaded that indeed those two signatures differed significantly.

I have looked at the two signatures. The one on the visa application is to be found in Exhibit D1 while the Plaintiff's specimen signature held by the Defendant is to be found in Exhibit D4. There is, to my untrained eye, a marked difference in the two signatures. It must be borne in mind the circumstances in which DW1 made the comparison. Although he had no doubt that the bank statement forwarded by the British High Commission was genuine and that it related to the bank account of the Defendant's customer called GLADYS CHEMUTAI, DW1 could not have known, as a matter of fact, that the visa application had been made by the customer. It could well have been made by a person passing himself or herself off as GLADYS CHEMUTAI, the Defendant's customer. It is indeed true, as the Plaintiff asserted, that the Defendant could easily have found out if the visa application had been made by the customer by simply calling her on the telephone or otherwise. But then, the Plaintiff herself never bothered to alert the

Defendant that she had made a visa application and provided the High Commission with her bank statement and that the High Commission might contact the Defendant to verify if the bank account belonged to the visa applicant. In cross-examination she conceded that she knew that the High Commission would do just that. So, if the Plaintiff would not bother to alert her bankers of her visa application and the expected inquiry by the High Commission, why should she expect her bankers to bother to contact her once the inquiry was made?

As I have already observed, to my untrained eye the two signatures in issue appear significantly different. It is thus not unreasonable that DW1, also not a trained document examiner, reached the same conclusion. Bearing in mind that the Defendant's first duty was to protect the interests of its customer in relation to her bank account (not in relation to her other interests outside the bank, including visa applications), I do not find that DW1's communication to the High Commission to the effect that the signature on the visa application did not agree with the customer's specimen signature kept by the Defendant was malicious or defamatory of the Plaintiff. The words complained of were therefore not defamatory of the Plaintiff.

#### **4. Did the Defendant owe to the Plaintiff a fiduciary duty of confidentiality and care?**

I accept the submissions of the Defendant's learned counsel that it is trite law that a banker is not the trustee of its customer; therefore, there is no fiduciary duty of confidentiality and care. I also accept that the relationship between a banker and its customer gives rise to an implied duty of confidence, that is, that all the affairs of the customer held by the banker are held in confidence. It is an implied term of the contract between them.

The issue here is whether the Defendant communicated any confidential information relating to the Plaintiff's affairs to a third party in contravention of the above-stated implied term of their contract. The Defendant did not communicate to the British High Commission any information regarding the Plaintiff's bank account. That information had already been placed in the hands of the High Commission by the Plaintiff herself when she attached her bank statement to her visa application. What the Defendant communicated to the High Commission was in fact the opinion that the signature on the visa application did not agree with the customer's specimen signature held by the Defendant. Was this, then, information regarding the customer's bank account? It certainly was not such.

#### **5. Did the Plaintiff's act of giving her bank statement to the British High Commission render the information relating to her bank account held by the Defendant no longer confidential?**

It will be recalled that the Plaintiff conceded that she knew that the British High Commission would contact her bankers to verify the information she gave regarding her financial status. Therefore, by giving her bank statement to the High Commission, and knowing that the High Commission would seek verification from the Defendant, the Plaintiff is deemed to have consented to the Defendant giving any necessary information regarding her bank account to the High Commission. But this point is moot because I have already found that the opinion given by the Defendant that the signature on the visa application did not agree with the Plaintiff's specimen signature held by the Defendant did not amount to information regarding her bank account.

#### **6. Is breach of the Plaintiff's constitutional right of freedom of movement properly pleaded and proved?**

The procedure for seeking protection of one's fundamental rights under the Constitution is set out in the rules made under section 84 of the Constitution. That procedure requires pleading in a certain way, including stating the precise right under the Constitution alleged to have been breached. There is no application before the court under those rules.

In any event, does the Plaintiff have a constitutional right to travel to the United Kingdom? She no doubt has the constitutional freedom of movement. But her entry into the United Kingdom will not depend on the Constitution of Kenya but on an entry permit that may or may not be granted by the

Government of the United Kingdom. It is to stretch reason to argue that by pointing out that the signature on the visa application did not agree with the Plaintiff's specimen signature held by the Defendant the Defendant thereby curtailed or hindered the Plaintiff from exercising her constitutional right and freedom of movement.

Having found as I have regarding the first six issues, the upshot is that the Plaintiff has not proved her case on a balance of probabilities. It thus fails and is hereby dismissed with costs to the Defendant.

In the event that I am reversed regarding liability on appeal, I would say the following regarding damages. The communication from the Defendant to the High Commission was both verbal (by telephone) and written. There is thus both slander and libel. In slander the Plaintiff must prove loss. In the present case I would find that the Plaintiff has proved injury to her character and reputation, at least in the eyes of the British High Commission. Libel on the other hand is actionable *per se*; the Plaintiff need not prove any injury as long as the words complained of are defamatory of her character and reputation.

Compensatory damages will be awarded in order to vindicate the Plaintiff in the eyes of the public and to compensate her for the injury caused to her reputation and character. The Plaintiff would be entitled to these compensatory damages.

Aggravated damages will normally be awarded where, by his conduct, the Defendant has aggravated the defamation. It will also depend on the nature of the defamation and various other factors. In the present case I do not find that aggravated damages are justified. I also do not find that exemplary damages are called for. They will normally be awarded to punish the Defendant, primarily where the defamation was actuated by malice. I would find that in the instant case the Defendant was not actuated by malice.

Taking all relevant facts placed before the court into consideration, and doing the best I can, I would award the Plaintiff damages of KShs. 400,000/00. But in the event, her suit is dismissed with costs to the Defendant.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT**

**THIS 30<sup>th</sup> DAY OF NOVEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**