

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

Civil Case 721 of 2005

KENYA AKIBA MICRO FINANCE LTD.1ST
PLAINTIFF

GIDEON MWITI IREA2ND
PLAINTIFF

VERSUS

THE STANDARD LTD.
.....DEFENDANT

R U L I N G

On the 13th June 2005, the Plaintiffs, Kenya Akiba Micro Finance Ltd. and Gideon Mwitira, sued the Standard Ltd. the publisher of “**The Standard**” newspaper claiming damages for libel arising out of an article published in the issue of the 13th June 2005. It was alleged that Kenya Akiba Micro Finance Ltd. had defrauded and duped its customers and quoted an instance where a named customer had been taken on a wild goose chase and ended without the loan he had applied for after paying a deposit of K.Sh.47,000/= and delivering his title deeds to the Plaintiffs.

Fearing that there was a danger that the Defendant might publish further defamatory articles, the Plaintiffs, in addition to general damages, asked for a permanent injunction to restrain the Defendant from making or printing any further adverse public comment on the matter of fraud touching on the Plaintiffs.

On the same day, the Plaintiffs applied for a temporary injunction under Order 39 rule 2 of the Civil Procedure Rules. An interim injunction was granted, *ex parte*, by Ransley, J on the 14th June 2005, which order has been extended from time to time.

The application is supported by three Affidavits: one sworn by the Second Plaintiff and the other two by two happy and satisfied customers of the First Plaintiff, Henry Kariuki Mbae and Joseph Wamwayi Ondundo. On behalf of the Defendant, the Replying Affidavits were sworn by Danti Kahura, the Journalist who actually wrote the offending article, and Peter Wainaina who claimed he had been defrauded by the Plaintiffs.

The Defendant filed a Defence on the 15th July 2005 and in paragraph 5 thereof raised the defence of justification. It is averred that if and in so far as the words complained of in their natural and ordinary meaning bore or were understood to bear the meanings set out in paragraph 5, they were true in substance and in fact. The Replying Affidavits of Danti Kahura and Peter Wainaina are to the same effect.

At the hearing of the Application, Miss Githinji, learned counsel for the Plaintiffs, submitted that the words complained of did not constitute fair comment and were published maliciously and caused panic among the Plaintiffs’ customers. In relation to the case of Peter Wainaina, Miss Githinji said what had happened was merely a delay. She also said the publication was intended to paralyze the operations of the First Plaintiff.

Mr. Gitonga, learned counsel for the Defendant, submitted that it is not in the public interest to restrain the Defendant from exposing acts of fraud perpetrated on the public by the First Plaintiff. In his submission, the Plaintiffs have not established a *prima facie* case with a probability of success.

As I have already said, the Defendant has filed a Defence in which the defence of justification has been raised and also provided particulars in some detail. What the Defendant has set out to do is that it will, at the trial, adduce evidence to prove that the words complained of are true. The Defendant is not relying on privilege or any such defence. It is saying that what it published was true in substance and in fact.

In my considered view, where the defence of justification is pleaded, a court should treat with care any application for injunction unless it can be shown that there is an element of malice. I have read the Affidavits of Mr. Kahura and Mr. Wainaina and I think they raise issues of substance.

In paragraph 5 of the Defence filed on the 15th July 2005, the Defendant named Peter Wainaina as the customer who was defrauded by the Plaintiffs. There is no evidence that a Reply to Defence has been filed to contest the complaint made by Mr. Wainaina.

On the 21st July 2005 and without leave of the court, the Plaintiffs filed two Supplementary Affidavits sworn by Henry Kariuki Mbae and Joseph Wamwayi Odundo, the two happy and satisfied customers of the First Plaintiff referred to earlier herein. However, there was no supplementary or further affidavit from the Plaintiffs themselves to answer the serious allegations made by Mr. Wainaina in his Affidavit of the 13th July 2005.

In the end, I have come to the conclusion that the Plaintiffs have not established a *prima facie* case with a probability of success. Accordingly, the Plaintiffs are not entitled to an order of temporary injunction. Consequently, the Chamber Summons application dated and filed on the 13th June 2005 fails and it is ordered that it be and is hereby dismissed with costs to the Defendant.

It is further ordered that the interim injunction granted on the 14th June 2005 and the order made by Njagi, J on the 23rd September 2005 to maintain the *status quo* be and are hereby respectively vacated and discharged.

Dated and delivered at Nairobi this Third day of March, 2006.

P. Kihara Kariuki

Judge