REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE NO. 15 OF 2001

1. **BUSIA TEACHERS CO-OPERATIVE CREDIT AND SAVINGS SOCIETY LTD**

2. **ANDEREA LUMUMBA KECHULA ……..…… PLAINTIFFS**

VERSUS

NATION MEDIA GROUP LTD ………........................……... DEFENDANT

J U D G M E N T

The plaintiffs commenced an action against the defendant and prayed for general and aggravated damages plus costs for libel in an amended plaint dated 15th day of February 2003. The defendant denied the plaintiffs' claim by filing an amended defence dated 3rd March 2003.

The basis of the plaintiffs' action is the publication contained in the Daily Nation of 19th February 2001 at page 17 a newspaper owned by the defendant. The offending publication read as follows:

"Society Issues Bad Cheques.

By Nation Correspondent.

More than 300 teachers and their school going children were on Saturday stranded in Busia town after a cooperative society gave them bouncing cheques.

The teachers, who were still struggling to return to their homes yesterday morning, expressed their lack of confidence in the management of the Society and asked the Government to immediately probe the Society's accounts.

"We applied for school fees loans in September last year, but the management has been giving us false promises. We were forced to sleep in the cold because we were depending on this money. We just do not know how we will get home now" said Mrs Jerida Otieno."

The society's chairman, Mr Andrew Kechula blamed the problem on a delay by the Teachers Service Commission to remit deductions from the teachers salaries to the Society.

He said that they issued the cheques hoping that the TSC would have disbursed the money to the society's accounts by the time the teachers presented their cheques for cashing.

Most of the teachers travelled long distances from Budalangi, Butula Funyula, and Nambale divisions to Busia town to cash their cheques.

The teachers said they had been given the bad cheques after pressure increased on the management to issue school fees loans.

“We had travelled with our children hoping to get money to take them to school, but instead we are now stranded with our children, whose fate we do not know” Mr Paul Mudimu said.”

The plaintiffs complained that the article referred and was understood torefer to both the plaintiffs and in its natural and ordinary meaning meant and was understood to mean that the 1st plaintiff was insolvent and incapable of meeting its financial obligations to its members.

It was further averred by the plaintiffs that the article was false and malicious aimed at causing mistrust amongst the 1st plaintiff’s members and employees and was further meant to cause dissatisfaction in the

leadership of the 2nd plaintiff who is now viewed as being incapable of leading the 1st plaintiff as its official.

The defendant denied the plaintiffs’ claim in its amended defence and stated that the facts published were fair comment made upon facts which are matters of public interest. The defendant further averred that the publication complained of was done *bona fide* and without malice but under the sense of public duty and in honest belief that they were true. The defendant further invoked the defence that the publication was privileged information.

When this matter came up for hearing the plaintiffs sought for and was granted leave to rely on the evidence tendered on the 6th day of March 2002 before the Honourable Lady Justice Mary Ang’awa. The record reveals that two witnesses testified in support of the plaintiffs’ case.

The 2nd plaintiff, Andrea Lumumba Kechula who is the 1st plaintiff’s chairman testified as PW I. He produced in evidence a copy of the Daily Nation of 19.2.2001 which contained the offending publication. He pointed out the portion which referred to him in his capacity as the chairman of the 1st plaintiff. He denied having spoken to the press as portrayed in the paper. It was his evidence that the statement attributed to him was false and malicious. He further stated that the publication portrayed him as an incompetent and dishonest person hence he was not worth to hold the position he held as the chairman of the 1st plaintiff. He was able to show that he was at Port Victoria at the time when the statement was made. This witness was able to show that he and the first plaintiff did not issue bad cheques. His evidence showed that the 1st plaintiff had money in its bank accounts at the National Bank of Kenya. He told this court that he demanded for an apology from the defendant who did not heed his demands. It is said that so many members of the 1st plaintiff wanted to withdraw their membership from the 1st plaintiff as a result of the publication.

The 1st plaintiff’s manager, Chrispinus Ombare, testified as PW 2. He said he got shocked when he saw the article which gave a false state of affairs of the 1st plaintiff. He denied having received any information concerning bounced cheques because there was none. He also confirmed the fact that the 2nd plaintiff was away at the time when the publication stated he had talked to the press. He talked of receiving about a 1000 members wanting to withdraw their membership from the 1st plaintiff due to the false and malicious publication.

At the close of the plaintiffs’ case the defendant offered no evidence but opted to submit instead. Mr Mbiyu who appeared for the defendant submitted to the effect that the plaintiffs failed to offer evidence in support of their case in contravention of the order of 4.6.2002. The aforesaid read as follows:

“By consent

1. The application dated 4.5.2002 seeking for stay of execution be and is hereby withdrawn.

2. The judgment entered herein on the 7th day of March 2002 be and is hereby set aside with thrown away costs to the plaintiff in any event.

3. The suit herein is to be heard *de novo* on the 1st and 2nd July 2002.

4. The issues recorded for trial before the Judge on the 6th day of March 2002, do remain as issues for trial.

5. The documents recorded on the 6th March 2002, as admissible be admitted without calling the maker."

However when this suit came up for hearing the plaintiffs were granted leave to rely on the evidence recorded on 6.3.2001 instead of taking fresh evidence. The defendant's advocate did not take kindly the turn of events. It is on this basis that he submitted to the effect that the plaintiffs did not support their action by failing to tender evidence. With due respect to the learned counsel his submission is not tenable because I had already made a ruling on it when the matter came up for hearing before me on 2nd December 2003 in which I overruled his objection and allowed the plaintiffs to rely on the evidence tendered on 6.3.2001. No application to set aside the said decision has been made. The defendant has not also appealed against my decision. Consequently I have no jurisdiction to reconsider a submission which I have already heard and determined. In view of what I have stated the defendant's submission on this issue is rejected for lacking in merit and for being improperly presented.

Another objection which was raised as a preliminary point by the defendant is that the original plaint was not accompanied by a verifying affidavit. It was the submission of Mr Mbiyu that there was no competent suit for this Court to hear and determine. Mr Omondi who appeared for the plaintiffs opposed the defendant's arguments and averred that there was a verifying affidavit accompanying both the original plaint dated 28th May 2001and the amended plaint dated 15.2.2003 . I have considered the two rivaling submissions and the pleadings placed before me. I have noted that the plaint dated 28/5/2001 was accompanied by a verifying affidavit sworn by Andrea Lumumba Kechula on the same date. It means that the defendant's objection has no foundation in law.

However even assuming that there was no verifying affidavit accompanying the original plaint I think the law gives this Court the discretion to admit such a plaint. I will reproduce the provisions of order VIII rule 1 (2) and (3) as follows:

"(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.

(3) The Court may of its own motion or on the application of the defendant, order to be struck out any plaint which does not comply with sub-rule (2) of this rule."

It is clear that under sub-rule (3) the Court is given a wide discretion either to strike out a plaint which is not accompanied by a verifying affidavit or excuse and retain the plaint depending on the circumstances of each case. The law was not couched in mandatory terms. This may be because the rules committee envisaged that genuine mistakes could be made by parties in the process of filing plaints in our courts. I am of the view that the failure to file a verifying affidavit does invalidate the plaint so long as a satisfactory reason is given by the plaintiff in which case the Court may admit a verifying affidavit even after the plaint has been lodged. It should be noted that a party who intends to challenge the competency of plaint under order VII rule 1 (3) of the Civil Procedure Rules must approach the court by summons pursuant to the provisions of order VII rule 10 of the Civil Procedure Rules. In this instant case the defendant moved the Court in its final submissions. Of course I can only state that the objection was improperly taken because the defendant avoided the procedure prescribed by law.

It is not disputed that the amended plaint dated 15th February 2003 is accompanied by a verifying affidavit. It is a well settled principle of law that an amended plaint relates back to the date of the original plaint. I have come to the conclusion that the action filed by the plaintiff is competent and properly founded despite the lapses pointed out by the defendant. Having come to this conclusion I now proceed to

consider the merits of the whole suit.

The issues in this suit were settled by the advocates appearing for the parties before the hearing commenced before the Hon Lady Justice Ang'awa on 6th March 2001. I will deal with the issues which were agreed upon as follows:

First, is whether the defendant published the offending publication unlawfully, maliciously and without proper investigations. The 2nd plaintiff produced as exhibit no 3 a copy of the Daily Nation of 19th February 2001. In it, the defendant published the words complained of at page 17. This fact is not denied by the defendant but the defendant's advocate sought to justify its publication, but it is unfortunate because no evidence was offered to establish the justification. I have considered the submissions of the defence and the evidence presented by the plaintiffs' witnesses backed by-their advocate's submissions. I find that the offending words complained of were published by the defendant without proper investigations. There was no iota of evidence or submission which justified the said publication. Therefore the defendant published the article without any lawful justification in law. The second issue is whether the publication of the article was defamatory to the plaintiffs! I have come to the conclusion that the words used in the article in their natural and ordinary meaning referred to the 1st plaintiff as a cooperative society which gave loans to teachers, its members and that the society was not credible in the running of the affairs of its members. The article also depicted the 1st plaintiff as an organisation which was on the verge of collapse and that the same was insolvent. From the evidence on record it is evident that the publication was false and that it created an impression by innuendo that the plaintiffs were incapable and incredible to run the affairs of a reputable organisation. I am satisfied that the defendant published the article actuated by malice and spite. The defendant admitted publishing the article and did not offer or make any apology or settlement. I further find that the publication had the effect of lowering the reputation of the plaintiffs in the opinion of right thinking members of the community which in essence will make them shun or avoid them. The evidence of PW 2, clearly showed that some 1000 members of the 1st plaintiff made threats to apply to withdraw their membership after they read the article. In cases of libel, it is trite law that the same is actionable *per se*. I refer to the treatise of *Carter-Ruck on Libel and Slander* (4th Ed P 166 which stated):

> "An action for defamation is essentially an action to compensate a person for the harm done to his reputation. In all actions for libel and in some actions for slander the law presumes that the plaintiff has suffered harm and in these actions, usually described as actions *per se* the actual sum to be awarded as damages are said to be 'at large'. Although a person's reputation has no actual cash value the court is free to form its own estimate of the harm in the light of all the circumstances."

The remaining issue for me to decide is what is the quantum of damages which should be awarded in this case?

The defendant did not offer any submission on this issue. However the plaintiff proposed a figure of Ksh 8,000,000 for general damages and a further sum of Ksh 2,000,000/= for aggravated damages. On the limb on general damages the plaintiffs referred to the case of *John Patrick Mchira vs Wangethi Mwangi & another* Nairobi HCCC No 1707 of 1996 in which this court made an award of Ksh 8,000,000/= to the plaintiff who was a lawyer by profession. The plaintiffs herein rely on the confidence of their members which was eroded by the wreckless publication. The damage caused cannot be calculated in monetary terms. I can only give an estimate based on the facts presented to this court. Under section 16 A of the Defamation Act, the amount of damages to be awarded is said not to be less than one million where the libel is in respect of an offence punishable by death. But that is not the case in this matter. Doing the best I can, I think an award of Ksh 2,000,000/= is sufficient on the head of general damages.

The plaintiff has urged this Court to make an award of Ksh 2,000,000 for aggravated damages. It should be noted that aggravated damages can only be awarded where the publication of an article is actuated by malice. I am of the view that malice can be inferred where the defendant publishes an article while he knows that the same is false or he does not care whether it is true or false which is the case here. I will award a sum of Ksh 400,000/ = as aggravated damages. At the time of publishing the article the defendant

knew that there were no bounced cheques nor protesting members of the 1st plaintiff. The defendant did not lead any evidence to proof the contrary or establish some truth in their article.

The upshot therefore is that I hold the defendant liable for libel and enter judgment for the plaintiffs jointly. I make the following awards:

(i) General damages …….. Ksh 2,000,000/=

(ii) Aggravated damages ... Ksh 400,000/=

plus

(iii) Costs of the suit.

Dated and Delivered at Bungoma this 10th day of June 2004.

J.K. SERGON

JUDGE