



Five Forty Aviation v Travel News (K) Limited & another (Civil Case 546 of 2012) [2024] KEHC 12729 (KLR) (Civ) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12729 (KLR)

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

**CIVIL
CIVIL CASE 546 OF 2012**

AN ONGERI, J

SEPTEMBER 23, 2024

BETWEEN

FIVE FORTY AVIATION PLAINTIFF

AND

TRAVEL NEWS (K) LIMITED & ANOTHER DEFENDANT

JUDGMENT

1. The plaintiff filed the plaint dated 5/11/2012 seeking the following remedies;
 - i. A permanent injunction restraining the defendant's by themselves or through their agents or employees from publishing or causing to be published any publication that is defamatory of the plaintiff.
 - ii. Damages for libel.
 - iii. Aggravated damages for libel.
 - iv. Costs.
 - v. Interest on (ii), (iii) and (iv) above.
 - vi. Further or any other relief that the honourable court might deem fit to grant.
2. The plaintiff avers in the said plaint that on or about the month of October or November 2012 2nd Defendant in the course of his employment with the 1st defendant maliciously wrote an editorial while



the 1st defendant published or caused to be published in its November issue the editorial that contained the following words which are defamatory to the plaintiff:

“Talking of shenanigans, Fly540 our local so-called low costcarrier (LCC) finds itself in hot water on two fronts. Evidently owing truckloads of cash for fuel purchases in Kenya, it has until the middle of November to pay up or be wound up. In Tanzania it has folded completely. I'd stay away if I was you,until all becomes clear, if ever.“

3. Further that in their natural and ordinary meaning the said words meant and were understood to mean that the plaintiff:
 - i. Was dishonest and was trading while insolvent and facing being closed down but was still collecting money from the public without intending to provide service paid for;
 - ii. The plaintiff was not fit to engage in the business of airtravel;
 - iii. The plaintiff was engaged in actions that were meant to defraud the general public and were therefore fraudsters;
 - iv. The plaintiff was bent on selling bogus and worthless air tickets to the public with the intention of defrauding them;
 - v. The plaintiff was engaged in criminal activities that included fraud and obtaining goods by false pretense;
 - vi. The plaintiff was engaging in dishonest business practices; and
 - vii. The plaintiff was pretending to be a serious business but was in actual fact only an outfit of fraudsters and not an honest business.
4. The plaintiff contends that the said allegations are not true and were made maliciously and further contends that the natural and ordinary meaning of the words in paragraphs 5 above were understood to have the meaning stated in paragraph 6 above.
5. In consequence the plaintiff's reputation in its trade and business have been seriously damaged.
6. The defendants filed a defence dated 13th November 2012 denying the plaintiff's claim.
7. The hearing of this case proceeded on 13/02/2024. PW 1 the CEO and Director of 540 Aviation Ltd adopted his written statement dated 5/11/2012 as his evidence in chief and he also produced his bundle of documents of even date.
8. PW 1 stated in the said statement that he is a Director of the Plaintiff.
9. That the Plaintiff is a Company registered in Kenya and runs an airline known as Fly540 which flies to various destinations both locally and within the African region and can be described as a fairly successful in the business.
10. That on or about the 2nd November,2012 the plaintiff's friends and many people in the travel business mainly Travel Agents called him and asked him whether it was true that the Plaintiff had been ordered to fold up its business.
11. That first PW1 took the queries to be the usual rumours that had been doing the rounds that he had sold his interest in the Plaintiff and was on his way out of the Company. But he grew concerned when he started getting specific queries that the Plaintiff had been ordered by the Court to wind up unless the Plaintiff paid up massive debts “owed” to fuel suppliers.



12. Upon further inquiry PW1 was informed to go to the internet and read a story published in www.travelnewskenya.travel.
13. PW1 accessed the site and found a publication in what is called emagazine published by the defendant called 'Travel News Kenya' published by the 1st defendant.
14. He found in one of the publications an editorial written by the 2nd defendant the contents of which were highly libelous to the Plaintiff and stated thus:

“Talking of shenanigans, Fly540 our local so-called low cost carrier(LCC) finds itself in hot water on two fronts. Evidently owing truckloads of cash for fuel purchases in Kenya, it has until the middle of November to pay up or be wound up. In Tanzania it has folded completely. I'd stay away if I was you, until all becomes clear, if ever.”
15. The said story is not true and is clearly false and must have been published maliciously as the publisher never bothered to get in touch with the any persons in a position in the Plaintiff or myself for that matter to get a balanced information on the matter.
16. The 2nd Defendant, had he bothered to make an inquiry with the Plaintiff would have found out that the only matter the Plaintiff had in the Courts involving supply of fuel is with a Company known as Fueljet Limited.
17. That he would have found out that the matter is pending in the Court of Appeal and that the amount claimed by the said Company has been deposited at Barclays Bank, Queensway Branch in Nairobi in the joint names of their respective advocates.
18. He would have further found out that the only matter seeking to windup the Plaintiff is a matter premised on the same claim that is pending in the Court of Appeal and that the Plaintiff has moved the Court to dismiss the Petition of Winding Up. He would also have found out that the Petition has been stayed pending the application by the Plaintiff.
19. Further, that the 2nd Defendant would have found out that the Plaintiff is not under any threat of being wound up or that it had been given a deadline to make payment by mid November or get wound up.
20. The 2nd Defendant would also have found out that there is no other persons or Company that is claiming to have supplied the Plaintiff with fuel and had not been paid and had therefore sought to wind up the Plaintiff.
21. Upon reading what was contained in the website aforestated the plaintiff instructed the Plaintiff's advocates to write to the Defendants and demand that the 2nd Defendant should apologise for the publication and retract the allegations.
22. The firm of Mungu and Company wrote to through email to the 2nd Defendant on 3rd November, 2012 making the demands aforestated and giving the Defendants up to the end of the day on 4th November 2012 otherwise the Plaintiff would move to court.
23. The 2nd Defendant's response was that the demand made by the Plaintiff was unreasonable and also that the information it published was obtained from a 3rd party and if the Plaintiff wished then it could publish the article where it obtained the information from and that our demands were simply meant to silence the free press since the matters that he published was in public domain.



24. The 2nd Defendant did not make any offer to comply with the Plaintiff's demands but seem to be stating that so long as in his opinion the matters that he had reported were in public domain" then he could publish them by reproducing what a third party had already written.
25. The backbone of any airline business is with Travel Agents and if there is anything that would take away or compromise their confidence in an airline, they would not book their clients in such an airline. This is exactly what the Defendants' article in the internet has done to the Plaintiff and will continue to erode its business if not stopped.
26. The publication is highly defamatory to the Plaintiff and in that it is engaged in a highly competitive business in which we have put in many years of hard work, the players in the industry are very few and the publications can be used to whittle down our business niche in that we have been portrayed by the Defendants as
 - i. Dishonest and was trading while insolvent and facing being closed down but was still collecting money from the public without intending to provide service paid for;
 - ii. Not fit to engage in the business of airtravel;
 - iii. Persons engaged in actions that were meant to defraud the general public and were therefore fraudsters;
 - iv. Person bent on selling bogus and worthless air tickets to the public with the intention of defrauding them;
 - v. Person engaging in criminal activities that included fraud and obtaining goods by (A) false pretense;
 - vi. Person engaging in dishonest business practices; and
 - vii. Person pretending to be in serious business but was in actual fact only an outfit of fraudsters and not an honest business.
27. In cross examination, PW 1 said he was aware of a case filed against 540 Ltd by Finejet.
28. PW 1 said 540 Ltd is still in operation. He said the defendant referred to a winding up case file by Finejet on 20/7/2012.
29. PW 1 said the winding up order was set aside on 30/7/2012. He said he deposited 656,304 USD which was the amount in dispute between 540 Ltd and Finejet.
30. The defendant called one witness Tony Clegg – Butt who produced his written witness statement dated 13/11/2012 as his evidence in chief.
31. DW 1 said he picked the story from one of the newspapers, the Business Daily and he decided to inform his readers.
32. DW1 said he found a High Court case which confirmed a winding up order had been put in place against the plaintiff.
33. DW 1 said FLY 540 Aviation Ltd is not flying today. He said it was closed in November 2022.
34. In cross-examination, DW 1 said the magazine has a wide readership in Kenya and East Africa in general. He said he got the information in the Business Daily.



35. DW 1 said he published the Article on 31/10/2012. He said he was not aware of the consent entered in the Bankruptcy petition on 307/2012.
36. The parties filed written submissions which I have duly considered.
37. The plaintiff submitted that the meaning of the word shenanigans according to the Cambridge Dictionary is as follows:
- “Secret or dishonest activities, usually of a complicated type”
38. That any reasonable person would construe the meaning of the words “shenanigans” to mean that the Plaintiff is engaged in deceptive activities in order to defraud a particular party of its right.
39. The next phrase used by the defendants in its Article is “Fly 540 our so called” The Dictionary meaning of the phrase “our so called.” means is ‘falsely or improperly so named.”
40. That any reasonable person would construe the said phrase to mean that 510 Aviation calls itself allow cost carrier while in real sense it is not. It is also construed to mean someone alleging to be something that they are not.
41. The Defendants went on to further inform the public through their editorial that “it would be good for them to stay away until all becomes clear, if ever. ”
42. This statement would definitely turn away prospective clients, agencies, business associates and passengers noting that public perception is a key determinant in selecting who to conduct business with.
43. The plaintiff further said that the tone of words used in the impugned Article was that of spreading malicious and degrading propaganda about the Plaintiff to millions of readers and subscribers of its publication in the internet.
44. In *Phineas Nyagah Versus Hon. Gitobu Imanyara: Civil Suit No. 697 of 2009*, the court discussed malice as follows: -.
- “the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself (if the language used is utterly beyond or disproportionate to the facts”.
45. The plaintiff further submitted that the Winding up Petition was filed on the 20th July, 2012 and set aside 10 days later, on the 30th July, 2012. There was a Consent entered into by the Plaintiff and Finejet Limited wherein parties.
46. That the parties agreed to set aside the winding up proceedings on condition that the Plaintiff was to deposit the sum of US \$656,304.49 in a joint account. This Consent was entered into on the 30th July, 2012. This application was in the court records yet no reference was made to its existence in the article.
47. The Defendant published its article in the month of November and did not in any way inform the public that the winding up Order had been set aside or that that Plaintiff had filed a Notice of Appeal against the Judgment of the Judge which notice of Appeal had been filed and was in the court records. They submitted that the Defendants had ample time to verify facts before publishing the said article but instead chose to publish an article without thinking about the kind of impact it would have on the Plaintiff's organization.



48. Secondly, regarding the Plaintiff's in the Finejet matter, the Plaintiff had filed a Notice of Appeal against the said Judgement which said Notice of Appeal was in the court records.
49. These facts were not taken into consideration by the Defendants in publishing the impugned Article.
50. The Defendant stated that it is an electronic magazine that has a wide readership and is concerned with tourism and travel in Kenya and Eastern Africa. The said Defendants submissions go on to describe itself as having a large subscriber base amongst persons and institutions involved in the travel and tourism industries of the region.
51. There are many stakeholders in the tourism industry and such industry is not confined within the regions of Kenya and Eastern Africa.
52. The internet is not confined to readership based on its region. That it is read all over the world over the internet, irrespective of whether or not one lives within a particular region and as such, are equipped with information that is readily available on the internet, the good, the bad and the ugly. All this informs the decisions we make on a day to day basis.
53. The Defendants submitted that the plaintiff's suit is unmerited and the same should be dismissed forthwith with costs, given that the Plaintiff has failed to prove their case on the required balance and that they have not led any evidence in support of their claim that the Defendants' article was defamatory.
54. That the crux of this matter is an Article published by the 1 Defendant's November issue of the magazine 'Travel News'; as follows;

“Talking of shenanigans, Fly 540 our local so-called low cost Cartier (LCC) finds itself in hot water on two fronts. Evidently owing truckloads of cash for fuel purchases in Kenya, it has until the middle of November to pay up or be wound up. In Tanzania it has folded completely. I'd stay away if I was you, until all becomes clear, if ever.”
55. The Defendants deny the meanings that the Plaintiff has attributed to these words, and contend that the natural and ordinary meaning of these words are that:

That the Plaintiff owed large sums of money for fuel that it had bought. That it had until mid-November to settle its debt or be wound up. That it had ceased to do business in Tanzania.
56. That suppliers and travelers should be wary of doing business or advancing credit to it until its affairs had been sorted out.
57. Further, the defendant submitted that in an action for defamation is essentially an action to compensate a person for the harm done to their reputation.
58. In all actions for libel and slander, the law presumes that the Plaintiff has suffered harm and although the person's reputation has no cash value, the Court will form its own estimate of the harm in light of all the circumstances of the case and the Court will therefore take into account the Plaintiff's profile vis-a-vis what had been published about him.
59. Further that in a defamation action, the burden is on the Plaintiff to prove whether the words are defamatory and whether the words were defamatory of the plaintiff. If the plaintiff established both these elements, then the burden shifts to the defendants to establish, if they can, or more of the defences that they have raised.



60. In addition to that, the Plaintiff has not denied their contents as being untrue in its Reply to the Defence. The Plaintiff truly owed large sums of money for fuel that it had bought as evidenced in the court proceedings between it and Finejet Limited in Civil Case Number 331 of 2011.
61. That the Plaintiff also faced winding up proceedings instituted by, Finejet Limited, the decree-holder of Civil Case pos 331 of 2011 and in Petition Number 19 of 2012.
62. The defendant said that it is also true that the Plaintiff ceased doing business in Tanzania.
63. In light of which, the Defendants gave their fair and reasonable comment to its readers on the issues facing the in its submissions.
64. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
65. The issues for determination are as follows;
 - i. Whether the plaintiff proved the tort of defamation against the defendants.
 - ii. Whether the defendants have a valid claim against the plaintiff's claim.
 - iii. Whether the defendants are liable to pay the plaintiff the remedies the plaintiff is seeking.
66. On the issue as to whether the plaintiff has proved the tort of defamation, the following are the elements of the tort of defamation;
 - (i) The statement must be defamatory,
 - (ii) It must refer to the plaintiff and;
 - (iii) It must be published by the defendants i.e communicated to at least one person other than the plaintiff.
67. I find that the defendants did not deny that they published the article. The defendants pleaded the defence of justification.
68. Since the Defendants admitted having published the impugned Article, the court must now consider whether the defendants have a valid defence against the plaintiff's claim.
69. The defendants maintained that the Plaintiff owed creditors large sums of money for fuel that it had bought. That it had until mid-November to settle its debt or be wound up and that it had ceased to do business in Tanzania.
70. The 2nd defendant said that these statements of facts in its Article were not calculated to disparage the Plaintiff's image to the eyes of the public but to inform them of what was the state of affairs of the Plaintiff at the material moment.
71. However, there is evidence that the Winding up Petition was filed on the 20th July, 2012 and set aside 10 days later, on the 30th July, 2012.
72. There was a Consent entered into by the Plaintiff and Finejet Limited wherein parties agreed to set aside the winding up proceedings on condition that the Plaintiff was to deposit the sum of US \$656,304.49 in a joint account.
73. This Consent was entered into on the 30th July, 2012. This application was in the court records yet no reference was made to its existence in the article.



74. The Defendant published its article in the month of November and did not in any way inform the public that the winding up Order had been set aside on the 30th July, 2012 or that that Plaintiff had filed a Notice of Appeal against the Judgment.
75. I find that the Defendants had ample time to verify facts before publishing the said article but instead chose to publish an article without thinking about the kind of impact it would have on the Plaintiff's organization.
76. Regarding the Plaintiff's judgment in the Finejet matter, there is evidence that the Plaintiff had filed a Notice of Appeal against the said Judgement which said Notice of Appeal was in the court records.
77. These facts were not taken into consideration by the Defendants in publishing the impugned Article and I find that the same is not accurate.
78. The Defendants admitted that the 1st Defendant published an electronic magazine that has a wide readership and is concerned with tourism and travel in Kenya and Eastern Africa.
79. It is not in dispute that the Defendants have a large subscriber base amongst persons and institutions involved in the travel and tourism industries of the region.
80. There is no doubt that the publication had an adverse effect on the plaintiff's reputation in its trade and its business must have been seriously damaged.
81. The impugned Article contained the following words which were reckless and which in their ordinary meaning warned travelers to keep off the flight;

“Talking of shenanigans, Fly540 our local so-called low cost carrier(LCC) finds itself in hot water on two fronts. Evidently owing truckloads of cash for fuel purchases in Kenya, it has until the middle of November to pay up or be wound up. In Tanzania it has folded completely. I'd stay away if I was you, until all becomes clear, if ever.”
82. In the Halsbury's Laws of England 4th Edition vo. 28, the author opined thus;

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words convey to the ordinary man. Having determined the meaning, the test is whether under the circumstances in which the words were published, a reasonable man to whom the publication was made could be likely to understand them in a defamatory sense”.
83. The 2nd defendant said he was not aware that the winding up petition was set aside and a consent was entered on 30/7/2012.
84. The 2nd Defendant did not contact the plaintiff before he would publish the Article.
85. The 2nd Defendant said that he read the Article in Business Daily on 18/10/2012 but he did not produce the said source of the Article or attach it to his pleadings.
86. There is evidence that at the time the Article was published in October 2012, the winding up order had been set aside on the 30th July, 2012. DW 1 said he published the Article on 31/10/2012.
87. The 2nd Defendant said that the plaintiff is no longer in operation today and that it was closed shop in November 2022.
88. However, I find that at the time the Defendants published the Article, the plaintiff was still in operation.



89. The words used by the defendants clearly reveal malice on the part of the Defendants.
90. In the case of Phineas Nyagah vs. Gitobu Imanyara (2013) eKLR, the court stated as follows on the issue of malice;

“Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be found in the publication itself if the language used is utterly beyond the facts.”

91. I find that the defence of justification must fail in the circumstances of this case.
92. The defendants are liable for defamation.
93. I have considered the submissions by both parties on the issue of quantum of damages.
94. I award the plaintiff ksh.2 million general damages for defamation.
95. I find that aggravated damages are not payable in this case. In the case of DDO & another v East Africa Magazine Limited & 2 others [2020] eKLR, the court held as follows on the issue of aggravated damages;

“On aggravated damages, it is clear that the same are awarded where the court finds that there were aggravating factors. In the case of Francis Xavier Ole Kaparo vs. Standard Limited & 3 others (2010) e KLR the court held:

“The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have followed from the defamatory words or statements above, caused by the presence of the aggravating factors”.

- i. I enter judgment in favour of the plaintiff against the defendant in the sum of ksh. 2 million together with costs of the suit and interest from the date of this judgment until payment in full.

DATED SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD SEPTEMBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

