



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 170 OF 2014

TRANSAFRIC INSURANCE CONSULTANT LIMITED.....1ST PLAINTIFF

DANIEL NDOTIRE GATAMA.....2ND PLAINTIFF

VERSUS

KENYA ALLIANCE INSURANCE COMPANY.....1ST DEFENDANT

EVANSON KIMEMIA.....2ND DEFENDANT

LOISE NGUGI GOTA.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. In their Complaint dated 11th June 2014 and filed on 13th June 2014, the Plaintiffs sought the following reliefs against the Defendant:-
 - a. An unreserved apology published by the Defendants to all the persons to whom their letters and emails have been published and copied to all players in the insurance industry in Kenya.
 - b. General damages for libel.
 - c. Punitive Damages.
 - d. Interest on (a) and (b) above.
 - e. Cost of this suit.
2. Their List and Bundle of Documents was also dated 11th June 2014 and filed on 13th June 2014. Their Reply to Defence was dated 28th July 2014 and filed on 30th July 2014. They subsequently filed an Amended Reply to Defence dated 12th August 2014 on 13th August 2014.
3. The Defendants' Defence was dated and filed on 15th July 2014. The Defendants Written Statement, List and Bundle of Documents were dated 28th July 2015 and filed on 11th August 2015. They had also filed another Witness Statement dated 27th June 2018 on even date.
4. The Plaintiffs' Witness Statements were dated 20th September 2018 and filed on 21st September 2018 while those of the Defendants were undated but filed on 30th November 2018.
5. When the matter came before the court on 19th December 2018, the parties requested it to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE PLAINTIFFS' CASE

6. The 2nd Plaintiff was a Director of the 1st Plaintiff herein which was licensed to practise as a brokerage firm. The 1st Defendant was a

client of the 1st Plaintiff. The 2nd and 3rd Defendants were the Managing Director and Technical Managers of the 1st Defendant respectively.

7. The 1st Plaintiff was appointed by the 1st Defendant to adjust a loss involving Silent Valley Creameries Ltd (hereinafter referred to as “1st Defendant’s Insured”). On behalf of the 1st Plaintiff, the 2nd Plaintiff conducted investigations and thereafter prepared a comprehensive report which was presented to the 1st Defendant. It proposed that the 1st Defendant pay its Insured Kshs 9,682,498.50/= but instead of doing so, on 1st October 2013, the 1st Defendant admitted liability but unilaterally and without justification issued the Insured a letter of offer together with a Discharge Voucher in the sum of Kshs 1,700,487/=.

8. On 28th October 2013, the 2nd Plaintiff subsequently, attended a meeting at the 1st Defendant’s offices with a view to clarifying issues in his Report. The 1st Plaintiff’s fee note was settled in full on 18th March 2014.

9. In December 2013, a person by the name Peter Nderitu alerted him to two (2) emails and letters which were maliciously published. The contents were as follows:-

a. By an email dated 29th November 2013 the 1st and 2nd Defendants wrote the following about the Plaintiffs:-

“...It was totally unnecessary to involve Mr Gatama who carried out an unsatisfactory adjustment on the claim which necessitated us to appoint Messrs Cunningham Lindsey Kenya to re-adjust the loss.”

b. Further, by an email dated 29th November 2013 the 2nd Defendant wrote the following about the Plaintiffs:-

“...We agree with you that we keep matters professional and would request you to facilitate so that the Loss Adjuster does his work so that we can sort out our client’s claim as it is in our interest to do that. An offer can be made to ensure fairness to all. Is there a problem clarifying issues through a professional Adjuster to ensure fairness is served to all?”

c. In a letter dated 23rd January 2014 addressed to the Insurance Regulatory Authority, the 1st and 3rd Defendant wrote the following about the Plaintiffs:-

“The adjustment report made no indication the adjuster had verified the information provided to him by the insured... the adjustment report undoubtedly failed to capture the pertinent issues expected to be considered when adjusting a Fidelity Guarantee claim of this kind of business concern.”

10. In a letter dated 31st January 2014, the Insurance Regulator proposed two (2) loss adjustors, either McLarens Young International or Protectors Ltd to re-adjust the loss. On 3rd February 2014, the 1st Defendant appointed McLarens Young International to re-adjust the loss. In a letter dated 4th March 2014 to the 1st Defendant, it indicated that it had nothing further to add to the 1st Plaintiff’s Report.

11. In a letter dated 7th April 2014 addressed to M/S Henia Anzala & Associates, the 1st and 3rd Defendants wrote the following words:-

“In a letter dated 7th April 2014 addressed to Messrs Henia Anzala & Associates the 1st and 3rd Defendants wrote the following about the Plaintiffs:-

“The adjustment report submitted by TransAfric Insurance Consultants Ltd, upon scrutiny was found to be lacking in substance. We found that there were issues that ought to have been clarified in the report but were not adequately addressed...”

12. It was the Plaintiffs’ case that the words in their natural and ordinary meaning meant and were understood to mean:-

a. **The 1st Plaintiff and the 2nd Plaintiff were a dishonest firm and person respectively.**

b. **The 1st Plaintiff and the 2nd Plaintiff were incompetent and not fit to be trusted or employed to carry out any loss adjustment work;**

c. **The 1st Plaintiff and the 2nd Plaintiff were not qualified as professional loss adjusters.**

d. **The 1st Plaintiff and the 2nd Plaintiff were corrupt.**

e. **The 1st Plaintiff and the 2nd Plaintiff were and are unfit to conduct the business of loss adjustment.**

13. They pointed out that it had previously carried out similar loss adjustments following the 1st Defendant’s instructions and the same had never been challenged. They were categorical that the published words were defamatory against them and consequently, the Defendants ought to be directed to offer an unreserved apology to all persons the emails were copied to and they be awarded punitive damages to restrain the Defendants from such conduct in future.

THE DEFENDANTS' CASE

14. The Defendants denied all the averments of the 2nd Plaintiff's evidence-in-chief and contended that the words complained of were fair comment, made in good faith and without malice. It was their contention that they had a constitutional right to express their genuine thoughts and opinions regarding the services the 1st Plaintiff rendered to the 1st Defendant.

15. Their case was that upon investigations being conducted, it was established that no loss occurred at its Insured's premises, at the time of investigation, it was established that there was no production of cheese or any other products and that it was clear that its Insured had no capacity to produce cheese worth Kshs 120,000,000/=.

16. It was also their contention that the police never recorded the statement of one James Karanja, the Complainant therein and the suspects were never arrested or warrants of arrest issued.

17. They therefore urged this court to dismiss the Plaintiffs' case.

LEGAL ANALYSIS

18. The Plaintiffs and Defendants did not file a joint statement of Agreed Issues. The Defendant did not also file any Statement of Agreed Issues.

19. The Plaintiffs' Statement of Agreed Issues was dated 17th March 2015 and filed on 19th March 2015. The issues were as follows:-

- 1. Whether the 1st and 2nd Plaintiffs undertook the loss adjustment exercise at Silent Valley Creameries Limited.**
- 2. Whether the 2nd Plaintiff attended a meeting at the 1st Defendant's offices and clarified issues raised in his Loss Adjustment Report.**
- 3. Whether the published words complained of were malicious, false and calculated to cause injury to the 1st and 2nd Plaintiffs.**
- 4. Whether the words complained of in their natural and ordinary meaning meant and were understood to import the meaning set out in paragraph 14 of the Plaintiff.**
- 5. Whether as a result of the words, the Plaintiffs were injured in their credit, reputation and in their business.**
- 6. Whether the Plaintiffs were entitled to the relief prayed for in the Plaintiff.**
- 7. Who shall bear the costs of this suit.**

20. Both the Plaintiffs and the Defendants called one (1) witness each. The 2nd Plaintiff (hereinafter referred to as "PW 1") testified on his own behalf and that of the 1st Plaintiff while Elizabeth Kagiri (hereinafter referred to as "DW 1") testified on behalf of the Defendants' case. Their examination-in-chief was on all fours with how their respective cases were set out hereinabove.

21. During his Cross-examination, PW 2 admitted that in his Witness Statement or Plaintiff he did not indicate that he had interviewed the Defendant's Insured's Managing Director and Production Manager namely Paul Sorabh and Mr Karanja respectively. He added that he got details of the theft from Nanyuki Police Station and that he did not need to indicate his source of information.

22. He stated that he was aware that the 1st Defendant's Insured went to court after the 1st Defendant issued it with a Discharge Voucher of Kshs 1,700,487/=.

23. He added that he did not name the people to whom the defamatory words were published and that his firm's name was not given in the emails.

24. He was emphatic that he suffered loss as ICEA Lion General Assurance stopped giving him work and that his credibility was eroded in the eyes of Insurance Regulatory Authority (herein after referred to as "IRA").

25. During her Cross-examination, DW 1 stated that all her testimony was obtained from the file as the 1st Defendant's employee as a Claims Supervisor.

26. This court noted that both the Plaintiffs and the Defendant were agreed as to what constituted defamation. The Plaintiffs' relied on the cases of Joseph Njogu Kamunge vs Charles Muriuki Gachari Ltd [2016] eKLR, Nation Media Group Ltd & Another vs Albert N Mutua [2017] eKLR, Wycliffe A Swanya vs Toyota East Africa Ltd & Another [2009] eKLR to buttress their argument that the published words were malicious and that the Defendants could not sustain their defence of fair comment.

27. On the other hand, the Defendants relied on the cases of London Artists Ltd vs Littler [1969] 2 All ER 193, Khasakala vs Aurah & Others [1995 – 1998] 1 EA 112 to support their argument that their comment was justified it represented an honest opinion and was

published without malice.

28. This court carefully considered the words that were complained of and determined that the contents in the emails and letter were honest opinion and without malice. Indeed, Invespot Investigators who had been instructed by the 1st Defendant to investigate the loss created doubt as to whether really the loss occurred at its Insured's premises.

29. The Plaintiffs did not demonstrate that the published words had the potential of lowering the image of the Plaintiffs in the estimation of right thinking members of the society, that they were shunned and avoided by others or that the words exposed them to hatred, contempt or ridicule as was explained in **Gatley or Libel and Stander 10th Edition** that was relied upon by the Defendants herein.

30. The Plaintiffs did not satisfactorily demonstrate that IRA and ICEA Lion Insurance Co Ltd stopped engaging the 1st Plaintiff due to the words complained of. Questions were raised as to whether the loss really occurred which this court determined were not intended to malign the Plaintiffs' reputation.

31. Notably, in the letter dated 21st November 2013 from the Claims Manager ICEA to the IRA, (Page 61 of the Plaintiffs' Exh "1"), the insurance company indicated that the 1st Plaintiff had performed its assignments satisfactorily and it intended to retain its services in 2014. There was also a letter dated 19th November 2013 from CIC General Insurance also vouching for the professional work and integrity of the Plaintiffs (Page 62 of the Plaintiffs Exh "1").

32. There were no other documentations that were adduced by the Plaintiffs to show that the positions had changed to their detriment.

33. On carefully perusing the emails of 29th November 2013, the letters of 23rd January 2014 and 7th April 2014, (pp 39-44 of the Plaintiff's Exh "1") this court did not see what was defamatory in the contents therein. The 1st Defendant was entitled to seek a second loss adjustor opinion after questions on the loss arose.

34. The emails of 29th November 2013 (Page 39 of Plaintiffs Exh "1") were from Evanson Kimemia, the 1st Defendant's Managing Director at the time complaining that the Paul/ Peter were copying communication exchanged between them to other parties while the loss re-adjustment had not been concluded.

35. The burden of proof was on the Plaintiffs to prove their claim as stipulated in Evidence Act Cap 80 (Laws of Kenya).

36. Section 107 of the Evidence Act states:-

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

37. Section 108 of the Evidence Act states:-

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

38. Section 109 of the Evidence Act states:-

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

39. Having considered the oral and documentary evidence that was adduced herein, the Written Submissions and the case law that was relied upon the parties, this came to the firm conclusion that the Plaintiffs did not prove their case on a balance of probability that the words complained of well were within the definition of defamation. Their case fell below the threshold of what could be said to have been defamation. The 1st Defendant was entitled to seek a second opinions as it felt that the 1st Plaintiff's Report was unsatisfactory. Second opinions are common place and are not intended to undermine others. They are meant to compare opinions of like minded persons or experts and not to undermine each other.

DISPOSITION

40. For the foregoing reasons, the upshot of this court's Judgment was that the Plaintiffs suit was not merited and the same is hereby dismissed with costs to the 1st Defendant.

41. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of May 2019

J. KAMAU

JUDGE