



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 57 OF 2018

MWANANCHI CREDIT LIMITED 1ST PLAINTIFF

DENNIS MWANGEKA MOMBO 2ND PLAINTIFF

VERSUS

ANERLISA MUIGAI DEFENDANT

JUDGMENT

1. The plaintiffs, *Mwananchi Credit Limited* and *Dennis Mwangeka Mombo* instituted suit against the defendant *Anerlisa Muigai* by way of a plaint dated 21st March 2018 seeking general, punitive, exemplary and aggravated damages for defamation and interest. The plaintiffs also sought orders of prohibitory injunction to restrain the defendant whether by herself, her servants or agents from posting, publishing or broadcasting on the internet or social media platforms the alleged defamatory words and images and a mandatory injunction directing the defendant to pull down all her publications and posts that touch on the plaintiffs in whatsoever way.

2. It is the plaintiffs' case that the 2nd plaintiff is a director of the 1st plaintiff company which is an entity that advances loans to customers on a willing borrower willing lender basis; that in the month of September 2015, the defendant borrowed KShs.13,000,000 from the 1st plaintiff. She defaulted in servicing the loan leading to the institution of HCCC No. 357 of 2017 which was referred for mediation; that when the suit was pending mediation, the defendant negligently and recklessly published on social media namely her Facebook and Instagram platforms untrue allegations against the plaintiffs which were defamatory; that the publications against the plaintiffs in their natural and ordinary meaning meant and were understood to mean *inter alia* that the 1st plaintiff company was incorporated to carry out fraudulent business under the guise of a lending institution; that the 2nd plaintiff is a fraudster who uses his company to defraud people and he had colluded with one *Ben Kangangi* to defraud the defendant of KShs.20,000,000.

3. The plaintiffs further asserted that the publication was actuated by malice and that as a result thereof, their reputation had been seriously damaged; that the 2nd plaintiff has suffered considerable distress and embarrassment.

4. The court record shows that upon being served with summons to enter appearance and defence, the defendant did not do so. Upon application by the plaintiffs, the Hon. Deputy Registrar entered interlocutory judgment in favour of the plaintiffs against the defendant on 13th September 2018. The case was thereafter fixed for formal proof.

5. In the formal proof hearing, the 2nd plaintiff testified in support of the plaintiffs' case. He claimed that the offending publication had tainted the image of the 1st plaintiff company and his reputation as an individual. He produced in evidence the bundle of documents filed together with the plaint including the offending publication and comments from social media users.

6. In the absence of any rebuttal by the defendant by way of a statement in defence or evidence, the pleadings and the evidence tendered by the plaintiffs remain uncontroverted. Having read the offending publication both in the defendant's Facebook and Instagram pages, I find that some of the statements therein were extremely defamatory of the 2nd plaintiff but I did not come across any statement that can be said to have been defamatory of the 1st plaintiff. The interlocutory judgment entered in favour of the 1st plaintiff against the defendant is consequently set aside.

7. After considering the pleadings and the 2nd plaintiff's oral evidence and documents tendered in evidence, I am satisfied that the 2nd plaintiff has proved his case against the defendant on a balance of probabilities and he is therefore entitled to damages. The interlocutory judgment entered in his favour against the defendant is hereby confirmed.

8. Regarding assessment of damages, the starting point is a consideration of the principles that should guide a trial court in awarding damages in libel claims. In *Johnson Evan Gicheru V Andrew Morton & Another, [2005]*, the Court of Appeal adopted the principles set out in *Jones V Pollard, [1997] EMLR 233; 243*, which listed those principles as follows:

- i. The objective features of the libel itself such as its gravity, its province, the circulation of the medium in which it is published, any repetition;
- ii. The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both upto and including the trial itself;
- iii. Matters tending to mitigate damages, such as the publication of an apology;
- iv. Matters tending to reduce damages; and
- v. Vindication of the plaintiff's reputation past and future.

9. In the same case, *Githinji JA* in discussing the proper approach for a court to take in the assessment of damages for defamation cited with approval the English case of *John V MGN Limited, [1997] QB 586* at page 607 paragraph F where he stated that:

“In assessing the appropriate damages, for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributed of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to handful of people.”

10. In this case, the 2nd plaintiff testified that he is a director of the 1st plaintiff which deals in the business of lending money to members of the public. In that capacity, he is expected to be a man of good standing in the society and a person of integrity. The offending publication depicted him as a person of questionable integrity who is associated with criminal activities. It obviously painted him in bad light in the eyes of the persons who accessed the publications on the internet as evidenced by the numerous comments generated by the publications. The scope of the publication was far and wide given the medium of publication chosen by the defendant which is accessible to an unquantifiable number of people both locally and globally. There is no doubt that the damage of character sustained by the 2nd plaintiff was substantial.

11. In his submissions, learned counsel for the plaintiff submitted at length on the issue of liability but did not make any proposals on quantum of damages. In the case of *Arthur Pap Odera V Peter O. Ekisa Alias Shujaa Peter O. Ekisa, [2016] eKLR* which was cited by the plaintiff, *Hon. Msagha Mbogholi J* awarded the plaintiff a sum of KShs.2,000,000 in general damages to compensate him for loss of reputation owing to offending publications on social media platforms. This was about three years ago in the year 2016. Taking into account all relevant factors, including inflationary trends, I will award the 2nd plaintiff in this case a sum of Kshs.2,500,000 in general damages.

12. The plaintiff had also prayed for exemplary and aggravated damages. Exemplary damages are meant to punish the defendant. *Maraga, J* (as he then was) in *Abdul Hamid Ebrahim Ahmed V Municipal Council of Mombasa, [2004] eKLR* held that:

“Exemplary damages are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute.”

13. Aggravated damages on the other hand will be awarded against a defendant who is shown to have acted out of improper motive. The Court of Appeal in *Miguna Miguna V Standard Group Ltd & 4 Others, [2017] eKLR*, cited with approval the holding in *John V MG Limited, [1997] QB 586* which gave an indication of circumstances in which aggravated damages should be awarded. The court stated as follows:

“Aggravated damages will be ordered against a defendant who acts out of improper motive eg. Where it is attracted by malice; insistence on a flurry defence of justification or failure to apologise.”

The 2nd plaintiff did not demonstrate that any of the above situations applied to the defendant in this case.

14. On the prayers for orders of injunction, prayer 4 of the plaint is granted on terms that the defendant is restrained from further posting, publishing or broadcasting or causing to be posted, published or broadcasted on the internet on her Facebook, twitter or instagram pages words or statements that are defamatory of the plaintiff. A mandatory injunction is also issued directing the defendant to pull down the offending publications touching on the 2nd plaintiff from all her pages in social media platforms.

15. The upshot of this judgment is that the plaintiffs' suit succeeds to the extent that general damages are awarded to the 2nd plaintiff against the defendant in the sum of KShs.2,500,000. The amount will attract interest from today's date until payment in full. Orders of prohibitory and mandatory injunctions are also issued on the terms stated above.

16. On costs, I note that the plaintiffs did not pray for costs in their plaint but under *Order 4 Rule 6* of the *Civil Procedure Rules*, failure to seek costs in the plaint does not disentitle a plaintiff from an award of costs in deserving cases. Under *Section 27* of the *Civil Procedure Act*, I exercise my discretion and award costs of this suit to the 2nd plaintiff.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Salach: Court Assistant

No appearance for the plaintiffs and for the defendant though duly served