



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NUMBER 1221 OF 2004**

**H G THANWALLA (INSURANCE BROKERS) LTD ..... PLAINTIFF**

**VERSUS**

**APA INSURANCE LIMITED ..... DEFENDANT**

**AND**

**ASSOCIATION OF KENYA INSURERS ..... THIRD PARTY**

**J U D G M E N T**

On 27<sup>th</sup> August, 2004, Association of Kenya Insurers, the Third Party herein, issued circular No. 149/GIC/08/NBA advising all underwriters to submit a list of Premium defaulters. In answer to the aforesaid circular, APA Insurance Ltd, the Defendant herein, remitted a list that showed that H. P. Thanwalla (Insurance Brokers) Ltd, the Plaintiff herein, owed the Defendant a sum of Ksh.458,789/- as of 27<sup>th</sup> August, 2004 as unpaid premium. Being aggrieved, the Plaintiff filed this suit vide the Plaint dated 9<sup>th</sup> November, 2004 and prayed for inter alia damages for defamation. The Defendant successfully applied to have the Third Party enjoined to this suit so that it would seek for indemnity from the Third Party. The Defendant filed a defense to deny the Plaintiff's claim.

It is the Plaintiff's case that on diverse dates the Defendant wrote a complaint to the Third Party portraying the Plaintiff as a premium defaulter. The Plaintiff is of the submission that the Defendant made, published and or caused to be published a further malicious and unlawful purported default premium against the Plaintiff to the Third Party while the Defendant knew or ought to have known that the claims were untrue, false, misleading malicious, unjustified and defamatory of the Plaintiff.

The Defendant admitted having published the information, which depicted the Plaintiff as a premium defaulter. The Defendant however, stated that the publication was done without malice and with honest belief that the publication was done without malice and with the honest belief that the Plaintiff owed the money in question. The Defendant further submitted that the Third Party went ahead to circulate a list with the Plaintiff's name listed as a premium defaulter without the Defendant's knowledge and consent and as such the Defendant is not liable for the actions of the Third Party.

The Third Party on the other hand stated that it had no capacity to confirm the correctness of the list it received from its members which included the Defendant. The Third Party further pointed out that the Defendant had a duty to act in utmost good faith at all times. The Third Party urged this court to find that the Defendant failed to prove the existence of a duty owed to it by the Third Party which was breached. The Third Party further stated that it is the Defendant which owed it a duty to act in utmost good faith. The Third Party further submitted that the Defendant had failed to disclose to it that the outstanding debt of Ksh.458,789/- allegedly owed to the Defendant by the Plaintiff had been a subject of court proceedings.

The Plaintiff summoned Taj Thanawalla (PW 1), its Managing Director to testify in support of its case. PW 1 told this court that the Plaintiff has been in the Insurance Business for 54 years with a clean record. He also told this court that the Defendant had filed an action before the subordinate against the Plaintiff to recover a sum of Kshs.458,789/20 being premiums allegedly owed to it between 1998 and 1999 which suit was heard and dismissed on 5<sup>th</sup> December, 2003 on the basis that there was no business which was transacted between the parties after 1994. PW 1 further stated that a year after it lost the aforesaid case, the Defendant set in motion a series of events that led to the Plaintiff's name being circulated to insurance companies in the country as a premium defaulter in the sum of Ksh.458,798/-. PW 1 stated that the Plaintiff came to know that its name had been circulated as a premium defaulter through the Third Party's letter dated 23<sup>rd</sup> August, 2004. By that time, it is said that the Plaintiff's name had been circulated to all insurance companies in Kenya by the Third Party. The Plaintiff pointed out that the publication gravely injured the Plaintiff's business reputation and credibility in the eyes of all insurance companies.

The Defendant on the other hand summoned Paul Kibet (DW 1) its legal officer to testify in support of its defense. DW 1 told this court that the suit it filed to recover the sum of Ksh.458,798/- from the Plaintiff was dismissed for being time-barred and that the sum was due as at the date the suit was filed. The Defendant through the evidence of DW 1 that it was under an obligation to instruct or cause the Third Party to circulate the information to their members and that the Defendant did not independently or otherwise circulate the information to any

member of the public. The Defendant stated that the Third Party made an apology. The Defendant denied all the allegations leveled against it.

The Third Party stated that the obligation to determine the correctness of the offending statement was on the Defendant and that its obligation was merely to circulate the said list to its members. The Third party further stated that once it noticed its mistake, it offered an apology to the Plaintiff and as such the Defendant should be held liable for defamation as against the Plaintiff.

Having considered the evidence presented by the parties, the following issues arose for the determination of this court.

**i) Whether or not the Plaintiffs granted PW 1 authority to bring this suit.**

**ii) Whether or not the publication was defamatory of the Plaintiff.**

**iii) Who is liable?**

**iv) Whether the Plaintiff is entitled to the reliefs sought.**

On the first issue the Defendant has urged this court to strike out and or dismiss this suit for want of authority on the part of the Plaintiff to PW 1. The Plaintiff on the other has urged this court to reject the invitation to dismiss this suit on this ground. The Plaintiff argued that the issue was merely raised at the hearing of the suit hence the Plaintiff had no proper notice of the objection. The record shows that PW 1 admitted having filed no authority granted to him to file the action. With respect, the objection raised by the Defendant is so fundamental that it needed to be pleaded in the defence from the beginning. The Plaintiff was ambushed when the issue was put to PW 1 while testifying in cross-examination. In response to the question, PW 1 stated that he was the sole director of the Plaintiff company hence the authority to institute and defend the suit by the Plaintiff is vested in him. With respect, I agree with the Plaintiff's submission that in the circumstances of this case, the verifying affidavit was sufficient under the repealed Civil Procedure Rules under which this suit was filed. What was required is that the person swearing the affidavit should be a person duly authorized to do so. Consequently, I find no merit in the objection.

It is appropriate at this stage to deal together with the second and third issues. It is not in dispute that the Defendant forwarded the name of the Plaintiff to the Third Party to be circulated as one of the premium defaulters. It is also admitted that the aforesaid statement turned out to be false.

Having considered the evidence presented by both sides, it is now clear that the Defendant breached its duty not to make any negligent misrepresentation. The evidence tendered shows that the Defendant failed to disclose that the alleged outstanding sum of Kshs.458,789/- had been a subject of court proceedings in **Nairobi CMCC No. 2917 of 2002** which suit was eventually dismissed and there is no evidence that an appeal has been preferred to impugn the dismissal order. The Defendant knowingly and deliberately submitted the Plaintiff's name as a premium defaulter yet it knew the issue had been determined in a court of law against it. It is also clear that the Defendant knowingly and intentionally induced the Third Party to unjustly list the Plaintiffs as a premium defaulter. I am satisfied that the Plaintiff's reputation was defamed and damaged by the false listing. The Defendant is solely found liable for the malicious listing.

Having found the Defendant solely liable, it is now necessary to go into quantum. I have already enumerated the awards the Plaintiff has beseeched this court to grant. On the head of general damages, the Plaintiff has beseeched this court to award it Ksh.4,000,000/-. The defendant is of the submission that there was no evidence of loss shown by the Plaintiff and that since an apology has been made by the Third Party, no damages should be paid.

I have taken into account the authorities cited and the fact that the Plaintiff suffered the indignity of insurance companies demanding review of its books of accounts before they could give the Plaintiff business. The proposal for payment of Kshs.4 million on this head is on the higher side. I am convinced that a sum of Ksh.2,000,000/- is reasonable.

The second claim the Plaintiff sought to be awarded is Ksh.1,000,000/- as aggravated damages. It is apparent from the evidence tendered that the Defendant flatly refused to apologize for its libelous conduct. In the circumstances, the Plaintiff is entitled to damages on this head. I award it Ksh.500,000/- as aggravated damages.

The third claim is for exemplary damages. The Plaintiff asked this court to award it Ksh.3,000,000/-. I am not convinced that an award should be made on this head since the Plaintiff failed to justify this award. I decline to make an award.

The fourth order sought is that of an injunction. I am satisfied that the Plaintiff is entitled to the order. The Plaintiff being a successful party is entitled to costs and interest.

The contest between the Defendant and the Third Party tilts in favour of the Third Party. Consequently, the claim by the Defendant as against the Third Party is dismissed with costs to the Third Party as against the Defendant.

In the end, the Plaintiff is given judgment in its favour and against the Defendant as follows: -

**i) General Damages Kshs.2,000,000.00**

**ii) Aggravated Damages Kshs. 500,000.00**

**iii) An injunction to restrain the Defendant from any future publication of the defamatory words complained of.**

*iv) Costs given to the Plaintiffs.*

*v) Interest on (i) and (ii) above at court rates from the date of judgment until full payment.*

*The Defendant's claim against the 3<sup>rd</sup> party is dismissed with costs to the 3<sup>rd</sup> Party.*

**Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of July, 2018.**

.....

**J K SERGON**

**JUDGE**

***In presence of***

..... *for the Plaintiff*

..... *for the Defendant*

..... *for the Third Party*