



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 546 OF 2012

FIVE FORTY AVIATION LTD PLAINTIFF

V E R S U S

TRAVEL NEWS (K) LTD.....1ST DEFENDANT

TONY CLEGG-BUTT.....2ND DEFENDANT

RULING

1) Five Forty Aviation Ltd, the plaintiff herein, sued Travel News (K) Ltd and Tony Clegg-Butt, the 1st and 2nd defendants respectively vide the plaint dated 5.11.2012 whereof it sought for inter alia damages for defamation.

2) In paragraph 5 of the plaint the plaintiff sated as follows:

In or about the month of October or November 2012, the 2nd defendant in the course of his employment with the 1st defendant maliciously wrote an editorial which 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, Fly 540 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.”

3) When served with the plaint the defendants filed a defence to deny the plaintiff’s claim.

4) The defendants have now taken out the motion dated 14.5.2013 the subject matter of this ruling in which they seek for the following orders:

i. For an order determining whether or not the words complained of are capable of bearing the meaning attributed to them in paragraph 6 of the plaint; and

ii. If the said words are not capable of such meanings, for a consequential order that the plaintiff’s claim be dismissed and judgment be entered for the defendants with costs; and

iii. For an order that all costs of and occasioned by this application be the defendants’ costs in any event.

The motion is based on the grounds stated on the face of the application.

5) The plaintiff opposed the application and urged this court to dismiss it and proceed to hear the suit. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded consent order to have the motion disposed of by written submissions.

6) I have considered the grounds stated on the face of the motion and the rival written submissions. It is the submission of the defendants that the pleaded meanings attached the words complained of are the product of strained, forced and unreasonable interpretation.

7) The defendants further argued that the pleaded meanings of the words complained of are not in their natural and ordinary meanings which would have been conveyed to the ordinary reasonable reader. The defendants consequently asked this court to decide the issue before any evidence is given or any questions or issue of fact is tried as a preliminary issue.

8) The plaintiff on the other hand submits that the words meant and were understood to mean that the plaintiff was:

a. Dishonest and trading while insolvent and facing being closed down but was still collecting money from the public without intending to provide for service paid for;

b. Not fit to engage in business of air travel;

c. Engaged in actions meant to defraud the general public and therefore fraudsters;

d. Bent on selling bogus and worthless air tickets to the public with intention to defraud;

e. Engaged in criminal activities that included fraud and obtaining goods by false pretence;

f. Engaged in dishonest business activities;

g. Pretending to be a serious business but was in actual fact only an outfit of fraudsters and was not an honest business.

9) The plaintiff further argued that he has pleaded malice in his plaint thus there is need to receive evidence.

10) I have carefully considered the pleadings and the submissions presented before this court. It is not in dispute that the plaintiff has reproduced the words the defendants used to refer to the plaintiff. It is also not in dispute that the plaintiff has given in paragraph 6 of the plaint what it thought to be the natural and ordinary meaning of the words complained of and what were understood to mean of the plaintiff.

11) In paragraph 7 of the plaint the plaintiff avers that the allegations were malicious. This court has been invited to determine the question as to whether or not the words said or printed by the defendants in reference to the plaintiff meant what is attributed to be in paragraph 6 of the plaint.

12) I have carefully perused the words complained of and it is clear that some of the words used in the publication included **“Shenanigans” and “So called”**. This court has been invited to make a finding that the words complained of are not defamatory.

13) With respect, I do not think it is appropriate to determine such serious issues via an application. In order to determine such a question there is need to receive evidence in a trial which is interrogated through cross-examination to determine the meaning attached to such words by the persons who read and hear such words.

14) In the end, I find no merit in the defendants’ motion. The same is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 2nd day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants