



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 3094 OF 1988

KABANSORA LIMITED..... PLAINTIFFS

VERSUS

THE STANDARD LIMITED..... DEFENDANTS

JUDGMENT

This suit relates to an article which was published in the Standard Newspaper on 14th February, 1988. The alleged offending part is as follows:

“A mill processing animal feeds and other cereals is posing hazard to aircraft as birds get attracted to the site”.

“The mill, situated along the old airport road started operating last September despite objections by the Directorate of Civil Aviation.”

“The mill was started by the Sansora Group of Companies but was later to an Asian Firm.”

It will at once be seen that the plaintiff was not mentioned by name. I did not see this as in any way being fatal to the plaintiff’s case. It is obvious that someone may be referred to in an article without being named. In some circumstances, nearly every reader of an article will at once understand that a reference is to a particular person even though he is not named. In other circumstances, such understanding will only be limited to groups of people. There is no mysterious principle of law involved. The hurtful statement may be made concerning a person whose name is not given. In the language of the law the plaintiff will have a cause of action if he proves that there has been a publication of and concerning him of words which are defamatory of him. The first simple issue in this case is whether there was such a publication?

I have carefully considered all the evidence which has been tendered and have given anxious consideration to the submissions made by advocates of the parties on this point. On all the material facts available I am satisfied that the reasonable reader would understand the article as referring to the plaintiff.

It was argued on behalf of the defendant, secondly, that the suit was brought by the wrong party. Apart from observing that this is not pleaded in the defence I am satisfied having regard to the evidence of Mr Nyachae when he said:

“Kabansora Limited is the holding company of Kabansora Flour Mills which is concerned with the milling and selling of flour. The mill is owned by Kabansora Ltd.”

that the suit by the plaintiff has been properly brought.

As to the question, of, whether the article complained of is defamatory of the plaintiff, this does not call for an elaborate consideration. Just to take one simple matter. An allegation that the mill started operation despite objections by the Director of Civil Aviation imputes that the plaintiff commenced operation in an unlawful or otherwise irregular manner as he did not have the consent from the Civil Aviation Authority. To say the least this is *prima facie* defamatory of the plaintiff and I see no merit in the submissions on the part of the defendant on this issue. Considering the documentary evidence of authority, correspondence etc, between the plaintiff and civil aviation.

The main defences would appear to be fair comment and qualified privilege. To deal with the first question. I am not satisfied on the material before me that this is a case of fair comment at all. There is nothing factful on which a fair comment can be based. I am satisfied that there is malice here on the material available before me. It is true that the plaintiff did not file a reply giving particulars of malice under order 6 rule 6A of the Civil Procedure Rules but as we stated by Platt, JA in *Joe Kadhi vs Isaac J Arimi* CA 94 of 1984 this provision is directory rather than mandatory. Is malice an answer to fair comment? It has long been decided that it is. On fair comment I ask myself simply whether the opinions expressed were fair comment? To allege that the mill was commenced despite an objection from the Directorate of Civil Aviation (which is not true) cannot in my judgment be a fair comment. Moreover, the evidence disclosed that the plaintiff's factory is not a bird's attraction sport. Yet the defendant made such an allegation; Why? There was no objection from the Directorate of Civil Aviation in respect of commencement of operations by the plaintiff. Yet the defendant positively stated in the article that there was such an objection. The making of such a report and the failure to counter-check the truth of it is to my mind evidence of malice. Although "DW2" made a search of ownership at the company's registry he falsely stated in the article that the plaintiff's factory was owned and started by the Sansora Group of Companies; Why? And, to say the ownership of the company had changed hands and that an Asian firm had bought it (not disclosed in the companies registry) was a clear attempt to impute some sinister or dishonourable intentions and conduct on the plaintiff company.

Although the fact that the defendant had no reasonable grounds for believing his statement to be true is not in itself conclusive evidence of malice, yet honest belief must be founded on some sort of reasonable basis and therefore in determining that such honesty did in fact exist, I am entitled to take into consideration, as I do, the grounds on which it was founded. The defendant's belief that the DCA had objected to the commencement of the operations of the plaintiff's mill was so groundless that I come to the conclusion that the defendant could not, and did not, honestly believe the statement he made to be true and I additionally infer malice therefrom, also.

Having regard to the material before me and in the circumstances of this case I find malice on the defendant's part and my finding that malice was established cannot protect the defendant on the issue of fair comment. The plea of fair comment must, therefore, fail.

As to qualified privilege in view of my finding as to malice, the qualified privilege is destroyed. This defence, therefore, also fails.

That leaves me with the consideration of the quantum. The article was serious and consists of a serious reflection upon the business of the plaintiff for which it is entitled to substantial damages. As stated by *Gatley on Libel and Slander* (8th Ed): "A corporation does not need to prove special damages or financial loss to recover damages for defamation to its business reputation in a way calculated to injure its reputation in its trade or business." Mr Nyachae in his evidence stated that the defamatory words complained of did in fact have the effect of damaging the plaintiff's business reputation and goodwill and created difficulties in the plaintiff's dealings with its customers. I consider the lapse of time since the 1960s and I also take into account the effects of inflation and the devaluation of the Kenya currency. In the light of all the mitigating factors that were put to me by Mr Noad and having regard to all the circumstances of the case and giving the matter the best consideration I can, I assess the damages of Kshs 200,000/-.

In the result, there will be judgment for the plaintiff for Kshs 200,000/- with costs and interest as prayed.

Dated and Delivered at Nairobi this 6th day of August, 1993

E. OWUOR

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JUDGE