



REPUBLIC OF KENYA



Muiruri v OP Ngoge t/a OP Ngoge & Associates, Advocates (Civil Case 813 of 2007) [2024] KEHC 9573 (KLR) (Civ) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 813 OF 2007**

**JN MULWA, J
JULY 31, 2024**

BETWEEN

WM MUIRURI PLAINTIFF

AND

OP NGOGE T/A OP NGOGE & ASSOCIATES, ADVOCATES DEFENDANT

RULING

1. By a plaint dated 4/12/2007, the Plaintiff instituted this defamation suit against the defendant seeking:
 - a. General damages for Libel
 - b. Exemplary damages for malicious libel; and
 - c. Costs of the suit and interest.
2. By a Notice of Preliminary Objection (PO) dated 8/07/2023, the defendant objected to the court's jurisdiction to hear and determine this suit upon grounds that:-
 - a. The suit is *resjudicata*
 - b. That the issues revolve around privileged document and communication.
 - c. That the suit contravenes doctrine of separation of powers, by the plaintiff asking High Court to sit on appeal against disciplinary proceedings of the Judicial Service Commission
 - d. That *defamation act* is subordinate to *the constitution* at articles 10, 25, 27, 33, 28, 29 and 172, among other grounds.
3. In opposition to the Preliminary Objection, the plaintiff filed grounds of opposition as well as submissions.



Defendant's Submissions dated 19/08/2023.

4. It is submitted that applying the principles in the case of *Owners of Motor Vessel "Lillian" v Caltex Oil (Kenya) Ltd* [1989] KLR that this court ought to down its tools because the defendants complaints and letter on record which are the key planks and gravamen in the Plaintiffs case were bona fide true statements made to the Hon. Chief Justice Evans Gicheru pertaining to professional misconduct of the plaintiff in respect of Judicial proceedings presided over by the Plaintiff as the Deputy Registrar and Taxing Officer and therefore he was absolutely immuned and privileged - citing the case of *Nellie S Francis v Dr. James A. Gallo et al*, Supreme Courts, Rhode Island Supreme Clerk's Office No. 2011-129 Appeal.
5. It is further submitted that proceedings of administrative officers exercising their powers or discretion in application of the law are regarded as judicial or quasi-judicial in character and therefore privileged. The case of *Brady E. Al. v Bickford Et. al* AC (38581) court of Appeal in Connecticut was cited in support.
6. The defendant also submits that this suit is *resjudicata* as the issues raised in the present suit were the same issues raised and determined in the defendant's disciplinary proceedings before the judicial Service Commission of Kenya before he was lawfully and or compulsorily retired and therefore this suit ought to be declared *resjudicata* and closed as the court lacks jurisdiction to re-open and re-litigate it.

Cited also is there Court of Appeal decisions in Nairobi civil appeal No. 11of 2008 *Pevans East Africa limited and another v The Chairman Betting Control and Licencing Board and 7 Others*.

Plaintiff's Submissions Dated 17/08/2023

7. Citing *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 698 it is submitted that the Preliminary Objection does not meet threshold of a Preliminary Objection as defined therein as all the facts raised require ascertainment and interrogation including the disciplinary proceedings before the Judicial Service Commission.
8. In addition the Plaintiff submits that Article 159 (2) (a) of *the Constitution* and Rule 3 of Legal Notice Number 117 *constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practise and Procedures Rules* 2013 and Section 3a of the *Civil Procedure Act* places duty on the courts to foster fair, just and expeditious determination of suits.
9. Further submissions are that all the documents and letters produced during the judicial proceedings ought to be scrutinised for the court to allay unsubstantiated allegations by the defendants.
10. To that extent, it is urged that all the facts in the suit have to be ascertained and therefore do not meet the threshold of a pure point of law. Other cited cases in support are:-
 1. *Hon. Justice Kaplana H. Rawal & 2 Others v Judicial Service Commission & 5 others* [2016] eKLR
 2. *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 Others* Petition No. 10 of [2014] eKLR
 3. *Raila Odinga and 2 others v IEBC and 3 Others* Election Petition Number 5 od 2013 [2013]eKLR



11. The Plaintiff cites Section 6 *Defamation Act* that gives absolute privilege to fair and accurate newspaper reports of judicial proceedings and as there was not a newspaper when the offensive letter dated 21/12/2006 was written, then it cannot be accorded absolute privilege.

Citing the decision of the Court of Appeal *Mirugi Kariuki v AG* [1992] eKLR, it is submitted as held therein that courts are not to abdicate jurisdiction merely because the proceedings are of administrative nature or of an intended disciplinary character.

12. For the above the Plaintiff submits that the Preliminary Objection is misconceived, incurably defective, bad in law and must be dismissed.

Analysis and Determination

13. In the classic and celebrated case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* Civil Appeal No. 9 of [1969 EA 696] the court held that:-

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit.....

It raises a pure point of law, which, if argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion”.

14. Additionally, in the case of *Oraro v Mbaja* [2005] I KLR, the court held:-

“.....a Preliminary Objection correctly understood, is now well defined and declared to be a point of law which is blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle a true Preliminary Objection Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

I have carefully considered the parties pleadings herein and principles set out in the *Mukisa Biscuits Case (supra)* as well as others coming thereafter among them those cited by the plaintiff.

15. A Preliminary Objection must be a pure point of law argued on the assumption that the facts pleaded are correct and undisputed and that such facts need not be ascertained.

It is a fact that cannot be raised where what is being sought is subject of courts discretion.

16. I have considered the parties pleadings, the defence and counterclaim.

It is clear that the issues raised by the Plaintiff and the Defendant do not fall under the threshold of a pure point of law, which underpins a Preliminary Objection.

17. The Defendant in its statement of claim denies all the material facts and allegations raised by the plaintiff in its statement of claim.

18. By the above denial of the Plaintiffs allegations, it goes without a doubt that the said claims ought to be ascertained.



19. By the definition in the *Mukisa Biscuits case*, a Preliminary Objection cannot lie where the facts ought to be ascertained. The said allegations in the counterclaim and in totality both the plaintiff's case and the defendant's case raises issues that can not to be said to be correct, or undisputed.

The assumption that they are pure points of law and therefore correct is far from the nature of the suit before the court

20. In the case of *Oraro v Mbaja* [2005]1 KLR, in furtherance to the holding in the *Mukisa Biscuits case* the court held that a point of law which is blurred with factual details is liable to be contested and proved through the process of evidence and therefore cannot be pure points of law.
21. It is therefore clear that any fact allegations or assertions which call for proof by evidence or anything that purports to be a Preliminary Objection must not deal with disputed facts which stand to be tested by normal rules of evidence.
22. Additionally the court will not abdicate its jurisdiction conferred to it under the *Constitution* and statute (*defamation Act*) merely because the impugned proceedings are of administrative nature as in Disciplinary Proceedings before the Judicial Service Commission, has held in the decision of the Court of Appeal in *Mirugi Kariuki v AG* (*Supra*).
23. For the foregoing, the court finds and holds that the Defendant's Preliminary Objection dated 8/07/2023 is devoid of merit and is dismissed with costs to the plaintiff.
24. The case shall be mentioned on 26th September, 2024 for directions on the progression of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 31ST DAY OF JULY 2024.

JANET MULWA

JUDGE

