



**Otieno v Njiru t/a B N Mbuthia & Co Advocates (Civil Suit 503 of 2011)
[2023] KEHC 1325 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1325 (KLR)

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

**CIVIL
CIVIL SUIT 503 OF 2011**

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

BERNARD O OTIENO PLAINTIFF

AND

**BENSON MBUTHIA NJIRU T/A B N MBUTHIA & CO
ADVOCATES DEFENDANT**

RULING

1. The plaintiff instituted a suit against the defendant by way of the plaint dated November 15, 2011 and sought for inter alia, various forms of damages and an order for permanent and mandatory injunctions against the respondents, arising out of the tort of defamation.
2. The defendant filed a defence to deny the plaintiff's claim. Before this suit came up for hearing, the defendant filed an application seeking the suit be struck out for failure to disclose a reasonable cause of action actionable against the defendant. The defendant went further and filed a notice of preliminary objection challenging the jurisdiction of this honourable court to hear and determine the current suit as couched and presented before this court. It is argued that a complaint against an advocate's professional misconduct should be heard and determined before the advocate's disciplinary tribunal under section 60 of the *Advocates Act*.
3. The crux of the matter is whether the contents of the defendant's written submissions dated November 17, 2010 filed by the defendant's firm were indeed defamatory and whether the plaintiff is then entitled to an order for general damages.
4. The preliminary objection is the subject matter of this ruling. By an application of preliminary objection filed on November 10, 2021, the defendant raised issues before the hearing on grounds that this court lacks jurisdiction to hear this matter for the following reasons;



- i. The alleged cause of action, if at all there is one, is way below this court’s pecuniary jurisdiction and aptly fits within the jurisdiction established under section 7 of the *Magistrates Courts Act, 2015*.
 - ii. The alleged cause of action lies within privilege.
 - iii. The instant suit is bad in law, incompetent for offending mandatory provisions and the elaborate procedure set out at section 60 of the *Advocates Act* and *Advocates (Disciplinary Committee) Rules, 1990*.
 - iv. This honorable court lacks original jurisdiction to hear and determine a complaint against an Advocate for professional misconduct such jurisdiction exclusively vests in the advocates disciplinary tribunal established under section 57 of the *Advocate’s Act*.
5. When the parties attended court, directions were given that the preliminary objection be disposed of by way of written submissions. Consequently, the parties put in written submissions on the same.
 6. It is the submissions of Mr. Akoto, learned advocate for the defendant, that it should be noted that both the plaintiff and the defendant are High Court of Kenya advocates, and that the alleged defamatory remarks and dispute stem from a document submitted to the court during the course of a judicial inquiry while the aforementioned advocates were prosecuting a matter.
 7. The defendant submitted that the jurisdiction of handling a dispute between an advocate and his client or an advocate to an advocate is preserved under section 60 of the *advocates Act* for the advocate’s disciplinary tribunal. The defendant cited section 60 of the *Advocates Act* provides as follows;

A complaint against an advocate of professional misconduct which expression includes disgraceful or dishonorable conduct incompatible with the status of an advocate, may be made to the tribunal by any person.
 8. The defendant contends that it is only the advocate’s disciplinary tribunal which can then determine whether the contents of the impugned submissions as filed by the defendant advocate bordered on professional misconduct, if found culpable, for the professional misconduct the advocate is then liable for punishment meted out in line with sections 60 (4) of the *Advocates Act* which provides for the following remedies;

(4) After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order — (a) that such advocate be admonished; or (b) that such advocate be suspended from practice for a specified period not exceeding five years; or (c) that the name of such advocate be struck off the Roll; or (d) that such advocate do pay a fine not exceeding fifty thousand shillings; or such combination of the above orders as the Tribunal thinks fit. (e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings
 9. It is the defendant’s submissions that when it comes to complaints involving advocates, the High Court lacks original jurisdiction to hear and resolve these cases because they have been reserved for the advocate’s disciplinary tribunal. As a result, the courts, and the High Court in particular, can only exercise the supervisory and appellate jurisdictions that are expressly and completely outlined at sections 62, 64, 65, and 67 of the *Advocates Act*.



10. The defendant further submits that as was established in the well-known case of *Munster v. Lamb* 1883 11 QBD 588, defamatory statements made by an advocate in reference to or during a judicial inquiry are not actionable. This holds true even if the statements are irrelevant to the issues of fact in the case and are made without justification or excuse and with the intent to harm the advocate personally.
11. The defendant also pointed out that it is indeed settled that the rule of law is that what is said in the course of the administration of the law is privileged the same privilege that extends to judges and witnesses for words spoken in the course of a judicial proceedings. On this the defendant has relied on the case of *Henderson V Broomhead* 4H & N *Revis v Smith* “where the court held the general conclusion is that witnesses speaking with reference to the matter which is before the court whether what they say is relevant or irrelevant, whether what they say is malicious or not are exempt from liability to any action in respect of what they state, whether statement has been made in words, or through viva voce examination or whether it has been made on affidavit.”
12. In retort, the plaintiff gave brief facts of the matter and identified three issues for determination:
 - i. Whether the defendant’s preliminary objection raises a pure point of law.
 - ii. Whether the plaintiff’s suit as pleaded exceeds the jurisdiction of this honourable court.
 - iii. Whether the plaintiff’s claim is covered by privileged or is acclaim for professional misconduct meant to be raised before the advocates disciplinary tribunal.
13. On the first issue, the plaintiff submitted that the defendant’s preliminary objection is misplaced as it seeks that this court assess damages without hearing the parties and taking evidence which action will amount to trial by affidavits /submissions.
14. On this the plaintiff relied on the case of *Oraro v Mbaja* (2005) eKLR Ojwang J (as he then was) at pg.3 stated:-

I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and 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 which the court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.
15. On the second issue, the plaintiff submitted that this honourable court has an unlimited and original jurisdiction on all criminal and civil matters including this current suit.
16. On the third issue, the plaintiff submitted that the defendant had further raised the issue that this suit is misplaced as court proceedings are the subject of privilege hence no claim can arise out of court proceedings.
17. The plaintiff further submitted that the defendant submitted a written submissions filed on November 17, 2010, alleging that the plaintiff had been the subject of published defamatory allegations. The plaintiff, who was offended by the aforementioned defamatory allegations, filed an application asking that the aforementioned submissions be thrown out. The submissions were then deleted by the court.



18. It is the plaintiff's submissions that once the submissions were struck out from the court record, they were deprived of their privilege and they can maintain a claim for defamation.
19. On this argument the plaintiff relied on the case of *Marquette Law Review Volume 36 The priveledge Barring Civil Liability for libel in Pleadings by William H Bezold* where the learned author notes as follows:-

From a review of the cases it can be seen that the courts have universally agreed, even in early English and American laws, that there should be allowed a privilege or freedom from civil action for the use of libel in judicial proceedings. With the aid of the privilege the lawyer may discharge his duty as the administration of justice demands. Without the privilege the search for truth would be hampered, and the and aggressiveness that society demands. Of course it is not fitting that the privilege be without restrictions. If counsel goes beyond the bounds of privilege whether because of misplaced zeal or his own or his client's vindictive feelings, the privilege is lost and the protection withdrawn

20. Reference is made to the case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 cited in the submissions by the respondent, where the court defined the term 'preliminary objection' in the following manner:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."

21. According to section 60 of the *Advocates Act*, the disciplinary tribunal for advocates has the authority to handle a dispute between an advocate and his client or an advocate to another advocate.
22. The defendant argues that only the advocate's disciplinary tribunal can determine whether the contents of the impugned submissions as filed by the defendant advocate bordered on professional misconduct; if so, the advocate is then subject to punishment under section 60(4) of the *Advocates Act*, which lists the following remedies;

4) After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the tribunal may order — (a) that such advocate be admonished; or (b) that such advocate be suspended from practice for a specified period not exceeding five years; or (c) that the name of such advocate be struck off the roll; or (d) that such advocate do pay a fine not exceeding fifty thousand shillings; or such combination of the above orders as the tribunal thinks fit. (e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings

23. It is also clear the High Court lacks original jurisdiction over complaints involving advocates because those disputes have been preserved for the advocates' Disciplinary Tribunal. As a result, the courts, and the High Court in particular, can only exercise supervisory and appellate jurisdiction.
24. I am in agreement with the defendant that indeed the alleged cause of action, if at all there is one, is way below this courts pecuniary jurisdiction and further to that we can have all matter pertaining advocate's professional misconduct handled in courts as there is an advocates tribunal which was set up to handle the disputes between advocates and advocates and clients.



25. Section 60 of the *Advocates Act* provides as follows;

A complaint against an advocate of professional misconduct which expression includes disgraceful or dishonorable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.

26. In view of the foregoing, the court is satisfied that the preliminary objection is well taken. The court hereby strikes out the plaintiff’s suit with costs for offending section 60 of the *Advocates Act*.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

