



REPUBLIC OF KENYA



KENYA LAW
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**Owako v Ochieng (Miscellaneous Application 17 of 2021)
[2022] KEHC 14321 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION 17 OF 2021**

JN KAMAU, J

OCTOBER 25, 2022

BETWEEN

DAVID OSCAR OWAKO APPLICANT

AND

F. A OCHIENG RESPONDENT

RULING

1. In his Notice of Motion dated December 6, 2021 and filed on December 15, 2021, the Applicant herein sought for orders that the Respondent do pay him Kshs 100,000,000/= for defamation of character and refusing to satisfy Interlocutory Judgment entered against the 1st to 17th Defendants (sic) for breach of orders issued by this court, that a notice for execution to issue a Decree (sic) against the Respondent within thirty (30) days to pay him Kshs 100,000,00/= for defamation of character and that the Respondent be compelled to satisfy two interlocutory judgments in his favour for Kshs 112,121,000/= and Kshs 7,000,000/= delivered by Deputy Registrars Hon Lokopoiyot and Hon Wambilyanga correspondingly. (sic)
2. He swore an Affidavit in support of his said application on December 6, 2021. On March 24, 2022. he filed a Supplementary Affidavit sworn on March 22, 2022 to buttress his averments in his Supporting Affidavit.
3. In his affidavit evidence, he averred that his case was a libel-defamation suit against the Respondent for allegedly uttering the words, “you killed my father” during court proceedings and which injured his reputation as a law-abiding citizen.
4. He contended that the Respondent together with Hon. Lady Justice Kamau, duty Judge, failed to satisfy two interlocutory judgments liquidating sums Kshs 7,000,000/= and Kshs 112,121,000/= by Ruling dated November 22, 2021. He added that he had booked an OB No 03/1/12/2021 Report on the aforesaid defamation case at Kisumu Central Police Station.



5. He pointed out that the Respondent infringed his rights by associating with his elder brother the late Tony Olwande, a former Senior Manager in Chemilil Sugar Company that was responsible for trading and selling his sugarcane worth millions of shillings in cohorts with senior politicians namely, the late Hon Biwott, the late Hon Ezekiel Barngetuny, Hon Henry Kosgei and the Deputy President (sic) by paying his sugarcane proceeds worth millions of shillings to non-deserving entities. He alluded to proof of payment of Kshs 1,950,380/=. Notably, a perusal of Exhibit marked D002 was a letter from the Office of the President whose date was not clear but was in 2006 addressed to the Managing Director of Chemelil Sugar Company wherein the said Managing Director was asked to come up with a programme for harvesting his cane from a farm LR No 10817/3 in which there was a dispute of ownership.
6. He blamed the Respondent for his missing files and had transferred Kisumu HCCC No 38 of 2009 to Kakamega HCCC No 6 of 2019 and that he had halted his two applications one for Busia and another in Kakamega to arrest the judgment by this very court which had been slated for November 22, 2021 together with Hon Lina Akoth (sic) in lying under oath that the applications did not invoke vacation rules.
7. He set down several cases in Kisumu Chief Magistrate's Court, Kisumu High Court, Kisumu Court of Appeal, Nyando, Kakamega which he stated both the Respondent and this court failed to satisfy two (2) interlocutory judgments.
8. He further contended that the Respondent acknowledged in a video clip that he was familiar to his family but lied that he did not know him and had never met him socially because they had met. He stated that he mentioned that the Respondent's father was dead to which the Respondent said on the video, "You killed my father".
9. On March 24, 2022, the Respondent also filed what he referred to as Grounds of Opposition or Objection. They were dated March 22, 2022. He objected to the participation of the Attorney General in this matter and stated that administrative jurisdiction and authority reposed in the Chief Justice. He also contended that the application had been overtaken by events as the Respondent had directed that files be placed before the Chief Justice and that there was a stay of the Ruling of this court that was delivered on December 3, 2021.
10. In opposition thereto, the Attorney General entered appearance for the Respondent and filed Grounds of Opposition on his behalf. He contended that the application was baseless and the cited provisions did support (sic) the orders sought. He added that the application was defective, an abuse of the court process and ought to be struck out as there was neither an action for defamation brought before any court in a competent manner nor was there any decree or judgment to warrant issuance of notice of execution as the Applicant had sought in Prayer No (2) therein.
11. It was his case that if at all there were any the Applicant ought to have followed the proper execution proceedings as envisioned in Order 22 of the *Civil Procedure Rules*. He was emphatic that the application was misconceived and bad in law. He pointed out that there was no valid cause of action against the Respondent as he had never been judgment debtor in any case pertaining the applicant so as to be required to satisfy the Judgment referred to in Prayer No (4) of the application.
12. The Applicant's Written Submissions were dated March 22, 2022 and filed on March 24, 2022 while those of the Respondent were dated April 24, 2022 and filed on April 27, 2022.
13. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.



14. Notably, the Applicant had filed an application seeking the recusal of this court in a different matter. When the matter came up on March 15, 2022, this court sought to know from him if he was comfortable with it dealing with the matter to which he responded in the affirmative. It is on that ground that this court found itself dealing with this matter.

Legal Analysis

15. Notably, the Applicant's Grounds of Opposition or Objection dated March 22, 2022 and filed on March 24, 2022 are not a known pleading in law when filed by an applicant. These are pleadings that are filed by a respondent in opposition to an application. The contents therein were also very disjointed and confusing.
16. He also referred to a certification which had been occasioned by uncertainty of law arising from contradictory precedents that required the Supreme Court to resolve.
17. Going further, his submissions did not appear to have been relevant to the present application. He seemed to focus more on a different application dated February 1, 2022 wherein he asserted that he had prayed for grant of conservatory orders staying/setting aside the Ruling and orders of the Court of Appeal delivered on December 4, 2020 in Civil Application No 44 of 2020 *David Oscar Owako vs Chemelil Sugar and 7 Others*.
18. He blamed the Court of Appeal that consisted of Hon Justice Ole Kantai, Hon Justice Gatembu Kairu and Hon Justice Kiage for expunging an interlocutory judgment unprocedurally and that the said bench and advocates could not in any way interfere with the points of law that is ratified in the [Constitution](#) under Order 10 [Cap 21](#) Laws of Kenya.
19. He added that the Respondent issued an order on December 11, 2021 to transfer the matter (sic) before this court under the guidance of the Chief Justice to set a seven (7) bench tribunal to hear it when he discovered that there was a prima facie case against the above-mentioned bench of the Court of Appeal. He was emphatic that he had satisfied the threshold for the grant of the orders he sought and had an arguable appeal which would be rendered nugatory if this application was not allowed (sic).
20. On his part, the Attorney General submitted that the Respondent was immune from prosecution from any tortious liability that could arise in his line of duty being a government officer appointed under Article 166(5) of the [Constitution](#) of Kenya 2010 and as a result, the application suing him as such was defective and an abuse of the court process.
21. He invoked Section 4(5) of the [Government Proceedings Act](#) and Article 160(5) of the [Constitution](#) of Kenya and argued that the Respondent was not liable to an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. He further cited Section 4(1)(a) and Section 12 of the [Government Proceedings Act](#) and argued that such suits are brought against the Honourable Attorney General but which was not the case herein hence the application ought to be struck out.
22. He argued that it was difficult to place a nexus between the prayers sought and the provision of law that had been used to move the court. It explained that Order 8 of the [Civil Procedure Rules](#) 2010 provides for amendments of pleading and not for the vague orders sought herein. He added that Section 3(a) and 3(b) speak about the special jurisdiction of the court.
23. He pointed out that there was a clear-cut procedure provided by the [Civil Procedure Rules](#) in which one should bring an action for defamation and that the application herein did not amount to a plausible defamation suit. He asserted that the Respondent had never been a judgment debtor in any case



- pertaining to the client and there was no decree attached to prove that and therefore he could not be compelled to satisfy a fictitious judgment.
24. He contended that the facts in the applicant's supporting affidavit were not supported by any evidence and in any event the applicant was the one slandering the Respondent by insinuating he was a judgment debtor in a matter that he was not a party to, imputing that the Respondent was a bad debtor, statement which was very injurious to his character.
 25. Based on the above premise, it was emphatic that the Applicant had filed this matter following the wrong procedure as a claim of his nature ought to have been brought by way of a Plaint and not a Notice of Motion application.
 26. Be that as it may, no technical objection can be raised to any pleading on the ground of want of form as stipulated in Order 2 Rule 14 of the *Civil Procedure Rules*. The same provides as follows:-
No technical objection may be raised to any pleading on the ground of any want of form.
 27. Further, whereas Order 50 Rule 10(1) of the *Civil Procedure Rules* stipulates that every order or statutory provision under which an application has been brought must ordinarily be stated, no application shall be refused by reason of failure to comply with the said Rule.
 28. In addition, Order 50 Rule 10(2) of the *Civil Procedure Rules* states that no application shall be defeated on a technicality for want of form that that does not affect the substance of the application. Article 159(2)(d) of the *Constitution* of Kenya, 2010 also mandates courts to administer justice without undue regard to technicalities.
 29. For the aforesaid reasons, this court was not persuaded by the Respondent's submissions that the present application ought to be dismissed for failure to cite the correct provision of the Civil Procedure Rules that the same had been brought under.
 30. Notably, judicial officers are immune from any action or suit on account of their performance of a judicial function. Article 160(5) of the *Constitution* of Kenya provides that:-

“ A member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”
 31. This court had due regard to the case of *Moses Wamalwa Mukamari vs John O Makali & 3 Others* [2012] eKLR where the court therein emphasised this protection and determined that the correct party to be sued with a judge or judicial officer was the Attorney General.
 32. It was evident from the Applicant's pleadings that he sued the Respondent in his personal capacity for failure to enter interlocutory judgment in certain matters which were not disclosed. There was no evidence of the judgments that he was referring to. His pleadings also consisted of complaints against the Respondent, some Judges of Appeal and other Judicial Officers in several courts.
 33. Whereas any party is at liberty to appeal against any decision that aggrieves him or her, he or she cannot sue the judge or judicial officer who made such decision. The appellate system suffices to deal with ordinary errors of law and fact so that in the end justice is served.
 34. However, where a judge's or judicial officer's conduct consists of egregious illegalities, violation of the judicial oath or outright illegalities and criminality, a mechanism for removal does exist and the same can be triggered by an aggrieved party for determination by the relevant fora.



35. This court was satisfied that those mechanisms suffice to guard the integrity of the judicial process and to protect the rule of law and the rights of litigants. They ensure that judicial immunity, which is laudable and necessary for the protection of judicial independence does not morph into judicial impunity.
36. The notion and spectre of judges being sued for discharging their judicial functions must be firmly resisted as a serious threat to judicial independence, the integrity of the judicial process, the sanctity of the rule of law and the liberty of all citizens which cannot be countenanced in a rational society and a constitutional democracy such as ours.
37. This court agreed with the Attorney General's submissions that the application herein was misconceived for having been filed against the Respondent for on account of decisions he may have made in his ordinary course of duties and/or performance as a judge.
38. It also agreed with the Attorney General's submissions that this was not a proper claim for general damages for tort of defamation. The procedure for filing claims for defamation suits is not by way of applications. Rather, the same is by way of a suit which has to be proved by way of tendering oral and/or documentary evidence. It is trite law that he who alleges must prove.
39. Further, an award of damages has to be assessed by the trial court after hearing the case. The damages can never be sought in an application in the manner that the Applicant. The role of a plaintiff would only to submit to a trial court what he or she opines to be fair compensation by way of damages for the damage or injury to his or her character. An award for damages can only be made where a plaintiff proves his case on a balance of probabilities against the Learned Judge.
40. In its considered view of this court that the Applicant had not made out his case in a proper manner befitting of the grant of the orders he sought.

Disposition

41. For the foregoing reasons, the upshot of this Court's decision was that the Applicant's Notice of Motion application dated December 6, 2021 and filed on December 15, 2021 was not merited and the same be and is hereby dismissed.
42. This court deviated from the general principle that costs follow the event in this case of the Attorney General for the reason that it would be unjust and unfair to award costs to the government against its citizen.
43. This court highly recommends that the Applicant seeks legal representation to assist him in lodging his claims in court to enable courts understand what his real issues for determination are.
44. In the meantime, it is hereby directed and ordered that the Applicant herein will only file further pleadings, affidavits and any documentation, in whatever form, in respect of the complaints raised herein and in this matter with the leave of court.
45. It is so ordered.

DATED and DELIVERED at KISUMU this 25th day of October 2022

J. KAMAU

JUDGE



