



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO. 9 OF 2014**

**RICHARD B. O. ONSONGO.....PLAINTIFF**

**VERSUS**

**HON. ROSE OGENDO NYAMUNGA.....1<sup>ST</sup> DEFENDANT**

**MRS JOYCE OLWEYA.....2<sup>ND</sup> DEFENDANT**

**MR. PAUL OGENDO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff's claim against the Defendants is for:-

- a) **“General damages for defamation and damages on the foot of aggravated damages.**
- b) **Costs of the suit.**
- c) **Interest on (a) and (b) at court rates from date of filing suit until date of judgment.**
- d) **Any other relief the Honourable Court may deem expedient to grant.”**

2. The Plaintiff an Advocate of the High Court of Kenya based in Kisumu but who also practices law in other East African Courts in the name and style of **Onsongo & Company Advocates** told this court that he is married with four children and has served two separate terms as the Chairman of the Law Society of Kenya – West Kenya Chapter and has represented the East African Law Society in the East African Court of Justice. He stated that in the course of his practice he has represented many private companies and corporate clients and is a person of good standing as he has not been the subject of any investigation by any state agency or the Advocates Complaints Tribunal either as an Advocate or in his private words.

3. In relation to this case he stated that sometimes in the year 2010 he was instructed by one Stephen Ogendo, a beneficiary in **Kisumu High Court Succession Cause No. 231 of 1991** to represent him in the matter in which the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were also interested. He duly filed his documents whereupon all the advocates representing the different parties recorded a consent on the mode of distribution. The court then made an order for payment of his fees. It was at that juncture that the file went missing in the registry. After making several visits to the registry to no avail he wrote a letter to the Deputy Registrar of the court asking her to trace the file so that his costs could be assessed. It was then that he was handed two letters dated 18<sup>th</sup> February 2014 and 19<sup>th</sup> February 2014 the first authored by Mrs Joyce Olweya and Mr. Paul Ogendo the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the second by Honourable Rose Nyamunga MP, the 1<sup>st</sup> Defendant. The letters read:-

**“THE REGISTRAR**

**KISUMU HIGH COURT**

**P O BOX 126**

**KISUMU**

**Date: 18<sup>th</sup> February 2014**

**Dear Sir/Madam**

Facts of the case

- 1991 the three brothers Walter, Tobias and Paul Ogendo went to court to be allowed administrate the estate of their later father.
- The three were then granted the order to be administrator.
- End of the same year 1991, one of the administrators, Tobias Ogendo passed on and the two, Walter and Paul went back to court to ask for new administration which was granted.
- 1999, Walter passed on and Paul was unwell. It is during the years that followed that our nephews, Richard and Willis Obiero Ogendo went to court quietly and illegally to obtain the administration of the estate.
- From the year 2000 to 2005 while the two brothers were administrators, the family of the late Ogendo was always kept in the dark. They did not have any idea on the finances divided from the estate. The family tried all means to no avail.
- In 2005, since we could not follow any transaction concerning the estate, we applied to the court to allow us bring Mama Grace Ajuang', our step mother to join the nephews as administrator.
- In 2007, Willis, one of the nephews passed on leaving Richard and Mama Grace as administrators.
- Mama Grace being semi-literate was always manipulated by Richard, her signature was always forged and up to now she has no idea of what is happening.
- In December 2009, we decided to meet as a family to distribute the estate which we did and submitted to the Lawyer P. J. Otieno and Yogo Advocates for formalization in the court.
- While this was going on, in 2010 June, we heard that one of the property RL Block 7/319 Anyawa street Kisumu was on sale.
- After investigations we wrote a letter to Kisumu Provincial Commissioner, registrar of lands Nairobi and sent copies to Kisumu lands registrar and the CID Kisumu of the said sale. We even put a caveat on the said property.
- Come 2011, we came to realize that the property had been fraudulently sold by our sister in-law (Rosemary Atieno Abuto) to Sasha Investments Company at a cost of seventeen million (17 million).
- We reported the matter to court, while the court is ongoing; Richard who is one of the administrators has gone ahead and thrown out one of the tenant in the said property and is trying to replace him with another tenant known as Ramogi Chemist without consultation.

The facts that led us to the opinion of moving the case from Kisumu High Court to Nairobi High Court are as follows:-

1. From what we understand, normally it's the beneficiaries who are supposed to appoint administrators; this is not with our case.
2. The length of time the case has taken to be determined has been unusually long.
3. The documents have been constantly removed from the file to interfere with proceedings by one staff at the Kisumu High Court, Tina.
4. There is unusual interest by several lawyers in Kisumu and we suspect bribery is taking place; the lawyers are:-
  - Kimanga
  - Onsongo
  - Anyul
  - Ogutu Mboya
5. Death threats from Richard Ogendo, Richard Guya the new tenant and advocate.
6. Hence reason for a neutral ground.

Thank you.

Yours faithfully,

Mrs Joyce Olweya

Mr. Paul Ogendo

.....

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CC. – The Chief Justice

-The Registrar of High Court Nairobi”

“THE REGISTRAR

19<sup>TH</sup> FEBRUARY, 2014

KISUMU HIGH COURT

P O BOX 126

KISUMU

Dear Sir/Madam

RE: SUCCESSION FILE ON THE ESTATE OF THE LATE MANASON OGENDO BODO CASE NUMBER 213 OF 1991

Facts of the case

- 1991 the three brothers Walter, Tobias and Paul Ogendo went to court to be allowed administrate the estate of their later father.
- The three were then granted the order to be administrator.
- End of the same year 1991, one of the administrators, Tobias Ogendo passed on and the two, Walter and Paul went back to court to ask for new administration which was granted.
- 1999, Walter passed on and Paul was unwell. It is during the years that followed that our nephews, Richard and Willis Obiero Ogendo went to court quietly and illegally to obtain the administration of the estate.
- From the year 2000 to 2005 while the two brothers were administrators, the family of the late Ogendo was always kept in the dark. They did not have any idea on the finances divided from the estate. The family tried all means to no avail.
- In 2005, since we could not follow any transaction concerning the estate, we applied to the court to allow us bring Mama Grace Ajuang’, our step mother to join the nephews as administrator.
- In 2007, Willis, one of the nephews passed on leaving Richard and Mama Grace as administrators.
- Mama Grace being semi-literate was always manipulated by Richard, her signature was always forged and up to now she has no idea of what is happening.
- In December 2009, we decided to meet as a family to distribute the estate which we did and submitted to the Lawyer P. J. Otieno and Yogo Advocates for formalization in the court.
- While this was going on, in 2010 June, we heard that one of the property RL Block 7/319 Anyawa street Kisumu was on sale.
- After investigations we wrote a letter to Kisumu Provincial Commissioner, registrar of lands Nairobi and sent copies to Kisumu lands registrar and the CID Kisumu of the said sale. We even put a caveat on the said property.
- Come 2011, we came to realize that the property had been fraudulently sold by our sister in-law (Rosemary Atieno Abuto) to Sasha Investments Company at a cost of seventeen million (17 million).
- We reported the matter to court, while the court is ongoing; Richard who is one of the administrators has gone ahead and thrown out one of the tenant in the said property and is trying to replace him with another tenant known as Ramogi Chemist without consultation.

The facts that led us to the opinion of moving the case from Kisumu High Court to Nairobi High Court are as follows:-

1. From what we understand, normally it’s the beneficiaries who are supposed to appoint administrators; this is not with our case.
2. The length of time the case has taken to be determined has been unusually long.
3. The documents have been constantly removed from the file to interfere with proceedings by one staff at the Kisumu High Court, Tina.
4. There is unusual interest by several lawyers in Kisumu and we suspect bribery is taking place; the lawyers are:-

- Kimanga

-Onsongo

-Anyul

-Ogutu Mboya

5. Death threats from Richard Ogendo, Richard Guya the new tenant and advocate.

6. Hence reason for a neutral ground.

Thank you.

Hon. Rose Nyamunga M.P.

**KISUMU COUNTY**

CC. – The Chief Justice

**-The Registrar of High Court Nairobi”**

It is those two letters that he alleges were defamatory of him. He contended that in 2014 he was the only Onsongo in Kisumu and that he took issue with the letters as firstly he had never involved himself in corruption. He contended that he had nothing to do with the file not being easily traced in the registry. He stated that moreover he had been instrumental in moving the matter forward. He stated that prior to writing those letters the defendants had not contacted him to verify the correctness of their contents. He asserted that although the letters were addressed to the Chief Justice, the Chief Registrar and Deputy Registrar Kisumu they were nevertheless published to himself. He stated that any person reading them would perceive him as a person who is corrupt, who engages in bribery, not of upright moral character, dishonest, untrustworthy and not capable of carrying out a clean legal practice; In other words not fit to have the clients he has. He further stated that having been sent to the Chief Justice and the Registrar the letters are a permanent record of the court. He contended that despite note and demand for an apology the defendants have neither apologized nor withdrawn the contents of their letters hence this suit. He produced in evidence a national identity card (EXB.P1), Admission Certificate (EXB. P2), Certificate of Registration (EXB. P3), the letter by the 1<sup>st</sup> defendant dated 19<sup>th</sup> February, 2014 (EXB. P4), letter by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants dated 18<sup>th</sup> February 2014 (EXB.P5), Consent letter in Succession 213 of 1999 (EXB. P.6), Law Society of Kenya Weekly Newsletter dated 23<sup>rd</sup> July 2012 (EXB. P7) and the demand letter to the defendants (EXB.P8).

4. In their joint written statement of defence the defendants admitted having written the letters in issue but denied that the same bore any defamatory. They also averred that the words were published on occasion of qualified privilege whose particulars they give as –

a) **“The 1<sup>st</sup> and 3<sup>rd</sup> Defendants are one of the beneficiaries to the Estate of Manason Ogendo Bodo deceased whose estate is the subject matter in Kisumu High Court Succession Cause No. 213 of 1991.**

b) **The 2<sup>nd</sup> Defendant is one of the Administrators of the Estate of Manason Ogendo Bodo in Kisumu High Court Succession Cause No. 213 of 1991.**

c) **The Plaintiff is a practicing Advocate and in relation to the Estate of Manason Ogendo Bodo in Kisumu High Court Succession Cause No. 213 of 1991 he is the Advocate on record for one of the Beneficiary one Joseph Stephen Ogendo.**

d) **In the sincere belief by the Defendants, the letters dated 18<sup>th</sup> February, 2014 and 19<sup>th</sup> February, 2014 by the Defendants and addressed to the Registrar High Court Kisumu and the said letters copied to the Honourable Chief Justice and the Registrar of High Court Nairobi to which contents of the letters, was for the Respective Persons to act in their capacity as Persons responsible for efficient Administration of all the Judiciary matters and issues to the goal of ensuring expedient disposal and determination of Judicial matters and cases to their logical conclusion.**

e) **In the premises the Defendants, the Honourable Chief Justice and the Registrars of the High Court in Kisumu and Nairobi respectively had a common or corresponding interest in the subject matter of the letter complained of in the reasonable protection of their own legitimate interests to the Honourable Chief Justice and the Registrars of the High Court Kisumu and Nairobi respectively.**

f) **The Defendants were therefore under a legal, social and moral duty, or in the protection or furtherance of a legitimate interest, to write/or published and copied the letters dated 18<sup>th</sup> February, 2014 and 19<sup>th</sup> February, 2014 to the Registrar of the High Court Kisumu, the Honourable Chief Justice and the Registrar High Court Nairobi respectively.”**

5. In the alternative they aver that the words were fair comment made in good faith and without malice upon a matter of expression of opinion by the defendants and give the following particulars:-

a) **“The 1<sup>st</sup> and 3<sup>rd</sup> Defendants are one of the beneficiaries to the Estate of Manason Ogendo Bodo deceased whose estate is the subject matter in Kisumu High Court Succession Cause No. 213 of 1991.**

**b) The 2<sup>nd</sup> Defendant is one of the Administrators of the Estate of Manason Ogendo Bodo in Kisumu High Court Succession Cause No. 213 of 1991.**

**c) The Plaintiff is a practicing Advocate and in relation to the Estate of Manason Ogendo Bodo in Kisumu High Court Succession Cause No. 213 of 1991 he is the Advocate on record for one of the Beneficiary one Joseph Steven Ogendo.**

**d) There has been unusual delay to completely hear and determine the Kisumu High Court Succession Cause No. 213 of 1991: Estate of Manason Ogendo Bodo.**

**e) Further, the attempts to locate the Court File in Kisumu High Court Succession Cause No. 213 of 1991: Estate of Manason Ogendo Bodo in the Court Registry has been futile a fact admitted by the Plaintiff at Paragraph 15 of his Plaintiff statement dated 4<sup>th</sup> March 2014.**

**f) The missing of the Court File in Kisumu High Court Succession Cause No. 213 of 1991: Estate of Manason Ogendo Bodo occasion interference of the relevant Court proceedings and documents.**

**g) That given the duration of the Succession File in Kisumu High Court Succession Cause No. 213 of 1991: Estate of Manason Ogendo Bodo and sometimes the missing of the Court File in the said matter it is warranted that any suspicion may be aroused.**

**h) In the premises the words complained of were fair comment in expressing the opinion that every litigation must always come to an end without unreasonable delay”.**

6. They deny that the Plaintiff's credit and reputation has been injured and urge this court to dismiss his suit with costs.

7. At the hearing the defendants testified that they were the children of the deceased person in the Succession Cause and that they wrote the impugned letters because they could no longer make any head way in the matter. They stated that the cause has reconstructed several times after the pleadings went missing. They contended that all they needed was to get help, from the Chief Justice being the person who had the final say. They contended that the letters were confidential and they did not know how they got into the hands of the administrators. They expressed surprise that they were sued by the Plaintiff and contended that twenty five years was a long time for a matter to be pending in court. They further contended that there was nothing wrong in saying that some advocates in Kisumu had unusual interest in the matter as they suspected something was going on. They contended that their suspicion could only be investigated by the custodians of the case. They denied saying that the Plaintiff was involved in corruption or that he was untrustworthy. They asserted that the letters were not circulated to other people other than those they addressed and contended they were not responsible for their leaking to other people. They maintained that there was nothing wrong with what they did and stated that they merely mentioned the names of the advocates they suspected were unduly interested in the matter. They stated that as a matter of fact one of the assets was fraudulently disposed by their daughter in-law. They produced the Succession Cause in evidence (EXB. D1).

8. This judgment was scheduled for 18<sup>th</sup> January 2018 but by then written submissions of the Advocates had not been filed ostensibly because the registry refused to receive them as the file was with the Judge awaiting judgment. I can see those of the Plaintiff are now stamped as received on 11<sup>th</sup> January 2015 but by 18<sup>th</sup> January 2018 when we mentioned this matter they were not on record. Those of the defendants were filed on 22<sup>nd</sup> January 2018. I have now had ample opportunity to consider the evidence and rival submissions. As it is not disputed that the defendants wrote the two letters the issues for determination are:-

**i. Whether the letters were written of and concerning the Plaintiff.**

**ii. Whether the same were published to persons other than the Plaintiff.**

**iii. Whether the words used were defamatory or whether they were fair comment.**

**iv. Whether the Plaintiff is entitled to damages as prayed in the plaint.**

9. Having read the two impugned letters I am satisfied that the same were written of and concerning the Plaintiff. There is evidence that the Plaintiff acted for one of the beneficiaries in the Succession Cause in which the defendants were also beneficiaries.

10. The contents of the two impugned letters are similar save for the authors. On the second page at Item 4 the letters refer to four advocates by name the second one on the list being Onsongo. There is evidence that the Plaintiff in this case acted for one of the beneficiaries in the Succession Cause in which the defendants are also beneficiaries. There is also evidence that he is the Onsongo who practices in the names and style of Onsongo & Company Advocates as can be seen from the Certificate of Registration of his law firm. There is therefore no doubt that these two letters were written of and concerning the Plaintiff.

11. That the two letters were published is not in doubt as the defendants admit that they were sent to the Deputy Registrar and copied to the Chief Justice and the Registrar of the High Court, Nairobi; provided that the words complained of were read by even one other person other than the plaintiff that is publication. The Plaintiff testified that the two letters were brought to his notice when he visited the court registry to inquire into a letter he himself had written concerning the Succession Cause, which means that the letters were published to an even wider audience; Court files are after all public documents. Although the defendants allege the letters were confidential there is no proof of that. Ordinarily a Deputy Registrar receiving such a letter in the ordinary course of business would upon noting its contents and acting thereon file it away in the relevant file in this case the Succession Cause. The defendants ought to have known this or must have known that.

12. It was their contention that they wrote the letters as way of seeking help as their matter had stalled in court as their records kept missing from the file. While I agree that a party faced with their predicament would be entitled to seek help from the custodians of the case, it is my finding that their letters went beyond seeking help. After setting out the facts of the case the defendants proceeded to give the reasons for moving the Cause from Kisumu to Nairobi and one of those reasons was “*unusual interest by several lawyers in Kisumu and we suspect bribery is taking place .....*”. They then proceeded to name the Plaintiff and other advocates. Any ordinary person reading can only conclude that the Plaintiff was one of the lawyers who had unusual interest in the matter and who were suspected of bribery by the authors. It is my finding that in their ordinary meaning the words used portrayed the Plaintiff as a crook. They could not have been fair comment was not true first because the Plaintiff was acting for one of the beneficiaries and was therefore entitled to have an interest in the matter. Secondly because it was not shown that the interest he had was more than was expected of an advocate acting in a matter. Thirdly the Plaintiff himself stated that this was confirmed by the court official who was called as a witness by the defendants that he himself had written a letter to inquire into the disappearance of the file as he needed his fees assessed having persuaded the other advocates and beneficiaries in the matter to record a consent on the mode of distribution. The defendants did not bother to establish what his interest in the matter was and listing him together with other advocates they suspected of bribery in the case was defamatory and cannot be fair comment. What was fair comment was that the records had disappeared from the file several times and they needed to have the matter transferred to Nairobi from Kisumu. In **Kenya Tea Development Agency Limited V. Benson Ondimu Masese T/A B.O. Masese & Company Advocates [2008] eKLR** the court found a letter written to the Advocates Commission defamatory despite that the appellant was exercising its right to lodge a complaint against the advocate. It was addressed to only one body and not anybody else. Similarly this court finds the words complained of in the two letters were malicious and were defamatory of the Plaintiff despite that they were written to persons to who the defendants were entitled to lodge a complaint regarding their cause. The fact that the defendants continue to hold that the words are true without giving particulars of why they state the Plaintiff was involved in bribery demonstrates they were actuated by malice. As I have stated it was not demonstrated that the Plaintiff in fact had an unusual interest in the matter other than an advocate acting in a matter would or that he had dealt with the matter in a manner that could give rise to suspicion that he was doing so corruptly. The fact that they were not sure bribery was going on hence use of the word “*suspect*” is what should have caused them to refrain from naming the Plaintiff as one of those lawyers.

13. Libel is actionable without proof of damage. (See **Halsbury’s Laws of England, Fourth Edition Page 3 Paragraph 1** where it is stated:-

**“1. Libel and slander actions. In English law, speaking generally, every man is entitled to his good name and to the esteem in which he is held by others, and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse. If a defamatory statement is made in writing or printing or some other permanent form, the tort of libel is committed and the law presumes damage .....**”

The Plaintiff therefore need not prove actual damage though this may be taken into account when considering the measure of damages to which I find that he is entitled. In **Johnson Evan Gicheru V. Andrew Morton & Michael O. Mara Books Limited – Nairobi Civil Appeal No. 314 of 2000** – the court approved the following as principles which should guide the court on the amount of damages to be awarded:-

- 1. “The objective features of the libel itself such as its gravity, its province, the circulation of the medium in which it is published and any repetition.**
- 2. The subjective effect of the plaintiff’s feelings not only from the prominence itself but from the defendant’s conduct thereafter both up to and including the trial itself.**
- 3. Matters tending to mitigate damages such as the publication of an apology.**
- 4. Matters tending to reduce damages.**
- 5. Vindication of the plaintiff’s reputation past and future.**

The Plaintiff’s Advocate has proposed general damages of Kshs.15,000,000/= and aggravated damages of Kshs.2,000,000/= while the Defendant has relying on **Sankale Ole Kantai V. Nyamodi Ochieng Nyamodi & Another [2012] eKLR** submitted that an award of Kshs.500,000/= would suffice. I have taken note that although the defamatory letter was addressed to the Deputy Registrar and copied to the Chief Justice and Registrar of the High Court it was left in the court file hence circulating the publication to more people. I have also taken note of the fact that the defendants lack of remorse and their stand that everything they stated in that letter was justified. Whereas they may have been justified in raising a concern as to the length of time it had taken to resolve the dispute they were certainly not justified in their allegation that the Plaintiff was involved in bribery in the matter. If they were, as I have already stated they have not brought evidence of such justification to court. I have also taken into consideration that the Plaintiff has, despite the defamatory letter continued to practice law in the corridors of this court and elsewhere and that therefore his reputation both personal and as an advocate was not that badly dented. My finding is that the damages awarded in the **Sankale Ole Kantai V. Nyamodi Ochieng Nyamodi & Another** (Suppra) only Kshs.500,000/= was awarded way on the lower side as in **Kenya Tea Development Agency Limited V. Benson Ondimu Masese T/A B.O. Masese & Company Advocates** (Suppra) which had been decided four years earlier the Court of Appeal had reduced the damages awarded to the Advocate from Kshs.10,000,000/= to Kshs.1,500,000/=. Doing the best I can, I assess general damages in this case at Kshs.2,500,000/= (Two Million Five Hundred Thousand Shillings). I am also satisfied that the Plaintiff is entitled to aggravated damages as the Defendants have adamantly refused to apologize even in the face of this case. For aggravated damages I award a sum of Kshs.500,000/= (Five Hundred Thousand Shillings).

14. Accordingly I enter final judgment for the Plaintiff against the defendants jointly and severally for:-

- 1. General damages Kshs.2,500,000/= (Two Million Five Hundred Thousand Shillings)**

**2. Aggravated damages Kshs.500,000/= (Five Hundred Thousand Shillings)**

**3. Costs of the suit**

**4. Interest on (1) & (2) at court rates from the date of filing suit.**

It is so ordered.

**Signed, dated and delivered at Kisumu this 27<sup>th</sup> day of February 2018**

**E. N. MAINA**

**JUDGE**