



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 54 OF 2013

ALI BAKARI MOHAMED APPELLANT

VERSUS

DAVID M. MUIRURI RESPONDENT

JUDGEMENT

This appeal emanates from the ruling of Hon. Yusuf Shikanda, delivered on 16th December, 2013. The grounds of appeal are as follows: -

- 1. THAT the learned magistrate erred in both law and fact by holding that Malindi CMCC No. 19 of 2013 is res judicata Malindi CMCC No. 223 of 2012.***
- 2. THAT the learned trial magistrate erred in both law and fact by holding that any defamatory material filed in court cannot give cause of action.***
- 3. THAT the learned trial magistrate erred in the interpretation of section 7 of the Civil Procedure Act.***
- 4. THAT the trial magistrate failed to appreciate the rights of litigates by according the appellant herein an opportunity to ventilate his case on merit.***
- 5. THAT the learned magistrate failed and/or misdirected his mind that the appellant herein is not a party to Malindi HCCC No. 27 of 2012.***

Parties agreed to determine the appeal by way of written submissions. M/s Kilonzo Aziz & co. Advocates, counsels for the appellant submit that the trial court misdirected itself when it held that suit number CMCC 19 of 2013 was res judicata as there was also suit No. CMCC 223 OF 2012. The trial court failed to appreciate the provisions of section 7 of the Civil Procedure Act. Counsel relies on the case of **GANATRA V GANATRA (2007) 1 E.A 76** where the court stated the following on res judicata: -

“What constitutes re judicata is stated under section 7 of the Civil Procedure Act (chapter 21). For res judicata to be established three conditions have to be fulfilled.

Firstly, that there was a former suit or proceedings in which the same parties as in the subsequent suit or proceedings litigated.

Secondly, that the matter in issue in the later suit must have been directly and substantially in issue in the former suit.

Thirdly, that a court competent to try it had heard and finalised matters in controversy between the parties in the former suit.

In my ruling delivered on 9th September, 2006, I struck out the application as being incurably defective. I also allowed the applicant to file a fresh application. I did not hear and finally determine the issues in dispute. Therefore the doctrine of res judicata does not apply in our present case.”

According to counsel for the appellant, Civil Suit No. CMCC 223 of 2012 was not dismissed and was not heard on merit. It was simply struck out for want of cause of action. Therefore the second Suit No. CMCC 19 OF 2013 was not res judicata.

It is further submitted that the trial court erred in law by dismissing the application for review in total disregard of the facts and law when it held that an affidavit constituted court proceedings. According to counsel for the appellant, proceedings means judges or magistrate's handwritten notes. The cause of action in CMCC No. 19 of 2013 emanated from an affidavit sworn by the respondent in HCCC. No. 27 of 2012 where the respondent made defamatory statements against the appellant. The trial court relied on section 3 (1) (c) of the Judicature Act which brings in the common Law of England yet the Kenyan Constitution under Article 159 emphasizes on dispensation of justice without undue regard to technicalities. The trial court erroneously held that the application had been filed after unreasonable delay.

Mr. Muranje, counsel for the respondent is in agreement with the findings of the trial court. Counsel submit that the appellant filed a suit replica to what had been struck out seven months earlier. The suit was struck out on 18th March, 2013. The appellant sought to have the orders striking out the suit reviewed. The application was dismissed leading to this appeal. The appeal is one against the decision to strike out the suit but has been disguised as an appeal against the dismissal of the subsequent application.

The dispute herein can be traced to Civil Suit No. Malindi HCCC. 27 of 2012, **MIRKO BLAETTERMANN** (suing through **SHABIR HATIM ALI**) **VS DAVID MUIRURI & 2 OTHERS**.

In that suit, the respondent herein filed a replying affidavit sworn on 9th March, 2012. Paragraphs 24 and 34 of that affidavit states as follows: -

24. THAT contrary to what the applicant has portrayed in his affidavit, I have in my possession affidavits of various allies of the deponent which clearly outlines how the court files were destroyed by officers of the court through the plotting and scheming of the applicant, his friends one ALI BAKARI (DARIO) and a police officer one GEORGE OGOLA (the sole investigating officer in the Criminal Case cited hereinabove) in conspiracy with judicial officers JOYCE MANYASI (FORMER CHIEF MAGISTRATE) and one PETER MBIU (court clerk).

34. THAT evidence of how the said SHABIR HATIM ALI on behalf of BRUNO PEZZOTTA and his allies, one DARIO and CPI GEORGE OGOLA conspires with judicial officers being JOYCE MANYASI former chief Magistrate, PETER MBIU a court clerk and an advocate by the name MR. WAMEYO planned for the disappearance of court files and are guilty of filing frivolous suits and using one ALEX KITSAO has since emerged and all the culprits should be ones prosecuted criminally but not the persecution currently extended to the defendants.

As a result of those averments the appellant herein instituted Malindi CMCC No. 223 of 2012 alledging that the respondent had defamed him. The suit was struck out by the court on the ground that it did not disclose any cause of action as the affidavit by the respondent was part of the court proceedings. Subsequently, the appellant filed Malindi CMCC No. 19 of 2013. Paragraphs 4, 5 and 6 of the plaint in Civil Suit No. CMCC 19 of 2013 states as follows:

4. *On or about the 9th day of March, 2012, the defendant caused to swear and publish a defamatory affidavit with such defamatory words against the plaintiff herein which read as follows “...the court files were destroyed by officers of the court through the plotting and scheming of the applicant, his friend one ALI BAKARI (DARIO)...”*

5. *The said defamatory words are contained in paragraph 24 of the aforesaid affidavit by the defendant are words by the defendant himself purporting to cite the source as being one ELIZABETH GATHONI NDUNG’U who is highly believed to be a fictitious source.*

6. *at paragraph 34 of the said affidavit by the defendant, the defendant with the intent of fully tarnishing the plaintiff’s name went ahead to paste mud on the plaintiff by publishing the following words “...one DARIO and Cpl GEORGE OGOLA conspires with judicial officers being JOYCE MANYASI former Chief Magistrate, PETER MBIU a court clerk and an advocate by the name MR. WAMEYO planned for the disappearance of court files...”*

The record shows that counsel for the respondent raised a preliminary objection contending that Civil Suit No. 19 of 2013 was res-judicata. The court delivered a short ruling on 18th March, 2013 and struck out the suit with costs. The court allowed the respondent to continue with his counter claim which is basically a claim on costs. Counsel for the appellant filed an application dated 3rd October, 2013 seeking a review of the ruling of 18th March, 2013 and reinstatement of Civil Suit No. 19 of 2013 that had been struck out. The trial court delivered its ruling on 16th December, 2013 and dismissed the application. The appeal herein is in relation to that ruling of 16th December, 2013.

The issue for my consideration is whether the trial court was right by dismissing the application dated 3rd October, 2013 seeking orders of review and reinstatement of Civil Suit No. 19 of 2013. I have seen the notice of preliminary objection dated 7th February, 2013. Ground number two of the notice indicate that the suit, i.e. Malindi CMCC 19 of 2013, was res judicata in view of Malindi CMCC 223 of 2012. The appellant contends that the earlier suit had been struck out and was not heard on merit. There is no contention that Civil Suit No. 223 of 2012 was not similar to Malindi CMCC 19 of 2013.

It is clear to me that Suit No. 223 of 2012 is similar to Suit No. 19 of 2013. Both suits were struck out for disclosing no cause of action. The trial court relied on the case of **ROBERT M. MUGA V MUCHANGI KIUNGA & 2 OTHERS Nairobi Civil appeal (C.A) Nos. 102, 256 and 267 of 1998 (2007) (eKLR)**. In that case the court stated the following: -

The expression “heard and finally decided” means a matter on which the court had exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. It is essential that it should have been heard and finally decided. What operates as res judicata is the product of what is fundamental to the decision.

Order VI rule 13 mandates the court to strike out any pleading on the grounds set out in subsection (1) thereof. A decision whether to strike out a suit goes to the merits of the suit. We would also, think that when the court pronounces its judgement or ruling under this rule it must be said to be a judgement or decision on the merits on the material before it and have the same effect as a dismissal upon evidence; and accordingly, the matters in issue in the first suit must be deemed to have been heard and determined.

The trial court did conclude that the suit was res-judicata as the earlier suit had been struck out.

The dispute herein revolves around the issue as to whether the affidavit filed by the respondent in HCCC No. 27 of 2012 was privileged and therefore immune to separate litigation. The trial court reasoned that the affidavit was part of the proceedings in that case and was therefore privileged. The Black’s Law dictionary (9th edition) defines the word privilege as follows: -

A special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty. A privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that, under ordinary circumstances, would subject the actor to liability.

The same dictionary defines judicial privilege in the following terms: -

The privilege protecting any statement made in the course of and with reference to a judicial proceedings by any judge, juror, party, witness, or advocate.

Litigation privilege is also defined by the dictionary as follows: -

A privilege protecting the attorneys and parties in a law suit against tort claims based on certain acts done and statements made when related to the litigation. The privilege is most often applied to defamation claims but may be extended to encompass other torts, such as invasion of privacy and disclosure of trade secrets. The facts of each case determine whether the privilege applies and whether it is qualified or absolute.

The paragraphs that were alleged to be defamatory have been reproduced herein above. It is clear that the appellant was not a party to Civil Suit No. 27 of 2012. The alleged defamation arose in that suit. Affidavits are filed in Civil Suits under Order 19 of the Civil Procedure Act. An affidavit can be filed to prove a fact. Under Order 19 rule (3) affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. The respondent herein averred that a court file had been destroyed and the appellant is one of those people who caused the file to be destroyed. The respondent even averred that an advocate and a magistrate was involved in the disappearance of a court file. Under Order 19 rule 6, the court can order any matter contained in an affidavit which is scandalous, irrelevant or oppressive to be struck out. In essence therefore the respondent was certain that the appellant had caused a court file to be destroyed.

The question which arises is whether privilege of proceedings is absolute and this brings out the question of whether a litigant can say anything even if it is false or scandalous or slanderous. What is the remedy to those who are mentioned adversely in proceedings which they are not involved? Under Parliamentary rules, the parliamentary privilege cannot be invoked where a parliamentarian intends to adversely mention someone who is not a member of parliament without moving a substantive motion. The effect of such a procedure is that the person to be mentioned adversely will have notice and might as well sent his response to the speaker. That is why at times parliamentarians have been challenged to repeat what they have said inside parliament in public.

My view is that judicial or litigation privilege is not absolute. One cannot take oath in court and make a testimony which defames a third party and still come under the protection of the same court. If that was to be the case then all what a party will require is to file a flimsy suit against a non-interested litigant and support the suit with affidavits which raises serious allegations against third parties. When confronted by the third parties the plaintiff will simply raise the defence of judicial process privilege. That will make the courts to be protectors of people who make false and scandalous averments.

The Civil Procedure Act stipulates that any scandalous, irrelevant or oppressive averment can be struck out. Similarly, one can be charged with the offence of perjury under section 108 of the Penal Code if it is found that the statement made under oath is false. Such statement includes an affidavit.

The dispute arose in a civil suit. There is difference of privilege information between civil and criminal proceedings. Section 198 of the Penal Code provides for cases in which publication of a defamatory matter is absolutely privileged. Section 198 (e) states that if the matter is published in the course of any judicial proceedings by a person taking part therein as a judge, magistrate, commissioner, advocate, assessor, witness or party thereto. An affidavit is an averment under oath and not a publication and does not fall within the protection of section 198. However, in civil proceedings an affidavit becomes part of the proceedings. The word "proceedings" is not limited to the notes taken by judicial officers but

includes the pleadings and other documents forming part of the record.

What should the person who feels to have been defamed in judicial proceedings do? Is it that his fate is sealed? Article 28 of the Constitution protects human dignity. Some averments erodes human dignity and should not come under the protection of judicial privilege. If that were to happen then the constitutional right of human dignity will be eroded. The appellant herein was not a party in the proceedings where he was alledged to have destroyed a court file. If there is a follow up, he can be charged in court for having caused the disappearance of court documents. People might also be warned that should they have a court case with the appellant, they should be careful as he might cause the disappearance of the court file. That cannot be good reputation. In his plaint in Civil suit No. 19 of 2013, the appellant states that the respondent's affidavit has portrayed him as a corrupt person who is capable of corrupting judicial officers and influencing disappearance of court files. The affidavit clearly paints the appellant in bad picture. The respondent could have reported the matter to the police and cause the appellant, the advocate and the magistrate to be charged in court. That would have led to the respondent giving greater details as to how the court file was made to disappear or to be destroyed.

This is a civil dispute. The court cannot protect someone who makes serious allegations against no-parties. The appellant could have applied to be enjoined in Civil Suit No. 27 of 2012 as a third party and apply to have the libelous paragraphs struck out. The respondent can oppose the application or reiterate that he stands by his averments. Should the appellant be allowed to be enjoined in the suit, he can raise a claim against the respondent based on defamation.

The record is that there was no appeal against the decision to strike out Malindi CMCC No. 223 of 2012. The fate of that case is that it no longer exists. Civil suit No. 19 of 2013 was similarly struck out for being res-judicata. Since there was no appeal on the earlier decision relating to Civil Suit No. 223 of 2012, it follows that any suit filed subsequently but on grounds similar to those in CMCC 223 of 2012 is rendered res-judicata. My view is that the decision to strike out Civil Suit No. 223 of 2012 on the ground that it raised no cause of action was erroneous. The defence of privilege cannot be extended to a party who makes averments which are not supported by any evidence. The respondent could have given the dates, time and place where the court file was destroyed. The respondent's averments can be challenged.

In view of my above findings, I do hold that allowing this appeal will not help the appellant. The appeal is being brought to resuscitate a suit that was similar to another suit that had been struck out. The appeal herein lacks merit and is hereby dismissed. In light of my finding that the court erroneously struck out Civil Suit No. 223 of 2012 which led to the filing of Civil Suit No. 19 of 2013, I do set aside the order of costs in Civil Suit No. 19 of 2013. The appellant shall not pay any costs related to that suit. The appellant was forced to institute suits as a result of averments made in proceedings in which he was not involved. He cannot be condemned to pay costs yet he was pulled into the dispute by the respondent. The respondent cannot sit pretty and tell the appellant that he accused him of stealing and destroying court files and also stretch his hand asking for his costs of the suits. Each party shall meet their own costs of this appeal.

Dated and delivered in Malindi this 21st day of September, 2016.

S.J. CHITEMBWE

JUDGE