



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 20 OF 2012**

**SOLOMON AMIANI .....1<sup>ST</sup> PLAINTIFF**

**RENATA SERNEELS .....2<sup>ND</sup> PLAINTIFF**

**- V E R S U S -**

**SALOME MUTENYO OTUNGA ..... 1<sup>ST</sup> DEFENDANT**

**KWALE COUNTY COUNCIL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

[1] This matter came in Court for the hearing of the application dated 14<sup>th</sup> March 2013. In that application Mr. Anyanzwa was for the Applicant while Mr. Ojode was for the Respondent. This application came up for hearing on 9<sup>th</sup> May 2013. Before the application could be argued, Mr. Gikandi advocate appeared and asked the Court for leave to address the Court. Mr. Anyanzwa and Mr. Ojode did not have any objections on Mr. Gikandi addressing the Court.

[2] Mr. Gikandi told the Court that he was previously instructed by the 1<sup>st</sup> Respondent to represent her in this case. He was now no longer appearing for the 1<sup>st</sup> Respondent. Mr. Gikandi informed the Court that the reason for his seeking audience in Court. He said that the Respondent had sworn an affidavit on 10<sup>th</sup> April 2013. According to Mr. Gikandi, she had made positive categorical averments in the affidavit, that he Mr. Gikandi and Mr. Anyanzwa purported to extract Kshs. 2,000,000/- from her. That Mr. Gikandi then her lawyer was compromised. These averments were contained in paragraph 20 of Miss Otunga's affidavit of 10<sup>th</sup> April 2013 aforesaid.

[3] Mr. Gikandi said that he had sworn an affidavit to deny those allegations. He requested the Court to stand this matter over so that the file could be sent to C.I.D for investigations. That after those investigations are done, then if Mr. Gikandi and Mr. Anyanzwa were guilty they could face the full force of the law. Further that if they were not guilty Miss Salome Mutenyo Otunga should equally face the full force of the law for her allegations.

[4] This statement of Mr. Gikandi was supported by Mr. Anyanzwa the Counsel for the Plaintiff/Applicants. Mr. Ojode learned Counsel for the Applicant said that although the offending affidavit was drawn by his firm, he is not the one who drew it. He said he had not read the affidavit. That had he read it; he should have dealt with it internally. He said that he had tried to explain his predicament to Mr. Gikandi who did not accept his explanations. That Mr. Gikandi abused him in presence of other

Counsels. Mr. Gikandi maintained that Mr. Ojode was aware of the affidavit.

[5] At that point I made a ruling that the matter be fixed for hearing for the examination of Salome M. Otunga advocate on her affidavit dated 10<sup>th</sup> April 2013 aforesaid on 27<sup>th</sup> May 2013. I gave Mr. Gikandi leave to cross examine Miss Otunga on the alleged offending parts of the affidavit. This was with a view of expunging from the record or retaining paragraphs 17 and 20. Mr. Anyanzwa and Mr. Ojode were given a similar opportunity to examine Miss Otunga on her affidavit. I ordered that it was only after that exercise that I would make a decision to send the file to the C.I.D for investigations as per request by Mr. Gikandi. I ordered the application for contempt of Court herein to await the result of that exercise.

[6] On 27<sup>th</sup> May 2013 Miss Salome Otunga, the 1<sup>st</sup> Defendant and the deponent of the affidavit dated 10<sup>th</sup> April 2013 climbed on the dock. Miss Otunga is incidentally an advocate of the High Court of Kenya. She was sworn. She said that she is the deponent and author of the affidavit dated 10<sup>th</sup> April 2013. The affidavit was sworn before Mburu Kariuki Advocate Commissioner for Oaths on 10<sup>th</sup> April 2013 and commissioned on the same date. She admitted that she inserted paragraph 17 and 20 of the affidavit. Paragraph 17 and 20 of the affidavit stated as follows-

Paragraph 17;-

*“That on the night of 3/4/13 the 1<sup>st</sup> Plaintiff was heard bragging aloud at Rockstars bar that he would show me “dust” since the Hon. Aminga was Mr. Anyanzwa’s pupil and therefore Mr. Anyanzwa could prevail upon him to do as Mr. Anyanzwa pleased. He said that Hon. Aminga would give me a hefty bond and ensure that I spent at least one night in the cells to give them an opportunity to demolish my building.”*

Paragraph 20;-

*“That it is clear from the foregoing that the Plaintiffs as well as Mr. Anyanzwa have hatched a grand scheme to frustrate me considering how Mr. Anyanzwa wonders aloud how I am an Advocate who is younger than him in practice and have that kind of asset and also considering the fact that my former Advocate was compromised and together with Mr. Anyanzwa attempted to extort Kshs. 2,000,000/- from me. I am aware that they are currently working in cohorts to frustrate me.”*

[7] Miss Otunga on cross examination by Mr. Gikandi about paragraph 20, she maintained it was true. That she got the information from Mr. Gikandi’s clerk a Mr. Abelazo Mutua that Mr. Anyanzwa and a Mr. Solomon had gone to Mr. Gikandi’s office. Miss Otunga said that Mr. Gikandi talked to a Mr. Amiani and was given Kshs. 100,000/- to mess up the case.

[8] Miss Otunga produced an M-pesa record from her phone showing a payment of Kshs. 1,500/- to Abelazo Mutua who had said he had information to tell her. This money was to buy the said Abelazo Mutua lunch. Miss Otunga said that she had instructed Mr. Gikandi to act for her upto March 2012 when she changed her Advocates after learning that Mr. Gikandi was compromised by the Plaintiffs. She said she learnt that after Mr. Gikandi had told her that the Court file had disappeared and Mr. Anyanzwa had filed an application to have a skeleton file opened and to have the injunction orders extended. That this application was coming up for hearing on 22<sup>nd</sup> February 2013. That on 21<sup>st</sup> February 2013 she paid Kshs. 1,500/- to Mr. Gikandi’s clerk Abelazo Mutua who told her that Mr. Gikandi was given Kshs. 100,000/- by Mr. Solomon Amiani.

[9] On her examination Miss Otunga confirmed that she did not call or write to Mr. Gikandi about it. That she did not report to the police about it. That she knew the matter was coming for hearing the following day on the 22<sup>nd</sup>. That on 22<sup>nd</sup> Miss Otunga spoke to Mr. Gikandi and she instructed Mr. Gikandi to oppose the application by Mr. Anyanzwa that was coming for hearing. That Mr. Gikandi did not oppose the application. He instead extended the order for 3 weeks. She said she did not write to Mr. Gikandi at all. That she did not write because she wanted peace with Mr. Gikandi. She was positive that

Mr. Gikandi had tried to extract Kshs. 2,000,000/- from her. That the money was for Mr. Anyanzwa. That Mr. Gikandi asked for the money. She said she had paid Mr. Gikandi Kshs. 50,000/-. That there is not one day that Mr. Gikandi demanded for fees. That Mr. Gikandi has never failed to attend the Court even one day.

[10] On being cross examined by Mr. Anyanzwa, Miss Otunga maintained that prior to this case they had not met. They have never acted together. She maintained that Mr. Anyanzwa and his client went to Mr. Gikandi's office. She said she believed Mr. Gikandi's clerk. The consideration of this information was that she would buy Mr. Gikandi's clerk lunch. She maintained that people buy information all the time. She said Mr. Anyanzwa was her arch enemy. She denied she is a pathological liar.

[11] Mr. Gikandi relied on the case of Mahendra Shah and Barclays Bank Ltd 1976-80 1 KLR page 168. He argued that before anyone can put pen on paper on an allegation for compromise one should have filed a complaint. The conversation between Abelazo Mutua and Miss Otunga should have been brought into Court and reported to police.

[12] He argued that paragraph 20 should be expunged from the record. He argued that he expected to have been sued if he had been fraudulent or negligent. That the Court should not be used to destroy the character of an innocent lawyer. Mr. Anyanzwa associated himself with the sentiments of Mr. Gikandi. He said that paragraph 17 should also be expunged from the record. That parties who come to Court should not be allowed to make reckless allegations against reputations built over decades.

[13] Mr. Ojoro argued that Miss Otunga was justified in inserting paragraph 17 and 20. That the conduct of the Advocates was suspect from the information received. This conduct was extending the date by consent. He finally said that investigations are ongoing.

[14] Order 10 rule 3 of the Civil Procedure Rules sets out matters in which an affidavit may be confined-

*“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.” (highlighting mine)*

*“provided that in interlocutory proceedings or by leave of the Court an affidavit may contain statement of information and belief showing the sources and grounds thereof.”*

[15] The deponent herein made allegations against two senior lawyers of this Court. The allegations have very serious criminal and professional implications. These allegations were not facts the deponent was able to prove of her own knowledge. She attributes her source of information to one Abelazo Mutua a clerk of Mr. Gikandi. This information was not voluntary. It was bought for Kshs. 1,500/- as evidenced by her testimony in Court. She produced an M-pesa payment of Kshs. 1,500/- to Mr. Abelazo Mutua.

[16] Whether this money was for that purpose only, only Miss Otunga knows since she neither called Mr. Abelazo Mutua as her witness nor did she table a conversation with him and/or obtain an affidavit from the said Mutua. Mr. Mutua is said to work with Mr. Gikandi here in Mombasa. His availability was therefore not a challenge to Miss Otunga. The criminal implications here are bribery, fraud, professional misconduct among others. There was no protest to Mr. Gikandi who was then her Counsel. There was no protest to Mr. Anyanzwa the Counsel for the other party. There was no letter of protest to Court. There was no letter to complain about the conduct of Mr. Gikandi and Mr. Anyanzwa to the Law Society. There was no complaint to the police. The deponent herein of the affidavit now under scrutiny is herself an advocate of the High Court of Kenya. She knows very well what to do when such things happen.

[17] The averments on paragraph 17 and 20 in this affidavit if not true seriously injure the reputations of Mr. Anyanzwa and Mr. Gikandi. They boarder on defamation. Defamation has been explained as follows;-

*“A defamatory statement is one which injures the reputation of another by exposing him to*

*hatred, contempt, ridicule or which tends to lower him in the esteem of right thinking members of society.”*

[18] Are the allegations of Miss Otunga true? Firstly she has no personal knowledge of them. Secondly she relies on evidence of a clerk who demanded payment for such information. The clerk who was working in Mombasa and who was not called to testify. A clerk who did not file any affidavit to say the allegations of Miss Otunga were true. Suppose, the clerk lied to Miss Otunga for a plate of food? Where does that leave the reputations of two senior counsels?

[19] The lawyers business is with words. They are the material of his craft.<sup>1</sup> The function of language is to communicate, a process requiring a speaker or a writer, a medium of communication with a hearer or a reader. The speaker or writer should so chose a term that is likely to be interpreted the way she/he wants. Lord Devlin said the test was the effect on the ordinary man not the logical man.

[20] Section 107 of the Evidence Act Cap 80 states that whosoever desires the court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist. Section 109 of the Evidence Act puts the burden of proof as to any particular fact on the person who wishes the court believe in its existence. The burden of proof of fraud allegations have to be strictly proven. The burden of proof being above the balance of probabilities and below reasonable doubt<sup>2</sup>.

[21] I have had the opportunity to see for myself the demeanor of Miss Otunga in court. As I have earlier stated in my ruling herebefore delivered, Mr. Ojode under the instruction of Miss Otunga had alleged that all the pleadings drawn by Mr. Anyanzwa are a nullity since he had not taken a Practising Certificate. One would have expected that, that allegation is fool proof since one now only needs to access the Law Societies web site to know the status of any lawyer. I took it as gospel truth. On 9<sup>th</sup> May 2013 Mr. Anyanzwa came in court armed with a copy of a Practising Certificate dated 1<sup>st</sup> January 2013 plus the payments thereof. The allegation by Miss Otunga had been made before me, in a full open Court packed with lawyers, litigants and members of the public. On production of the Practising Certificate, Mr. Ojode on behalf of Miss Otunga tried to apologise to Court and Mr. Anyanzwa. The concerned lawyer could have non of the apologies. The damage had been done.

[22] Professional Ethics and Etiquette dictates that lawyers treat each other with decorum and dignity. Wild surmises and allegations against the person of a professional colleague should be avoided at all costs. It matters not how personal or heated the brief before the Court is. Lawyers are officers of the Court. Their professional training and continuous experience enable the lawyer to handle sensational issues of the moment and to refer those issues that belong to another stage to the relevant bodies. Lawyers know that irrespective of how the individual lawyer is convinced that a fraud or criminal offence is committed, such conviction still remains an allegation until the contrary is proved. No lawyer should put pen into paper imputing allegations of fraud without knowing the possibilities of being called to account and to be ready for the necessary legal consequences. Lawyers are men and women of honour. They do not make wild allegations or wild surmises. The few errant ones that do, are disciplined by their professional body the Law Society of Kenya.

[23] The Court if moved may take necessary action. The Court here is invited to take action and strike paragraph 17 and 20 of the affidavit of Miss Otunga learned Counsel and 1<sup>st</sup> Defendant herein. I accept such invitation.

[24] I am convinced that the allegations made by Miss Otunga in paragraph 17 and 20 are not of her own knowledge. The source of information for paragraph 17 is not disclosed. I strike out this paragraph for that reason.

[25] Paragraph 20 is scandalous and imputes criminal acts on Mr. Gikandi and Mr. Anyanzwa. The source of that information is suspect and unconvincing. No credible evidence was adduced before me. The paragraph is based on a preconceived enmity between Miss Otunga and Mr. Anyanzwa. The paragraph is struck out as being scandalous, irrelevant and oppressive.

[26] As the sections I have struck out appear to me to be defamatory in nature, I leave it to the respective Counsels to take any action they deem appropriate in regard to protecting or salvaging their reputations as the case may be. Having struck out the offending paragraphs 17 and 20. I find no need to send the file to C.I.D for investigation. In any case, the offended parties by the struck out sections (as herein before stated) are senior Counsels who no doubt need not have the Courts advice on what to do next.

[27] The application for contempt of Court may now be fixed in the Court Registry on merits.

**Dated and delivered in open Court at Mombasa this 27th day of June, 2013.**

**S. N. MUKUNYA**

**JUDGE**

Mr. Anyanzwa Advocate for the plaintiff - present

Mr. Ojode Ogoro - not present

Mr. Gikandi - present

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1 Lord Macmillan - Law and other things

2 Ratilal Gordhanbhai Patel V Lalji Makanji [1957] EA 314,31