REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 519 OF 2001

RUMBA KINUTHIA..... PLAINTIFF

VERSUS

K.T.N. BARAZA..... DEFENDANT

JUDGMENT

The Plaintiff filed this suit against the Defendant praying for judgment for

(a) General damages for defamation

(b)Costs of the suit plus interest

(c) Any other relief that the court may deem fit and just to grant.

The suit arises out of Court Ruling in another case at this Court station being High Court Miscellaneous Civil Application No.224 of 2004, a judicial review. More specifically, the suit arises out of what Justice Lenaola said in his ruling in that case.

Following that ruling, there is no dispute that the Defendant on 4th March 2004 in its newscaster at 7.00 p.m. in Swahili News Bulletin, reported that

"***Jaji alisema kwamba kesi hiyo ilitayarishwa vibaya na wakili Rumba Kinuthia.***"

Those words are found in paragraph 4 (i) of the plaint and the Defendant in its filed defence admits that it reported those words.

I should note that although the Defendant filed a defence in this suit in response to which the Plaintiff filed a reply dated 5th August 2004, somehow the Defendant seems to have lost interest in the suit. That followed the Defendant's filing of its Chamber Summons dated 1st November 2004 seeking to have the Plaintiff's suit struck out for being frivolous and/or vexatious. That chamber summons was not prosecuted by the Defendant for it was dismissed for non appearance on 27th January 2005 and that dismissal does not seem to have meant anything to the Defendant and its then, Advocates Mohammed & Muigai, who continued to sleep and were still sleeping when on 7th April 2008 a Notice of change of Advocates dated 19th March 2008 was filed by Ochieng, Onyango, Kibet And Ohaga, Advocates

replacing Mohamed & Muigai Advocates.

Apart from the filing of that Notice of Change of Advocates, the new Advocates for the Defendant seem to have also been infected by the sleeping decease the Defendant and its previous Advocates had been suffering from and therefore Ochieng, Onyango, Kibet and Ohaga, Advocates have not so far done anything else in this suit; so that when the Plaintiff's Advocates fixed this suit for hearing on 16th June 2009, the Plaintiff's Advocates do not seem to have remembered the Defendant had changed Advocates. The relevant hearing notice was, as a result, served upon Mohamed and Muigai, Advocates, instead of Ochieng, Onyango, Kibet and Ohaga, Advocates and on 16th June 2009 I was, unaware, made to hear this suit *ex parte* on the basis that the Defendant's Advocate had been served with the relevant hearing notice and had failed to turn up without explanation. Relevant affidavit of service dated 19th January 2008 had been filed on 16th June 2009.

It appears the date of the affidavit of service should have been 19th January 2009 the relevant hearing notice having been served on 5th December 2008. But there it is.

I started hearing of the suit upon being informed that the Defendant's Counsel had been served with a hearing notice but I had not checked the documents myself to notice the discrepancies. It is now when I am writing this judgment that I am discovering what I should have seen on 16th Jane 2009 when I so much relied upon the guidance I was being given by the Plaintiff and his Advocate as officers of the High Court.

Having found myself in that situation, I have decided to continue further and write this judgment to decide the suit in the High Court.

During the hearing, the Plaintiff could not produce a copy of judge Lenaola's ruling on the basis of which he was complaining against the Defendant in this suit. When I inquired I was told it was thought the quotes included in the Defendant's filed written statement of defence dated 4th August 2004 were sufficient. But at the close of the hearing, the Plaintiff's counsel promised to file written submissions thereafter together with a copy of Justice Lenaola's ruling. That was subsequently done.

From the pleadings and relevant evidence before me, the Plaintiff in this suit is a prominent Advocate of long experience in Kenya well known in human rights, civil and children litigation. He owns a law firm where he employs other lawyers who are qualified Advocates.

High Court Misc. Civil Application No.224 of 2004 was being handled by his law firm RUMBA KINUTHIA & Co. Advocates, for the Applicant in that Application. I have no advantage of knowing whether chamber summons or Notice of Motion or any other application filed by the Applicant in High Court Misc. Civil Application No.224 of 2004 were revealing the name of the individual advocate in the law firm of RUMBA KINUTHIA & Co. Advocates, who actually drafted each of those applications, although I am aware that normally no such revelation would be in an application filed by a law firm.

The Plaintiff is offended by the use of his name in the report complained of. He told the court it was not necessary to refer to his firm by his name. He said the Applicant's applications in that case were drafted by an Associate in the law firm whose name was Daniel Mutisya Ngala. The said Associate was an employee in the law firm RUMBA KINUTHIA & CO. ADVOCATES.

The Plaintiff said that the judge did not mention the Plaintiff's name in the Ruling and that therefore the Defendant should not have mentioned the Plaintiff's name in the report complained of because mentioning that name did not reflect a true statement made by the judge.

It is therefore the Plaintiffs case that since the Defendant did so, the news bulletin created a very negative picture of the Plaintiff in his professional standing causing him a lot of mental anguish and that any right thinking member of society watching the news that day would automatically have concluded that the Plaintiff was an incompetent lawyer who cannot draft pleadings correctly. He told the court that

he subsequently lost a large number of clients yet by that time he had been in private practice for 21 years. As a result he closed his law office branch at Ngong Town and another branch at Naivasha for lack of sufficient work. That is because the Defendant's news cast was by then the most popular one in the country and it is nation wide.

The Plaintiff thinks the Defendant did not like him because, as an advocate, the Plaintiff had instituted two civil suits against The Standard Group Limited, a sister company to the Defendant company in this suit.

The Plaintiff is therefore saying the words in the report complained of were unsubstantiated, defamatory, misleading, ill-motivated, malicious, scandalous and full of spite.

The Plaintiff added that colleagues made jokes about the issues as clients made comments and I do note that in paragraph 6 of the plaint, the Plaintiff listed nine meanings he says can be derived from the "defamatory words used in the news bulletin in their ordinary meaning and interpretation; and in paragraph 8 of the plaint is put what the Plaintiff considers he has suffered.

The Defendant's written defence dated 4th August 2004 and filed on 5th August 2004, apart from admitting the making of the report complained of in the words complained of, does deny falsehood, ill will and malice and rest of the contents of paragraphs 3, 4 of the plaint as well as contents of paragraphs 6, 7 and 8 of the plaint

The Defendant points out that what is complained of is an accurate report of proceedings before a court of law exercising judicial authority in Kenya and therefore absolutely privileged.

Relies on section 6 of the Defamation Act Cap.36 Laws of Kenya.

Alternatively relies on the defence of fair comment.

Considering the pleadings and the evidence brought before me, I will start with section 6 of the Defamation Act which states as follows:

" ***A fair and accurate report in any newspaper of proceedings head before any court exercising judicial authority within Kenya shall be absolutely privileged.***

Provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter."

Looking at a copy of Justice Lenaola's ruling which is dated 3rd march 2004 in High Court Misc. Civil Application No.224 of 2004 (H.C. MISC. Civil Appl. No.224/04), I find the whole ruling material but bearing in mind its length, perhaps quoting the conclusion only will do. It is a ruling in which the learned Judge clearly showed that what was before him had not been done satisfactorily as required by the law and he concluded as follows from the last paragraph on page 11 at number 24:

"***It is now clear that I am disinclined towards granting leave in this matter.***

25.Before I make final orders however, I must say something about this Application generally.

26. Perhaps urgency was what drove the Applicant to draw this application which I frankly found not to be well thought out. (see page 1 paragraph 2 above). As I said earlier, necessary steps were side-stepped or jumped, to bring forth the matter. A matter of this nature which draws heavily on public support and expectation should have been carefully scrutinized before being shown to the watchful eye of this court. The risk is precisely what has be fallen this application; an otherwise merited matter is shut out because of a casual approach based on a badly drafted affidavit in support and a shaky statement of facts. I would have expected, with respect, much more from the Applicant and Counsel. Courts cannot at this stage, when the Judiciary is undergoing fundamental changes, be expected to

give insightful and eye opening decisions when parties are busy bringing still-born matters for determination.

27. In any event, I have to do what I am mandated by law, its procedure and practice to do, and with great reluctance, I hereby dismiss the application dated 1st March 2004."

Looking at that passage from the ruling in H.C. Misc. Civil Appl. No.224 of 2004 in relation to the words complained of as stated in paragraph 4 (i) of the plaint, I hold the opinion that the words complained of are a fair and accurate report of what Justice Lenaola said in his ruling aforesaid. The report or words complained of therefore enjoy absolute privilege under section 6 of the Defamation Act thereby making the Defendant free from liability to the Plaintiff in defamation.

Alternatively and should it be held that the defence of absolute privilege is not available to the Defendant, I do find that the report or the words complained of constitute fair comment on matter of public interest.

I should add here that H.C. Misc. Civil Appl. No.224 of 2004 was a case where Advocates, RUMBA KINUTHIA & Co. were representing the Applicant. I have said elsewhere in this judgment that I have no evidence that the name of the individual advocate in that law firm who drafted every application in that case was being indicated on the relevant application. If there were no such indication and the application was simply shown as filed by RUMBA KINUTHIA & Co, Advocate and bearing in mind what the learned Judge said in his ruling, the way the Defendant used the name "RUMBA KINUTHIA" in the words complained of is fair.

Otherwise even if they had used the words "Mawakili Rumba Kinuthia" to mean it was "RUMBA KINUTHIA & Co, Advocates", the fact would still have remained that "kutayarishwa vibaya", the most important element in the matter, will have remained with that law firm just in the same way it remains when the words "Wakili Rumba Kinuthia" is used; and that is what the ruling in H.C. Misc. Civil Appl. No. 224 of 2004 is all about.

Something is done badly by a firm of advocates or one of the advocates in that firm. A court points that out in its decision and a newspaper or radio station or television reports the decision accurately or fairly and that happens in many cases. There should be no litigation in defamation.

That leads me to the next stage in this judgment which is that in this suit even assuming that the Defendant has neither a defence of absolute privilege nor the defence of fair comment, in my view, I do not find defamation because I think it is too much stretching imagination to say that the report or the words complained of as set out in paragraph 4 (i) of the plaint mean, in their ordinary meaning and interpretation that:-

1)The Plaintiff is not duly qualified as an advocate of the High Court of Kenya;

2)The Plaintiff did not have the requisite competence to practice as an advocate of the High Court of Kenya;

3) The Plaintiff is uncaring as far as his client's plight is concerned;

4)The Plaintiff cannot procure legal redress on behalf of his clients;

5) The Plaintiff despite being a duly qualified advocate of the High Court of Kenya cannot draft pleadings currently;

6) The Plaintiff is intellectually and academically wanting;

7)The Plaintiff is an advocate whose reputation and credibility is wanting and/or challenged;

8)The Plaintiff was actually lying and/or misleading his client i.e. Hon. Koigi Wa Wamwere;

9) The Plaintiff is unworthy of any respect as an advocate or otherwise.

These, as I said before, are found in paragraph 6 of the plaint and the Plaintiff's oral evidence before me was in support.

Many a time Courts make remarks similar to those made in H.C. Misc. Civil Application No. 224 of 2004 aforesaid and sometimes more robust remarks than the one giving rise to the complaint in this suit are made and courts are empowered in law to, and must by nature of their judicial work, make such remarks where appropriate. When that is accurately or fairly reported or published, the reporter or publisher ought not be sued in defamation instead of the party concerned simply taking the necessary steps in law to correct what the court has criticized.

Otherwise I do not see how a dismissal of a single simple application handled by a firm of advocates can make a particular advocate partner in that firm, or the whole firm for that matter, lose business as if parties never lose applications or lose main suits in courts of law in Kenya.

Adding that I do not find malice on the part of the Defendant in this suit, I think I have said enough to dispose off the suit, as in this "defamation suit", I do not find it necessary to make specific findings on whether the reports complained of was "unsubstantiated, misleading, ill-motivated, scandalous and full of spite as against the Plaintiff."

Accordingly this suit be and is hereby dismissed with costs to the Defendant.

Dated this 17th day of July 2009.

J.M. KHAMONI

JUDGE

<u>Present</u>:

Mr. Gitonga for the Plaintiff and the Plaintiff himself

Court clerk - Florence