



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 221 of 2005**

**GEORGE ODINGA ORARO.....PLAINTIFF**

**VERSUS**

**THE STANDARD LIMITED.....DEFENDANT**

**R U L I N G**

Before me is an application by way of Chamber Summons brought by the Plaintiff under Order VI Rule 13 (1) (c) of the Civil Procedure Rules seeking orders that the Defendant's defence dated and filed on the 7<sup>th</sup> April 2005 be struck out. The application is based on the grounds as stated on the body of the Chamber Summons and supported by an affidavit sworn by the Applicant on 24<sup>th</sup> February 2006.

The application is opposed by the defendant who has filed a replying affidavit sworn by Nelly Matheka, the company secretary of the defendant on 13<sup>th</sup> September 2006.

The facts which gave rise to this litigation briefly may be stated:

**“In the issue of the “The Standard of the 17<sup>th</sup> day of December 2004, the defendant wrote, printed and published an article entitled “Former ally denies he betrayed Ouko” in which it made the following highly defamatory statement of and concerning the Plaintiff that is to say:**

**“A witness Mr. Daniel Mburu claimed in February that K’yoo and the former Minister’s lawyer George Oraro made an about-turn on the night of February, 12, 1990 and effectively led Ouko to his death.**

**Mburu told the Parliamentary Committee probing Ouko’s murder that the Minister was expecting Oraro and K’yoo to help him flee to Uganda. Instead they allegedly arrived in three police vehicles at Ouko’s Koru home accompanied by former Internal Security P.S. Hezekiah Oyugi, former Nakuru DC Jonah Anguka and police officers.”**

The same words were part of the defendant’s lead story in the 28<sup>th</sup> February 2004 issue of “**The Standard**” when under the rather sensational headline “**Lawyer betrayed Ouko to his killers**” the defendant wrote, printed and published the following words and concerning the plaintiff that is to say:-

**“Dr Robert Ouko’s lawyer and his political aide were yesterday accused of betraying him to his killers. A former police officer told an inquiry into Ouko’s murder that the lawyer and the campaigner handed Dr. Ouko over to his killers ..... Mukhwana said Ouko’s confidants, lawyer George Oraro and aide James Onyango K’yoo, made an about-turn on the night of February 12, 1990 and effectively led Ouko to his brutal death. On the night of his murder, the witness said,**

**Ouko was expecting Oraro and K'youo to come and help him flee the country through Uganda Boarder. Instead they arrived in three police vehicles at Ouko's Koru home accompanied "by former powerful Internal Security Permanent Secretary Hezekiah Oyugi and former Nakuru DC Jonah Anguka and a contingent of armed uniformed Police Officers. The Parliamentary Select committee probing the Ouko murder heard that the former guard at the late Minister's house Zabron Agalo Obonyo was even offered Sh 4 million to "shut his mouth" over the betrayal and subsequent murder"**

The plaintiff states these publications, published in purported report of the proceedings of the Parliamentary Select Committee inquiring into the disappearance and death of the former Minister for Foreign Affairs and International Co-operation the late Dr Robert John Ouko were defamatory to him and brought this suit seeking judgment against the defendant for:

- (1) An order that the defendant do give a full apology, make amends and withdraw the offending words with apology to be published in the same manner as the offending words.
- (2) A permanent injunction restraining the defendant from publishing any further or similar defamatory material of and concerning the plaintiff.
- (3) General damages for libel and exemplary damages for malicious libel.

He also sought costs of the suit.

The defendant on being served with the plaint filed a defence in which it admitted to have published the words complained of but states that the words were published on an occasion of qualified privilege pursuant to Section 7 (1) of the Defamation Act and Part II paragraph 7 (b) of the schedule thereof.

Mr Ougo appearing for the plaintiff submitted that the words complained of were calculated to engender hatred, contempt or ridicule of the plaintiff, lower the plaintiff in the estimation of the public, cause people to shun or avoid the plaintiff and impute that the plaintiff is a criminal dishonest untruthful or untrustworthy. The publication also entailed imputation concerning the plaintiff which injured his reputation, his profession, trade and standing. He further submitted that the defendant having admitted to have published the said defamatory statement concerning the plaintiff, there is no suit to go for trial and urged the court to strike it out. While Miss Omullo appearing for the defendant submits that the defendant has a good defence to the plaintiff's claim in that the defence of qualified privilege under Section 7 Sub-Section (1) of the Defamation Act Cap 36 applies since what it published was a fair and accurate report of the proceedings before the Parliamentary Select Committee.

She further submitted that since at the stage of striking out a pleading the court has no information on merits of the case through discovery and oral evidence that power should be exercised sparingly and cautiously. This is a drastic remedy and should only apply in plain and obvious cases.

I agree that those powers are drastic and should be exercised with great caution, but as the Court of Appeal said in **CHATTE V. NATIONAL BANK OF KENYA LTD Civil Appeal No 50 of 1996** (unreported)

**"Once that caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on merits the court is perfectly entitled to strike out a pleading."**

The defendant admits publishing the words complained of in paragraph 3 of the plaint but states that the words complained of comprise fair and accurate reporting of the proceedings of the Parliamentary Select Committee inquiring into the disappearance and death of the former Minister for Foreign Affairs and International Co-operation the late Dr Robert John Ouko at County Hall, Nairobi on 27<sup>th</sup> February 2004 and the evidence given on that date by inquiry witness Daniel Mburu Mukhwana.

The rule of law is that where there is judicial proceedings before a properly constituted judicial

tribunal exercising its jurisdiction in an open court, then the publication without malice, of a fair and accurate report of what takes place before the tribunal is privileged.

It has been said that for the privilege to apply, a report must be strictly confined to actual proceedings in court and must contain no defamatory observations or comments from any quarter whatsoever in addition to what forms strictly and properly the legal proceedings.

I have examined the proceedings of the Select Committee exhibited as annexure G002 to the affidavit in support of this application and nowhere do the words **Lawyer betrayed Ouko to his death. Mukhwana said Ouko's confidants lawyer George Oraro and aide James Onyango K'yoo made an about-turn on the night of February 12, 1990 and effectively led Ouko to his brutal death.**

I have without any hesitation, come to the conclusion that no triable issues are disclosed either in the defence of the respondent in the replying affidavit or in anything that was said before me by counsel for the defendant. Accordingly, no useful purpose would be served by holding a trial on the merits. That being my view of the matter, I would allow the Plaintiff's Chamber Summons, strike out the defence filed and enter interlocutory judgment for the plaintiff with a further order that the plaintiff be allowed to formally prove his claim. The plaintiff shall have costs of this application.

Dated and delivered at Nairobi this 25th day of July 2008.

**J. L. A. OSIEMO**

**JUDGE**