



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

Civil Case 376 of 1999

J.P. MACHIRA APPLICANT

VERSUS

ABOK JAMES ODERA RESPONDENT

JUDGMENT

1: PROCEDURE

1. The relationship between the parties in this suit is that of advocate/client. The plaintiff J.P. Machira is an advocate of the High Court of Kenya and has been so practicing for 27 years. The defendant herein Abok James Odera t/a A.J. Odera & Associate is a professional Architect and Practicing Architecture and design in his firm.

2. The defendant did some work for M/s Kenya Post and Telecommunications who failed to pay him. He approached the plaintiff to demand payments for fees incurred from the work done amounting to Ksh.293 m. The plaintiff agreed to take up the brief. He made demand for the payment of Ksh.293m for his client. There was resistance from the Kenya Post and Telecommunication Corporation on the payment of this amount. The plaintiff filed suit.

3. Prior to so filing suit, a formal agreement had been entered into between the plaintiff and defendants that the plaintiffs' fee for undertaking the case would be Ksh.23 m. This was agreed to in writing.

4. Once the suit was filed and defence entered by the Kenya Post and Telecommunications the plaintiff applied for the defence to be struck out. This application came before Ole Keiwua J (as he then was) who declined to struck out the defence but instead referred parties to arbitration. The plaintiff, on behalf of the defendant appealed against this decision. The court of appeal granted a stay of proceeding and declined to allow the matter to be referred to arbitration. This was because once a defence is filed and although there may be a clause to refer matters to arbitration in an agreement, the issue of arbitration is waived.

5. On the decision of the court of appeal, M/s Kenya Post and Telecommunications settled directly with the defendant at a fee of Ksh.101,000,000/- without involving the plaintiff. The plaintiff sued for his fee at Ksh.23 m as agreed. (The sum of Ksh.101 m was paid directly to the defendant).

6. The defendant was of the view that as he obtained Ksh.101m and not Ksh.293 m the fee should in fact go down from Ksh.23 m to a lesser figure. When the defendant filed his defence against the case requiring him to pay the fee of Ksh.23 m, the plaintiff applied to have the defence struck out. This was successfully allowed by Okubasu J on 30.7.98 (Hccc183/98). The defendant paid the plaintiff 4 million earlier, on 4.2.98, on receiving the demand letter.

7. The defendant not being satisfied with the turn of events wrote a letter of complaint to the law society whereby he copied the same to The Secretary, Disciplinary Committee and The Secretary, Advocate Complaints Commission in which he alleged that the said agreement on the fees due to the plaintiff was a "gross default and professional negligence" That the plaintiff had shown the defendant "irregular practice procedure" and kept informing him (defendant) that he is in very "good books with majority of judges"

8. The plaintiff filed this present suit seeking compensation in the TORT of defamation. The plaintiff averred that the contents of the letter and publication were "false, malicious and spiteful, highly defamatory to the plaintiff" That the defendant was "actuated by extreme malice, falsehood and spiteful" all calculated to "injure the plaintiff in his personal professional capacity and image as an advocate of the High Court of Kenya of long standing."

9. The defendant filed defence. The plaintiff then filed a notice of motion dated 30.3.99 seeking the striking out of the defence. This was granted by Mitey J (as he then was) on 10.6.99. The defence was duly struck out. The defendant applied to set aside this order. The matter came for interparties hearing before Mugo J. The application was dismissed.

10. The positions of this suit before me is that there is no defence. What is now required is the issue of assessment of damages. I heard the evidence of the plaintiff.

11. For ease of reference the following are related cases to this suit:-

a) Hccc518/96 A.J. Odera v Kenya Post Telecom Corporation.

This is a High Court case that was concluded.

Dispute arose as to the legal fees leading to the filing of:-

b) Hccc183/98 J.P. Machira v A.J. Odera

Summary judgment entered by Okubasu J 30.7.98

An appeal by defendant was filed to the Court of Appeal which is still pending to date:-

c) CA161/99 A.J. Odera v J.P. Machira

The defendant paid part of the decretal amount (fees). There is a stay of further execution by consent.

CASE NOT reached for hearing by Court of Appeal.

d) Misc. App.899/98 A.J. Odera v J. P. Machira

Suit filed by defendnt touching on the legal fee.

Suit dismissed by Osiemo J as being res-judicata as summary judgment had been given in Hccc 183/98 by

Okubasu J (No.2 above).

e) Hccc.376/99 J.P. Machira v A.J. Odera

The current suit before me. A defamation suit arising out of a letter written by A.J. Odera to the Advocates Complaints Commission and the Law Society.

12. The advocate for the defendant states they may appeal against the decision of Mugo J for not setting aside the order striking out the defence in this matter. Nonetheless what is before this court is the formal proof of damages.

II: EVIDENCE ON FORMAL PROOF

13. The plaintiff gave evidence on formal proof in which he stated that the letter to the Law Society copied to others was damaging to his reputation and character. If the defendant disputed his professionalism as an advocate, he ought to file a suit on professional negligence. He did not do so. The letter to the Law Society was therefore baseless.

14. The advocate for the defendant was permitted to cross examine the plaintiff. From the line of cross examination it transpired that the plaintiff had over charged for his fees of Ksh.23 m. This sum was to be 8% of Ksh.293m. As the defendant only received Ksh.101m the fee ought to have been say 8 m or less. The plaintiff stated that the defendant at some point went directly to the defendant in the main suit and negotiated an out of court settlement of Ksh.101m. He then sued for his fees when the defendant was paid directly. He relied on the written agreement as to fees (which the defendant does not dispute that there was a written agreement on the fee).

15. The other aspect in cross examination is that the advocate herein (the plaintiff) was negligence in not referring the matter to arbitration. The plaintiff stated that the Kenya Post and Telecommunication Corporation had persistently declined to discuss the moneys owned to the defendant. To bring them to do this it was normal procedure to have the said suit filed. The defendant then would have to apply to arbitration but not file a defence. Once a defence has been filed then the issue of arbitration is waived.

16. The defendant refused to make any apology for the letter written.

III: FINDING

17. It is a duty for an advocate to defend his client. He must do so to the conclusion of the suit even if that client fails to pay his fee. Once a suit is concluded an advocate is permitted to **sue** for his fees. This is the correct procedure of dealing with clients. An advocate should never abandon a case on the grounds that he had not been paid his fee but as stated above **must** conclude the suit to its finality then sue for his fees. It was in this action undertaken by the plaintiff and the striking out of the defence that prompted the defendant herein to write the letter, the subject of this judgment, to the Law Society thereby prompting this suit on defamation being filed.

18. The plaintiff has stated that his character had been injured as a result of the defamatory letter. It portrayed him as a corrupt advocate and not in a good light.

19. I find that the plaintiffs' action in suing for his fees is correct. The plaintiff was earlier correct in filing suit and once the original main suit was filed for the claim, there would be waiver of the issue of arbitration. The defendant should have allowed the plaintiff to settle the suit at Ksh.293 m as he demanded. Instead he took it upon himself to settle the suit at Ksh.101,000,000/- and failed to pay the agreed sum of Ksh.23 m.

20. I hereby refer to the issue of defamation. The letter in question was addressed and referred to the Law Society, The Advocate Complaints Commission and The Disciplinary Committee. The advocate for the plaintiff referred to the following case law in support of the claim for damages.

20.1 Biwott v Clays Ltd

(2002) 2EA 334

Visram, J CA (as he then was)

The defendants admitted liability and or failed to enter appearance. The issue of assessment of damages was the only one left. The court held that both general and aggravated damages can be amended.

20:2 Godwin Wanjika Wanjiku V Okoth (1979) KLR 24

Muli, J.

The defendant failed to inquire into the fact and position as regards a defamatory letter. It was held that there was malice.

20.3 John Patrick Wachira v Nation Newspapers & Another

Hccc1709/96

Kasanga Mulwa, J.

The defendant refused to apologise for publishing an incident in their news papers. It was held that general and aggravated damages could be awarded.

21. From the evidence before me, I am satisfied that plaintiff acted in the correct manner and professionalism as required by an advocate of the High Court of Kenya.

22. The letter in question was defamatory in nature. Its intention was and did injure the plaintiffs feeling, integrity, status and reputation as an advocate.

23. It can be argued that the limitation of publication was to a very few people. In the case of W.S.O. Davis v Hohanla Karamshi Shah (1957) E.A 352. The publication of a defamatory letter was sent to W.S.O. Davis superiors. The defendant did not defend the suit. It was held that the defendant was liable.

24. In considering the award to be made, “the manner of publication and the extent of circulation, applying [the] principle to the facts of the case, the plaintiff was entitled to a sum that would present proper compensation and indicate the serious injury to [the plaintiffs] reputation”. Biwot Vs Clays Ltd (200) 2EA 334, Visram, J.

25. I award the plaintiff Compensatory damages of Ksh.500,000/-

Aggravated damages of Ksh.500,000/-

Exemplary damages of Ksh.500,000/-

Total Ksh.1.500,000/-

26. I award the cost of this suit to the plaintiff. I award interest on the damages awarded from the date of this judgment.

Dated this 30th day of October 2006 at Nairobi.

M.A. ANG’AWA

JUDGE

Kimondo Mubea & Co. Advocates for the plaintiff

T.O. K'opere & Co. Advocates for the defendant