



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE 75 OF 2004**

**BENSON ONDIMU MASESE .....PLAINTIFF**

**VERSUS**

**KENYA TEA DEVELOPMENT AGENCY LIMITED .....DEFENDANT**

**J U D G M E N T**

In this case **Benson Ondimu Masese** t/a B. O. Masese and Company advocates, the plaintiff claims damages against the Kenya Tea Development Agency Limited the defendant for alleged defamation arising out of two letters issued by the defendant. The first of the two letters was issued on 30<sup>th</sup> May 2003, and was addressed to the Minister for Justice and Constitutional Affairs in which the minister's intervention was sought by the defendant to contain what it alleged to be a menace caused to some tea factories by unscrupulous wayward lawyers, magistrates, doctors, auctioneers and ambulance chasers. A second letter was dated 10<sup>th</sup> July, 2003 and it was addressed to the Advocates' Complaints Commission and it referred to the earlier letter and it also confirmed that a meeting had been by some representatives of the defendant and the Minister. The defendant claimed that their as complaints were against the firms of .....and B. O. Masese who were notorious in soliciting for business in the vicinity of the factories and that investigations conducted by insurers had established that most of claims made by the advocates were fraudulent in that the causes of action leading to the suits never took place and that the advocates in collusion with the courts and other beneficiaries of the whole process ensured that outrageous awards were made. A list of cases in which fraudulent claims were made was annexed to the letter. In this letter the defendant sought the intervention of the Advocates Complaints Commission in form of the requisite disciplinary action against the said advocates. The letter appears to have found their way into the hands of the members of public including the plaintiff's clients who handed them to him.

On 28<sup>th</sup> May 2004 the plaintiff brought an action against the defendant claiming damages for the alleged defamation contained in the said letters. In paragraph 3 of the plaint he averred that the defendant had on 30/5/03 falsely and maliciously wrote, printed and published or caused to be published concerning the plaintiff and in the way of his business the following words:-

***“.....the above situation has been caused by unscrupulous/wayward lawyers magistrates, doctors, auctioneers and ambulance chasers.....”***

***“.....way ward advocates have appointed amongst the factory workers, agents who recruit fellow workers as clients with promises of handsome court awards.....the most notorious advocates are.....”***

The plaintiff further pleaded in paragraph 4 of the plaint that on 10<sup>th</sup> July, 2003 the defendant further falsely and maliciously wrote, printed and published or caused to be written and published or caused to be

written and published of and concerning the plaintiff and in the way of his business the following words:-

***“The problem has been caused by unscrupulous lawyers, magistrates, doctors, auctioneers and ambulance chasers whereby advocates***

*appoint agents among factory workers who recruit fellow workers as clients with promises of handsome court awards.....”*

*“.....the practice is so rampant that it is almost crippling the*

***operations of various tea factories in the above districts and our attempt to obtain court redress have been futile. Our complaints are against the firms of Khan and Katiku, Sila Munyao and Company***

*Advocates, K. O. Obae and Company Advocates, and B. O. Masese who are Notorious in soliciting for business in the vicinity of the factories.....”*

*-----Investigations commissioned by insurers have revealed*

***that most of these claims are fraudulent in that the cause of action leading to the suits never took place.....the advocates***

*in collusion with the courts and other beneficiaries of the whole process ensure that outrageous awards are made .....*”

The plaintiff contended that the said words in their natural and ordinary meaning the defendant meant and was understood to mean:-

- (a) **That** the plaintiff is unprofessional in the manner in which he conducts his business;
- (b) **That** the plaintiff is a corrupt person;
- (c) **That** the plaintiff is a fraudulent person;
- (d) **That** the plaintiff is unscrupulous person; and
- (e) **That** the plaintiff is money-minded and can do anything however unlawful to get money.

He contended that the defendant's aforesaid acts have injured his credit and reputation and have brought him into public scandal, odium and contempt. He also claimed that the defendant published the said words out of reckless disregard, malevolence and/or spite towards the plaintiff and gave particulars of the same. He sought general damages for defamation and damages on the footing of aggravated and exemplary damages and costs of the suit.

On 21<sup>st</sup> June, 2004 the defendant filed a statement of defence in which it admitted in paragraph 3 therein that it published the words set out in paragraph 3 of the plaint but it denied that it did so falsely and maliciously. The defendant further denied that the words were defamatory of the plaintiff. It also admitted that it published the words set out in paragraph 4 of the plaint but again it denied that it did so falsely or maliciously and it also denied that the words were defamatory. As regards to paragraph 5 of the plaint the defendant denied that the said words in their natural and ordinary meaning meant or were understood to mean what was stated therein or any defamatory meaning. With regard to the said words the defendant stated as follows:-

- (a) that some of the said words are true in substance and in fact;
- (b) that further and in the alternative in so far as the said words consist of statement of fact the said words were true in substance and in fact; in so far as the said words consisted of expressions of opinion,

they were fair comment on the said fact which are matters of public interest, namely the circumstances surrounding the actions that were filed in court;

© that further and in the alternative the said words were published under a sense of public duty and without malice towards the plaintiff and in the honest belief that the charges in them were true. Furthermore the matter published was for the public benefit;

The defendant gave particulars of the alleged public duty and that the said words were published on a privileged occasion. The defendant thereafter denied the contents of paragraphs 6, 7 and 8 of plaintiff which included the particulars of the defamation as set out in paragraph 8 thereof.

In his reply to the defence the plaintiff joined issue with the defendants' averments in the defence and also refuted the claim that the words were not falsely and/or maliciously printed and published and that they were not defamatory.

When eventually when the case came up for hearing only the plaintiff and his advocate turned up in court. The advocate for the defendant was indicated to be engaged in another case in Nairobi but the defendant's witnesses were also not in court. An application for adjournment was therefore refused as no valid reasons were given for it.

In his testimony the plaintiff said that he is an advocate of the High Court of Kenya and that he practices in Kisii under the name of B.O. Masese and Company advocates. In disclosing a current practicing certificate the plaintiff stated that he had practiced for 8 years and during that period he had acted for many clients in relation to various claims, which included some claims arising from industrial accidents against some tea factories managed by the defendant. It was the plaintiff's contention that whenever a client wishes to give him instructions to act, for him he normally requests such a client to give him full instructions in writing and supported his documents so that he could decide whether the claim is reasonable before he accepts to act for such a client. The plaintiff indicated that all the cases he had handled involving industrial accidents at the tea factories managed by the defendant were represented by advocates instructed by the factories and that some of the cases had been concluded while few were still pending in courts. The plaintiff claimed that on 30<sup>th</sup> May, 2003 the defendant issued and published a document addressed to the Minister of Justice and Constitutional Affairs in which it stated that advocates in Kisii, Nyamira and Gucha Districts in collusion with doctors, auctioneers and magistrates had filed fraudulent claims against the factories in those districts and had used unwarranted means to obtain the claims. He added that the said letter contained the offensive words quoted in paragraph 3 of the plaintiff was circulated and distributed in all areas where the defendant had operations. The plaintiff claimed that on 10/07/03 the defendant again issued a similar document to the earlier one which was addressed to the Advocates' Complaints Commission and which contained defamatory words of him quoted in paragraph 4 of the plaintiff. The plaintiff contended that both the letters of 30/05/03 and 10/07/03 were defamatory of his name and that he was specifically named and the details of the cases in which he was alleged to have fraudulently committed the alleged acts were also set out. The plaintiff added that the words contained in the said letters drastically have injured his name and character as an advocate and that on 10/05/04 he issued a demand notice to the defendant and to which in its response the defendant admitted that it published the said letters. According to the plaintiff the Advocates Complaints Commission wrote to him on 12/11/03 calling upon him to explain how the said cases were conducted and that he made a response by his letter of 03/12/03 furnishing the Commission with all the copies of the pleadings and certified copies proceedings relating to all the cases which had been set out by the defendant. The plaintiff contended that the Commission wrote to the defendant on 05/03/04 and copied it to him and that once again he wrote to the Commission on 25/03/04 clarifying and supplying the details of the said cases and that the Commission has thereafter not taken action over the defendant's claims..

According to the plaintiff the case No. Kisii/CMCC No.239 of 2003, which was one of those set out by the defendant and in which he had acted for the plaintiff was defended by M/S AGN Kamau and Company advocates. He claimed that the case was settled out of court by consent and that his client was compensated. The plaintiff put in as exhibit certified copies of the proceedings of this case. The other suit contained in the defendant's letters was Kisii CMCC No.240 of 2003 in which the plaintiff had also

acted for the plaintiff and that M/s Wangai Nyuthe and Company advocates had acted for the defendant. Plaintiff claimed that that case was concluded after a trial and that no appeal was preferred. He put in as exhibits certified copies of the proceedings in that case. The third case was Kisii CMCC No.241 of 2003 in which the plaintiff also had acted for the plaintiff and the defendant was represented by M/S Nyaundi and Tuiyot, Advocates. He claimed that, that case was also settled out of court by consent. The fourth case was Kisii CMCC No.242 of 2003 in which the plaintiff had also acted for the plaintiff and the defendant was represented by M/S Olago Aluoch and Company advocates which he claimed was concluded after a full trial and judgment was delivered. He added that there had been no appeal preferred against the judgment of the Chief Magistrate's Court. The plaintiff added that M/S Nyaundi Tuiyot Advocates also acted for the defendant in Kisii CMCC No.243 of 2003, which was settled out of court by consent. The plaintiff claimed that Kisii CMCC No.244 which is defended M/S Olago Aluoch and Company Advocates is still pending in court though the plaintiff had testified. The plaintiff added that the other case was Kisii CMCC No.245 of 2003 which was defended by M/S Wangau Nyuthe and Company advocates which had been finalized after a trial and that no appeal was preferred. The plaintiff's contention and claim was that the defendant had failed to show fraudulent or corrupt acts attributed to him in all the cases, it had set out in its complaints to the Advocates Complaints Commission. According to him the defendants' defamatory publications had adversely affected him and he gave an example of one incident of effect of the letters. He said that on 10/11/03 he was invited for an interview for a post of a magistrate by the Judicial service Commission but due to the said publication of the letters eventually he was not interviewed for the post. He added that no longer does he get instructions to act for clients in any industrial claims. According to the plaintiff the words of the defendants contained in the letters quoted in paragraphs 3 and 4 of the plaint meant that he is a corrupt unprofessional, fraudulent and unscrupulous person who could do anything to obtain money. He claimed that his reputation, character and name having been scandalized he sought compensation by an award of general and exemplary damages.

The record of this case indicates that on 28<sup>th</sup> July 2004 the plaintiff filed a statement of issues but the defendants does not appear to have either agreed with those filed by the plaintiff or filed its own. Having perused the issues filed by the plaintiff's I am satisfied that if I adopt them in my judgment all the matters in dispute between parties in this suit will be fully covered. These issues are as follows:-

1. Whether the published words were defamatory to the plaintiff?
2. Whether the defendant published the said words falsely and maliciously?
3. Whether the published words were meant and/or understood, in their natural and ordinary meaning to mean what is alleged in Paragraph 5 of the plaint?
4. Whether the words published by the defendant were true in substance and fact?
5. Whether the defendant printed the said words as expression of opinion was fair comment and were so published in the interest of the public?
6. Whether the defendant published the said words under a sense of public duty and without malice?
7. Whether the plaintiff has suffered injury and loss and damage as a result of the publication of the said words by the defendant?
8. Whether the plaintiff is entitled to compensation by the defendant?
9. Who should bear the costs of this suit?

It will be possible for me in this judgment to combine several of the above issues when dealing with them. As the defendant has admitted that it published the words complained of the first issue is whether the two letters dated 30/05/03 and 10/0703 were defamatory to the plaintiff's name and character as alleged. That issue can be examined together with issue No.3. Bearing in mind the very words used in

each of the two letters and the fact that the plaintiff was specifically named together and the particulars of the cases were given which he had handled and in which the fraudulent and corrupt acts were alleged to have been committed by him, I am satisfied that the two letters were defamatory to the plaintiff's profession as an advocate of the High Court.

The two letters were indicated to have been addressed to the Minister of Justice and Constitutional Affairs and the Advocates Complaints Commission respectively. The defendant in its defence pleaded that the letters were not published falsely or maliciously. However the plaintiff claimed that that was not correct as some copies of the letter he produced in this court as exhibits were indicated to have been brought to him by one of his clients who had picked them near one of the factories. According to the plaintiff the documents were published maliciously in that they were widely circulated and distributed in the areas where the defendant has operations. There is no evidence to contradict that assertion. I therefore accept that the said letters were published maliciously.

In its defence the defendant advanced defences which can be summarized as (a) fair comment (b) justification (or truth) and (c) privilege.

Turning first to the defence of justification, it was incumbent upon the defendant to establish that what it alleged the plaintiff was true so as to succeed in this defence. It should be noted that the defendant had lodged a complaint against the plaintiff before the Advocates Complaints Commission and had given the details and particulars of the cases the plaintiff was alleged to have used to make the unwarranted and fraudulent claims against the factories under the management of the defendant. When the Advocates Complaints Commission asked the plaintiff to respond to the said complaints he appears to have furnished the Commission with certified copies of the proceedings, copies of the discharge vouchers and copies of the statements of accounts in respect to each of all the stated cases which were finalized and pending. It appears that the Commission was satisfied, as it did not press for any further investigations into the matter nor did it issue any disciplinary measure. Unfortunately the defendant does not appear to have shown why did the advocates who had represented the Kibirigo tea factory the defendant in all the cases set pit agreed to settle some of the claims if in fact the industrial accidents in fact had not occurred as claimed by the defendant. Were the defendant advocates also probed? What actions did the manager of the said factory taken if the alleged accidents did not take place as claimed? I note that one of the defence lawyers in the said cases is Mr. John Olago-Aluoch who is one of the prominent lawyers in West Kenya who sat in the Council of Law Society for many years. Was his views relating to the alleged corrupt acts taken by the defendant before the issue of the offending letters.

The defendant had a burden to establish this issue but it did not show that all or some or any of the cases filed against Kibirigo tea factory by the plaintiff were fake claims to be able to have the defence of justification. In my view the defence of justification cannot be available to the defendant.

The defence of true and fair comment was also advanced in the statement of defence but once again the defendant was under duty and an obligation to give details of the facts on which the comment was based and as the matter also related to public interest it should have specified the matters of public interest it relied. I accept that the fact that the defendant would have been rightly concerned if there was the reputable Insurance Companies were declining to insure the said factories. That is an issue, which can be of public interest, but the rise in the Industrial cases could have arisen in the poor management of the factory by its staff. I find no material, which satisfy the defence of their counsel of fair comment.

It was the defendant's further claim that the words complained of were published on a privileged occasion. Having advanced this defence it was necessary for the defendant to show the circumstances that made the matter of public interest, the sources and the status of any information, the steps it has taken to verify the truth before publishing the words complained of. The plaintiff had pleaded that the said words were published falsely and maliciously. It would appear to me that although the information relating to truth of all the cases handled by the plaintiff was available to the Manager of Kibirigo tea factory who is the defendant's employee and agent but it recklessly published the offending words without checking the truth of them from him. That in my view amounts to malice on the part of the defendant which causes the defendant to lose the protection of the defence of qualified privilege. I

therefore hold that the defendant is liable to the plaintiff in damages and that the defendant was in fact actuated by malice.

On the issue of the quantum of damages I note that the plaintiff's advocates have suggested that if their client is awarded Kshs.15,000,000/= general damages and Kshs.5,000,000/= exemplary damages he would be adequately compensated. They relied in the **HCCC No.1067 of 199 – K.N.K. BIWOT VRS CALYS LIMTIED AND 3 OTHERS, HCCC NO.4856 OF 1990 WARUIHIU J. MUI TE VRS OCHIENG AND ANOTHER HCCC NO.1709 OF 1996 – MACHARIA VRS MWANGI AND ANOTHER, MOMBASA 25 HCCC NO.102 OF 2000 – MUSINGA AND COMPANY ADVOCATES VRS NATIONAL NEWSPAPAERS LIMITED.**

I have carefully considered all these authorities and the awards made in each of them and bearing in mind all the circumstances of the case, I would award the plaintiff Kshs.7,000,000/= as general damages and Kshs,3,000,000/= as exemplary damages.

There will therefore be judgment for the plaintiff against the defendant as follows:-

<b>General damages</b>	<b>Kshs.7,000,000/=</b>
<b>Exemplary damages</b>	<b><u>Kshs.3,000,000/=</u></b>
<b>Total</b>	<b><u>Kshs10,000,000/=</u></b>
<b>Costs and interest</b>	

**DATED AND DELIVERED this 28<sup>th</sup> day of October, 2005**

**B. K. TANUI**

**J U D G E**

**In the presence of:**

Ouma for plaintiff

**N/a for defendant**

B. K. TANUI

**J U D G E**

**/mk.**