



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

**Civil Case 1081 of 2004**

**FRANCIS OCHIENG OIRO ..... PLAINTIFF**

**VERSUS**

**NAKUMATT HOLDING LIMITED ..... DEFENDANT**

**RULING**

By chamber summons dated 16.02.05 and filed on 06.04.05 under Order VI rule 13 (1) (a) of the Civil Procedure Rules, the defendant applied for the following orders:-

1. That the plaint herein be struck out.
2. That the plaintiff do pay the costs of this application and the suit.

The grounds upon which the application is based are that:-

1. The suit discloses no reasonable cause of action against the defendant.
2. The defendant has an absolute defence in law.
3. No cause of action lies where the purported defamatory words are published in court proceedings.
4. The plaintiff's suit cannot lie in law.

The defendant's application is stated to be supported by the above grounds plus provisions of law.

The application came up for hearing before me on 19.09.05 whereat the defendant/applicant was represented by learned counsel, Mr. K. Kamau while the plaintiff/respondent was represented by learned counsel, Mr S.O. Ojienda.

Defendant's/applicant's counsel drew attention to paragraph 2 of the defence to the effect that the

words complained of by the plaintiff/respondent were contained in a replying affidavit filed in High Court Miscellaneous Civil Suit No.1287 of 2003 and that the defendant is entitled to and invokes the defence of absolute privilege. Applicant's counsel said that there had been no reply to the defendant's assertion that the words complained of were contained in an affidavit in judicial proceedings and that under the law the suit cannot lie. He referred to:-

- a) Gatley on Libel & Slander, 8<sup>th</sup> Edition, paragraphs 13.5, 13.6 and 13.16.
- b) Section 6 of the defamation Act (Cap. 36).

Defendant's/applicant's counsel urged the court to strike out the plaint.

On the other hand, the plaintiff/respondent said in essence that while the defendant/applicant contended that the words complained of were contained in an affidavit in judicial proceedings, the affidavit relied on has not been put in evidence in the present proceedings; that the Defamation Act is silent on matters reported in judicial proceedings, that this court cannot make an informed decision on the affidavit alluded to by the defendant/applicant; and that the court cannot dismiss the suit at this preliminary stage. In plaintiff's/respondent's counsel's view, the issue whether the words complained of were in an affidavit e.t.c. can only be canvassed at a full hearing. According to him, privilege is given only to newspapers. Plaintiff's/respondent's counsel added that if the words in question were in an affidavit in judicial proceedings and were reported in a newspapers the defendant/applicant had a duty to bring the newspaper on board and disclaim liability but the defendant/respondent's counsel reiterated that the proper course is for the matter to be addressed at a full hearing rather than being disposed of at a preliminary point.

He referred to:-

- a) The proviso to section 6 of the Defamation Act.
- b) The provisos in the marked passages in Black's Law Dictionary: under the term "blasphemy" on page 182; under the term "incident" at page 783; and under the term "sedition" at page 1388.
- c) Halsbury's Laws of England, Vol. 24 paragraph 17 (page 9); paragraph 37 (page 17); paragraph 40 (page 19); paragraph 41 (page 20); paragraph 49 (page 26); paragraph 172 (page 96); and paragraph 189 (page 103).

- d) Greenslade & Another -vs- Swaffer & Others [1955] 3 AU ER 200.
- e) Morris & Another -vs- Sandess Universal Products [1954] I Au ER 47.
- f) Kemsley -vs- Fort & Others [1951] KB 34.

Plaintiff's/respondent's counsel submitted that no sufficient grounds have been advanced for dismissal of the suit at this preliminary stage. He maintained that there are many issues of law and fact not brought to court for the court to make an informed decision. He even added that there is no dispute that the words are defamatory.

In reply, defendant's/applicant' counsel said there is no admission in the pleadings or otherwise that the words complained of are defamatory. He added that the application, brought under Order VI rule 13 (1) (a), is in the nature of a preliminary objection; that no affidavit or other evidence is permitted at this stage; and that the court has only to look at the pleadings as filed. He also said that on 01.12.04 the plaintiff/respondent was put on notice that the words on which the claim was based were in pleadings before court and that this averment has not been denied. With regard to the qualifications cited in Black's Law Dictionary, defendant's/applicant's counsel submitted they are inapplicable to this case. He referred to page 17 paragraph 37 of the Halsbury's extract alluded to earlier to make the point that publication must first be alleged and then proved. According to him, it was a must to join the publisher, which has not been done and that it is not the defendant's duty but the plaintiff's duty to being in the correct parties.

I have duly considered the rival arguments of the parties.

As I see it, the central issue around which this case revolves is the affidavit containing the words complained of. That is the genesis of the complaint. The said affidavit is said to have been filed in High Court Miscellaneous Civil suit No.1287 of 2003. The affidavit is not part of the record in the case now before me. Where or not the words complained of in this case are in an affidavit filed in Judicial proceedings is a question of fact on which no judicial determination can be made before that fact is established by evidence. That stage has not been reached yet and a determination on the said issue can only properly be made at a full hearing of the suit.

I hold that the proper forum for adjudication upon the issues raised in support of the present application is at a full hearing of the suit herein. Accordingly, the chamber summons application dated 16.02.05 and filed on 06.04.05 must be and is hereby dismissed. Costs shall be in the cause.

Orders accordingly.

**Delivered at Nairobi this 28<sup>th</sup> day of November, 2005.**

**B.P. KUBO**  
**JUDGE**