



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 234 OF 2012

SHEETAL KAPILA.....PLAINTIFF

-VERSUS-

WESTMONTPOWER (K) LIMITED.....DEFENDANT

JUDGMENT

1. Through the amended plaint dated 23rd January 2019, the plaintiff herein, **Sheetal Kapila**, an advocate of the High Court of Kenya, sued the defendant herein seeking the following orders: -

- a. A declaration that the remuneration agreement entered into by the defendant is valid and binding upon it.**
- b. A declaration that the fees paid to the plaintiff by virtue of the said remuneration agreement are not subject to taxation.**
- c. 25% of all the sums payable to the defendant under the order of the Court of Appeal dated 24th November 2014 in civil Application No. NAI 254 of 2013.**
- d. Interest thereon at 12% per annum from 4th December 2014 until payment.**
- e. Damages on the footing of aggravated damages for malicious falsehood.**
- f. Damages for anxiety and distress.**
- g. Costs.**

2. The plaintiff's case is that he acted for the defendant in a number of legal actions filed against it by one East African Power Management Limited (EAPML) in the High Court and at the Court of Appeal.

3. The plaintiff states that on or about 12th October 2007 the parties herein entered into an agreement, in which the amount of the fees due to the plaintiff's law firm was fixed in respect to its disputes with East African Power Management Limited. The plaintiff contends that the agreement provided that he would be paid 25% of the value of the sums deposited by the defendant in the course of its litigation with East African Power Management Limited, and that it was to be paid in consideration of work done and services that it had rendered to the defendant.

4. It was the plaintiff's case that one of the terms of the said agreement was that the fees agreed to be paid to the plaintiff were to be paid out of the said deposits.

5. The plaintiff states that on or about 3rd August, 2010, the defendant entered into a written agreement with East African Power Management Limited wherein they agreed to settle their various disputes and to mark all matters being litigated between themselves as settled, and that they also agreed to divide the amounts deposited by the defendant amongst themselves. Following the said settlement, the plaintiff retained 25% of the value of the said deposits in accordance with the aforesaid agreement, as well as a further amount of outstanding fees due and owing from the defendant, and admitted by the defendant as duly owing.

6. The plaintiff claims that the defendant wrongfully repudiated their said agreement and claimed that no monies were due and owing from it to the plaintiff, whether under the said agreement or at all. The plaintiff further states that the defendant has demanded the payment of the monies he lawfully deducted from the deposits, but adds that he has declined to repay the said sums, as he claims that the same was properly due and payable to his firm.

7. As a result of the plaintiff's refusal to repay the said sums, the defendant lodged a complaint against the plaintiff to the Disciplinary Committee of the Law Society the defendant on the ground that the plaintiff had wrongfully retained monies due to the defendant yet the legal fees had neither been agreed or taxed.

8. The plaintiff contends that the defendant did not disclose to the Disciplinary Committee that it had entered into a remuneration agreement with the plaintiff which entitled him to retain the sums in question, nor did it disclose that part of the money retained by the plaintiff was in respect to fees that the defendant had admitted to be due and owing to the plaintiff.

9. The plaintiff maintains that the remuneration agreements are valid and binding upon the defendant by dint of Section 45 of the Advocates Act, which provides that where an agreement has been made by virtue of the said section, the costs of an advocate shall not be subjected to taxation.

10. The plaintiff states that despite their written agreement on fees, on or about 3rd and 8th December 2014, the defendants instructed **M/S Triple OK Advocates** to write to the law firm of **M/S Esmail & Esmail Advocates** to inform them that they did not instruct the plaintiff to act for them in Nairobi Civil Appeal No. 154 of 2003 and Kenya Oil Company Limited (hereinafter "**the Kenol case**"). The plaintiff contends the purpose of the said letter was to falsely and maliciously direct the said law firm of **Esmail & Esmail** not to effect any payment to the plaintiff for the monies that the Court of Appeal had awarded in the Kenol case.

11. The defendant opposed the plaintiff's case through the statement of defence filed on 21st May 2012 wherein it concedes that it instructed the plaintiff to represent it in various matters in court and that in the course of the said representation, the Advocate was paid by a total of USD \$ 251,024.00 for professional fees and disbursements incurred in the conduct thereof a breakdown of which was as follows:

a. **USD 60,000 -30.3.2007**

b. **USD 67,917 – 25.5.2007**

c. **USD 19,246 – 07.12.2007**

d. **USD 18,861 - 18.1.2008**

e. **USD 85000- 23.6.2010**

12. The defendant states that in October, 2010, the advocate received the sum of USD 813,875/30 and Kshs 17,469,838/75 on behalf of the defendant company which he was required to forward to the company. It further states that despite having already received his legal fees as set out hereinabove, the said advocate unilaterally decided to forward the sum of USD 475,592/48 to the Company and retained an aggregate sum of US\$ 506,355/80 on account of alleged legal fees for '*work done for which no fees has been paid*'.

13. The defendant states that subsequent demands by the company that the advocate remits the said sum of USD 506,355/80 have been unsuccessful and that numerous meetings between the plaintiff and the defendant's representatives have come to naught.

14. It is the defendant's case that owing to the plaintiff's failure to pay up the aforesaid sums, the defendant lodged a complaint against the plaintiff for professional misconduct with the Disciplinary Committee of the Law Society of Kenya vide Disciplinary Committee Cause No. 73 of 2011.

15. The defendant maintains that the plaintiff's unilateral deduction of the aforesaid sums from the monies held on account of the defendant was without justification and amounted to misappropriation of client's money for which he is liable to the defendant.

16. The defendant further states that following the filing of the aforesaid Disciplinary Cause No. 73 of 2011, the plaintiff filed a replying affidavit dated 17th August, 2011 to which he annexed a note dated 12th October, 2007 signed by one **Bob Sutherland** he now referred to as an agreement for remuneration of fees.

17. The defendant's case is that the said **Bob Sutherland** was not its officer with the capacity to enter into an agreement that can bind the defendant and further, that the agreement was never made under the seal of the defendant or pursuant to any resolution by the defendant's Board of Directors.

Oral evidence.

18. At the hearing of the case, the plaintiff (PW1) adopted his witness statement dated 15th March 2016 as his evidence in chief and produced the bundle of documents filed with the plaint as exhibits.

19. On cross examination PW1 conceded that the instant suit was filed following the institution of the defendant's complaint before the Advocates Disciplinary Tribunal and that the bone of contention is the remuneration agreement of 12th October 2007.

20. The plaintiff testified that he withheld the money in dispute as a result of the Remuneration Agreement and that he said Agreement was a valid agreement within the meaning of Section 45 of the Advocates Act as it was signed by the plaintiff and one **Bob Sutherland** on behalf of the defendant.

21. The plaintiff testified that he had knowledge that the said Bob Sutherland was the defendant's sole representative in Kenya and that he (Bob Sutherland) had the authority to sign the Remuneration Agreement. He testified that the said **Bob Sutherland** was however not listed as a Director in the Defendant's Annual Returns.

22. The plaintiff admitted that he had numerous email correspondences with defendant after the signing of the Remuneration Agreement which email did not make any reference to the Remuneration Agreement and that he subsequently received at least 3 payments from the defendant without any reference to the Remuneration Agreement.

23. On the claim for malicious falsehoods, the plaintiff testified that the defendant's advocates (Triple OK) claim that the defendant never instructed him to act for them was false and added that he claims damages from the defendant because the said advocates acted on behalf of the defendant.

24. On re-examination PW1 testified that the defendant was owned by two Malaysian Companies that were under management and that the administrators in Malaysia had completed their work and returned the company to its original directors. He added that he personally received instructions to act for the defendant from **Mr. Bob Sutherland** and that the two Remuneration Agreements specified the scope of work that was to be undertaken by the plaintiff.

25. He further testified that the payments received by the plaintiff following the email correspondence were largely for different matters outside the Remuneration Agreement. He reiterated that the money he retained was based on the Remuneration Agreement.

26. The defendant did not call any evidence in support of its case but informed the court that they will rely on the proceedings from the Advocates Disciplinary Tribunal.

27. Parties thereafter canvassed the case by way of written submissions.

Plaintiffs submissions.

28. **Mr. Wandabwa**, learned counsel for the plaintiff submitted the plaintiff proved his case against the defendant on a balance of probabilities by showing that his claim for fees was based on the Remuneration Agreements signed by the defendant's authorized agent.

29. It was submitted that since the defendant ceased trading in 2004, it discharged all its employees save for the said **Bob Sutherland** who continued to represent the defendant in settling its outstanding affairs. Counsel argued that the defendant did not substantiate its contention that **Mr. Sutherland** lacked the authority to sign the Remuneration Agreement.

30. Counsel submitted that the letters written by Triple OK Advocates to Esmail & Esmail Advocates were intended to maliciously deprive him of the fees agreed upon in the Remuneration Agreement thus necessitating the filing of the fresh claim for fees in the amended plaint. Counsel argued that the publication of the said letters painted the plaintiff in bad light and tainted his professional reputation. For the argument on payment of damages for defamation, counsel cited the decision in **Samuel Ndungu Mukunya v Nation Media Group Limited & Another** [2015] eKLR.

31. It was submitted that the failure, by the defendant, to tender the testimony of its intended witness meant that the plaintiff's case was uncontroverted. It was further submitted that the plaintiff's claim for damage for defamation is not statute barred in view of the fact that the application to amend the plaint was filed in 2015. For this argument, counsel cited the case of **South British Insurance Company Limited v Samiullah CA No. 3 of 1967** wherein it was held that where a plaint is amended, the amendment is deemed to have taken effect at the time the plaint was filed.

Defendant's submissions

32. **Mr. Masika**, learned counsel for the defendant urged the court to consider the context of this suit in light of the pending disciplinary proceedings against the defendant before the Advocate's Disciplinary Tribunal and note that the instant suit was filed as a reaction to the said disciplinary proceedings.

33. Counsel submitted that the plaintiff did not prove that the Remuneration Agreements were valid within the contemplation of Section 45 of the Advocates Act. It was submitted that the plaintiff did not demonstrate that the said **Bob Sutherland** had the defendant's authority to sign the Agreements. Counsel argued that the action for damages for malicious falsehood must under Section 4(2) of Limitation of Actions Act be filed within 12 months, in which case, the instant action ought to have been instituted by 8th December 2015. It was further submitted that the defendant cannot be held liable for the utterances of their advocates (Triple OK) as defamation suits are actions in personam.

Analysis and determination

34. I have carefully considered the pleadings filed herein, the testimony of the plaintiff and the written submissions together with the authorities that were cited.

35. The main issues for determination are as follows; -

- a. Whether the Remuneration Agreements are valid and binding upon the defendant.
- b. Whether the plaintiff has established its claim for damages for malicious falsehood.

Remuneration Agreement

36. The defendant challenged the validity of the Remuneration Agreements on the basis that the signatory, **Mr. Bob Sutherland**, lacked the capacity to enter into agreements that can bind the defendant and that the purported Agreements were never made under the seal of the defendant or pursuant to any Resolutions by the defendant's Board of Directors.

37. On his part, the plaintiff maintained that **Mr. Sutherland** was the defendant's duly authorized agent capable of signing the Remuneration Agreements within the meaning of Section 45 of the Advocates Act.

38. In determining whether Mr. Sutherland was the defendant's agent this court will consider the definition of an agent according to Halsbury's Law of England (Vol. 1 2008) which states as follows on the authority of an agent: -

- a. **The authority of the agent may be implied from the conduct of the parties or from the nature of the employment.**
- b. **The authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties.**
- c. **The agent may exercise his discretion so as in the best manner possible for his principal.**
- d. **The implied authority of an agent extends to all subordinate acts which are necessary or ordinary incidental to the exercise of his express authority.**
- e. **At common law the general rule is that a person sufficiently signs a document if it is signed in his name and with his authority by someone else; and in such case the agent's signature is treated that of his principal.**

39. Section 120 of the Evidence Act stipulates as follows: -

“Where one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth from that thing.”

40. In the present case, it was not disputed that the plaintiff had the defendant's instructions to act for it in the various court cases. In the defendant's statement of defence filed on 21st May 2012, it confirms that it instructed the plaintiff, while practicing as a partner in the firm of **AR Kapila & Company Advocates**, to represent it in various matters in court. I have perused the subject Remuneration Agreements dated 12th October 2007 and I note that both were signed by **Mr. Bob Sutherland** for and on behalf of the defendant. In both Agreements, which were in the form of a letter from **Mr. Sutherland** to the plaintiff, the said **Mr. Sutherland** stated in part as follows:

In respect to the claim against “Kenol”:

“We are agreeable to paying fees to your firm equivalent to 25% of all monies recovered from Kenol. These payments will be made additional to any fees that may have been made to Kapila Anjarwalla & Khanna, and shall only be made from sums recovered from Kenol.”

41. In respect to East African Power Management Limited, he stated that; -

“In the circumstances, we are agreeable to paying fees to your firm equivalent to 25% of the sums deposited in court to defend these two actions

These payments will be made additional to any fees already paid to your firm by us and shall only be made from the deposits returned to us.”

42. At the hearing, the plaintiff testified as follows regarding his dealings with **Mr. Sutherland** and the agent/principle relationship between **Mr. Sutherland** and the defendant: -

“I never dealt with the original Directors..... I personally only received instructions from Mr. Sutherland. The complainant to Law Society of Kenya Disciplinary Committee and who also filed the defence witness statement is someone I have never dealt with. He was not involved in the affairs of the defendant between 2001-2010 when the company was in administration. I dealt with Mr. Sutherland throughout.”

43. Section 2 of the Law of Contract Act stipulates as follows:

“No contract in writing shall be void or unenforceable by reason only that it is not under seal.”

44. Section 35 of the Companies Act, 2015, on the other hand, stipulates as follows regarding Company Agreements/Contracts.

“(1) A contract may be made-

a. by a company, in writing under its common seal; or

b. on behalf of a company, by a person acting under its authority, express or implied.”

(2) Any formalities required by law for a contract made by a natural person also apply, unless a contrary intention appears, to a contract made by or on behalf of a company.”

45. Guided by the above-cited provisions, I find that contrary to the defendant’s assertions, written contracts made by companies are enforceable even if they are not made under seal and that contracts may be made on behalf of a company, by a person acting under its authority, express or implied. In the present case, the plaintiff’s claim that Mr. Sutherland made the written Remuneration Agreements on behalf of the defendant was not controverted by any evidence, to the contrary. It is worthy to note that while the defendant concedes, at paragraph 2 of its statement of defence, that it retained the plaintiff’s services to represent it in various matters in court, the defendant is curiously silent on how such instructions were issued to the plaintiff. Apart from the defendant’s mere denial that **Mr. Sutherland** was not their agent, no material was placed before this court to show that **Mr. Sutherland** was total stranger or imposter acting at his own behest without the defendant’s authority. I find that in view of its own admission that the plaintiff acted for it in various court cases, the defendant owed this court the duty to at least present evidence, on who exactly had its authority to sign remuneration agreements or give instructions to the advocates who acted for the defendant during the period in question.

46. I therefore find that the plaintiff proved, on a balance of probabilities, that Mr. Sutherland was the defendant’s agent and was thus a person with the capacity to enter into agreements that can bind the defendant.

47. My above findings on the capacity of Mr. Bob Sutherland to enter into agreements that can bind the defendant notwithstanding, I am still minded to consider the contents of the subject Remuneration Agreements and if they can be enforced by this court. The wording of the said Agreements was as follows:

“Dear Sheetal,

We have also noted your opinion, in addition to the one you have given the Receivers on the EAPML disputes, that Westmont Power Limited has no defence on the merits to the claims made by Kenya Oil Limited in respect of the claim for unpaid invoices.

However, you are confident of success in this case as a result of legal and procedural mistakes by Kenol’s lawyers which you have identified and which you have been able to take advantage of. You have advised us that our appeal against the court’s refusal to set aside the judgment will certainly succeed, and the case will be sent back to the High Court to hear our application to refer the dispute to arbitration. The application, in your opinion, is also likely to succeed, and Kenol will have to take its claim to London for arbitration.

However, you have advised us that any intended reference to arbitration became time barred in 2004, so a stay of High Court proceedings will serve to shut out Kenol permanently from pursuing its claim against us. Kenol will have no other forum available to it to recover its claim.

In the circumstances, as we are not in any position to pay your fees for all your work done to date, and as you are fully confident of the successful outcome of this case, we are agreeable to paying fees to your firm equivalent to 25% of all monies recovered from Kenol.

These payments will be made additional to any fees that may have been made to Kapila Anjarwalla and Khanna, and shall only be made from the sums recovered from Kenol.

Yours

Bob Sutherland

For and on behalf of

Westmont Power Kenya Limited “

48. My understanding of the wording of the said agreements, in as far as the payment of legal fees is concerned, is that the payment of the advocate’s fees will be contingent/subject to the success of the cases that the advocate/plaintiff was handling on behalf of the defendant.

49. Section 45 (1) of the Advocates Act provides: -

“Subject to Section 46 and whether or not an order is in force under Section 44, an advocate and his client may-

- a. Before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;
- b. Before or after or in the course of any contentious business in a civil court make an agreement fixing the amount of the advocate’s instruction fees in respect thereof or his fees for appearing in court or both;
- c. before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.”

50. Section 46(c) and (d) on the other hand provides that: -

“Nothing in this Act shall give validity to—

- c. any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof; or
- d. any agreement by which an advocate agrees to accept, in respect of professional business, any fee or other consideration which shall be less than the remuneration prescribed by any order under section 44 in respect of that business or more than twenty-five per centum of the general damages recovered less the party and party costs as taxed or agreed;”

51. A plain reading of the above provisions of the Advocates Act shows that while section 45 gives advocates and clients the discretion to agree on remuneration, that discretion is subject to section 46 of the Act, which makes any agreement for remuneration that is conditional on success, or payment at different rates according to success or failure of the case, illegal. Sub-section (d) of Section 46 also invalidates any agreement that provides for payment of what is less than what is prescribed.

52. In the present case, the 2 letters in question show that the client was not in a position to pay the advocate’s fees for all the work that he had done but that since the advocate was confident of the successful outcome of the cases, the client was agreeable to paying fees equivalent to 25% of all monies recovered from Kenol and EAPML. It is thus clear to me that the only way that the fees due to the plaintiff could be recovered was if the pending suits succeeded. This means that recovery of the advocate client fees was partly based on the success of the litigation and also on full recovery of the amount owed. Needless to state that the conditions provided in the said letters dated 12th October, 2007 clearly contravene Section 46(c) & (d) of the Advocates Act that prohibits payment of advocates fees being conditional on the success of the suit. My finding is that the Section 46 of the Advocates Act is a critical factor in these proceedings which this court cannot ignore in the face of the obligation placed on the court to consider the law in totality whether cited or not.

53. In *Patel v Singh (2)* [1987] KLR 585, the Court of Appeal dismissed an appeal holding that a contract entered into by the parties that was contrary to the provision of section 3(1) of the Exchange Control Act Cap 113 was illegal *ab initio* and unenforceable. Nyarangi, JA. quoted with approval the following passage from the case of *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, at page 388: -

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract *ab initio* and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”

54. In *National Bank of Kenya Ltd v Mahesh Manubhai Patel*, Mombasa Miscellaneous Civil Application No.583 of 2003 Maraga J, (as he then was), when applying section 46(1) of the Advocates Act, to an agreement between an advocate and a client; stated:

“Section 45 itself says that it is subject to section 46. This section makes an agreement providing for payment of advocates fees on success or less than that provided in the order invalid. The agreement in this case provides for payment of up to 60% of the scale fees on success. It also provides for advocates fees which is less than the scale fees provided for in the Order. For these reasons given, I find that the agreement offends the provisions of section 46(c) & (d) and declare it illegal.

55. Guided by the above decisions, I find that any contract that contravenes a statute is illegal and the same is void, *ab initio* and is therefore unenforceable. The logical conclusion of this finding would be that the Remuneration Agreements between the plaintiff and the defendant regarding the payment of legal fees is unenforceable.

56. My above findings on the validity of the Remuneration Agreement would have been sufficient to determine this matter but I am still minded to consider the plaintiff’s claim for damages for malicious falsehoods.

Damages for malicious falsehood, anxiety and distress.

57. The Plaintiff's claim for damages under this heading is captured at paragraphs 15, 16 and 17 of the amended plaint as follows:

15. On 3 and 8 December 2014, the defendant's advocates, acting on the defendant's express instructions in writing, wrote to a firm of advocates known as Esmail and Esmail and stated that it would henceforth be acting for the defendant in the disputes between the defendant and one Kenya Oil Company Limited ("Kenol") in Civil Appeal No. 154 of 2003, Civil Application No. NAI 254 of 2013 (both matters in the Court of Appeal at Nairobi), and in High Court Civil Case No. 106 of 2002. The said advocates further wrote that "at no time' had the defendant instructed the plaintiff or his firm to represent the defendant in HCCC No. 106 of 2002.

16. The purpose of the said letters was to direct Esmail and Esmail not to effect any payment to the plaintiff of the monies that the Court of Appeal had ordered Kenol in Civil Application No. NAI 254 of 2013 to retribute to the defendant.

17. The said words were false and published maliciously.

58. From the aforesaid paragraphs, it is clear that the plaintiff's claim for damages is on the basis of instructions issued by the defendant to its advocates to assert that the plaintiff did not have any instructions to represent the defendant in Civil Application No. NAI 254 of 2013 and HCCC No. 106 of 2002. The plaintiff's case is that this assertion deprived him of the legal fees due to him from Kenol under the Remuneration Agreement.

59. The defendant opposed the plaintiff's claim for damages on two fronts, firstly; that the claim was statute barred and secondly; that the defendant could not be held liable for the publication of the alleged defamatory letter by its agent/advocate.

Limitation period.

60. The defendant's case was that since a claim for malicious falsehood is in the nature of defamation (libel and slander), the claim ought to have been filed within 12 months from the date of the cause of action arose, in this case, from the 3rd and 8th December 2014 when the alleged offensive letters were authored. The defendant argued that since the amended plaint was filed on 23rd January 2019, the suit was time barred having been filed 4 years from the time the cause of action arose.

61. In a rejoinder, the plaintiff argued that the suit was not time barred in view of the fact that the application to amend the plaint so as to incorporate the claim for malicious falsehood was filed on 23rd March 2015 before the expiry of the limitation period.

62. The question which then arises is whether the plaintiff's claim for damages for malicious falsehood is time barred. In other words, when exactly was the claim for malicious falsehood filed? Did the cause of action arise at the time of the filing of the application to amend the plaint or at the time of the actual filing of the amended plaint after leave was granted in 2019?

63. Courts have adopted the position that an amendment to pleadings go back to the date of filing of the suit. This position is referred to as the principle of relation back in amended pleadings. The principle is that an amendment to a pleading relates back to the date that pleading was originally filed. In *Mohan Meakin (K) Limited v Attorney General* [2014] eKLR the Court of Appeal discussed the relation back principle in amended pleadings and held that amendment of the plaint relates back to or speaks from the date on which the suit was filed.

64. In *Epaito v Uganda Commercial Bank*, [1971] EA 185, the court observed that the principle of relation back in amended pleadings is a rule of practice not founded on any statutory provision. The English Court of Appeal stated as follows in *Sneade v. Wotherton Baryes and Lead Mining Company*, [1901] 1 K.B. 295 where Collins M.R. stated at page 297 that upon an amendment being allowed, **"the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed."**

65. The relation back principle has however been the subject of a lot of debate within our jurisdiction. Some courts have adopted the English decisions such as the first case of *Eastern Radio v. Patel*, [1962] EA 818 where Gould, J.A. held that an amendment to a pleading related back to the date it was filed. Newbold, JA (as he then was) held a contrary view while Sir Ronald Sinclair preferred to leave the issue open. Newbold JA's view was that **"[l]ogic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed."**

66. In the case of *South British Insurance Co. Ltd v. Samiullah*, (supra) Law, JA expressed no definite opinion on it but observed that **"even if an amended plaint does relate back to the date of the original plaint, for some purposes, such relation back cannot in my view operate so as to preclude a judge from taking notice of the date of the amendment, if such date is material to the issue for decision, as it undoubtedly was in this case."** The other two Judges of Appeal in that case concurred without any comment.

67. Guided by the finding in the *South British Insurance Co.* case (supra) I find that the justice of this case will require that the date of the filing of the application to amend the plaint be deemed to be the date that the claim for malicious falsehood was instituted in view of the fact that the said cause of action had not arisen as at the time that the suit was filed in 2012, but is alleged to have arisen in August 2014. My take is that the application for amendment of the suit having been filed in March 2015, the claim for damages for malicious falsehood was instituted in March 2015 before the expiry of the limitation 12 months later in August 2015. My further finding is that the plaintiff cannot be blamed for the 4 years' delay in the conclusion of the application for leave to amend the plaint. I also that the justice of this case requires that March 2015 be deemed to be the date of the filing of the claim for damages for malicious falsehoods.

68. Turning to the second limb of the claim under defamation which is whether the defendant can be held liable for the defamatory statements made by his advocates, I note that the alleged offensive letters were written by the defendant's advocates in the cause of litigation. At this juncture, I find it appropriate to reproduce the entire contents of the said letters in this judgment for the record.

Esmail & Esmail Advocates

13th Floor, Corner House

Kimathi Street

NAIROBI.

Dear Sirs

Civil Appeal No. 154 of 2003- Westmont Power Kenya Limited v Kenya Oil C. Ltd.

Civil Application No. NAI 254 of 2013 - Westmont Power Kenya Limited v Kenya Oil C. Ltd.

High Court Civil Case No. 106 of 2002- Kenya Oil C. Ltd. Westmont Power Kenya Limited

We refer to the above matters in which you act for Kenya Oil Co. Ltd.

We have been instructed to come on record for WESTMONT POWER KENYA LIMITED in place of A.R Kapila & Co. Advocates. Our client contends that the said firm no longer has instructions to present them in any of its matters as the Advocate - Client relationship between them came to an end. Please enclosed herewith duly filed copies of the Notices of Change of Advocates in the above matters for your perusal and records.

All future correspondences and documents relating to the above matters should in the premises, be served on us.

Yours faithfully

TRIPLEOKLAW ADVOCATES

ELIAS J. MASIKA

esmail@tripleoklaw.com

cc Client.

cc A.R. Kapila & Company Advocates

7th floor, Transnational Plaza

City Hall way

NAIROBI."

Esmail & Esmail Advocates

13th Floor, Corner House

Kimathi Street

NAIROBI

Dear Sirs.

High Court Civil Case No. 106 of 2002- - Kenya Oil C. Ltd. v Westmont Power (K) Limited.

We refer to the above matter and ours dated 3rd inst.

We have now obtained further clarification from our instructing client, WESTMONT POWER KENYA LIMITED, who has confirmed that at no time did it instruct the firm A.R. Kapila & Co. Advocate to represent them in this matter. Any purported representation by the said firm or any other person action at the behest of the said firm in relation to this suit has been without our client's sanction and authority and cannot, therefore, bind our client on any manner whatsoever. As we have now filed the relevant Notices of change of Advocates all correspondences to our clients in relation hereto should be served on us.

Yours faithfully

TRIPLEOKLAW ADVOCATES

ELIAS J. MASIKA

esmail@tripleoklaw.com

cc A.R. Kapila & Company Advocates

7th floor, Transnational Plaza

City Hall way

NAIROBI.

c.c The Deputy Registrar,

High Court of Kenya,

Commercial & Admiralty Division

Milimani- NAIROBI.”

69. From the contents of the said letters it is clear that they were written on behalf of a client pursuant to and in the course of litigation and in respect to the issue of whether or not the plaintiff acted for the defendant in High Court Civil Case No. 106 of 2002 - *Kenya Oil C. Ltd. v Westmont Power (K) Limited*. It is also clear to me that the issue whether the plaintiff had instructions to act for the defendant in the said case is the main issue in contention in this case. I also note that the communication was strictly between the parties' Advocates and was only copied to the Applicant's client for communication.

70. Furthermore, the alleged offensive letters were written by the defendant's advocate and not the defendant itself, in which case, considering that actions for defamation are actions in personam, I find that the defendant cannot be held liable to the actions of its lawyer. I am guided by the decision in *Ethics and Anti – Corruption Commission v Judith Mariyn Okungu and Another [2017]* eKLR wherein the Court emphasized that an action of libel or slander is purely personal in nature.

71. Be that as it may and in the event that this court is wrong on its finding that the client cannot be held liable for alleged defamatory statements made by his advocate, I am still minded to determine if the said letters can be said to constitute malicious falsehood and are therefore defamatory in nature. In *Wycliffe A. Swanya v Toyota East Africa Limited & Francis Massa* Nairobi CA NO. 70 of 2008, the Court of Appeal stated as follows on what amounts to defamation:

“It is common ground that in a suit founded on defamation the plaintiff must prove:-

- i. That the matter of which the plaintiff complains is defamatory in character;**
- ii. That the defamatory statement or utterances was published by the defendant and that defendant's publication in the sense of defamation means that the defamatory statements was communicated to some on other than the person defamed.**
- iii. That it was published maliciously.**
- iv. In slander, subject to certain exceptions that the plaintiff has suffered special damages.**

72. In *Richard Otieno Kwach v The Standard Limited & David Makali* Nairobi HCCA 1099 of 2004, the court observed that **“words are defamatory if they involve a reflection upon the personal character or official reputation of the plaintiff....”**

73. In *J. Kudwoli v Eureka Educational and Teaching consultants & 2 Others* HCC 126/90 Kuloba J set out the matters that a plaintiff in a suit founded on defamation, be it libel or slander, must prove. The matters are:

- i. The matter of which the plaintiff complains was published by the defendant;**
- ii. That the publication concerned or referred to the plaintiff;**
- iii. That the publication was defamatory in character.**
- iv. That it was published maliciously; and**

v. In slander, subject to certain exceptions, that the plaintiff has thereby suffered special damages.

74. In the present case, I have already noted that the issue of whether or not the plaintiff was duly instructed to act for the defendant was the main issue in contest in this case. It is an issue that can only be resolved through production of evidence to show that the defendant specifically instructed the plaintiff to act for it in the case in question. In the circumstance of this case, I am unable to find the defendant's denial that it instructed the plaintiff to act for it can be said to have been malicious. I am therefore unable to find that the plaintiff the claim for malicious falsehood was proved to the required standards.

75. Having regard to the findings and observations that I have made in this judgment, I find that the plaintiff's case was not proved to the required standards and I therefore dismiss it with costs to the defendant.

Dated, signed and delivered via Microsoft Teams at Nairobi this 5th day of June 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Masika for defendant

Miss Kamau for plaintiff

Court Assistant: Sylvia