



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 69 OF 2010

AMOS K. C. KALE

STEPPHEN BUNDOTICH

M/S KALE MAINA & BONDOTICH & CO. ADVOCATES.....PLAINTIFFS

- V E R S U S -

REBECCA GESORA1ST DEFENDANT

THOMAS LETANGULE t/a LETANGULE & CO. ADV.....2ND DEFENDANT

RULING

1) Amos K. C. Kale and Stephen Bundotich advocates T/A Kale Maina and Bundotich advocates, the plaintiff herein, filed this suit against Rebecca Gesora and Thomas Letangule T/A Letangula & Co. Advocates, the 1st and 2nd defendants respectively. In the aforesaid plaint, the plaintiffs prayed for damages for defamation. The plaintiffs aver that through an application filed in this court (i.e H.C.C.C no. ELC 215 OF 2008, Mary Luande & 40 others =vs= Registered Trustees of Teleposta Schemes) dated 23.09.2009, the defendants by themselves and or their agents, employees and or servants falsely, maliciously, recklessly, printed and published or caused to be written, printed and published defamatory words of the plaintiffs in paragraph 25 of the affidavit of Rebecca Gesora filed in support of the aforesaid application. For ease of reference, the contents of paragraph 25 of the affidavit of Rebecca Gesora is reproduced as follows:

“That I know as a fact that the registered trustees, the administrators and the law firm of Mssrs Kale, Maina and Bundotich advocate want to sell the suit houses to their own select investors, or to themselves with a bid to corruptly and unjustly enrich themselves to the detriment of the plaintiffs herein.”

2) The plaintiffs further stated in their plaint that the aforesaid words in their natural and ordinary meaning meant or were understood to mean the following about the plaintiffs’ personal and professional character:

i. That the plaintiffs were unscrupulous

ii. That the plaintiffs were dishonest

iii. That the plaintiffs were fraudsters

iv. That the plaintiffs are not people fit to undertake any transaction on behalf of the administrators of Teleposta Pension Scheme as advocates.

3) When served with the plaint the defendants filed a defence to deny the plaintiffs' claim.

4) The 2nd defendant is now before this court seeking to have the suit as against him to be struck out vide the motion dated 25.11.2015. The motion is supported by the affidavit of Thomas Letangule. When served, the plaintiff opposed the motion by filing the replying affidavit of Stephen Bundotich. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the motion disposed of by written submission.

5) I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and replying affidavits. I have further taken into account the rival written submissions and the authorities cited. The main issue which commends itself for the determination of this court is the question as whether or not the 2nd defendant enjoys absolute privilege and immunity on court proceedings. There is no dispute that the plaintiffs have sued Mr. Thomas Letangule, the 2nd defendant, in his capacity as an advocate jointly with his client on account of what his client, the 1st defendant herein, deponed in an affidavit. It is also not in dispute that the relationship between the 1st and 2nd defendants is that the 2nd defendant was an advocate appointed to act and represent the 1st defendant in Nairobi H.C.C E.L.C. no. 215 of 2008, wherein the 1st defendant was the 26th plaintiff out to 66 plaintiffs against the Registered Trustees of Teleposta Pension Scheme. It is the submission of the 2nd defendant that he enjoys absolute privilege and immunity from a suit for defamation in respect to what is stated in court proceedings like what happened in this case. The 2nd defendant argued that the protection accorded by privilege and immunity is intended to ensure that there is free and fearless discharge of public duty in the administration of justice. In other words it is meant to help encourage freedom of speech and communication in judicial proceedings without fear and or constraints of risk of being sued for defamation.

6) The plaintiff are of the view that the motion seeking to strike out the suit as against the 2nd defendant cannot be defeated by the defence of absolute privilege and immunity. It is submitted that the motion is calculated to delay the expeditious conclusion of this matter. The plaintiff complained that the motion was filed way after pleadings had closed and after the agreed issues were drawn up. The plaintiff further pointed out that the 2nd defendant had failed to indicate which specific provision he was relying on under the Civil Procedure Rules to have the suit struck out. It is the plaintiffs' submission that indeed there exists a legal right protected by law that was infringed upon by the defendants hence causing untold harm and suffering to the plaintiffs. The plaintiffs further stated that the advocate is charged with the duty to draw up, execute and file court pleadings and he gives advice to their clients too. It is pointed out that the application dated 23.9.2009 was drawn by the 2nd defendant hence the statements in the affidavit were therefore from both the defendants. In short, the plaintiffs are of the view that the 2nd defendant recklessly advised his client hence he cannot escape liability for the matters pleaded. The plaintiffs also argued that the 2nd defendant does not enjoy absolute privilege where there is express malice and bad faith manifesting itself from the pleadings.

7) After taking into account the arguments of both sides, I form the following view of this matter. I have already stated that the 2nd defendant herein is sued for defamation arising from an advocate/client relationship. It is clearly put that the advocate was reckless in advising the client and in drafting and filing pleadings, which were defamatory to the plaintiffs. The relationship between an advocate and a client is not an ordinary relationship. An advocate occupies a fiduciary position and receives privileged information which should never be divulged to the outside world without the client's authority. The information or instructions the advocate receives is not his information. In fact in many cases the advocate receives instructions to act on behalf of the client. There is therefore need to ensure that an advocate can vigorously articulate this client's case without fear of taking personal responsibility for

discharging his work to promote his client's interest. The advocate is entitled to pursue his client's instructions. At the time of taking instructions an advocate in all fairness is not expected to know the whole story of the dispute. At that time he will know one side of the story of the dispute that is the side of his client. The whole story will be known when the pleadings have been filed, served and a response filed.

In **Westlaw's Canadian Encyclopedic Digest**, under "**Defamation**" (2010): states that:

"No action of libel or slander lies, whether against judges, counsel, witness or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. Those statements are absolutely privileged, the immunity resting upon grounds of public policy and convenience, with the object of securing the free and fearless discharge of high public duty in the administration of justice."

In **MJ vs DV, Justice Jackson on the Saskatchewan court of appeal stated;**

"absolute privilege exists not to protect persons who have made malicious statements, but to protect those involved in the justice system from necessity of having to weight their words for fear of an action in defamation, it is designed to encourage freedom of speech and communication in judicial proceedings, and it s need is born out, at last in part by necessity;

The protection is also discussed in **Gatley on Libel and Solander, 9th edition, paragraph 13,13** emphasize the higher protection given to lawyers in the nature of the 2nd defendant herein, it is stated that;

"An absolute privilege protects lawyers for the statements not only made in court, but any statement made in response to inquiries by the other side in litigation or contained in a pleading or other document incidental to the action."

Munster v. Lamb, 11 Q.B.D 588, AT P. 604 52 L.J.Q.B. 726 C.A) Brett M.R reiterates with emphasis the necessity of this privilege for lawyers even more than judges and parties. Herein it is acknowledged that some advocates have abused this privilege, but even this abuse has not warranted the need to remove the absolute privilege. The judge stated that;

"A counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulties. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he should have his mind so embarrassed that he could not do the duty which he is called upon to perform. Far more that a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public, the rule of law is that what is said in the course of the administration of justice id privileged; and the reason of that rule covers a counsel even more than a judge or a witness, the reason for the rule is that a counsel who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct."

8) It is clear from the above citations and excerpts that advocates are privileged and cannot be stripped of such protection whimsically.

9) In the end, I find the suit as against the 2nd defendant is untenable. It cannot be maintained nor sustained in law.

10) Consequently, the motion dated 25.11.2015 is found to be meritorious. It is allowed as prayed.

Dated, Signed and Delivered in open court this 16th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

..... for the Defendant