



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 41 of 2003

ROSSELY OLIVIA ADERO OTIENO & ANOTHER..... PLAINTIFFS

VERSUS

DEVSKI STEEL MILLS LTD & ANOTHER..... DEFENDANT

JUDGEMENT

1. By a plaint dated 9th January 2003, the plaintiffs herein, **ROA Otieno** and **J Orenge** T/A ROA Otieno & Co. Advocates filed this suit against the Defendant seeking the following **orders**:

1 Damages for defamation

2 Damages on the foot of aggravated or exemplary damages.

3 An injunction to restrain the Defendants and each of them by themselves and/or by their servants, or otherwise howsoever, from the publication of the said words or any words similar in effect and/or substance.

4 Costs and interest.

2. Following the filing of the defence by the defendant herein, the plaintiffs filed a Chamber Summons dated 30th July 2003 in which they sought orders that the defence filed herein be struck out and that judgement be entered for the Plaintiff as prayed in the plaint and the claim be set down for formal proof.

3. The said application in due course came up for hearing and by his ruling dated 4th June 2004, **Lenaola, AgJ** (as he then was) allowed the said application with costs thus paving way for the plaintiffs to have their matter heard through a procedure commonly known as “formal proof”. “Formal proof” strictly speaking is not a legal term but is a term which has been coined by legal practitioners to connote situations where the plaintiff is enjoined either due to default judgement or where a defence has been struck out and final or liquidated judgement cannot be entered to set the matter down for assessment of damages.

4. What then are the consequences of entry of judgement either in default of a pleading or process or as a result of striking out of the defence? In **Mutekanga vs. Equator Growers (U) LTD [1995-1998] EA 219**, the Supreme Court of Uganda held that an interlocutory judgement having been entered in favour of the Appellant when the suit came on for formal proof, breach of the agreement was no longer an issue. The law is that under Order 2 rule 11(1) of the Civil Procedure Rules in the absence of a defence, all the allegations in the plaint save for damages are admitted. See **Julius Murungi Muriangi vs. Equitorial Services Ltd. & Another Nairobi HCCC No. 2714 of 1988**. The Court of Appeal restated the law in

Makala Mailu Mumende vs. Nyali Gulf & Country Club Civil Appeal No. 16 of 1989 [1991] KLR 13 in which it held that Judgement in default of appearance presupposes that there is a cause of action and that where judgement is entered in default liability is admitted and the Court must proceed to assess damages.

5. However, the quantum of damages must depend on the evidence on record so that where the plaintiff despite lack of defence is unable to prove that as a result of the defamation, he/she suffered any loss the damages awardable may be merely nominal. See **Eriab Wavamuno vs. Teddy Sseezi Cheeye Kampala HCCS No. 402 of 1992.**

6. It follows that the relevant evidence for the purposes of this judgement is the one relating to assessment of damages.

7. Before proceeding further it is important to note that the claim by the 2nd plaintiff herein was withdrawn hence it does not fall for consideration in this judgement.

8. According to the 1st plaintiff who testified as PW1, she is an advocate of the High Court of Kenya and has been practising since 1974 and that her practice is mainly on conveyancing and litigation. Following her decision to represent one of the defendant's workers who sustained injury at work the defendant wrote a letter in which it claimed that the plaintiff was colluding with the defendant's workers. The said letter was copied to Federation of Kenya Women Lawyers popularly known as FIDA, the Advocates Complaint Commission, the Law Society of Kenya and the Senior Resident Magistrate, Kajiado. In the said letter, it was claimed that the plaintiff had filed fraudulent claim. Despite the said allegation, PW1 testified that the claim that gave rise to the said publication was eventually settled in May 2012. Despite that the plaintiff never received any apology or retraction from the defendant.

9. In cross-examination PW1 confirmed that although the matter was being dealt with by a partner in the firm known as **Julius Orenge**, the offending letter referred to **ROA Otieno & Company Advocates**. She, however, admitted that the mandate of the Advocates Complaint Commission is to receive complaints against advocates.

10. The plaintiff called **Esther Jowi Anyango Aduma** as PW2. According to PW2, she is a Commissioner in the Office of the Attorney General and relied on her witness statement which was filed in court. According to the said statement, at the material time PW2 was the secretary to the said Commission which received a copy of a letter dated 15th November 2002 drawn by the defendant addressed to the plaintiff firm and copied to the Commission raising certain complaints against the plaintiff that the plaintiff and in particular the said **Mr Orenge** was colluding with doctors to defraud the company. After considering the said complaint the Commission rejected the same. Despite that rejection the defendant persisted in the said complaints which were similarly rejected. According to PW2, the letter indicated that the lawyers were criminals engaging in criminal activities by purporting to represent the defendant's workers who were purportedly injured while they were in fact not.

11. In cross examination PW2 testified that the defendant had a right to lodge a complaint with the Commission. She reiterated that the complaint related to the firm of **ROA Otieno** and **Julius Orenge** in particular although the letter was addressed to the firm.

12. I have considered the material on record including the pleadings, the evidence and submissions of parties. Exemplary damages are awarded where compensatory damages are not sufficient and when the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not and decided to publish it because the prospects of material advantages outweighed the prospects of material loss; i.e. the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty. I am not satisfied that the publication of the article complained of was done with such a motive. Aggravated damages, on the other hand, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances and will be ordered against a defendant who acts

out of improper motive e.g. where is actuated by malice; insistence on a flimsy defence of justification or failure to apologise. In this case there is evidence that the defendant persisted in writing defamatory letters to the Commission notwithstanding the rejection of the complaints against the plaintiff firm. It was also averred and not contradicted that the defendant never offered any apology. In an action for libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider what his conduct has been before action, and in court during the trial. See **Gicheru vs. Morton & Another [2005] 2 KLR 332.**

13. In this case, the position taken by the defendant even at the time of the trial was that it was justified in taking the action it took and this was despite the fact that its defence had been struck out. Accordingly I find that from the position taken by the defendant, the plaintiff is entitled to aggravated damages.

14. With respect to an award for general damages, in **Ndungu Njoroge & Kwach Advocates & Another vs. The Standard Limited & Another Nairobi High Court Civil Case No. 117 of 2004,** I on 15th October 2012, was of the view that taking into consideration the 2nd plaintiff's reputation, long standing I would have awarded to him Kshs 5,000,000.00 had the suit succeeded.

15. In the present case, although the allegations were serious allegations against an advocate of long standing, the extent of the publication was not very wide and the same was outrightly rejected by the Commission. In **Kenya Tea Development Agency Ltd Vs. Benson Ondimu Masese T/A B O Masese & Co. Advocates Civil Appeal No. 95 of 2006** the Court of appeal reduced the award from Kshs. 10,000,000.00 to Kshs. 1,500,000.00 though the advocate in question in that suit was of a lesser standing than the advocate in the present suit.

16. Before concluding this judgement in cases of defamation, it must always be remembered that award of damages in defamation cases measure something so intrinsic to human dignity as a person's reputation and honour as these are not marketplace commodities. Unlike businesses, honour is not quoted on Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur. There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of as reputation, on the one hand, and determining as sum of money as compensation, on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank. This is not to underrate the part monetary awards play in our society. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains as money oriented as it is. Moreover, it is well established that damage to one's reputation may not fully be cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitutes a real solace for irreparable harm done to one's reputation. See **Albie Sachs, J in Dikoko vs. Mokhatla 2006 (6) SA 235 (CC); 2007 (I) BCLR I (CC).**

17. In the result I find that the 1st plaintiff herein **Rossely Olivia Adero Otieno** is entitled to an award of damages which I hereby assess as follows:

(a) General Damages for defamation of character – Kshs 3,000,000.00

(b) Aggravated Damages - Kshs 1,000,000.00.

(c) Interests on (a) and (b) above at Court rates from the date of this judgement till payment in full.

(d) Costs of this suit.

Dated at Nairobi this 3rd day of June 2013

G V ODUNGA
JUDGE

Delivered in the presence of **Mr Wilson** for Mr **Ligunya** for the Plaintiff and **Mrs Maira** for the Defendant