



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: GICHERU, OMOLO & BOSIRE, JJ.A.)**  
**CIVIL APPEAL NO. 188 OF 1997**  
**BETWEEN**

**KENYA AIDS SOCIETY ..... APPELLANT**

**AND**

**ARTHUR OBEL ..... RESPONDENT**

**(Appeal from the Ruling and Order of the High Court of Kenya  
at Nairobi (Justice Mbito) delivered on 15th May, 1997  
in  
H.C.C.C. NO. 1079 OF 1996)**

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**JUDGMENT OF THE COURT**

The question that the Court has to resolve in this appeal, it appears to us, is whether Mr. Justice Mbito correctly exercised the judicial discretion reposed in him by Order 39 Rules 2, 3(1) and 9 of the Civil Procedure Rules, when that learned judge refused to grant to Kenya Aids Society, the appellant herein, an injunction to restrain Arthur Obel, the respondent, his servants and/or agents from

***"..... manufacturing, distributing, offering for sale, selling, administering or in any other manner dealing with a substance known as Pearl Omega pending the hearing and determination of this suit."***

According to the plaint filed in the High Court on the 3rd May, 1996, the appellant is a Non-Governmental Organisation registered under the Non-Governmental Organisations Act of 1990, and among its objects and aims are:-

***(i)to provide and make available information on Acquired Immune Deficiency Syndrome (AIDS), Human Immune Deficiency Virus (HIV) and related ailments to all persons irrespective of their colour, creed, caste, sex, tribe or nationality;***

***(ii)to lobby for the recognition and protection of the rights of people with HIV/AIDS not to be discriminated against at work, or in social, cultural, educational or such like institutions whatsoever by reason of their condition;***

***(iii)to sensitize people with HIV/AIDS on their legal rights and any legal lacuna in the law affecting HIV/AIDS;***

***(iv)to lobby for legislative reform and initiative and generally undertake advocacy work in all areas affecting HIV/AIDS.***

***(v) to liaise with relevant Government departments in handling HIV/AIDS issues and in furtherance of the objectives of the Society.***

The respondent was described in the same plaint as a registered medical practitioner and researcher, practising medicine in both public and private capacity and conducting research on various drugs and poisons in Kenya and elsewhere.

In his affidavit sworn in opposition to the prayer for an injunction against him, the respondent describes himself as **ARTHUR OTIENO OBEL, MRCP (UK), PHD** and further as

***"..... a Professor of Medicine in the University of Nairobi and a Specialist Physician, Researcher and a trained Clinical Pharmacologist".***

There cannot be any doubt from the record available before us that the respondent is a highly trained man and what he says in his area of training is very likely to be taken seriously, particularly by ordinary members of the public. We agree with Mr. Ndambiri for the appellant that a man like Professor Obel must of necessity be restrained when addressing the public in the area of his specialisation and that if for some reason of his own, such as personal gain, he chooses to make unsubstantiated claims likely to be believed and to be injurious to the public, then the courts ought to intervene and stop him.

What was the bone of contention between the appellant and the respondent? These are to be found in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the plaint to which we have referred. Broadly put, the appellant alleged that the respondent, through the print media, had held out to members of the public that he had found a cure for AIDS/HIV, that that cure went by the name "Pearl Omega", that the appellant's members had approached it and asked the appellant about the drug, the appellant had bought the drug, its members had used the same and found it to be ineffectual against HIV/AIDS, and that upon discovering that the drug was ineffectual, the appellant had carried on investigations with the relevant bodies with the result that the respondent was in total violation of various Acts of Parliament which control the research, production or manufacture of drugs and other poisons. These Acts were cited as the Pharmacy and Poisons Act, Cap 244, Laws of Kenya, and the rules made thereunder and the Science and Technology Act. The appellant further alleged that the respondent knew or ought to have known that he had not complied with the Acts and that he also knew or ought to have known that Pearl Omega was not a cure against HIV/AIDS. The appellant, therefore, sought various declarations and orders against the respondent and among the orders sought was that for general damages. Pending the hearing of these claims, an interim injunction was sought in terms we have already set out. It is the application for an injunction which came up for hearing before Mbiti, J. on various dates, and having fully heard the parties, the learned Judge came to the conclusion that the appellant had not made out a prima facie case with a probability of success and further that even if such a case were made out, damages would adequately compensate the appellant. It is clear to us beyond peradventure that in coming to these conclusions, the learned Judge had before him the correct principles to be considered in deciding whether or not to grant an injunction. He specifically cited the case of **GIELLA V. CASSMAN BROWN & CO. LTD [1973] E A 358** and he considered all the opposing points put before him by either side. He considered all the relevant factors and left out all irrelevant issues. We suppose it is in the interest of the appellant to ensure that all the laws regarding research into drugs, their manufacture and distribution are complied with, but even if the appellant were to prove in the impending trial that such laws were not complied with, the appellant would still be required to prove loss to it and its members arising from the failure to comply with the law.

The only loss we can see is that the appellant and its members would have spent money buying a concoction that is ineffectual against the malady it was intended to cure. We agree with Mbiti, J. that such loss is readily quantifiable and can be adequately compensated by an award of damages. Mr. Ndambiri's contention before us was that the respondent ought not to be allowed to exploit the desperation of those suffering from HIV/AIDS. We have already cited the qualifications and the respondent's training background. If it were to be proved at the hearing of the pending litigation that he is for purposes of personal gain, merely exploiting the desperation of his patients, that would be a relevant factor to take into account in assessing the damages to be awarded against him. In any case, on its own showing, the appellant had known even before the filing of the suit that Pearl Omega is ineffectual against

HIV/AIDS. With that knowledge it is not obliged to buy Pearl Omega and it is its duty to pass that information to its members. That is one of its objectives. We are satisfied that the learned trial Judge correctly exercised his discretion in refusing to grant an injunction to the appellant and that being our view of the matter, our order in this appeal shall be that it be and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 23rd day of January, 1998.**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**