IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Omolo & Akiwumi JJ A)

CIVIL APPEAL NO. 122 OF 1994

BETWEEN

G. B. M. KARIUKI …….....…….……APPELLANT

AND

HON. FRED KWASI APALOO …….....…….……..……RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Lady Justice Aluoch) dated 12th day of May, 1994

in

HCCC No 1376 of 1994)

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JUDGMENT

Gachuhi JA. I have no doubt that this appeal is not maintainable.

This appeal arose from the appellant's plaint having been struck out and dismissed on application by respondent under order VI rule 13 of the Civil Procedure Rules on grounds that:

(a) It disclosed no reasonable cause of action; and/or

(b) It was frivolous and vexatious and/or

(c) It was an abuse of the process of the court.

The application was mainly argued on the point of law as no defence had been filed and even if it was placed on the file at the time of the hearing it was never relied upon by the trial judge in her ruling. The argument hinged on absolute privilege enjoyed by the respondent.

How did this suit come about? Mr Matiba who contested the seat of presidency in the 1992 general election complained to the Chief Justice, the respondent, of his earlier refusal to appoint a five judge bench to hear and determine his appeal arising from the election petition, the subject matter of that appeal. He also complained of the delay in delivering reasons for dismissal of his appeal by the three judges of appeal. By so doing,

Mr Matiba expected a response from the respondent and none other. The respondent in an attempt to make his earlier ruling clear, replied to Mr Matiba, in a letter which is alleged to contain the words defamatory of the plaintiff. The words as pleaded in para 6 of the plaint are:

"...I believe you cannot have understood the legal rationale for the different constitution of the Court in Appeals Nos 179 of 1993 and 176 of 1993 on one side and the Civil Application No 20 of 1994 on the other. I suggest you obtain competent legal advice preferably from a lawyer of standing who would have no motive to misrepresent the true legal position to you...."

The argument before the trial judge was, and the trial judge accepted the submission, that the words complained of were not referable to the plaintiff because the respondent was suggesting to Mr Matiba that if the reason given earlier was not understood he could obtain legal advice from anybody else. A suggestion of a lawyer of standing merely meant to obtain a second opinion from a lawyer of standing regarding the respondent's reasons for refusal. If the words complained of were not referable to the plaintiff whose name was not in the letter, then the plaint disclosed no cause of action and was bound to be struck out. Appellant's view was that defamation was referable to him by innuendo which could have come out at the trial. This view was also rejected as the plaint itself disclosed no cause of action.

It was further argued that the trial judge in dismissing the plaint relied on the doctrine of absolute privilege. The appellant's submission was that a claim of privilege could have only been claimed in the defence and not otherwise. This was resisted on the point of law.

It has been argued before us that the point of law need not be pleaded. This is true. The respondent, a judge, holding administrative office of Chief Justice while executing his judicial duties in Court or in execution of his administrative duties within the jurisdiction, enjoys absolute privilege from being sued civilly for his expressions either in writing or verbally. This is so under the common law and under the provisions of section 6 of the Judicature Act cap 8.

The common law of England, which is applicable in this country by virtue of section 3(1) (c) of the Judicature Act cap 8 is set out in *Anderson v Gorrie* [1895] 1QB 668. The head note reads:

"No action lies against a judge in respect of any act done by him in his judicial capacity, even though he

acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice."

In the leading judgment, - at page 671 Lord Esher MR stated:

"To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office."

Kay LJ and Smith LJ supported the view of Lord Esher MR and dismissed the appeal. The appeal was filed against three judges of the Supreme Court of Trinidad and Tobago.

The application of the common law and statutory provision in section 6 of the Judicature Act cap 8 gives absolute privilege to the respondent. This immunity rendered the appellant's suit to be struck out and dismissed by the superior court. I am in agreement with the judgment prepared by Akiwumi, JA and the final conclusion that this appeal should be dismissed.

As Omolo, JA also agrees, the order of the Court is that this appeal is dismissed with costs certified for one counsel.

Omolo JA. Mr S B M Kariuki, the appellant herein, has in the recent past been the advocate on record for the Hon K S N Matiba. Since December, 1992, Hon Matiba has waged titanic battles against President Moi over the Presidency of our Republic. On the 29th December 1992, the two of them, together with other candidates, presented themselves to the seat of justice of the people of Kenya. Hon Matiba lost. He

next moved to the law Courts. He lost there as well. From the averments contained in paragraph 5 of the plaint herein, it is clear Hon Matiba was not entirely satisfied with the way in which the Courts had dealt with his matters. The Hon Fred Kwasi Apaloo, the respondent herein, has been the Chief Justice of Kenya since the 1st April, 1993 and in that capacity he oversees the administration of justice by the Courts. Hon Matiba entered into correspondence with him. He wrote letters to the Chief Justice complaining about this and about that. The Chief Justice thought, rightly in my view, that it was his duty to reply to Hon Matiba's letters. In a letter dated the 22nd March 1994, the Chief Justice suggested to Hon Matiba and I quote:-

"..I suggest you obtain competent legal advice, preferably from a lawyer of standing who would have no motive to misrepresent the true legal position to

you....".

Mr Kariuki became aware of that letter. He thought it was libelous of him in his professional capacity as a lawyer. He sued the Chief Justice for the alleged libel seeking damages. But even before filing his defence, the Chief Justice counter-attacked. Founding himself upon order VI rule 13 of the Civil Procedure Rules, he asked Aluoch, J to strike out Mr Kairiuki's plaint because it disclosed no reasonabale cause of action, was frivolous and vexatious and was an abuse of the process of the Court. The Chief Justice argued through his lawyers that the paragraph in his letter to Hon Matiba, and which I have already set out, could not possibly be libelous of Mr Kariuki because it never referred to him at all, and further that even if Mr Kariuki had been referred to and the words were to be held to be libelous he (the Chief Justice) had absolute protection under section 6 of the Judicature Act. Aluoch J accepted these contentions and ordered Mr Kariuki's entire plaint struck out with costs. The learned judge added, for good measure, that Mr Kariuki's claim was meant to embarrass and intimidate the Chief Justice. I think I broadly agree with the learned judge. It is obvious to me that to counternance Mr Kariuki's type of claim would open judges to endless harassment by all manner of malcontents, whether advocates or parties, who might feel that they have unfairly lost their battles in the Courts. The law as it stands now does not permit it. Those who harbour a burning ambition to have a go at the judges must start elsewhere – in Parliament. I agree with Akiwumi, JA that this appeal must be dismissed with costs.

Akiwumi JA. This appeal is of undoubted considerable interest because it involves a suit which was brought by the appellant who is a member of the legal profession and as is common knowledge, one time Chairman of the Law Society of Kenya, against the Chief Justice of the country, who is the respondent in this appeal. This appeal arises out of alleged defamatory words published by the respondent in his letter of 22nd March, 1994, addressed to the appellant's a client, the well known political figure in the country, Mr Matiba. As far as I am aware, this is the first time that such an action has been brought against a judicial officer in this country, let alone, its Chief Justice. Apart from this uniqueness of the suit, it also raises important issues of public interest and the independence of the Judiciary. However, the legal issues presented by this appeal are, to my mind, not unduly complicated.

It is now desirable to summarise the circumstances that have culminated in this appeal and to do so, it would be necessary first, to consider the plaint filed by the appellant in the suit. The following to my mind, is what

emerge from the plaint. Mr Matiba was a presidential candidate for the 1992 presidential elections and upon losing the elections to President Moi, brought an election petition to unseat him. An application to strike out the petition as being incompetent, was dismissed by the Election Court and a Notice of Appeal against this dismissal was filed in this Court. On the instructions of Mr Matiba, the appellant who was acting for him in his election petition, unsuccessfully moved this Court in Misc Application No 241 of 1993, to strike out the Notice of Appeal. President Moi was subsequently granted leave by the High Court, to appeal to this Court which culminated in Civil Appeal No 176 of 1993. In the meantime, upon being instructed by Mr Matiba, the appellant sought in Civil Appeal No 179 of 1993, the reversal by this Court of the leave to appeal granted by the High Court. It was then that the appellant, acting upon the instructions of his client, requested the respondent in his capacity as Chief Justice, and exercising the jurisdiction conferred on him as such, to constitute a bench of five judges to hear the two appeals namely,

In laying the foundation for the averment that was to be made later in the plaint that the respondent had in his letter of 22nd March, 1994, to Mr Matiba, maliciously and to satisfy a personal spleen, published defamatory matters about the appellant to Mr Matiba, his secretary and that of the respondent, it was averred in the plaint that in the correspondence between the appellant and the respondent requesting the latter to constitute a bench of five judges, the appellant had conveyed in my view, rather audaciously and impertinently, his client obviously unwarranted fears that the respondent might not appear to be acting fairly in the matter simply because he had recently on a national day, been decorated by President Moi with the national honour of an Elder of the Golden Heart (EGH). An honour which can be said to be aptly conferred on the head of the judicial arm of the Government of the country. What was the respondent expected to do? Was he expected to delegate his powers to somebody else who lacked the necessary jurisdiction, to determine whether a bench of five judges should be constituted or not, or was he to accede to the appellant's request whether he thought it meritorious or not? The temerity of the appellant in conveying the fears of his client to the respondent, having regard to the fact that the appellant was an advocate, can be seen to have been calculated to pressurize the respondent in the discharge of his judicial duty, into making a decision in favour of Mr Matiba. And here it may be stated at once, that the plaint did not give the names of the secretaries, not even that of Mr Matiba or aver as it should have, that it was part of the duties of these secretaries to deal with the correspondence of their respective superiors. (See *Atkins Court Forms*, 2nd Ed 1994 Issue p 150).

The appellant further chose to aver baldly in the plaint without giving any material details of the surrounding circumstances, that the respondent had on 30th March, 1993, in the presence of at least eight advocates, confirmed that he had been angered by the implication in the appellant's correspondence with him that he would not be seen, because of the conferment upon him of the national honour of an EGH, to be acting fairly in his consideration of the appellant's request to constitute a bench of five judges. It was also further averred that a year later, on 30th March, 1994, and with a similar lack of details, the respondent had admitted to some eight senior members of the Kenya Bar that he had written the alleged libelous words in his letter of 22nd March, 1994, for the same reason. These averments which are presumably intended to establish the malice that actuated the alleged defamation of the appellant, it must be noted, are special facts which are not averred to have been in the knowledge of those to whom according to the plaint, the defamatory words had been published.

Then on 18th March, 1994, after Mr Matiba had lost his appeal in this Court and President Moi had won his, Mr Matiba, this time, and not the appellant, it is averred in the plaint, wrote to the respondent quite clearly in his capacity as Chief Justice, expressing concern about the length of time this Court was taking in giving its reasons for its decision in the appeals. It was the respondent's reply to this letter dated 22nd March, 1994, which contained the alleged defamatory words. This reply to a letter which was written to him in his capacity as Chief Justice, could only have been written by the respondent in that capacity as Chief Justice, although the plaint was less than candidly silent on this in order to give what can only be described as spurious support of the averment at the commencement of the plaint that the action had been brought against the respondent in his personal capacity. The alleged defamatory words are as follows:

".....I believe you cannot have understood the legal rationale for the different constitution of the Court of Appeal in Appeals Nos 179 of 1993 and 176 of 1993 on one side and the Civil Application No 20 of 1994 on the other. I suggest you obtain competent legal advice preferably from a lawyer of standing who would have no motive to misrepresent the true legal position to you....." .

There are a number of things to be noted about these words. Apart from the lack of candidness in the plaint already referred to, it cannot be, as was urged by counsel for the appellant, that the alleged defamatory

words were employed in the respondent's reply to Mr Matiba's letter of 18th March, 1994, in which one is asked to suppose that the only material issue raised by Mr Matiba was the delay by this Court in giving its reasons for the decisions in Appeals Nos 179 of 1993 and 176 of 1993. In the absence of material details in the plaint, one is left to draw the only sensible conclusions as the trial judge found, and with

which I agree, that the alleged defamatory words can only be explained by the fact that Mr Matiba had, in his letter, written by himself, complained not only about the delay in the giving of reasons by this Court for its decisions in the appeals, but had also criticized the respondent's refusal to constitute a bench of five judges of this Court to hear the appeals referred to above, when he had done so in respect of Civil Application No 20 of 1994, which became popularly known as the "*Don's* case", and implying that he had been unfairly treated by the respondent. In these circumstances, it was the obvious judicial duty of the respondent acting as Chief Justice, and it would have been absurd for him to have acted in any other capacity within his undoubted jurisdiction, to endeavour to correct the impression Mr Matiba had of the matter, by telling him that his perception of the legal position was wrong and advising him in order that he might satisfy himself as to the true legal position, to seek nothing more really, than a second opinion from a competent independent lawyer. One may be forgiven the obvious inference that his advocate, the appellant, must have held the same view of the law, otherwise it is unlikely that Mr Matiba would have written the way he must have done on this issue.

It must, however, be noted that the alleged defamatory words do not specifically name the appellant. The matter was left in the air as it were, and if this is to be inferred by way of any innuendo, can it be said that those to whom the words were published namely Mr Matiba, his secretary and that of the respondent, were aware of the special facts as already narrated surrounding the matter. I would say perhaps only Mr Matiba did. In *Bruce v Oldham Press Ltd* [1936] 1 AER 287 Green LJ had this to say:

"Defamatory statements which are in the air as it were, and do not appear by their words to refer to the plaintiff, have got to be made referable to the plaintiff by reason of special facts and circumstances which show that the words can be reasonably construed as relating to the plaintiff."

There are no special facts known to the secretaries linking the appellant to the defamatory words and as Scott LJ said in that same authority:-

"The absence of any such link makes the statement of claim defective on two grounds: first that it discloses

no cause of action vested in the plaintiff; and secondly, that on the issue of identification it gives the defendants no information as to the case they will have to meet at the trial."

Whilst the words complained of may be defamatory, the plaint is defective in this regard at least, with respect to the secretaries.

The foregoing in summary, constitute the circumstances as they emerge from the plaint which formed the basis of the appellant's cause of action that the respondent had maliciously defamed him namely, as set out in paragraph 13 of the plaint which is reproduced hereunder, and which concedes the true position that the respondent was acting in a judicial capacity as Chief Justice, that:

"13. At the time of writing and publishing the words complained of the defendant was the Chief Justice in charge of the administration of justice in Kenya and was expected to be exemplary in his conduct and respect for the rights of other people."

It must therefore be concluded that even though in paragraph 2 of the plaint it is averred that the respondent was being sued in his personal capacity, it was no more than a hollow attempt to place him beyond the ambit of the absolute immunity from civil action conferred on him by s 6 of the Judicature Act in respect of judicial acts performed by him in the exercise of his jurisdiction. It is plain from the rest of the plaint that the alleged defamatory words were written and published by the respondent in his official capacity as a judge, being the Chief Justice of Kenya in reply to the letter from Mr Matiba addressed to him as such. In the case of *Jeraj Shariff & Co v Chotai Fancy Stores* [1960] EA 374, Windham JA, stating, the position as to whether a plaint discloses a cause of action or not, had this to say:

"The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form party of it, and upon the assumption that any express

or implied allegations of fact in it are true."

The express or implied allegations of fact in the appellant's plaint that can be said to be true are that the respondent was acting at all times in his official capacity as Chief Justice and that the averment in the plaint that the respondent acted in his personal capacity is devoid of truth.

Not surprisingly, an application was made to the High Court on behalf of the respondent to strike out the plaint with costs on three of the specific grounds mentioned in order 6 r 13 of the Civil Procedure Rules namely, that the suit;

(a) discloses no reasonable cause of action,

(b) is frivolous and vexatious, and

(c) is an abuse of the process of the court.

As can be done, the application to strike out, was made before the defence was served (See *Att-Gen of Duchy of Lancaster v L & N W Ry* [1892] 3 Ch 274), and was at the same time as may be done, made under the inherent jurisdiction of the court. (see *Vinson v The Prior Fibres Consolidated Ltd* (1906) W N 209 Supreme Court Practice 1993 Vo P 332 para 18/19/2, and *Riches v Director of Public Prosecutions* [1973] 2 All ER 935).

Upon the *inter partes* hearing of the application the learned judge of the High Court in her ruling concluded that the suit against the respondent:

"...discloses no reasonable cause of action, and is clearly frivolous and vexatious and an abuse of the court process because of the statutory provisions which give absolute immunity to judges and magistrates, from civil liability for actions taken or words uttered in the performance of their judicial function"

Having come to this conclusion, the learned judge delivered herself of the following comment which sets out what the learned judge conceived to be the appellant's motives for instituting his action against the respondent:

"In view of this I can say that this case against the defendant was meant to embarrass and intimidate him in the performance of his judicial functions. I cannot allow that to happen and it is for this reason that I must proceed to strike out the plaint and dismiss the suit with cost to the defendant. I will also award him the costs of this application".

This comment with which I agree, being surplusage to the learned judges decision that s 6 of the Judicature Act applied, does not effect the learned judge's conclusion or the real reasons for it. But I venture to say as in this case, that where an action is brought with the intent to embarrass, the dismissal of such a suit for such a reason, may "often be required by the very essence of justice to be done (per *Lord Blackburn in Metropolitan Bank v Pooley* (1885) 10 App Cas 210 p 221) so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation

Dated and delivered at Nairobi this 24th day of November 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

R.S.C.OMOLO

.....

JUDGE OF APPEAL

A.M.AKIWUMI

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR