



Peter O. Ngoge t/a O.P Ngoge & Associates Advocates v Muiruri (Civil Appeal 261 of 2017) [2022] KECA 566 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KECA 566 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 261 OF 2017
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA
MAY 13, 2022**

BETWEEN

**PETER O. NGOGE T/A O.P NGOGE & ASSOCIATES
ADVOCATES APPELLANT**

AND

W. M. MUIRURI RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Odunga, J.) dated 20th September, 2012 in HCCC No. 813 of 2007)

JUDGMENT

1. This is a first appeal to this Court and a brief background of the facts leading to the appeal shall put the dispute in proper context. The respondent is a former Chief Magistrate and Deputy Registrar of the High Court whereas the appellant is an advocate of the High Court of Kenya. The respondent instituted a suit by way of a plaint dated 4th December 2007 seeking general and exemplary damages for libel against the appellant. The cause of action was hinged on a letter written by the appellant to the Honourable Chief Justice dated 21st December 2006 and copied to several other persons in which the appellant complained about the respondent's conduct of proceedings in respect of Nairobi High Court Miscellaneous Civil Application Numbers 670, 671, 672, 673 and 679 of 2006 respectively. The appellant claimed in the letter that the respondent had been compromised in the discharge of his duties in respect of the above matters; he was corrupt; not fit to be a Chief Magistrate or Senior Deputy Registrar of the High Court of Kenya; he had manipulated proceedings in which he was presiding contrary to his undertaking as a judicial officer; was not honest and lacked integrity; was unfit to hold a public office; was incompetent and inefficient and was unethical, unprofessional and dishonest. The respondent deemed the words offensive and libelous of him and hence the suit.
2. The appellant in response denied the claim by his defence dated 7th February 2008. He averred that the respondent could only institute the proceedings through the Attorney General and further



that the only bodies competent to hear and determine any dispute touching on the conduct and integrity of the respondent in the performance of his public duties as the Chief Magistrate and Senior Deputy Registrar of the High Court were the Judicial Service Commission (JSC) and the Kenya Anti-Corruption Commission (KACC) hence the suit was misplaced and incompetent. He further averred that the letter complained of having been filed in court is subject of the judicial proceedings hence immunised or privileged from inquiry by way of a defamation suit filed by the respondent. He further pleaded justification and contended that since the JSC had not summoned him to give evidence before it, any decision arrived at by the same commission cannot be relied upon in this suit, that the office held by the respondent was incapable of being defamed.

3. As a follow up to the defence, the appellant filed a chamber summons application dated 21st October 2009 pursuant to order VI rule 13(1)(a) of the *Civil Procedure Rules* as well as Section 3A of the *Civil Procedure Act*. He sought orders that the respondent's suit be struck out with costs on the grounds that: it disclosed no cause of action since the JSC had not sat and determined the truthfulness of the complaint lodged by the appellant against the respondent in his capacity as the Senior Deputy Registrar; the court lacked jurisdiction to usurp the powers of JSC by hearing and determining the claim yet the JSC had not taken any action against respondent; the doctrine on separation of powers did not allow the court to take over the roles and duties of JSC to discipline errant inefficient and incompetent or corrupt judicial officers upon a complaint lodged; the impartiality of the court could not be guaranteed during hearing of the claim since JSC had not determined the complaint and that the claim could not be determined impartially by his colleagues; a judicial officer could not be sued or sue in respect of matters he was handling as a judicial officer thus the filing of complaint before the JSC; Section 6 of the *Judicature Act* gave the respondent immunity from suits therefore the respondent could not sue since he might provoke the lodgment of a counterclaim.
4. In response to the application, the respondent filed the following grounds of opposition: that the appellant's application was an abuse of the court process, was frivolous and mischievous; the plaintiff raised a reasonable cause of action which accrued as a result of the appellant's publication of the offensive letter; the High Court had unlimited jurisdiction in criminal and civil matters and the appellant's petition to the JSC could not prevent the respondent from invoking such unlimited original jurisdiction so that ends of justice are met; the doctrine on separation of powers did not apply; that he was a man of impeccable integrity on early retirement; the immunity from being sued is given to the judicial officer and not to a tortfeasor who breaches such an officer's right in the course of the judicial proceedings and that Section 6 of the *Judicature Act* did not bar or prohibit a judicial officer from suing in a civil suit for acts or omissions arising from proceedings conducted before him or her.
5. Upon hearing the parties in the plenary, the trial court rendered itself thus on the application:

“Taking into account the foregoing, I am not convinced that the suit is demurrable and something worse than demurrable. I am further unconvinced that the plaintiff is not completely bad to the extent that not even an amendment can save it. The fact that it may not necessarily succeed in light of the defences relied upon by the defendant does not render the suit hopeless, in my view.”
6. The trial court went ahead and dismissed the application with costs.
7. Aggrieved by the dismissal of the application, the appellant filed the instant appeal on the grounds that the trial court erred in law and fact: by failing to find that due to the doctrine of separation of powers, the court lacked concurrent jurisdiction and powers with the JSC to hear and determine the appellants complaint; by failing to find that the defamation suit was filed prematurely before the JSC acted on the complaints and later the respondent proceeded on early retirement; by permitting the respondent's



defamation suit to proceed for hearing on merit, the High Court had usurped powers and jurisdiction of the JSC under articles 10, 168 and 172 of *the Constitution* meriting the intervention of the court under articles 22 and 258 of *the Constitution* to uphold fundamental human rights; by allowing the defamation suit to proceed when the respondent had been dismissed thereby sitting on an appeal against the JSC decision contrary to the rules of natural justice and articles 10,25,27,37,48,50,168 and 172 of *the Constitution*; failed to recognize the separation of powers of the JSC and the jurisdiction of the High Court; failing to appreciate the Bangalore and Latimer principles on the independence and the impartiality of the judiciary; failing to find that the complaint dated 21st December 2006 against the respondent in his capacity as the Chief Magistrate and Senior Deputy Registrar was justified against the material on record which was used by JSC resulting into the respondent's compulsory early retirement; by failing to find that all judicial proceedings are absolutely immuned from inquiry by the High Court vide a defamation suit considering the complaint was in regard to judicial proceedings and filings; the ruling was completely biased intended to allow the respondent to challenge his dismissal; failing to find that the complaint was a fair comment or criticism; failing to find that the defamation suit did not disclose any reasonable cause of action considering the complaint had not been dismissed by the JSC to date; failing to find that articles 10,37,168 and 172 of *the Constitution* did not bar a person who has lodged a complaint against a judicial officer from publishing the said complaints to the whole world if possible; finding that the respondent had been compulsorily retired from judicial service upon attaining age of 50 contrary to the material on record and by pursuing the defamation suit he was being denied fair trial and fair hearing contrary to articles 10,25,27, 48 and 50 of *the Constitution* as read with articles 2,3, and 7 of the African Charter and by allowing the respondent to pursue a vexatious and frivolous defamation suit.

8. This appeal was canvassed by way of written submissions with minimal oral highlights. Acting in person the appellant submitted that the High Court lacked the jurisdiction over the JSC to hear and determine the defamation suit which had been filed prematurely yet the JSC had not acted on the complaint, that though article 165 of *the Constitution* granted jurisdiction to the High Court to hear and determine disputes, not all disputes should however be heard by the court. That the defamation suit implied that JSC being a tribunal was to down its tool to investigate the complaint on the doctrine of subjudice. The High Court could not usurp the jurisdiction of JSC conferred by articles 168 and 172 of *the Constitution*. In addition, the respondent's defamation suit implied he was waiving judicial immunity which he enjoyed under article 160 of *the Constitution* as read with section 6 of the *Judicature Act*, thus the appellant had to file a counter-claim in respect of matters the respondent handled as judicial officer hence curtailing the independence, impartiality and neutrality of the judiciary.
9. It was further submitted that the disclosures by the respondent and the statements made in the High Court proved beyond reasonable doubt that the complaint lodged against the respondent with the JSC resulted in his compulsory retirement thus the defamation suit was malicious, frivolous and did not disclose any cause of action against the appellant. The court was referred to the decision in *The Owners of the Motor Vessel Lillian "S" Vs. Caltex Kenya Ltd* (1989) KLR 1 where it was held that without jurisdiction a court downs its tools and takes no further steps in a matter.
10. In opposing the appeal, Mr. Billing learned counsel submitted that the High Court did not err in its findings. It could not abdicate its jurisdiction merely because the proceedings were administrative in nature. To buttress this argument we were referred to the decision in *Mirugi Kariuki Vs. Attorney General* [1992]eKLR. We were urged to find that the High Court applied the rules of natural justice in its decision and that the appellants' pleadings were considered by the court in the determination of the application. Counsel also relied on the case of *Ridge Vs. Baldwin* [1964]A.C.40, to buttress his argument.



That the court had properly exercised its jurisdiction and arrived at a fair and just determination having given the parties a chance to ventilate their grievances and had allowed the appellant to file its counter-claim.

11. Counsel further submitted that the trial court was not biased against the appellant. The court was not sitting on an appeal from the decision of JSC contrary to articles 10,25,27,37,48,50, 168 and 172 of *the Constitution*, as alleged by the appellant. Further, it was submitted that the court did not err in failing to find that the proceedings were absolutely immuned from inquiry in a defamation case since the appellant was a tortfeasor in the course of the proceedings and the issues with regard to proceedings were left for trial in the High Court.
12. Having carefully read and considered the record of appeal, submissions and authorities cited, the only issue that arises for determination is whether in dismissing the appellant's application the trial court exercised its discretion properly. The other issues raised in the grounds of appeal are really irrelevant since they were not issues for determination by the trial court on an application to strike out a suit on account of not disclosing a cause of action. Such an application does not attract evidence in support thereof.
13. The appellant filed a chamber summons application to strike out the plaint on various grounds already set out elsewhere in this judgment. The application was brought under the then order VI rule 13(1) (a) of the Civil Procedure Rules which provided interlia;

“at any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that:

- a) It discloses no reasonable cause of action or defence in law
- b) It is scandalous, frivolous or vexatious
- c) It may prejudice, embarrass or delay the fair trial of the action
- d) It is otherwise an abuse of the process of the court And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

14. The provision under which the application was brought did not require as already stated, the applicant to support the application by way of evidence. Accordingly, such an application would not be accompanied by a supporting affidavit. All that that the applicant was required to do was to state concisely the grounds upon which the application was hinged on. This is exactly what the appellant did. There are clearly established principles that guide the court when exercising its power under this provision. The court has to exercise this jurisdiction sparingly as it is draconian and has to be invoked in clear and obvious cases. The trial court has to consider all the facts of the case without embarking on a trial of a suit for not disclosing a cause of action.
15. In the celebrated case of *D.T. Dobie & Company (Kenya) Limited Vs. Joseph Mbaria Muchina & Another* [1980] eKLR, this Court stated as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with the merits of the case for that is the function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, “without oral evidence tested by cross-examination in the ordinary



way"(Sellers, L.J(Supra). As far possible, indeed not at all, there should be no opinions expressed upon the applicant which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If the action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overreact by considering itself in a bind to summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought motto act in darkness without the full facts of a case before it.”

16. We have no doubt all that the trial court was alive to the above principles when it considered and dismissed the appellants application. Considering the averments in the plaint and the appellant's reaction to the same, can it be really said that the suit was hopeless and did not disclose a cause of action known in law? We do not think so. In our view the issues raised in the plaint, defence and indeed even grounds of appeal manifest the fact that the suit was not frivolous and indeed should be the subject of interrogation by the High Court should the suit proceed to hearing.
17. We do agree with the learned judge's finding that if a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However, if the suit is without substance or groundless or fanciful or is instituted with some ulterior motive which the law does not recognize a legitimate use of the process, the court will not allow its process to be as a forum for such ventures. To do this would amount to vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense.
18. This we do not think is the case with the respondents claim against the appellant to warrant striking out of the plaint. The issues raised by the appellant after sojourning worldwide in search of material in support of its defence and indeed this appeal, can only be resolved at a full trial. They are not a candidate for summary disposal. Certainly they raise several table issues.
19. For these reasons, we find no fault in the manner the trial court exercised its discretion and accordingly dismiss the appeal with costs.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

H. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

