



**Kerich & another v Odiwuor t/a OP Ngoge & Associates Advocates
& 2 others (Civil Miscellaneous Application 390 of 2011)
[2024] KEHC 6147 (KLR) (Civ) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION 390 OF 2011

AN ONGERI, J

MAY 24, 2024

BETWEEN

CHARLES KERICH 1ST PLAINTIFF

KALEKYE MUMO 2ND PLAINTIFF

AND

**NGOGE PETER ODIWUOR T/A OP NGOGE & ASSOCIATES
ADVOCATES 1ST DEFENDANT**

ERIC ORINA 2ND DEFENDANT

HOUSING FINANCE COMPANY OF KENYA 3RD DEFENDANT

JUDGMENT

1. The plaintiffs in this case, Charles Kerich and Kalekye Mumo (hereafter referred to as the 1st and 2nd plaintiffs respectively) filed this suit vide plaint dated 5/9/2011 against the defendants, Ngoge Peter Odiwuor T/A O P Ngoge & Company Advocates and Eric Orina (hereafter referred to as the 1st and 2nd defendants respectively) seeking the following prayers
 - i. Declaratory Orders that the plaintiff did not issue instructions to the defendants in High Court Miscellaneous Application 245 of 2006 and HC Misc. Civil Application 883 of 2007 respectively.
 - ii. Declaratory orders that the taxed bill of costs of ksh.1,056,252.00 in HC Misc. Application 883 of 2007 arising from High Court Miscellaneous Application 2435 of 2006 should not be settled by the plaintiffs in view of prayer (i) above.



- iii. Declaration that the defendants should pay costs to the plaintiffs in defending HC Misc. Civil Application 883 of 2007.
 - iv. Any other relief or order of the Honourable court may deem expedient to grant.
2. The 1st defendant filed a defence and counter claim to the plaintiff's suit dated 11/10/2011 in which he sought the following prayers;
 - i. General damages for violations of the 1st defendant Socio-Economic Rights and for defamation.
 - ii. Exemplary damages for malicious libel.
 - iii. Costs and interest on (a) and (b) in this suit.
 - iv. Any other or further relief that this honourable court deems fit and just to grant the circumstances.
3. The 1st defendant averred in the counterclaim that by lodging the plaintiffs' suit after obtaining a controversial stay of execution illegally in Nairobi HC. MISC. Application No * 883 of 2007 given by Justice Maraga without a hearing or legal basis long after a similar Application for stay of execution was dismissed by Justice Waweru in the same file the plaintiffs herein upon the legal advice of the firm of Ojienda & Co. Advocates and with the illegal assistance from some Judges of the High Court have violated the 1st Defendants Socio — Economic Rights enshrined by Article 43 of *the constitution*.
4. That further, the plaintiffs exposed the 1st Defendant to prosecution by the Kenya Revenue Authority for Value Added Tax arising from the Taxed Advocate client Bill of costs which was adopted as a Judgment of the Court on 29th March 2011 by the Honourable Lady Justice Rawal in Nairobi HC. Misc. Application No. 883 of 2007.
5. That the 1st Defendant claims general damages from the plaintiffs and the firm of Ojienda & Co Advocates whose sole proprietor is Mr. Seth Ojienda for advising his clients to violate the Defendants Socio — Economic Rights by refusing to pay the decreed legal fees which has not been upset by the Court of Appeal.
6. The 1st Defendant further avers that the plaintiffs upon the advice of the firm of Ojienda & Co. Advocates falsely unprocedurally and maliciously caused to be written, filed and published malicious words and statements in the plaintiffs suit herein and in their demand letter before action and which averments in the plaintiffs suit herein are defamatory of the 1st Defendant as an Advocate of the High Court of Kenya.
7. The 1st Defendant avers that the words contained at paragraphs 6, 7, 8, 13, 14 and 15 of the plaint and in the letter before Action written by Ojienda & Co. Advocates for the plaintiffs are not true, are scandalous, vexatious and unprocedural and in their natural and ordinary meaning are understood collectively to mean,
 - a. That the 1st Defendant was corrupt in lodging a Judicial Review suit for the plaintiffs without instructions of the plaintiffs.
 - b. That the 1st Defendant was unprofessional and dishonest in lodging the Judicial Review suit without instructions of the plaintiffs.



- c. That the 1st Defendant conducted himself dishonestly and unprofessionally and does not merit holding any public office for lodging Judicial Review proceedings without the plaintiff's consent.
 - d. That the Defendant is dishonestly executing a Taxed Advocate/clients Bill of costs which has not been adopted as a Judgment of Court under Section 51 (2) of the Advocates Act against the plaintiffs.
 - e. That the 1st Defendant was dishonest in lodging Taxation proceedings to recover legal fees against the plaintiffs for legal services rendered without the plaintiff's instructions.
8. In consequence whereof the 1st Defendant's reputation as an Advocate of the High Court of Kenya has been damaged given that the suit lodged by the plaintiffs is now a public document and the 1st defendant has therefore suffered considerable distress and embarrassment and claims General damages for libel against the plaintiffs and the firm of Ojienda & Co. Advocates.
 9. The 1st Defendant further avers that the spurious allegations made in the plaint has affected the reputation of the 1st Defendant together with the reputation of the 1st Defendants Law firm and the 1st Defendant now seeks legal redress in the form of General damages for defamation to repair the Defendants dented reputation.
 10. That by lodging the plaintiffs suit despite there being a Judgment duly entered against them by the High Court under Section 51 (2) of the Advocates Act in Nairobi HC. Misc. Application NO. 883 of 2007 and for which they have not Appealed to the Court of Appeal the 1st Defendant avers that the plaintiffs and their Advocates on record intended the said spurious allegations in the plaintiffs suit herein to be consumed by the society generally and also knew or ought to have known that the same would reach the plaintiffs professional colleagues, family and friends which they did as a matter of facts maliciously.
 11. The 1st Defendant states that the plaintiffs and their Advocates on record were actuated by extreme malice and spite in writing printing distributing and filing of the plaintiffs suit herein whose averments are not only false but also are highly malicious scandalous, unprocedural and defamatory of the 1st Defendant and were intended to injure him in his professional capacity as an Advocate given that the suit is now available for public consumption.

Particulars Of Malice

The plaintiffs and the firm of Ojienda & Co. Advocates wrote printed and published the said offensive words in their letter before Action and lodged this suit when they knew or ought to have known that the same were false, malicious, vexatious, scandalous, unprocedural defamatory and injurious to the 1st Defendant as an Advocate in view of the Judgment given in favour of the Defendant in Nairobi HC. Misc. Application No. 883 of 2007 against the plaintiffs and also in view of the Ruling of Waweru J. given therein on the 8th July 2011.

The plaintiffs and the firm of Ojienda & Co. Advocates knew that there is already a Judgment entered for the 1st Defendant against the plaintiffs in Nairobi HC. Misc Application No. 883 of 2007 under section 51 (2) of the Advocates Act.

The plaintiffs and the firm of Ojienda & Co. Advocates wrote printed and published the said offensive words and statements in the plaint with reckless disregard as to whether or not they were false defamatory or injurious to the 1st Defendant, and the 1st Defendant claims exemplary damages



for malicious libel against the plaintiffs and the firm of Ojienda & Co. Advocates for the plaintiffs herein for damaging the Reputation of the 1st Defendant as an Advocate.

12. That the Defendants reputation image, credit, integrity and status as an Advocate of the High Court of Kenya has been substantially damaged by reason of the publication of the said suit for public consumption by reasons of its lodgment.
13. That by reasons of the foregoing the 1st Defendant has suffered mental agony, distress anguish, substantial loss and damage in his profession, besides violations of the 1st Defendant Socio — Economic Rights enshrined by Article 43 of *the constitution* reputation and his family life for which he seeks full and appropriate compensation from the plaintiffs and the firm of Ojienda & Co. Advocates who is violating his oath of office and Article 10 of *the constitution* by peddling lies in Court and misleading the plaintiffs to commit perjury in this proceedings.
14. The plaintiffs' suit was dismissed on 8th June 2016 and the defendant proceeded with the counter claim on 6/7/2021.
15. The defendant relied on his witness statement dated 11/10/2011 in which he stated that the plaintiffs principally sued him herein with a view of depriving him of the Judgment entered in his favour under section 51 (2) of The *Advocates Act* on the 29th March 2011 by the Hon. Lady Justice Rawal in Nairobi HC Misc. Application No. 883 of 2007 against the plaintiffs.
16. In other words, the plaintiffs are circumventing Justice to avoid payment my legal fees which had been duly taxed and for which they have not lodged an Appeal to the Court of Appeal to challenge the Judgment of Rawal J.
17. That the suit is highly misconceived, frivolous, scandalous and abusive of the process of the Honourable Court because the issues of retainer being raised therein are res Judicata and accordingly the Honourable Court pursuant to Section 7 of the *Civil Procedure Act* does not have jurisdiction to hear or to entertain the plaintiffs on this suit in respect of matters which are clearly res-judicata and contrary to the public policy that litigation must finally come to an End.
18. That he wanted to make it crystal clear that the only remedy available to the plaintiffs is to lodge an appeal to the Court of Appeal to challenge the Ruling of Rawal J. given in his favour on 29th March 2011 in Nairobi HC. Misc. Application NO. 883 of 2007.
19. That it is now well settled that a Judge of parallel jurisdiction cannot sit on an appeal against the decision of another Judge of parallel jurisdiction. This is also provided for in *the constitution*.
20. That apart from being res judicata the letter written by the plaintiffs Advocates before lodging the suit together with the averments in the plaint are defamatory to both himself and to the firm of S. Ogeto Ongori & Co. Advocates as clearly stated in the statement of Defence and counterclaim filed herewith.
21. That prior to coming on record in Nairobi HC Misc Application No. 883 of 2007 on behalf of the plaintiffs, the firm of Ojienda & Co. Advocates sought leave of Court to come on record for the plaintiffs under Order 9 Rule 9 of the Civil Procedure Rules. After leave was granted by the Hon. Justice Mwera, the firm of Ojienda & Co. Advocates filed and served Notice of change of Advocates. Why did he seek leave of Court and consent of the firm of S. Ogeto Ongori & Co. Advocates if the said firm were not having instructions of the plaintiffs to Act for the plaintiffs in Nairobi HC Misc Application No. 883 of 2007.
22. That this has not been explained by Mr. Ojienda and the plaintiffs who are even asking the Honourable Court to award them costs incurred in defending Nairobi HC. Misc. Application NO. 883 of 2007.



23. That in a nutshell, the plaintiffs are being misled by the firm of Ojienda & Co. Advocates to lodge this suit and to defame the firm of S. Ogeto Ongori & Co. Advocates as well as the 1st defendant's firm of Advocates. This conduct of Mr. Seth Ojienda is unprofessional and unconstitutional.
24. That it is the Honourable Mr. Justice Maraga who gave the plaintiffs a window of opportunity to file Applications strength and activation energy to continue abusing the process of this Honourable Court by blocking execution of the decree given in my favour by Justice Rawal on 29th March 2011 after the Honourable Mr. Justice Waweru had dismissed a similar Application sought by the plaintiffs through Mr. Ojienda in Nairobi HC Misc. Application No. 883 of 2007 for stay of execution on 8th July 2011.
25. That the Honourable Court is therefore aiding and abetting injustice contrary to Article 10 of *the constitution* to my detriment by encouraging unnecessary litigation long after it became functus officio resulting into unnecessary post-Judgment Applications meant to prolong litigation and to avoid execution of the Decree which has not been appealed against and without security.
26. That the firm of Mr. Seth Ojienda T/A Ojienda & Co. Advocates should be punished for encouraging his clients to abuse the process of the Honourable court by lodging this suit and numerous Applications with a view of violating my Socio –Economic Rights enshrined by Article 43 of *the constitution*.
27. That by reason of the foregoing he has suffered great loss and damage and his SOCIO — ECONOMIC Rights have been violated. That he is unable to continue with his further Education at the University of Nairobi or to run his Law firm properly without legal fees which the Honourable Court has been blocking him from accessing despite rendering legal services to various clients — the plaintiffs included.
28. In cross examination, the 1st defendant said he represented the plaintiffs and further that his name is in the judgment. He said he is seeking general damages for defamation in his counter claim and for damages for violation of his social economic rights.
29. The 1st defendant further said that the judgment was joint and several and he is seeking the entire decretal sum.
30. The two plaintiffs testified as PDW1 and PDW2 in their defence to the counterclaim. PDW1 Charles Kerich and adopted his witness dated 4/1/2023 as his evidence in chief.
31. In cross examination PDW1 said he did not instruct the 1st defendant to represent him.
32. He also said he deposited shs.75,0000 in the bankruptcy case.
33. PDW2, Kalekye Mumo also adopted his witness statement dated 9/12/2023 as his evidence in chief.
34. In cross examination, PDW2 said he used to be an official of the Kenya Union of Journalists.
35. He said he was not aware of Misc. Case no. 245 of 2006. He said Mr. Orina (the 2nd defendant) was the secretary general.
36. The parties filed written submissions as follows:
37. The 1st Defendant submitted that the Plaintiffs have illegally and unprofessionally subjected him to cruel and unlawful treatment by subjecting him to violation of his socio-economic rights as a Barrister, uprooting him from legal practice in Kenya, and rendering his legal practice innocuous, by disregarding the decree rendered in his favour by Lady Justice Rawal on 29th March, 2011.



38. He proposed a sum of Kshs. 300,000,000 in General damages to redress the violations of his socio-economic rights, to be enforced jointly and severally against the Plaintiffs, together with interest and the cost of the proceedings.
39. He contended that the 1st Plaintiff has deliberately and dishonestly contravened professional ethical standards to the detriment of the 1st Defendant, to whom he owes a Professional Duty of Care. He asserted that the 1st Plaintiff had advised the other Plaintiffs to disobey the decree of Justice Rawal dated 29/03/2011 in favour of the 1st Defendant and filing in suit to challenge that decree in a Court of parallel jurisdiction instead of filing an Appeal.
40. He also contended that the 1st Plaintiff had misadvised the other Plaintiffs to sign false and scandalous witness statements and well as filing false pleadings against the 1st Defendant claiming that he had represented them without instructions.
41. He concluded that the 1st Plaintiff had waived his immunity as an Advocate, meriting the intervention of this Honourable Court to enter judgement in favour of the 1st Defendant, jointly and severally against the Plaintiffs, as sought in the counterclaim.
42. The Plaintiff submitted that the main issue for determination in this matter was whether the Defendants are entitled to the orders sought in the Counterclaim, which are general damages for defamation, exemplary damages for malicious libel, costs of the suit and any other relief that this court finds fit to grant.
43. The Plaintiff further submitted that an Advocate cannot be sued for what they uttered during the course of legal proceedings. He referred to the finding in the American case of *Bochetto v Gibson* in which the court came up with a two-prong test in determining qualified privilege, that is:
- “It was issues during the regular course of Judicial Proceedings; and
It was pertinent and material to those proceedings.”
44. He also relied on the finding in the case of *Joseph Njogu Kamunge v Charles Muriuki Gachari* (2016) eKLR where the Court held:
- “The essence of the Defense of qualified privilege is that the person making a statement has a duty to do so and the person who hears, or reads the statement, has a corresponding interest in doing so.”
45. With regards to the Defendant’s claim of violation of his socio-economic rights, the Plaintiff submitted that none of the socio-economic rights protected under Article 43 of *the Constitution* of Kenya have been pleaded as infringed.
46. Further, the Plaintiff submitted that the Defendant had not pleaded the exact words alleged to be defamatory, verbatim. He referred to *Gaitley in Libel* (10th Edition) where the author observed that:
- “The words used are material facts and they must, therefore, be set out verbatim in the particulars of the claim . . . It is not enough to describe their substance, purport of effect.”
47. The Plaintiff concluded that the Defendant’s counter claim should be dismissed with costs.
48. The issues for determination in the counterclaim are as follows;
- i. Whether the 1st defendant proved his counterclaim to the required standard.



- ii. Whether the plaintiffs have a defence to the 1st defendant's counterclaim.
 - iii. What remedies is the defendant entitled to.
 - iv. Who pays the costs of this suit?
49. on the issue as to whether the 1st defendant has proved his case to the required standard in Civil cases, the 1st defendant filed a counterclaim seeking general damages for defamation and for violation of his social economic rights.
50. The 1st defendant also sought exemplary damages for malicious libel.
51. I find that there is evidence that the 1st defendant obtained a judgment against the plaintiffs from Justice Rawal(as she then was) in which she ruled as follows;
- “That judgment be and is hereby entered for the applicant/advocate against the respondents/clients for the sum of kshs.1,056,257 with interests pursuant to Rule 7 of the Advocates Remuneration order.
- That the costs of the Application be borne by the respondents/clients.”
52. The plaintiffs did not seek review or appeal against the judgment and instead filed this suit.
53. I find that filing a suit per se does not amount to defamation. The suit filed by the plaintiffs amounts to an abuse of the Court process and the 1st Defendant ought to have applied to have the same dismissed or raised a preliminary objection on the ground that this suit is res judicata.
54. Order 2 Rule 7 of the Civil Procedure Rules 2010 provides:
- (1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.
 - (2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.
 - (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.
 - (4) This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant.



55. The ingredients of defamation were summarized in the case of John Ward V Standard Ltd , HCCC 1062 of 2005 as follows:-

“The ingredients of defamation are:

- a. The statement must be defamatory.
- b. The statement must refer to the plaintiff.
- c. The statement must be published by the defendant.
- d. The statement must be false.”

56. I find that the 1st Defendant did not give particulars of the exact words that he claims to be defamatory verbatim. Gatley on Libel and Slander, 11th Edition at 28.17 page 973 provides that:

“...If the exact words cannot be pleaded, the words must at least be set out with reasonable precision.”

57. I find that the 1st Defendant has not proved that the statements made by the Plaintiffs meet the test for defamation as explained in the case of John Ward V Standard Ltd , HCCC 1062 of 2005(supra).

58. In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under any circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in defamatory sense.

59. I find that the 1st defendant has failed to prove that the plaintiffs defamed him by filing this suit. The plaintiffs were seeking declaratory orders that they had not given the defendant instructions to act for them.

60. On the issue as to whether the plaintiffs violated the 1st defendant’s social-economic rights, I find that the 1st defendant had a judgment in his favor in respect of a taxed bill of costs which he ought to have executed.

61. The 1st defendant said that the court gave a stay of execution and that was the reason he did not execute the decree of the court in his favor.

62. The plaintiffs’ conduct amounted to an abuse of the court process.

63. I find that there is no evidence that the social economic rights of the 1st defendant were violated by the withholding of his legal fees.

64. It is the state that has the obligation to ensure that every person enjoys the right to food, education and health and this means that the state has a duty to pass and implement policies to ensure that these rights are provided for.

65. Article 43 of *the Constitution* of Kenya 2010 states as follows;

“ (1) Every person has the right —

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;



- (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”

66. In the case of *MMM v Permanent Secretary, Ministry of Education & 2 others (Constitutional Petition 133 of 2013)* [2013] KEHC 6002 (KLR) (Constitutional and Human Rights) (1 November 2013) (Judgment) Justice Lenaola (as he then was) held that socio-economic rights were clearly justiciable and held as follows;

“For a very long time, socio-economic rights were regarded as secondary rights while civil and political rights were considered absolute. With the advent of various international covenants such as the International Covenant on Economic, Social and Cultural Rights, socio-economic rights became part of Kenya’s primary law through *the Constitution* of Kenya, 2010 and they were at par with other fundamental rights. They were thus provided for under article 43 of *the Constitution*”.

67. However, in the current case, I find the plaintiffs did not violate the 1st defendant’s social economic rights since the obligation to guarantee the same is upon the state.

68. In the case of *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR25, the Court held that even where the rights have to be progressively achieved;

“... the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question....It must be recalled that the right guaranteed under Article 43(1) (a) is premised on establishment of a “standard.” This standard must be judged in a holistic manner.”

69. To hold that the plaintiffs violated 1st defendant’s socio-economic rights by withholding his legal fees would be overstretching the Application of Article 43 of *the Constitution*.

70. It is true that the plaintiffs ought to have filed an appeal against the judgment and decree of Justice Rawal (as she then was) dated 29/03/2011 in favour of the 1st Defendant instead of filing a suit to challenge that decree in a Court of parallel jurisdiction.

71. However, the 1st defendant ought to have filed a notice of preliminary objection to this suit or filed an Application to have it dismissed for being res judicata after stay of execution was granted in Nairobi HC Misc. Application No. 883 of 2007.

72. I find that the counterclaim is not merited and the same is dismissed at this stage.



73. The judgment against the plaintiffs Nairobi HC Misc. Application No. 883 of 2007 was several and joint meaning any one of them or all of them were bound to settle the same.
74. In the case of Sammy Mbugua Njuguna v Wakalaba Agencies Limited & 3 others [2019] eKLR , the court held as follows;

“This question was addressed in the case of Republic v PS in Charge of Internal Security ex parte Joshua Paul [2013] eKLR. The court held as follows:

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”

75. The plaintiffs are directed to settle the sum awarded in Nairobi HC Misc. Application No. 883 of 2007 and in default the 1st defendant is at liberty to execute for the same.
76. The plaintiffs’ suit was dismissed on 8th June 2016 and the 1st defendant is entitled to the costs of this entire suit because the plaintiffs dragged him to court wrongfully.
77. For avoidance of doubt, the plaintiffs will pay the defendant’s costs for defending this suit and also costs of the plaintiff’s suit which was dismissed on 8th June 2016.
78. The reason for ordering the plaintiffs to pay the costs of this suit is that they ought to have appealed against the judgment in HC Misc. Application 883 of 2007 arising from High Court Miscellaneous Application 2435 of 2006.
79. This suit is an abuse of the court process and the plaintiffs are condemned to pay the costs to be agreed on by the parties or assessed by the Taxing Master.

Orders to issue accordingly.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF MAY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

