

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL SUIT No. 0019 OF 2016

OPIYO JOSEPH OTIITI PLAINTIFF

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VERSUS

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|----|----|--|-----------------|
| | 1. | M/S M. OYET & CO. ADVOCATES | } |
| | 2. | MUMTAZ KASSAM & CO. ADVOCATES & SOLICITORS | } |
| 10 | 3. | DR. MUMTAZ KASSAM | }... DEFENDANTS |
| | 4. | OYET MOSES | } |
| | 5. | MARGARET MUTONYI | } |

Before: Hon Justice Stephen Mubiru.

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RULING

This is a ruling on a preliminary objection raised by counsel for the fourth defendant practicing under the name and style of the first defendant, and counsel for the fifth defendant. Counsel for the fifth defendant contended that this suit contravenes the provisions of the Constitution. He relied on article 128 (4) of *The Constitution* which provides for judicial immunity. The pleadings of the plaintiff clearly indicate that the plaintiff's complaint arises from a decision that the fifth defendant made in her capacity as trial judge. If the defendant is aggrieved by the conduct of the fifth defendant during the performance of her work, his remedy is to appeal the decision or to file a complaint before the Judicial Service Commission. The suit contravenes section 46 (1) of *The Judicature Act* providing for the protection of judicial officers from suits of this nature arising from the performance of their functions. He therefore prayed that the suit against the fifth defendant, be struck out with costs.

30 Associating himself with those submissions, the fourth defendant argued that on basis of Order 7 rule 11 of *The Civil procedure rules*, there is no cause of action against him and the first defendant. The plaintiff's claim against him is that he represented a litigant in court in the same proceeding that was presided over by the fifth defendant and the court upheld his preliminary objection. He prayed that court finds that he has no cause of action against both defendants.

In response, the plaintiff who is self-represented, argued that his cause of action against the judge (the fifth defendant) is that she made the decision personally. The expression she used was "I" which shows she passed it in her personal capacity when she should have said "the court finds." Section 46 of *The Judicature Act* is not a protection against such personal acts. Secondly, Article 5 6 of *The Constitution* states that the language of court is English and yet he was criticised for not having been able to state in full a French expression of the abbreviation in the defendant's name. Under article 126 (1) of *The Constitution* his intention is to recover damages. He was accused of being mentally sick. It is the advocates that accused him of being mentally sick. The fourth defendant Oyet told lies in court. They accused him of being mentally sick and that he jumped 10 over a wall. Section 74 of *The judicature Act* pins them down. Oyet was the advocate for the defendant. They never filed a defence. He prayed that the objection be overruled.

I have perused the plaint. It discloses that the plaintiff had during the year 2013 filed civil suit No. 46 of 2013 against "Action Against Hunger." The fourth defendant, practicing law under the 15 name and style of the second defendant in the instant suit, represented the defendant as counsel in that suit. When the suit came up for hearing, the third defendant, practicing law under the name and style of the first defendant in the instant suit, held brief for the second defendant. He raised a preliminary objection contending that the plaint did not disclose any cause of action against the defendant, "Action Against Hunger." The objection was upheld by the fifth defendant 20 in her capacity as the trial Judge and she struck out the suit with costs. That decision aggrieved the plaintiff, hence this suit.

He contends in the plaint that during the hearing of the preliminary objection that was raised in civil suit No. 46 of 2013 against "Action Against Hunger," the fourth defendant acted 25 unprofessionally, told lies in court, and caused the fifth defendant to make an unjust decision. As a result, his suit by which he intended to show that "Action Against Hunger" had harassed, illegally detained and defamed him, was struck out. He contends that the third defendant bribed the fifth defendant to rule in his favour, causing him mental anguish. The third defendant engaged in unprofessional conduct by causing unnecessary adjournments and late filing. The five 30 defendants therefore conspired to cause "Action Against Hunger" to "escape punishment." He therefore as part of the remedies, seeks court's protection against the professional misconduct of

the defendants by imposing a fifteen (15) year ban on them from legal and judicial practice respectively, "their academic papers / practicing licences be retracted, the 5th defendant be removed from judicial office," and a "five year jail term in a state civil prison" be imposed for; intentional delay of justice, concealment of evidence, possession of forged / altered documents, giving and filing perjured statements and using them in passing judgment, causing mental pain and suffering upon the plaintiff and disturbing his peace and tranquillity. He also seeks to recover costs of the suit.

A plaint discloses a cause of action if its averments show that the plaintiff enjoyed a right which has been violated and the defendant is responsible for that violation (see *Auto Garage v. Motokov (No3) [1971] EA 514* and *Joseph Mpamya v. Attorney General, [1966] II KALR 121*). In determining whether or not a plaint discloses a cause of action, the court must look only at the plaint (see *Onesforo Bamuwayira and two others v. Attorney General [1973] HCB 87*; *Nagoko v. Sir Charles Turyahamba and another [1976]HCB 99*). Under Order 7 rule 11 (a) and (d) of *The Civil Procedure Rules*, a plaint that does not disclose a cause of action or where the suit appears from the statement in the plaint to be barred by any law, must be rejected.

According to article 128 (4) of *The Constitution of the Republic of Uganda, 1995* a person exercising judicial power is not be liable to any action or suit for any act or omission by that person in the exercise of judicial power. Similarly, section 46 (1) of *The Judicature Act* provides that a judge or other person acting judicially is not be liable to be sued in any civil court for any act done or ordered to be done by that person in the discharge of his or her judicial functions, whether or not within the limits of his or her jurisdiction.

Judicial immunity is a common-law concept, derived from judicial decisions, and now a constitutional and statutory provision. As a general rule, a judge is immune or protected from lawsuits seeking damages for any actions performed by the judge as part of his or her official duties. Judicial immunity thus shields a judge from liability for unpopular or controversial judgments. Judicial immunity encourages an independent judiciary and allows a judge to make decisions without fearing retaliation. It is "[a] general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him

[or her], [should] be free to act upon his [or her] own convictions, without apprehension of personal consequences to himself [or herself],” (see *Bradley v. Fisher*, 13 Wall. 335 (1872)).

5 It is a judge’s duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His [or her] errors may be corrected on appeal, but he [or she] should not have to fear that unsatisfied litigants may hound him [or her] with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation (see *Pierson v. Ray*, 386 U.S. 547 (1967)).

10 The scope of the judge’s jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he acted in the clear absence of all jurisdiction (see *Stump v. Sparkman*, 435 U.S. 349
15 (1978)). Judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial (see *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Immunity generally does extend to all judicial decisions in which the judge has proper jurisdiction, even if a decision is made with "corrupt or malicious intent." It is not for the protection or benefit of a malicious or corrupt judge, but for the
20 benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences (see *Scott v. Stansfield*, LR 3 Ex 220, 223 (1868))

25 A judge can be sued for money damages based on his or her non-judicial actions (actions not made in a judge's official capacity). At common law, a judge is also liable for actions that are judicial in nature but taken when the judge lacks jurisdiction or authority over the matter or administrative decisions made while off the bench, like hiring and firing decisions. However, section 46 (1) of *The Judicature Act* protects all actions of a judicial nature, whether or not they are within the limits of his or her jurisdiction. A judicial act covered by judicial immunity is an
30 act that occurs while the judge is resolving a dispute. The courts have adopted a test to determine if an act is judicial. First, does a judge normally perform the act? Second, did the parties deal with the judge in his or her judicial capacity? If the answers to these two questions are yes, the

judge may not be sued for his or her action. Some examples of judicial or official acts are issuing a warrant and denying an application for relief.

For example in *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980) the appeal to the Seventh
5 Circuit concerned the scope of judicial immunity to be afforded to a judge who engaged in highly irregular conduct. The Judge personally arrested a tenant who was in arrears on rent owed the judge's business associates. At the police station, the judge had arraigned the tenant, waived the right to trial by jury, and sentenced him to 240 days in prison. He proceeded without the assistance of a prosecutor, a defence counsel, a court reporter, or a court clerk. The conviction
10 took place near midnight in a police station. Six days of this sentence were served before another judge intervened. The Court found that the judge was authorized by law to hear the kind of case in which he acted and in fact had general jurisdiction except in felony cases. It dismissed the argument that a judge had no jurisdiction outside a courtroom since valid judicial acts are often performed outside the courtroom. Vanderwater's acts in arraigning, convicting, and sentencing
15 Lopez, outrageous as they were, were not taken in the clear absence of all jurisdiction. That the papers were signed in a police station instead of in a courtroom therefore did not mean that they were signed in clear absence of jurisdiction. The court thus found the judge partially immune from suit. It held that he was immune for arraigning, convicting, and sentencing the tenant but not for conducting the arrest and prosecution as these were non-judicial acts committed under
20 colour of state law. As a result of this incident, the Judge was removed from office by the Illinois Courts Commission.

In drawing a distinction between which of his acts were protected by judicial immunity and ones that were not, the court observed that;

25 Vanderwater is absolutely immune from suit for his acts of arraigning, convicting, and sentencing Lopez. The irregular arraignment, conviction, and sentence were not, however, the only acts of Vanderwater that proximately caused Lopez' injury. Vanderwater acted as prosecutor. He made the decision to prosecute. He determined the offense to be charged, originally contemplating criminal trespass
30 and then deciding on theft of the key. He prepared a written charge on the "Notice to Appear" form. He caused Gamble to sign the blank complaint form and the next day had that form completed by the State's Attorney's staff. He prepared a guilty plea and waiver of jury and caused a signature, which he says was Lopez', to be placed

thereon. Finally, Vanderwater presented the charge and plea form to himself with the expectation that it would be the basis for an unconstitutional conviction and sentence. These acts were not functions "normally performed by a judge." They were not, therefore, "judicial acts," and are not, as a consequence, protected by judicial immunity.

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It was further held in that case that protection may be afforded even if the act was prompted by malicious or corrupt reasons, "flawed by the commission of grave procedural errors," or taken in excess, but not in clear absence, of jurisdiction. The doctrine of absolute judicial immunity will therefore protect a judge against liability for a given act if two conditions are satisfied. First, the act must not have been taken in the "clear absence of all jurisdiction" and second, the act must be a "judicial act." Actions in excess of, but not in clear absence of, jurisdiction too are covered by that immunity. Even "grave procedural errors," are not enough to deprive a judge of all jurisdiction. Malice and corruption are similarly insufficient. The factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e. whether they dealt with the judge in his or her judicial capacity. In the *Vanderwater case*, the prosecutorial acts were taken under colour of state law but were not judicial in nature.

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I have considered all the material averments in the plaint. I find that the complaint levelled against the fifth defendant relates to her decision and the perceived manner in which she reached that decision, when she struck out the plaintiff's claim against the defendant in civil suit No. 46 of 2013, "Action Against Hunger." It was a judicial act that is protected by absolute immunity. That the plaintiff alleges the decision to have been arrived at maliciously, unprofessionally and in collusion with an advocate appearing for the defendant, does not take it out of the ambit of the protection. Such a complaint may only be investigated and dealt with by the Judicial Service Commission and not by way of suit. I therefore find that the suit against the fifth defendant is barred by law, and by virtue Order 7 rule 11 (d) of *The Civil Procedure Rules*, must be rejected.

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The rest of the defendants are advocates who represented the defendant in the same suit. The complaint against them is that they engaged unprofessional conduct during the hearing of the preliminary objection. Unfortunately for the plaintiff, they too are protected by absolute

immunity. At common law, the doctrine of advocate's immunity provides an advocate with immunity for any claims that may be brought arising out of the advocate's conduct of litigation.

5 It is a doctrine of the common law which operates to prevent an unhappy litigant from suing their lawyer over the lawyer's conduct of the litigation. The immunity applies only to work performed in the courtroom and work performed out of the courtroom that is intimately connected to how the case is being run in court. The immunity attaches to the participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power. Save for negligent advice, advocate's immunity from suit prevents an unhappy litigant suing their lawyer
10 after a case has been judicially determined. The immunity is founded on reasons of public policy, specifically the need to avoid re-litigation of issues already decided by the judicial process through collateral proceedings.

In addition, advocates are officers of the court, and their duties to their clients are subject to their
15 paramount duty to the court. If the advocates are concerned about being exposed to liability in negligence, the possibility of their own potential liability might lead them to protecting their own interests ahead of those of the court and the client, and so compromise their independent and objective judgment in their presentation of the client's case. From time immemorial, an advocate's duty is to advocate his or her client's cause with vigour and zeal. If in that process an
20 advocate oversteps the line between legitimate argument and verbal misconduct impugning the court, i.e. advocacy appropriate to the heat of battle, the court may cite such an advocate for contempt. If the misconduct results in a miscarriage of justice, a higher court may reverse the decision on appeal. A contempt of court may be committed by an advocate through spoken words, by insolent or contemptuous behaviour. Spoken words, even if not in themselves
25 contemptuous, may constitute contempt if uttered in an insolent or defiant manner.

Although defamatory, a statement will not be actionable if it is subject to an absolute or qualified privilege. A statement made in the course of judicial, administrative, or legislative proceedings is absolutely privileged and wholly immune from liability. That immunity is predicated on the need
30 for unfettered expression. The extension of an absolute privilege to judicial officers, advocates, witnesses, and parties and their representatives is grounded in similar public-policy concerns.

The defamatory statement, however, must have some relation to the nature of the proceedings in order to be privileged.

5 The litigation privilege is not a license to defame for an advocate who knows the statement to be false, or utters it in reckless disregard of its truth or falsity. Advocates are given an absolute immunity for statements made in the course of judicial proceedings so that they may exercise unfettered judgment in their clients' interest. A statement is privileged only if it has some relation to the proceeding. The absolute privilege applies to any communication a) made in judicial or quasi-judicial proceedings; b) by litigants or other participants authorised by law; c) to achieve
10 the objects of the litigation; and d) and has some connection or logical relation to the action. Whether a defendant is entitled to the privilege is a question of law. The litigation privilege extends to all statements or communications made in connection with the judicial proceeding. The English rule differs slightly from the American rule in that England affords a true, absolute privilege without regard to the relevancy of the statements to the subject matter of the
15 proceedings (see *Munster v. Lamb*, [1883] 11 Q.B.D. 588).

The trouble with privileges is that they are granted to good and bad alike. Immunity, where it exists, is given to a malicious and dishonest advocates as well as to an honest advocate. At the risk only of contempt of court and disciplinary proceedings, an advocate has an absolute
20 privilege in the courtroom to revile or to defame, and to distort the truth. We accept such a privilege and grant it grudgingly because it is more important to allow an advocate to speak freely on matters before the court than it is to punish the advocate as a rogue. The litigation privilege protects the integrity of the judicial process by preventing the intimidation of advocates by litigants and accountability before a possibly hostile public. It is not for the protection or
25 benefit of a malicious advocate, but for the benefit of the public, whose interest it is that advocates should be at liberty to exercise their functions with independence and without fear of consequences. But since it runs counter to the policy that no wrong should be without a remedy, the protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice.

In *Fenning v. S.G. Holding Corp.*, 47 N.J. Super. 110 (App. Div. 1957), the late Chief Justice Hughes, then sitting in the Appellate Division, explained adherence to the doctrine of litigation immunity:

5 The doctrine that an absolute immunity exists in respect of statements, even those
defamatory and malicious, made in the course of proceedings before a court of
justice, and having some relation thereto, is a principle firmly established, and is
responsive to the supervening public policy that persons in such circumstances be
permitted to speak and write freely without the restraint of fear of an ensuing
defamation action, this sense of freedom being indispensable to the due
10 administration of justice.

This immunity exists for the benefit of the public, since the administration of justice would be
greatly impeded if advocates were to be in fear that any disgruntled and possibly impecunious
persons against whom they made comments in court might subsequently involve them in costly
15 litigation. Consequently, if an advocate representing a client in litigation decides, for any reason,
to make false and damaging statements about someone else with some connection to the case,
that statement is protected by the absolute litigation privilege to say anything in connection with
litigation without fear of having to pay for it. bad faith or malicious motive will not destroy the
privilege as long as the speech has some relation to the judicial proceeding. The advocate's
20 motivation behind the speech, and even his or her actual knowledge of its falsity, is irrelevant.

That the plaintiff alleges those defendants acted unprofessionally does not take their behaviour
out of the ambit of the protection of that absolute privilege. Such a complaint may only be
investigated and dealt with by the court under its contempt of court powers or as disciplinary
25 proceedings by the Uganda Law Council, and not by way of suit. Although words portraying
plaintiff as a person with a mental disability could amount to actionable defamation unless
privileged, I find that the suit against the rest of the defendants is barred by law, and by virtue
Order 7 rule 11 (d) of *The Civil Procedure Rules*, must be rejected. In conclusion, I find that the
plaint does not disclose any cause of action against any of the defendants and it is hereby struck
30 out with costs to the defendants.

Dated at Gulu this 13th day of September, 2018.

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Stephen Mubiru
Judge
13th September, 2018.