REPUBLIC OF KENYA

IN THE HIGH COURT

AT CHUKA

CIVIL CASE NO. E001 OF 2020

PETER MUNGAI KIRERA .... 1ST PLAINTIFF

MOSES NDUNGU KIRERA.................................2ND PLAINTIFF

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS....1ST DEFENDANT

THE ATTORNEY GENERAL.......................... 2ND DEFENDANT

PATRICK GITONGA HARUN ....3RD DEFENDANT

MICHAEL NJUE NJOKA.................................4TH DEFENDANT

RULING

1. There are two applications which are pending before this court. The first application is the Plaintiffs' Notice of Motion application dated 13/11/2020 seeking for orders that the 1st Defendant's defence be struck out as being scandalous, frivolous, vexatious, and interlocutory judgment be entered against the 1st Defendant. It also seeks for costs of the application. The same is brought pursuant to **Order 2, Rule 15 (1) (b), (c)** and **(d)** of the **Civil Procedure Rules 2010**. It is premised on the grounds on the face of the application and is supported by the affidavit of Peter Mungai sworn on 13th November 2020.

2. The second application is the Plaintiff's Notice of Motion application dated 23/02/2021 which seeks an order that for the defence filed by the 2nd and 3rd Defendants be struck out and interlocutory judgment be entered against the 2nd and 3rd Defendants. The application also seeks orders to be provided for.

3. On 09/03/2021, this court ordered that the two applications be canvassed by way of written submissions. The parties proceeded and filed submissions which I have duly considered.

Issue for Determination

4. Having perused the two applications, the responses to the applications and the rival submission in support and in opposition of the same, the main issue for determination is whether the statements of defence of the 1st, 2nd and 3rd Defendants should be struck out and judgment entered for the Plaintiffs.

Analysis

5. The first application is brought under the provisions of **Order 2, Rule 15 (b), (c)** and **(d)** of the **Civil Procedure Rules 2010** which provide as follows:

> **"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**
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> **(a) it discloses no reasonable cause of action or defence in law; or**
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> **(b) it is scandalous, frivolous or vexatious; or**

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(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.”

6. The principles that guide the court in determining whether to strike out a pleading were set out by Madan JA in the case of ***D.T. Dobie & Company (Kenya) Limited v. Joseph Mbaria Muchina & Another, Civil Appeal 37 of 1978 [1980] eKLR***. The court in that case 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 any merits of the case for that 'is a 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 as possible, indeed not at all, there should be no opinions expressed upon the application 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.**
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> **If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind 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.**
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> **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 not to act in darkness without the full facts of a case before it.”**

7. The same position was taken by the Court of Appeal in the case of **Kivanga Estates Limited v. National Bank of Kenya Limited [2017] eKLR** where the court stated that striking out of pleadings is a remedy that must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court should utilize this drastic measure of litigation.

8. In this case, the substantive suit was initiated by the Plaintiffs vide a Plaint dated 01/09/2020. The Plaintiffs claim that they were maliciously charged and prosecuted in **Chuka Chief Magistrate’s Court Criminal Case no. 291 of 2018**. They now seek general damages for unlawful arrest, false imprisonment, and malicious prosecution. The brief facts of the aforesaid criminal proceedings are that the Plaintiffs faced the charge of destroying crops contrary to **Section 334(a)** of the **Penal Code**. This provoked the commencement of **Chuka High Court Judicial Review No. 30 of 2018** in which the Plaintiffs became the ex-parte applicants. They challenged the decision to prefer charges against them in the said criminal proceedings, which decision was made by the Inspector General of the Police and the 1st, 3rd, and 4th Defendants herein.

9. This court, although differently constituted, considered the judicial review application, and consequently found that the said decision to prefer charges against the Plaintiffs was not only ill advised in view of the history of the matter but also tainted with illegality and irrationality. The court thus proceeded to quash the charge registered under ***Chuka Chief Magistrate’s Criminal Case No. 291 of 2018*** and the proceedings thereon.

10. The common ground that cuts across both applications in this case is that the statements of defence by the 1st, 2nd, and 3rd Defendants are scandalous, frivolous, vexatious and may prejudice, embarrass and delay the fair trial of the action before court. The Plaintiffs are specifically vexed by the fact that defences by the defendants constitute an act of defiance against express findings of a court of competent jurisdiction against which the 1st Defendant did not prefer an appeal.

11. In order to succeed in a claim for an award of damages against the defendants, four essential elements of malicious prosecution must be fulfilled. These requirements were set out in the case of **Murunga v. The Attorney General (1997) KLR 138** and are as follows:

a. The prosecution ought to have been instigated by the defendants.

b. The matter must have been finalized in favour of the Plaintiff.

c. The prosecution or its continuance must have been actuated by malice on the part of the defendants.

12. In my view, **Chuka High Court Judicial Review No. 30 of 2018** only determined the issue of the illegality of the decision to prefer charges against the Plaintiffs. It did not consider or determine the other elements that need to be proved to sustain a claim for damages for malicious prosecution. As such, it is my view that the application to strike out the 1st Defendant’s defence fails on that ground.

13. The Plaintiff have further averred that the defences of the 1st, 2nd, and 3rd Defendants should be struck out as they are mere denials. From the record, the 1st Defendant filed its statement of defence on 22/10/2020 and in it, the 1st Defendant denied that the Plaintiffs were illegally arrested, detained and charged as alleged in paragraphs 6, 7, and 8 of the Plaint. The 1st Defendant further denied that the Plaintiffs were maliciously prosecuted as alleged in paragraph 9 of the Plaint. In the alternative, the 1st Defendant averred that if at all the Plaintiffs were arrested, detained, charged, and prosecuted, the same was done legally and was based on a genuine complaint by the 3rd Defendant.

14. The 1st Defendant maintains that the charges that were preferred against the Plaintiffs were as a result of a valid complaint by the 3rd Defendant in Chuka Police Station vide OB No. 11/22/7/2018. It further maintains that the complaint was consequently investigated by the police and the outcome of the said investigations is what informed the criminal charges that were preferred against the Plaintiffs. That it did not act maliciously but on evidence that had been collected by the police.

15. On the other hand, the 2nd Defendant filed its statement of defence dated 10/11/2020 on 16/11/2020. In it, the 2nd Defendant also denied that Plaintiffs' averments as set out in paragraphs 6 – 10 of the Plaint. It maintained that its actions in receiving complaints from the public were underpinned in law and denied that there was any prosecution of the Plaintiffs in Criminal Case no. 291 of 2018. The 2nd Defendant further maintained that the costs set out in the Plaint are outrageous and not founded in law.

16. On 22/12/2020, the 3rd Defendant filed his statement of defence that is dated 21/12/2020. The 3rd Defendant also denied the Plaintiffs' claims as contained in paragraphs 6, 8 and 9 of the Plaint. It is his contention that he is a private citizen and therefore had no way of interfering in the alleged prosecution of the Plaintiffs.

17. From a perusal of the defences, it is my view that the same are not mere denials but do raise substantive triable issues that this court ought to consider on merit.

18. It was the Plaintiffs' further contention that the 1st Defendant's defence should be struck out as it had not filed their witness statement and documents as required by the provisions of **Order 7 Rule 5** of the **Civil Procedure Rules 2010**. On the other hand, the Plaintiffs contend that the defences by the 2nd and 3rd Defendants should be struck out because they did not serve the memorandum of appearance and defences within the prescribed time.

19. In the case of **Saudi Arabian Airlines Corporation v. Sean Express Services Limited, Civil Case No. 79 of 2013 [2014] eKLR** cited by the 2nd Defendant, the court expressed itself as follows:

> **"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that "…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away."**

20. Article 159(2)(d) of the **Constitution** provides that in exercising judicial authority, the court should be guided by the principle that justice should be administered without undue regard to procedural technicalities. Pursuant to the spirit of Article 159(2)(d) of the Constitution it is my view that failure by the defendants to serve the memorandum of appearance and defence within the prescribed time is a technicality that should not prevail over the role of this court to further substantive justice. The court should have an opportunity to consider the evidence of the parties before determining the substantive issues in question. In addition, the Plaintiffs have not demonstrated any prejudice or injustice that has been occasioned by the Defendants' failure to file and serve the impugned pleadings within the prescribed time. In those circumstances, I am of the view that striking of the subject pleadings is not the best recourse at this stage. As such, it is my view that the subject applications equally fail on this ground.

Conclusion

21. In view of the foregoing and given that the substantive claim by the Plaintiffs is for a colossal amount of money in damages, I opine that the matter should thus be heard and determined on merits. As such, it is my view that the Notice of Motion applications dated 13/11/2020 and 23/02/2021 are not merited. I proceed to dismiss them with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 23RD DAY OF SEPTEMBER, 2021

L.W. GITARI

JUDGE