REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 6 OF 2016

MICHELLE BIBI FONDO

BENJAMIN KAI CHILUMO.....PLAINTIFFS

VERSUS

JOSEPH MUNYOKI NZIOKA

MKAMBURI MKAWASI

RADIO AFRICA GROUP..... DEFENDANTS

RULING

1. The 1st defendant on 7th October, 2016 filed an application dated 6th October, 2016 under the provisions of Order 2 rule 15, Order 11 rule 3(2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. He seeks the following orders:-

(i) That the plaint dated 1st March, 2016 be struck out and/or alternatively the suit herein against the defendants be struck out with costs to the defendants; and

(ii) That the costs of this application be provided for.

2. The application is supported by the affidavit of the 1st defendant, Joseph Munyoki Nzioka sworn on 6th October, 2016. The 1st plaintiff filed a replying affidavit on 21st May, 2019.

3. On the date when the application dated 6th October, 2016 came up for hearing, the law firm of Havi & Company Associates sought leave to cease from acting for the 2nd and 3rd defendants in this matter. No documents were filed on behalf of the said defendants, in respect to the application in issue. It can be safely concluded by this court that they had no interest in the application filed by the 1st defendant.

4. The 1st defendant's Counsel filed his written submissions on 11th June, 2019. The plaintiff's written submissions were filed on 28th June, 2019.

5. A plaint which was filed on 2nd March, 2015 by the plaintiffs is the one which triggered the present application. In the said plaint, the plaintiffs claim that on 19th February, 2015 the 1st defendant maliciously and wrongfully composed or caused to be composed and wrote or caused to be written, published or caused to be published a statement outlined in the plaint and pleadings filed in the High Court at Malindi, which were defamatory to the plaintiffs.

6. It was alleged that on 2nd March, 2015 and subsequent dates, the 2nd and 3rd defendants with intention to cause harm to the plaintiffs' names maliciously and wrongfully composed or caused to be composed and wrote or caused to be written, published or caused to be published, republished or caused to be republished a defamatory statement in the Star Newspaper. The said statement was outlined in the plaint.

7. As stated earlier, the 2nd and 3rd defendants did not file a response to the 1st defendant's application. The 2nd plaintiff did not file a replying affidavit. The affidavit filed by the 1st plaintiff does not contain any deposition that she had sworn the affidavit on her own behalf and that of the 2nd plaintiff. Therefore, this court will only address the application dated 6th October, 2016 strictly as being between the 1st plaintiff and the 1st defendant.

8. In the written submissions filed by the 1st defendant's Counsel, he stated that the statement attributed to the 1st defendant was made under oath in paragraph 6 of an affidavit sworn by the 1st defendant on 19th February, 2015 in Malindi HCCC No. 9 of 2015 between **Raindrops Ltd. versus County Government of Kilifi**. It was further stated that the contents of the said affidavit were published by the 2nd and 3rd defendants herein in the Star Newspapers of 22nd March, 2015. The alleged words were captured in paragraph 13 of the plaint as follows:-

> *"That I confirm of my own knowledge and from information given to me by our CEO, one Shibu Hamisi Mgandi, that those who sought or demanded bribes from the plaintiff included but are not limited to one Ben Chilumo Kai who is the Chief Executive Officer, Finance and one Bibi Fondo who is the Head of Legal at the defendant County Government. In fact they did demand bribes so frequently and in the presence of witnesses including our said CEO Shaibu Hamisi Mgandi who was especially exposed to the demands when he was following up on the release of our funds. It was made clear our funds would be released easily upon our payment of "taxes" to them. Indeed to date, our funds from the escrow account have not yet been released for several months".*

9. Counsel for the 1st defendant made reference to the Treatise **V. Mitteen**; **Law of defamation and malicious prosecution; Civil and Criminal 12th Edition at pp 142 and 143** to demonstrate that the deposition the 1st defendant made by way of affidavit in HCCC No. 9 of 2015 was absolutely privileged and conferred on him complete immunity from liability to an action for damages. **Westlaw's Canadian Encyclopedic Digest, 2010** was also referred to, on the topic of defamation, to demonstrate that no action for libel or slander can lie against a Judge, Counsel, witness or parties for words written or spoken in ordinary course of proceedings before any court or tribunal recognized by law, as they are absolutely privileged. The said Digest further states that immunity rests on grounds of public policy and convenience with the object of securing the free and fearless discharge of high public duty in the administration of justice.

10. It was argued for the 1st defendant that since the statement in his affidavit sworn on 19th February, 2015 related to a judicial proceeding and it was part of the court record, the said statement (deposition) was accorded absolute privilege which was meant to ensure that there was free and fearless administration of justice. It was argued that it was also meant to help encourage freedom of speech under Article 23 of the Constitution of Kenya without fear of the risk of being sued for defamation.

11. Counsel for the 1st defendant contended that the contested statement in his affidavit constituted what a reasonable and fair minded man could depone from the nature of the proceedings which were undertaken in court. He argued that the said statement did not form the subject of libel as the 1st defendant had a legal duty to swear the affidavit for the public to know the reasons why the County Government of Kilifi had withheld the release of funds to Raindrops Limited. It was stated that as such, the 1st defendant enjoyed absolute immunity from the present suit.

12. It was contended that the plaintiffs were not prejudiced in any way in their reputation and credit by the depositions in the 1st defendant's affidavit as they were still in the employment of the County Government in the roles they held before the affidavit in issue was sworn, filed and even after it was published by the 3rd defendant.

13. In addition to the foregoing, it was submitted that in HCCC No. 9 of 2015, the Counsel for the County Government of Kilifi made an application to have the 1st defendant's affidavit that contained the deposition in issue struck out for being scandalous and oppressive. It was further stated that the 1st defendant was subjected to cross-examination and that the court in a ruling delivered on 9th July, 2015 found that the affidavit sworn by the 1st defendant was proper and proceeded to dismiss the said application..

14. In his submissions, the 1st defendant's Counsel went ahead to argue the case for the 2nd and 3rd defendants with regard to the publication that was made following the affidavit sworn by the 1st defendant. Taking into account that the law firm of Kilonzo & Aziz had not been instructed to act for the 2nd and 3rd defendants as the law firm of Havi & Co. Associates had been on record for the latter defendants, I find the submissions made by Counsel for the 1st defendant with regard to the 2nd and 3rd defendants misplaced.

15. It was submitted that the plaintiffs' suit did not disclose any cause of action as the matter which was complained of as being defamatory was made in an occasion of absolute privilege. It was stated that the suit as such was scandalous, frivolous, vexatious and an abuse of the court process. The case of **D.T. Dobie & Co. (K) Limited v Muchina** [1982] KLR was cited to illustrate what amounts to a "reasonable cause". The 1st defendant's Counsel also cited the case of **Geminia Insurance Co. Limited v Kennedy Otieno Onyango** [2005] eKLR, in urging this court not to waste precious judicial time in hearing a case based on a plaint that is scandalous, frivolous and vexatious.

16. The 1st plaintiff's Counsel in his written submissions stated that the power to strike out pleadings is a draconian measure which ought to be employed as a last resort and only in the clearest of cases. He relied on the case of **DT Dobie & Company (Kenya) Ltd v Muchina** (supra), on the principles to be considered in striking out a pleading.

17. It was submitted by the 1st plaintiff's Counsel that a defence of absolute privilege cannot be invoked under Section 6 of the Defamation Act unless there is a hearing of the case. It was argued that the 2nd and 3rd defendants had not filed an application urging the court to invoke the provisions of Section 6 of the said Act in a summary manner. Further, they had not filed an affidavit to prove that the publication was fair and accurate and they had not claimed that the publication was not blasphemous, seditious or indecent. It was submitted that it was not up to the 1st defendant to plead so.

18. It was also argued that the privilege provided under Section 6 of the Defamation Act was accorded to Newspapers and the 1st defendant was not the author of the article in issue or owner of the Star Newspaper. As such, the defence of privilege was not available to him.

19. Counsel for the 1st plaintiff posited that a determination of whether a report is fair, accurate, blasphemous, seditious or indecent called for the testing of evidence through cross-examination, which cannot be done in a court's summary jurisdiction.

20. In citing the provisions of Order 2 rule 7(2) of the Civil Procedure Rules, it was contended that the 1st defendant had failed to give particulars to show that the report he made was fair and accurate reporting and/or the information given was a statement of fact and not blasphemous, seditious or indecent.

21. It was also submitted that a defence under Section 6 of the Defamation Act is available in the reporting of court proceedings but none were attached, thus rendering the present application fatal. The case of **J.P. Machira v Wangethi Mwangi & Nation Newspapers** [2018] eKLR was cited to illustrate that what is protected is a fair and accurate report of court proceedings and that it is necessary to have a case heard when a report by Newspapers refers a both pleadings and court proceedings.

22. The case of **Francis Ochieng Oiro v Nakumatt Holdings Limited** [2005] eKLR was relied on, where the Judge held that where the words complained of were in an affidavit, it was a question of fact which could only be established by evidence.

23. The rest of the submissions by the 1st plaintiff dwell on the publication which was allegedly made by the 2nd and 3rd defendants. I find them not to be applicable as the application herein was filed by the 1st defendant.

ANALYSIS AND DETERMINATION

The issue for determination is if the plaint should be struck out or the 1st defendant should be struck out of the suit filed by the plaintiffs.

24. The affidavit from whence the words complained of by the plaintiffs, was filed in Malindi HCCC No. 9 of 2015. The 1st defendant failed to attach a copy of the said affidavit in the present application to enable this court to gain a global overview of the contents of the said affidavit. The plaintiffs in their plaint filed on 2nd March, 2016 in paragraph 13 outlined the words which form the subject of the suit against the 1st defendant herein. The words in issue are said to have been published by the 2nd and 3rd defendants on 2nd March, 2015 and also on subsequent dates. The 1st defendant failed to annex a copy of the said article to his affidavit. As stated earlier, the 2nd and 3rd defendants filed no replying affidavit(s) to either support the 1st defendant's application or to oppose it.

25. The 1st defendant in his affidavit sworn on 6th October, 2019 deposed that the contents of his affidavit filed in court on 19th February, 2015 in Malindi HCCC No. 9 of 2015, **Raindrops Limited v County Government of Kilifi**, were published in the Star newspapers of 2nd March, 2015 by the 2nd and 3rd defendants. This court was therefore requested by the 1st defendant to strike out the plaint filed by the plaintiffs or strike out his name from the suit.

26. A copy of the affidavit which the 1st defendant swore in Malindi HCCC No. 9 of 2015 and the Newspaper article in issue, are contained in the plaintiffs' lists of documents in this case. The 1st defendant's affidavit in support of the application herein is so brief that it does not establish if *viva voce* proceedings took place before the article complained of was published or if the words so published by the 2nd and 3rd defendants, were solely drawn from his affidavit. I therefore do concur with the submissions made by Counsel for the 1st plaintiff that the 1st defendant cannot move this court to strike out the plaint or to strike him out of the proceedings when he has failed in his affidavit to clarify if judicial proceedings had actually taken place or if they had not, at the time the statement and article complained of were published.

27. In the case of **Amos K. C. Kale & another v Rebecca Gesora & another** [2017] eKLR, Judge Sergon cited the case of **MJ v DV**, where Justice Jackson of the Saskatchewan Court of Appeal stated thus:-

> ***"Absolute privilege exists not to protect persons who have made malicious statements, but to protect those involved in the justice system from necessity of having to weigh their words for fear of an action in defamation, it is designed to encourage freedom of speech and communication in judicial proceedings, and its need is born out, at last in part by necessity."***

28. The 1st defendant's Counsel submitted that the contents of the 1st defendant's statement of defence claiming that the plaintiffs had demanded for bribes from Raindrops Company Limited following a contract between them and the County Government of Kilifi, was not defamatory since they were still in the employment of the said county government, was untenable. It is this court's finding that such an argument cannot hold unless and until the case herein against the 1st defendant and his co-defendants has been heard and determined. It is only through his evidence that the 1st defendant will substantiate the contents of his statement of defence and will be subjected to cross-examination. If the 1st defendant emerges successful in the suit herein, he will be awarded damages and therefore he will suffer no prejudice by the suit proceeding to hearing.

29. In making the determination herein, I have considered the submissions made and authorities relied on. In the case of **Geminia Insurance Co. Limited v Kennedy Otieno Onyango** (supra) Musinga J held as follows:-

> ***"It is trite that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."***

30. In this case, the allegations that were made against the plaintiffs were very serious and it is this court's view that it is only just and fair for the case herein to go to full hearing since the 1st defendant does not work for the Star Newspaper which published the words which are said to have been defamatory. The issue of whether the 1st defendant has immunity which is at times accorded to Newspapers depending on the circumstances under which a publication was made, as per the provisions of Section 6 of the Defamation Act, will be considered by the Trial Court.

31. This court's finding is that the1st defendant failed to articulate his application effectively through his affidavit. In conclusion, the order that commends itself to me is one for sustaining the suit. The application dated 6th October, 2016 is hereby dismissed. Costs shall be in the cause.

DELIVERED, **DATED** and **SIGNED** at **MALINDI** on this **28th** day of **February, 2020**.

NJOKI MWANGI

JUDGE

In the presence of

No appearance for the plaintiffs

Ms Mulwa holding brief for Mr. Kilonzo for the 1st defendant

Mr. Samuel Kabue – Court Assistant