REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 92 OF 2019

LINDON NICHOLAS OTIENO.....PLAINTIFF

VERSUS

DALE BOLTON.....1ST DEFENDANT

SCHOLA MUNYAO T/A

MUNYAO KAYUGIRA & CO ADVOCATES.....2ND DEFENDANT

RULING (1)

1. The 1st Defendant's Notice of Motion application dated 10th July 2019 and filed on even date sought the striking out of the suit against her for not disclosing a reasonable cause of action in law. The said application was based on the grounds that the suit was allegedly drafted by the 2nd Defendant on his behalf and that the suit did not disclose any words or statements, written or oral that he uttered and/or published that were concerning of or referring to the Plaintiff.

2. In opposition to the said application, on 4th October 2019, the Plaintiff filed a Replying Affidavit that he swore on 27th September 2019. He termed the said application fictitious, vexatious, an abuse of the court process and lacking in merit. It was his contention that he had sued the Defendants for the defamatory statement they had published in a letter dated 11th December 2018.

3. He averred that the 1st Defendant could not escape liability unless he denied ever having instructed the 2nd Defendant to publish the said defamatory statement. He stated that it would be a miscarriage of justice for the 1st Defendant to be released from the proceedings herein as he had not demonstrated that the 2nd Defendant acted without his authority.He thus urged this court to dismiss the present application with costs to him.

5. It was the 1st Defendant's submission that the Plaint did not set out particulars of any defamatory words he uttered or published of concerning or referring to the Plaintiff and it was not sufficient to for him to merely contend that the 2nd Defendant was his agent without specifying what he himself had written or published. He placed reliance on the case of **Veronica Wambui vs Michael Wanjohi Mathenge [2015] eKLR** where it was held that the purpose of pleadings is to enable a defendant know what the case against him and that all material facts must be pleaded.

6. On his part, the Plaintiff relied on the case of **Saudi Arabia Airlines Corporation vs Petroleum Company Limited [1986] eKLR** where it was held that striking out of a pleading divests a party of a hearing and consequently the same should be used sparingly.

7. Notably, Order 2 Rule 15 (1) of Civil Procedure Rules, 2010 provides 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—

(a) it discloses no reasonable cause of action or defence in law; or

(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.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

7. The court must at all times be cognisant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it was plain and obvious that a plaint disclosed no reasonable cause of action or defence in law, where a plaint was scandalous, frivolous, vexatious, where a plaint may prejudice, embarrass or delay the full trial of the action or where the plaint was otherwise an abuse of the court process.

8. In the case of **Grace N Karianjahi vs Dr Simon Kanyi Mbuthi [2002] eKLR**, it was also held as follows:-

"The Plaint can also be frivolous, if it has no substance, it is fanciful or that the party is simply trifling with the Court or wasting the Courts time. The Pleading is also vexatious if it has no foundation in law, it is filed for the mere purpose of annoying the other party; it is leading to no possible good and has no chance at all of succeeding. On the other hand, pleadings are otherwise an abuse of the court process when they are filed in court simply to waste its time or when they are worthless or to delay the due process of the law".

9. In the same breathe, a court must exercise restraint and proceed very cautiously when it has been asked by a party to strike out pleadings before a matter has proceeded for full trial. Indeed, striking out pleadings before hearing of a matter is a draconian step and must be used sparingly and in the clearest of the cases as was held in the case of **D.T. Dobie Co Ltd vs Muchina [1982] KLR D.T. Dobie** and in the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) held as follows:-

"It is trite law 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."

10. In the case of **Elijah Sikona & Another vs Mara Conservancy & 5 Others [2013] eKLR,** it was further held as follows:-

"There are well established principles which guide the court in exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act 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".

11. In addition, in the case of **Wedlock vs Moloney [1965] 1 WLR 1238**, it was held that:-

"…Summary jurisdiction of court was never intended to be exercised by a minute and protracted examination of documents and the facts of the case in order to see if the Plaintiff really has a cause of action…"

12. As could be seen from the aforesaid cases, the common thread was that courts must be very cautious to deny parties an opportunity to ventilate their cases no matter how weak their opponents felt their cases were. However, they were also called upon to be vigilant not to allow cases that fell within the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 to clog the already congested court diaries.

13. To establish whether or not the Plaintiff's case fell within the ambit of Order 2 Rule 15(1)(a) of the Civil Procedure Rules, this court deemed carefully perused the Plaint and noted that in Paragraph (5) of the Plaint dated and filed on 6th May 2019, he had stated as follows:-

"On or about the 11th December 2018, the defendants jointly and/or severally falsely and maliciously authored, uttered, printed and/or published the following defamatory words in a letter addressed to the Chief Executive Officer NGO's Co-ordination Board and copied to Kraido & Company Advocates against the Plaintiff which reads:-

"Our client's assertion that Mr Otieno is conflicted is founded on the following incidences: the registration of Organics 4 Orphans an international NGO started off on a rough note because the consultant that was engaged produced a fake/counterfeit certificate. While Mr Ogollah was arrested and charged with the offence of forgery and making a counterfeit certificate, the charges against him were not pursued by the NGOs Board. Many years later, early 2018, as the organization was seeking work permit recommendation for one of its international staff from the NGO Board, Mr Ogollah told Mr Dale Bolton, Chair of the Organics for Orphans International Board, that he and Mr Otieno come(sic)**) from the same tribe so he would assist him as he had previously done when he faced the criminal charges in respect of the counterfeit papers. Our clients were shocked to learn about Mr Otieno's involvement as in his position, he was tasked with legal and compliance affairs of the NGO's Board but went on to assist Mr Ogollah to get off criminal charges, a move that clearly undermined the authority of the NGO's Coordination Board and the integrity of its processes."**

14. In Paragraph (6) of the Plaint, he contended as shown hereunder:-

"The Plaintiff avers that the aforementioned words were not only falsely and maliciously uttered, printed and/or published but

were also defamatory as in their plain and ordinary meaning and by necessary implication, the words meant and could only have been interpreted that the Plaintiff is:-

a. A merchant of questionable character engaging in dubious businesses;

b. A criminal;

c. Unprofessional;

d. A conspirator;

e. Dishonest and fraudulent; and

f. Used undue means secretly with others to have charges against Mr Ogollah dropped.

15. It was evident from Paragraphs (5) and (6) of the Plaint that the Plaintiff was complaining of words that were published by the 2nd Defendant on behalf of the 1st Defendant herein. It appeared to this court that the suit was filed against both Defendants much the same way that an author of an article in the newspaper is normally sued along with the newspaper that publishes the article. This is what this court understood to have been the Plaintiff's case against the 1st Defendant herein.

16. It did not appear to this court that he had merely filed the present case to waste the court's time. He appeared to have been genuinely aggrieved by the contents of the letter complained of. Whether the said facts were sufficient to prove his case against the 1stDefendant herein was a different issue altogether. This was a matter of evidence to be adduced during trial. At this point, this court was only concerned with establishing whether or not there was outright demonstration of the instances contemplated in Order 2 Rule 15 (1) of the Civil Procedure Rules and in particular Order 2 Rule 15(1)(a) of the Civil Procedure Rules.

17. After carefully analysing the parties' respective submissions and the case law they each relied upon, this court was not persuaded that the Plaintiff's suit against the 1stDefendant ought to be struck out no matter how weak the 1st Defendant felt his case against him was. There was need for the court to interrogate the meritsor otherwise of the Plaintiff's assertions to determine if the 1st and 2nd Defendants had defamed him as he had contended.

18. Indeed, striking out of the pleadings at this point had the potential of infringing on his right to have his dispute determined by a court of competent jurisdiction as stipulated in Article 50 (1) of the Constitution of Kenya.He had already commenced the preparation of his trial by filing a Pre- Trial Conference hence the need for him to be given an opportunity to ventilate his case. However, there was also the equally important need for the trial to proceed expeditiously to avoid the Sword of Damocles hanging over the 1st Defendant indefinitely.

DISPOSITION

19. For the foregoing reasons, the upshot of this court's Ruling was that the 1st Defendant's Notice of Motion application dated and filed on 10th July 2019 was not merited and is hereby dismissed. Costs of the application will be in the cause.

20. To progress this matter further, the Plaintiff is hereby directed to take a date for Pre-Trial Directions at the Registry within the next sixty (60) days from the date of this Ruling failing which the 1st Defendant will be at liberty to take such action to safeguard his interests herein.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of May 2020

J. KAMAU

JUDGE