



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 130 OF 2019

HON AMB. AMINA MOHAMMED..... PLAINTIFF/ RESPONDENT

VERSUS

STANDARD MEDIA GROUP LIMITED....1ST DEFENDANT /1ST APPLICANT

ORLANDO LYOMU.....2ND DEFENDANT/ 2ND APPLICANT

JOE ODINDO.....3RD DEFENDANT/ APPLICANT

GEOFFREY MOSOKU.....4TH DEFENDANT/ APPLICANT

ROSELYNE OBALA.....5TH DEFENDANT/APPLICANT

JAMES MUNYEKI.....6TH DEFENDANT/APPLICANT

MOSES NYAMORI.....7TH DEFENDANT/APPLICANT

RULING

The Defendants /Applicants herein have moved this Court by way of the Notice of Motion dated the 21st August, 2019, in which they have sought orders to strike out the suit as against the 2nd to 7th Defendants and that the Plaintiff do bear the costs of the suit.

The application was brought under the provisions of Section 1A, 1B, & 3A of the Civil Procedure Act, Order 1 Rules 10 (2), 14 & 25 and Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules.

The grounds in support of the application are that; the Applicants are all employee/ agents of the 1st Defendant; that they are not the publishers of the Standard Newspapers; the plaint discloses no reasonable cause of action against 2nd to 7th defendants; that their joinder will prejudice, embarrass or delay the fair trial of the action and that the suit against them is otherwise an abuse of the Court process.

The Plaintiff/ Respondent has opposed the application by way of Grounds of opposition dated the 7th November, 2019 and filed on the same day. The same is opposed on the following grounds; that, in libel proceedings respecting Newspapers , liability attaches jointly and/ or severally to all the defendants; that in defamation proceedings against Newspapers, tortious liability is not specific but shared; that suits in defamation cannot attach without the various roles of the specified individuals; that a corporate entity, on its own, cannot commit the tort of defamation; that the application lacks legal basis and that it raises matters that can only be raised at the full trial.

The application was canvassed by way of written submissions.

In their submissions, the applicants have submitted that the Plaintiff's suit being one based on defamation, and having alleged that she was defamed in an article that was published by the Standard Group PLC who are the proprietors of the said Newspaper, the Respondent ought not to have filed the suit against the 2nd to 7th applicants who are employees and /or agents of the 1st applicant, in total disregard of the legal principle that a company is a separate and distinct legal entity from its shareholders, directors and agents. They have relied on the case of Salmon vs Salmon (1897) AC 78 which was upheld in our jurisdiction in the case of Victor Mabachi & another Vs Nurtturn Bates limited, Civil Appeal No 247 of 2005 (2013) eKLR in which the court held that;

“.....as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”

In this regard, it was submitted that the applicants neither obtained the leave of the court nor filed a suit indicating that the company is participating in fraud, tax evasion or any illegal or improper purpose so as to enable the court to lift the veil of the 1st applicant and join the 2nd to 7th applicants.

The applicants urged the court to take cognizance that there is an agency relationship between the 2nd to 7th applicants herein and the Standard Group PLC is their employer and by virtue of that relationship, its employees have consent to act on its behalf in undertaking its objective of disseminating information to the public.

They further submitted that an agent of a disclosed principal cannot be sued and cited the case of Victor Mabachi (supra) and that of **Antony Francis Wareheim T/A Wareheim & 2 Others Vs Kenya Post Office Savings Bank, Civil Application Nos. 5 & 48 of 2002** to advance their submission in that regard and argued that, in absence of factors vitiating the liability of the principal, the joinder of the 2nd to 7th applicants is unwarranted and therefore, no reasonable cause of action arises against them.

The applicants argued that the joinder of the 2nd to 7th applicants is an abuse of the court process as the Respondent seeks to use the judicial process to irritate and annoy her opponents. They cited the case of **Satya Bhamu Gandhi Vs Director of Public Prosecutions & 3 Others (2018) eKLR** which interrogated in depth the concept of abuse of court process as follows;

“It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use”.

An abuse is done when one makes an excessive or improper use of a thing or to employ such a thing in a manner contrary to the natural rules for its use” [Black law Dictionary, sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 10-11]

They urged the court to invoke its discretionary powers and strike out the suit as against the 2nd to 7th applicants so as to facilitate the just, expeditious, proportionate and affordable resolution of the dispute herein and so as to give effect to the overriding objective provided for in section 1A of the Civil Procedure Act.

On the part of the Respondent, it was submitted that the applicants are necessary parties to the suit and to support that contention, counsel cited the case of **Green Square Limited Vs Sheladia Associates & 2 others (2017) eKLR** which explains who a necessary party to a suit is, as follows;

“.....The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action , and that the question to be settled ,therefore must be a question in the action which cannot be effectively and completely settled unless he is a party”

And the case of **Kiarie Waweru Kiarie Vs Moses Kanyira & others (2016) eKLR** which quoted the case of **D.T Dobie & Company (k) limited vs Muchera**, Court of Appeal Nairobi on the meaning of a reasonable cause of action as hereunder;

“The words reasonable cause of action in order 13 (1) means an action with some chances of success when the allegations in the plaint only are considered”

On whether there has been misjoinder of the 2nd to 7th applicants, it was submitted that liability affixes on participation and /or authorization of publication of the defamatory matter and that every person who takes part in the publication of the defamatory matter is prima facie liable in respect of the publication and by virtue of that fact, the Respondent argued that the 2nd to 7th applicants are properly joined in the suit. Reliance was placed on Halsbury Laws of England, 4th Edition, Volume 28, par 38 as hereunder;

“Every person who takes part in or procures the publication of a libel is prima facie liable jointly and severally for all the damage caused by it. Thus, if a libel appears in a Newspaper, the author of the libel and the proprietor, editor, printer, publisher and the vendor of the Newspaper are prima facie jointly and severally liable”

And to the case of **Gideon Mose Onchwati Vs Kenya Oil Company limited (2015) LKR 347** In which the court held that;

“Where libel is published in a Newspaper or book or magazine, everyone who has taken part in publishing it or procuring its publication or has submitted material published in it is prima facie liable”

She has urged the court to dismiss the applicants’ application with costs to her.

The court has considered the submissions by the parties together with the application and the affidavits in support of and in opposition to the application.

The applicants have sought for orders to strike out the suit against them. The general principles which guide a court in exercising its discretion whether or not to strike out a pleading are now well settled. See the case of **DT Dobie & Co. (Kenya) Limited vs. Muchina & Another (1982) Klr.** These principles also apply in cases of defamation, however in applying the general principles, the court will have regard to the special rules of pleadings in defamation cases as laid out in Order 1 Rule 7 and 8 of the Civil Procedure Rules and also have regard to the governing statute – the Defamation Act.

The plaintiff has sued the defendants herein in a case of defamation following publication of an article which the first defendant published, the particulars of which are set out in paragraphs 10 and 11 of the plaint.

The plaintiff has alleged that the said publication is defamatory of her.

In paragraph 10 of the plaint, she avers that the first defendant newspaper wrote, printed articles, published the plaintiff's photograph and run the Editorial and commentary publication complained of.

Further, in paragraph 13 of the plaint, she refers to the similarities in the words and statements in the 1st defendant's newspaper and those of the Daily Nation of the 4th February, 2019, as libellous of her character.

In the plaint, the 2nd and 3rd defendants are described as adults of sound mind and as the chief Executive officer of the 1st defendant and the Editorial Director, respectively while the 4th – 7th defendants are described as writers with the first defendant.

Upon perusal of the plaint, the court notes that save for that description, the actual publication complained of is attributed to the first defendant.

In the statement of defence, the first defendant has admitted the descriptive paragraphs of the plaint. It has also admitted in paragraph 6 of its defence that it was at all material times the

publisher of the articles complained of and that the 2nd – 7th defendants are its employees. In this regard, the applicants have argued that since there is a disclosed principal, the plaintiff ought not to have sued them, being agents of the first defendant.

Order 1 Rule 3 on who may be joined as defendants states;

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally or in the alternative, where, if separate suits were brought against such persons, any common law or fact would arise”.

Order 1 Rule 4 states ***“Judgment may be given without amendment;***

(b) Against such one or more of the defendants as may be found to be liable according to their respective liabilities’.

Order 1 Rule 9.

“No suit shall be defeated by reason of the misjoinder or non-joinder of the parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

The court has noted the cause of action as defamation and the contents of the statement of defence filed by the defendants. The 4th – 7th defendants are described as writers with the 1st defendant, the 3rd defendant as an Editor Director while the 2nd defendant is the Chief Executive Officer of the 1st defendant.

The 1st defendant in its defence has admitted the publication and has also admitted the relationship between itself and the rest of the defendants as that of employees.

The court is alive to the fact that this being a cause of action in defamation, courts have on several occasions held that an action in defamation is intrinsically a personal action and that the person to maintain an action is the person directly defamed. Likewise, the proper person to be sued as a defendant is the person who published the defamatory words or caused them to be published or ratified the publication. See the case of **Grace Wangui Ngenye vs. Chris Kirubi & Capital Group Limited (Civil Appeal number 40/2020)**.

The same position has been advanced in **Gatley & Lindsell on slander and Libel** as follows;

“An action for defamation is purely a personal action. The proper person to sue as a claimant is the person defamed and the proper person to be sued as the defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another)”

In Halsbury Laws of England, 4th Edition, volume 28, par. 38”

“Every person who takes part in or procures the publication of a libel is prima facie liable jointly and severally for all the damage caused to it. Thus, if a libel appears in a newspaper, the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper are prima facie jointly and severally liable”.

Whereas this court fully appreciates the above as the legal position, in the circumstances of this case, I find that the 2nd – 7th defendants are

not necessary parties to the case and particularly in view of the admission by the 1st defendant of an employer/employee relationship between themselves and the 1st defendant having admitted the fact of publication.

In any event, as the court held in the case of **Green Square Limited vs. Shaladia Associates & 2 others (2017) eKLR.**

“the only reason which makes it necessary to make a person a party to an action so that he should be bound by the result of the action and the question to be settled, therefore must be a question in the action which cannot be effectively and completely settled unless he is a party”.

In the instance case, the question to be settled between the plaintiff and the 2nd – 7th defendants can be effectually and completely settled without the 2nd -7th defendants being parties to the suit.

The 1st defendant having admitted the publication, it is upon it to defend the case the best way it knows how.

In arriving at this conclusion, the court has taken into account the special circumstances under which newspapers operate, the main core of their business being to print and publish newspapers on Daily or weekly basis as the case may be.

By virtue of that, and considering that they do so, through writers and editors, it would help in saving a lot of judicial time if such writers and editors are not joined as parties to the almost daily suits that are filed against the newspapers. This is particularly so in a case like the one before the court where the first defendant (Standard Media Group Limited) has admitted publication and has gone further to admit an employer/employee relationship between it and the other defendants. I say this because, if the defendants are found liable, judgment will be entered against them jointly and severally and the first defendant having admitted the publication, would satisfy any judgment entered against it, the same way it would, if the same was entered against all the defendants jointly and severally, on account of employer/employee relationship.

By leaving out the employees, it would help a great deal to facilitate the just, expeditious, proportionate and affordable resolution of such matters so as to give effect to Section 1A of the Civil Procedure Act unless of course, it is denied that the writer/editor was not an employee of the newspaper.

In the premises, I find and hold that the application dated 21st day of August 2019 has merits and it is hereby allowed as prayed. The suit against the 2nd – 7th defendants is hereby struck out but with no orders as to costs.

Dated, Signed and delivered at Nairobi this 24th day of September 2020

.....

LUCY NJUGUNA

JUDGE.

In the presence of

..... **the Applicant**

..... **for the Defendants/ Respondents**