



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 187 OF 2019

CEASAR WANJAO NGIGE.....PLAINTIFF/RESPONDENT

VERSUS

KAREN MWENDE NDUVA.....DEFENDANT/APPLICANT

RULING

Before me is the defendant's Notice of Motion dated the 29th day of October, 2019 seeking to strike out the plaint as it discloses no reasonable cause of action. The motion is brought under Order 2 Rule 15 of the Civil Procedure Rules, 2010.

The defendant contended that the plaint does not as by the law set out in verbatim the very words of libel alleged to have been published by the defendant of the plaintiff and for that failure, the plaintiff has no cause of action against the defendant.

The defendant also avers that Erick Theuri and the Kenya insights Website, though adversely mentioned in the plaint as having allegedly published the libel, have deliberately not been joined to the suit. That such deliberate omission is evidence that the suit is scandalous, frivolous and vexatious; may prejudice, embarrass the delay, the fair trial of action; and is otherwise an abuse of the process of the court.

The defendant asserted that the case at bar is fanciful, trifling and hopeless and is therefore a plain and obvious candidate for striking out.

The defendant has urged the court to dismiss the case to prevent the defendant from being harassed and put to unnecessary expense by frivolous, vexatious or hopeless litigation.

The plaintiff/respondent filed his grounds of opposition on the 5th March, 2020 in which, he has raised the following grounds;

- (i) The application is fatally defective and untenable in law.
- (ii) The application is hopelessly misconceived, frivolous and totally devoid of merits.
- (iii) That the application lacks merit and its only actuated by ulterior object of scuttling down what is already in motion.
- (iv) That the application is an abuse of the court process and its only meant to slow down the suit in its tracks.

The application was disposed off by way of written submissions which this court has duly considered.

In her submissions, the defendant submitted that the cause of action being that of defamation, publication of false and defamatory statements by the defendant of the plaintiff, is the essence of the tort. Therefore, the law requires that the plaintiff set out verbatim, the exact words published by the defendant.

She submitted that in the case herein, the plaintiff has not set out verbatim the exact words published by the defendant to enable the court determine if or not they are defamatory. She averred that the plaintiff has also not claimed that the defendant published the statement complained about and for the above reason, she has urged the court to strike out the plaint as it discloses no reasonable cause of action. The case of *Joseph Njogu Kamunge vs. Charles Muriuki Gachari (2016) eKLR* and that of *Wycliffe R. Swanya vs. Toyota East Africa Limited & Another (2009) eKLR* were relied on.

Submitting on why the plaintiff's cause of action is an abuse of the court process, the defendant averred that the plaintiff has filed a separate cause of action against Eric Theuri seeking the same reliefs as in the case herein.

In his submissions, the plaintiff submitted that having amended his plaint on the 15th day of March, 2020, the plaintiff's application has been

overtaken by events as there is already an amended plaintiff which supersedes the original plaintiff and therefore the application dated 29th October, 2020 has no merits.

The court has considered the submissions filed by both parties. The application is brought under Order 2 Rule 15 of the Civil Procedure Rules that grants the court the powers to strike out a pleading for the following reasons;

- a) If 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.

The defendant's application is based on two main grounds;

- 1) That the plaintiff has not set out in verbatim the words complained of.
- 2) Eric Theuri and the Kenya insights website have not been joined to the suit.

From the wording of Order 2 Rule 15, the power to strike out a pleading is discretionary.

There are well established principles which guide the court in the exercise of its discretion under this rule. In the case of *Elijah Sikona & George Pariken Warok* on behalf of *Trusted Society of Human Rights Alliance vs. Mara Conservancy & 5 others civil case no. 37 of 2013 (2014) eKLR* the court when dealing with an application seeking to strike out a plaintiff observed that;

“----- 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.”

In the case of *Bank of Credit & Commerce International*, the court held;

“Summary determinations of cases are draconian and drastic and should only be applied in plain and obvious cases both as regards the facts and the law. In a matter that alleges that the suit is scandalous, frivolous and vexatious, and otherwise an abuse of the court process, I must be satisfied that the suit has no substance or is fanciful or the plaintiff is trifling with the court or the suit is not capable of reasoned argument. It has no foundation, no chance of succeeding and is only brought merely for purpose of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the court process where it is frivolous and vexatious.”

In the classic case of *DT Dobie & Company (K) Limited vs. Muchina, Madan J.* held;

“The court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable action, for 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 function is solely reserved for the trial judge as the court itself is not usually fully informed so as to deal with the merits.

No suits 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---- A court of justice ought not to act in darkness without the full facts of the case before it”.

On the merits of the application, the court notes that, the plaintiff filed an amended plaintiff on the 15th day of April, 2020. Pleadings in this matter have not closed, because the defendant has not yet filed her defence and therefore, the plaintiff did not require the leave of the court to amend his plaintiff. In the amended plaintiff, he has quoted in verbatim the words complained of which he alleges, the defendant used in the Facebook page owned by one Erick Theuri and with the facit authority of the said Erick Theuri.

Though the said Eric Theuri is not a party to the suit herein, the plaintiff/applicant in his submissions has disclosed that the plaintiff has filed another case against Eric Theuri seeking the same reliefs as in the case herein. Bearing in mind that the plaintiff has already amended his plaintiff, I find and hold that the defendant's application dated 29th October, 2019 has been overtaken by events. I say so because, the amended plaintiff is properly on record as the plaintiff needed no leave of the court to amend the plaintiff as the pleadings have not yet closed. Secondly, as pointed out by the defendant, there is already a pending suit against Eric Theuri. The plaintiff should move the court to have the two suits consolidated and be heard together as the cause of action against the two defendants is the same.

In the end, the application dated 19th October, 2019 is hereby dismissed and since the plaintiff amended his plaintiff after the same was filed, it

is only fair that the defendant is awarded costs of the application.

The same is assessed at kshs. 10,000/= to be paid within fourteen (14) days from the date of this ruling.

Orders accordingly.

Dated, signed and delivered at NAIROBI this 29th day of October, 2020

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent