



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 131 OF 2019

HON. SICILY K. KARIUKI.....PLAINTIFF/RESPONDENT

-VERSUS-

STANDARD GROUP PLC.....1ST DEFENDANT/APPLICANT

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

JOSEPH ODINDO.....3RD DEFENDANT/APPLICANT

JOHN BUNDOTICH.....4TH DEFENDANT/APPLICANT

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

VINCENT ACHUKA.....6TH DEFENDANT/APPLICANT

JACOB NG'ETICH.....7TH DEFENDANT/APPLICANT

RULING

1. The defendants/applicants herein have taken out the Notice of Motion dated 21st August, 2019 and the same stands supported by the grounds set out on the face thereof. The applicants are seeking an order to the effect that the 2nd to 7th defendants be struck out of the suit, and that the plaintiff do bear the costs of the application and the suit.

2. In response, the plaintiff/respondent filed Grounds of Opposition on 20th January, 2020 and put forward the following grounds:

- a) THAT in libel proceedings respecting newspapers, liability attaches jointly and/or severally to all the defendants.***
- b) THAT in defamation proceedings against newspapers, tortious liability is not specific but shared.***
- c) THAT suits in defamation cannot attach without various roles of the specified individuals.***
- d) THAT a corporate entity on its own cannot commit the tort of defamation.***
- e) THAT the law on defamation is established on necessary parties.***
- f) THAT the application lacks legal basis.***
- g) THAT the application raises matters that can only be raised at full trial.***
- h) THAT the prayers sought in the application are not available to the defendants.***
- i) THAT the application is for dismissal.***

3. The Motion was canvassed by way of written submissions, with the applicants contending that the 2nd to 7th applicants are employees and not publishers of the 1st applicant and hence they are improperly enjoined in the suit since there is no reasonable cause of action against

them.

4. According to the applicants, the Standard Newspaper is printed by the 1st applicant and that a company is a separate legal entity from its shareholders, directors and agents. The applicants cited this holding by the Court of Appeal in the case of **Victor Mabachi & another v Nurtun Bates Limited [2013] eKLR**:

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

5. The applicants further contended that since the 2nd to 7th applicants are merely agents of the 1st applicant in respect to the alleged publication of the impugned articles, they were acting within such capacity and cannot therefore be sued. The applicants once again turned to the case of **Victor Mabachi & another** (supra) where the Court of Appeal determined that an agent cannot be sued where the principal has been disclosed.

6. The applicants are equally of the view that the suit against the 2nd to 7th applicants is an abuse of the court process and relied upon the address by the court in the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** regarding what constitutes an abuse of the court process, as hereunder:

“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. The black law dictionary defines abuse 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 thing in a manner contrary to the natural legal rules for its use.””

7. The respondent responded by submitting that a party ought not to be struck out of a suit where it has been shown that he or she is a necessary party to the suit and where a reasonable cause of action has been disclosed against him or her. The respondent quoted *inter alia*, the case of **Green Square Limited v Sheladia Associates & 2 others [2017] eKLR** in which the court rendered itself thus:

““What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved: that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately... the court might often think it convenient or desirable that some of such persons be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. 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 the question to be settled, therefore must be a question in the action which cannot be effectually and completely settled unless he is a party” ”

8. The respondent contended that all who take part in an impugned publication are prima facie liable in that respect, a position which was upheld by the court in the case of **Gideon Mose Onchwani v Kenya Oil Co. Limited & another [2018] eKLR** as follows:

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

9. It is therefore the submission of the respondent that the application is unfounded and ought to be dismissed.

10. This court has considered the grounds stated on the face of the Motion; the Grounds of Opposition and the rival written submissions coupled with the authorities relied upon therein.

11. The brief background of the dispute is that the plaintiff/respondent brought a suit in the nature of defamation against the applicants herein, vide the plaint dated 17th June, 2019 and sought for various reliefs including general, aggravated and exemplary damages.

12. The applicants filed a joint statement of defence to challenge the averments made in the plaint.

13. It is clear that the key issue for determination at this point concerns the striking out of the 2nd to 7th applicants. The principles offering guidance to the court in determining whether or not to strike out and/or substitute the name of a party are encapsulated under **Order 1, Rule 10 (2)** of the **Civil Procedure Rules** (“the Rules”) and are as follows:

i) Whether or not the party to be substituted or struck out is a necessary party to the suit; and

ii) Whether or not the presence of such party will assist the court in effectively adjudicating upon and settling all questions arising out of the suit.

14. Further to the foregoing, **Order 1, Rule 3** of the **Rules** prescribes persons who may be joined as defendants in the manner hereunder:

“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”

15. From my perusal of the plaint, I note that the 2nd applicant is sued as the Chief Executive Officer of the 1st applicant; the 3rd applicant in his capacity as the Editorial Director; while the 5th to 7th applicants were sued as the writers of the 1st applicant. These descriptions were admitted in the statement of defence filed by the applicants on 30th July, 2020.

16. While I note that no description was given in the pleadings in respect to the 4th applicant, upon perusing the impugned articles filed by the respondent and constituting her list and bundle of documents, I established that he was at all material times the Managing Editor of the 1st applicant.

17. Moreover, going by the pleadings filed by the applicants, the relationship between the 1st applicant and the remaining applicants was not disputed at all.

18. While I am alive to the legal position that a corporate entity is separate from its directors and/or shareholders, I am also alive to the legal position that in defamation cases such as the present one, the proper person to be sued as a defendant is one who either published the defamatory publication or caused the same to be published or ratified the publication.

19. That said, the question to be answered is whether the 2nd to 7th defendants are necessary parties to the instant suit. I refer to the case of **Green Square Limited v Sheladia Associates & 2 others [2017] eKLR** cited by the respondent and where the court described a ‘necessary party’ in the manner to follow:

“ ..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 the question to be settled, therefore must be a question in the action which cannot be effectually and completely settled unless he is a party” ”

20. The above was similarly stated 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)”

21. Moreover, **Halsbury Laws of England, 4th Edition, volume 28, par. 38** quoted in the respondent’s submissions, reads that:

“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.”

22. Having perused the record and pleadings, I note that in addition to admitting to the nature of relationship between the applicants in the sense that the 2nd to 7th applicants are employees of the 1st applicant, the 1st applicant further admits to making the impugned publication though pleading the defences of justification, qualified privilege and fair comment.

23. In view of the foregoing factors and unique circumstances, I take the view that whereas there is nothing to indicate a misjoinder of the 2nd to 7th applicants, I find that the issues raised in the instant claim can be adequately ventilated without necessitating the presence of the 2nd to 7th applicants as defendants to the suit. Furthermore, excluding the said applicants in the suit may greatly assist in ensuring the expeditious and efficient disposal of the respondent’s claim.

24. Consequently, I find merit in the Motion dated 21st August, 2020 and I hereby order that the suit against the 2nd to 7th defendants/applicants be and is hereby struck out but with no orders on costs.

Dated, Signed and Delivered at Nairobi this 29th day of October, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... **for the Plaintiff/Respondent**

..... **for the Defendants/Applicants**