



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL (DEFAMATION) CASE NO. 2 OF 2020**

**ZADOCK MAKHANU KHAEMBA**

**T/A KHAEMBA CONTRACTOR.....PLAINTIFF**

**VERSUS**

**JOHN BORORIO.....1<sup>ST</sup> PLAINTIFF**

**BORORIO & CO. ADVOCATES.....2<sup>ND</sup> PLAINTIFF**

**RULING**

1. Before me is a preliminary objection in respect of which the Defendants have stated that the plaint does not disclose a reasonable cause of action against them.

**The case for the Plaintiff**

2. The case for the Plaintiffs in their plaint dated 14<sup>th</sup> February 2020 is as follows. The 1<sup>st</sup> plaintiff in paragraph 2 of the plaint has described himself as a Construction Association Firm based in West Pokot. In paragraph 5 of his plaint, the 1<sup>st</sup> plaintiff has averred as follows: *“The cause of action arise from defamation of the plaintiff’s characters in both libel and Serious slander that occurred severally as per the police OB no. 43/14/10/2019.”*

3. The plaintiffs have submitted that those words are defamatory and for that reason they are seeking general damages.

4. In support of their case the plaintiffs have cited Articles 22, 23 and 27 of the 2010 Constitution of Kenya.

**The case for the Defendants**

5. The defendants denied the claim. The defendants filed a Notice of Preliminary objection which is couched in the following language:

- i) The suit offends the provisions of Order 2 Rule 7 of the 2010 Civil Procedure Rules.
- ii) The instant suit is fatally defective.

6. In support of their case, the Defendants have cited Order 2 Rule 7(i) of the 2010 Civil procedure Rules which provide as follows:

*“wherein an action for libel or slander the Plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning he shall give particulars of the facts and matters on which he relies in support of such sense.”*

7. Furthermore they have cited the case of *Harrison Kariuki Mburu =Vs= National bank of Kenya & Credit Reference Bureau Africa Ltd, HCC No. 97 of 2012*, in which that court stated that in libel and slander the very words complained of are the facts on which the action is grounded. The court stated that: *“ a plaintiff in a libel action must set out with reasonable certainty in his pleadings the words complained of but also must be prepared to give such particulars as to ensure that he has a proper case to put before the court and is not merely fishing one ..... in libel and slander the very words complained of are the facts on which the action is grounded ..... if he cannot give the particulars he cannot be allowed to go on with the charge.”*

**Issues for determination**

8. The issue raised before me is that the plaint is fatally defective for failing to disclose a reasonable cause of action. It is trite law that a preliminary objection may only be raised on a pure point of law, which has arisen from the pleadings of both the Plaintiffs and the Defendants. *See Grace Wangui Ngenye Vs Chris Kirubi & Another [2015] eKLR.*

9. In the instant application, the 1<sup>st</sup> Plaintiff describes himself as a Construction Firm. He is not an advocate of the High Court of Kenya. The defamatory words complained of are not per se defamatory in their ordinary meaning. The alleged defamation is slander and libel. The plaintiffs should have set out in the plaint in which manner the words complained of defamed them, which they have failed to do. In addition to the ordinary advocates of the High Court there are many types of advocates including those who advocate violence, peace and many other types of advocates.

10. Striking out of the plaint is a draconian measure and should only be done in the clearest cases only.

11. In the instant application, I find that the plaintiffs have not complied with the requirements of Order 2 Rule 7(i) of the 2010 Civil Procedure Rules. It therefore follows that the words complained of do not disclose a cause of action. This is a clear case for striking out.

12. In the premises, I uphold the preliminary objection with the result that the same is hereby dismissed with costs to the defendants.

**Ruling signed, dated and delivered in open court at Kitale on this 16TH day of December, 2020.**

.....

**J.M. BWONWONG’A**

**JUDGE**

**16/12/2020**

**In the presence of**

**The Plaintiffs in person for the Plaintiffs**

**Mr. Teti holding brief for Mr. Nyamu for the defendants**

**Ms Chemosop - Court Assistant**