**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL SUIT NO. 27 OF 2013**

**PATRICK NGARI NJERU …….....PLAINTIFF**

**VERSUS**

**JOSEPH KALII & 24 OTHERS……..DEFENDANT**

**RULING**

**The Application**

On 24th June 2013, the Plaintiff filed a suit herein by way of a Plaint dated 21st June 2013, seeking a permanent injunction and damages against the Defendants for alleged defamation. On 1st September 2016, the Plaintiff subsequently filed a Notice of Motion dated 19th August 2016, which is the application that is before this Court for consideration. The Plaintiff in the said application is seeking orders that the Statement of Defence dated 8th August 2013 and filed on 13th August 2013 be struck out and dismissed with costs, and that the suit be set down for formal proof of damages.

The grounds for the application are that the Statement of Defence is a mere denial, is a sham, is vague and raises no *bona fide* triable issues worth investigation by the Court.

The 4th Defendant filed a replying affidavit sworn on 28th February 2017 on the authority of the other Defendants, and in which he deponed that the Defendants herein filed an application for dismissal of this suit for want of prosecution on 3rd August 2015, and which was compromised as withdrawn by a consent order recorded in court on 20th July 2016. Further, that this was on condition that the Plaintiff was to pay the Defendants thrown away costs of Kshs.10, 000/= within 10 days from the said date, failure to which the suit stood dismissed with costs to the Defendants. That the 10 days lapsed on/or before 30th July 2016 without payment, and the suit automatically stood dismissed as per the consent orders hence there is no suit and this application should be dismissed with costs . The Defendants attached a letter filed in court on 16 September 2016 confirming that the Plaintiffs did not pay as agreed in the consent order.

Furthermore, that this application for summary judgment is being filed contrary to the law as a defence had been filed on 13th August 2013 denying defamation and seeking dismissal of the suit, and all these issues were put into consideration by both sides in recording the consent on 20th July 2016.

In rejoinder, the Plaintiff filed a further affidavit he swore on 30th March 2017 wherein stated that the thrown costs were to be paid within thirty (30) days and not ten (10) days as alleged, and that were in fact paid within the 30 days. He annexed a copy of a letter from his advocate dated 15th August 2016 forwarding a cheque to the Defendant's advocates, being payment of the throwaway costs. Further, that the Defendants accepted the thrown away costs without any complaint and did not return the same in protest or principle.

**The Submissions**

The Plaintiff's counsel, Onyoni Opini & Gachuba Advocates, filed submissions dated 30th March 2017, wherein they urged that the Defendants did not disclose a reasonable defence as they have admitted that they authored and published the words complained of by delivering the letter to the recipients on the face thereof. That the words complained of are defamatory in their natural and ordinary meaning. Further, that the Defendants did not file any particulars of facts in reply to counter the particulars of malice .

According to the Plaintiff, arising from the said defence , the fact that the Defendants authored and published the words complained does not require proof at trial, and he is also not required to prove that the words complained of are defamatory in the natural and ordinary meaning thereof. Reliance was placed on Order 2 Rule 15(1)(a) of the Civil Procedure Rules, 2010 to strike out the Statement of Defence for non-disclosure of a reasonable cause of action or defence in law . Also cited was Order 13 for the position that there was an admissions of facts by the Defendants.

The Plaintiff also averred that Defendants did not plead any statutory defence prescribed under sections 7 and 8 of the Defamation Act, and

have nothing to be heard on in trial. Further, that By virtue of Order 2 Rules 7(2)&(3) and 8 of the Civil Procedure Rules, 2010, the Defendants are precluded from giving evidence in chief without leave of court and unless they have pleaded particulars of facts on the matter.

Lastly, that having accepted the payment of the throw way costs, the Defendants abandoned their right to claim that the suit stands dismissed and are therefore estopped by the doctrine of abandonment. Reliance was placed on section 120 of the Evidence Act in this regard. Several judicial decisions were cited by the Plaintiff's counsel in support of their arguments.

The Defendants' counsel, Mutunga & Muindi Company Advocates filed submissions dated 13th March 2017, and contended that the application dated 19th August 2016 is an abuse of the court process because there is no suit pending for hearing, pursuant to the consent orders recorded in court on 20th July 2016 for payment of thrown away costs of Kshs. 10,000/= within 10 days, and failure to which the suit would stand dismissed with costs . They reiterated that the 10 days lapsed on 30th July 2016 , and the Plaintiff did not pay, and hence the suit stood dismissed automatically.

In addition, that the application is incurably defective in that it is brought under Order 13 Rule 1 of the Civil Procedure Rules which is for judgment on admissions, and a look at the defence filed shows no admission whatsoever to defamation.

**The Issues and Determination**.

I have carefully considered the pleadings filed herein, and submissions made by the Plaintiff and Defendants. The issues for determination are firstly, whether the suit herein is still subsisting, and secondly if so, whether the Defence filed herein by the Defendants should be struck out for reasons that it does not disclose a reasonable defence. Lastly, if the other two issues are answered in the affirmative, whether the matter should proceed to formal proof.

On the first issue it is stated that there was a consent order recorded by the Court on throw costs and in default thereof that the suit shall stand dismissed. I have perused the proceedings herein and note that on 20th July 2016 when the said consent order is purported to have been record, all that this Court did was to give pre-trial directions, after the parties submitted that they had agreed to have the application to have the suit dismissed compromised subject to throw away costs being paid.

The said agreement was however not adopted and recorded by the Court as its order. Therefore no such consent order exists, and furthermore, the Defendants did not produce evidence of any such order issued by the Court. This suit is therefore still subsisting.

In addition, the Plaintiff did bring evidence of payment of the throwaway costs by way of the letter dated 15th August 2016 annexed to his further affidavit, which was acknowledged as received by the Defendant's advocates in a stamp dated 18th August 2016. The contents of this letter have not been rebutted by the Defendants, and it was received one month before the letter relied on by the Defendants about non-payment that was filed in Court on 16th September 2016, and in which the Defendants did not have the courtesy to copy the Plaintiff.

On the second issue, striking out of pleadings is governed by the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rule, which provides as follows:

> **"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**
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> **(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. "**

**It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-**

> **"No suit 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 and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."**

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. I have perused the Defence dated 8th August 2013, and it evident therein that the Defendants deny various averments made by the Plaintiff in his Plaint, including that the subject letter giving rise to the present suit is defamatory. The Plaintiff is therefore still under a legal duty to prove the defamation, and the proper fora to do so is at the trial and not by way of application. There are thus triable issues raised by the Defence, and also as demonstrated by the arguments that the Plaintiff put forward in his submissions herein in support of his case.

As the Defence is still on record, the third issue as to whether the suit should proceed to formal proof therefore becomes moot.

The Plaintiff's Notice of Motion dated 19th August 2016 is therefore dismissed for the foregoing reasons which costs to the Defendants.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 14th day of March 2018.**

**P. NYAMWEYA**

**JUDGE**