



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 450 OF 2015**

**RELEY SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**THE NAIROBI STAR PUBLICATION LIMITED....DEFENDANT**

**RULING**

The plaintiff filed this case against the defendant for general damages, among others, for libel and a permanent injunction to restrain the defendant from publishing words contained in the articles complained of. Upon service of the summons to enter appearance the defendant filed a defence in which the plaintiff's claim was denied.

There is now before me an application by way of Notice of Motion dated 23<sup>rd</sup> June, 2017 for an order that the defendant's statement of defence dated 15<sup>th</sup> February, 2015 be struck out. The reasons are set out on the face of the application alongside an affidavit sworn by a Director of the plaintiff. The application is opposed and there is a replying affidavit sworn by an employee of the defendant. Both parties have filed submissions and cited several authorities which I have read.

It is a cardinal policy and principle that courts should endeavour to sustain suits rather than dismiss them. That will be in line with the tenor, context and spirit of the Constitution and rules of natural justice. To strike out a pleading necessarily drives out a party out of the seat of justice without a hearing, which is in itself an affront to access to justice.

The court must be satisfied that a party's pleading may not stand the test of a trial to invoke the order for striking out, which the courts have repeatedly termed as drastic and draconian. Such an order may be granted where there is a very clear demonstration that a pleading is so hopeless, that it will be a waste of judicial time to let it go for trial.

Where a party has filed a defence and it is alleged no triable issues exist, the court must be satisfied that no answer can be drawn therefrom to the plaintiff's claim. This is so because, a triable issue need not be a reflection of what should succeed but that a court should be given an opportunity to preside over the dispute through examination, and this can only be done through a trial. In the case of **Job Kilach vs Nation Media Group Limited & others (2015) eKLR** the Court of Appeal said inter alia as follows,

**“Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”**

In yet another case of **Hashi Empex Limited vs. Wangethi Mwangi & another (2009) eKLR** the court stated,

**“It has been stated many times that a defendant need demonstrate only a single triable issue to be entitled as a matter of law to defend the action. There are at least two here. I am thus not satisfied that this is a plain and obvious case where the defendants should be denied the right to defend the suit on liability. The action ought to go to full trial.”**

I have looked at the plaint and the defence sought to be struck out. It cannot be said by any standards that the defence is a mere denial or that it offers no contrary evidence to challenge the plaint. Indeed, the reasons set out on the face on the application and the averments in the affidavit in support of the application are a pointer to several issues that can only be tested through a trial and cross-examination of the witnesses.

I must observe that a practice is taking root where parties are bent on trying to lock out their opponents before a full trial is conducted, yet it is obvious that such steps may not see the light of the day in view of development of the law as set out in many decided cases. Some of the submissions by both parties herein go to the root of issues that may be subject to the main trial and it may be prejudicial if I were to delve any deeper in the circumstances.

I am satisfied that the plaintiff, by its application, has not persuaded the court to grant the order sought. The application is therefore dismissed with costs to the defendant.

I note that pleadings have been closed and therefore direct the parties shall comply with Order 11 of the Civil Procedure Rules so that the case is heard on merit.

***Dated, signed and delivered at Nairobi this 9<sup>h</sup> Day of March, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**