REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 148 OF 2017

DR. EZEKIEL ONYANGO........................PLAINTIFF

VERSUS

SHELLA SHEIKH.............................1ST DEFENDANT

ANTHONY OBIDULU.....................2ND DEFENDANT

RULING

The plaintiff filed this suit against the defendants jointly and severally claiming damages for libel, and a permanent injunction to restrain them from publishing or making defamatory remarks concerning him. The record shows that on 21st July, 2017 the plaintiff applied for judgment against both defendants for failure to enter appearance and or file a defence. That request was filed on 25th July, 2017 and on 28th July, 2017 the Deputy Registrar entered that judgment.

Upon service of the summons to enter appearance and file defence, the defendants filed a defence on 7th August, 2017. This was after the interlocutory judgment had been entered against them.

There is now before me an application by way of Notice of Motion under Order 2 Rule 15 (1) (b), (c) and (d), Order 6 Rule 1 and 2, Order 7 Rule 1 and 5, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the substantive order that the statement of defence filed by the two defendants dated 4th August and filed on 7th August, 2017 be struck out.

The reasons upon which the order is sought are set out on the face of the application alongside the supporting affidavit sworn by the plaintiff. The application is opposed and grounds of opposition have been filed together with a replying affidavit sworn by the 1st defendant. Both parties filed submissions to address the application and cited several authorities. I have considered the material placed before me with the view to determining the said application.

The thrust of the plaintiff's application is that the statement of defence was filed out of the prescribed time without leave of the court and therefore was contrary to the mandatory provisions of the Civil Procedure Rules. That being the case, it is bad in law and an abuse of the court process. Additionally, the said statement of defence is said to be a sham without any merit and discloses no reasonable defence to the plaintiff's claim warranting a trial.

On the other hand, it is the defendant's case that the law on striking out of pleadings is well settled under the Civil Procedure Rules and case Law. To strike out a pleading is a draconian measure which should be cautiously applied. The defendants denied that the delay in filing the defence was inordinate and stated that it was filed in a timely manner. Additionally, the defence is substantial and addresses the issues and allegations contained in the plaint, therefore the application by the plaintiff has no basis in law on account of being frivolous and an abuse of the court process and should be dismissed accordingly.

The plaintiff is allowed under the cited provisions to move the court for the order sought. The time lines for entering appearance and filing a defence are also prescribed in the rules. The rules further provide what should accompany the defence on filing the same. However, the courts have from time to time granted extension and leave to the parties to comply with the Civil Procedure Rules.

The summons to enter appearance and file a defence were served on 7th July, 2017. Assuming without deciding that the defendants were to enter appearance then the last day would be 22nd of July, 2017; 15 days allowed to file a defence would obviously end on or about 8th August, 2017 when this statement of defence was filed. That calculation in my view cannot dislodge the statement of defence already on record.

The order sought by the plaintiff is discretionary. The power to strike out pleadings must be sparingly exercised. A chain of decided cases have upheld the position that such an order can only be invoked in the clearest of cases.

It is not necessary for me to set out all the cases cited by both counsel on this issue. Suffice to say that the principles cut across all pleadings challenged under the same title.

One of the leading cases is **D.T. Dobie and Company Limited vs. Muchina (1982) KLR**. In that case the court stated as follows,

> **"It is a power which should be exercised inter alia, sparingly and with circumspection. The summary procedure does not enable the court to hold a trial on the affidavit by engaging in minute and protracted examination of documents and facts of the case. Moreover, the court would not strike out a pleading if it discloses an arguable case or raises triable issues."**

It has further been held in the case of **Kenya Trade Combine Limited vs. Shah Civil Appeal No. 193 of 1999** that,

> **"All a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed".**

Striking out a pleading has the effect of locking out a party from the court, thereby driving him or her out of the seat of justice without a hearing. That would amount to denial of access to justice, a right secured in the Constitution.

I have looked at the plaint and the defence on record. It cannot be said that the defence is a sham as contended by the plaintiff in this application. The defendants should be allowed to defend the plaintiff's suit on merit and leave it to the court to determine the end result. The application by the plaintiff therefore fails and is dismissed with costs to the defendants.

Pleadings having been closed, I direct that the parties comply with Order 11 of the Civil Procedure Rules so that this matter is listed for hearing.

Dated, signed and delivered at Nairobi this 8th Day of March, 2018.

A. MBOGHOLI MSAGHA

JUDGE