REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 250 OF 2015

ALEX MAUTIA MORUME.....PLAINTIFF/APPLICANT

AMERISOURCE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

HON. ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

CENTRAL BANK OF KENYA.....2ND DEFENDANT/RESPONDENT

RULING

1. The application dated 31st August,2016 seeks the following orders:

> **"1. That this Honourable Court be pleased to strike out the Defendants' respective defences that is to say; the 1st Defendant's defence dated 20th August, 2015 and filed herein on 24th August, 2015 and the 2nd Defendant's defence dated 7th September, 2015 and filed herein on 8th September, 2015.**
>
> **2. That as a consequence if the grant of prayer No. 1 above, this Honourable Court be pleased to enter interlocutory Judgment on liability and the matter to proceed for assessment of damages on priority basis.**
>
> **3. That this Honourable Court be pleased to make any other or further Orders necessary to meet the ends of justice.**
>
> **4. That the costs of this application be in the cause."**

2. The application is predicated on the grounds stated therein and is supported by the affidavit of the 1st Applicant, Alex Mautia Morume who is also the Director of the 2nd Applicant, Amerisource Ltd. In the substantive suit, the Applicants seek damages for alleged malicious prosecution of the 1st Applicant. It is stated in the grounds that the defences filed by the Respondents consist of bare denials. That the defences filed herein are scandalous, frivolous, vexatious an abuse of the process of the court and continuing with the trial will embarrass and delay the fair trial of the suit.

3. The application is opposed. It is stated in the replying affidavit sworn by Martine Muriuki Munene counsel for the 1st Respondent that their defence is not a mere denial but raises triable issues and ought to go to trial. It is further stated that there was a reasonable and probable cause for the arrest, charge and prosecution and that the Plaintiffs are required to prove the essential elements of the wrong of malicious prosecution.

4. In the replying affidavit filed on behalf of the 2nd Respondent, it is stated that the 2nd Respondent had reasonable and probable cause when it forwarded the complaint to the Banking Fraud Investigations Department (BFID). That the 2nd Respondent acted without malice and had no control over the investigations and the prosecution. The 2nd Respondent denies the responsibility in the publication of any articles in relation to the prosecution. It is stated that several triable issues have arisen from the suit herein which ought to be resolved by way of oral evidence.

5. The Plaintiffs also filed the Preliminary Objection dated 16th December, 2016 on the following grounds:

> **"1.That save paragraph 8 of the replying affidavit dated 14th November, 2016 sworn by the 1st Respondent's Advocate Martin Muriuki Munene, the other paragraphs do not set out which are the facts based on information and belief and the sources of that information and facts deposed to from the deponent's own knowledge hence offend provision of order 19, rule 3 (1) of the Civil Procedure Rules 2010 and should be struck out.**
>
> **2. The 1st Defendant/Respondent's advocate, Martin Muriuki Munene is not competent to swear an affidavit on disputed/contentious matters in this suit and to that extent, his affidavit dated 14th November, 2016 is incompetent."**

6. Both the application and the Preliminary Objection were heard simultaneously by way of written submissions. I have considered the said submissions.

7. The principles of the law applicable in an application for the striking out of pleadings were well set out in the case of **D.T.Dobie &Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR**. Although the court has an inherent jurisdiction to dismiss a case which is scandalous, frivolous, vexatious and an abuse of the court process, it's a drastic remedy which ought to be exercised sparingly only in plain and obvious cases when it is clear that the action cannot succeed or is in some way an abuse of the court process. The parties cannot be driven out of the seat of judgment unless the case is unarguable.

8. As stated by Madan, J in the case of **D.T.Dobie (supra)**:

> **"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.**
>
> **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."**

9. In the case at hand, the Applicants have given detailed facts regarding the merits of their case. However, the said evidence requires to be tested by way of cross-examination. The Respondents have filed defences which are not mere denials but raise triable issues in respect of proof of the wrong of malicious prosecution. The Respondents also deserve to be heard on merits.

10. The Preliminary Objection raised is in respect of the affidavit sworn by counsel for the 1st

Respondent. Although counsel should not descend into the arena of the dispute before court, the impugned affidavit generally reiterates the contents of the defence filed by the 1st Respondent. Having observed above that the statements of defence filed raise triable issues that ought to go to trial, I find no merits on the Preliminary Objection raised.

11. For the aforestated reasons, I dismiss both the application and the Preliminary Objection with costs.

Date, signed and delivered at Nairobi this 17th day of May, 2018

B. THURANIRA JADEN

JUDGE