



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 100 OF 2016

YUSUF ABDI ADAN.....PLAINTIFF/RESPONDENT

VERSUS

HUSSEIN AHMED FARAH1ST DEFENDANT/RESPONDENT

HUSSEIN UNSHUR MOHAMED2ND DEFENDANT/RESPONDENT

MOHAMED ABDIKADIR ADAN3RD DEFENDANT/RESPONDENT

MOHAMED HASSANINTERESTED PARTY/APPLICANT

RULING

1. This ruling relates to a Notice of Motion Application dated 7th June, 2016, filed by the Interested Party herein, under the Provisions of Articles 50 (1) and 33 (3) of the Constitution of Kenya, Section 1A, 1B and 3A of the Civil Procedure Act,(herein “the Act”) Order 2 Rule 15 and Order 19 Rule 6 of the Civil Procure Rules (herein “the Rules”) and all the enabling provisions of the Law.

2. The Applicant filed the application seeking for a total of 7 prayers, as here below reproduced:-

(1) That this Application be certified urgent and heard exparte in the first instance;

(2) That Mohammed Hassan the Applicant herein be and is hereby joined in this suit as an Interested party only for purposes of prosecuting this motion;

(3) That this Honourable Court be pleased to strike out paragraphs 21, 22, 25 and 46 of the Petition dated 9th March 2016 and paragraphs 19-23 of the Affidavit of Yussuf Abdi Adan sworn on 23rd January 2014, filed herein as well as any other content therein which in any way makes reference to or raises allegations against the Intended Interested party;

(4) That this Honourable Court be pleased to strike out paragraph 4(j) of the Notice of Motion Application, Paragraph 53 of the Supporting Affidavit thereto sworn by Yussuf Abdi Adan on 30th March 2016, Paragraph 57 of the Complaint, paragraphs 19-23 of the Affidavit of Yussuf Abdi Adan sworn on 23rd January 2014, Paragraph 52 of the 1st Plaintiff’s Witness Statement and Paragraph 3(kk) of the Witness Statement of Mr. Abdirahman Yussuf Abdi, as well as any other content which in any way makes reference to or raises allegations against the Intended Interested party;

(5) That this Honourable Court be pleased to strike out and expunge from the record and all pleadings filed herein by the 1st Plaintiff, any other material and/or allegation to the extent that it is libelous, disparaging of the Intended Interested party herein and/or is without evidential support whatsoever and is scandalous, vexatious and an abuse of the process of this Honourable Court;

(6) That this Honourable Court grants any further, or other orders it may deem fit;

(7) That the costs of this Application be awarded to the Intended Interested party in any event.

3. However, prayers 1 and 2 are spent, following the initial hearing of the application and the grant of prayer (2), whereby the Applicant was

enjoined in this matter as an Interested Party. The Application is supported by the grounds on the face of it and an affidavit sworn by the Applicant dated 30th May 2016.

4. In a nutshell, he deposes that, on 14th March 2016, his attention was drawn to his photo in the Business Daily Newspaper under the Article headlined: “NBK board chair entangled in Kshs 100 Billion fraud claims”. Upon reading the article, he learnt with shock that, untrue, misleading and scandalous allegations had been made against him in High Court Winding up Cause No. 7 of 2016, in the matter of; Blue Bird Aviation Co. Ltd, which has since been struck out. He then instructed his Advocate to secure the Petition papers and confirm the existence of the allegations therein. He learnt that, the allegations contained in the said article were identical to those made in this suit, as they arise from the common set of complaints.

5. He avers that he has read the Pleadings filed herein on 31st March, 2016, including the Notice of Motion Application, the 1st Plaintiff’s supporting Affidavit, his statement and that of his witness, and learnt that the 1st Plaintiff/Respondent is a shareholder and director of the 2nd Plaintiff (now struck out), and seeks for a number of reliefs against three Defendants co- directors as herein stated.

6. That he is the Chairman of the National Bank of Kenya Ltd and neither a director or shareholder in Blue Bird Aviation Limited,(herein “the Company”) and is completely disinterested in the proceedings and outcome of the derivative suit herein.

7. He further averred that the 1st Plaintiff/Respondent and/or his Advocate has with unmitigated malice made extremely scandalous assertion against him, at the aforesaid paragraphs that seem to insinuate that, the bulk of the monies the 1st Plaintiff/Respondent alleges were fraudulently obtained from the Company, were channeled through him, with the sole intention to defraud the 1st Plaintiff/Respondent as well as the Company.

8. That the allegations are to be understood that, as an individual and/or the Chairman of the National Bank of Kenya, he has been engaged in fraudulent activities, including but not limited to money laundering and, that, in conspiracy with the Company and/or with some directors and/or shareholders, (not being the 1st Plaintiff/Respondent), he has defalcated or facilitated the defalcation of large sums of money and caused the sums to be stashed away elsewhere or used to purchase properties to the prejudice of the Plaintiffs.

9. He argues that, the scandalous and libelous allegations have received wide press coverage with active participation or connivance of the 1st Plaintiff/Respondent and/or his Advocate and as a result whereof, the scandalous allegations have caused and continuous to cause him and his family untold mental anguish, public opprobrium and have exposed him to great disrepute in the business community and the public at large.

10. That the allegations of misconduct on his part are false and there is no evidence proffered in support thereof. He states that the 1stPlaintiff/Respondent did not seek for any information or demand for the same on the scandalous allegation against him before the same were made in these proceedings and the subsistence of the scandalous paragraphs in the court record not only legitimizes but serves to perpetuate the ongoing unqualified injury and injustice meted against him.

11. The Applicant argues that, under Article 33 (3) of the Constitution of Kenya, he is entitled to have his rights and reputation respected, and under Article 35 (2) thereof, he has a right to have the correction or deletion of untrue and misleading information that affects his person. In that case it can only be fair that, the impugned paragraphs be expunged from the court’s record and that no prejudice shall be occasioned to the 1st Plaintiff/Respondent if the orders sought for herein are granted.

12. However, the Application was opposed vide a Replying Affidavit dated 16th February 2018, sworn by Yussuf Abdi Adan; the Plaintiff/Respondent herein. He deposed that, the substratum of this matter is the derivative suit, brought by the 1stPlaintiff/Respondent against the Defendants for the benefit of the Company. That, the Interested Party/Applicant herein is a potential witness to be called during the hearing of the substantive suit and that as a witness, he cannot have any other interest in a suit other than to give evidence.

13. The 1st Plaintiff/Respondent termed the subject Application as not only incompetent and devoid of any merit but vexing in its nature in that, it is obviously sponsored by the Defendants with a view to delay the fair hearing of the matter. He argued that the Applicant is a surrogate litigant.

14. In response to the averments in the Affidavit in support of the Application, the Plaintiff/Respondent averred that, the Applicant provided financial services of consultancies to the Defendants in a number of schemes; a case in point, being a property known as Land Reference No. 16659. That he knew very well that, the money he was entrusted with was misappropriated from the Company, and that he was not authorized by the board of directors to undertake such consultancies.

15. That the Applicant knew very well that the Defendants were siphoning the money from the Company and facilitated the scheme involving;

(a) The purchase and subsequent charging of a property L.R. No. 16659 (formerly, L.R. No. 14209) Nwambije Ranch, comprising 83,000 acres, located in Kilibasi of Kinango sub-County in Kwale, and the said property was charged to National Bank of Kenya.

(b) In 2005, the Applicant facilitated the process of the application for a license by Dahabs hill Co, a money transfer institution with presence in Kenya that wanted to open a Commercial Bank in Kenya and was in charge of raising capital from the prospective shareholders. That the Defendants subscribed to 50% shareholding and deposited substantial funds with a view to help smoothen the process of getting a license from the Central Bank of Kenya but the Application was unsuccessful.

(c) That the Applicant, being the Chief Executive Officer of the stock brokerage firm of Dyer and Blair, and knowing that funds

were always from the Company, invested millions of shillings in shares for the Defendants, and advised them on many other transactions and investments. That he also opened a foreign trading account for the Defendants at Dyer and Blair and transacted millions of Dollars.

16. It was further averred that, the National Bank of Kenya entered into an agreement dated 1st November 2012, with Shimbaland Ranching Co. Limited, whereby it was agreed that, if the charger, Mwabeja Ranching Company defaults in the repayment of the charged debt, then the Bank would exercise its statutory power of sale in respect of the said sale. Subsequently, Mwabeja Ranching Co. defaulted in the repayment and the property was sold to Shimbaland Ranching Company Limited through a private treaty at the price of Kshs 305,000,000.

17. That the 1st, 2nd and 3rd Defendants herein are the shareholders of Shimbaland Ranching Co. Limited and that the property was allegedly bought for and by the Company. It is averred that the sale of the property was approved by the board of directors of the National Bank of (K) Ltd, and that the Applicant who is a Chairman thereof failed to disclose the conflict of interest in the transaction.

18. The Plaintiff/Respondent refuted the allegation by the Applicant that he and/or his Advocate participated in the publication of the subject article in the Business Daily Newspaper. Further, no evidence has been presented to the Court to show that the Applicant has allegedly suffered any damage to his alleged reputation within the business community and the public at large. That even then, this is the wrong forum to address such concerns.

Finally, the Plaintiff/Respondent argued that, the grant of the orders sought for herein, will greatly weaken his case and compromise the suit. It was argued further that, the Applicant cannot join a suit to strike out paragraphs and exit the proceedings.

19. The parties disposed of the Application through oral submissions. The Applicant reiterated the averments in the supporting affidavit to the effect that, in the Plaint filed herein, there are no prayers sought against him and even after the Court allowed joinder, there is no claim against him. That the allegations at paragraph 57 of the Plaint, and repeated in various other paragraphs as aforesaid are serious and if they turn out to be true, he ought to be made a Defendant, yet he is not.

20. It was submitted that the requirement of the law after the 2010 Civil Procedure Rules, in particular Order 2 Rules 3, requires evidence be annexed to initial statement of claim, the idea being to do away with frivolous claims and yet when the Plaint herein was filed, there was no material relating to the serious allegations against the Applicant attached thereto. Therefore, the allegations are made without any evidence to prove the same at least on prima facie basis.

21. Reference was made to the case of; *Musikari Kombo –vs- Moses Masika Wetangula & 2 Others (2013) eKLR*, and *Samuel Ndung'u Mukunya –vs- Nation Media Group Limited & Another (2012) eKLR*, where the Court struck out the impugned paragraphs as no evidence was provided to prove the allegations therein were and the culpability of the person charged.

22. The Applicant submitted that a suit cannot be used to tarnish a non-party thereto. That such pleading become ambiguous. He relied on the case of; *Steven Kariuki –vs- Mike Wanjohi & 2 others (2013) eKLR*. Further that although the Plaintiff's/Respondent's position is that scandalous material can be included in a suit, however, the Court can strike it out, if it irks the other party and more so, if it is against the non-party.

23. That the Applicant is not concerned with the striking out of the suit, and need not wait for the whole trial, in that the way the trial is framed he is completely left out, and that the Applicant is not in this matter to prove the veracity of the claim. That although the Applicant is cited with two companies of; National Bank of Kenya and Dyer Blair, he cannot be cited as an individual and the Plaint has no prayers against these companies. Thus, there seems to be a personal vendetta.

24. That there are also allegations of funds transfer to Arab Emirates which are of criminal nature and yet there is no evidence that, there is a criminal claim or a claim against the Applicant in this matter. Thus the intention is to injure him so that, he is not given an opportunity to be heard.

25. The Applicant termed the Plaintiff's/Respondent's averments at paragraph 16 in the Affidavit dated 16th February 2018, that the striking out of the impugned paragraph will greatly weaken the case and compromise the suit as a weak excuse. That the case is not against the Applicant and it is quite clear that, he is not a compellable witness; therefore, the allegations are merely aimed at tarnishing him in the public face.

26. That the position in law is clear that, where scandalous material is contained in pleadings, and the material is unnecessary and may be indecent, offensive and made to prejudice a person not even a party, the allegations would be considered scandalous and the Court will not hesitate to strike them out.

27. The Applicant finally submitted humbly the particular paragraphs in prayer 3, 4, and 5 be struck out; and he be released from participation in line of paragraph 5, 6 and 7.

28. In response, the Plaintiff/Respondent submitted that it is not in issue that the Applicant is not a party as a Defendant and that he is in the matter just for the purpose of the application and if he succeeds or fails, he will parachute. He cannot vindicate or validate a right. That there is no law in this country that allows, a Court to strike out pleadings that will not benefit a Plaintiff or Defendant.

29. That the Articles 50 (1), 35 (2), and 33 (3) of the Constitution do not deal with the matter herein, and neither do the other provisions cited under the Civil Procedure Rules and that a guest litigant cannot make an application to strike out pleadings. He should have come in as a Defendant.

30. In addressing the specific prayers in the Application, the Plaintiff/Respondent submitted that prayer (3) thereof; prays for striking out of the paragraphs of the Petition dated 9th March 2016, but the Petition has been struck out and that gives compliment to him. That prayer(4) which refers to paragraph 4 (j) of the Notice of Motion Application, is directed to the Defendants and does not concern the Applicant unless, he is just eager.
31. That as regards paragraph 53 of supporting Affidavit and paragraph 52 of witnesses statement and paragraph 57 of the Plaintiff; and 3 (k) of witness statements, there are three distinct allegations made against the Defendant; namely; purchase of land, incorporation of a company and shares of Kshs 700,000,000, carried out when the Applicant was the Chief Executive Officer of Dyer and Blair.
32. That, it is noteworthy that, the Applicant does not state in the Supporting Affidavit that, he did not work for Dyer and Blair, he does not aver that he is a stranger to the Defendants and does not deny that, he maintained the three accounts. That if allegations are made and a person keeps quiet, the evidentiary burden shifts. , and if you don't answer, then the burden shifts as stated under Section 107 -109 of Evidence Act.
33. The Plaintiff/Respondent referred the Court to annexure to the Replying Affidavit marked "YAA 1", being sample transactions from Dyer & Blair Investment Bank, showing from pages 1 to 4, that the total transactions is Kshs 365,305,917.23 and conducted by the 3rd Defendant, and at page 5 to 8 thereof is the account of 1st Defendant Hussein Ahmed Farah showing he transacted to a tune of Kshs 226,115,579.72 and at pages 9 to 14, is the statement of the 2nd Defendant that he transacted to a tune of Kshs 259,013,905.61. That the money was invested at Dyer and Blair when the Applicant was the Chief Executive Officer. Therefore the allegations are not scandalous allegations.
34. Further, annexure marked "YAA 2" relates to Shimbaland Ranch Co. Ltd, and at page 23 thereof is form C2 of that company, which shows the Defendants herein are shareholders and directors thereof, and at page 15 is a sale agreement between National Bank of Kenya and the Ranching Company Ltd, which sale took place on 15th November 2012, when the Applicant was the chairman of the Bank, having been elected in June 2011, yet there was no disclosure of conflict of interest. That the Applicant has not produced any minutes to show that the sale was above board, yet at page 87 of the Judgment annexed to the Replying Affidavit, the Court found that the property was sold at an undervalue and the Bank had to pay a whopping sum of Kshs 156,938,000. Therefore, it is not correct to allege that the Plaintiff/Respondent is merely making allegations without evidence.
35. The Plaintiff/Respondent submitted that the cases herein are between the Plaintiff and the Defendant and at interlocutory stage there is zero obligation to prove allegations therein. That at the trial, the test is on the balance of probability and then the Court passes Judgment, and a judgment cannot be passed for the benefit of a non-party, if it does, it will be very prejudicial.
36. That the Plaintiff/Respondent has made allegations on other parties including Ms. Jan Mohammed at paragraph 35 and an American Company and if every person comes to Court, the Plaintiff will be cannibalized and nothing left of it.
37. In considering the authorities relied on by the Applicant, the Plaintiff/Respondent's Learned Senior Counsel submitted that, the case of; *Charles C. Sande vs KCC*, stipulates that issues before a Court can only be done through pleadings and the only issues for determination are those in the pleadings. That had the Applicant joined the suit as a Defendant, he then would have proper legal standing. The case of; *David Sironqa Ole Tukai vs- Francis Arap Muge & 2 Others (2014) eKLR*, cited to state the legal position of adjudicate of issues, not pleaded. Further reliance was placed on the write up of Gatley on: Libel and Slander.
38. It was submitted that the Application amounts to an abuse of the court process, that the Applicant wants an a "la carte, he does not want a buffet". Reference was made to the case of; *Hunter vs- Chief Constable of West Midlands Police & Others (1981) UKHL 13 (19 November 1981)*, where Lord Diplock dealt with what constitutes an abuse of process of the Court. That the Judge has a duty to protect the process of the court
39. Finally, it was submitted that, this is not a criminal trial, but a derivative suit on behalf of the Company for a wrong done to it by the Defendants. That it is not alleged that the Applicant has committed a criminal offence. He is not criminally culpable but it is pleaded that as a financial consultant he traded with the company in a manner prejudicial to it. It is a commercial claim.
40. However in the final reply, the Learned Senior Counsel representing the Applicant submitted that the Application is not frivolous. It's not made by a non-party as the Court allowed the Applicant to be a party herein. Therefore any documents filed are treated as a pleading pursuant to Civil Procedure Act. That under Article 27, of the Constitution of Kenya, any party who has an interest in the matter can come inter meddle and seek relief; and under Article 33(3) the Applicant is rightly able to come before the Court, to protect his constitutional rights and under Article 35 (2) he has a right to have the false information corrected and deleted.
41. It was further submitted that under Section 1A, 1B, of the Civil Procedure Act the matters should be dealt with in a just and expeditious manner. There is no doubt, there is a dispute between Plaintiff and Defendants and as the Plaintiff/Respondent has dragged the Applicant into the matter, the Court should seek to give effect to the overriding objectives.
42. The submissions terming the Application as incompetent, in that prayer (3) refers to a non-existent Petition; were rebutted by the submissions that, when the Application was filed there were two suits in this matter, and the winding up No. 7 of 2016, was subsequently, quite rightfully dismissed when the Application was filed, and under paragraph 4, the prayers refer to proceedings before the Court.
43. The Applicant argued that he has admitted that, he is the chairman of National Bank of Kenya. However he is not concerned with the allegations made against him but the veracity thereof and that an injured person is entitled to come to court. That the arguments made in relation to sections 107 to 109 of the Evidence Act are erroneous in relation to what is a burden of proof and the onus of proof, which arises where one party in evidence has said one thing against the other, and ought to be proved. That the onus does not arise in pleadings. It arises at trial and no such thing arises in this Application. That the burden of proof is always on the allegor and evidence goes into the onus of proof

and blunt allegations in pleadings, call for a blanket traverse. Reference was made to; Mulla but onus remains on the alleging party. In any case, under paragraph 3 and paragraph 13, of the Affidavit of the Applicant, he clearly denies the entire scandalous allegations.

44. That a pleading is defined at section 2 of the Civil Procedure Act. That an Originating Summons is a Pleading and so is an Interlocutory Application.

45. The case of; Ole Tukai, was termed as irrelevant here and that it should be dealt with at the end of the trial and that the Court cannot rule at the end of the case on an issue which was not an issue. It was for the Plaintiff/Respondent to decide who to sue.

46. I have considered the rival submissions well-articulated by the Learned Senior Counsels representing each party herein and the authorities cited and/or relied on. I am grateful for the same. In considering the entire Application, I wish to point out from the outset that, first and foremost, the Plaintiff filed this suit against Defendants who are not participating in the hearing of this Application, due to the fact that, the main contest is between the Applicant and the Plaintiff/Respondent. Therefore any orders made at this stage must not lose sight of that fact. Secondly, though the allegations complained are in reference to the Applicant, they are also leveled against the Defendants who are sued jointly and/or severally. Therefore once again, it should be borne in mind how any orders made at this stage will affect the entire case. Thirdly, the matter is still at an Interlocutory stage and it is important that precaution be taken so that the Court does not delve into the merits of the case that may be prejudicial to the entire case or the parties.

47. Be that as it may, in my considered opinion, the issue is whether, the Applicant has made out a case, for expunging the impugned paragraphs and/or averments herein. It suffices to note that, the Court has discretionary power under **Order 2 Rule 15** of the Civil Procedure Rules, to strike out pleadings as here below provided:-

“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

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.” (emphasis mine)

48. However, it is trite law that, the power to strike out pleadings must be exercised judiciously and not whimsically. Indeed case law is settled on this issue. The cases of, inter alia; Yaya Towers Limited vs Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000, DT Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR 1; and Co-Operative Merchant Bank Ltd vs George Fredrick Wekesa Civil Appeal No. 54 of 1999 held that:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

49. To revert back to the matter under consideration, I find that, the main grounds raised by the Applicant are that, the offending and/or impugned materials are; *scandalous, frivolous or vexatious*. The parties referred the Court to various legal authorities on what constitute a scandalous and/or vexatious pleading. I have considered the same, save to refer to the case of; Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164, where it was stated that;

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?”

50. In the same vein, the Court in the case of; Joseph Gitau & 2 Others vs Ukay Estate Ltd NBI HCCC No. 813 of 2004, while considering what constitute scandalous materials had this to say:-

“allegations in a pleading are scandalous if they state matters which are indecent, or offensive or made for mere purpose of abusing or prejudicing the opposite party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party, or make any charge of misconduct or bad faith against him or someone else.”

51. These legal principles have also been upheld in the cases of; Blake vs Albion Life Assurance Society (1876) LJQB 663; Marhamvs Werner, Beit & Company (1902) 18 TLR 763; Christie vs Christie (1973) LR 8 Ch 499, save to add that, matters that are necessary but otherwise accompanied by unnecessary details, may be deemed scandalous.

52. However, it is noteworthy that, materials may not be scandalous, if the matter, however scandalizing, is relevant and admissible in evidence, in proof of the truth of the allegation, in the Plaintiff or Defence, therefore, when considering whether the matter is scandalous,

regard must be had to the nature of the action.

53. Thus, basically the impugned allegations should have probative value, tending to prove or disapprove a matter in issue. It should not be frivolous. In that regard the cases of; *Dawkins vs Prince Edward of Save Weimber (1976) 1 QBD 499*; *Chaffers vs Goldsmid (1984) 1 QBD 186* held that; a matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting court's time; or (v) when it is not capable of reasoned argument.

54. Similarly the allegation should not be vexatious, and a matter is vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v) where it can really lead to no possible good. (See *Willis vs Earl Beauchamp (1886) 11 PD 59*).

55. Finally the impugned allegation should not amount to a pleading that tend to prejudice, embarrass or delay fair trial. A pleading is prejudicial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) it is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See *Strokes vs Grant (1878) AC 345*; *Hardbord vs Monk (1876) 1 Ex. D. 367*; *Preston vs Lamot (1876)*.

56. I also find that one of the key factors to consider before holding that a particular material is scandalous is whether that material is relevant. in the case of; *Fischer vs Owen (1878) 8 C.D. 645*, it was stated that a matter can only be said to be scandalous if it is irrelevant.

57. The key questions herein remain, as to whether the impugned materials are scandalous and indeed, lower the Applicant reputation in the eyes of the right thinking members of the society. The learned Senior Counsel, Mr Fred Ojiambo, strongly submitted that, the Plaintiff/Respondent has made serious allegations of criminal nature and in such a general manner without evidence and it prejudices the Applicant.

58. The Court was referred to the case of; *Tipis vs Ntimama & Another (2008) 1 KLR (EP) 346*, where the Court stated that, the deficiency of particulars in the pleading or statements cannot then be salvaged by Rule 17 (1) (f). That one fundamental precept underpinning our judicial system is equality of parties before the Court. That, Article 50 of the Constitution sets out the right to a fair trial. It is a fundamental right and Article 25 of the Constitution states that the right cannot be derogated from.

59. However, the Plaintiff/Respondent maintains that, he has adequate evidence to support the impugned allegations during the trial and has no apology to make for the same; that given an opportunity he will repeat the same.

60. I have considered the averments in the impugned paragraphs and I have no doubt in my mind that, they are indeed quite serious. In the given circumstances, the question that arises is; whether the Court should grant the orders sought for herein at this stage. As rightfully submitted by the Applicant, every person has a right under Article 35 of the Constitution, to access information held by the State and/or any other person relating to him. He also has the right to the correction or deletion of untrue or misleading information that affects him or her.

61. Indeed, under Article 23 thereof, the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

62. However, I find that this is a matter of competing interests, the Applicant is entitled to the above stated rights but the Plaintiff too, is entitled to a right to be heard and access justice under Article 48. At this stage I will invoke what I term as, the rule of "the lesser evil". It simply begs the questions: If the impugned information is expunged at this stage, who among the parties would more adversely affected and/or prejudiced. What if the case proceeds and during the trial, there is evidence adduced to support the allegations complained against and at that stage the material has been expunged? What if there is no evidence adduced to support the same; will the Applicant be justly compensated in damages? Will the Applicant have an opportunity to be heard to rebut the said allegations?

63. In answering these questions, evidence must be availed as of necessity. It cannot be done at this stage. It was submitted that the Applicant is a witness in this matter and will have an opportunity to answer to the allegations. However it was also properly submitted that, this is not a criminal trial and that he is not a Defendant. However he is an Interested Party, and has a right to participate in the matter as such. He is not a spectator.

64. In this regard, I am inclined to disallow the Application at this stage to allow the Plaintiff an opportunity to present the evidenced alleged to be available. I note that several other issues were raised by the parties in their arguments relating to but not limited to: what constitute a pleading, an abuse of the Court process and the violation of the Applicant's constitutional right. I am inclined to hold and do hold that, they be reserved for the main hearing. The costs of the Application will abide the outcome of the main suit.

65. It is so ordered.

Dated, delivered and signed in an open Court this 23rd day of July 2018.

G. L. NZIOKA

JUDGE

In the presence of:

Mr. Ahmed Nassir SC, -----for the Plaintiff/Respondent

Ms. Jan Mohammed -----for the 1st Defendant/Respondent

No appearance ----- for the 2nd Defendant/Respondent

No appearance -----for the 3rd Defendant/Respondent

Mr.Jelle for Mr. F. Ojiambo, SC,--- for the (I. P)/Applicant

DennisCourt Assistant