REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 121 OF 2015

MUIGA KURIA .... PLAINTIFF

VERSUS

SAFARICOM LIMITED .... DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated on 12th April 2017 and filed on 13th April 2017 was brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Rules 2010 and other enabling provisions of the law. It sought the following prayers:-

1. THAT the Plaint dated 19th March, 2015 be dismissed/and or struck out in its entirety.

2. THAT the costs of the Application and of this suit be in the cause.

THE DEFENDANT'S CASE

2. The Defendant's application was supported by the Affidavit of its Principal In-House Counsel, Litigation Management, Daniel Ndaba, on 12th April 2017. Its Written Submissions were dated 10th May 2018 and filed on 14th May 2018.

3. Its case was that it was a leading telecommunication service provider across the country and was not in any way involved with the operations of the police in the country. It stated that it had no knowledge of occurrences of 4th July 2013 between the Plaintiff herein and a certain policeman and that in any event, roughing up civilians was by no means part of its ordinary course of business.

4. It was thus its averment that the facts of the suit herein were inconsistent, erroneous, baseless and intended to mislead the court and tarnish its impeccable reputation and cause it damage in the eyes of the public at large who were its key target customers.

5. It pointed out that during subscription and registration of a sim card, a subscriber was required to confirm all the details he provided to the agent and that the duty of investigating criminal activities lay with the police.

6. It termed the Plaintiff's suit as scandalous, frivolous, vexatious and that added that it failed to disclose any reasonable cause of action against it.

7. It therefore urged this court to strike out and/or dismiss the suit herein in its entirety with costs to it.

THE PLAINTIFF'S CASE

8. In response to the said application, on 22nd June 2017, the Plaintiff swore a Replying Affidavit that was filed on 23rd June 2017. His Written Submissions were dated and filed on 4th June 2018.

9. His case was that the Defendant gave the police a false report which they used to track him down through his Sub-Chief and arrested him. He stated that police officers informed him that his Safaricom line had been registered under ID Number 112547610 instead of 1125476, the former number belonging to a woman who had been linked to multiple robberies.

10. His contention was that he would not have undergone the ordeal he went through had the Defendant not provided the police with erroneous information. He was therefore emphatic that his defence had disclosed a reasonable cause of action and denied that it was not vexatious, scandalous or frivolous as had been contended by the Defendant herein.

11. He averred that the Defendant's Statement of Defence consisted mainly of denials and consequently, urged this court to dismiss the present application with costs to him.

LEGAL ANALYSIS

12. The Defendant submitted that it had nothing to do with the ordeal that the Plaintiff went through in the hands of police and that he had not adduced evidence to demonstrate that it was liable for negligently giving police erroneous information.

13. It referred this court to the case of **Grace N Karianjahi vs Dr Simon Kanyi Mbuthi [2002] eKLR** where it was held as follows:-

> **"The Plaint can also be frivolous, if it has no substance, it is fanciful or that the party is simply trifling with the Court or wasting the Courts time. The Pleading is also vexatious if it has no foundation in law, it is filed for the mere purpose of annoying the other party; it is leading to no possible good and has no chance at all of succeeding. On the other hand, pleadings are otherwise an abuse of the court process when they are filed in court simply to waste its time or when they are worthless or to delay the due process of the law".**

14. On his part, the Plaintiff set out in detail what his case was about to demonstrate that his case had disclosed a reasonable cause of action. He referred this court to the case of **Elijah Sikona & Another vs Mara Conservancy & 5 Others [2013] eKLR** where it was held as follows:-

> **"22. There are well established principles which guide the court in exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court".**

15. He also placed reliance on the case of **Wedlock vs Moloney [1965] 1 WLR 1238** where it was held that:-

> **"…Summary jurisdiction of court was never intended to be exercised by a minute and protracted examination of documents and the facts of the case in order to see if the Plaintiff really has a cause of action…"**

16. He further relied on the case of **D.T. Dobie Co Ltd vs Muchina [1982] KLR** amongst other cases where the common thread was that the court's power to strike out pleadings must be exercised cautiously, sparingly and in the clearest of the cases.

17. He argued that he had a right to be heard to (**sic)** administrative action as contemplated in Articles 47, 48 and 50 of the Constitution of Kenya, 2010.

18. Order 2 Rule 15 (1) of Civil Procedure Rules, 2010 provides as follows:-

> **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.**
>
> **(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.**
>
> **(3) So far as applicable this rule shall apply to an originating summons and a petition.**

19. The court must be cognisant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it is plain and obvious that a plaint discloses no reasonable cause of action or defence in law, where a plaint is scandalous, frivolous, vexatious, where a plaint may prejudice, embarrass or delay the full trial of the action or where the plaint is otherwise an abuse of the court process.

20. In the same breathe, a court must exercise restraint and proceed very cautiously when it has been asked by a party to strike out pleadings

before a matter has proceeded for full trial. Indeed, striking out pleadings before hearing of a matter is a draconian step and must be used sparingly and in the clearest of the cases as was held in the case of **D.T. Dobie Company Limited vs Muchina (**Supra) and in the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) held as follows:-

> "**It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."**

21. This court carefully considered the Plaintiff's submissions and noted that analysing the same had the potential of this court combing through the evidence he was relying upon to determine whether or not he had disclosed a reasonable cause of action, a situation that was envisaged in the case of **Wedlock vs Moloney** (Supra). At this point, this court should only be concerned if there was outright demonstration of the instances contemplated in Order 2 Rule 15 (1) of the Civil Procedure Rules.

22. The question of whether or not the Defendant was negligent as was particularised in Paragraph 10 of Particulars of Negligence showed that this was not a clear cut case. There was need for the court to interrogate the merit or otherwise of the Plaintiff's assertions to determine if the Defendant was negligent as he had contended. Striking out of the pleadings at this point had the potential of infringing on the Plaintiff's right to have his dispute determined by a court of competent jurisdiction as stipulated in Article 50 of the Constitution of Kenya.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's Ruling was that the Defendant's Notice of Motion application dated 12th April 2017 and filed on 13th April 2017 was not merited and is hereby dismissed with costs to the Plaintiff.

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of September 2018

J. KAMAU

JUDGE