



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 84 OF 2017

NAZI WASHE MUNGA.....PLAINTIFF

VERSUS

PETER GIKONYO NG'ANG'A.....DEFENDANT

RULING

1. On 12th October, 2017, the plaintiff/applicant filed an application of even date premised on the provisions of Order 2 rule 15(1) (b) (c) (d) and Order 51 rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. She seeks the following orders:-

- (i) That the written statement of defence herein be struck out or expunged from the court record;
- (ii) That Judgment be entered against the defendant as prayed in the plaint; and
- (iii) That the costs of this application and of the suit be borne by the defendant.

2. The application is anchored on the grounds on the face of it and the supporting affidavit of Nazi Munga, sworn on 12th October, 2017. The defendant/respondent filed a replying affidavit dated 30th November, 2017 to oppose the application. The applicant filed her written submissions on 25th January, 2018. The defendant filed his on 19th February, 2018.

3. Mr. Ngonze, Learned Counsel for the applicant informed this court that the genesis of the suit herein is a letter that the respondent wrote to the Director of Public Prosecutions with regard to an alleged misconduct at Tononoka Children's Case No. 120 of 2016. The said letter alleges that the applicant and his lawyer were having an affair with the blessing of the Hon. Magistrate, which compromised the case. The court was referred to the documents marked NWM 3 which impugn the applicant's morality. It was stated that a demand letter was written on 13th March, 2017, marked as NWM 4 and it was received by the respondent on the same day.

4. It was submitted that instead of replying to the demand letter, the respondent filed a replying affidavit on 15th March, 2017 in the Children's Court. Counsel made reference to paragraph 6 thereof where the respondent stated that the purpose of the letter was in pursuit of justice and he was desperately seeking other avenues to access his son through the complaint letter. Reference was made to the plaint filed on 25th August, 2017 which was received on 31st August, 2018 by the respondent which in paragraphs 4-8 refers to the demand letter.

5. It was submitted that in paragraphs 4(d), (e) and (f) of the statement of defence, the respondent qualifies the defence of fair comment by stating that at a court attendance of 13th March, 2017, the applicant herein and the plaintiff in High Court Civil Case No. 82 of 2017 were engaged in an animated discussion relating to the time spent together in Dar-es-salaam, Tanzania, to show that they were having an amorous relationship.

6. The court was referred to the annexure marked NWM-5 being the proceedings of 13th March, 2017 which show that the lower court was not sitting on the said date.

7. The court was referred to the witness statement at paragraph 6 which shows that the plaintiff in Mombasa HCCC No. 82 of 2017 did not attend court and the allegations made by the respondent about him and the plaintiff herein being engaged in animated discussions are false.

8. It was submitted that the defendant failed to attach documentary evidence to his replying affidavit which was described as threadbare and that there was no response to the factual averments contained in the replying affidavit or in support of the defence case.

9. The applicant's Counsel stated that the power to strike out pleadings is used in instances where the cases are as clear as daylight. He relied

on the case of **Figuerado vs Editor Sunday Nation and Others** [1968] EA at paragraph E, to support his assertion.

10. Mr. Ngonze submitted that the respondent must show that each statement in the publication is true. Further, if the averment qualifies, the allegation of fair comment is false and it follows that the defence is untrue and the initial publication would be untrue. Counsel argued that the right to a fair hearing should not be at the expense of the applicant being dragged into unnecessary proceedings. He prayed for the defence to be struck out and for the matter to be fixed for formal proof. He further indicated that the submissions made in support of the present application apply to a similar application made in Mombasa High Court Case No. 82 of 2017, Daniel Mutiso Ngonze vs Peter Gikonyo Ng'ang'a.

11. The respondent opposed the application dated 12th October, 2017. He submitted that he and the applicant herein are biological parents of one Justine Washe Gicheru, the subject of Tononoka Children's Court (TCC) No. 120 of 2016, Peter Ng'ang'a vs Nazi Munga and Another in which the respondent was the plaintiff.

12. The respondent referred to the case of **Equatorial Commercial Bank Limited vs Jodam Engineering Works Limited and 2 Others** [2014] eKLR, where the court outlined what constitutes a reasonable defence and held that a defence has to raise a *prima facie* triable issue. The respondent submitted that he had in paragraph 4 of his statement of defence responded fully to the applicant's allegations in paragraphs 4 to 15 of the plaint. He indicated that he had comprehensively addressed the issues raised by the applicant. He asserted that the averments in the plaint were on the basis of an honest opinion and a factual and true summation of the attendant facts. The respondent further stated that he had indicated that the letter dated 18th January, 2017 was not malicious and did not defame the applicant.

13. The respondent further stated that there were triable issues as the defence he filed had not been responded to. He cited the case of **Unga Millers vs James Mueni Kamau** [2005] where Gacheche J (as she then was) held that he who does not file a reply to such a defence is deemed to have admitted the said allegations.

14. He referred to the case of **Wenlock vs Moloney** [1965] 1 WLR where the principles of what a court should consider when faced with an application for striking out a suit were laid out.

15. The respondent informed the court that the statement of defence he filed was a reasonable one. He further submitted that the power to strike out proceedings is a discretionary one. He cited the case of **D.T Dobie Company (Kenya) Limited vs Muchina** [1982] KLR, where Madan J.A said that the power to strike out pleadings should be sparingly used and only when the pleading is shown to be clearly untenable.

16. He also relied on the case of **Crescent Construction Co. Ltd. vs Delphis Bank Limited** [2007] eKLR, in which the Court of Appeal held that the power to strike out pleadings should be exercised with the greatest of care and caution.

17. The defendant urged this court not to drive him from the judgment seat as his defence raises triable issues. He stated that his witnesses will come to court to counteract the applicant's allegations as he had filed witness statements, his list of documents and bundle of documents. He stated that his submissions herein apply to the case in Mombasa HCCC No. 82 of 2017.

18. In responding to the defendant's submissions Mr. Mutiso invited the court to look at the applicant's witness statements *vis a vis* the respondent's previous witness statements and the statement of defence. He submitted that there were glaring disparities with regard to the occurrences of 13th March, 2017 between the case in Mombasa HCCC No. 82 of 2017 and the present case.

19. In referring to the case of **Raphael Kitur vs Radio Africa t/a The Star** [2014] eKLR, Counsel for the applicant submitted that the court held that the summary procedure of striking out pleadings is applicable in plain and obvious cases. He stated that the respondent's statement of defence seemed to be change at all occasions.

20. Mr. Ngonze made reference to the case of **John Wood vs The Standard Ltd** [2006] eKLR where the court laid out the conditions to be considered before determining whether the defence is for striking out in a defamation case.

21. He further submitted that in the **D.T Dobie Company (Kenya) Limited vs Muchina** case (supra), the court held that the only amendment that can be injected in a case is through a pleading and not the evidence.

ANALYSIS AND DETERMINATION

22. The issues for determination are:-

- (i) If the defence herein should be struck out for failing to raise triable issues; and
- (ii) If Judgment should be entered against the defendant.

23. The applicant in her supporting affidavit to the present application asserts that the statement of defence should be struck out for the following reasons:-

- (i) That it is a sham, frivolous and consists of mere denials which ought not to be countenanced by this court;
- (ii) That on 13th March, 2017, Tononoka Children's court which was seized of Tononoka TCC No. 120 of 2016 did not sit and the events alleged by the defendant could not have taken place therein;

(iii) That the defence of justification would only set in prior to the publication of 18th January, 2017 and not a reaction to the demand letter of 13th March, 2017 or the alleged events of 13th March, 2017. The applicant regarded the belated attempts to plead “justification” for the defamatory publication as poorly scripted, disjointed and a ridiculously bizarre condition that only serves as fodder for aggravated damages. The applicant deposed that the indirect plea for justification was never pleaded in response to the demand letter dated 13th March, 2017 or incorporated in paragraph 6 of the respondent’s supporting affidavit sworn on 14th March, 2017;

(iv) That she and the respondent were never married and if they were, he should have resorted to divorce proceedings and;

(v) The respondent admitted publishing the remarks which the applicant deems to be defamatory, thus the respondent has no defence to the issues pleaded in the plaint. The applicant referred to the statement of defence as an abuse of the court process which is intended to delay an expedited determination of the matter.

24. In his replying affidavit, the respondent deposes that the statement of defence is not an abuse of the court process but is a true summation of the matters in relation to the present action. He states that the letter dated 18th January, 2017 was not malicious and did not defame the applicant and the matter is best dealt with by the court, after parties have adduced evidence.

25. The respondent further deposes that the claim for libel ought not to stand because the publications made were factual and not defamatory to the applicant in any way. He considered the present application as being geared towards denying him the right to be heard.

26. The provisions of Order 2 rule 15(1) of the Civil Procedure Rules state as follows:-

“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

(b) It is scandalous, frivolous and 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 be entered accordingly as the case may be.”

27. The applicant herein alleges to have been defamed through a letter dated 18th January, 2017 that was addressed to several parties. It is alleged that further defamatory words were authored by the respondent in a document titled “My statement” filed in the Tononoka Children’s Court Registry on 8th February, 2017. The applicant in paragraph 8 of her plaint states that the respondent knew that the contents of the said publications were likely to be perused and internalized by persons they were addressed to as well as employees of the institutions the publications were sent and other persons who had reasonable access thereto in the ordinary course of business and/or human conduct and that they were actually perused and internalized.

28. In his statement of defence filed on 28th September, 2017, the respondent in paragraph 4 denies the contents of paragraphs 4 to 15 of the plaint and puts the applicant to strict proof thereof. The respondent asserts the reasons as to why he made the alleged defamatory remarks. In paragraph 5 thereof, he avers that the allegations in the plaint arising out of his statement in TCC No. 120 of 2016 were made on the basis of an honest opinion and a factual and the summation of the attendant facts.

29. The respondent in paragraph 6 of his statement of defence avers that the contents of the letter dated 18th January, 2017 were not malicious and did not in any way defame the applicant as they contained materially, factual and truthful assertions.

30. The Court of Appeal in the case of **Ramji Megji Gudka Ltd. vs Alfred Morfat Omundi Michira and 2 Others** [2005] eKLR stated as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT Dobie & Company (Kenya) Ltd vs Muchina [1982] KLR 1, in which Madan J.A. at p. 9 said:-

“The Court ought to act very 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. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.” (emphasis added).

31. In the present case, the respondent has steadfastly stood by the veracity of the publications he made. He has pleaded honest opinion and

factual summation of the facts attendant to the issues that transpired prior to him penning the alleged offending writings. In **Blue Sky EPZ Limited –vs Natalia Polyakova & Another [2007] eKLR**, the court held that:-

“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue.” (emphasis added).

32. Having perused the averments in the plaint as against those contained in the statement of defence, it is my finding that the latter raises triable issues which will have to be fully thrashed out in a full trial. I therefore hold that the statement of defence on record is not a sham or an abuse of the court process.

33. In **Provincial Insurance Company of East Africa Limited** now known as **UAP Provincial Insurance Limited vs Lenny M. Kivuti**, Civil Appeal No. 216 of 1996 (unreported) the Court of Appeal stated:-

“In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend.”

34. I decline to strike out the statement of defence for the reasons given in this ruling. The application dated 12th October, 2017 is hereby dismissed. Costs are awarded to the defendant/respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of November, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mathare holding brief for Mr. Ngonze for the plaintiff/applicant

No appearance for the defendant/respondent

Mr. Oliver Musundi - Court Assistant