



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NUMBER 257 OF 2015**

**HON. MIKE MBUVI SONKO.....PLAINTIFF**

**VERSUS**

**GOVERNOR EVANS ODHIAMBO KIDERO.....1<sup>ST</sup> DEFENDANT**

**THE STAR NEWSPAPER.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The 1<sup>st</sup> Defendant/Applicant herein has moved the court by way of Notice of Motion dated 16<sup>th</sup> October, 2015 seeking the following orders: -

1. Spent
2. The suit be struck out or the name of the 1<sup>st</sup> Defendant should be struck out; and
3. The costs of the Application be provided for.

The Application is brought under Section 3A of the Civil Procedure Act, Order 1 Rule 3, 9 and 10 (2), Order 2 Rule 15, Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions.

The Notice of Motion is premised on the grounds set out on the body of the same and it's supported by the Affidavit of Hon. Dr. Evans Kidero sworn on the 16<sup>th</sup> day of October, 2015.

The summary of the facts as captured in the said Affidavit are that, the Plaintiff herein filed a plaint dated 27<sup>th</sup> day of July, 2015 against Applicant and the Star newspaper alleging that the Star Newspaper and the Applicant have defamed him based on an article that was published by the Star Newspaper on the 23<sup>rd</sup> day of June, 2015. The Plaint was accompanied by the Notice of Motion dated 27<sup>th</sup> July, 2015.

The 1<sup>st</sup> Defendant avers that the Plaint is based on the Star Newspaper Article dated 23<sup>rd</sup> June, 2015 which is titled: -

***“Kidero says Sonko is a drug peddler”*** and read as follows: -

***“Kidero accuses Sonko of using his ambulances and hearses to supply drugs to the slum.....  
It is very ironical that ambulances are roaming all over our roads in full sirens for people to***

*assume someone's health is in danger only to find out they are dashing drugs to some place... it is sad for respected leaders to use their influence to destroy our young generation with drugs instead of mentorship and financial empowerment projects to end poverty.”*

The 1<sup>st</sup> Defendant depones that the Plaintiff does not quote the words verbatim that were allegedly uttered by him but instead the Plaintiff has quoted verbatim the words from the newspaper excerpt to show the words that were allegedly spoken by 1<sup>st</sup> Defendant with an intention to defame him. According to him there is no nexus between him and the plaintiff in any way whatsoever and the plaintiff does not disclose any reasonable cause of action against him and should therefore be struck out. He relied on the case of **Gatimu Farmers Co. Ltd Vs Mbugua & Another (2004) eKLR** where the court struck out the suit as it did not disclose any reasonable cause of action against the Defendant.

In the alternative, the Applicant has sought that his name be struck out from the suit as he has been wrongly enjoined in the suit, the reason being that he was not the author, or writer or editor or the publisher of the alleged defamatory article. In his view, the article was authored solely by the 2<sup>nd</sup> Defendant and if any other party is to be enjoined, then it should be the author of that article or the chief editor of the Star Newspaper. He states that he is not in control of what the Star Newspaper publishes and if it chooses to give a “**juicy**” interpretation of his statements then the Applicant cannot purport to sue him for their undoing.

The Applicant depones that at no point in his speech did he refer to the Plaintiff/Respondent particularly as a drug baron. He relies on Article 174(F) of the Constitution that provides that one of the objects of devolution is to promote social and economic development and that substance abuse is one of the obstacles that challenge the achievement of this object of devolution in Nairobi County and as the Governor of Nairobi, the 1<sup>st</sup> Defendant has a Constitutional mandate to fight substance abuse viciously.

The 1<sup>st</sup> Defendant further depones that he is aware that drug abuse is a vice that has affected hundreds of thousands of lives of the residents of Nairobi ranging from Children to aged people and that drug abuse has been attributed to, as the cause of death, high crime rates, spread of chronic diseases such as HIV/AIDS, Cancer and High drop out from learning institutions, unemployment and many other social evils. According to him, he has addressed the issue of drug peddling on several platforms and he cannot therefore understand why the Plaintiff is insisting that he is the one whom he was referring to. The 1<sup>st</sup> Defendant insists that he did not adversely mention the Plaintiff's name in relation to drug peddling and that the words were general in nature and did not refer to any specific person.

In 1<sup>st</sup> Defendant's view, if there was any defamation of the Plaintiff, then such defamation was occasioned by the 2<sup>nd</sup> Defendant as the 2<sup>nd</sup> Defendant was the one who chose to give its own interpretation of his utterances, most probably for commercial and reader advantage and owing to the fact that he has no say whatsoever in determining what the 2<sup>nd</sup> Defendant publishes, it is therefore, wrong and malicious to purport to sue him in respect of the publication of the Article published by the 2<sup>nd</sup> Defendant. He urges the court to strike out the suit against him and/or his name be struck out.

The Plaintiff has opposed the Application by way of a replying Affidavit sworn on 28<sup>th</sup> October, 2015 by himself wherein he depones inter alia that the 1<sup>st</sup> Defendant's Application dated 18<sup>th</sup> October, 2015 is defective in form and it's a deliberate attempt by the 1<sup>st</sup> Defendant to escape liability. The reasons for the defect are said to be that the Application is not signed and so is the Affidavit in support of the same. It is also alleged that the both the Application and the Supporting Affidavit are not dated.

The Plaintiff depones that the 1<sup>st</sup> Defendant was quoted by the 2<sup>nd</sup> Defendant as having uttered the said words and he never bothered to offer to correct or even say that he was misquoted and that what the 1<sup>st</sup> Defendant has attempted to do is but an afterthought and is in no way a reflection of the facts as he knows them and as known to Kenyans living in Nairobi and other places who have followed the matter. According to him, and at that particular time, he was operating Sonko Rescue Team which had ambulances and because of the popularity of the whole operation the 1<sup>st</sup> Defendant did not like it and he

showed dislike for it by attacking it in public at every opportunity he had.

Further in his affidavit, he depones that it is only in clear and unequivocal cases of wrong joinder of parties that the court can allow a party to walk away from a suit at an interlocutory stage and that the justice of the case demands that the 1<sup>st</sup> Defendant remains in the suit as he will be mentioned at all times and his utterances are central in the case and the court will be left with a shell if the author of the words complained of is removed from the suit.

The submissions by the learned counsels largely reiterated the contents of the Affidavits by the respective parties. On his part counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff does not disclose a reasonable cause of action against the 1<sup>st</sup> Defendant. He went on to submit on the principles that courts consider in a case for defamation and relied on the case of **Kazungu Kambi & Another Vs Francis Atwoli** where the court expressed itself that in a case of libel or slander, the words complained of must be set out in the verbatim in the statement of claim.

On his part, the learned counsel for the Plaintiff submitted on Article 159(2) (d) of the Constitution that justice shall be administered without undue regard to technicalities. That judicial authority is not a technical issue and the court has to consider the circumstances of every individual case. He relied on the provisions of Order 1 Rule 3 of the Civil Procedure Rules on who should be joined as a Defendant in a suit.

He further submitted that the matters raised in the Application can better be canvassed at the full trial so that justice can be done to all the parties in the case and that even if the 1<sup>st</sup> Defendant was carrying out his constitutional mandate to the people of Nairobi County, he has no right to defame others.

I have carefully considered the Application, the Affidavits and the submissions made by the learned counsels for the respective parties.

The Application has been brought under Order 2 Rule 15 inter alia, which provides: -

***“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 that the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”***

The power to strike out a pleading or a party from the suit has been held over the years to be a draconian measure which ought to be employed only as the last resort or even then, only in the clearest of cases. This was held in the case of **DT. Dobie Company Limited Vs Muchina (1982) KLR at page 9** where the court expressed itself as follows: -

***“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.”***

In the case of D.T. Dobie above and in espousing the above principle, Madan JA (as he then was) adopted the finding of Sellers L. J in the case of **Wedlock Maloney and Others (1965) 1 W.L.R. 1238** where the learned judge had this to say, while setting out principles to be considered by a court in striking out a pleading.

***"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."***

Further and in the same case Danckwerts L.J. detailed: -

***"The power to strike out any pleading or any part of a pleading under this rule is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."***

In the 4<sup>th</sup> Edition, Volume 36 of Halsbury's Laws of England at paragraph 73 the writer has this to say on striking out of pleadings: -

***"In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that the absolute defence exists, the court will strike it out. A pleading will not, however, be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading ought to be exercised with extreme caution and only in obvious cases..."***

I have carefully perused the pleadings and the defences filed herein by the Defendants and in my humble view, there exists some triable issues touching on each Defendant. A triable issue is defined in Black's Law Dictionary, 9<sup>th</sup> Edition at page 1644 as follows: -

***"A triable issue" is deemed to mean, "subject or liable to judicial examination and trial whilst "the trial" is defined as a formal judicial examination of evidence and determination of legal claims in an adversary proceeding."***

In the pleadings, the Plaintiff alleges that he was defamed by both the Defendants in an Article published by the 2<sup>nd</sup> Defendant in the Star Newspaper dated the 23<sup>rd</sup> June, 2015, and he has sought various remedies against both Defendants jointly and severally. The offending Article is titled: -

***"Kidero says Sonko is a Drug Peddler"***

Paragraph 2 of the said Article reads: -

***"Kidero accused Sonko of using his ambulances and hearses to supply drugs to the slums"***

While Paragraph 5 of the same reads: -

***"Kidero was speaking to Mathare residents where he officiated the Launch of AQ Tap Water ATMS."***

The 1<sup>st</sup> Defendant in his defence denies the allegations as pleaded in the pleadings.

On its part, the 2<sup>nd</sup> Defendant admits having published the article complained of but denies that the same

was false and malicious. It further pleads that the article was a publication in respect of a matter of great public concern and the information therein was a public benefit.

Though the 1<sup>st</sup> Defendant has argued that the Plaintiff does not disclose a reasonable cause of action against him, it is my humble view that he is a necessary party in these proceedings and his presence is necessary for the court to effectually and completely determine all the issues before it.

Among the issues that the court will have to consider is whether the Article is defamatory and whether the same was published by the Defendants. The 1<sup>st</sup> Defendant in his defence avers that he did not mention the Plaintiff's name in his address to the people at Mathare, yet the Article mentions the Plaintiff by name. The Defendants have been sued jointly and severally and it's important for both to remain in the proceedings so that the court can be in a position to determine the issues in the suit and who between the two Defendants is liable.

As to who, necessary parties to the proceedings are in the case of **Amon Vs Raphael Tuck & Sons Ltd (1956) 1 ALL ER 273** the court held: -

***“The party to be joined must be someone whose presence before the court is necessary as a party. What makes a party necessary?... the only reason which makes a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party”. It is not enough that the intervener should be commercially or indirectly interested in the answer. The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally that is by curtaining his legal rights. That will not be the case unless an order may be made in the action, which he is legally interested”.***

Am alive to the fact that at this stage, the court ought not to deal with any merits of the case for that function is solely reserved for the trial judge as the court itself is not usually fully informed so as to deal with the merits. 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.

***“..... A court of Justice, ought not to act in darkness without the full facts of the case before it....***

See the case of DT Dobie & Co. (K) Ltd (supra)

Order 1 Rule 7 of the Civil Procedure Rules is very material to the case at hand, it provides: -

***“Where the Plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more Defendants in order that the question as to which of the Defendants is liable, or to what extent, may be determined as between all parties.”***

Before I conclude, counsel for the Plaintiff he submitted that the first Defendant's Applications is defective in that both the Application and the supporting affidavit are not dated and they are both not signed.

For the avoidance of doubt, I wish to confirm that the copies I have in the court file are both dated and signed and therefore the objection has no merits.

From the foregoing, I have come to the conclusion that the Plaintiff's claim against 1<sup>st</sup> Defendant is not frivolous and/or vexatious and the same should not be struck out. The 1<sup>st</sup> Defendant's name should also not be struck out and the matter should proceed to full hearing.

In the end, the Application dated 16<sup>th</sup> October, 2015 is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Nairobi 24<sup>th</sup> day of March, 2016.

.....

**L NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Plaintiff.*

..... *for the 1<sup>st</sup> Defendant*

..... *for the 2<sup>nd</sup> Defendant*