



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 7 OF 2015

ELIZABETH ATIENO AYOO PLAINTIFF

VERSUS

THE NAIROBI STAR PUBLICATION LIMITED DEFENDANT

RULING

The Plaintiff's Notice of Motion dated 30th July 2015 seeks the striking out of the Defendant's Statement of Defence dated 16th March 2015 on grounds that it may prejudice, embarrass and delay the fair trial of this matter and that the Plaintiff's suit be set down for formal proof.

The application is opposed in terms of Grounds of Opposition dated 8th September 2015 filed herein on 11th September, 2015 the gist of which is that the Statement of Defence raises a triable issue and the matter ought to proceed to full hearing.

When the Advocates for the parties appeared before me on 29th September 2015 they consented to canvassing the application by way of written submissions. These were duly received.

The background of this matter is that on 3rd July 2014 the Defendant published in its "Corridors of Power" column and in its online edition words which the Plaintiff considers to be defamatory of her as follows:-

"The legal department at Maseno University is being accused of favouring a particular firm for contracts. Senior staff at the university said an official at the department is related to a director of the firm hence the favouritism. The officer is said to have awarded the firm contracts for 13 years."

The Plaintiff through her lawyers wrote to the Defendant on 11th July 2014 and demanded an apology as well as a retraction of the article. In a letter dated 22nd July 2014 the Defendant replied and stated that the article did not name, identify or mention the Plaintiff and expressed willingness to publish a clarification that the official at the legal department is not the Plaintiff. However after the Plaintiff wrote back on 7th August 2014 informing the Defendant that she was the only official in the legal department of Maseno University and that she was the wife of Tobias See a director of Riley Falcon which had supplied security services at the University for 13 years but that she was not a member of the Tender Committee that used to award tenders, the Defendant responded by acknowledging those facts and offering to publish an apology in the Star. Thereafter the Plaintiff indicated she was agreeable to the publication of the apology but none was ever published. On 25th February 2015 she filed the suit herein. In a statement of defence filed on 16th March 2015 the Defendant admitted publication of the article but denied it was false, malicious or defamatory instead stating that it was true in substance and fact – (see paragraph 12 of the Defence). The Defendant also pleaded privilege – (see paragraph 21 of the Defence).

Counsel for the Plaintiff submits that this application is premised on Article 159(2)(b) of the Constitution, Section 1A, 3A, 3B and 63 (e) of the Civil Procedure Act and Order 2 rule 15(1)(c) of the Civil Procedure Rules 2010 all of which favour an expeditious disposal of the matter. He contends that the defence evades and obscures the real issue in the suit which is that the Defendant recklessly published the impugned article without verifying the veracity of the facts and without notifying the Plaintiff of the impending publication in order to clarify the facts thereof; that the defence does not provide reasons why the Defendant failed to comply with the Media Act 2007 and the Code of Ethics thereof when publishing the impugned article. He further submits that the defence is embarrassing as it raises ambiguous or unintelligible issues and that despite admitting that the article was false the defendant further defamed the Plaintiff by paragraph 12(d) and (e) and 21(d) and (e) of the Defence; that procurement at Maseno University is undertaken through its procuring unit, the user department, tender opening committees, tender processing committees and the tender committee established under Section 26(4) of the Public Procurement and Disposal Act 2005 and its membership does not include the University's legal officer. He submits therefore that the defence is at variance with the legal provisions relating to award of contracts. Further that the defence is not supported by any evidence that the Plaintiff was involved in the procurement of contracts or that Riley Falcon Security Services secured the said contract because of its relationship with its Director. On the defence of privilege on grounds of public concern and public interest Counsel submitted that the same is devoid of any facts and is thus a dilatory tactic slyly employed by the Defendant in order to derail the suit and in order to evade the consequences thereof and the Defendant has no defence capable of trial on the merits and the same ought to be struck out. Counsel relied heavily on the following cases:-

1. *Kennedy M. Kassamani V. Khamisi Iddi Musungu & 2 Others [2014] Eklr.*
2. *Tom Odhiambo Achillah t/a Achilla T. O. & Co. Advocates V. Kenneth Wabwire Akide t/a Akide & Company Advocates & 3 Others [2015] eKLR.*
3. *Chirau Mwakwere V. Nation Media Group Ltd. & Another [2009] eKLR.*
4. *Jennifer Kamau V. Humphrey Mbaka Nandi [2013] eKLR.*
5. *J.P. Machira t/a Machira & Company Advocates V. Wangethi Mwangi & Another [1998] eKLR.*
6. *Jakoyo Midiwo V. Kenya Times Media Trust Ltd. & Another [2005] eKLR.*
7. *Grace Wangui Ngenye V. Chris Kirubi & Another [2015]eKLR.*
8. *ICDC V. Daber Enterprises Limited [2000] 1 EA 75.*

Counsel for the Defendant has on the other hand submitted that the Defence discloses a reasonable defence. That the Defendant has pleaded justification and qualified privilege and these are bonafide defences provided under Sections 14 and 15 of the Defamation Act and whether or not the defence will finally succeed or not it must go for trial. He has also submitted that the Defence herein does not contain ambiguous, unintelligible, immaterial or irrelevant issues to the status of the Plaintiff so as to prejudice, embarrass or delay fair trial of this action. He contends that the Plaintiff's averment that the defendant's defence is not true is not a ground for striking it out. Further that looking at the prayers sought in the Plaint this application is an abuse of the Court process as striking out the defence will not result in the entry of judgment as the claim is for unliquidated damages that require proof at a trial and the Court would be engaged twice on an issue that can be tried once in a hearing. He contends that this would not be good use of judicial time. It is also contended that striking out the statement of defence will deny the defendant a right to a fair hearing as provided under Article 50 of the Constitution of Kenya. He prays that the Defendant be granted its day in Court. On the Court's jurisdiction to strike out pleadings Counsel acknowledges that the Court does have power to do so but cautions that the Court must act cautiously and with care. He concludes by reiterating the submission that the defence raises a triable issue and once again urges this Court to find the instant application an abuse of the Court process and dismiss it with

costs. Counsel relied on:-

1. *The Constitution of Kenya.*
2. *The Civil Procedure Act and Rules.*
3. *Bullen and Leake and Jacob's precedents of Pleadings (12th Edition) 1975 London.*
4. *Awuondo V. Surgipharm and Another [2011] 1 EA.*
5. *Ajit Singh Viridi V. j.e. Modoy [2014] eKLR.*
6. *Mercy Karimi Njeru and Another V. Kisima Real Estate Limited [2015] eKLR.*
7. *Kenya Power & Lighting Co. Ltd. V. Alliance Media Kenya Limited [2014] eKLR.*

In *DT Dobie & Company (Kenya) Ltd. V. Muchina [1982] KLR 1* it was held that:

“As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.”

In *Jackson Ngechu Kimotho V. Equity Bank Ltd. NBI H.C.C. 587/2011* cited with approval in *Raphael Kitur V. Radio Africa T/a Star [2014] eKLR* the Court stated that *“if a pleading raises a triable issue even if at the end of the day it may not succeed the suit ought to go on trial since in civil litigation as opposed to criminal trials there is no provision for holding mini trials or a trial with a trial....”* and in *Gupto V. Continental Builders Ltd. (1976-80) 1 KLR 809* Madan JA stated:-

“If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a Plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go for trial, just as a sham or bogus defence ought to be rejected peremptorily.”

In an appeal decided recently the Court of Appeal faced with an issue similar to the one before this Court stated in *Grace Wangui Ngenye V. Chris Kirubi & Another [2015] eKLR*:-

*“.....The general principles which guide a Court in exercising its discretion whether or not to strike out a pleading as stated in *DT Dobie & Co. (Kenya) Limited V. Muchina & Another [1982] KLR 1* and in other cases also apply in defamation cases. However in applying the general principles, the Court will have regard to the special rules of pleadings in defamation cases as laid in Order 1 rule 7 and 8 of the Civil Procedure Rules 2010 (formerly Order VI Rule 6A and 6B of Civil Procedure Rules) and also have regard to the provisions of the governing statute – The Defamation Act”(Sic)*

In this case therefore not only must I consider the general principles for striking out pleadings but I must have regard to Order 2 rule 7 and 8 of the Civil Procedure Rules and the Defamation Act. It is the Plaintiff's contention that the article published in the Defendant's Newspaper of 3rd July 2014 and the online version thereof were defamatory and that the publication thereof was actuated by malice. In the Plaintiff's she gives the particulars of malice as being:-

“(a) The Defendant authored or caused to be authored and published the offending words with reckless disregard as to whether or not they were false, defamatory or injurious to the Plaintiff's reputation.

(b) The Defendant authored or caused to be authored and published the offending words without taking any sufficient precautions or steps to establish the truthfulness or correctness thereof.”

It is instructive that given the provisions of Order 2 rule 7(3) of the Civil Procedure Rules she need not have given these particulars.

In its statement of defence the Defendant admitted the publication of the article of and concerning the Plaintiff and denied that the same was false, malicious or defamatory. It then asserted that the words were true and proceeded to give particulars as required by Order 2 rule 7(2) of the Civil Procedure Rules which provides:-

“Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.”

It is noteworthy however that in so far as the Plaintiff's contention is that she was not herself involved in the procurement of contracts at the University and that therefore by the article accusing her of favouring her husband's firm for contracts was not true the particulars do not fully comply with Order 2 rule 7(2) of the Civil Procedure Rules. The rule requires the Defendant not only to give particulars stating which of the words complained of he alleges are statements of fact but of the facts and matters he relies on in support of the allegation that the words are true.

In paragraph 12 the Defendant has given particulars of the words complained of it alleges are statements of fact but has not give particulars of the facts and matters it relies on in support of the allegation that the words are true. Moreover soon after publication of the Article the Plaintiff's Advocate wrote to the Defendant seeking an apology – (see letter dated 11th July 2014). On 22nd July 2014 the Defendant wrote back and denied that the article made any reference to the Plaintiff. This prompted the Plaintiff to write again on 7th August 2014. The letter states:-

“RE: DEFAMATION OF RILEY FALCON SECURITY SERVICES LIMITED AND ELIZABETH A. AYO

We refer to your letter dated 22nd July, 2014 the contents and purport whereof we have noted.

Your letter is unremorseful and a mere denial. To assist you to address us substantively on the issue, please note the following facts:

- (a) That Elizabeth Ayoo is the only official in the legal department of Maseno University;***
- (b) That Elizabeth Ayoo is the only legal officer of Maseno University;***
- (c) That Elizabeth Ayoo joined Maseno University as a legal officer in the year 2004;***
- (d) That Elizabeth Ayoo is the only official in the legal department of Maseno University that is related to a director of a company that has been a supplier at Maseno University for the last 13 years;***
- (e) That Elizabeth Ayoo is the lawful wife of Mr. Tobias See***
- (f) That Mr. Tobias See is a director of Riley Falcon Security Services Limited;***
- (g) That Riley Falcon Security Services Limited has provided security services to Maseno***

University for the last 13 yearss (2001 – 2014);

(h) That Elizabeth Ayoo has never awarded any tender to Riley Falcon Security Services Limited or at all either in her official capacity as the legal officer or her in private capacity;

(i) That the responsibility of awarding tenders above Kshs.500,000.00 at Maseno University is the responsibility of the Tender Committee as provided for under the First Schedule of the Public Procurement and Disposal Regulations, 2006 as amended by the First Schedule of the Public Procurement and Disposal (Amendment) Regulations, 2013;

(j) That for purposes of section 26(4) of the Public Procurement and Disposal Act 2005 read with the Second Schedule of the Public Procurement and Disposal Regulations, 2006 the legal officer is not a member of the university's Tender Committee;

(k) That the legal officer and by extension Elizabeth Ayoo has never attended any of the Tender Committee meetings or participated in any of its proceedings;

(l) That at all material times Maseno University has always procured security services through transparent and competitive tender process in compliance with the provisions of the Public Procurement and Disposal Act, 2005;

(m) That Riley Falcon Security Services Limited has since 2001 participated in all such competitive tenders notified by Maseno University;

(n) That at no time has Riley Falcon Security Serivces Limited been favoured or awarded any tender by the legal officer or by Elizabeth Ayoo but has always won such tenders on merit and awarded by the Tender Committee.

With the benefit of the above facts, kindly confirm to us by return the persons you referred to in the offending article.”

About a week later the Defendant wrote back as follows:-

“RE: DEFAMATION OF RILEY FALCON SECURITY SERVICES LIMITED AND ELIZABETH A. AYOO

We refer to your letter dated 7th August, 2014.

In light of the facts that you have rightly brought to our attention, we would like to publish an apology to your clients in the Star.

Please let us know if our offer is acceptable to your clients.

We look forward to hearing from you.

Yours faithfully,

Linda Musita

Star Legal Officer

CC. William Pike, Managing Director, The Star,”

In my view this letter did not just offer an apology to the Plaintiff but also acknowledged that the facts as stated in the article were incorrect or rather not true. In view of this admission does the defendant have a defence that raises a triable issue? It is my finding that even bearing in mind that a defence that raises

triable issues does not mean a defence that will eventually succeed – (see **Awuondo V. Surgipham and Another [2011] 1 EA P. 4**), the defence herein ought not to be allowed to go for trial. It is admitted that the words complained of refer to the Plaintiff of and concerning her profession and character. She relied on the natural and ordinary meaning of the words as conveying a defamatory imputation which following the decision of the Court of Appeal in **Grace Wangui Ngenye V. Chris Kirubi and Another (Supra)** does not require proof by oral evidence. The Defendant by its own letter acknowledged that the article was not accurate and offered to publish an apology which it never did. The defences put forward would therefore not succeed at the trial and in my view this is a plain and obvious case where striking out of the defence is warranted. Accordingly the Plaintiff's Notice of Motion is allowed so that the defence is struck out and judgment is entered for the Plaintiff on liability. The suit shall then be set down for proof of damages. The costs of the application be borne by the Defendant.

Signed, dated and delivered at Kisumu this 28th day of April 2016

E. N. MAINA

JUDGE

In the presence of:-

Mr. Siganga for the Plaintiff (holding brief for Gachuba)

N/A for the Defendant

CA: Sarah