REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 60 OF 2015

FRANCIS ATWOLI & 5 OTHERS.....PLAINTIFFS

VERSUS

HON. KAZUNGU KAMBI & 3 OTHERS.....DEFENDANTS

RULING

The Plaintiffs' suit is an action in defamation. It is based, as pleaded in the **plaint dated 16th February 2015**, upon words allegedly uttered on or about 13th February 2015 by the Defendants with reference to the Plaintiffs. They contend in the plaint that these words were made to the Kenyan public and to 'international bodies across the globe'. The contents of the defamatory statements have not been set out fully in the plaint. They have quoted part of those defamatory statements as follows:-

> **"…..the six (6) top most COTU(K) officials are responsible for Honorable George Muchai's Death….."**
>
> **"….that is why the (read COTU officials) killed George……"**
>
> **"we want to see all the six (6) COTU officials led by Francis Atwoli in handcuffs for Muchai's murder……"**

It is thus not clear who the words were referring to as only the 1st Plaintiff is mentioned. It is also not stated where the words were uttered and to whom. The words are also said to have been uttered jointly and severally by all Defendants.

Together with the Plaint, the Plaintiffs sought an injunction restraining the Defendants from uttering defamatory words and statements against them pending hearing and determination of the suit. The application was heard by Mabeya J. and in a considered ruling he noted –

> **"in my view, the pleading in the Plaint is at large as far as identifying the Plaintiffs, save for Mr. Atwoli, with the words complained of…..Looking at the Plaint, it is not clear where and how the publication was made. The words are alleged to have been uttered and published jointly and severally. The questions that linger in the mind of the court are; how were the words uttered jointly? Were they uttered by all the Plaintiffs as set out in paragraphs 13, 14 and 15 at the same time or separately? If jointly, was it in unison i.e. as a choir or how was it? Who among the Defendants uttered what words against which of the Plaintiffs? Where were the words published? As pleaded is it possible for each of the Defendant to know in respect of**

which of the words alleged he is liable and for which he has to respond to in his defence? Is it not likely to embarrass oneself whilst trying to meet the Plaintiff's claim as pleaded? These questions remain unanswered."

The Defendants have now filed two applications by **Notice Of Motion dated 16th September 2015 (by the 1st Defendant)** and notice of motion dated 6th November 2015 (by the 3rd and 4th Defendants) in which they seek an order to dismiss or strike out the suit as against them under **Order 2 rule 15 (1), (a, b, d), (2)** and **(3)** of the **Civil Procedure Rules** (the **Rules**). These applications were heard together.

The grounds for the applications are that the averments in the plaint are vague and general in nature; that the plaint has not set out precisely the exact words which they are alleged to have uttered; that the suit is incompetent, misconceived, misplaced, frivolous, vexatious and an abuse of court process; that the plaint does not disclose the cause of action against them and is thus incurably defective.

In reply the 1st, 2nd, 3rd, 5th and 6th Plaintiffs filed grounds of opposition which include –

i. That the applications are misconceived, untenable and incapable of being granted.

ii. That by virtue of order 15(2) no evidence is admissible on an application brought under order 15(1)(a) of the Civil Procedure Rules. The affidavits should therefore be expunged from the record.

iii. That there is no demonstration as to how the plaint is scandalous, vexatious and or frivolous or an abuse of the process of the court.

iv. That in any event, the applicants have already filed defences denying the allegations proffered against them in the plaint.

v. That the power to strike out or dismiss a suit at the interlocutory stage is draconian and should be exercised sparingly and only in the clearest of cases.

I have read the supporting affidavits and the Grounds of opposition. I have also considered the written submissions of the parties.

As already pointed out, the Plaintiffs' case is not properly pleaded in that it is not clear which defamatory statements the action is founded on or which Defendant defamed which of the Plaintiffs and where this occurred. These details have not been set out in the plaint as is the requirement in defamation cases. Mabeya J. stated as much in his ruling.

In the case of **DT Dobie & Company (Kenya) Ltd –vs Muchina [1982] KLR 1** the Court of Appeal opined *inter alia* –

(i) The words "reasonable cause of action" in Order VI, rule 13 (1) mean an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as tend to support the claim prayer.

(ii) The words "cause of action" mean an act on the part of the defendant which gives the plaint his cause of complaint.

(iii) 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.

(iv) ...

(v) ...

(vi) ...

(vii) ...

(viii) (*Obiter* Madan, JA) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing (of) the case.

(ix) (*Obiter* Madan, JA) The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

Moreover, the Court should not permit an action to be tried by way of affidavits and submissions under the guise of an application to strike out pleadings.

I agree with Counsel for the Plaintiffs that an application to strike out a pleading upon the ground that it discloses no reasonable cause of action does not permit evidence beyond the pleading itself. See **Order 2, Rule 15(2)** of the **Civil Procedure Rules.**

The plaint pleads defamation. The Plaintiffs have claimed facts that support that cause of action. Looking at the plaint without more, it cannot be said that it raises no reasonable cause of action. Evidence of the defamation is said to be contained in a compact disc which evidence 'could not be produced for falling short of the requirements of the law regarding admission of such evidence'. Whether or not the cause of action will succeed in light of the defences put forward by the Defendants is a different matter best left to trial of the action.

Striking out is a drastic jurisdiction to be exercised sparingly, and only in the clearest of cases. Such is not the case here. Life can still be injected to the suit by amendment.

The result is that the notice of motion applications dated 16th September 2015 and 6th November 2015 must be refused. They are hereby dismissed. The Plaintiffs are hereby allowed to amend the Plaint within 30 days of today and serve the defendants who shall file defences to the amended plaint within 15 days of service. Costs of the application shall be in the cause. It is so ordered.

Dated, signed and delivered at Nairobi this 28th Day of September, 2016.

MBOGHOLI MSAGHA

JUDGE