



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 416 OF 2015

HUNKAR TRADING COMPANY LIMITED

JACKSON KAHUNGURA KARIUKI.....PLAINTIFFS

VERSUS

1. SAMUEL WAWERU KIIGI

2. BLUE ROSES LIMITED.....DEFENDANTS

RULING

Before me are two applications (by Notice of Motion dated 16th February 2016 (1st Defendant) and 23rd February 2016(2nd Defendant)) seeking the main orders that the Plaintiffs' suit be struck out.

The application is stated to be brought under section 1, 1A, 1B and 3A of the Civil Procedure Act, Cap 21 (the Act) and under Orders 2, rule 15(1) (a) and 51, rule(1) of the Civil Procedure Rules (the Rules).

The grounds for the applications set out on the face thereof are –

- (i) That the Plaintiffs as filed discloses no reasonable cause of action as against the Defendants.
- (ii) That the Defendants have never and neither has it been pleaded that they published any material that could be termed as defamatory.
- (iii) Without a plea of any publication, a claim in defamation cannot lie under the law of defamation.
- (iv) That the suit will only seek to embarrass the 1st Defendant and waste valuable judicial time.
- (v) That the Plaintiffs do not have any *bona fide* grievance and the suit is frivolous and vexatious.
- (vi) That it is trite that a party is bound by its pleadings.
- (vii) That the complaint is contradictory in nature, is an abuse of the court process and is meant for ulterior motives otherwise than for redress.

In response to the applications the Plaintiffs filed grounds of opposition on 18th February 2016 and 1st

March 2016 (in response to the 1st Defendant's and 2nd Defendant's notice of motion respectively). These grounds are similar in both documents. They are –

- (i) That the motions are frivolous, vexatious and an abuse of the court process as the suit herein discloses a reasonable cause of action as against the Defendants with respect to the tort of defamation.
- (ii) That the orders sought are incapable of being granted at a preliminary stage especially as the suit outlined misuse of a telecommunication device by the 1st Defendant as an agent of the 2nd Defendant.
- (iii) That the grounds advanced may only be described as red herrings intended to mislead the court.
- (iv) That the suit sought to be dismissed demonstrates facts that can sustain a merited suit for the tort of defamation and which is yet to be heard.
- (v) That the applications are fatally defective as they do not sufficiently illustrate their purpose under the said provisions they have being brought under.

The applications were canvassed by way of written submissions. The 1st Defendant's submissions were filed on 11th March 2016, the 2nd Defendant's on 22nd March 2016 while the Plaintiffs' were filed on 8th April 2016. I have considered the submissions, including the cases cited.

The Plaintiffs' case as pleaded in the plaint as against the 1st Defendant is that he maliciously printed and published text messages on diverse dates in the year 2015 which were meant to disparage the reputation of the Plaintiffs as they were false, malicious and defamatory. The 2nd Defendant is ostensibly sued on the basis of it being vicariously liable for the torts of its agents and or employees/Director (the 1st Defendant).

They therefore sought an unqualified apology and withdrawal of the said statements, a permanent injunction to restrain the Defendants from further publishing the defamatory statements and damages for libel.

In the defences dated 12th and 25 January 2016 respectively the 1st and 2nd Defendants denied the Plaintiffs' claims and put them to strict proof. More particularly they denied –

- (i) that they ever published any information regarding the Plaintiffs whether to their business associates, clients, friends and or the public whether in a text message or letter;
- (ii) that the Plaintiffs suffered and continues to suffer damage as claimed in the Plaint.
- (iii) that the Plaint meets the threshold for defamation claims.

In the alternative the 2nd Defendant averred that the communication complained of was not published and could only have been viewed by the 2nd Plaintiff.

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

- (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 plaintiff 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 Madam, 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.”

The plaintiffs plead defamation in form of libel. What this court has to interrogate is whether the plaint as worded can sustain a claim in the tort of defamation.

In J. Kudwoli Vs Eureka Educational and Training Consultants & 2 Others Mombasa Civil Cases 126 & 135 Of 1990 [1993] eKLR Kuloba J as he then was stated:

An aspect of publication which must be stressed is that the publication must have been made by any act of the defendant which conveys the defamatory meaning of the matter to the third party who understands the meaning of the matter he perceives. The matter must be seen, felt, or heard by at least one other person than the person defamed, and in addition, it must be intelligible to the recipient of it..... A publication carried in a vehicle not perceivable by the third person is not actionable..... a publication is not sufficient unless it is made to a person who understands the defamatory significance of the matter complained of...”

The source of the ‘defamatory statements’ written to the 2nd Plaintiff is as a result of the ‘falling out’ of the parties in their commercial engagement. The Plaintiff in my view does not disclose whether the said text messages were published to a third party. From reading the plaint, it seems the 2nd Defendant was only complaining to the 2nd Plaintiff and doesn’t appear to have been broadcast to the world at large but to the 2nd Plaintiff only. In the Plaintiffs’ submissions it is asserted that the text messages were sent to a Mr. Aggrey Omondi. Submissions do not form part of pleadings and this should have come out clearly in the Plaintiff.

It is also imperative that publication in a defamation suit disparages the reputation of the Plaintiff and lowers him/her in the minds of right thinking members of the society. See Phineas Nyagah vs Gitobu Imanyara [2013]eKLR.

Although the Civil Procedure Act has granted this court unlimited inherent powers which should be used to allow a hearing of the substantive claim on merit, all the same the Court is not bound to sustain a limping pleading, in this case the plaint, up to hearing stage otherwise Order 2 rule 15 would not have

been made.

In view of the foregoing, the applications are hereby allowed. The suit as against the Defendants is hereby struck out as it does not exhibit any reasonable cause of action. The Defendants shall have the costs occasioned by this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 13th Day of October, 2016.

A. MBOGHOLI MSAGHA

JUDGE