

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 564 OF 2011

JOYCE NZIUKO.....PLAINTIFF

VERSUS

MARY MAINA NANDEKA.....DEFENDANT

RULING

The plaintiff filed this suit against the defendant alleging that she was defamed through messages sent to her by way of (SMS) short message service. As a result, she claimed general damages for defamation, costs and interest. The defendant denied the plaintiff's claim in her defence whereby, while admitting sending the messages to the plaintiff they were not defamatory or meant to annoy at all. The said messages were sent to the plaintiff personally and not to any other person.

Subsequent to the filing of the defence, by an application dated 20th March and filed on 21st March 2012, the defendant sought orders to have the suit truck out with costs. The said application was by way of Notice of Motion under Order 2 Rule 15 of the Civil Procedure Rules.

The reasons set out on the face of the application are that, the plaint discloses no reasonable cause of action because the messages cited as giving rise to the cause of action of defamation were never published but were sent to the plaintiff only. The messages allegedly sent to the plaintiff on 4th and 5th March 2010 cannot be a basis for a claim for defamation due to limitation, and that the suit is not grounded on any material capable of being defamatory. There is a replying affidavit sworn by the plaintiff to the said application, whereby the plaintiff states that the defendant clearly admitted she sent the alleged messages and they were intended to annoy. That admission in itself gives rise to the cause of action and the plaint discloses a reasonable cause of action as demonstrated in paragraphs 3,4,5 and 6.

She added that, whether or not the messages were published or sent to other people is a matter of evidence which shall be given at the trial, and therefore it is clear the plaint raises reasonable cause of action and should be allowed to proceed to trial.

Both learned counsel have filed submissions addressing the application which I have read. It is true in fact and in law that, unless there is publication of defamatory statement, no action shall lie because it is the evidence of a third party that confirms publication. The plaintiff has stated in her affidavit that that is a question of fact.

Whether or not the particulars of defamation should be included in the plaint is debatable because, Order 4 of the Civil Procedure Rules is silent in that regard. It is correct therefore to conclude that the plaintiff's suit is not as hopeless as the defendant wishes the court to believe, and in my view the plaintiff should not be driven out of the seat of judgment before a hearing. She is entitled to have her day in court and whatever else has been submitted in this application belongs to the province of a full trial. The application is therefore dismissed with costs to the plaintiff.

I note that this is a relatively old matter where pleadings have been closed, and it behoves both parties herein to comply with the pre-trial directions and conferences under Order 11 of the Civil Procedure rules

in order to move this case forward.

Orders accordingly.

Dated, signed and delivered at Nairobi this 8th Day of December, 2016.

A. MBOGHOLI MSAGHA

JUDGE