REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL NO.69 Of 2012

TOM ODHIAMBO ACHILLAH T/A ACHILLA T.O & CO ADVOCATES…..........…PLAINTIFF

VERSUS

KENNETH WABWIRE AKIDE T/A AKIDE & COMPANY ADVOCATES.....1ST DEFENDANT

THE LAW SOCIETY OF KENYA……………………...............................…..2ND DEFENDANT

THE CITY COUNCIL OF NAIROBI…………….................................………3RD DEFENDANT

THE PEOPLE MEDIA GROUP LIMITED……….................................…..4TH DEFENDANT

R U L I N G

The dispute subject matter of this suit and application arises from an article published in **"The people"** newspaper dated 3rd March 2011 titled ***"LAWYERS DEMAND OVER SHS 1B FROM CITY HALL, REPORT SHOWS***". The plaintiff **TOM ODHIAMBO ACHILLAH** who is also an advocate of the High Court of Kenya, vide a plaint dated 30th January 2011 claim that the article, allegedly initiated by the defendants herein is defamatory of him and he seeks judgment against the defendants jointly and severally for general damages for libel, special damages, costs and interest.

The defendants filed separate statements of defenses in which they all denied that the article was defamatory of the plaintiff. The 2^{nd,} 3rdand4th defendants also filed separate applications seeking the court to strike out the case against them for disclosing no cause of action against them.

The 2nd defendant, Law Society of Kenya's application is dated 22ndNovember 2012 and supported by the affidavit of Appollo Mboya, its Chief Executive Officer. Mr. Mboya deposes that the letter dated 23rd February 2011 was not authorized by the 2nddefendant as it was signed on behalf of the 1st defendant law firm.

On 23rdFebruary 2011 the 2nd defendant placed an advert in the Standard Newspaper of 7thSeptember 2011 notifying the public that the report on City Council of Nairobi dated 16thFebruary 2011 bearing the letterhead of the 2nd defendant was not authorized by or authored by it. The same notice also stated that any law firm offended by the notice should deal with the City Council of Nairobi and the signatory of the report. The 2nd defendant claims that the 1st defendant Kennedy Wabwire Akide advocate admitted in his defence that his firm was instructed by the 3rd defendant City Council of Nairobi to render legal advice concerning the subject matter in dispute. The 2nd defendant claim that it has been dragged into proceedings which do not concern it and that even after the newspaper advertisement of 7th September

2011 the plaintiff did not adhere to the information.

The 3rddefendant's application is dated 4th April 2014. it is supported by the affidavit of Karisa Iha, the Legal Affairs Director of the Nairobi City County. He deposes that in a quest to audit liabilities of the 3rd defendant in the year 2011, they requested the Law Society of Kenya to vet and verify the various fee notes raised by various law firms to the City Council of Nairobi and to that end provide a detailed report recommending the adequate amounts to be paid for legal services rendered. He claims that the Council's instructions to the Law Society of Kenya were very clear in that, the 2nd defendant was supposed to verify the legal fees due and owing to the advocates as at 3rd November 2010. He stated that the statements made by the Council were made in good faith as fair comment premised on and limited to the findings in the said report. In his view, the issuance of information based on an official document received from the Law Society of Kenya and which it believed to be a true account of the information sought and given does not make 3rd defendant liable for defamation. The 3rd defendant further stated that the content of the report by the Law Society of Kenya and the publication by the 4th defendant are at variance and there is no nexus established by the plaintiff to point to the 3rd defendant's involvement in the publication of the report or article in the 4th defendant's news paper article thus the claim against the defendant should fail.

The 3rd defendant also denied that it authored or published the report dated 16th February 2011. They stated that the council did not author, publish or cause to be published the newspaper article dated 3rd March 2011. It argued that the suit as filed discloses no reasonable cause of action or any cause of action as against the 3rd defendant.

The 4th defendant's application is dated 28th January 2012. It is supported by the affidavit of Kenneth Ngaruiya, the chief Financial Officer of the 4th defendant. He deposes that the 4th defendant published in its newspaper known as the "**The paper"** issue of 3rd March 2011, an article titled ***"LAWYERS DEMAND OVER SH 1B FROM CITY HALL, REPORT SHOWS" but*** he argues that the plaintiff having allegedly been offended by the publication of the said report would have sought for demand from the 4th defendant to either retract the publication of the said report to or print a suitable apology. A notice of intention to sue would have followed before presenting the suit to court. He stated that the plaintiff did not follow the fundamental procedure.

The plaintiff and 1st defendants have opposed all the applications. vide the grounds of opposition dated 29th November 2012 filed in opposition of the 2nd defendant application, the plaintiff stated that the circumstances under which the first defendant obtained the 2nd defendant's letterheads and used them to write letters defaming the plaintiff is a matter of evidence.

He stated that the 2nd defendant has accepted that the 1st defendant was its chairman at the time of the events complained of, and having accepted that the libelous letter was written on its letterheads therefore the complaint against the 2nd defendant is valid.

The plaintiff has also opposed the 3rd defendant's application through grounds of opposition dated 20th May 2014. He maintained that the 3rd defendant made or published a statement of and concerning the plaintiff and that it also authorized or published the report dated 16th March 2014 which is a matter of evidence and that therefore it is preferable if the issue is left to be determined at the hearing of the suit.

The 3rd defendant opposed the striking out of the 2nd defendant from the suit through the replying affidavit of the Karisa Iha, Legal Affairs Director of the Nairobi City County. He deposes that the legal department submitted to the Town Clerk's office fee notes from various law firms for payment for the legal services provided to the council. The Town Clerk perused the fee notes and forwarded them to the Law Society of Kenya for clarification.

The Law Society of Kenya responded through their letter dated 23rd February 2011 advising that some of

the fee notes were genuine while others were more than the recommended amount under the Advocates Remuneration Order. On 2nd March 2011, the press approached the Town Clerk inquiring the amount owed by the Council to the law firms. He avers that the 3rd defendant's comment to the media was based on the advice received from the Law Society of Kenya whom the 3rd respondent had instructed to vet and verify the genuineness of the various advocates' fee notes, which fee notes included the plaintiff's. Mr. Karisa contends that the 2nd defendant's presence in these proceedings is necessary as the comments made and alleged to be defamatory were made in an honest expression of the opinion based on the advice of the 2nd defendant.

The 3rd respondent also opposed the 4th defendant's application contending that the suit as filed does not disclose any cause of action against the 3rd defendant but it does as against the 1st, 2nd and 4th defendants. Mr. Karisa maintained that failure to issue a demand letter or notice before action, if proven is not ground for striking out a suit against a party as the relevance of such failure would only abort the issue of costs of the suit payable with respect to such a party. The 3rd respondent also stated that the presence of the 4th defendant in these proceedings is necessary for purposes of determining the real question in controversy between the parties.

All parties agreed to prosecute the three applications by way of written submissions which were filed and exchanged.

The 2nddefendant submitted that the plaintiff shall not be prejudiced if the Law Society of Kenya is struck out as the plaintiff will continue to pursue his claim against the other defendants. The 2nd defendant also argued that the 1st defendant did not file any opposing documents in opposition to the application therefore there is no rebuttal to the facts that there was no contractual relationship or privity of contract between the Law Society of Kenya and the 1st or 3rd defendants. The 2nd defendant cited the case of **MOHAMED & ANOTHER VS HAIDARA (1972) E.A 166 (CA)** where the Court held that a replying affidavit was essential as it gives real evidence of the material facts that is contained in the appellant's affidavit. The 2nd defendant also cited the case of **NITIN PROPERTIES LTD VS KALSI & ANOTHER (1995-98) 2 EA 257 (CAK), MPAKA ROAD DEVELOPMENT LTD VS KANA (2004) 1EA 161 all** in support of its case.

The 3rd defendant submitted that the remedies sought by the plaintiff are untenable against the 3rd defendant since the Council is not responsible for the publication made by the 4th defendant. The 3rd defendant stated that the plaintiff cannot establish a nexus between the publication made by the 4th defendant and the information allegedly provided by the 3rd defendant. It is the 3rd defendant's further contention that the allegations made by the plaintiff against the 3rddefendant are unsubstantiated and irrelevant to the determination of an action for libel against the plaintiff. The 3rd defendant submitted that it is an unnecessary party to these proceedings and the insistence on having them as party to the suit is a waste of the court's time. It was submitted on behalf of the 3rd defendant that the essence of a suit, pleadings and indeed a party's enjoinment in a suit is to ensure exhaustion of all the issues for determination and the just determination of the identified issue in dispute. In support of its contention, the 3rd defendant cited the case of **KAGWIRIA MUTWIRI KIOGA VS THE STANDARD LIMITED & 4 OTHERS (2010) EKLR, JOHNN WARD VS STANDARD LIMITED (2006) EKLR, MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS (2013)** which cases address the issue of necessary parties to suits.

The 4th defendant submitted that the plaintiff had failed to make available to the court any proof that before the case was filed, demand Notice and notice of intention was served upon the 4th defendant. The 4th defendant further submitted that the under Order 3 Rule 2(d) of the Civil Procedure Rules, all suits filed in court shall be accompanied by copies of documents to be relied on at the trial including a demand letter.

The plaintiff in response to the various submissions by the 2nd, 3rd and 4th defendants submitted that the 2nd defendant in its application would appear to be saying that the fact that it did not authorize the 1stdefendant to write the letter makes the plaintiff's claim against it frivolous and vexatious or make the same an abuse of court process. He submitted that a claim by a party against another for defamation is a claim known to the law, and that it is not a frivolous claim to make and it does not amount to an abuse of the court process to make such a claim. The plaintiff argues that so long as he can show that the letter complained off was written on the letter head of the 2nd defendant the plaintiff has a right to sue the 1st defendant. Further, that the circumstances under which the letter was written and whether the second defendant is liable is a matter of evidence for the trial.

The 1st defendant did not file any response; however, this court allowed him to submit on purely points of law and during the highlighting of the submissions Mr. Mureithi, counsel for the 1st defendant told the court that the 1st defendant believed that all the issues raised by the respective parties are better ventilated at a full trial because striking out some defendants will not serve any justice to the case.

Having set out the respective parties' positions as above, i embrace the following view of the matter:

On the one hand, Order 1 rule 9 of the Civil Procedure Rules enact that no suit shall be defeated for misjoinder or non joinder of parties and requires that the court deals with the matter in controversy so far as regards the rights and interests of the parties actually before it.

On the other hand, Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:-

"***The court may at any stage of the proceedings, either upon or without the application of either part, and on such terms as may appear to the court to be just, <u>order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out</u>, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. "***

The court may thus on its own motion or on application of any party to the proceedings order the striking out a party who the court finds was improperly joined. In the exercise of that discretion, the court must as a matter of cause, act according to reason and fair play and not according to whims and caprice. The question therefore, as deciphered from all the applications subject of this ruling is whether the 2nd, 3rd and 4th defendants are necessary parties to this suit and if so, whether any cause of action is disclosed against them.

The defendants 2-4 seek to be struck out the plaintiffs suit against them under the provisions of Order 2 Rule 15 1a, b, c and d, upon which some of the applications are grounded. The effect of that order, if granted, of course, would be that the said defendants are also struck out of the record leaving only the 1st defendant. The substantive provisions upon which the applications are grounded enact that

> **"(1) 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 the suit to be stayed or dismissed or judgment to be entered accordingly, as the case

may be.”

The power to strike out pleadings or a party from the suit, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. That power should only be exercised after the court has considered all facts and not the merit of the case. The case of **DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR espoused the above principle where** Madan JA (as he then was) adopted the finding of **Sellers LJ** in **Wenlock v Moloney (1965) 1 WLR 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 LJ** *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”.

Madan JA (as he then was) in the **DT Dobie** case (as above) added his own view as to the matter with striking out of suits:

“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 the case before it.”

The above holding has been applied as the *locus classicus* in matters of striking out suits and or amendment of pleadings and can be summarized as:

a. The Court should not strike out suit if there is a cause of action with some chance of success;

b. The power to strike out suit should only be used in plain and obvious cases and with extreme caution;

c. The power should only be used in cases which are clear and beyond all doubt;

d. the Court should not engage in a minute and protracted examination of documents and facts; and

e. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.

Ringera J (as he then was) in the **Dr. Murray Watson** case (supra) quoted from the **4th Edition, Volume 36, of Halsbbury’s Laws of England** at **paragraph 73**:

> ***“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. Its 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….."

The learned Judge, after adopting the above statement with approval, went on to say:

"The pith and marrow of it is that where on a consideration of only the allegations in the plaint the court concludes that a cause of action with some chance of success is shown then that plaint discloses a reasonable cause of action".

According to Person, J in **Drummond Jackson v British Medical Association** **(1970) 2 WLR 688** at p. 676, the definition of a cause of action was determined as:

"A cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint." Have the applicants, therefore, shown that there is no *prima face* case as against them or put it the other way, has the plaintiff shown that he has a prima facie case against the 2nd-4th defendants?

The plaintiff's claim is that the letter of 23rd February 2011 by the 1st and 2nd defendant to the 3rd defendant and the publication in the "people's daily" on 3rd march 2011 was defamatory of the plaintiff. It is the 2nd defendant Law Society of Kenya's contention that no cause of action has been made against the it. The 3rd defendant City Council of Nairobi's case is that it sought clarification from the 2nddefendant Law Society which is Kenya's premier Bar Association on the fee notes submitted to the City Council by different law firms for the legal services rendered and the 2nddefendant through the letter dated 23rd February 2011 written and signed by the 1st defendant who was then the Duly elected Chairman of the Law Society of Kenya (2nd *DEFENDANT*) advised the City Council that that some of the fee notes were genuine while others were more than the recommended amount provided for under the Advocates Remuneration Order. The 3rd defendant's contention is that the comment made concerning the exorbitant fees charged by lawyers was genuine and based on the advice given by the 1st and 2nd defendants. The 4th defendant on the other hand complains that it was not served with the demand notice and the notice of intention to sue so the suit against it is not proper before this court.

From the foregoing, and from my perusal of the plaintiff's plaint dated 30th January, 2012 and the respective defenses filed challenging the claim as instituted, it is my humble view that there exist several triable issues touching each and every defendant in a chain reaction which cannot be ignored by striking out the plaintiff's suits against the 2nd, 3rd, and 4th defendants. In **ELIJAH SIKONA & GEORGE PARIKEN NAROK ON BEHALF OF TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE V MARA CONSERVANCY & 5 OTHERS CIVIL CASE NO. 37 OF 2013 [2014] EKLR, Anyara Emukule J when dealing with an application seeking to strike out a plaint observed that:**

22. There are well established principles which guide the court in the exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court.

23. A cause of action is *"a factual situation the existence of which entitles one person to obtain a remedy against another person-"*LETANG VS. COOPER [1965] Q.B. 232. If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some

> **collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures.**

According the Blacks' Law Dictionary, 9th Edition at page 1644, a "triable issue" is deemed to mean ***"subject or liable to judicial examination and trial'*** whilst "the trial" has been given to mean "***a formal judicial examination of evidence and determination of legal claims in an adversary proceeding."***

In my understanding triable issues are those that are subject to judicial examination in a Court for determination on their merits. Although the 2nd and 3rddefendant have argued that the plaintiff has not established a cause of action against them, It is my most considered view that they are necessary parties in these proceedings and that their presence before the court is necessary for the court to effectually and completely determine all the issues.

I am also persuaded by the decision in **KUDWOLI VS EUREKA EDUCATIONAL AND TRAINING CONSULTANTS & 2 OTHERS CIVIL CASE 126 & 135 OF 1990[1993] EKLR** where 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.**

The alleged defamatory letter was addressed to the 3rddefendant, signed by the 1st defendant in the letterhead of the 2nd defendant and published by the 4th defendant in the ***"People's Daily"*** on 3rd March 2011. In my view all the defendants' alleged actions are connected to the publication of the alleged defamatory material.

I find that the triable issues from the above chain would include whether or not the 1st defendant in writing the letter of advisory to the 3rd defendant was doing so in his official capacity as the Chairman of the Law Society of Kenya, who are the Second Defendants, and or whether he was doing so in his own personal capacity as an advocate of the High Court of Kenya. Evidence will have to be lead to prove the various contentions raised in the defence by the 1st defendant as well as the 2nd defendant.

Another triable issue would be whether or not the 3rd defendant which solicited for the advise from the 2nd defendant and which availed the letter/report to the media, as published by the 4th defendant, so acted in good faith and in the public interest or acted maliciously. Finally, whether the 4th defendant acted with malice in publishing the contents of the said letter. Last but not least, is whether the letter subject matter of the dispute herein was defamatory or at all against the plaintiff.

Examining the plaintiff's claim on both the plaint and responses to the three applications, It appears clothed as relates the role of the 2nd 3rd and 4th Defendants in the alleged wrongs that constitute the basis of this suit.

I find that the presence of all the defendants as sued is necessary and will assist the court to determine the matter fully and effectively. As to who necessary parties are to proceedings, In **Amon Vs Raphael Tuck & Sons Ltd (1956) 1 ALL ER 273**, the court held that:-

"The party to be joined must be someone whose presence before the court is necessary as a party. What makes a person a necessary party?.....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 curtailing his legal rights. ***<u>That will not be the case unless an order may be made in the action which he is legally interested.”</u>***

Waki J’s finding in the **<u>Bank of Credit & Commerce International</u>** case was very much to the point when the learned Judge detailed:

> ***“Summary determinations of cases are Draconian and drastic and should only be applied in plain and obvious cases both as regards the facts and the law. In a matter that alleges that the suit is scandalous, frivolous and vexatious, and otherwise an abuse of the court process, I must be satisfied that the suit has no substance, or is fanciful or the Plaintiff is trifling with the court or the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for purpose of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the court process where it is frivolous and vexatious.”***

In my judgment, the hearing and determination of the Plaintiff’s case herein is one which is capable of reasoned argument. It is not for this Court to tread at this stage, on the shoes of the trial judge nor indeed to usurp that task. There are issues which need to be tried, a semblance of which I have set out above and which, in my view, will require *viva voce* evidence to be brought before Court.

In the case of **DT Dobie & Company (K) Ltd Vs Muchina (supra) Madam J** held :

“The ***court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before missing a case for not disclosing a reasonable action for being otherwise as abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that function is solely received for the trial judge as the court itself is not usually fully informed so as to deal with the merits. No suits ought to be summarily dismissed unless it appears so hopeless that is 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.”***

It has not been shown to the satisfaction of this court that the pleadings hereto are, prima facie *prima facie*, scandalous, frivolous, vexatious, tending to prejudice, embarrass or delay fair trial; or abuse of the process of court.

It has been held in **<u>Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499 that a</u>** pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details.

However, the word “scandalous” for the purposes of striking out a pleading under **Order 2 rule 15** of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See **<u>J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997.</u>**

But they may not be scandalous if the matter however scandalizing is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court’s time; or (v) when it is not capable of reasoned argument. See **<u>Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. GoldsMid (1894) 1 QBD 186.</u>**

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

A Pleading tends to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. (Emphasis mine). See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

A pleading is an abuse of the process where it is frivolous or vexatious or both.

Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further particulars. See **Kemsley vs. Foot (1952) AC 325.**

However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did".

In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it

must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment".

The 4th defendant's basis for seeking striking out the suit herein against it is that the plaintiff did not serve them with a demand and notice of intention to sue before action, which would have prompted an apology. In addition, that since Order 3 Rule 2 of the Civil Procedure Rules require that suits when instituted must be accompanied by all documents that a party wishes to rely on, the plaintiff's suit is fatally defective for non compliance with the said rule.

In response, the plaintiff submitted that the issue of demand or notice of intention to sue is only applicable where a party seeks for costs and the court can deny costs to such a party who did not issue demand.

It is clear from the record that the applications by the 2n2, 3rd and 4th defendants for striking out the plaintiff's suit were lodged before pre trial conference and discovery was made. At the time and even now, Order 11 of the Civil Procedure Rules had and has not been complied with by the parties and the court has not certified this suit as ready for trial. In my view, the issue of whether or not the documents to be relied upon at the trial have been filed can only be canvassed during the pre trials and not by way of an application to strike out pleadings at this stage. That is what Order 11 rule 3(1)(a) of the Civil Procedure Rules envisages which provides:

> ***"with a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of the pleadings convene a case conference in which it shall-***

a. ***Consider compliance with Order 3 rule 2 and Order 7 rule 5;***
b. **………..**

Order 3 rule 2 of the rules referred to above provide that (***material to the objection raised by the 3rd defendant***):

"2. All suits filed under rule 11 including suits against the government except small claims, shall be accompanied by:-

a. **………**
b. **……..**
c. **…….**
d. ***Copies of documents to be relied on at the trial including a demand letter before action***

To entertain that kind of preliminary objection at this stage would be engaging into a pre mature trial which would prejudice the parties' cases, as there is no absolute prohibition for a party who has not complied with Order 3 rule 2 of the Civil Procedure Rules seeking leave of court to file documents at any

other time other than at the time of filing suit.

In the end I find the applications by the 2nd, 3rd and 4th defendants seeking to strike out the plaintiff’s suit devoid of any merit and decline to grant them and proceed to dismiss them accordingly.

I award costs of all those applications to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY, 2015

R.E.ABURILI

JUDGE