



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 160 OF 2015**

W M M ..... PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED .....DEFENDANT

**RULING**

1) The subject matter of this ruling is the motion dated 25<sup>th</sup> June 2015 in which the Plaintiff sought for the following orders.

***1. The defence dated 2<sup>nd</sup> June, 2015 and filed on 3<sup>rd</sup> June 2015 be struck out with costs to the Plaintiff.***

***2. The suit herein be set down for formal proof.***

***3. The costs of and occasioned by this application be borne by the Defendant in any event.***

2) The motion is supported by the affidavit sworn by the Plaintiff.

The Defendant filed grounds of opposition to resist, the motion, when the motion came up for interpartes hearing, this court with the concurrence of learned counsels gave directions to have the motion disposed of by written submissions. Learned counsels were also allowed to make oral highlights on the written submissions.

3) I have considered the grounds set out on the fact of the motion plus the facts deponed in the supporting affidavit. I have further considered both the written and oral submissions. Before delving deeper into the substance of the motion, I think it is important to set out in brief, the history behind the motion. It is apparent from the pleadings and the submissions that what provoked the applicant to file this suit against the Defendant is publication on the headline of the weekly edition of The Nairobiian of 26<sup>th</sup> September to 2<sup>nd</sup> October 2014 which read in part as follows:

**“M defies court after messy Divorce Exclusive: Ex-wife in ill tempered marriage rocked by cash rows cruelty and accusation of infidelity sues [particulars withheld] for not paying ksh,150,000 monthly upkeep”.**

4) The Plaintiff found the above excerpt together with others to be defamatory. When served with the plaint together with the summons, the Defendant filed a defence to deny the Plaintiff's Claim. The Defendant raised the defence of **fair comments** and **justification**. The Defendant also stated that it acted

in the utmost good faith hence it cannot be found liable for defamation.

5) The Plaintiff has now approached this court seeking to have the defence struck out and to thereafter list the matter for hearing as a formal proof. It is the submission of the Plaintiff that the Defendant admitted publishing the offensive words against the Plaintiff. The defences raised in the defence cannot lie. The Plaintiff further argued that the Defendant knew that the publication was neither substantially true nor factual. It is said that the facts relied upon in the defence do not establish the factual basis and or truth in substance of the offensive words at all to afford the Defendant the defence of justification.

6) The Plaintiff further argued that the offensive words could not have been merely comments but are impish assertions of recklessly contrived conclusion not based on facts disentitling the Defendant the defence of fair comment. The Plaintiff also argued that the offensive publication was predicated on an allegation of a breach of a court order by the Plaintiff which the Defendant has not set out nor produced. For the above reasons this court was urged to find the defence to be scandalous, vexatious and without triable issues.

7) In response to the Plaintiff's arguments, the Defendant filed grounds of opposition. The Defendant argued that the question on liability for the tort of libel cannot be determined summarily but through a trial.

8) The Defendant pointed out that the Plaintiff did not concisely set out what is scandalous, frivolous or vexatious in the defence. The Defendant also argued that by raising the defence of justification and fair comment did not in any amount to an abuse of the court process. The Defendant further argued that the fact that the Plaintiff filed a reply to its defence means that its defence raises serious triable issues. It is also argued that the Defendant has not admitted that the publication was defamatory or maliciously published.

9) The motion simply seeking to strike out the Defendant's defence under Order 2 rule 15(1) of the Civil Procedure rules. The power to strike out pleadings under the aforesaid provision is discretionary and is intended to give an aggrieved party a remedy expeditiously without waiting to undergo the rigours of a trial save for formal proof in cases where the defence filed is obviously a sham. The Defendant has raised two twin points in defence i.e justification and fair comment. The Plaintiff has argued that those defences were just a sham. In **Halsbury's Laws of England 3<sup>rd</sup> vol. 24 pages 43-83** the defence of justification is substantively discussed as follows:

**"The defence of justification:**

***"The defence of justification, which is a good defence in a civil action for libel or slander, is that the words complained of were true in substance and in fact ..... and it is for the Defendant to satisfy the jury that the statement which is justified, or so much, if it be divisible, as is separately justified, is true in substance and in fact. If the statement complained of imputes the commission by the Plaintiff of a criminal offence, the Defendant, to succeed in his plea of justification, must prove the commission of the offence charged as strictly as if the Plaintiff was being persecuted for the offence. In other cases the proof required is perhaps, less strict, but the Defendant must satisfy the jury that the statements justified is substantially true, though the proof does not establish every little detail. If the statement complained of is that the Plaintiff has been guilty of habitual misconduct, the Defendant does not discharge the burden on him by proving one isolated instance of such misconduct.***

10) The Defendant's defence is not accompanied by a witness statement although it listed Irvin John Jalang'o as a witness. The Defendant did not also deem it fit to file an affidavit to answer or counter the averments contained in the Plaintiff's affidavit filed in support of the motion. As we speak the Plaintiff's factual averments have not been properly answered by an affidavit. This appears to be the reason which may have motivated the Plaintiff to take out the motion. Had the Defendant filed an affidavit at that level, most probably, an explanation in support of the defence of justification would have carried the day irrespective of its credibility. I am therefore convinced in the circumstances that the defence of

justification was not properly laid.

11) In the same treatise, the defence of **fair comment** is discussed

*The defence of fair comment*

*“The defence of fair comment requires that the material fact or facts on which comment or criticism is based should be truly stated and be a matter of public interest and the comment or criticism on the fact or facts should be fair, within the wide limits which the law allows ..... in the first place the matter defended as a comment must be a comment and not mere assertion of fact... the defence of fair comment will fail if the comment or criticism is not fair and honest. The comment must not misstate facts, because a comment cannot be fair which is built upon facts not truly stated and if a Defendant cannot show that his criticism contains no or no material, misstatements of fact he will fail in his defence of fair comment.*

12) A critical look at the defence put forward by the Defendant as fair comment stands alone. The same is not backed by a witness statement. If the Defendant had filed a witness statement, the court could have prima facie, considered the same and form an opinion as to whether those twin defences are genuinely raised or are just pretended defences. I am minded not to go into the merits or otherwise of the witness statements filed by the Plaintiff so that I do not prejudice the trial judge’s view since the suit is yet to go for trial. From my short analysis, I am convinced that the defence of **justification** and fair comment as of now are not available to the Defendant. I find the defence lacking in seriousness hence it is frivolous. What is clear in my mind is that the Defendant has denied the allegation that what it published was defamatory. The Plaintiff filed a reply to defence to answer to the Defendant’s defence by basically stating that the defence for justification and fair comment are not available. There is no doubt the Defendant admits publishing the offensive words. What is denied is that it published an article full of inaccuracies. In paragraph 3 of the Plaintiff’s affidavit sworn on 20<sup>th</sup> June 2015 and filed in support of the motion, the Plaintiff specifically makes an averment that the Defendant published factual inaccuracies which le in his opinion was defamatory to him. In paragraph 5 of the same affidavit the Plaintiff gave detailed explanation to show that the publication was inaccurate, false and defamatory.

13) The Defendant did not deem it fit to file an affidavit to controvert the averments made on oath. The Defendant merely filed grounds of opposition. The facts deponed in the aforesaid affidavit therefore remain uncontroverted. For this reason I find the motion to be well founded. It is allowed as prayed with costs to the Plaintiff.

Dated and delivered in open court this 23<sup>rd</sup> day of October, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant