



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 253 OF 2011**

**1. AMERISOURCE LTD**  
**2. ALEX MAUTIA MORUME.....PLAINTIFFS**  
  
**VERSUS**  
  
**NATION MEDIA GROUP LTD.....DEFENDANT**

**RULING**

1. The Plaintiff filed this suit seeking general and aggravated damages and exemplary damages. It was alleged that the Defendant on 7<sup>th</sup> July, 2010 maliciously and without any justifiable cause published of and concerning the Plaintiff and caused to be circulated a libellous and malicious article in one of its newspapers, the daily nation under the national news at page 9, 5<sup>th</sup> Column. The article is said to bear the title "*pyramid scheme boss denies illegal trading.*" It is said to read as follows:-

*"A pyramid scheme director has been charged with conducting banking business without a licence. Mr. Alex Morume Mauta, an Ameri Source Ltd director, denied the charge. The court heard that between June 29 and July 20, 2007 at Hazina Towers, Nairobi, the accused jointly with another not in court carried out banking business without a license issued from Central Bank of Kenya. The case was listed for hearing on August 18".*

2. He lamented that although the Defendant published the said article claiming to be an extract from court proceedings in which the 2<sup>nd</sup> Plaintiff was involved the words "*pyramid scheme boss*" and "*pyramid scheme director*" do not form part of the charge which was read in court against the 2<sup>nd</sup> Plaintiff in the said proceedings.

3. The Defendant filed a defence in which it admitted publishing the article. It however denied having done so maliciously and without lawful justification. It alleged that the words complained of were a fair and accurate report of the judicial proceedings and therefore privileged. It was further that the 2<sup>nd</sup> Plaintiff was charged with an offence of carrying on a banking business without a license and the 2<sup>nd</sup> Defendant was a director of the 1<sup>st</sup> Plaintiff. That the words were not defamatory. That the words were fair information upon facts which are matters of public interest.

4. The motion before this court is dated 14<sup>th</sup> November, 2011 in which the Plaintiff seeks the following orders:-

*a. That the defence dated 30<sup>th</sup> August, and filed on 1<sup>st</sup> January, 2011 be struck out.*

b. That judgment on liability be entered for the Plaintiffs against the Defendant as prayed in the Plaintiff.

c. That the Plaintiff's suit be listed for formal proof or assessment of damages.

d. That costs of this application be provided for.

e. That such other or further relief be granted as the court may deem just to grant.

5. The application is based on the grounds set out on the body of the application and the supporting affidavit of Alex Mautia Morume who is a Director of the Plaintiff sworn on 17<sup>th</sup> November, 2011. He contended that the words published in the Defendant's newspaper do not form part of the charges that were read to him in court on 2<sup>nd</sup> July, 2010. That the Defendant introduced false extraneous matters such as 'pyramid scheme boss' and 'pyramid scheme director' in the article which words he says were not uttered in the judicial proceedings concerning him. That the article as a whole is thereby neither fair nor accurate and does not attract absolute privilege. He stated that the publication has led to customers shunning his business and has caused him to suffer great damages including closing down business due to distress for rent.

6. In response thereto, Sekou Owino who is the legal officer of the Defendant contended that the issue raised in the defence on whether or not the contents of the article complained of were accurate is one that may only be fairly determined at the trial of the suit. That the contents of paragraph 6 of the plaintiff amount to a trial of the issues raised in the main suit that have been submitted to determination by this court and the proper adduction of such evidence would be at trial. That the demand letter referred to in paragraph 7 of the affidavit was received by the Defendant and amends requested were not made due to reasons set out in the defence. That the defence on record raises triable issues and that the defences raised privilege and justification are available to a defendant in any claim for defamation and it therefore lies upon this court to determine their suitability to the action. He urged that the Defendant would be prejudiced in the event this application is allowed.

7. This application was canvassed by way of written submissions. In their submissions the Plaintiff discussed the grounds for striking out defence. **Charity Kaluki Ngilu v. Headlink Publishers & 4 others (2011) eKLR** and **Mpaka Road Development Company Limited v. Abdulfafir Kana (t/a Anilkapuri Pan Coffee House, Nairobi, Milimani HCCC No. 318 of 2000** (unreported) was cited where the legal terms, scandalous, frivolous, vexatious and a pleading that tends to prejudice, embarrass and delay fair trial considered by court in determining an application for striking out were defined. The Plaintiffs also discussed the applicable principles of law. Reliance was placed on **Grace Wangui Ngenye v. Wilfred D. Kiboro & another (2009) eKLR**. In that case it was highlighted that while the Plaintiff has an obligation to show that the defendant should not be allowed to defend the suit, the defendant has a corresponding obligation to demonstrate that he should be allowed to defend the suit thus demonstrate that the defence raises reasonable defence and/or triable issues. Referring to the phrases "***pyramid scheme boss***" and "***pyramid scheme director***" the Plaintiff cited Halsbury's Laws of England, 4<sup>th</sup> edition (1997), Vol. 28 paragraph 46 where it was stated that the natural meaning of words for the purpose of defamation is not a question of legal construction rather it is that which the words would convey to ordinary persons. It was argued that the defendant has not adduced evidence and therefore the defence contains bare denials. On the defendant's defence of absolute privilege, the Plaintiff argued that absolute privilege does not extend to a report on pleadings or other documents which had not been filed with the court or referred to in open court. They cited **Margaret Wachira v. Wachira Waruru & another (2007) eKLR** where it was held that for privilege to apply, a report must be strictly confined to actual proceedings in court and must contain no defamatory observations. On justification the Plaintiff cited Grace Wangui Ngenye and Charity Kaluki Ngilu (supra) where in both cases the court held the opinion that where justification was pleaded, it was upon the defendant to establish its truth and that it was incumbent upon such a defendant to demonstrate by way of affidavit evidence the kind of evidence intended to be relied upon at the trial to prove justification. On the defence of fair comment, the Plaintiff's position was taken from section 15 of the Defamation Act, Cap 36 that it has to be shown that the facts upon which the comment is based are true and the comment is an honest expression of publisher's

opinion. It was finally argued that the article was published maliciously since the defendant disregarded the truth.

8. The Defendant on the other hand argued that the defence could only be struck out under Order 2 rule 15 of the Civil Procedure Rules in clearest of cases. It was argued that the words were used in reference to the 2<sup>nd</sup> Plaintiff as a director of the 1<sup>st</sup> Plaintiff which had been charged with carrying on banking business without a license which have come to be popularly known as pyramid schemes and that the said words would be implied to mean illegal banking. The Defendant argued that the reporting was strictly confined to the actual proceedings in relation to the charge which fact it says the Plaintiff's do not deny. That it was justified to use the phrases complained of since the Plaintiffs were charged with conducting illegal banking business. It was submitted that the article was based on facts with regard to the charge against the Plaintiffs. It was further argued that the burden was upon the Plaintiffs to prove that the publication was actuated by malice. The Defendant relied on the case of **Yobesh Amoro t/a B.A. Ouma Associates Advocates v. Heritage Insurance Co. Ltd (2007) eKLR** where the judge declined to strike out the defence after a consideration that it raised triable issues.

9. The test to be used in determining whether or not to strike a defence was enunciated in the case of **Saudi Arabian Airlines Corporation vs. Sean Express Services Ltd (2014) eKLR** as follows:-

*"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the "Sword of the Damocles". Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that "...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away."*

10. Having warned myself as stated in the above excerpt what is left for determination is whether or not the defence herein raises triable issues. The court in **George P.B. Ogendo v. James Nandasa & 4 others (2006) eKLR** had this to say while dealing with a similar application, that:-

*"...an evasive and vague defence from which the Plaintiff cannot know what defence is being pleaded will normally be struck out on the grounds that it is wanting in seriousness and tends to annoy...The term "abuse of the process of the court" connotes that the process of the court must be carried out properly and honestly and in good faith, and it means that the court will not allow its functions as a court of law to be misused."*

11. The defendant pleaded justification, fair comment, and privilege. A defendant is permitted to plead justification only where it is clear that the allegations made and complained of are true in fact or substance. Order 2 rule 7 (2) of the Civil Procedure Rules provides as follows:-

***"(2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."***

12. The Court in **Associated Leisure Ltd & Others v. Associated Newspapers Ltd [1970] 2 ALL ER** affirmed this provision where Lord Denning MR. restated the rule as follows:-

***"A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages."***

13. The Plaintiff has in the instant case not denied that they were charged with conducting an illegal banking business, what is complained of is that the two phrases used therein were not in the charge. The Defendant on the other hand argues that the term pyramid scheme is the common term used to refer to illegal banking business. Having so contested, this court shall be charged with determining whether or not the phrases were used maliciously, it is however noteworthy that the burden of so proving normally lies with the Plaintiff. It is only after determining whether the term pyramid scheme is a commonly used term for illegal banking business as alleged that the issue of malice can be determined. Having pleaded that the published words were true in substance and fact, the Defendant should be given a chance in a full trial on merit to satisfy the court that the statement was true in substance and in fact and that the defences of opinion and fair comment are available to it. It follows therefore that the defence does not contain mere denials.

14. Accordingly, I decline to strike out the defence as prayed and dismiss the application by the plaintiff. I order that the matter be set down for trial on merits. I make no orders as to costs.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of November, 2015

R.E.ABURILI

JUDGE