



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 490 OF 2013

GEORGE KURIA MWAURA.....PLAINTIFF

VERSUS

1. ISAIAH LUCHELI

2. THE STANDARD LIMITED.....DEFENDANTS

RULING

1. Before this court for determination is the motion dated 10th June, 2015 seeking to strike out the Defendants' defence and that summary judgment be entered in favour of the Plaintiff as prayed for in the plaint.
2. The application is brought under the provisions of Order 2 rule 15 1(a),(b),of the civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act, 2010 and any other enabling provisions of the law.
3. The Plaintiff's claim against the defendant is for damages for alleged defamation arising from a publication titled "***Five jointly face city land fraud charge***" published in the Standard Newspaper on 4th October, 2013. The article stated as follows:-

"Prosecution says accused who had enjoined Moi in Sh. 1.6b land dispute facing similar charges. A city court has consolidated three criminal cases against five people who enjoined retired president Daniel arap Moi in a Sh. 1.6 Billion land dispute...The first suit involved Simon Kiprono Laboso who is one of the four businessmen who had sought the injunction of the retired president in the case and George Mwaura who is not a party to the suit...Mwaura faced a separate charge that on October 7 at Ardhi House, he fraudulently obtained a title deed for the parcel of land measuring 0.2131 hectares by representing a letter of allotment dated October 24, 1986, purported to be from the Commissioner of Lands. Mwaura and Laboso were arrested after a court session at the High Court and an attempt by their lawyer to have Lady Justice Pauline Nyamweya to issue an order blocking their arrest was rejected..."

4. The Defendants pleaded qualified and absolute privilege. The Defendants contended that the meanings of the words particularised at paragraph 14 and 15 of the plaint contain certain importations not mentioned in the feature complained of. The Defendants further stated that they were not party to nor have responsibility for the drafting and drawing of the charge sheets and as such cannot be accountable for the contents of the same and denied that the Plaintiff's reputation has been injured.
5. The Plaintiff's motion is supported by his affidavit and the grounds set out on the face of the

application. The reasons advanced for the application are that the defence does not disclose that the Plaintiff actually attended court section on 3rd October, 2013 either as a party therein and the linkage between the Plaintiff and the ELC Case No. 1403 of 2007 to justify the allegation as printed by the Defendant. That the defence does not disclose that the Plaintiff enjoined Mr. Moi in KShs. 1.6 Billion land dispute comprising of 16 acres of land situated in Embakasi, that the defence has no evidence on record to show that the Plaintiff made a forged document as alleged, that here is no evidence that the Plaintiff and four others jointly face fraud charges and that the defendants have no evidence that the Plaintiff forged the grant number I.R. No. 46540 for L.R. No. 14277 dated 24th August, 1989.

6. In response thereto, Caroline Cheruiyot swore an affidavit on behalf of the defendants/respondents in which she contended that the publications were true in substance and fact in so far as they consisted an accurate report as captured by the Defendants from the Public Investment Committee of the National Assembly and made in good faith.

7. The parties filed and exchanged written submissions with the plaintiff filing reply submissions to the defendants' submissions as well. The Plaintiff's submissions were a reiteration of the affidavit in support of the application. It was submitted that the publication was made without factual foundation since the Defendant had no sufficient material evidence that the Plaintiff had sued Hon. Daniel Arap Moi and that he had forged title documents and given false information to the police and that therefore the defence raises no triable issues. Citing Souza Figueiredo & Co. v. Moorings Hotels (1959) EA 425 particularly the holding that " *where the Defendant show by affidavit that there is a bona fide triable issue,*" the Plaintiff submitted that the Defendant pleaded defence of justification and it was incumbent upon it to demonstrate by way of affidavits the kind of evidence the Defendants intend to rely upon at the trial, to prove that the story published of and concerning the Plaintiff was true or substantially true in fact which affidavits could be of the eye witnesses to the incidents mentioned in the publication. That the Defendants have exhibited authorities without giving reasons as to why the court should allow them to defend the case, and the Plaintiff submits that this constitutes what is known in law as "**poisoning the well.**" That there are no particulars in the defence or submissions that could enable the Defendant to beseech the court to allow them to proceed with the case for trial. It was submitted that an inference of malice is drawn since the publication was unconfirmed lies. It was submitted that the defence was evasive and unequivocal. The Plaintiff referred to paragraph 1 which read "*Save for what is herein expressly admitted, the Defendants deny each and every allegations of facts contained in the Plaint filed in the above mentioned matter as if the same were set out verbatim and traverse seriatim.*" The Plaintiff cited Diamond Trust Bank (K) Ltd v. Martin Ngombo & 8 Others (2005) eKLR and Blue Sky EPZ v. Natalia Polyakova & Another (2007) eKLR. In both cases, the courts emphasised that a sham defence or one which raises mere denials ought to be struck out to give quick remedy to the Plaintiff. That although the Defendant relied on Article 50 and 47 of the Constitution to urge the court not to strike its defence, the promulgator of The Constitution of Kenya, 2010 knew the purpose of Order 2 Rule 15 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides for striking out of pleadings where they are found not to raise reasonable cause of action or defence, are scandalous, frivolous or vexatious, where they may prejudice, embarrass or delay fair trial and where they are found to be an abuse of court process. Placing reliance on Magunga General Stores v. Pepco Distributors Ltd (1987) 2 KAR 89 where it Njagi J. while addressing the issue of general denials found that it was not enough for a defendant to simply deny liability without giving some reason, the Plaintiff argued that the Defendants having put the defence of fair comment, privilege and justification, they needed to provide particulars of facts on which the defence of fair comment was based. It was further argued that the Defendants have failed to file their list of witnesses and documents as provided for under Order 7 rule 5(b) and (d) respectively and the court is bound to dismiss the defence. It was submitted that the defences offered by the Defendants are not available in light of the provisions of Article 33 (3) and 34 of the Constitution which limits the freedom of expression and the freedom and independence of the media respectively.

8. The Defendant on the other hand submitted that the Plaintiff's application had no basis since no evidence should be admissible in an application such as this. It was contended that summary procedure was meant to give quick remedy to the Plaintiff where the defence was a sham and raised no triable issues. Citing Patel v. E.A Cargo Handling Services Ltd (1974) E.A. 75 it was submitted that a defence which raises prima facie defence should go for trial. It was argued further that a triable issue does not

mean one that has to succeed and this court was urged not to take such a draconian measure. Placing reliance on **Scanhouse press Limited v. Time New Service Limited (2008) eKLR** where it was held that summary judgment should only be entered where the amount claimed has been specified and can be ascertained as a mere fact of arithmetic. That since the claim at hand is for exemplary and compensatory damages, the suit ought to be determined on merit by full hearing.

9. The main issue for determination in this application is whether or not the defence is triable and whether summary judgment can be entered in favour of the Plaintiff.

17. Order 2 Rule 15 of the Civil Procedure Rules, 2010 stipulates that:-

1. At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-

a. it discloses no reasonable cause of action;

b. it is scandalous, frivolous or vexatious;

c. it may prejudice, embarrass or likely delay the fair trial of the action; or

d. it is otherwise an abuse of the process of the court...

2. No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

18. This court is mandated to determine matters before it without undue regard to procedural technicalities as espoused under Article 159 of the Constitution of Kenya, 2010 and that that an application will not be defeated on a technicality or want of form.

10. The judicial principles applicable in striking out pleadings were set out in the celebrated case of **D. T. Dobie & Co (Kenya) Ltd v Muchina (1982) KLR 1**, where the Court of Appeal pointed out that the power to strike out is a discretionary one but ought to be applied very sparingly. It would be exercisable only in very plain cases. The plaintiff maintained that this was not one of such clear cases. In the above cited case of **D.T.DOBIE & Co**, the court made it plainly clear that:

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

b. The power 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.

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.”

11. In **V.K. Construction Co. Ltd vs Mpata Investment Ltd HCC 257/2003** Honourable Ringera J pronounced himself thus:

“the jurisdiction to strike out pleadings is to be exercised cautiously and sparingly and only where the cause of action is so obviously bad and almost incontestably bad. For the remedy is a draconian one and where life can be injected in the plaint by an amendment the plaintiff should be given a chance to do so.” the discretion of the court in such a scenario is unfettered and the learned magistrate should have exercised that discretion in favour of the plaintiffs/applicant and failure to revive the suit occasioned a traversity of justice.”

12. From the above decision, the power to strike out pleadings has been held to be a draconian measure which ought to be employed only as a last resort and only in the clearest of cases.

13. In the case of Sultan Hardwares Limited v. Steel Africa Limited [2011] eKLR the Court of Appeal stated the following:-

"We are aware that the suit in the superior court was not heard on its merits and what is at stake before us is whether the appellant should have been given an opportunity to be heard on its defence which had been filed. In the case of Lalji t/a Vakkep Building Contractors vs. Casousel Ltd. [1989] KLR. 386 the predecessors of this Court (Nyarangi, Platt, J.J.A. and Kwach, Ag. J.A.) held that:

"Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist". See also – Kassam vs. Sachania [1982] KLR 191 and Zola v Ralli V Bros Ltd [1969] E.A. 591."

14. Ouko J (as he then was) in Diamond Trust Bank (K) Ltd v. Martin Ngombo & 8 Others (2005) eKLR held that:-

"This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence...The jurisprudence that passes through the above cases is that a mere denial or general traverse is not sufficient defence and that a defence that has no merit is for striking out." (Emphasis mine).

15. 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."

16. The test for such application for striking out defence was recently well pronounced in the case of Saudi Arabian Airlines Corporation v. Sean Express Services Ltd [2014] eKLR in the following long but useful rendition:-

"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 that 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."(emphasis added).

17. In other words, where the defence is a sham, on the face of it, the court will not hesitate to strike it out. The plaintiff contends that the defendant's defence is a sham because there is no evidence to support its allegations and hence the publication was malicious. The general rule of pleadings is that matters must be specifically pleaded. The defendant must thus in their defence plead specifically any matter which they allege makes the action not maintainable or which, if not specifically pleaded might take the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim.

18. In the instant case, considering the defendants' defence that they were not party to nor have responsibility for the drafting and drawing of the charge sheets and as such cannot be accountable for the contents of the same and applying this test to this case, it is inferred that the defendants denied the Plaintiff's claim and gave a reason for it. This therefore requires the court to interrogate whether or not the reported words were as per the alleged charge sheets. This can only be done by a full hearing. That being so, such an issue is triable. It has been held time without number that an issue need not necessarily be one that will succeed, but the moment a defence is found to have a triable or arguable issue then a defendant ought not to be locked out from defending the case. In addition, for this court to strike out a defence, it must be absolutely clear that the court will not be engaging in a mini trial of sorts, examining documents on record which have not been produced in accordance with the rules of evidence, on oath.

19. What I have established from my perusal of the record and the comprehensive grounds, supporting affidavit and submissions as well as counter submissions by the plaintiff applicant is pure evidence of why the defence should not go to trial which offends the very provisions of Order 2 rule 15 (2) that no evidence shall be admissible on an application under Subrule 1(a) but the application must state concisely the grounds on which it is made.

20. In the early cases of **Soliza Figuerido & Company Ltd vs Mooring Hotel Ltd (1959) EA 425** the Court of Appeal held that if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions. And in **Kenya Trade Combine Ltd vs Shah CA 193/99**, the Court of Appeal stated:-

"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."

21. In **Bangue Indosuez vs D.J. Lowe & company Ltd CA 79/2002** and **Momanyi v Hatimy & Another (2003) 2 EA 600** the Court of Appeal was categorical that where a bona fide triable issue has been disclosed, the court has no discretion to exercise in regard to the defendant's right to defend the suit.

22. It is also noteworthy that evidence is not to be produced in pleadings rather reasons for denials are the

ones to be given. Evidence is to be produced during trial and therefore I find no substance in the Plaintiff's argument that the **denials were made without evidence to the same**. On this I am fortified by the provision of Order 2 particularly rule of the Civil Procedure Rules on pleadings which stipulates that what is to be pleaded is facts and not evidence.

23. For those reasons, I decline to strike out the defence as filed by the defendant and accordingly dismiss the plaintiff's application dated 10th June, 2015 with costs to the defendant.

Dated, signed and delivered in open court at Nairobi this 11th day of November, 2015.

R.E.ABURILI

JUDGE