



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 426 OF 2013

GEORGE KURIA MWAURA PLAINTIFF

VERSUS

ALPHONCE MUNGAHU 1ST DEFENDANT

THE STAR PUBLICATION LIMITED2ND DEFENDANT

RULING

The plaintiff sued the defendants jointly and severally claiming damages and an apology following a publication in “**The Star**” newspaper attributed to the 1st defendant. Upon service of summons to enter appearance the defendant complied followed by statement of defence.

From the record, the plaintiff filed a separate statement of issues on 6th October, 2014 while the defendants filed a statement of contested issues on 7th October, 2014. About nine months thereafter, the plaintiff filed an application by way of Notice of Motion dated 6th June, 2015 under Order 2 Rule 15 1(a) and (b) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking orders that the 1st and 2nd defendants’ written statement of defence be struck out and judgment be entered in favour of the plaintiff as prayed in the plaint. He also asked for costs of the suit. The application is opposed and there are grounds of opposition filed on behalf of the defendants. Both counsels have filed written submissions which I have on record. Order 2 Rule 15 1(a) and (b) provides as follows.

“15. (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.”**

It is now accepted that the striking out of any pleading is a drastic order that should be sparingly granted. If there is a cause of action with some chance of success such an order should not be given. Further, if a pleading can be injected with life by amendment it, ought to be allowed to go for trial.

The authorities cited by both counsel in the matter revolve around the same principles. I must comment however at this stage that both counsel in their written submissions have delved into matters that belong to the province of the main trial and final submissions as if parties have already been heard in evidence. In suits of this nature where statements are said to be false and malicious, it is extremely difficult for the court to establish the veracity or otherwise of such statements without oral evidence being adduced and

tested under cross-examination.

I have looked at the statement of defence filed by the defendants. It has raised among other issues the defence of justification and qualified privilege. These are defences specifically laid down in the Defamation Act, Cap 36 Laws of Kenya.

Triable issues do not necessarily mean that they should succeed at the end of the trial. They should be able to justify a party has his or her day in court so that one is not driven out of judgment seat before a hearing.

The record before me also shows parties have already identified issues to be determined during the trial. That alone is enough confirmation that they are triable issues. The application is therefore misplaced and cannot be allowed under the circumstances of this case. If anything it has contributed to the delay of expeditious disposal of this matter. It is therefore dismissed with costs to the defendants.

Before I conclude I must refer both counsels to Order 8 of the Civil Procedure Rules on the amendment of pleadings. It is true that the plaintiff filed an amended plaint which bears the court stamp of 27th February, 2014.

On the other hand the statement of defence filed on behalf of the defendants was served upon the plaintiff's counsel on 25th February, 2014. A party may without leave of the court amend any of his pleadings once at any time before pleadings are closed. Pleadings are closed fourteen days after service of the defence, and in the present case therefore the plaintiff did not need any leave to file the amended plaint. (See Order 2 Rule 13 of the Civil Procedure Rules).

With the same breath the plaintiff cannot say that the defendants have no defence on record because they did not file a defence after the amended plaint. A reading of Order 8 Rule 2(a) is clear. Where an amended plaint has been served on the defendant and if he has already filed a defence the defendant may amend his defence. It is therefore the discretion on the part of the defendants to either retain the old defence filed or file an amended defence to the amended plaint.

The submissions in that regard are therefore a non- issue. The parties shall now comply with the pre-trial directions so that this suit is listed for hearing.

Dated and delivered at Nairobi this 7th day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE