



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1521 OF 2002**

**INTERCONTINENTAL HOTELS CORPORATION LIMITED t/a HOTEL  
INTERCONTINENTAL...PLAINTIFF**

**VERSUS**

**XAVIER LUGAGA.....1<sup>ST</sup>  
DEFENDANT**

**THE STANDARD LIMITED.....2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. The subject matter of this ruling is the motion dated **7<sup>th</sup> November, 2014** taken out by the Plaintiff herein in which it sought for the following orders:

- i. The Defence be struck out.
- ii. The suit do proceed to formal proof for assessment of damages by written submissions on a priority basis.
- iii. The Defendants do pay the costs of this application and the suit.

2. The motion is supported by the affidavit of Jaswant Babra. The Defendant vehemently opposed the motion. When the motion came up for interpartes hearing, Learned Counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

3. Let me first set out the background of the dispute before considering the merits or otherwise of the motion. On 25<sup>th</sup> April 2002, it is alleged that the Defendants published statements which the Plaintiff considered defamatory to it hence this suit. The aforesaid words which were published are reproduced in paragraph 4 of the plaint dated 18<sup>th</sup> September, 2002. The Defendants filed a defence to deny the Plaintiff's claim. It was the Defendants assertion the words complained of were not defamatory or malicious published. At the close of pleadings the Plaintiff identified six issues which it though should go for trial.

4. In the motion, the subject matter of this ruling, the Plaintiff has asked this Court to strike out the Defendants defence on the basis that the same is a mere denial, scandalous, frivolous and vexatious. It is also argued that the defence is an abuse of the Court process. The Defendants are of the view that the motion has no merit. The Defendants have pointed out that the defence raises serious triable issues which can only be determined by a full trial. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support of the motion plus the grounds of opposition. I have further considered the rival written submissions. I have also considered the authorities supplied by both

sides. The main order sought is for the striking out of a defence. This Court will be slow to make such an order unless it shown that the defence is so hopeless that the only inference it can make is that the defence was filed to delay the conclusion of the dispute. ***In Cooperative Merchant Bank Limited Versus George Fredrick Wekesa C.A. No. 54 of 1999 (unreported)*** the Court of Appeal restated the principles to be considered before striking out a pleading 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 a 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”.***

5. The question which must be answered is whether on this motion meets those principles? The Plaintiff has made very powerful submissions which one to the effect that the defence is a bare denial. It is also argued that the Defendants admitted publication of the defamatory statement and that they have offered no apology. For this reason, the Plaintiff argued that the Defence is scandalous, frivolous, vexatious and otherwise an abuse of the Court Process. The Defendants are of the view that whether or not the publication was defamatory and whether or not its publication was actuated by malice is a question of fact that can only be determined through a trial. I have already stated that at the close of pleadings the Plaintiff prepared the agreed issues which clearly show there are triable issues which can go for trial with respect, I agree with the submissions of the Defendants that there is need to interrogate the Plaintiff’s case through a trial. On this account I am inclined to disallows the motion. Consequently the Plaintiff, motion is dismissed with costs abiding the outcome of the suit.

**DATED, SIGNED and DELIVERED this 18<sup>th</sup> day of December 2014.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant