REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 337 OF 2013

RAPHAEL KITUR ……..………….………………..........….. PLAINTIFF

VERSUS

RADIO AFRICA T/A THE STAR ………..………........…. DEFENDANT

R U L I N G

By an application by way of notice of motion dated 10th march 2014 and filed in court on 18th March 2014, the plaintiff Rapahel Kitur seeks from this court orders that:-

1) The defendant's defence dated 18th October 2013 and filed in court on 23/10/2013 be struck out and judgment be entered for the plaintiff against the defendant as prayed in the plaint.

2) That the suit be listed for assessment of damages and/or formal proof.

3) That costs of this application and the suit be borne by the defendant.

The application is brought under the provisions of Order 2 Rule 15 (a), (b), (c), (d), Section 1A, 1B and 3A, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law.

The said notice of motion is premised on seven grounds that:

1. The defence filed herein discloses no reasonable defence in law.
2. The plaintiff was never charged with the offence as published.
3. The publication and the words complained of are scandalous.
4. The matters published are so obviously libelous of the plaintiff.
5. The defendant did not seek for clarification and information from the plaintiff
6. The defences of innocence is inapplicable to the facts of this case.
7. The offer of amends made by the defendant and the apology published did and could not undo

the damage already caused to the plaintiff.

The said notice of motion is further supported by the affidavit of Raphael Kitur, the plaintiff herein sworn on 10th March 2014.

In his supporting affidavit, the plaintiff deposes that as the words complained of are obviously libelous of him and as the defendant admits publishing the said words to the effect that the plaintiff had been charged with issuing a bouncing cheque for Sh. 450,000/- which fact the defendant knew to be false, as they never called him to ascertain the truth of the allegation before publishing the alleged words concerning him, then they have no defence capable of raising any triable issues. He further deposes that he lost nomination into a senatorial seat for Bomet County as his political competitors made capital of the publication.

The defence that is sought to be struck out is dated 18th October 2013 wherein at paragraph 5, the defendant admits publishing the said works innocently in relation to the plaintiff and that it made an offer of amends on 25th September 2012 and an apology published in the same column of the defendant's newspaper on 19th September 2012 and an apology published in the same column of the defendant's newspaper on 19th September 2012 as soon as it received notice that the said words were or might be defamatory of the plaintiff, which offer had not been withdrawn.

In the said apology reproduced in the defence, the defendant contends that that publication erroneously referred to the person charged with issuing a dude cheque as the plaintiff herein and upon learning that the person charged share a name with the plaintiff they retracted. There is copy of charge sheet for one Raphael Kipkurui Kitur, who was charged with the offence of cheating contrary to Section 315 of the Penal Code and issuing a bad cheque for Sh. 450,000/- contrary to Section 316A (1) (a) as read with Subsection 4 of the Penal Code.

The defendant filed grounds of opposition to the application stating that:

(1) The notice of motion is incompetent in so far as the same is based upon evidence contrary to Order 2 Rule 15 (2) of the Civil Procedure Rules, 2010.

(2) The statement of defence discloses a reasonable defence to the claim set out in the plaint dated 15th August, 2013.

(3) The notice of motion is an abuse of the process of court for the reason that the striking out of the statement of defence will not conclusively determine the claim herein.

The parties agreed to file written submissions to dispose of the application with the plaintiff filing his on 27th October 2014 and the defendant filing on the same day, each relying on a set of authorities in support of their rival positions.

The case of **D.T. Dobie – Vs – Muchina KLR (1982)** set out principles that a court must consider in striking out pleadings and had this to say:

> ***"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and that the party should not be driven from the judgment seat unless the case is unarguable."***

Courts over time have held that:-

"The summary procedure is only appropriate to cases which are plain and obvious so that any master or Judge can say at once that the statement of claim as it stands is insufficient even if proved to entitle the plaintiff to what he asks", Per **Lord Pearson** from the case of **Hubduck & Sons Ltd – Vs – Wilkinson, Heywood and Clark (1899) IKB 86 at P. 91.**

Before determining whether the defence in this case is fit for striking out, it is necessary to understand what defamation is.

In **John Wood – Vs – The Standard Ltd (2006) eKLR,** the court defined defamation as:-

> ***"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling."***

It is also trite that for the case of defamation to succeed, the following amongst others must exist:-

1. The defamatory statement must be referring to the plaintiff.

2. The statement must be published to third party

3. The impugned statement must be false.

In this case, although the defendant admits publishing the words, they deny that the same were done maliciously as it was erroneous since in truth, it referred to the person who was actually charged with the offence of issuing a dude cheque who has a similar name with the plaintiff and that they were initially made to believe that it was the plaintiff but upon confirmation that it was not the plaintiff, they acted with alacrity and published an apology which they reproduced in the defence.

I have looked words and the charge sheet subject of the defamation alleged and indeed, the accused person in that matter Rapahel Kipkurui Kitur was in count 2 charged with the offence of issuing a bad cheque contrary to Section 316 A (1) (a)(4) of the Penal Code, the amount being Sh. 450,000/- vide cheque No. 000029 drawn on a/c 02968391000 Equity Bank Mama Ngina Branch.

On the other hand, the publication alleged that ***"Former Transport and Communication Assistant Minister Raphael Kitur was charged in a Nairobi court for issuing a bad cheque."***

No doubt, the names of the accused in the charge sheet and those of the plaintiff herein are similar save for the middle name and the standing of the plaintiff was also mentioned. As to whether the defendant's publication was erroneous, is a matter of evidence to be adduced at a full hearing. The tenets of fair hearing compel me to reject this application at this juncture and to hold that to find that on the face of it the plaintiff was defamed without according the defendant the right to a fair hearing which right is guaranteed under Article 50(1) of the Constitution would be to trample on that right, which, by virtue of Article 25 of the Constitution, cannot be limited.

The jurisdiction to strike out a pleading should therefore be exercised only in plain and obvious cases to prevent parties being deprived of their rights to have their day in court by a proper trial.

In **Jackson Ngechu Kimotho – Vs – Equity Bank Ltd NRB HCC 587/2011** the court held that:

> ***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking on a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. Therefore, if a pleading raises a triable issue <u>even if at the end of the day it may not succeed</u> the suit ought to go on trial since in civil litigation as opposed to criminal trials there is no provision, for holding mini trials or a trial within a trial. However, where a suit is without substance of groundless or fanciful and or is brought or is instituted with some interior motive or for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process, the court will not allow its process to be as a forum for such ventures since to do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot***

appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

I have examined in detail all the cases cited by the plaintiff in support of the of striking out pleadings under Order 2 Rule 15 (1) of the Civil Procedure Rules – the old Order 1 were decided before the new constitutional order and the enactment of Sections 1A and 1B of the Civil Procedure Act. The pendulum has now swung and courts are no longer in a hurry to strike out pleadings except in very clear and unambiguous cases. As was rightly put in the **Ajit Singh Virdi – Vs – J.F. Modoy (2014) eKLR**

"To surmount the restriction, the pleading must be undeniably a sham, a demurrer, the deficiency must be easily ascertainable without reference to or probing for any evidence. I do not consider the requirement to be a simple procedural requirement which is diminished by Article 159 (2) (d) of the Constitution. It is a major companion in administration of substantive justice as it shall become clear later.

The restriction in Subrule 2 of the Order 2 Rule 15 of the Civil Procedure Rules serves the interest of substantive justice required under Article 159 of the Constitution. It ensures that those cases which raise triable issues are heard on merit through a trial; it wades off summary rejection of a party's claim arbitrary, for such is draconian act of driving a party away from the seat of judgment; it reinforces the benevolent attitude of the court to sustain rather than to dismiss cases similarly. Doubtless, the said subrule entrenches the constitutional desire of serving substantive justice and, therefore, the insistence by the law that an application which is based on Order 2 Rule 15 (1) (a) should be made in the clearest of cases makes sense. I admit it is a discretion which should be exercised sparingly and cautiously. Up to this point, I believe a case is made why an omnibus application which includes the ground that the impugned pleading discloses no reasonable cause of action and defence should be resisted or adopted only upon careful consideration of the entire case."

In my view, the instant case is not one of those very clear ones where the drastic remedy is for striking out of the defence. In any case, it has been held in **Awuondo – Vs – Surgipharm & Another 2011 EA** by the Court of Appeal that a defence that raises triable issues does not mean a defence that will eventually succeed. And that if there are some issues which require evidence that are raised by the defence, the matter must be let to go to a full trial.

Consequently, I decline to grant the prayers sought and direct the parties to cause the matter to be set down for pre-trial preparations as required under Order 11 of the Civil Procedure Rules.

Costs of this application shall be in the main suit.

Dated, signed and delivered at Nairobi this 17th day of December, 2014.

R.E. ABURILI

JUDGE