



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HCCC NO 482 OF 2010

JOHN M. OHAGA.....PLAINTIFF

V E R S U S

NATION MEDIA GROUP LTD.....DEFENDANT

R U L I N G

1. The Plaintiff's claim is for damages in defamation. His case is that he was libelled by a certain publication in a newspaper owned by the Defendant, and also published on the internet. The offending words have been pleaded in full in the plaint dated **19th October 2010**. Full particulars constituting the libel have also been given. The Plaintiff also pleaded that the publication was actuated by malice, particulars of which he has given.
2. The Defendant filed a **statement of defence dated 29th November 2010**. It admitted publishing the words complained of but denied the imputation of defamation assigned to them by the Plaintiff. The Defendant also denied that in publishing the words complained of it was actuated by malice. It denied the particulars of falsehood, malevolence and spite pleaded in the plaint.
3. The Defendant also specifically denied that in the natural and ordinary meaning of the words complained of and in their proper context, the words were capable of bearing the meanings or innuendo pleaded in the plaint.
4. The Defendant further pleaded as follows –
 - i. **The words published were in their proper context true in substance and in fact to the extent that the staff of NSSF had done a memo to the KACC relating to the issues raised in the article.**
 - ii. **Further and/or alternatively, in so far as the words, in their natural and ordinary meaning or otherwise, consist of expression of opinion, they are fair comments and fair information upon facts which are matters of public interest namely:**

The funds of the NSSF, which are public funds and therefore relate to matters of public interest, are in the public domain.

- iii. **Further and/or alternatively, the said words in their natural and ordinary meaning or otherwise were published under a sense of public duty and without malice to the Plaintiff, and in the honest belief that the information contained therein was true and was further published as fair information on matters of public interest namely:**

The funds of the NSSF, which are public funds and therefore relate to matters of public interest, are in the public domain.”

The Defendant has thus pleaded that the words complained of were published on a privileged occasion.

5. The Plaintiff subsequently filed **notice of motion dated 3rd February 2011** seeking two main orders as follows –

- i. **That the statement of defence dated 29th November 2010 be struck out and judgment be entered for the plaintiff.**
- ii. **That the suit do proceed to formal proof.**

The application is brought under **Order 2, Rule 15(1) (b), (c) and (d)** of the **Civil Procedure Rules, 2010** (the **Rules**).

6. The grounds for the application are –

- i. That the defendant has no *bona fide* defence to the Plaintiff's claim.
- ii. That the defence consists of mere general denials and does not raise any triable issues.
- iii. That the publications complained of, in so far as they refer to the plaintiff, were without factual basis, were false, malicious and defamatory of the Plaintiff.
- iv. That the **Defamation Act, Cap 36** does not afford the Defendant any defence to the Plaintiff's claim.
- v. That it has already been determined in *Nairobi HCCC No. 701 of 2005(O.S.), Pan-Africa Builders and Contractors Limited –vs- National Social Security Fund* that there was no impropriety on the part of the Plaintiff in the conduct of the arbitral proceedings.

7. There is a supporting affidavit sworn by the Plaintiff. It not only gives the background that led to publication of the words complained of, but also repeats the Plaintiff's case as pleaded in his plaint. The affidavit also has pleaded that a ruling in the said Nairobi HCCC No. 701 of 2005 (O.S.) has in effect decided the issue of liability in the present suit. The affidavit further contains what clearly are arguments in support of the Plaintiff's case. Attached to the affidavit, *inter alia*, is a ruling dated 27th January 2011 in Nairobi HCCC No. 701 of 2005 (O.S.).

8. The Defendant has opposed the application by **replying affidavit dated 12th October 2011**. It is sworn by one **Sekou Owino**, the Legal Officer of the Defendant. The affidavit repeats in detail the Defendant's case as pleaded in its statement of defence. Grounds of opposition emerging therefrom include –

- i. That the legal issues canvassed in Nairobi HCCC No. 701 of 2005 (O.S.) do not in any way affect the present suit as neither of the parties herein were in the said suit, nor was the present suit mentioned in those proceedings.
- ii. That the Plaintiff's case as pleaded and particularized in the plaint and as “strenuously denied” by the Defendant in its statement of defence militates against the grant of the orders sought.
- iii. That numerous issues for trial are disclosed by the pleadings.

9. The application was canvassed by way of written submissions. The Plaintiff's submissions were filed on 15th December 2011 while those of the Defendant were filed on 24th February 2012. I have considered those submissions, including the authorities cited.

10. The guiding principle in applications to strike out pleadings is that the court ought to act cautiously and allow such application only in clear and obvious cases. The court will consider the facts of the case without embarking upon a trial of the same.

11. The court will not be concerned with the merits of the impugned pleading at this stage; that is a function of the trial court. The court must indeed refrain from expressing any opinions upon the merits of the facts pleaded as this may prejudice the fair trial of the action, should it go to trial. For all these, see the well-known case of *D. T. Dobie & Company (K) Ltd –Vs- Muchina [1982] KLR 1*.

12. I may add that the court should not permit an action to be tried by way of affidavits and submissions under the guise of an application to strike out.

13. As already seen, the application is premised upon the submission that the Defendants' statement of defence raises no triable issues. What are the defences raised by the Defendants? In this connection we must remember that the law is that if only one triable issue is disclosed, that is enough to permit the suit to proceed to trial.

14. The Plaintiff has pleaded at paragraph 12 of his plaint no fewer than ten particulars of falsehood, malice and spite on the part of the Defendant in publishing and printing the words complained of. These particulars include -

(i) That the words complained of were deliberately slanted to inflict the greatest possible harm, damage, injury, embarrassment, ridicule, contempt and hatred on the Plaintiff both in his own personal capacity and in his professional image, reputation, status and standing in the eyes of the public, clients, colleagues and business partners and associates.

(ii) That the Defendant was not motivated by truth or balanced reporting but by extreme malice and other ulterior motives, all calculated to injure the Plaintiff.

(iii) That the Defendant published the words complained of to promote the sale and circulation of its newspapers while destroying the Plaintiff both in his personal and professional capacity as a husband, a parent, an arbitrator and an Advocate of the High Court of Kenya.

iv. That the Defendant deliberately, maliciously and callously slanted the true facts and introduced innuendos and used strong emotive language calculated to maximise the injury and hatred to the Plaintiff both in his personal and professional capacities.

15. All these are very serious allegations. The Defendant has denied each and every one of them in its statement of defence. Are these issues that should be tried by untested affidavit evidence and submissions thereon? I think not. These are serious issues that ought to be canvassed upon tested evidence in a trial of the action.

16. The Plaintiff has also pleaded at paragraph 12 of the plaint no fewer than twelve instances which he says the words complained of, in their natural and ordinary meaning, were understood by the reading public to mean. A wide range of meanings has been pleaded, from criminality, to unprofessional conduct, to incompetence as an arbitrator, to indifference to the plight or welfare to the majority of Kenyans, to the lack of personal integrity, to betrayal of his professional oath as an Advocate, to being an irresponsible parent, to engaging in and facilitating the plunder of public funds, etc. Again the Defendant has denied each and every one of these various meanings that the Plaintiff has assigned to the words complained of. Should they not be examined in a trial of the action? Why should the court be invited to examine these alleged meanings without the benefit of tested evidence?

17. In the application at ground 3 of the grounds and reasons thereof, the Plaintiff has stated –

“The publications complained of, in so far as they refer to the Plaintiff, were without factual basis, were false, malicious and defamatory of the Plaintiff”.

The Defendant has denied this.

18. These and other contested issues of fact ought to be decided upon tested evidence. The trial judge will look at the publications complained of in light of any evidence placed before the court, including the proceedings giving rise to the stories complained of.

19. In the present case, I find that the pleadings disclose several triable issues which ought to go to trial. This is not a plain and obvious case where the drastic remedy of striking out ought to be granted. The parties must have their day in court in support of their respective cases. I find no merit in the application and I must refuse it. It is hereby dismissed with costs to the Defendant. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF AUGUST 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST 2013