



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 134 OF 2011

LEONARD GETHOI KAMWETI.....PLAINTIFF

VERSUS

- 1. SOLOMON KITUNGU**
- 2. JAINDI KISERO**
- 3. NATION MEDIA GROUP LIMITED.....DEFENDANTS**

R U L I N G

1. The **notice of motion dated 29th November 2011** concerns the 1st Defendant and the Plaintiff. The application is by the 1st Defendant and it seeks the main order that the Plaintiff's reply dated 30th May 2011 to the 1st Defendant's statement of defence dated 18th May 2011 be struck out.

2. The application is brought under **Order 2, rule 15(1) (b) and (d)** of the **Civil Procedure Rules** (the **Rules**). It is premised upon the following grounds appearing on the face thereof -

- (i) That the Plaintiff has introduced at paragraphs 2, 3, 4 (v) & (vi) and 6 of his reply new matters not pleaded in the plaint.
- (ii) That the 1st Defendant will not have an opportunity to respond to these new allegations "as the reply is the final document filed before pleadings close".
- (iii) That in any event the new matters introduced "are of a scandalous and vexatious nature as against the 1st Defendant".
- (iv) That the reply does not conform to the requirements of **Order 2, rules 11 and 12** of the Rules.
- (v) That the reply is, in the circumstances, an abuse of the process of the Court.

The application is supported by the 1st Defendant's affidavit annexed thereto. The affidavit in effect argues the application.

3. The Plaintiff has opposed the application by **replying affidavit filed on 3rd February 2012**. The main grounds of opposition emerging therefrom are –

- (i) That the application is fatally defective.
- (ii) That the Plaintiff's reply to the 1st Defendant's defence complies with the Rules.
- (iii) That it would not be just to grant the order sought.

4. The application was canvassed before Khaminwa, J by way of

written submissions, but due to unavoidable circumstances the learned Judge could not prepare and deliver ruling. That is why the matter is now before me.

5. I have considered the submissions, including the cases cited. The 1st Defendant's submissions were filed on 25th May 2012 while those of the Plaintiff were filed on 2nd July 2012. I have also perused the plaint, 1st Defendant's defence and the impugned reply to 1st Defendant's defence by the Plaintiff.

6. I consider the following to be the issues to be determined in this application -

- i. **Is the 1st Defendant's application fatally defective?**
- ii. **Has the Plaintiff, in his reply dated 30th May 2011 to the 1st Defendant's defence, introduced new matters not pleaded in his plaint contrary to rules of procedure?**
- iii. **If so, has the 1st Defendant been ambushed without any opportunity to respond?**
- iv. **Are the matters pleaded at paragraphs 2, 3, 4 (v) and (vi) and 6 of the Plaintiff's reply of a scandalous and vexatious nature as against the 1st Defendant?**
- v. **Does the Plaintiff's reply conform to the requirements of Order 2, rules 11 and 12 of the Rules?**
- vi. **Is the Plaintiff's reply an abuse of the court process?**

7. The Plaintiff's suit as pleaded in the lengthy plaint dated 12th April 2011 is in defamation. The cause of action is in respect to a letter dated 23rd March 2010 written by the 1st Defendant to the Managing Director of the *National Bank of Kenya* of which the Plaintiff was Company Secretary. The cause of action is also founded on two articles authored by the 2nd Defendant and published in two newspapers owned by the 3rd Defendant. It is the Plaintiff's case that the words contained in the three documents were, by their ordinary meanings and/or by innuendo, defamatory of him. The Plaintiff also pleaded **malice** in publication of the three documents.

8. In his statement of defence dated 18th May 2011 the 1st Defendant admitted writing the letter dated 23rd March 2010 in his official capacity but denied publication thereof as pleaded. However, he denied that the letter was defamatory of the Plaintiff, or that it was written with malice. He also denied that he availed the letter or the contents thereof to the 2nd and 3rd Defendants as alleged by the Plaintiff at paragraph 12 of the plaint. In the alternative and without prejudice the 1st Defendant pleaded **qualified privilege**.

9. The "new matters" in the Plaintiff's reply to the 1st Defendant's

defence complained of by the 1st Defendant are –

Paragraph 2:

“In reply to paragraphs 3, 6, 7, 9 and 10 (a) and (f) of the defence, the Plaintiff reiterates that the Defendants published the words complained of. The 1st Defendant has by prior footprints established a predictable pattern of either leaking or giving sensitive information to the co-Defendants for publication, which publications, ordinarily quote the 1st Defendant portraying him in great light while portraying others dimly.

Previous leads and interviews that were published by the Defendants:

- a. **Article by 2nd Defendant in the *East African* of 5.4.2010 on “massive share dilution expected as giants battle for controlling interest in NBK”.**
- b. **Article by 2nd Defendant carried in the *Daily Nation* of 16.11.2009 titled “Proposed sale of NBK raises a storm”.**
- c. **Article by 2nd Defendant carried in the *East African* of 6.3.2011 on KPA privatization.**
- d. **Article by 2nd Defendant carried in the *Daily Nation* of 7.3.2011 on Port privatization.**
- e. **Article in the *Daily Nation* of 29.10.2009 on MPs to have final say in port saga.**
- f. **Article by 2nd Defendant carried in the *Daily Nation* of 11.2.2010 on the sale of *Numerical Machining Complex (Nyayo Car)*.**
- g. **Article on sale of state firms appearing in the *Daily Nation* of 7.2.2010 quoting a weekend telephone interview by the 1st Defendant.**
- h. **Article in the *Business Daily* of 27.5.2011 on sale of sugar firms quoting the 1st Defendant.**
- i. **More articles to be provided upon discovery”.**

Paragraph 3:

“In reply to paragraph 4 of the defence, the Plaintiff maintains that the words carried in the letter of 23/3/2010 were false and malicious as particularized in the plaint save to add that:

- a. **It was false to allege that the issue of conversion of preference shares was coming up for discussion at the Annual General Meeting.**
- b. **The 1st Defendant knew or ought to have known that NSSF and Treasury were the only preference shareholders in National Bank of Kenya Limited.**
- c. **The 1st Defendant knew or ought to have known that N.S.S.F and Treasury were both represented on the Board of National Bank of Kenya Ltd.**
- d. **The 1st Defendant knew or ought to have known that the money constituting share premium account arose from the floatation of ordinary shares long before the preference shares were created.**
- e. **The 1st Defendant knew or ought to have known that N.S.S.F and Treasury had, subject to approval of the AGM, agreed to convert the share premium account to bonus shares to be distributed among ordinary shareholders.**

- f. The 1st Defendant knew or ought to have known that the said NSSF and Treasury had agreed to the agenda of Annual General Meeting including the creation and allocation of bonus shares.
- g. The 1st Defendant knew or ought to have known both the NSSF and Treasury are major ordinary shareholders of the Bank and did not stand to lose as alleged.
- h. The 1st defendant knew or ought to have known there was nothing immoral or fraudulent in the intended AGM.
- i. The 1st Defendant made the allegations recklessly not caring whether what he said was true or false.
- j. The 1st defendant abused his office and the occasion.
- k. The 1st Defendant knew or ought to have known that there was no holder of preference shares whose interest was threatened by the Plaintiff as alleged.”

Paragraph 4 (v) & (vi):

“In reply to paragraph 8, the Plaintiff avers that the allegations leveled against him in the letter of 23/3/2010 show no honest and legitimate discharge of public duty. The 1st Defendant instead abused his office in that:

- i.
- ii.
- iii.
- iv.
- v. It exceeds the known limits of fair comment or honest discharge of public duty”.
- vi. The 1st Defendant abused both his office and the occasion.”

Paragraph 6:

“Further, even if the words were published on an occasion of qualified privilege, the 1st Defendant had not used the occasion honestly and so cannot enjoy the protection of qualified privilege. The 1st Defendant was motivated by malice and abused his office and the occasion. The Plaintiff reiterates the particulars of malice in the Plaint and adds the following:

Additional particulars of malice

- a. The words complained of were violent, aggressive and irrational attack on the person or character of the Plaintiff and not a question of privatization.
- b. The attack was devoid of any legitimate expression of a technical disagreement.
- c. The letter conveys unbridled ambition to ridicule, hurt or harm the character of Plaintiff.
- d. The words were a deliberate falsehood written upon prior calculation to be published in the newspaper by the 2nd and 3rd Defendants.
- e. Causing the words to be published in the press and widely circulated.

- f. **The words complained of were written to belittle and disparage the Plaintiff in the eyes of many.**
- g. **The words were published recklessly not caring whether they were true or false”.**

10. Order 2, rule 7 (3) of the Rules provides as follows –

“(3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred”.

11. At paragraph 10 of the plaint the Plaintiff has pleaded that the 1st Defendant **maliciously** wrote and published the letter dated 23rd March 2010. The particulars of malice given at paragraph 24 of the plaint appear to be in respect to the 2nd and 3rd Defendants.

12. At paragraph 11 of his defence the 1st Defendant pleaded **qualified privilege** in the alternative and without prejudice to the other defences already pleaded. He particularized the qualified privilege.

13. Under Order 2, rule 7 (3) of the Rules quoted above, the Plaintiff was required, if he intended to allege that the 1st Defendant was actuated by express malice, to file a reply giving particulars of the facts and matters from which the malice is to be inferred. **I am satisfied that the averments contained in the impugned paragraphs of the Plaintiff’s reply to the 1st Defendant’s defence constitute such particulars of the facts and matters from which the Plaintiff pleads the malice alleged against the 1st Defendant is to be inferred.**

14. My determination of the issues in this application (except the first issue) is thus in favour of the Plaintiff. The Plaintiff’s reply is in accordance with the rule quoted above. It has not introduced any new matter not pleaded in the plaint, and the 1st Defendant has not been ambushed. The impugned paragraphs of the reply are not scandalous or vexatious as against the 1st Defendant. I also see nothing in the reply that offends Order 2, rules 11 and 12 of the Rules. Nor is it an abuse of the process of the Court.

15. I have chosen to decide the application upon its own merits. That is why I have not bothered with the first issue, which is a technicality. In this day and age, and in light of various provisions in the **Constitution of Kenya, 2010** and the **Civil Procedure Act, Cap 21**, any contentious issues in litigation are best resolved on their merits, rather than on technicalities of procedure. The plea by the Plaintiff that the 1st Defendant’s application is defective is a technicality.

16. In the event the notice of motion dated 29th November 2011 is dismissed with costs to the Plaintiff as against the 1st Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2013