REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NARIOBI

CIVIL CASE NO.611 OF 2010

HON. KENNETH MARENDE…….....…….. PLAINTIFF

VERSUS

PEOPLE MEDIA GROUP LIMITED…….....…….. 1ST DEFENDANT

CHRIS OYUGA……...…….....…… 2ND DEFENDANT

MAINA MUIRURI….....…….....…….3RD DEFENDANT

RULING

Application dated 15/9/2011 is by Notice of Motion brought under Order 2 rule 15 and Order 51 rule 1 of Civil procedure Code Rules, Section 1B and 3A of Civil Procedure Act. Order sought are:-

1. Defendants statement of defence be struck out

2. judgment be entered in favour of Plaintiff as prayed

3. This matter do proceed to formal proof

4. and that costs be awarded to Plaintiff.

The application is supported by affidavit of Hon. KENNETH MARENDE and on grounds stated:

a) that defence herein consists of mere denials and does not raise any triable issues

b) defence is frivolous and vexatious

c) the defence is otherwise an abuse of court process.

In his affidavit the Plaintiff state that on10th December 2010 he brought this action against the defendants for damages for lible and also for aggravated damages and an injunctive order restraining the defendants and each of them from publishing or causing to publish defamatory words of himself as he has stated in the plaint dated 12th December 2010.

On 19th January 2011 the defendants herein filed their statement of defence dated 19th January 2011. In their defence the defendants have admitted to publishing the words set out in paragraph 5 of the plaint under the banner title “Marende voted for poor leadership style” it was in the first defendant’s publication

of 23rd of October 2010. The defendants have admitted that the said words referred to him (Hon. Marende). The defendants in their defence alleged that the said words comprise of fair comment on matters of public interest and that the said words are privileged under paragraph 7 of part two of the schedule to the Defamation Act being a fair and accurate report of the meeting held. The meeting was held on 19th October 2010. The publication complained of does not fairly and accurately report proceedings of the meeting held on 19th October 2010. A copy of the minute is exhibited and marked KM 2 . It is clear and obvious that their publication does not bear fair and accurate content of the said proceedings. In the circumstances the defendants are deemed to have published the article complained of maliciously knowing it was false or recklessly not caring whether it was true or false. It is on record that the defendants were issued with request for particulars dated 7th of February 2011 and to date the defendants have failed to furnish any particulars as requested and this is a further proof that the defence lacks substance and cannot be sustained. The defence consists of mere denials and raises no issue for trial. Referring to replying affidavit of the defendants which is sworn by JOSEPH MAINA MUIRURI who says that he is the editor of the 1st defendant and that the minute of the meeting held on 19th October 2010 referred to in paragraph 9 of the supporting affidavit are not signed and cannot therefore be relied upon by the plaintiff in support of the notice of motion. That the said minutes refer to deliberations whose nature or content or contributors have not been disclosed and the minutes of the said meeting have not been confirmed. A perusal of the said unsigned minutes show that the deliberations ensued and it would be important to cross-examine the persons who attended the said meeting to confirm the nature of the deliberations since it seems that the said meeting could have raised similar issues to those contained in the article complained of in this suit. That in the circumstances it would be unfair to summarily strike out the defence without interrogating the said issues. That the defence raises triable issues which need to be canvassed at the hearing of the main suit.

The main issues which are:-

a) was the publication defamatory of the plaintiff

b) was the publication privileged under paragraph 7 of part two of the schedule to the Defamation Act.

c) Does the plaintiff as chairman of the parliamentary service commission and being present at the meeting of 19th October 2010 have particular knowledge of the proceedings at the said meeting. Should he be cross-examined on the said proceedings.

d) Is the article a fair comment on matters of public interest the management and conduct of the affairs of the parliamentary service commission.

The issue of whether an article is defamatory or not is within the powers and purview of the court and a plaintiff should not be allowed to circumvent the due process of law. Mr. Muiruri swears that the act of striking out a defence is a draconian step which should only be exercised in the clearest of cases which this is not.

The plaintiff's advocates have filed a list of authorities

1 **D.T. Dobie –vs- Muchina 1982 KLR No.1** where it was held that the words reasonable cause of action in Order 6 rule 13 (1) means an action with some chance of success, when allegation in the plaint only are considered a cause of action will not be considered reasonable if it does not state such facts to support the claim of prayer. The words cause of action means an act on the part of the defendants which gives the plaintiff his cause of complaint as the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discover and or evidence it should be used sparingly and cautiously. That suit was found to be incompetent as it disclosed no reasonable cause of action.

2 **Murri -Vs- Murri and Another 1999 1 E.A. 212**. Summarily remedy of striking is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of court

process or is un arguable. It has nothing to do with the case being complex or difficult.

3 **Mpaka Road Development Limited –vs- Kana** where it was held a matter would only be scandal our fivilous and vexatious if it would not be admissable in evidence to show the truth of any allegation in the pleading which is sought to be impugned e.g. imputation of character where character is not in issue, a pleading is frivolous if it lucks seriousness. It would be vexatious if it annoys of tends to annoy and it would annoy or tend to annoy if it is not serious or contains scandalous matter irrelevant to the action or defence. A scandalous or frivolous pleading is *ipso facto* vexatious.

4 **Charity Kaluki Ngilu –VS- Headlink publishers ltd & others Civil Case 1202 of 2005**. The courts powers to strike out a pleading is discretionary and the jurisdiction is intended to provide a quick remedy to a party who is being denied his claim by what amounts to a charm defence.

On the side of the respondent they have cited two authorities

1. **Vaiwin Ltd and R.M. Patel 2000 eKLR** 1 it is an appeal judgment where it is stated that summary judgment is a draconian measure and it should be given in only the clearest of cases and a trial must be ordered if a triable issue is found to exist or one is fairly arguable the court should avoid the temptation to anticipate the ultimate result of the trial.

2. Narmada shanker J. Dave & Aanother –vs- Zurobi Ltd in that case it was stated that if the defence raises a triable issue then the defendant will have shown it has leave to defend. A triable issue would be deemed to have been raised if the defence contains an issue which would constitute an arguable case on behalf of the defendant. A triable issue should be one on which a defendant would succeed in an action. A defence which is hopeless which raises no reasonable issue in answer to the plaintiffs claim and whose clear purpose is to delay inevitable judgment in favour of the plaintiff would be held to raise no triable issues

I have considered the plaintiffs application and after perusing the authorities cited by both parties, I am of the view that the statement of defence raises triable issues and is not frivolous or vexatious. It is also clear that it is not an abuse of court process

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 cautiously as stated by Madan J. A. in DT Dobie Case. It is not shown that the action is one that cannot succeed for defendants. In Mpaka Road Development Ltd –vs- Kana it was held that a matter would be scandalous, frivolous and vexatious if it would not be admissible in evidence to show the truth of any allegation in the pleading. It is frivolous if not serious and would be vexatious if it annoys.

I therefore do not consider at this stage that the statement of defence filed herein is for striking off and I dismiss the application and order the plaintiff to set the suit down for hearing.

Dated and delivered at Nairobi this 16th day of February 2012.

J.N. KHAMINWA

JUDGE