REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 433 OF 2010

DR. KIAMA WANGAI……..PLAINTIFF

VERSUS

JOHN N. MUGAMBI……1ST DEFENDANT

MUGAMBI & COMPANY……...….2ND DEFENDANT

RULING

Application dated 29/6/2011 filed by defendant applicant seeking orders:

Seeking the striking of the plaint on the ground that the suit is scandalous, frivolous or vexatious an abuse of the process of court. Further the name of 2nd defendant be struck out for being enjoined as a party in its own name

Costs.

On the grounds that

1. The plaint does not disclose any reasonable cause of action as set out in defamation Act Cap. 36 Laws of Kenya.

2. Facts in issue in the plaint prove no nexus to 2nd defendant.

3. The facts pleaded do not warrant filing a suit as it is not a legal wrong.

Mugambi & Company is a sole proprietary firm of advocates that cannot sue or be sued in its own name.

The plaintiff has filed other suits between same parties namely HCCC No. 432 of 2010 and HCCC No.434 of 2010 which attract the mandatory provisions of the law as envisaged in Section 60 of Civil Procedure Act under the principle of Res Subjudice.

The supporting affidavit is sworn by John Mugambi Njagi sworn on 29/6/2011. It is shown that this suit is similar to case No.432/2010 and 434/2010 between same parties and that the plaintiff has sued firm of advocates 2nd defendant which has no power to sue or be sued.

Further more it is the opinion of this party that the matter is not showing any defamation according to

law.

I have perused the written submissions of the applicant. The case of **Geofrey Gunjiri Njuguna –vs- Moses Gichohi 2008 eKLR** where the court held:

"in a claim based on libel it is of critical importance that the plaintiff prove to the satisfaction of the court that defamation words were and/or made known to third parties in courts of law do not act on assumption and speculations".

It is trite law that in spite of how weighty a defamatory matter is if only communicated to the plaintiff there can be no action founded on it as there would not have been publications. Also communication to one's advocate is privileged under Section 134 of Evidence Act.

In reply the plaintiff states that there was no defendant/client relationship. He relied in replying affidavit and written submissions.

The replying affidavit is sworn by the plaintiff himself and it shows that the plaintiff entered into agreement of tenancy with the defendant at a rent of Kshs.10,000/=. The defendant vacated the premises without refunding money or paying rent. There was demand made for Kshs.16,670. Suit was filed to request for apology but none was forth coming.

The plaint discloses a reasonable cause of action it is not scandalous, frivolous or vexatious or an abuse of process of court furthermore the 2nd defendant is propery enjoined in the suit.

He swears that suit No.432 and No.434 emanate from different and specific cause of action and has no relation with this No.432. The respondents submissions in response to defendants skeletal submissions show that there is a demand letter for Kshs.16,670/= owed by the defendants.

In HCCC No.432 there is a demand for 50.000 owed by defendants. In plaintiff's claim in No.434/2010 demand for 90.000/= owed by defendants. This does not apply to Section 6 of the Civil Procedure Act. The suits are not similar. Again the letter dated 16/8/2010 was drawn and signed by first defendant therefore it was 2nd defendant who was involved.

Regarding the authority of **Geofrey Ngunjiri Njuguna –vs- Moses Gichohi** the plaintiff submits that the same is distinguishable it relates to an appeal from original judgment of Chief Magistrate Court.

The issues for determination are best dealt at the hearing in a trial. Hon. Ringera said to strike out a pleading is a draconian step to be taken in only the most plain and obvious case "etc etc".

Upon perusing the submissions by the applicant and the reply by the respondent it is my view that the decision of whether the matter is defamatory or not must be made after full trial. In this matter where the parties were involved in other deals full evidence and not arguments must be canvassed before a court of law.

Following in the footsteps of Hon. Ringera J. now retired in **HCCC No.2064 of 2000 Barclays Bank of Kenya –vs- Dominic Defu, Kenyi Gachoka** and others when he said to strike out a pleading is a draconian step to be taken in only the most plain and obvious cases. Further I am of the opinion that whether applicants conduct within the meaning of the law is a matter of determination by the trial judge after viva voce evidence and debate on the disputed matters of law.

The applicant intends to deprive the court of that opportunity of hearing the parties and making a decision on the dispute.

I find the application unmerited and I dismiss the same with costs to the plaintiff.

Dated and delivered at Nairobi this 24th day of May, 2012.

J.N. KHAMINWA
JUDGE