REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 85 of 2005

MOHAMMED KHALIF ALI..... PLAINTIFF

VERSUS

HON BILLOW A KERROW M. P. ……..……..….....DEFENDANT

RULING

By a Chamber Summons dated 15th June 2005 and filed in this Court the same day, expressed to be brought under the provisions of Order VI Rule 13(1)(b)(c) and (d) [now Order 2 Rule 15(1) (b)(c) and (d)] of the Civil Procedure Rules and all other provisions of the law, the plaintiff prays for the following orders:

1. THAT the Defendant's Defence herein be struck out with costs.

2. THAT Judgement be entered for the Plaintiff as prayed in the Plaint and the suit to proceed for Formal Proof.

3. THAT the costs of this Application be provided for.

4. THAT such other and/or further relief be granted as this Honourable Court may deem fit and just to grant in the circumstances of the matter.

The application is based on the following grounds:

a) On 18th May 2004, the Defendant wrote a false, malicious, libelous and defamatory letter to the then Honourable Minister of state, provincial Administration and Internal Security alleging that the Plaintiff was the one causing infighting between two communities living in Mandera District.

b) The aforesaid letter was maliciously copied to various Government Institutions purely to discredit and defame the Plaintiff and as a result of which the Plaintiff was on 6th September 2004 summoned and questioned by the Government's Security Agencies.

c) The Defendant did not bother to find out the truth of the matter or even contact the Plaintiff to hear his side of the story before writing the aforesaid letter.

d) Even as a Member of Parliament, the Defendant had no privilege or justification to publish false, malicious, defamatory and disparaging remarks about the Plaintiff without confirming the truth of the matter.

e) The Defendant's Defence is a sham and is meant to delay the fair hearing and determination of this suit.

f) The Defence does not raise any triable issues.

g) The Defendant's Defence is frivolous, vexatious, scandalous, and an abuse of the Court's process.

h) Under these circumstances and in the interest of justice, it is fair and just that the Defendant's Defence be struck out.

The application is supported by an affidavit sworn by the plaintiff **Mohammed Khalif Ali**, the plaintiff on 15th June 2005. According to the said affidavit, the Defendant on 18th May 2004 wrote a false, malicious, libelous and defamatory letter to the then Honourable Minister of state, provincial Administration and Internal Security in which it was alleged that the plaintiff was authorized by top business and political leaders of Murille to travel to Europe and raise money from Murille Diaspora in Europe and U.S.A to disable the Garre Community in Mandera. The implication of the said letter, according to the plaintiff, was that he was the one perpetuating infighting between Murille and Garre Communities in Mandera, which according to him is a serious Criminal offence of Murder. He was accordingly, portrayed as a criminal, ruthless and merciless person who would engage in activities that would threaten and take the lives of innocent people. The letter, in his view, was contemptuous, disparaging and ill motivated towards him and was actuated by malice, contempt and spite by the Defendant and was meant to destroy and injure his reputation and business. As a result of the foregoing, the plaintiff's integrity, personality and status as a Businessman of long-standing has been irreparably injured. Contrary to the defendant's moral duty as a Member of Parliament of Mandera Central to write and publish the truth only, it is contended that the Defendant wrote the said letter falsely, maliciously, libelously purely to advance his political star. The Defendant, the plaintiff deposes, did not have any public or Constitutional duty as a Member of Parliament for Mandera Central to write false, malicious and libelous letter in a sensational manner to the said Minister and give it the widest possible prominence and circulation by copying the same to different Government institutions without ascertaining the truth of the matter. As a result of the said letter the plaintiff was summoned to appear before the District Criminal Investigation Officer, Mandera as well as the Provincial Criminal Investigation Officer, Nairobi Area over the said allegations actions which have led the security system to view him with suspicions causing interference with his business, social life and association with members of the public in general. The Defendant has, however, refused to correct the said impression and tender any apology despite demand for the same. Since the Defendant had no justification to write the said letter, it is the plaintiff's opinion that the Defence filed is frivolous, vexatious, scandalous and ought to be struck out for being abuse of the process of the Court. According to the advice from his advocates, the Defence does not raise any triable issues and is purely meant to delay the determination of the suit. It is therefore in the interest of justice, fair and just that the said Defence be struck out and interlocutory judgement entered on the plaintiff's behalf.

In opposition to the application, the defendant swore an affidavit on 23rd September 2005, in which he deposed that as a result of attacks on his constituents, he was approached by the said constituents in order to raise their concerns with the relevant investigative state agencies. According to him his said constituents had credible information regarding the said attacks and he received reports which he evaluated keenly. He prepared a letter which he presented to the Minister responsible for internal security and copied the same to institutions whose primary concern is security and not to any other person. As a Member of Parliament, the defendant deposes that he has the legal, political and moral responsibility to inform organs of government on a matter which could adversely affect his constituents and/or provoke inter clan armed conflict and that the people to whom he addressed and/or copied the letter have a corresponding obligation and/or duty to receive such complaints for the purposes of investigations. The defendant deposes that he has no ill will towards the plaintiff and that the letter he wrote expresses genuine concerns regarding acts of killings of his constituents which had persisted without an end in sight. According to him, the contents of his letter are true and that further the defence of qualified privilege debars this suit. In his view, the application is intended to deprive him of an opportunity to adduce oral evidence during the trial relating to the said defences by seeking a pre-trial evaluation of the

rival claims raised in the plaint and defence which to him is irregular and not permissible within our legal system.

The application was prosecuted by way of written submissions. According to plaintiff, considering the totality of the letter complained about, there cannot be any justification for the said publication and the defence filed is simplistic and unmerited, a grave abuse of the process of the Court comprised of mere general denials in light of the malicious and defamatory matter alleging the involvement of the plaintiff in armed invasion/attack, murder and such like atrocities. It is submitted that the Defendant was actuated by malice, contempt and spite meant to destroy the plaintiff's reputation and business and that due to the said publication, the Plaintiff's reputation and status has been injured irreparably. Being a Member of Parliament for Mandera Central the plaintiff did not have any public or constitutional duty to write a false, malicious and libelous letter and copy the same to different Government Institutions without ascertain the truth thereof. It is submitted that on consideration of the foregoing, the plaint, the defence and reply to the defence as well as the supporting affidavit and the annextures thereto the Defence filed does not raise any issues and is merely comprised of mere denials and ought to be struck out as prayed. It is submitted that it is not the duty of Members of Parliament to defame or libel or defame members of the public with abandon and in any case the Privileges and Immunities contained in Part II of ***The National Assembly (Powers and Privileges) Act Chapter 6 Laws of Kenya***, the privileges only come in when a Member of Parliament speaks in Parliament, National Assembly or a Committee or writes a Report to the National Assembly Committee of National Assembly. The letter written by the Defendant does not enjoy any privilege or immunity under the provisions of sections 3 to 13 of the said Act. Similarly, it is submitted that the provisions of the Defamation Act are of no assistance to the Defendant. Relying on his list of authorities and in particular Defamation Act Cap 36 and the decision in he case of **J P Machira T/A Machira & Company Advocates vs. Wangethi Mwangi & Nation Newspapers [2002] 2 KLR 54**, it is submitted that the Court ought to allow the application, direct that the Defence be struck out and the case proceeds to formal proof.

On behalf of the defendant the contents of the replying affidavit were reiterated and it was submitted that, based on **Ramji Megji Gudka Ltd vs. Alfred Morfat Omundi & 2 Others [2005] eKLR**, a triable issue is not necessarily one that the Defendant would ultimately succeed on but need only be *bona fide*. According to him the defence raises triable issues whether the words in the letter were false, malicious, libelous or defamatory; whether they were actuated by malice, contempt or spite calculated to injure and destroy the plaintiff's business and reputation; whether the letter was written under a sense of public and constitutional duty; and whether the letter passed for qualified privilege. It is the defendant's view that the defence is not sham but one on merit which ought not to be struck out. It is further submitted that an allegation in a pleading is said to be scandalous if it states matters which are indecent or offensive or are made for the mere purpose of prejudicing the opposite party which is not the case with the defence herein. A pleading is frivolous when it lacks substance or basis or is fanciful and is said to be vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble or expense which is not the position here. In support of this submission the defendant relies on **Mpaka Road Dvelopment Limited vs. Kana [2004] EA 160**. On the authority of **D T Dobie vs. Muchina [1982] KLR 1**, it is submitted that a pleading should only be struck out if it is manifestly hopeless that it amounts to an abuse of the court process and in so doing the court ought to exercise its jurisdiction sparingly and only in exceptional cases as the rules of natural justice require that the court must not drive away any litigant from the seat of justice. In the defendant's view, the defence on record is a complete defence to the claim made by the plaintiff which fact shall be established at the trial and no reason has been advanced to warrant the defence herein being struck out. In the defendant's view the application ought to be dismissed with costs and the parties directed to set the suit down for trial forthwith.

The jurisdiction to strike out a pleading is a discretionary one. However, like all discretions exercised by the Courts, must be made judicially or on sound legal and factual basis. In other words, the discretion must be exercised judicially, or in a selective and discriminatory manner, not arbitrarily or idiosyncratically for otherwise the parties would become dependent on judicial whim. See Smith vs. Middleton [1972] Sc 30; Cookson vs. Knowles [1978] 2 WLR 978, 981. In order to exercise the said discretion certain principles have been developed by the Courts which guide its exercise. It has been held that the same must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a

mini-trial thereof before finding that a case or defence does not disclose a reasonable cause of action or defence or is otherwise an abuse of the process of the court. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless of fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be as a forum for such ventures. 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 at the 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. The grounds upon which the courts do strike out pleadings under Order 2 rule 15 of the Civil Procedure Rules are that:

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,
The various phrases employed under the foregoing rule have been the subject of judicial pronouncements. These phrases are "scandalous" "frivolous", "vexatious", "embarrassing", "tending to delay a fair trial" and "otherwise amounting to an abuse of the Court process".

A pleading is said to be scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

However, the word "scandalous" for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper denial of a well-known fact can also be rightly described as scandalous. See **Machira Case** (supra).

But they may not be scandalous if the matter, however scandalizing, is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

A matter is said to be frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. GoldsMid (1894) 1 QBD 186.**

Again a pleading or an action is deemed to be frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen&Leake and Jacobs Precedents of Pleading (12thEdn.) at 145.**

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the pleading is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process or is frivolous or vexatious or both. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

It has been held that where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further particulars. See **Kemsley vs. Foot (1952) AC 325.**

In **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did".

In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive...The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment".

The defendant's defence to the suit can be categorised as follows:

1. That he published the subject material in the discharge of his public and constitutional duty as a Member of Parliament for Mandera Central.

2. That he believed that the said material was not only true but were deserving of very urgent attention of the officers of Government responsible for maintaining security.

3. That the same was not published maliciously.

For the Court to grant the present application, the applicant must satisfy the Court that the defences raised are so weak that the defence is beyond redemption and incurable by amendment. In other words the defendant's defence must be beyond resuscitation by amendment. The defendant contends that his constituents received credible reports which he evaluated keenly and which be believed to be true. Can it be said that the said publication was baseless and was actuated by malice? I am afraid at this stage of the proceedings and based on the material presented before the Court, the Court cannot conclusively make a determination as to the falsity of the publication as well as to the actual reason behind the said publication whether by malice or otherwise. In an application seeking striking out of pleadings the Court must always be minded of the need to avoid the temptation to try the case by way of affidavit evidence.

Was the defendant under a moral and Constitutional duty to communicate his Constituent's fears and apprehensions to the concerned authorities? In order to determine that issue would necessitate the interrogation of the role of a Member of Parliament with respect to affairs of the people whom he represents. I am afraid that interrogation and finding therefrom is outside the scope of this discourse as to do so would amount to trespassing on the jurisdiction of the trial court. In **D T Dobie vs. Muchina** (supra) the Court of Appeal expressed itself *inter alia* as follows:

"'Reasonable cause of action' means a cause of action with some chance of success when (as required by paragraph 2 of the Order 6 rule 1) only the allegations in the plaint are considered. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint…A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved…It is not the practice in civil administration of the Courts to have preliminary hearing as in crime. If it involves parties in the trial of the action by affidavits it is not a plain and obvious case on its face…The summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross- examination in the ordinary way. This seems to be an abuse of the inherent power of the Court and not a proper exercise of that power…Whereas no evidence is permitted in the case of Order 6 rule 13(1)(a), it is permitted in the case where there is an allegation that it is an abuse of the Court process…A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal…If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a Court of justice ought not act in darkness without the full facts before it."

I have said enough to show that I am not convinced that the issues raised herein are so plain that they can be determined at once without the need for oral evidence. Whereas the Court retains the jurisdiction to strike out pleadings in deserving cases, the advantage of the Civil Procedure Rules, 2010 over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out such as amendment and furnishing of particulars.*In applying the principle or concept of*

overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 1A and 1B of the Civil Procedure Act. The Court still retains an unqualified discretion to strike out pleadings; the only difference now is that the Court has wider powers and will not automatically strike out proceedings but the Court, before striking out, will look at available alternatives. See **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009.**

The law is that a statement of claim or defence should not be struck out and the plaintiff driven from the judgement seat or the defendant denied the opportunity of presenting his case in the normal manner unless the case is unarguable and where the hearing involves the parties in a trial of the action by affidavit, it is not a plain and obvious case on its face.

In the premises, the Chamber Summons dated 15th June 2005 fails and is dismissed with costs to the defendant.

Dated at Nairobi this 29th day of November 2012

G.V ODUNGA
JUDGE

In the presence of

Miss Nduta for Mr Macharia for the Plaintiff

Mr Wangalwa for Mr Ngatia for the Defendant