REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 555 of 2009

G B M KARIUKI……..... PLAINTIFF

VERSUS

THE NATION MEDIA GROUP LIMITED…….....…….…....1ST DEFENDANT

SHARLENE SAMAT ……...2ND DEFENDANT

JASMIN MISTRI……..……..……..3RD DEFENDANT

CHARLES KIARIE……..…….……4TH DEFENDANT

RULING

The defendants herein have moved the Court by way of a Motion of Notice dated 1st December 2011 expressed to be brought under Order 2 Rule 15(a)(b) and (d) of the Civil Procedure Rules seeking an order that the plaintiff's suit be struck out and that the plaintiff pays the costs of both the application and the suit. The application is based on the grounds that the words complained of were never stated during the broadcast in question; that no cause of action is disclosed against the Defendants there being no publication of the alleged defamatory statements; and that the suit is therefore without basis, frivolous and vexatious.

The application is supported by an affidavit sworn by **Sekou Owino**, the 1st defendant's legal officer on 1st December 2011. According to the deponent, the words complained of by the plaintiff as constituting defamatory material were never stated by either the third or fourth defendants who were the presenters of the show. It is further deposed that the name **Robert Kamau Karori** was never stated by the third or fourth defendants during the broadcast nor was it stated that the plaintiff had tried to murder the said **Robert Kamau Karori**. Since the defendants have pleaded that the words complained of were never published by the plaintiff, it is deposed that the plaintiff has no cause of action against the defendants as the alleged words were never published. Hence the suit ought to be struck out.

In opposition to the application the plaintiff filed the following grounds of opposition and swore a replying affidavit on 17th February 2012 in which he stated that the application is misconceived, bad in law and or is unsustainable in the obtaining circumstances. According to him the words complained of were indeed published in the Weekly Show on the 1st November 2008 and are defamatory and bear the meanings attributed to them in the plaint. It is further deposed that the transcript in the supporting affidavit is not the correct version of what transpired on the material day and hence the court cannot strike out the suit without the benefit of *viva voce* evidence being adduced and the screening of the said publication which was both audio and visual. In the deponent's view, the suit discloses a reasonable cause

of action and is not frivolous or vexatious in any way and/or at all. From the issues framed by the parties herein, it is deposed that the suit is in no way frivolous or vexatious.

The application was prosecuted by way of written submissions which submissions were highlighted by counsel.

In the defendants' submissions, although the defendants have reproduced a line by line comparison of the transcript and the facts stated in the plaint, confirm that the words alleged to have been stated during the broadcast were in fact never stated, the plaintiff in his response has filed a replying affidavit which, while challenging the correctness of the transcript, has not produced any evidence to show that the transcript is not a true record of the broadcast. No evidence, it is submitted, has been produced by the Plaintiff to disprove the fact that the transcript is correct for example by way of an alternative transcript. The fact that the words complained of were not stated in the broadcast makes this a clear case for striking out as the plaint does not disclose a reasonable cause of action and ought to be struck out as it discloses no reasonable cause of action and **D T Dobie & Company (Kenya) Ltd vs. Muchina [1982] KLR 1** is relied upon. Citing **Mosi vs. National Bank of Kenya Limited [2001] KLR 33**, it is submitted that the claim is also frivolous which refers to a claim that is ipso facto vexatious for nobody can be annoyed by a frivolous claim against him for it mat lead to loss of time and money. It is contended that no amendment can cure the defect in this plaint as the claim is founded on statements that were never made. It is further submitted that in a claim such as this for libel, the Plaintiff was required to set out verbatim, the words complained of and not their substance or effect as was done and relies on **Jacob R, *"Precedents of Pleadings", 14th edition, Vol. 1 (2001) London, Sweet & Maxwell***. In the defendants' view, the plaintiff should at the very least, have produced the video of the broadcast and set out the transcribed version in the plaint hence the application ought to be allowed.

According to the plaintiff citing **D T Dobie vs. Muchina [1980] KLR 1**, in an application for striking out, the court's discretion is to be used sparingly and in the clearest of cases and that the court must be satisfied in cases where the plaint is being struck out for disclosing no reasonable cause of action, that from the pleadings alone without going into evidence no cause of action has been disclosed. By introducing the affidavit evidence, it is submitted the defendants cannot seek to strike out the plaint for disclosing no reasonable cause of action as they are essentially calling evidence into play which is not permissible when one seeks to strike out a pleading for disclosing no reasonable cause of action and relies on **Mosi vs. National Bank of Kenya Limited [2001] KLR 33**. Further, it is submitted that a reasonable cause of action presupposes or means an action with some chance of success, when the allegations in the plaint only are considered. A cause of action, it is submitted, means an act on the part of the defendant which gives the plaintiff his cause of complaint. Here there are two contending versions of what was actually broadcast, the broadcast which was both audio and visual, hence the need to obtain the actual recording from which the court will determine what the actual words published were. To determine that, it is submitted, will necessitate *viva voce* evidence and cross-examination which is the realm of a trial and not through an application for striking out. To satisfy the test of a pleading being classified as frivolous and vexatious, it is submitted, based on ***Odgers principles of pleading and practice in Civil Actions in the High Court of Justice 22nd Edn***., that it must appear that the alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as *bona fide* and contend that he had a grievance which he is entitled to bring before the court. In the circumstances of this case, it is submitted that it cannot be said that the plaintiff had no bona fide grievance which entitled him to bring this action before this court and his claim is thus in no way frivolous or vexatious nor can it be said to be an abuse of court process. Again, it is submitted, if a claim is frivolous or vexatious, then it follows that the same cannot possibly raise any issue for determination. By framing issues for determination, it is submitted that this is a recognition that there are issues for determination clearly evincing the fact that the suit herein raises issues worthy of consideration and the same cannot be wished away as being frivolous or vexatious or indeed an abuse of court process.

In a rejoinder to the plaintiff's submissions, the defendants contend that Order 15 does allow for adducing of evidence on an application to strike out a pleading save for a situation where the application is based solely on rule 1(a) and not where the application is based on various provisions of Order 2 Rule 15 as the applicant herein does. In support of this submission, **Melika vs. Mbuvi [2001] 1EA 124** is cited. It is

further submitted that the contention by the plaintiff that here are two versions of what was actually published is not supported by the documents filed by the parties. Since it is the plaintiff who filed these proceedings nothing would have been easier than for him to put before the court the alleged correct version of the broadcast. In the circumstances, it is submitted *viva voce* evidence and cross-examination in respect of the transcript are not necessary. It is submitted that the plaintiff has not proved that the matters set out in paragraphs 8 to 11 of the plaint were stated in the broadcast and hence the facts in the transcript produced by the defendants have not been disproved. Since a pleading is scandalous if it consists of *inter alia*, matters that prejudice the opposing party while a pleading is vexatious if it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense. In support of this submission, **Joseph Okumu Simiyu vs. Standard Chartered Bank (K) Ltd [1994] LLR 1332** and **Trust Bank Limited vs. Amin & Company Ltd & Another [2000] KLR 164**. In line with the overriding objective of Civil Procedure Act as set out in section 1A of the Act, the defendants should not be put to incur costs in a suit which contravenes the provisions of the Civil Procedure Rules. The fact that issues have been agreed by the parties, it is submitted, does not in any way cure the Plaintiff's suit or take away from the Defendant's the basis for filing the present application since one of the issues for determination is whether the words complained of by the Plaintiff were stated during the broadcast.

As already indicated the application was primarily under Order 2 rule 15 of the Civil Procedure Rules. In the exercise of its powers under the said provision there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a pleading, that is a jurisdiction that 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. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. 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 used 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.

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".

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."

Before delving into the merits of the application, an issue was raised with respect to the competency of the application. Order 2 rule 15(2) of the Civil Procedure Rules provides as follows:

No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

Order 2 rule 15(1)(a) aforesaid deals with an application seeking striking out of a pleading on the ground that it discloses no reasonable cause of action or defence in law.

As already indicated at the beginning of this ruling, this application is based on the provisions of Order 2 Rule 15(1)(a)(b) and (d) of the Civil Procedure Rules. Where an application is based on rule 15(1)(a) no evidence is admissible and where a party swears an affidavit in support of an application grounded thereon, the court would not hesitate in striking out such an affidavit. However, the answer is not as simple where the application is grounded on the other subrules as well. In **D T Dobie vs. Muchina** (supra) the application was based on grounds other than subrule (a) aforesaid and while the Court held that the application made under the said subrule was incompetent, the Court went ahead to consider the other grounds. I will therefore not consider the application in so far as it is grounded on failure of the suit to disclose a cause of action. I will, however, consider the same on the grounds of the suit being frivolous and vexatious.

In this case, the plaintiff's case as pleaded in the plaint is that the defendants showed the plaintiff's picture twice while stating that "Judges lay down the law and stab motorists". It is further pleaded that the picture of the complainant was shown in hospital and the plaintiff's view is that the plaintiff was portrayed as having stabbed the alleged victim thus committing a felony. In their defence, the defendants have in paragraph 5 of thereof admitted that during the said broadcast pictures of the plaintiff were aired but denied that it was stated that the plaintiff had attempted to murder the said victim.

The defendants have now made an application seeking to have the suit struck out on the ground that the said words were never stated and have in fact given a version of their story by exhibiting what in their opinion is the true transcript. Since the plaintiff has not given its version of the transcript it is contended that the plaintiff's suit ought to be struck out.

The question that the Court has to pose at this stage is whether the plaintiff's claim is unsustainable. Whereas it is true that the plaintiff has not exhibited his version of the transcript, in my view to strike out the suit at this stage on that ground would amount to a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff's case is really sustainable. By so doing this court would be usurping the position of the trial judge by producing a trial of the case on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. In order for this court to determine the present application in favour of the applicant the Court would have to come to a conclusion that the defendant's version as exhibited is correct while the plaintiff does not have a different version. In my view, to do so at this stage would definitely amount to trial of the issues in this suit by way of affidavit evidence. In order for the court to exercise its discretion in this kind of application, the court must have regard to the quality and all the circumstances relating to the offending pleading. Under the overriding objective in sections 1A(2) of the Civil Procedure Act, the courts are now enjoined to give effect to the overriding objective as provided in section 1A in the exercise of its powers under the Act or in the interpretation of any of its provisions and under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009,** it was held *inter alia* that:

"If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

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.*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. 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 should not be struck out and the plaintiff driven from the judgement seat 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 this case the court is urged to find that the transcript exhibited by the defendants is the correct transcript. To do so, I am afraid, would amount to make a determination of this case based on affidavit evidence. I would have to make a finding that the plaintiff's allegations with respect to the actual words published in the plaint are untrue. It must be noted that the plaintiff's cause of action is based on both audio and video publication.

Taking all the circumstances of this case into consideration, I am not satisfied that the justice of the case will be attained by terminating this suit at this stage. The defendants' version is yet to be tested as against the plaintiff's evidence before the court can arrive at a just determination. Under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Under Article 25 that right cannot be limited. Whereas I agree that the form of a hearing does not necessarily connote adducing oral evidence and that in appropriate cases hearing may take form of affidavit evidence, to determine a suit by way of affidavit evidence ought to be resorted to only in clear and plain cases.

I am not satisfied that the present case can be termed as a clear and plain case. In the result the Notice of Motion dated 1st December 2011 fails and is dismissed with costs to the plaintiff.

Dated at Nairobi this 26th of November 2012

G.V ODUNGA
JUDGE

Delivered in the presence of

Ms Nyaidho for Mr Kahonge for Plaintiff

Mrs Okech for the Defendants