



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 420 of 2011

SAMUEL NDUNGU MUKUNYA..... PLAINTIFF

VERSUS

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

ALPHONSE SHIUNDU.....2ND DEFENDANT

RULING

By a Motion on Notice dated 20th April 2012, expressed to be brought under Order 2 Rule 15(b)(c)(d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other provisions of the law, the plaintiff prays for the following orders:

- 1. THAT this Honourable court be pleased to strike out the defence**
- 2. THAT Judgement be entered in favour of the Plaintiff as prayed in the Plaintiff.**
- 3. THAT the Defendants be condemned to pay the costs of this Application and the entire suit.**

The application is based on the grounds that the statement of defence is scandalous, frivolous and vexatious; that the statement of defence may prejudice, embarrass or delay the fair trial of the action; that the Statement of defence is otherwise an abuse of the process of the Court; that the Statement of defence is evasive and inconsistent; and that the statement of defence is spurious, evasive and offends the rules and laws governing pleadings.

The application is supported by an affidavit sworn on 20th April 2012 2010 by **Samuel Ndungu Mukunya**, the plaintiff herein. According to him, he was an applicant for the position of High Court Judge and shortlisted for the same. However, the defendants on 10th July 2011 falsely and maliciously caused to be published in its issue of the Sunday Nation concerning the plaintiff an article which was clearly careless and reckless. Despite the Honourable Chief Justice and the plaintiff himself explaining the circumstances leading to the plaintiff's inclusion in the shortlisted candidates, the Defendants went ahead to publish the article on 10th July 2011, the preceding day of his interview for the said post of the High Court Judge. According to the plaintiff he was not involved in the interfering of the short listing of the judges as published by the defendants. According to him the contents of the said publication were malicious and defamatory and the Defendant in so publishing the same were actuated by malice, ill-will and were outside the known parameters of objective journalism and calculated purely to injure him in his personal image. By the said publication, the plaintiff contends that he has been seriously injured in his image, credit and reputation and has been made to suffer great scandals, ridicule, odium and contempt. Despite demand made seeking apology and admission of liability, the defendants have not done so hence

the plaintiff believes the defendants' defence is a sham and is meant to delay the final hearing and determination of the suit.

In opposition to the said application the defendants filed the following grounds of opposition:

1. **The Defence raises triable issues which was only to be determined at the hearing of the suit.**
2. **No prejudice would be suffered by the Plaintiff if this matter proceeded for a full hearing.**
3. **It would be in the interest of justice to allow the suit to proceed for a full hearing.**
4. **The Application does not justify a grant of the orders sought.**
5. **The Application lacks merit.**

The defendants also filed a replying affidavit sworn by **Sekou Owino**, the 1st defendant's legal officer on 24th September 2012. According to the said deponent, although the Judicial Service Commission (hereinafter referred to as the "JSC") advertised the names of the applicants and candidates for the positions of the High Court Judges, the applicant's name was not amongst the said list and the respondents were unaware of the applicant's application to the JSC for the said post as well as the existence of the letter inviting the applicant to an interview. By a subsequent advertisement the JSC published reschedule of the said interviews in which only the names of un-interviewed candidates appeared amongst them that of the applicant, prompting the 2nd respondent to seek an explanation from the plaintiff/applicant who referred the 2nd respondent to the JSC and the 2nd respondent published the details as given to him. It is further deposed that it was thereafter on 6th July 2011 that the Chief Justice clarified the matter as an inadvertent omission of the applicant's name from the list of candidates without divulging how this omission occurred. On 8th July 2011, the 1st respondent received an email from a group calling itself **Concerned Legal Practitioners, Mount Kenya** in respect of this discrepancy and the 2nd defendant through the second defendant published the same with a view to engaging the public reaction thereto as the matter was a matter of public interest hence there was no malice or prejudice aimed at injuring the character of the plaintiff. In the deponent's view, the defence raises triable issues which can only be determined at the hearing of the case and is hence not scandalous, frivolous and vexatious and stand to suffer grave injustice and prejudice if the application is allowed hence the need to allow the matter proceed to full hearing.

In the plaintiff's written submissions, it is contended that the defence is a sham, scandalous, frivolous and vexatious since most of the paragraphs therein are mere denials. In the plaintiff's view, the article of 10th July 2011 made three allegations viz: that the inclusion of the plaintiff's name in the list of shortlisted candidates was based on cronyism rather than merit hence was fraudulent and irregular; that the plaintiff did not apply for the position; and that he used his political connections to have his name included in the said list. It is submitted that since the said publication was made after a clarification from the plaintiff, **Mr Gatere** and the Chief Justice the same was untrue and its untruthfulness known to the defendants prior to its publication. In light of the foregoing, it is submitted that the defence of fair comment cannot be sustained and reference is made to **J P Machira T/A Machira & Company Advocates vs. Wangethi Mwangi & Nation Newspapers Civil Appeal No. 179 of 1997** and **Kitto vs. Chadwick & Another [1975] EA 141**. Based on the **Machira Case** (supra), **Fidelis Muceke Ngulli T/A Ngulli & Company Advocates vs. Nation Newspapers & Printers HCCC No. 1896 of 1999** and **Gatley on Libel and Slander, 6th Edn. Page 706**, it is submitted that the publication was reckless and actuated by malice. While acknowledging that the remedy of striking out should be granted very sparingly, it is submitted on the authority of **Machira Case** (supra) and **Munyua and Others vs. Attorney General [1976] KLR 68** that it is available in the circumstances of this case.

On the defendant's part it is submitted that since the plaintiff has not highlighted the defendant's use of irrelevant or degrading charges or unnecessary details, or that the same is irritating, the defence cannot be said to be scandalous, frivolous and vexatious and reliance is sought in Order 18 Rule 19 of the Supreme

Court Practice, 1988 as well as **Stephen Kipkebut vs. Mathew Wambugu HCCC No. 1484 of 2001**. Accordingly, the Court is urged to ignore the plaintiff's submissions and disallow the prayers sought in the application. Since the defendants raise the issues whether the alleged defamatory article was maliciously and falsely printed; whether the words were capable of bearing the meaning attributed to them; whether the impugned publication amounts to fair comment on matters of public interest; and whether the same were published on a privileged occasion, the same constitute triable issues which ought to go to full hearing. In support of this submission, the defendants rely on **D T Dobie (K) Limited vs. Joseph Mbaria Muchina and Another [1982] KLR 1**, **Waters vs. Sunday Pictorial News limited [1961] 2 All ER** and **National Industrial Credit Bank Limited vs. Banksons Express and 2 Others HCCC No. 1064 of 1999**. With respect of the authorities cited, it is submitted that the same ought to be looked at in the light of the provisions of Article 34 of the Constitution of Kenya, 2010 and in light of the need to jealously guard the freedom of the media unless it is proved that the freedom has been abused which is an issue which can only be determined at the hearing. As opposed to the **Machira Case** (supra) where there was an admission of the allegations in the plaint, in the present case, it is submitted, there are no such admissions while in **Kitto Case** (supra) the Court found that there falsehoods in the allegations which findings have not been made in the present case. Accordingly, the authorities cited by the plaintiff, it is submitted, are distinguishable and the application ought to be dismissed.

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 or 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 Courts have over time made pronouncements on the terms "scandalous" "frivolous", "vexatious", "embarrassing", "tending to delay a fair trial" and "otherwise amounting to an abuse of the Court process".

A pleading is 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 and that 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 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 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 defence (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. See **Trust Bank Limited vs. HemanshuSiryakat Amin & Company Limited &Another Nairobi HCCC No. 984 of 1999.**

A pleading is an abuse of the process where it is frivolous or vexatious or both.

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 is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment”.

That the words published by the defendants on 10th July 2011 are on their face disparaging of the plaintiff cannot be denied. The defendants’ defence as can be gleaned from their joint defence filed on 23rd November, 2011 are as follows:

1. That the words published are fair comments and fair information upon facts which are matters of public interest regarding the interviews of the Judges under the new Constitution and that the same were published without malice but in the honest belief that the information was true.

2. That the matters were published on a privileged occasion.

From the outset I am cognisant of the fact that in an application of this nature the Court must avoid the temptation to try the case by way of affidavit evidence.

Defamation is not about publication of falsehoods against a person. It is therefore necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff’s reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See **J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**

The plaintiff’s case is that the publication was recklessly done in light of the clarification from the plaintiff, **Mr Gatere** as well as the Chief Justice. It is not in doubt that the recruitment of Judges of the High Court is a matter of public interest. With respect to newspaper reports, the matter which is reported may be of very wide public interest, but the protection of privilege is not thrown about it unless its publication is in the public interest and the newspaper can be said to be fulfilling a duty in revealing it. There is no defence of “fair information on a matter of public interest”. The defence of fair comment is available if facts are true and the matter is of public interest and the opinion is honestly held.

Waweru, J in **Nation Newspapers Ltd vs. Gibendi [2002] 2 KLR 406** while dealing with the defence held on 29/05/02 as follows:

“But the appellant pleaded fair comment on a matter of public interest that is, qualified privilege. To defeat that defence the respondent needed to prove actual malice. Actual or express malice is ill will or spite or any indirect or improper motive in the mind of the defendant at the time of the publication...The trial court did not address this issue in its judgement. There was no evidence that in publishing the words complained of the appellant acted from an indirect or improper motive such as spite, ill will or jealousy. Even if it were to be accepted that the reporter was rash or

negligent that would not be sufficient...From the evidence placed before the trial court the respondent failed to prove actual malice on the part of the appellant. The appellant's defence of fair comment on a matter of public interest therefore succeeded, and the trial court should have so held. That the matter was of public interest there cannot be doubt. This was a public school and there was evidence, on balance, that there had been some kind of disturbance and that some teachers in the school had staged a sit-in. The matter was serious enough to be investigated by the District Education Officer. The appellant had a social duty to write and comment on it...Upon the defence of fair comment on a matter of public interest therefore, the respondent's action should have failed".

It therefore follows that for the defence of fair comment to succeed, there must be a factual basis to them. In other words a defendant is not permitted to invent "facts" and then purport to comment on them. In the instant case, whereas there is no evidence on record that would justify the defence of fair comment since the defendants have not purported that the material attributed to the said Concerned Legal Practitioners, Mount Kenya Region was factual, the comments made by the defendants on their face seem to have been directed at the omission to include the name of the plaintiff in the first list; a matter which is not disputed and a matter which the defendant was entitled to comment on and as long as there was no element of malice. Accordingly, the said defence may well succeed at the hearing. I am therefore not satisfied at this stage that the said defence of fair comment on a matter of public interest with respect to the omission of the plaintiff's name is frivolous. Whether or not it will succeed at the hearing is another matter.

Having so found it is not necessary for me to consider the viability of the other defences.

A word of caution, however, to the defendants: in my view Article 34 of the Constitution does not give a blank cheque to the media to be irresponsible in their conduct with regard to the need to respect the right to privacy and human dignity and to ensure that respect for the rights of others is similarly protected. In appropriate cases, Courts will not hesitate to strike out defences where the criterion for doing so is met notwithstanding the provisions of Article 34 of the Constitution. The Court in doing so will also be guided by the need to protect human dignity and the principle of proportionality.

In the result the Notice of Motion dated 20th April 2012 fails and is dismissed but with no order as to costs in the light of non-compliance with the directions relating to timelines given by the Court on the part of the defendants.

Dated at Nairobi this 16th day of November 2012

G.V. ODUNGA
JUDGE

In the presence of

Mr. Kivuva Thangei for the Plaintiff
Miss Nyaidho for the Defendant