



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 1202 OF 2005**

**HON. CHARITY KALUKI NGILU.....PLAINTIFF**

**VERSUS**

- 1. HEADLINK PUBLISHERS LIMITED**
  - 2. WANGUHU NG'ANG'A**
  - 3. RADIO AFRICA LIMITED**
  - 4. CAROLINE MUTOKO**
- 5. CAROL RADULL.....DEFENDANTS**

**R U L I N G**

The Plaintiff's claims against the Defendants are in defamation. She has pleaded in her **amended plaint dated 5<sup>th</sup> December 2005** that at all material times the 1<sup>st</sup> Defendant was the publisher and proprietor of a weekly newspaper called the **Weekly Citizen**; that the 3<sup>rd</sup> Defendant was the proprietor of a radio station called **Kiss FM**; and that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were in employment of the 3<sup>rd</sup> Defendant at its said radio station as presenter and news-broadcaster respectively in a radio show called **The Big Breakfast Show**.

The Plaintiff's case against the 1<sup>st</sup> Defendant as pleaded is that in Volume 8, No. 27 of the *Weekly Citizen* of the week 4<sup>th</sup> to 10<sup>th</sup> July 2005 the 1<sup>st</sup> Defendant "*falsely, maliciously and spitefully*" printed and published of and concerning the Plaintiff a defamatory article titled

***"Exposed: Ngilu Sex Drama at City Club"***.

The words pleaded to be defamatory are quoted at paragraph 8 of the amended plaint. The article, paraphrased as far as the Plaintiff is concerned, was to the effect that the Plaintiff was caught having sexual intercourse in a car with her lover at the parking lot of a members' club in Nairobi.

The Plaintiff's case as against the 2<sup>nd</sup> Defendant as pleaded in paragraph 9 of the amended plaint is that on or about 28<sup>th</sup> July 2005 he called and convened press conferences and interviews and "*falsely, maliciously and spitefully*" made and published of and concerning the Plaintiff the following words:-

**“...she (the Plaintiff) must resign. She cannot continue to be chairman (sic) of this party when she has that kind of reputation – very bad reputation. In fact, this cannot be compared with Koinange Street. This is serious. Mr. Gachoka was actually expelled from the Parklands Sports Club for misconduct.”**

The Plaintiff’s case against the 3<sup>rd</sup> Defendant as pleaded in paragraph 10 of the amended plaint is that on the 29<sup>th</sup> July 2005, through its agents and servants, “*maliciously, recklessly and spitefully*” published of and concerning the Plaintiff certain words whose effect was to reproduce or rehash the defamation pleaded against the 1<sup>st</sup> Defendant.

A similar case is pleaded in paragraphs 11, 12 and 13 against the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The specific allegation against them is that they repeated the same defamation in their *Big Breakfast Show* of the 29<sup>th</sup> July 2005. The specific words alleged to have been defamatory of the Plaintiff as far as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants are concerned are pleaded in paragraphs 11, 12 and 13 of the amended plaint.

In paragraphs 14 and 15 the Plaintiff has pleaded that the defamatory words pleaded were in their natural and ordinary meanings made and were understood to mean by right-thinking members of the public that:-

- (a) “The plaintiff is of loose moral character.**
- (b) The plaintiff actually committed acts of adultery in a car within the precincts of a public club.**
- (c) The plaintiff has no sense of decency.**
- (d) The plaintiff has no regard or respect for the institution of marriage.**
- (e) The plaintiff is not chaste and is of questionable morals.**
- (f) The plaintiff is not fit to hold a public office.**
- (g) The plaintiff is unfaithful to her spouse.**
- (h) The plaintiff is a sex maniac/addict and of morals worse than those of ordinary commercial sex workers.**
- (i) The plaintiff should be shunned and avoided by the right-thinking members of the society.**
- (j) The plaintiff is corrupt.**

**(k) The plaintiff awards government contracts to ‘her lover(s)’.**

**(l) The plaintiff is guilty of abuse of office."**

The Plaintiff's plea is that she has been injured in her credit, career and reputation and has been brought into public scandal, odium and contempt.

In paragraph 16 the Plaintiff has pleaded particulars of malice.

The Plaintiff seeks judgment against the Defendants **jointly and severally** for general and aggravated and/or exemplary damages. She also seeks costs of the suit and interest.

All the Defendants entered appearance and filed defence. The **1<sup>st</sup> Defendant's statement of defence is dated 4<sup>th</sup> November 2005**. It has admitted being the publisher and proprietor of the weekly newspaper called *Weekly Citizen*. The 1<sup>st</sup> Defendant has also pleaded justification and/or fair comment. It has given particulars in paragraph 5. It seeks dismissal of the Plaintiff's suit.

The **2<sup>nd</sup> Defendant's statement of defence is dated 30<sup>th</sup> November 2005**. He denied convening press conferences as alleged by the Plaintiff or publishing the alleged defamatory words. At paragraph 4 of his defence he pleaded, without prejudice, that on 28<sup>th</sup> July 2005 he convened a press conference in his capacity as chairman of the council of the **National Rainbow Coalition (NARC)** Party. He further pleaded that the Plaintiff, in her capacity as chairperson of the said political party, was invited in order to explain, *inter alia*, whether the words published of and concerning her by the 1<sup>st</sup> Defendant were true. The 2<sup>nd</sup> Defendant denied uttering the words alleged against him and that all he said, in answer to questions from journalists, was that if the words published of the Plaintiff were true, then they were quite scandalous. He sought dismissal of the Plaintiff's claim.

The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed a **joint statement of defence dated 24<sup>th</sup> October 2005**. They admitted that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were employees of the 3<sup>rd</sup> Defendant. They pleaded that the allegedly defamatory words attributed to them in the *Big Breakfast Show* were:

**“...a deliberate distortion of its morning breakfast show of 29<sup>th</sup> July 2005 which was a call-in debate on whether the Plaintiff who at all material times was a public official was being victimised because of her gender.”**

It was further pleaded that the call-in debate did not allege any wrong- doing on the Plaintiff's part. The case as alleged against each specific Defendant is also denied and traversed.

In paragraph 16 of the statement of defence the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants pleaded fair comment made in good faith without malice on matters of public interest, namely, contributions in a call-in debate discussing calls being made for the Plaintiff to resign her public positions. Particulars under **Order VI, rule 6A** of the then Civil Procedure Rules were pleaded.

The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants also pleaded that they would rely on **section 15 of the Defamation Act**. They sought dismissal of the Plaintiff's claim.

I cannot see on the record any reply to defence filed by the Plaintiff.

The subject of this ruling is the Plaintiff's application by **chamber summons dated 26<sup>th</sup> April 2006**. She seeks an order to strike out the Defendants' statements of defence and consequent entry of judgment in her favour.

The application is brought under **Order VI, rule 13(1)(b), (c) and (d)** of the then **Civil Procedure Rules** (the **Rules**). I regard it a typographical error the omission of sub-rule (1) from the heading of the application.

The Plaintiff's case in this application is therefore that the defences are *scandalous, frivolous or vexatious*; that the defences may *prejudice, embarrass or delay the fair trial of the action*; and that the defences are *otherwise an abuse of the process of the court*. There is a supporting affidavit sworn by the Plaintiff. To it various documents are annexed.

All the Defendants have opposed the application. The 1<sup>st</sup> Defendant filed a notice of preliminary objection dated 8<sup>th</sup> May 2007. The following points are taken in that notice:-

- 1. That whereas the plaint discloses distinct causes of action (libel and slander respectively) against different Defendants, the plaint and the application seek joint judgment against the Defendants for all the distinct causes of action, as if the alleged distinct torts were committed by the Defendants jointly.**
- 2. That the court has no jurisdiction in law to condemn one defendant in damages for a cause of action attributable in law entirely to a co-defendant.**
- 3. That the court has no jurisdiction to jointly condemn co-defendants in damages for torts alleged to have been committed solely by a co-defendant.**
- 4. That the prayers sought in the application are not, and cannot be, available on the basis of the pleadings before court."**

The 1<sup>st</sup> Defendant also filed grounds of opposition on the same date. Apart from raising the same issues as in the notice of preliminary objection, the 1<sup>st</sup> Defendant has argued that the pleadings on record raise substantial issues for trial.

The 2<sup>nd</sup> Defendant filed a replying affidavit dated 27<sup>th</sup> September 2006. The main thrust of that affidavit is that his defence raises substantial triable issues.

A replying affidavit was filed on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants on 6<sup>th</sup> June 2006. It is sworn by one **Patrick Quarcoo**. The same answers issues raised in the supporting affidavit. It also argues that the defence filed on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants raises several triable issues as follows:-

- a) Whether the words complained of were defamatory of the Plaintiff.**
- b) Whether the words complained of were taken out of context and distorted.**
- c) Whether the matters pleaded in paragraphs 18 and 19 of the plaint are scandalous, frivolous and vexatious.**
- d) Whether the defences of justification and fair comment are available to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.**

e) **Whether there was any malice in the publication of the words complained of.**

f) **Whether the Plaintiff is entitled to the prayers sought.**

The application was canvassed upon written submissions. I have considered the same, including the many authorities cited.

The court's power to strike out pleadings is discretionary. The jurisdiction is intended to provide a quick remedy to a party who is being denied his claim by what amounts to a sham defence.

In the case of **D.T Dobie & Co. Ltd. –versus- Joseph Muchina (1982) KLR 1**, the *Court of Appeal* held as follows regarding the power to strike out (holdings 3, 8 and 9):-

**“3. As 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.**

**8. (Obiter, Madan JA) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.**

**9. (Obiter, Madan JA) The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”**

The power to strike out should be exercised in clear, plain and obvious cases. It is a summary procedure. An order to strike out is a radical remedy which the court ought to be slow in resorting to.

As already stated, the Plaintiff's case in this application is that the defences filed by the Defendants are scandalous, frivolous or vexatious; that they may prejudice, embarrass or delay the fair trial of the action; and that they are otherwise an abuse of the process of the court. The courts have tried to define all these legal terms. It has been held that a matter would only be scandalous if it would be inadmissible in evidence to show the truth of any allegation, for instance where an imputation is made on the character of a party when character is not in issue. It has also been held that a pleading would be frivolous if it lacks seriousness and therefore unsustainable in court.

A pleading would be vexatious if it annoys or tends to annoy, such as a pleading that is not serious or contains irrelevant or scandalous matters. See the case of **Mpaka Road Development Company Limited -versus- Abdulgafir Kana (t/a Anilkapuri Pan Coffee House, Nairobi, Milimani HCCC No. 318 of 2000 (unreported))**. See also the case of **Horkan Investment Limited –versus- Namayuk Self Help Group, Nairobi HCCC No. 2185 of 2001 (unreported)**.

In the latter case it was held that:

**“A pleading is scandalous if**

**(i) It states matters that are indecent.**

**(ii) Matters that are offensive or**

- (iii) Matters made for the mere purposes of abusing or prejudicing the opposite party.**
- (iv) Matters that are immaterial or unnecessary which contain imputation on the opposite party.**
- (v) Matters that charge the opposite party with bad faith.**
- (vi) Matters that containing degrading charges.**
- (vii) Matters that are necessary otherwise accompanied by unnecessary details.**

**A matter is frivolous:-**

- (i) If it has no substance or**
- (ii) It is fanciful or**
- (iii) Where a party is trifling with the court.**
- (iv) When to put forward the defence would be wasting court's time.**
- (v) When it is not capable of reasoned argument.**

**A pleading is said to be vexatious when:-**

- (i) It has no foundation**
- (ii) It has no chance of succeeding**
- (iii) The defence (pleading) is brought merely for purposes of annoyance or**

(iv) It is brought so that the party pleading should get some fanciful advantage or

(v) Where it can really lead to no possible good.

**A pleading tends 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. Each party may claim *debito justitiae* to have opponents case presented in intelligible form so that he may not be embarrassed in meeting the claim. The opposite party's pleading must be within rules of procedure set down by law. Not his own concoction and patch."**

Let us first deal with the issue of jurisdiction raised by the 1<sup>st</sup> Defendant in its notice of preliminary objection and grounds of opposition. That issue is that the Plaintiff having sought reliefs against all Defendants jointly and severally, such reliefs are incapable of being granted as the plaint discloses separate causes of action against the Defendants in respect to torts not committed by the Defendants in joint capacity. The 1<sup>st</sup> Defendant's submission thus is that the court lacks jurisdiction to grant the reliefs sought by the Plaintiff.

**Order I, rules 4** (in the material part) **and 5** of the Rules (as then existed) provide as follows:-

**"4. Judgment may be given without amendment –**

(a) .....

(b) **Against such one or more of the defendants as may be found to be liable according to their respective liabilities.**

**5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him."**

And **rule 7** of the same Order provides as follows:-

**"7. Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."**

It is clear from the above provisions that the court will not deny reliefs merely because they have been sought jointly and severally. A plaintiff's case will be considered as against each defendant sued. If the plaintiff's case is proved against one and not the other defendant the court will hold accordingly. The court will decide which defendant the plaintiff has succeeded against and give judgment accordingly. The plaintiff's case will not necessarily fall merely because he has succeeded against one and not the other defendant(s) sued jointly and severally. In any event amendment can always come to the rescue should it be necessary.

I therefore hold that this court has jurisdiction to deal with the Plaintiff's claims against the Defendants as pleaded.

In an application to strike out a defence, the plaintiff has an obligation to show that the defendant should not be allowed to defend the suit upon any of the grounds set out in Order VI, rule 13 (1) of the Rules. But the defendant has a corresponding obligation to demonstrate that he should be allowed to defend the suit. This he can do by way of admissible evidence presented, for instance in an affidavit. In other words, a defendant must demonstrate that his pleading raises a reasonable defence, that is, that it raises triable issues, and that therefore the suit ought to be allowed to proceed to trial.

There can be no doubt that the words published by the 1<sup>st</sup> Defendant in its weekly newspaper of and concerning the Plaintiff were gravely libellous of her. It cannot be otherwise to allege that an elderly married woman who has children and grandchildren, and who holds a senior public position as a cabinet minister, has been found having sexual intercourse in a car in the car-park of a member's club with a man who is not her husband, unless such allegation is true. The Defendant seems to accept this but has pleaded justification.

The defence of justification, as is well known, is to the effect that the words complained of were true in substance and fact. The law presumes that every person is of good repute until the contrary is proved. It is therefore for a defendant who pleads justification to prove affirmatively that the defamatory words are true, or substantially true. See **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 28, page 41, paragraph 82.**

In the present case, the 1<sup>st</sup> Defendant having pleaded justification, it was incumbent upon it to demonstrate by way of affidavit the kind of evidence it intended to rely upon at the trial to prove justification. Such affidavits could be of the eye-witnesses to the incident mentioned in the story. The 1<sup>st</sup> Defendant did not file such affidavits. Why should this be so for a party who has pleaded justification?

On the other hand the Plaintiff has provided in her supporting affidavit evidence in the nature of minutes of a special executive meeting of the members' club where the incident was alleged to have taken place to the effect that no such incident ever took place. The Plaintiff has further provided credible evidence in the supporting affidavit that on the day that she was alleged to have been having sexual intercourse in a car in Nairobi she was actually in London. She has exhibited a copy of her passport and the relevant entry visa stamp of Heathrow Airport.

In the face of all the material that the Plaintiff has placed before the court in this application, it should have been easy for the 1<sup>st</sup> Defendant, if it had it, to provide by way of affidavit the kind of evidence that it intends to rely upon at the trial to prove that the story published of and concerning the Plaintiff was true or substantially true in fact. It has not done so. It is clear to me that as far as the 1<sup>st</sup> Defendant is concerned there is nothing to go to trial. Its defence is a sham and raises no triable issue.

The substance of the 2<sup>nd</sup> Defendant's defence is that he did not falsely and/or maliciously utter the words ascribed to him in the press conference that he admittedly called himself. But he has not provided a transcript of the press conference to controvert the Plaintiffs assertion that the words he uttered at the conference were defamatory of her.

As already stated, a defendant is under obligation to satisfy the court that he should have leave to defend the suit. The defamatory words attributed to the 2<sup>nd</sup> Defendant were aired repeatedly in the breakfast show hosted by the 4<sup>th</sup> and 5<sup>th</sup> Defendants and carried in the radio station alleged to be owned by the 3<sup>rd</sup> Defendant. Yet the 2<sup>nd</sup> Defendant found no need to provide in his replying affidavit a transcript of the press conference that he himself had convened.

I hold that the 2<sup>nd</sup> Defendant's defence raises no triable issue to go to trial. The words attributed to him at his press conference were clearly defamatory of the Plaintiff. The effect of those words was to repeat and further disseminate the libel that had already been committed by the 1<sup>st</sup> Defendant against the Plaintiff.

Regarding the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, the Plaintiff has taken what amounts to a technical objection to the single replying affidavit sworn by Patrick Quarcoo and filed on behalf of the three defendants. That technical objection is that the affidavit is fatally incompetent for want of compliance with the provisions of **Order I, rule 12 (1) and (2)** of the Rules. That rule prescribed that where there are more plaintiffs or defendants than one, anyone or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and that such authority shall be in writing signed by the party giving it and shall be filed in the case.

It is to be noted that no objection has been taken to the single joint statement of defence filed for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. If several defendants can legitimately file a single joint defence, why should they not be able to file a single replying affidavit in response to an interlocutory application?

The emphasis of the Civil Procedure Act and Rules now is that courts, and indeed parties and their counsels, should be more concerned with facilitation of the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act and Rules. That is the overriding objective of the Act and Rules which the court, as well as parties and their counsels, are enjoined to further. See sections 1A and 1B of the Act. There must not be undue regard to technicalities of procedure.

The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant's main defence is as follows:

- 1. That the 3<sup>rd</sup> Defendant did not own the radio station that carried the *Big Breakfast Show* and aired words whose effect was to repeat and further disseminate the defamation committed by the 1<sup>st</sup> Defendant against the Plaintiff.**
- 2. That the transcript of the *Big Breakfast Show* relied upon by the Plaintiff is a distortion.**
- 3. That the 4<sup>th</sup> and 5<sup>th</sup> Defendants did not utter any words in the show that were defamatory of the Plaintiff.**

The Plaintiff has provided evidence in the supporting affidavit by way of a certificate of registration to the effect that the 3<sup>rd</sup> Defendant carries on business under the business name of **Kiss FM**. Though it had been pleaded in the original plaint that the radio station concerned was **Kiss 100.3 FM**, this was amended by the amended plaint to read Kiss FM.

Regarding the defence that the transcript of the *Big Breakfast Show* relied upon by the Plaintiff is a distortion, nothing could have been easier than for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants to provide their own transcript of the show in their replying affidavit. They have not done so. The irresistible inference can only be that the transcript provided by the Plaintiff is entirely correct.

Anyone reading through this transcript will immediately realize that the effect of the radio show concerned was to repeat and disseminate further the libel published by the 1<sup>st</sup> Defendant of and concerning the Plaintiff. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants cannot be heard to say that it was fair comment in a call-in radio show when the effect thereof was to repeat many times over the libel against the Plaintiff.

The words of the various listeners who called in were founded upon the basis that the allegations published of and concerning the Plaintiff were true. Clearly the libel against the Plaintiff was being perpetuated and further disseminated by the radio talk show.

I therefore find that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' statement of defence does not raise any triable issues to enable the Plaintiff's case against them to go to trial.

For the all the reasons given above, I must allow the Plaintiff's application. The Defendants' statements of defence are hereby struck out and interlocutory judgment entered severally against them in favour of the Plaintiff. The Plaintiff will proceed further as necessary. Costs of the application are awarded to the Plaintiff. It is so ordered.

There has been considerable delay in the preparation and delivery of this ruling. The same was caused by my ill health the last few years and is regretted.

**DATED AT MACHAKOS THIS 9<sup>TH</sup> DAY OF FEBRUARY 2011**

**H. P. G. WAWERU**

**JUDGE**

**SIGNED AND DELIVERED THIS 11<sup>TH</sup> DAY OF FEBRUARY 2011**