REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 324 OF 2009

HON. FRANKLIN MITHIKA LINTURI ……
PLAINTIFF

VERSUS

ERICK K. MUTUTA T/A E K MUTUA & CO. ADVOCATES ...
…….DEFENDANTS

RULING

The Plaint is filed to seek general, aggravated and exemplary damages for defamation against the Defendant who is an advocate of the High Court of Kenya.

The alleged documents which is claimed to be defamatory is a letter written by the Defendant to the Director of CID under instructions of his named client.

The Plaint then has been filed against the Defendant. The last two paragraphs of the said letters, which are quoted hereinafter:

"We believe that the action by HON. LINTURI border on the offence of obtaining by false pretence by entering into the contract and having the title deed transferred in his favour without any intention of paying the balance of the purchase price has a criminal element."

"The letter herein forms a complaint by our client to the police for investigation and appropriate actions."

It is preceded by averments that the Defendant published the above wordings falsely and maliciously to known and unknown persons. It is further averred that the Plaintiff who is a member of parliament has been injured in his reputation.

The defence filed on 10th July, 2009 avers that the suit is incompetent, frivolous, scandalous and abuse of the court process, that the Defendant is a disclosed agent and acted in his capacity as an advocate, that the words are not attributable to the Defendant. The Defendant has also raised defence of absolute privilege and justification and qualified privilege.

In Reply to the said Defence, the Plaintiff has raised the issue of express malice and then has given the particulars of malice.

I would pause here and note that it is trite that when it is averred that the Defendant falsely and

maliciously published the words complained, in the Plaint those words form a legal malice or malice in law which means publication without lawful excuse and does not depend upon the Defendant's state of mind. In the case of ***Clark –vs- Maolyneux (1877) 3 ABD 237 at 247*** it was observed:

'"The words "falsely, and maliciously published" which commonly appears in statements of claim in defamation actions are an allegation of legal malice, not express or actual malice. Since defamatory words are presumed to be false and their publication is presumed to be without lawful excuse, the words "falsely and maliciously" are unnecessary."

The express and actual malice defined as ***"ill will or spite towards the Plaintiff or any indirect or improper motive in the Defendant's mind at the time of the publication which is his sole and dominant motive for publishing the words complained of"*** *(See paragraph 145 at page 45 of Halsbury's Laws of England Vol. 28 (4th Edition)).*

Moreover in paragraph 220 of the Laws of Halsbury (above specified) it is observed – viz:-

"Where the Defendant has pleaded fair comment or qualified privilege, to which the Plaintiff has pleaded malice in reply, it is for the Plaintiff to adduce evidence of the facts and matters from which malice is inferred. Such facts and matters must have been pleaded."

The above principles of law have been incorporated in our Civil Procedure Rules (see Order 2 Rule 7). The reasons for the above observations made at this stage shall become clear when I would deal with the submissions made in respect of Chamber Summons dated 23rd March, 2010 filed by the Defendant/Applicant and which is the application I am expected to be dealing with.

The said application is premised under Order VI Rule 13 (b), (c) and (d) of the (Old) Civil Procedure Rules. (Order 2 Rule 15 in current Civil Procedure Rules).

It seeks the prayers that the Plaint against the Defendant be struck out. The grounds on which the application is filed are set forth and are as under:

a) That the suit herein is incompetent, misconceived, bad in law, disclose no cause of action and is an abuse of the court process;
b) That the suit is scandalous, frivolous and vexatious;
c) That the Plaintiff has sued a disclosed Agent;
d) That the Defendant's position is privileged under the Advocates Act (Cap 16 Laws of Kenya).

Although the issue of malice not having been particularized, is not in the grounds specified, the same was argued. I have adequately considered that issue in earlier part hereof and I thus find that the submissions thereon are rejected. The lack of particulars in the Plaint in itself is not improper by the Defendant/Applicant.

Second point raised is that the letter in question is not defamatory in its nature, having been addressed to the Director of CID by way of complaint from an Advocate under the instructions of his client.

It is further averred in the supporting affidavit of the Defendant, sworn on 23rd March, 2010, that he acted for one Jemimah Jeptoo Settim for sale transaction between the said person and the Plaintiff, who was represented by M/s Wanjiku Mukuru & Co. Advocates. The sale agreement is annexed to the application as Annexure EKM – II. It is also averred that the Plaintiff failed to pay the balance of purchase price in the sum of Kshs.11,093,500/= after the transfer in his name was effected. The Plaintiff despite the demand, even from his own Advocate having been made, has failed to pay the said balance. Thereafter, the vendor, the Defendant's client, sued the Plaintiff in HCCS No. 166/09 to seek order of cancellation of the title document registered in favour of the Plaintiff.

The Plaint *inter alia* averred that:-

"In breach of the terms of the said agreement for sale the Defendant has failed to pay the balance of the purchase price and fraudulently transferred the suit property into his name.

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i) Transferring the property into his name well aware that he was not ready and willing to honour the terms of the contract ……
ii) Keeping house"

The suit was filed on 25th May, 2009 and around the same date, the Defendant's client instructed him to write the letter under question which is annexed as Annexure "EKM – VI". It is thus contended that the Defendant acted under his statutory duty as an advocate. The letter also gave the background of the transaction as aforementioned.

It is further submitted that the said letter, apart from not being defamatory, was also not published. It was copied only to the client and the Plaintiff's Advocate who represented him in the Sale Transaction.

I may note that the supporting affidavit is not responded to and thus the averrements made therein are unchallenged and can be taken as true. Moreover, the averments are also corroborated by the documents annexed to the affidavit in support.

In view of the aforesaid, the fact averred in Reply to Defence in paragraph 7 (a) to the effect that the Defendant acted for both parties in the transaction are found to be untrue.

It is also apparent that the Act of the fraud is both Civil wrong and Criminal offence and any person aggrieved can take recourse to both actions.
In support of assertion that the letter in question was not defamatory and was addressed to the Director of CID as per the duty of any person to seek investigation, the Tanzanian case of ***Rwekanika –vs- Binamungu (1974) EALR 388*** was cited.

At page 389 of the said Judgment it is observed.

"It is the public duty of everyone who knows, or reasonably believes that a crime has been committed to assist in the discovery of the wrongdoer.

Any complaint made, or information given for that purpose to the police, or to those interested in investigating the matter, will in the interests of society, be privileged, and the mere fact that the Defendant has volunteered the information will make no difference. So that when a person has reason to believe that a crime has been committed, it is his duty and his right to inform the police. If he states only what he knows, he honestly believes he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is after all not guilty of the crime. It is therefore a settled principle of law that where an individual gives information or makes a statement to an officer of the law, whose duty it is to detect and prosecute criminals ….. to the effect that someone has committed a crime, such information or statement has the protection of privilege. This is so in the best interest of society, and the suppression of crime could not otherwise be enforced.

"If the charge is made honestly and to the proper authorities, the mere fact that it is found to be groundless, or that proceedings in respect of it are subsequently abandoned will not destroy the privilege…."

It was thus submitted that the suit does not disclose any reasonable cause of action and is frivolous and scandalous and be struck out.

The respondent/Plaintiff has filed grounds of opposition and cited three cases in support of his submissions that the court should be slow on making summary judgment.

I would like to quote some observations and passages adopted in the Civil Appeal No. 109/2005 between ***Said Hamad Shamigi AND Diamond Trust of Kenya.***

At page 6 of the Judgment, Court of Appeal adopted following passage from **DT Dobie –vs- Muchana KLR (1982) 1.**

"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 continuously".

On pages 7 and 8 the following passage from Lord Pearson from the case of **Hubduck & Sons Ltd. –vs- Wilkinson, Heywood and Clark (1899) 1KB 86 at 91** was cited: namely

"The summary procedure …… is only appropriate to cases which are plain and obvious so that any master or judge can say at once that the statement of claim as it stands is insufficient even if proved to entitle the Plaintiff to what he asks"

In the grounds of opposition, it is further contended that the defence raises triable issues and evidence to prove the same should be allowed.

With above submissions and facts, I shall begin my observations with the meaning of Defamation. In the case of ***John Word –vs- Standard Ltd. (2006) eKLR*** it is defined: viz

"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling."

It is also trite that for the case of defamation to succeed, the following amongst others be existing:

1) The defamatory statement must be referring to the Plaintiff,
2) The statement must been published to third party and
3) The impugned statement must be false.

The law as regards contention of falsity and malice which is averred in the Plaint is, in my view, adequately dealt with in the earlier part hereof and I need not reiterate it.

The Defendant has also raised a defence that the statements were made to the Director of CID and published only to the client and the Advocate of the Plaintiff and that it was not defamatory in nature and was written by a disclosed agent. Relying on those issues, the application is made for Summary Judgment.

It may be found that the communications by a solicitor on his client's behalf could be protected by qualified privilege (see Baker vs. Carrick (1894) 1 QB 838 C.A). However, in the Reply to his defence, the Plaintiff has raised the issue of express malice and in my considered opinion that issue could rebut the defence of qualified privilege if the Defendant fails to justify the said privilege. Can this court determine this issue at this stage? I would like to answer that in negative.

I may not deal with the said issues in depth, as it shall not be appropriate to suggest any determinations thereon. I may also state that the Tanzanian case of ***Rwakania (supra)*** did not deal with the issue of malice on the part of the complainant which is raised by the Plaintiff.

Moreover, the issue of publication of the letter in question to the Plaintiff's advocate also raises a triable issue of publication.

Thus there are some holes in the suit which are made by the pleadings and which need to be closed. Although I could have sympathy for the Defendant, the tenets of law and fair hearing compels me to

reject the application at this juncture, and I do find so.

The application dated 23rd March, 2010 is thus rejected.

The costs in cause.

Dated, signed and **delivered** at Nairobi this 5th day of **April, 2011**

K. H. RAWAL

JUDGE

5.04.2011