



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI LAW COURTS
CIVIL CASE NO. 124 OF 2011

HON. BASIL CRITICOSPLAINTIFF/APPLICANT

VERSUS

THE STANDARD GROUP LIMITED1ST DEFENDANT/RESPONDENT
EVERLYN KWAMBOKA2ND DEFENDANT/RESPONDENT

RULING

The application dated 25th May 2011 is premised under Order 2 Rule 15(1) (b), (c) and (d) of Civil Procedure Rules 2010 and Section 1A,1B and 3A of Civil Procedure Act. It seeks the prayer that the Defence dated 3rd May 2011 be struck out.

The main ground on which the application is based is that the Defendants in their defence have admitted having published the statements on which the Plaintiff has sought various reliefs against the Defendants. The publication alleged *inter alia* that:

- a) *The Plaintiff had been stopped from selling his parents home;*
- b) *The Plaintiff had been accused by his niece of forging her grandmother's signature to authorize sale of the property;*
- c) *The Plaintiff's niece had obtained an order barring him from selling her grandmother's KES.8million home;*
- d) *The Plaintiff had been accused of selling his father's property without consent of family members.*

It is alleged that the publication is defamatory of the Plaintiff and that the order of Hon. Sitati J. did not mention the Plaintiff at all. I may even cite the Order dated 29th March 2010 made by the Court on the Summons filed by a beneficiary in Succession Cause No. 1304/2007.

- 1) *That this application be and is hereby certified as urgent and service thereof be dispensed.*
- 2) *That the pending hearing and determination of this application KIRWAN ASSOCIATES LIMITED and/or RIANA PROPERTIES LIMITED, their employees, servants, assignees and agents be and are hereby restrained from selling, offering for sale, leasing, charging, transferring or in any way dealing with the property known as L.R. NO. 1/301 situated along LENANA ROAD, Nairobi.*
- 3) *That the application and this order be served upon the Respondents forthwith and in any event not later than (3) days from today's hearing date.*
- 4) *That interpartes hearing before the vacation court on 12.4.2010.*

The supporting affidavit to the said application mentions that the Plaintiff's close relatives are the

shareholders and directors of one Kirwan Associates Limited in whose name the property in issue was transferred by the Deceased in the referred Succession Cause. The sale was challenged in the said application on the ground *inter alia* that the deceased's signature on the sale documents was found to be a forgery.

From the above facts it is contended by the Applicant that:

- a) ***No orders of injunction were issued against the 1st Respondent in the succession matter, being the Plaintiff/Applicant in the suit now before this Honourable Court.***
- b) ***At no time did the Plaintiff's niece accuse the Plaintiff of forging her grandmother's signature to authorize sale of the property.***
- c) ***No court order was issued barring the Plaintiff from selling his mother's (his Plaintiff's niece's grandmother's) home; and***
- d) ***At no time was the Plaintiff accused of selling his father's property without consent of family members.***

It is further submitted that for the defence of privilege to apply the matters published must strictly confine to the actual proceedings in court and must not contain any defamatory observations or comments from any quarter.

The Applicant relied on the observations made by the High Court in the case of ***George Odinga Oraro V The Standard Limited [2008] eKLR***. It is true that the facts of the said case are very similar to the present case where the admitted publication by the media house was on the proceedings of the Select Committee. The defence raised similar issue of qualified privilege under Section 7 (1) of the Defamation Act (cap 36) and the court had observed:

"She further submitted that since at the stage of striking out a pleading the court, has no information on merits of the case through discovery and oral evidence that power should be exercised sparingly and cautiously. This is a drastic remedy and should only apply in plain and obvious cases. I agree that those powers are drastic and should be exercised with great caution, but as the Court of Appeal said in CHATTER V. NATIONAL BANK OF KENYA LTD Civil Appeal No. 50 of 1996 (unreported).

"Once that caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on merits the court is perfectly entitled to strike out a pleading."

The defendant admits publishing the words complained of in paragraph 3 of the Plaint but states that the words complained of comprise fair and accurate reporting of the proceedings of the Parliamentary Select Committee inquiring into the disappearance and death of the former Minister for Foreign Affairs and International Co-operative the late Dr. Robert John Ouko at County Hall, Nairobi on 27th February, 2004 and the evidence given on the date by inquiry witness Daniel Mburu Mukhwana. The rule of law is that where there is judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in an open court, then the publication without malice, of a fair and accurate report of what takes place before the tribunal is privileged.

It has been said that the privilege to apply, a report must be strictly confined to actual proceedings in court and must contain no defamatory observations or comments from any quarter whatsoever in addition to what forms strictly and properly the legal proceedings."

Before I dwell on the response from the Respondent, it may be opportune to reproduce the publication, as in my view the court is obligated to look closely into all the pleadings and relevant facts before it. In the case of ***Gupta v. Continental Builders Ltd (1978) KLR 83 at 87, Madan JA*** (as then he was) Observed that ***"In any given case it is the duty of the court to examine with minute care the documents and facts laid before it."***

The publication stated as under:-

***"Criticos stopped from selling parent's home
Former legislator is accused of selling father's property without consent of family members.***

Girl accused Criticos of forging her grandmother's signature to authorize sale of the property. Criticos and his late brother's daughter were to be the beneficiaries of the late George Criticos multi-million estate, which includes the home. Former Taveta MP Basil Criticos's niece has obtained an order barring him from selling her grandmother's Shs.8 million home. The girl, 17, got the interim order after discovering that the home, situated on Nairobi's Lenana Road, was allegedly sold secretly using her later grandmother's forged signature. The child, through her mother Nicola Kim, claims there is no way her grandmother Fanny Criticos would have sold the property without informing them. I am aware that at the time of her demise, the deceased resided in the same premises and had not sold the property, Ms Kim told the court. It was discovered that the signatures in the purchase documents did not match her grandmother's forcing her advocate to involve the Criminal Investigations Department's forensic experts. The said signature of the deceased was subjected to examination by a qualified forensic department examiner at the CID Headquarters and was found to be a forgery," she said.

The Defendants submitted that said words of the above publication constituted a fair and accurate report of the court proceedings brought against the Applicant and was published on an occasion of privilege and without malice towards the Applicant or without intention of injuring the Plaintiff/Applicant's reputation and/or character.

I do note that the application in the aforementioned case had seven Respondents one of them being the Applicant who is shown to be the 1st Respondent. There are other three **CRITICOS** who are amongst the Respondents. The Applicant is mentioned in paragraph 5 of the supporting affidavit, in the said application in succession cause, as having deponed that the deceased in that cause had sold the property. This fact cannot be disputed similar is the case as regards the averment that her (the Deceased) signature in the sale document is found to be a forgery. I further note that the only place the Plaintiff has been described or specifically mentioned is the second paragraph of the publication which states that he is accused of selling the father's property without the consent of family members. The mention of the "criticos" in other places could be attributed to other members of the family and I would refrain from making any further observations on that issue, at this stage.

In the premises aforesaid it shall not be justified to oust the Defendant from the seat of the litigation which action the court can undertake only in the clearest of the cases. I am aware that the court's discretion is wide and unfettered but as per the well established principles of law, the court shall exercise the same Judiciously and with great caution. I shall only cite the following passage from the case of ***Industrial and Commercial Development Corporation V. Daber Enterprises Limited [Civil Appeal No 41 of 2000]*** wherein the court of appeal at page 8 had observed as follows:

"Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his case determined by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination, for the scope of the proceedings in an application for summary judgment is to enable a plaintiff to obtain quick judgment where there is plainly no defence to the claim."

I do tend to agree that this suit needs to go on full trial and thus I dismiss the application on hand with cost in the cause.

Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of **November, 2011**

K. H. RAWAL
JUDGE
16.11.2011

