

REPUBLIC OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 102 of 2009

CECIL GUYANA MILLER..... PLAINTIFF

VERSUS

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

RASNA WARAH..... 2ND DEFENDANT

RULING

Coram: Mwera J
Wena for Applicant
Imende for Respondent

The plaintiff's Chamber Summons dated 22.09.09 brought under Order 6 Rule 13 (b) (c) (d) Civil Procedure Rules and S. 3A Civil Procedure Act had this principal prayer:

1) That the defendants' statements of defence herein be struck out and Judgement be entered for the plaintiff.

The grounds on which this summons was brought were that the defence of the 2 defendants was simplistic and raised no triable issues at all or that any issues raised were plainly unsustainable. That the statement of defence was scandalous, frivolous and vexatious and did not justify the defamatory publications complained of and so constituted an abuse of the court process.

The supporting affidavit sworn by the plaintiff referred to the publication complained of which appeared in the 1st defendant's issue of the Daily Nation of 23.2.09, written by the 2nd defendant. The article was exhibited. The words therein were said to have made direct reference to the plaintiff and that they were false, malicious and spiteful. They did not constitute a fair comment or pass as a matter of public interest. The defendants had not verified their truth before publishing them and in any case sections. 9, 10, 11 of the Defamation Act did not avail the defendants. The article was not protected by Section 28 of the National Assembly (Powers & Privileges) code (Act?). Further, that the plaintiff's family values were put in question by the article complained of, injuring his personal and professional integrity and lowering his reputation in the eyes of reasonable members of the society.

A replying affidavit by one Sekou Owino, a legal officer of the 1st defendant was filed on behalf of both defendants. The affidavit claimed that the defence raised triable issues eg. whether the meaning to be attached to the words complained of was gleaned from express meaning or innuendo; whether they passed for fair comment, public interest or privileged under Section 11 of the Defamation Act; and whether the 2nd defendant was properly sued as an agent of a disclosed principal. And that the plaintiff's name was not mentioned in the excerpt appended to the plaint. Further, that the words published were made in Parliament and so were privileged under Section 28 of the National Assembly (Powers & Privileges) Act and Section 11 of the Defamation Act. It was denied in the replying affidavit that the publication was actuated by malice. After other references to the plaint and the supporting affidavit, the replying affidavit concluded that it was not recognized in law to term a defence "simplistic", and if that defence was scandalous, that was a matter of fact to be proved by evidence.

In the submissions filed, the plaintiff corrected the heading of the summons to read Order VI Rule 13 (1) (b) (c) (d) – subrule 1 having been omitted initially. This was termed a typing error which caused no prejudice and was curable. More or less repeating what was deposed to in the supporting affidavit, Mr Wena argued that the defence in question was scandalous, an abuse of the court process and meant to delay a fair trial herein. Much as by this summons the Plaintiff was moving to demonstrate that the defendants did not deserve to defend this suit similarly the defendants had to show the court at this point that they actually could do so. Counsel went over the contents of the replying affidavit and concluded that no triable issues arose from the statements of defence. It was with no merit to deny that the plaintiff was referred to by name in the article complained of. It had not been shown in the replying affidavit that the words complained of were true, fair comment or a matter of public interest. The refuge sought by the defendants under the Defamation Act and the National Assembly (Powers and Privileges) Act was discounted as unavailable. The defence herein was thus termed a sham, warranting to be struck out.

On their part the defendants by briefly going over the plaint and the defence, urged the court to be reminded that a pleading should only be struck out if it is manifestly hopeless. So hopeless that it amounted to an abuse of the court process. In so holding the court ought to exercise its jurisdiction sparingly and only in exceptional cases. That that had not been demonstrated here and with reference to several authorities, needless to reproduce here, the court was asked to find that whether defamation was by express or natural meaning or innuendo largely depended on all the facts and circumstances of the given case and that is better done at the time of trial by way of evidence.

The defendants then moved to impeach the joint suit against them when the 1st defendant was known to be the principal of the 2nd defendant, then to the application of the 2 Acts of Parliament referred to earlier. The final remarks fell on the meaning and purpose of fair comment in cases of defamation.

After having gone over the principal pleadings herein, the affidavits filed and the submissions, this court is minded and it holds that a case has not been made out to strike out the joint statement of defence herein. In this application each side appears bent on reproducing what its pleading contains with the view to have the determination of this summons go this way or that. In fact the court was left with the impression that each sides' stand in this proceeding, constitutes the evidence in fact and exposition of the law to be put forth at the trial.

In these circumstances the prayers sought are declined with costs in the cause. Parties should move the suit for an early trial.

Orders delivered on 26.2.10.

J. W. MWERA

JUDGE