



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 1251 OF 2005**

**PATRICK KARIUKI MUIRURI ..... PLAINTIFF/RESPONDENT**  
**V E R S U S**  
**BARCLAYS BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**  
**THE STANDARD LIMITED.....2<sup>ND</sup> DEFENDANT**  
**R U L I N G**

Before me is a Chamber Summons dated 18<sup>th</sup> August, 2006 filed by M/s Miller & Company advocates on behalf of the applicant who is the 1<sup>st</sup> defendant herein **BARCLAYS BANK OF KENYA LTD**. The second defendant in the proceedings is **THE STANDARD LTD**. The respondent is the plaintiff who is **HON. PATRICK KARIUKI MUIRURI**.

The application was filed under Order 6 rule 13 (1) (b) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act (**Cap. 21**) and section 7 of the Defamation Act (**Cap. 36**).

The prayers sought are as follows-

1. ***The plaintiff's plaint herein be struck out on the grounds that:***
  - (a) *it is scandalous, frivolous and vexatious,*
  - (b) *it is otherwise an abuse of the court process.*
2. ***The cost of the entire suit and the application be born by the plaintiff.***

The application has grounds on the face of the Chamber Summons. The said grounds are two as follows-

1. ***The publication sued upon by the plaintiff is absolutely privileged having been a fair and accurate report of the court proceedings.***
2. ***The plaint filed herein is incompetent and fatally defective.***

The application was filed with a **SUPPORTING AFFDAVIT** sworn by **KENNEDY OCHIENG** advocate on 18<sup>th</sup> August, 2006. It was deponed in the said affidavit, inter alia, that the defamation case herein relates to a newspaper article published by **THE STANDARD LIMITED** on 9<sup>th</sup> April, 2005 headed "**Barclays Bank Sues MP and Others for Kshs.2million**" which article related to judicial proceedings filed against the plaintiff herein by the 1<sup>st</sup> defendant/applicant in Nairobi CMCC No. 3572 of 2005; that on the 31<sup>st</sup> August, 2005 the 1<sup>st</sup> defendant/applicant herein applied for summary judgment in that case; that subsequently the application for summary judgment was heard inter partes and on 25<sup>th</sup> July, 2006 Hon. Cheroni (**Senior Resident Magistrate**) delivered a ruling granting judgment as prayed in the plaint; that the plaintiff's suit herein was meant to vex the 1<sup>st</sup> defendant and was an utter abuse of the court process; that the plaint herein was embarrassing as the plaintiff had thrown in the entire article without pleading the specific words that were defamatory to him; that the plaint was frivolous, vexatious and was designed to deter the 1<sup>st</sup> defendant/applicant from its entitlement; and that it was in the interests of justice

for the 1<sup>st</sup> defendant's application herein to be allowed and that the plaintiff's suit be struck out as prayed.

The said **KENNEDY OCHIENG** advocate for the 1<sup>st</sup> defendant/applicant also filed a supplementary affidavit on 11<sup>th</sup> April, 2008, which affidavit was sworn on 4<sup>th</sup> April, 2008. This affidavit was said to have been sworn to exhibit documents which had just come into the possession of the said advocate to assist the court in determining the matters in contention. It was deponed, inter alia, that the plaintiff herein had filed an application dated on 4<sup>th</sup> April, 2007 in CMCC No. 3572 of 2005 to set aside the proceedings, judgment and decree in that case, and that the said application was argued and dismissed.

The applicant's counsel also filed written submissions on 20<sup>th</sup> January, 2009. It was contended in the said submissions the plaintiff herein did not state the words in the newspaper article published by the 2<sup>nd</sup> defendant which were defamatory to him. In any case, the said words were a fair and accurate report of the pleadings and proceedings in Milimani Commercial Court Chief Magistrate's Civil Case No. 3572 of 2005 on the claim against the plaintiff herein of, inter alia, a sum of Kshs.285, 262.95. It was contended therefore that the suit herein was scandalous, frivolous, vexatious and an abuse of the court process.

Reliance was placed on the case of **JOHN WARD – VS- STANDARD LIMITED [2006] eKLR** wherein Osiemo J. stated-

***“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. The ingredients of defamation are:-***

- (i)            *The statement must be defamatory.***
- (ii)           *The statement must refer to the plaintiff.***
- (iii)          *The statement must be published by the defendant.***
  
- (iv)          *The statement must be false.”***

It was emphasized that in Milimani Chief Magistrate's Civil Case No. 3572 of 2005 judgment was delivered by a court of competent jurisdiction in favour of the 1<sup>st</sup> defendant/applicant herein, against the plaintiff herein. Reliance was also placed on section 6 of the Defamation Act (Cap. 36), which provides-

***“6. A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged.”***

It was further contended that it was **THE STANDARD (2<sup>nd</sup> defendant herein)**, not 1<sup>st</sup> defendant/applicant herein who published the said words. Reliance was placed on the case of **HON. NICHOLAS BIWOTT -VS- HON. PAUL KIBUGI MUIE** – Nairobi HCCC No. 1369 of 2003 wherein the court held, inter alia that-

***“Moreover the publication alleged in the paragraph is only against the second defendant yet without publication defamation would be non-existent.”***

On the suit herein being scandalous, frivolous, vexatious and an abuse of court process, reliance was placed on the case of **MPAKA ROAD DEVELOPMENT LIMITED -VS- KANA [2001] 2EA 468** wherein Ringera J. (*as he then was*) stated-

***“A matter would be scandalous, frivolous and vexatious if it would be inadmissible in evidence to show the truth of any allegation in the pleading which was sought to be impugned..... A pleading was frivolous if it lacked ..... It would be vexatious if it annoyed or tended to annoy.”***

It was submitted that the pleadings disclose no arguable case and the suit should therefore be struck out. Reliance was placed on the case of **WATERS –VS- SUNDAY PICTORIAL NEWSPAPERS LTD [1961] 2 ALLER 158** at page 761 wherein the English court stated-

***“it is well established that the drastic remedy of striking out a pleading or part of a pleading cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed, it has been concluded before us that the rule is applicable only in plain and obvious cases.”***

The application was opposed. The plaintiff/respondent **HON. PATRICK KARIUKI MUIRURI** filed a **REPLYING**

**AFFIDAVIT** sworn by himself on 25<sup>th</sup> April, 2007. It was deponed in the said replying affidavit, inter alia, that in its ordinary, literal construction and by innuendo the article complained of was defamatory; that the said article was maliciously published and distributed by the defendants with the sole intention of injuring his reputation and exposing him to public ridicule; that there was malice; that the article was published before summons to enter appearance was served on the deponent and was meant to create the impression that he had no defence; that the fact that judgment was entered against the deponent in Milimani Chief Magistrate's Civil Case No. 3572 of 2005 did not of itself vindicate the defendants herein of offensive actions; that the article complained of did not attract absolute privilege; that the article which was the subject of this suit was not justifiable as it was sourced from a pleadings consisting of allegations which were subject to proof by way of evidence; and that striking out the pleadings herein was a draconian step that ought to be taken only in the clearest of cases.

The plaintiff/respondent also filed a further replying affidavit sworn by himself on 30<sup>th</sup> April, 2008. It was deponed in the said further replying affidavit that the deponent had instructed his advocates on record to file an appeal against the ruling made on 21<sup>st</sup> August, 2007 in Chief Magistrate's Civil Case No. 3572 of 2005 (Milimani); that there is a subsisting appeal arising from the decree and judgment pending determination; and that the various substantive issues raised herein can only be determined in a full hearing.

The counsel for the plaintiff/ respondent also filed written submissions on 23<sup>rd</sup> February, 2009. It was contended that the application had no merits and that the suit should proceed to full hearing. Reliance was placed on Order VI rule 13 of the Civil Procedure Rules and it was contended that an application such as the present one could only succeed if the pleading was devoid of any substance or does not raise any issues of fact or law. Reliance was placed on the case of **JIIWAJI -VS- SAHEB & ANOTHER [1990] KLR 773** wherein Bosire J. (*as he then was*) stated-

***“.....striking out pleadings is in effect dismissing the suit summarily and should only be resorted to in the clearest of cases. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to proceed.....”***

It was further contended that the present application was not sustainable because the supporting affidavits in support were sworn by counsel seized of the matter, and not the applicant. It was argued that the advocate did not have the capacity to render evidence in support of the application on matters which were controversial, and therefore the contents of the affidavits were hearsay and not admissible.

It was also contended that the publication made by the 2<sup>nd</sup> defendant herein was defamatory. It was contended also that the article did not attract absolute privilege as it was not from proceedings but rather from a single pleading and published merely 3 days from the filing of the case, and even before summons had been served.

It was further contended that the article was published maliciously and also that the issues in CMCC No. 3572 of 2005 (**Milimani**) had not yet been conclusively determined as there was an appeal still pending.

On the hearing date Ms. Kamunya for the 1<sup>st</sup> defendant/applicant addressed me in support of the application. Mr. Njenga for the plaintiff/respondent also addressed me.

I have considered the application, documents filed, the submissions of the parties counsel, as well as the authorities cited.

This is an application for striking out a suit because it is scandalous, frivolous, vexatious, and an abuse of the process of the court. Striking out is akin to summary dismissal of a suit, based on a preliminary or interlocutory application.

As was stated by Bosire J. In **JIIWAJI -VS- SAHEB & ANOTHER** (*supra*) –

***“.....striking out pleadings is in effect dismissing the suit summarily and should only be resorted to in the clearest of cases. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to proceed.....”***

This matter is a defamation matter. It relates to what was reported and the meaning and effect of what was reported, taking into account the timing and circumstances under which the report was made. There is also an appeal by the plaintiff /respondent herein pending from the decision of the subordinate court.

This might be a borderline case. However, in my view the substantive issues to establish or disprove the alleged defamation can only be determined after hearing evidence. I am of the view that it will not be in the interests of justice to strike

out the suit at this preliminary stage. After all, if the suit herein is unsuccessful, the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein will be compensated in the form of costs. No indication has been given that, having the case proceed to full hearing, will adversely affect the 1<sup>st</sup> defendant/applicant herein. On these reasons, I will decline to strike out the suit as it is not a completely hopeless case. It will go to full hearing. As for costs of this application, since this is a preliminary application, I will order that costs be in the cause.

Consequently, I dismiss the application herein. Costs in the cause.

Dated and delivered at Nairobi this 24<sup>th</sup> day of September, 2010.

**George Dulu**  
**Judge.**

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In the presence of-

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N/A for 1<sup>st</sup> defendant/applicant

Mr. Mayamba holding brief for Mr. Njenga for plaintiffs/respondents  
Catherine Muendo Court clerk.