



CIVIL PRACTICE AND PROCEDURE

- Ø Application to strike out pleading Order 6 R. 13.
- Ø Courts will strike out action which have excessive delay
- Ø Where in defamation the defence is fair comment on a matter of public interest there cannot be interrogatories.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 70 OF 2007

STEPHEN MIRITI MUGUNA.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LTD.....1ST DEFENDANT

JAMLICK MWONGERA alias MWA-O-NTL....2ND DEFENDANT

NICHOLAS MUGAMBI MBURUGU.....3RD DEFENDANT

RULING

The plaintiff sued the three defendants seeking for:-

- (a) *General damages for defamation.*
- (b) *Aggravated damages for defamation.*
- (c) *An order that the defendant do make and broadcast an apology to the plaintiff through the same media, and*
- (d) *An order for permanent injunction restraining the defendants either by themselves, their agents, employees, assigns and any other person acting on their behalf or behest from altering, speaking and or broadcasting any defamatory words against the plaintiff.*

The plaintiff alleges in his plaint that the 2nd defendant who works for the 1st defendant on a talk show telephoned the 3rd defendant

whereby the plaintiff was defamed in the discussion that took place. The three defendants filed their defences denying the plaintiff's claim. The plaintiff filed a chamber summons dated 10th March 2008 which is the subject of this ruling. The plaintiff's application seeks the striking out of the defendant's defence and entry of judgment in his favour. The plaintiff abandoned his reliance on Order XXXV of the Civil Procedure Rules and relied on Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules. That Rule provides:-

“Rule 13(1) at any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that –

- (a)
- (b) **It is scandalous, frivolous or vexatious; or**
- (c) **It may prejudice, embarrass or delay the fair trial of the action; or**
- (d) **It is otherwise an abuse of the process of the court and may order that the suit be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

It is apt at this stage to quote from the book of Mulla “*The Code of Civil Procedure*” Vol. 2 16th Edition at page 1814 to page 1815 where the author stated:-

“It seems to me’, said Brown LJ, Knowles V. Roberts ‘that the rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right.”

The plaintiff was at the material time the acting town clerk of the County Council of Meru. He alleges that the 2nd and 3rd defendants made statements implying that he was corrupt, was involved in nepotism, abusing powers of his office and mismanaging his office. The plaintiff in response to those allegations deponed in his affidavit in support of his application that the Local Government Act Cap 265 in particular section 92 (4) provides that Local Authority funds can only be utilized after authorization and after the procedure of procurement has been undertaken by the relevant committee. The plaintiff relied on this section to show that he could not have corruptly used the Local authority's funds. He further deponed that the defendants failed to respond to his request for particulars which he said was a clear indication that the defendants were intent on delaying the trial of this suit. In a replying affidavit sworn by the 2nd defendant on behalf of all the defendants, it was stated that the words spoken during the broadcast related to the plaintiff as an officer of the County Council of Meru and that the issues that were raised were issues of facts touching on his office. The defendants also deponed that the various qualifications which the plaintiff had attached to his supporting affidavit to prove that he was qualified to hold the office of a town clerk could only be the subject of a full hearing. It was deponed on behalf of the defendant that the defences filed had raised triable issues which required a determination after a full hearing. The plaintiff in his submissions submitted that the defendant's defences contained general denials that there were frivolous, vexatious and were an abuse of the court process. The plaintiff relied on various authorities as did the defendants which authorities I have had the opportunity to consider. In the case **J.P. Machira t/a Machira & Co. Advocates Vs. Wangethi Mwangi & An.** Civil Appeal No. 179 of 1977 Bosire J.A. stated:-

“In a case like this one, a court may look for triable issues from either the pleadings or, in an appropriate case from affidavits filed in answer to an application seeking to strike out the pleadings concerned. Where as in this case issues are not clearly identifiable from both the written statements of defence and the affidavit filed there would be no proper basis for sustaining the written statement of defence.”

With that in mind, I will consider the defences filed and the affidavit of the defendants to confirm whether they raise triable issues. The 1st and 2nd defendants in their defence denied the word complained of word defamatory. They also pleaded that the plaintiff was not mentioned by name when the words were spoken in the broadcast. The 3rd defendant in particular pleaded that some of the words spoken were justified in that the plaintiff did not have a university degree and that there were incidents of corruption. The 3rd defendant therefore pleaded that the plaintiff was not defamed. The plaintiff's claim that the utterance of the words complained of was due to a grudge between the plaintiff and the 3rd defendant was also denied. It was deponed in the defendant's replying affidavit that the case which was between the plaintiff and the 3rd defendant by the time of broadcast had been settled. For the plaintiff to succeed in his application it is necessary to show that the defendant's defences were scandalous, frivolous, vexatious and use of court proceeds. The plaintiff needed to show in respect of his allegation that the defences were scandalous, they were calculated to do permanent injury to the plaintiff. In my view, the plaintiff failed to prove that the defences were calculated to do such injury. It ought to be noted that nothing can be scandalous which is said to be true. From the reading of the defences before court one gets the idea that the defence raised by the defendants is that the statements made on the broadcast were true. Similarly, I also find that the defendants' defences cannot be said to be frivolous or vexatious. The statements made on the broadcast about the working within the County Council of Meru were stated to be true in the defendant's defences. Those defences in the light of the defence raised cannot be said to be frivolous or vexatious. Neither can they be said that they were meant to embarrass. In considering whether the defences were an abuse of the court process the case that comes to mind is **Allen vs. Sir Alfred McAlphine & Sons Ltd** [1968] 2 QB 229 where Lord Denning M.R. stated:-

“The delay of justice is a denial of justice to no one will we deny or delay right of justice. All through the years men have protested at the law's delay and counted it as a grievous wrong, had to bear. To put right with wrong we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it.”

I, for myself cannot see anything in the defendant's defences which can be termed as abuse of the court process or that it is intended to delay the conclusion of the suit. This present case can be distinguished from the case HCC No. 12 of 1993 Nairobi **George Oraro Vs. Wangethi Mwangi & Another**. In that case, the court in striking out the defence found that the report which had been published was false. I cannot at this stage of the present case determine whether the statements made by the defendants in the broadcast were false. In the **Oraro** case the court also found that the printing of the pleadings in a newspaper before they were read in court was prohibited by law. It is obvious that **Oraro's** case is distinguishable from this present case and accordingly it does not assist the plaintiff. I am unable to rely on the case of **Macharia** (supra) because the plaintiff only supplied to the court the judgment of Bosire J.A. and failed to supply the judgments of the other two judges who sat with him. Because of that failure, I could not determine what the judgment of the court was. The plaintiff argued that since the defendants had failed to respond to his request for particulars it was evidence that the defendants were delaying the hearing of this suit. The defendants pleaded in their defences that the words spoken were a fair comment and were of a public interest. Order X Rule 3 of the Civil Procedure Rules provides as follows:-

“In an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matter of public interest or were published on a privileged occasion, no interrogatories as to the defendants source of information or grounds of believe shall be allowed.”

Bearing that rule in mind, the particulars that the plaintiff sought are forbidden by that rule. The defendants' defences in my view do not consist of denials. They cannot be said to be scandalous, frivolous or vexatious. They also cannot be said that they are intent on embarrassing the plaintiff or are an abuse of the court process. For that reason, the plaintiff's Chamber Summons dated 10th March 2008 is without merit and is dismissed with costs being awarded to the defendants.

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO

JUDGE