



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 544 OF 2009

HON. UHURU MUIGAI KENYATTA.....PLAINTIFF/APPLICANT

VERSUS

THE STANDARD LIMITED.DEFENDANT/RESPONDENT

RULING

Before me is an application by way of Chamber Summons dated 3rd February, 2010 filed by M/s Shapley Barret & Company Advocates for the plaintiff. The application was brought under order VI Rule 13(1)(B) and 16 of the Civil Procedure Rules, as well as section 3A of the Civil Procedure Act (*Cap 21 Laws of Kenya*). The prayers in the application are four, as follows: -

- 1. THAT paragraphs 6, 7, 8, 11, 12, 13 and 14 of the defence dated 9th November 2009 and filed herein be struck out.**
- 2. THAT judgment on liability be entered for the plaintiff against the defendant.**
- 3. THAT the suit be set down for formal proof or assessment of damages.**
- 4. THAT the costs of this application be granted to the plaintiff.**

The application has grounds on the face of the Chamber Summons. It was filed with an affidavit sworn on 3rd February, 2010 by the Plaintiff/applicant.

The grounds of the application are as follows: -

- (a) The defence that the publication is not defamatory of and concerning the plaintiff is unsustainable as this Honourable Court in its ruling of 17th December, 2009 has held that;**
 - (i) The publication complained of in the proceedings defamed the plaintiff.**
 - (ii) The defamation is obvious, atrocious and wholly unjustified.**
- (b) The said ruling has not been challenged by the defendant.**
- (c) The defence of justification is unsustainable and misconceived as the defendant in breach of**

mandatory requirements of the law has failed to plead particulars of justification.

(d) There are no facts pleaded by the defendant to sustain or support the defence of fair comment in terms of the mandatory requirements of the law.

It was deponed in the affidavit filed with the application, inter alia, that upon filing of suit the applicant on 13th October 2009 filed an application seeking orders of temporary injunction to restrain the defendant from publishing, printing or distributing similar allegations against the applicant; that the said application was heard inter parties and a ruling delivered on 17th December 2009; that in the said ruling the court held inter alia that:- **“I am satisfied that the demotion complained of is obvious, atrocious and wholly unjustified. It has inflicted a most serious injury to the plaintiff’s character and reputation. The defamation has been repeated and is likely to be repeated”**; that the respondent has not challenged the said ruling; that where in a defamation case the defendant pleads a defence of justification and fair comment it must plead particulars relied upon to sustain the justification; and that an omission to comply with the mandatory requirement of pleading particulars, meant that the said grounds of the defence were unsustainable.

The application was opposed. Grounds of opposition were filed on 13th July 2010 by M/s Guram & Company Advocates. The grounds of opposition were as follows: -

- 1. That the application is an abuse of court process.**
- 2. That the application is frivolous and mischievous.**
- 3. That the defendants have a good defence.**

On the hearing date Mr. Oyatsi for the applicant and Mr. Billing for the respondent addressed the court.

Mr. Oyatsi for the applicant submitted that the words of the alleged defamation of the applicant were contained in the amended plaint filed on 2nd November, 2009. Counsel argued that in an application for an injunction, a ruling was delivered by the court that the Plaintiff had established defamation. That ruling had not been challenged. Therefore that finding remained valid. In addition, paragraph 11 of the defence pleaded justification as a ground of defence, but failed to give particulars which was a mandatory requirement under Order 6 Rule 6(A) of the Civil Procedure Rules. It was contended that this omission to include particulars was fatal to the said defence of justification or fair comment.

Mr. Billing for the respondent submitted that the particulars given in paragraphs 8 and 11 of the amended defence were sufficient. In any case, the facts could only be established in a hearing and not through such an interlocutory application. Counsel also relied on the Overriding Objective provisions under section 1A of the Civil Procedure Act (**Cap 21 Laws of Kenya**).

I have considered the application, documents filed, the submissions of both counsel and the law. The words said to have been stated by Justice Waweru at page 10 of the ruling of 17th December, 2009 cannot be denied. I have perused that ruling. However, those words were used in a preliminary application for an injunction, and were in my view, not meant to determine the whole case. The case can only be determined after evidence is tendered on both sides. Besides, the learned Judge at page 6 of the said ruling clearly stated the standard of proof he used in determining the interlocutory application for injunction. The standard the Judge used was based on **“strong prima facie evidence”**, not the balance of probabilities applied in civil cases. In my view, the prima facie evidence standard, however strong, is lower than proof on the balance of probabilities. I find and hold that the words used by the learned Judge did not establish that a case of defamation has been or has not been proved in the main suit. That proof will have to await the evaluation of evidence yet to be tendered in court.

I now go to the issue of particulars for justification and fair comment. Paragraph 11 of the defence dated 9th November, 2009 pleads justification and fair comment. There is no heading or sub-heading there

under containing the word “**particulars**”. However, paragraph 11(b) gives what can be described as particulars or clarification of the pleaded justification and fair comment. In my view, the fact that there is no specific heading under the words “**particulars**” does not mean that there are no such particulars. The pleading has to be read as a whole to know whether or not such particulars are present. In any event, amendments to a pleading can be allowed anytime before hearing, and even at hearing. In my view, it was premature to file this application. I find that the said defence contains what can be described as particulars of fair comments. In my view, the lack of particulars, if at all, may only curtail the evidence to be given by the party, but does not mean that the paragraph should be deleted or expunged.

I find and hold that the application is premature and has no legal merits. I will dismiss the same.

For the above reasons, I dismiss the application. However, costs will follow the decision in the main suit.

Dated and delivered at Nairobi 15th day of November 2010.

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GEORGE DULU

JUDGE

In the presence of

Mr. Oyatsi for the Plaintiff/applicant

Mrs. Sirai for the defendant/respondent

C Muendo – court clerk