



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**CIVIL CASE 397 OF 2005**

LUCY NJIRU ..... PLAINTIFF

VERSUS

TIMES NEWS SERVICE LTD .....1<sup>ST</sup> DEFENDANT

WILSON KIBET ..... 2<sup>ND</sup> DEFENDANT

CHRIS ODWESSO ..... 3<sup>RD</sup> DEFENDANT

**RULING**

The application before me is a Chamber Summons dated 6<sup>th</sup> October, 2008 brought by the Plaintiff. The Application is brought under Order VI Rules 13(1) (b), (c), and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The same is supported by the affidavit and a further affidavit both sworn by the Applicant Mrs Lucy Njiru dated 6<sup>th</sup> October 2005 and 24<sup>th</sup> April, 2006, respectively.

The application is seeking for orders that:-

1. **The defendant's defence be struck out**
2. **The Plaintiff's suit proceed for formal proof.**
3. **Costs of the application be provided for.**

The defence opposed the application and filed a Replying Affidavit dated 23<sup>rd</sup> March, 2006 and a Further Replying Affidavit dated 31<sup>st</sup> May, 2006, both sworn by Charles Ruto.

The Plaintiff's complaint is that the defence contains general denial, does not disclose triable issues and is an abuse of the court process. The Plaintiff states in her affidavit that the defence has not answered issues raised in the plaint.

In reply the defendants state that their Further Amended defence raises triable issues and that the same

expressly responds to issues raised in the plaint.

The cause of action arose out the publication of a story by the 1<sup>st</sup> Defendant touching on an accident case that was being handled by the Plaintiff who is an advocate. The Plaintiff claims that the words published by the 1<sup>st</sup> Defendant, a local daily, seriously injured her credit and reputation as an advocate and she has been brought into public scandal, Odium and contempt in the Estimation of right thinking members of society.

In the statement of defence the defendants aver that the said publication consisted of statement of fact that were substantially true and plead the defence of fair comment made in good faith and without malice.

Under Order VI rule 13(1) (b), (c) & (d) give the court discretion to strike out a pleading that is scandalous, frivolous, and vexatious and may prejudice embarrass or delay the fair trial of the action or is an abuse of court process,

The issue before the court in this instance is whether the defence ought to be struck out on the above grounds.

In INTER COUNTRIES IMPORTERS & EXPORTERS LTD vs. NAIROBI CITY COUNCIL (2002) I KLR AT 209 Ringera J. held inter alia –

**“When a defendant’s defence discloses a reasonable cause of defence and it is articulated in a manner which does not offend any of the Rules of pleadings, it cannot be said to be an abuse of the process of court. It could not be concluded that there was a clear unequivocal admission of the Plaintiff’s claim in the amount sought as to justify a Judgment on admission in accordance with provisions of Order 12 Rule 6 of the Civil Procedure Rules.”**

The Defendant having shown triable issues was entitled to have its day in court and the Plaintiff’s claim for the entry of summary judgment had to be rejected.

In SUNDAY PRINCIPAL NEWSPAPER LIMITED (961) 2 All GR 758 it was held -

**“It is established that he 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 conceded before us that the rule is applicable only in plain and obvious cases. For the purposes of this appeal, we are not in any way concerned with whether any of the defence raised is likely to be successful. The sole question is relation to each of the four headings is whether the case is so un-arguable that it ought to be struck out in *Limine*. I have come to the conclusion in relation to each of the four heading that it is quite impossible for us to take this drastic action.”**

Having considered the submissions by counsel for both side, facts of the case and case law as cited above, I find that the defence is not scandalous, frivolous or vexatious. The same has raised issues that are arguable. It is not for the court at this stage to decide whether defence is likely to succeed.

The defendants have raised the defence of fair comment and that their publication consisted of statements of fact that were substantially true, all these averments are arguable and raise issue to be canvassed at full trial.

Having arrived at the conclusion that the defence is reasonable and raises triable issues. I find it impossible to take a drastic measure of striking out the defence herein. The application therefore fails with costs to the defendant.

Dated and delivered this 28<sup>th</sup> May, 2009.

**ABIDA ALI- ARONI**

**JUDGE**