



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 889 OF 2005

1. NYAMONDI OCHIENG NYAMOGO

2. WILLYS NYAMODI NYAMOGO (*trading as*)

NYOMOGO & NYAMOGO ADVOCATES..... PLAINTIFFS

VERSUS

1. KENYA PIPELINE COMPANY LTD

2. GEORGE ONGONG'A OKUNGU

3. DONALD KAPTEN DEFENDANTS

RULING

Before the court is a Chamber Summons dated 28th February, 2006 filed by the Plaintiff/Applicant. The application is brought under the provisions of Order 6 rule 13 (1) b, c and d of the Civil Procedure Rules and S. 3A of the Civil Procedure Act. It is supported by the Affidavit of *Nyamodi Ochieng Myamogo* the 1st Plaintiff/Applicant.

The application is seeking for orders:-

- 1. That the Honourable court be pleased to strike out the defence herein.**
- 2. That the costs of this application be provided for.**

The Defendants/Respondents opposed the application by filing grounds of opposition and a replying affidavit.

In support of the application the applicants have relied on grounds that the defendants have admitted printing and publishing the letter they consider defamatory. That the defence consists of, mere denials, innuendos, contradictions, generalities and is therefore an abuse of the court process.

On their part the defendants/respondents object to the application. They contend that the same is frivolous, vexatious, scandalous and an abuse of court process. That the Plaintiffs having failed to file a reply to the defence, they are deemed to have admitted the particulars of privilege pleaded. They argue that the defence as filed discloses serious triable issues of fact and law.

I have considered the affidavits before the court, submissions by counsel and cases cited. The question for determination before the court is whether the defence before the court ought to be struck out under Order 6 Rule 13 (1) b, c and d.

Order 6 Rule 13(1) b, c, and d provides as follows –

13(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that

(b) It is scandalous, frivolous or vexatious or

(c) It may prejudice, embarrass or delay the fair trial of the action.

(d) It is otherwise an abuse of the court process and may order the suit to be stayed or dismissed or Judgment to be entered, as the case may be.

In their defence the defendants/respondents raised the defence of privilege, which particulars were not responded to. I find that the defence raises triable issues in that the defence pleaded qualified privilege in the publication of the letter complained of by the Plaintiffs/applicants, secondly, the defendants/respondents, denied that the words published in the said letter injured the Plaintiffs/applicants in their character or reputation. I am of the view that the defence raises real issues for determination at a full trial and that there is need at this stage to sustain the statement of defence.

Having arrived at the above conclusion I decline to take the drastic action of striking out the defence, thus shutting the doors of justice against the defendant. I accordingly dismiss the application with costs.

Dated and delivered at Nairobi this 16th day of June, 2009.

ALI- ARONI

JUDGE