REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 117 of 2005

KARIUNGA KIRUBUA T/A KARIUNGA KIRUBUA & CO ADVOCATES ……PLAINTIFF

V E R S U S

THE LAW SOCIETY OF KENYA……..DEFENDANT

CIVIL PROCEDURE & PRACTICE

Pleadings – striking out – application for striking out of suit – power of court to strike out- striking out under Order VI rule 13(1) (e) (b) and (d) and 16 of the Civil Procedure Rules.

R U L I N G

By an Amended Plaint dated 8th August 2006 and filed on 9th August 2006, the Plaintiff herein sought orders for (1) **general (2) exemplary and (3) punitive damages** against Defendant including the Kenya Television Network (KTN in short) the 6th Defendant and the Applicant herein.

The Plaintiff's claim is based upon a publication by the Defendants in their broadcasts that the Plaintiff was suspended for failing to account for some client moneys, and was to serve one year suspension.

Arising from the said claim, the 6th Defendant denied the claim and has filed an application by way of a Chamber Summons dated 22nd September 2006 in which it seeks the following prayers:-

(1) that the Amended Plaint dated 8th August 2006 and filed on 9th August 2006 be struck out for disclosing no reasonable cause of action as against the 6th Defendant.

(2) that the amended plaint herein be struck out for being scandalous, frivolous or vexatious as against the 6th Defendants.

(3) that the Amend Plaint be struck out for being otherwise an abuse of the process of the court;

(4) that the costs of the Application be provided for.

Prayer 1 of the Application was based upon the following grounds-

(1) the cause of action in the Amended Plaint herein is barred by section 4(2) of the Limitation of Actions Act, Chapter 22 Laws of Kenya as amended by section 20 of the Defamation Act (Cap 36, Laws of Kenya.

(2) that the cause of action has been commenced against the 6th Defendant in its own name which Defendant is not a legal entity and is therefore lacking in legal capacity thereby tendering the suit as against it unsustainable.

Prayers 2 and 3 of the Application are based on the following grounds:-

1) that the Amended Plaint herein does not state with precision the verbatim statement of the allegedly defamatory words complained of as allegedly published by the 6th Defendant as by law required,

2) that the Amended Plaint herein is grounded on alleged publications by the 6th Defendant which alleged publication if at all made, were made on occasion of qualified privilege as duly required by the Defamation Act,

3) that the Verifying Affidavits to the Amended Plaint sworn by the said Plaintiff on 8th August 2006 is improper and/or incurably defective as it was commissioned by a person without a practicing certificate.

4) that in the above circumstances, the Amended Plaint is without substance, fanciful and lacks bonafides.

5) that in any event the alleged founding cause of action is in the circumstances only meant to cause the 6th Defendant unnecessary anxiety trouble and expense and accordingly one for striking out.

And prayers 2 and 3 of the Application are supported by the Affidavit of Nelly Matheka, the Assistant Director, Legal, Standard Limited a Limited liability company established and duly existing under the Companies Act (Cap 486, Laws of Kenya) and which manages and controls the services and operations of the 6th Defendant.

It is observed that the 6th Defendant's Chamber Summons was filed after the filing of the Amended Plaint dated 8th August 2006 and it was not amended after the Plaintiff filed a Further Amended Plaint on 28th June 2007, which is dated 11th June 2007. The Further Amended Plaint refers to the 6th Defendant as the "**Standard Group Limited**." I did not hear Miss Oduor, learned counsel for the 6th Defendant, express a different opinion on grounds 2 and 3 that the 6th Defendant is in law and fact, the Standard Limited. Reference to the 6th Defendant as the Standard Group Limited is still suing the wrong entity.

Apart from the application by the 6th Defendant, similar applications were filed by the 5th Defendant on 6.10.2006. The Chamber Summons by the 5th Defendant is dated 4th October 2006. The 3rd Defendant filed its Chamber Summons dated March 2008 on 4th April 2008. The 2nd Defendant filed its Chamber Summons on 3rd April 2009, and it is dated 1st April 2009. The 2nd, 3rd and 5th Defendant's Chamber Summons applications are all founded on Order VI Rule 13(1) (a) of the Civil Procedure Rules. It is only the application by the 6th Defendant, and the subject of this Ruling which is based upon the provisions of Order VI rule 13(1) (a) (**that the pleading does not disclose a reasonable cause of action…..**, rule 13(1) (b) **(it is scandalous, frivolous vexatious**) and (d) **it is otherwise an abuse of the process of the court**.

So far as the record shows, there was a Replying Affidavit of the Plaintiff sworn on 4th May 2007 and filed on 14th May 2007. There is also the Replying Affidavit of Mr. John Wainaina Njogu sworn on 18th July 2008 in support of the commissioning of the Plaintiff's Replying Affidavit, that the Verifying Affidavit to the Further Amended Plaint was properly commissioned as the said John Wainaina Njogu is a duly appointed Commissioner for oaths. The Plaintiff's counsel also filed grounds of opposition dated 30th April 2008 to the 3rd Defendant's Chamber Summons of 10th March 2008.

When the applications by the 6th and 3rd Defendants were heard before me on 24th June 2009, the Plaintiff was represented by Mr. Lompo of the firm of B.G Kariuki, & Co. Advocates while the 1st Defendant, the Law Society of Kenya, was represented by M/S Gikunda and Isaboke, there was no appearance for the 2nd Defendant, the Kenya Broadcasting Corporation, the 3rd Defendant, (Royal Media Services) was represented by Mr. Gacheru of the firm of Kamau Kuria and Kiraitu advocates. There was no representation for the 4th Defendant (the People Daily) and 5th Defendant Nation Media Group while Miss Oduor appeared for the 6th Defendant variously referred to as the **Standard Group Limited and Kenya Television Network**, despite the service of the 6th Defendant's application and Supporting Affidavit thereon, by Nelly Matheka, the Assistant Director Legal, that their proper name is the Standard Limited.

Those essentially are the pleadings, the subject of the Ruling herein in so far as the applications of the 6th and 3rd Defendants are concerned.

For the 6th Defendant, Ms Oduor conceded on their ground (1) (a) that the Plaintiff's action was filed within the twelve (12) months prescribed under the Limitation of Actions, Act (Cap 22, Laws of Kenya S.4(2) for filing of actions based on alleged defamation. She consequently abandoned the argument that the action was barred by limitation.

In support of the contention that the Plaint did not disclose any reasonable cause of action, against the 6th Defendant, counsel submitted that a cause of action arises from a set of facts which entitle one party to maintain an action against another, that the set of facts must be contained in the plaint, that the Further Amended Plaint does not disclose any set of facts to maintain a cause of action against the 6th Defendant, that such facts should have been pleaded in the manner prescribed by order VIA rule 6A of the Civil Procedure Rules and that to that extent therefore, the Plaintiff has not pleaded any words published by the 6th Defendant to show that the words were defamatory of him, the Plaint is fatally defective.

Under paragraph 8 of the Further Amended Plaint, Miss Oduor submitted, the Plaintiff had confirmed that he was suspended from the Roll of Advocates in accordance with a procedure established and followed by the 1st Defendant. There was therefore nothing defamatory counsel submitted, about words set out in paragraph 10 of the Further Amended Plaint and which the 6th Defendant published. To that extent therefore, counsel urged the court to find that there was no cause of action against the 6th defendant.

The **third** leg of counsel's argument was that if indeed the words published were defamatory the 6th Defendant had qualified privilege under section 7 of the Defamation Act, and Part II of the Schedule Paragraph 5(b). Counsel submitted that the plaintiff had not disputed the statement and cannot claim against the 6th Defendant.

Miss Oduor's **fourth** argument was that the plaint does not comply with the rules of pleading. There is no valid Verifying Affidavit, and that unless an affidavit is properly commissioned it cannot stand. Counsel submitted that Mr. Njogu who commissioned the Verifying Affidavit did not have a Practising Certificate and he could not therefore commission any affidavit and that if there was no Verifying Affidavit there could be no valid Further Amended Plaint.

The **fifth** and **final** argument by Miss Oduor was that the 6th defendant is not the **Standard Group Ltd** but rather the **Standard Limited** that the Plaintiff had not made any proper attempt to amend the Plaint

since the application was made and the court should therefore not exercise its discretion in favour of the plaintiff.

For all those submissions counsel relied on the Plaintiff's list of authorities and in particular, **Fremak Construction Co. Limited Vs Minakshi Navin Shah** (Civil Appeal No. 85 Of 2002). The Other authorities apart from the Civil Procedure Act, (Cap 21 Laws of Kenya) and the Defamation Act (Cap 86 Laws of Kenya) were:-

1. OTIENO VS NATION NEWSPAPERS LIMITED [2002] 2 K.L.R. 79.

2. MAKAN & OTHERS vs. ATTORNEY GENERAL & ANOTHER [1974]E.A.534 and

3. ARI CREDIT & FINANCE LTD vs TRANS ASIA TRADING CO LTD & 2 OTHERS (Civil Case No. 1057 of 1995).

For all those reasons and the authorities cited, Counsel for the 6th Defendant prayed that the Plaintiff's Further Amended Defence be struck out with costs to the 6th Defendant.

Mr. Gikunda who appeared for the 1st Defendant, the Law Society of Kenya associated himself with submission by Miss Oduor, counsel for the 6th Defendant, and said he had nothing useful to add Mr. Gacheru, counsel for the 3rd Defendant submitted that although the Further Amended Plaint had neither been served upon them nor their client he had perused it, and noted that the amendments effected concerned description of the parties, and expressed comfort in arguing the 3rd Defendant's Chamber Summons dated 10th March 2008, and brought under Order VI rule 13 (1) (a) of the Civil Procedure Rules which requires no evidence hence has no affidavit except the grounds stated.

In addition to associating himself with the submissions of counsel for the 6th Defendant Mr. Gacheru submitted that the Further Amended Affidavit discloses no cause of action. It does not set out the words alleged to have been published by the 3rd Defendant. From paragraphs 8 and 9 of the Further Amended Plaint the Defendants do not know the cause of action against them or the 3rd Defendant. The Plaintiff admits in paragraph 8 of the Further Amended Plaint that he was suspended, and that is what the Defendant published. It is true. Truth is a complete defence to action on defamation. He relied on the book **Gatley on Libel** and Slander (10th Edn) Sweet & Maxwell 2004 para 26. 11. For those reasons he prayed that the Plaint be struck out and the suit dismissed against these defendants.

Mr. Isaboke Counsel for the 2nd Defendant, the Kenya Broadcasting Corporation on whose behalf a Chamber Summons had been filed by the firm of Hezekiel Oira seeking orders to strike out the plaint and dismiss the suit, associated himself with the submissions of counsel for the 6th Defendant. The 2nd Defendant said Chamber Summons is, as already noted above, dated 1st April 2009.

In addition Mr. Isaboke raised two issues, **firstly** that the plaintiff has not specified which channel under which the 2nd Defendant made the gross publication, **secondly**, counsel submitted, under the Kenya Broadcasting Corporation Act, (Chapter 221 Laws of Kenya) s. 46 a notice of 30 days is required to be issued to the corporation before the suit is filed or brought into court. No such notice was issued. In the circumstances he concurred with submissions by counsel for the 6th and 3rd Defendants that the suit should be dismissed.

Mr. Lompo learned counsel who appeared for the Plaintiff opposed the applications strongly. Counsel relied on the Replying Affidavit of the Plaintiff and that of John Wainaina Njogu both sworn as already indicated above, and in respect of the 3rd Defendant's application, the grounds of opposition dated 30th April 2008, that the entire application is incompetent defective and bad in law, and that the application is premature and an abuse of the court process.

In all Mr. Lompo based the Plaintiffs opposition to the 6th, 3rd, 2nd and 1st Defendants' applications for striking out the plaint and dismissal of the suit on four propositions-

Firstly it is not correct to contend that the plaintiff had failed to comply with the requirements of Order VI rule 6A of the Civil Procedure Rules. The Plaintiff had set out in paragraph 10 of the Further Amended Plaint the words published by these Defendants, and whether they were or were not the exact words, is a question of evidence.

Secondly counsel for the Plaintiff argued the Verifying Affidavit is not defective by being commissioned by a non practising Advocate. Counsel submitted that John Wainaina Njogu who commissioned the Verifying Affidavit was a Commissioner who is exempted from the requirements of taking out an Annual Practicing Certificate under Section 10 of the Advocates Act. There is a copy of the Commission attached to the Replying Affidavit of the said John Wainaina Njogu.

Thirdly the description of the 6th Defendant is merely a misdescription of the party, and that it is not fatal and material to the suit.

Fourthly, a claim of privilege cannot be raised at interlocutory stage because that is a question of evidence.

Fifthly on notice to the 2nd defendant, the Kenya Broadcasting Corporation, the plaintiff may still give evidence as to whether such notice was given on or was not given.

Sixth counsel submitted that striking out a suit is a drastic measure. Under Order VI rule 13(1), the court is vested with a discretion to either strike out the offending pleading or give an opportunity to the party to amend the pleading.

Lastly counsel distinguished the case of **Fremar Construction Co. Ltd vs Minakshi Navin Shah** (supra) from the current case. The Fremar case concerned a payment of money. That is not the situation in the Plaintiff's case of defamation. Counsel urged that the plaint discloses a reasonable cause of action and the applications by the 6th, 3rd, and 2nd should be dismissed with costs to the plaintiff.

In short replies, Miss Oduor, for the 6th Defendant submitted that the court should not allow the case to proceed to enable the plaintiff to fill gaps in his plaint. The defendants must know the case against them by precise pleadings in the plaint.

Mr. Gacheru for the 3rd Defendant restated his submissions that paragraph 10 of the plaint is clear. It does not say what words were used. The discretion by the court to allow an amendment exists, but in this instance it should not be exercised. The facts were within the knowledge of the plaintiff. The plaintiff has amended the plaint twice and never included those words. The proper order to make is to strike out the plaint and dismiss the suit.

In his reply Isaboke counsel for the 2nd Defendant submitted that where a law requires an action to be taken before another is taken, the plaintiff cannot be allowed to explain in the witness box why he failed to take the action prescribed by that law. Counsel therefore submitted that that being so, the court should not accord the plaintiff further opportunity for amendment.

Those were the respective counsel's submissions for and against striking out the Plaintiff suit as against the 1st, 2nd, 3rd and 6th Defendants. The single question is whether the Plaintiff's suit should be struck out and if so on what grounds.

The 6th Defendant's application gives two grounds namely Order VI rule 13(1) (a) and (b) of the Civil Procedure Rules. Reference to rule 16 of Order VI is only for procedural purposes, that application under the order be brought by way of Chamber Summons. Otherwise the grounds for seeking to strike out the Plaintiff's suit are common:-

(a) It is discloses no reasonable cause of action (Order VI, rule 13 (1) (a) and

(b) It is scandalous frivolous, or vexatious

(c) It is otherwise an abuse of the process of the court.

Order VI rule13 (1) (a) does not say that the plaint does not disclose any cause of action but rather that the plaint discloses no reasonable cause of action. To my mind this means that though the plaint may disclose a cause of action, that cause or action is not reasonable.

In the case of **Herman V. Smith** (1855) 10 Exch. 659, Park, B at p.66 said:

"**The term "cause of action" means all those things necessary to give a right of action, whether they are to be done by the plaintiff or a third person**."

And in Cooke vs Gill (1873) L.R. C.P. 107, Brett J. said at p.116-

"**cause of action" has been held from earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse**."

Discussing the same concept in the case of **ARI CREDIT AND FINANCE LTD vs TRANSASIA TRADING CO. LTD & OTHERS** (supra) Hayanga J. at p. 5 of his Ruling referred to the case of **Davy vs Garret (1890) 7 CH.D. 486** where James LJ said:-

"**They may claim ex debito justitiae (out of right) to have the Plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it**."

In the New Zealand case of **Dillon vs Macdonald** (1902) N.Z.L.R. 375, the Court of Appeal of that country discussed the meaning of the phrase "**cause of action"** and referred with approval to the definition ennunciated in **Jackson vs Spittal** (1870) L.R. 5 C.P. 542 and subsequently approved by a Conference of Judges that "**a cause of action is the act on the part of the defendant which gives the plaintiff his cause of complaint**".

The contention by these defendants is not merely that there is no cause of action as so defined but that even if there is such cause of action is not reasonable. For an action to be reasonable in law prima facie means "**in good faith according to reason as contra-distinguished from** "**caprice" having regard to existing circumstances of which the actor called on to act reasonably knows or ought to know.**"

In the Australian case of **Opera House Investment Pty Ltd. Vs. Divon Buildings Ltd.** (Cap 36) 55 C.L.R. 110 STARK J. said.

"**Reasonable" is a relative term, and the facts of the case must be considered before what constitutes a reasonable contract can be determined."**

In this case, the circumstances in issue are admitted by the plaintiff in paragraph 8 of the further Amended Plaint in this terms-

8. **On 5.11.2004 the first Defendant maliciously instigated an illegal and wrongful suspension of the Plaintiff from the Roll of Advocates for a period of 1 year, maliciously, wrongfully and illegally caused the alleged suspension to be published by the second, third and fourth, fifth and sixth defendants."** For the Plaintiff to sustain the cause of action on defamation (libel), the Plaintiff will need to show that his suspension was purged by this or higher court, to show that the act of suspension by the First Defendant was illegal and therefore wrongful. If the Plaintiff has not purged that suspension by order of court he cannot contend that it was either illegal or wrongful. He cannot therefore find any cause let alone a reasonable cause of action on the fact of his suspension which remains lawful until so purged or quashed.

While on this question of whether the plaintiff has any cause or any reasonable cause of action against these defendants, (which I hold as analyzed above he does not have) it seems to me that where a professional (such as an advocate or a medical practitioner) has after due process by either disciplinary committee tribunal or other body regulating the practice of his profession, been disciplined and has not successfully appealed against the findings of his disciplinary authority or body he has no cause let alone reasonable cause of action, against his professional body or disciplinary committee or tribunal.

On that ground alone the plaintiff' suit does not lie against these defendants or any of the other defendants sued. I will however touch on other grounds urged by the counsel for the Defendant/Respondent herein and also the Plaintiff's counsel.

Having concluded that the plaint discloses no reasonable cause of action, it must I think logically follow that the Plaintiff's action is no more than a vexation against in particular the 1st Defendant, his disciplinary body or committee thereof. An action is said to be frivolous, scandalous and vexatious essentially because it has no basis in law. In this case the action is based upon the tort of defamation.

To sustain an action in libel it has been held from very early times that the words used are material and they must therefore be set out verbatim in the particulars of the claim.

In **Wright vs Clements** (1820)3 cited in Gatley on **Libel and Slander** para 26 11. Abbot CJ. said:-

"**The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground for action**."

And in Fitzsimmons vs Duncan Ltd. [1908]2lr. R. 483 at 499 Palles CB said:-

"**In libel you must declare upon the words, it is not sufficient to state their substance**."

In Collins Vs Jones [1955] IQB. 564 at page 571 Denning L.J. said

"**A plaintiff is not entitled to bring a libel action in a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty. The court will require him to give particulars to ensure that he has a proper case to put before the court and is not merely a fishing one".**

In LOUGHEED VS CBC [1978] 4WWL 388 Miller J. said at p. 349-

"**In my view, a plaintiff in a defamation case involving an audio visual presentation should not be bound by the same strict rules as to particulars which apply to a written statement. However this privilege granted to such a plaintiff should not be extended to permit the pleading merely of general conclusions that the plaintiff has been defamed. The plaintiff must through his pleadings, clearly indicate to the Defendant which portions of the television play (or news cast) gave rise to the allegations of defamation…"**

Although there appears to be a relaxation of the rigours of the rules of pleadings where the matter complained of is part of a television, film or other audio visual presentation…the particulars of the claim must be pleaded with particularity to enable the defendant not only understand what it is the claimant alleges the words mean, but also enable him to decide whether they have that meaning as well as enable the court to frame (where necessary an injunction with sufficient precision. See **BRITISH DATA MANAGEMENT vs BOXER COMMERCIAL REMOVALS plc [1996] E.M. L.R. 349 CA.**

That is the effect of both order VI rule 6A(I) and (2) and s.7 and Part II paragraph 5(b) of the Defamation Act, (Cap 36, Laws of Kenya). Order VI rule 6A rule (1) provides:-

(1) 6A(1**) where in an action for libel and slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than in their ordinary meaning he shall give**

particulars of the facts and matters on which he relies in support of such sense.

(2) **where in an action for libel or slander the Defendant alleges that in so far as the words complained of consist of statements of fact, they are true in substance and in fact and in so far as they consist of expression of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.**

(3) when in an action for libel or slander the plaintiff alleges that the defendant maliciously published words or matters complained of he need not in his plaint give particulars on which he relies in support of the allegation of malice but if the defendant pleads that any of those matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of facts and matters from which the malice is to be inferred.

(3) Not in issue.

And Section 7(1) of the Defamation Act provides:-

7(1) Subject to the provisions of this section the publication in a newspaper of any such report as is mentioned in the schedule to this Act shall be privileged unless such publication is proved to be made with malice;

Part II paragraph 5 of the Schedule to the Defamation Act provides:-

5. A fair and accurate report of the findings or decisions of any of he following associations or of governing committee or governing body thereof.

a) …….

b) an association formed in Kenya for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of persons carrying on or engaged in any trade business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with the trade, business, industry or profession of the actions or conduct of those persons.

c) ……..

being a finding or decision relating to a person who is a member or is subject by virtue of any contract to the control of the association.

In this case, those defendants have raised the Defence of fair comment and have relied on the provisions of Section 7(1) and Part II paragraph 5(b) of the Schedule to Defamation Act. The Plaintiff has not filed any reply that the disciplinary committee of the Law Society of Kenya, the 1st Defendant, or indeed, the other defendants were actuated by malice despite filing an Amended and Further Amended Plaint.

Further the plaintiff failed to give the particulars as required by the authorities and Order VI rule 6A(1) of the Civil Procedure Rules. Paragraph 10 of the Further Amended Plaint does not say what exact words were published by these or other defendants. To say "**words to that effect**" is not equivalent to saying that the words published were:-

"**Kariunga Kirubua of Meru was also suspended for failing to account for Shs. 256,000.50. He is to serve a one year suspension."**

By failing to state the words alleged to have been published by these defendants, the Plaintiff

breached the cardinal principles as established in Order VI rule 6A of the Civil Procedure Rules and Section 7 of the Defamation Act and Part II paragraph 5(b) of the Schedule to the Act. These defendants do have a complete defence to the action.

The other issue I wish to touch upon is the Verifying Affidavit commissioned by John Wainaina Njogu an Advocate and a person exempted from taking an Annual Practicing Certificate under section 10(a) of the Advocates Act. Both the Plaintiff in his verifying Affidavit paragraph 2, and Mr. John Wanaina Njogu in paragraph 3 of his Replying Affidavit depone that he was appointed a Commissioner for Oaths on 21st September 2001 by the Hon the Chief Justice of Kenya and that the Commission has never been revoked. Mr Njogu depones in paragraph 1 of his Affidavit that he is an advocate of the High Court of Kenya and practices as such Advocate in the Attorney General's Chambers. That contention is with respect not correct for two reasons.

Firstly, a person who is admitted an Advocate in Kenya and is appointed a State Counsel in the Attorney General's Chambers or other department of the State Law Offices does not practice law as an Advocate in those offices but is a State Counsel and that is why he does not take out an Advocates Practicing Certificate and,

Secondly, the Commission is by its terms limited to operate – for as long as "**he continues to practice as such Advocate and this Commission is not revoked."**

Whereas the Commission has not been revoked certainly the exercise of the right and privilege to commission documents is subject to the obtention of an Annual Practicing Certificate under the Advocates Act. Any document purportedly commissioned by an Advocate without an annual practicing certificate is invalid and therefore of no effect. This is true of the Verifying Affidavit purportedly commissioned by John Wanaina Njogu on 11th June 2007 when he had no valid Annual Practicing Certificate as is required by the terms of his Commission and not section 10(a) of the Advocates Act.

In the case of **GULAM & ANOTHER VS. JIRONGO, [2004]I K.L.R. 158**, Ringera J. (as he then was) held inter alia that **Rules of Civil Procedure should be seen as hand maidens of justice and not its mistress, and accordingly, unless procedural lapses have caused the adversary a prejudice which cannot be compensated in costs or there is a clear manifestation to overreach, the same should not be accorded fatal**". The learned judge struck out the Verifying Affidavit and granted leave to the plaintiff to file a fresh affidavit.

In this case the Verifying Affidavit was commissioned by a person who was not competent to do by dint of the absence of an Annual Practicing Certificate. The Verifying Affidavit of the Plaintiff is therefore struck out. In view of my earlier order striking out the plaint it would serve no useful purpose to order that the plaintiff file a fresh Verifying Affidavit as the learned judge ordered in **Guram & another vs Jirongo** (supra)

Lastly, there was a question of notice to the 2nd Defendant the Kenya Broadcasting Corporation whose statute the Kenya Broadcasting Corporation Act, (Cap 221 Laws of Kenya), s. 46(a) requires that no action or legal proceedings shall be commenced against the Corporation until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Managing Director by the Plaintiff or his agent.

I would therefore agree with the submission by Mr. Isaboke learned counsel for the Defendant that where a statute prescribes a condition for the doing an act, then that condition must first be fulfilled before the act contemplated in the law is done. It is a condition precedent under the 2nd defendant's statutes that notice of thirty (30) days be given before any action or legal proceedings is commenced. The rule or procedure is for the guidance of the Plaintiff and also the protection of the defendant. Where therefore the plaintiff fails or ignores to be guided by that law, the law will protect the Defendant to the detriment of the Plaintiff who ignores the guidance of the law. That was the net effect of the decision of Simpson J. (as he then was) the case of **Mahan & others vs A.G. & Another (supra)**.

Order VI rule 13(1) confers upon the court a discretion at any stage of the proceedings to order to be struck out or amended any pleading on any of the grounds stated in sub-rules (1) (a-d) inclusive. The discretion to either strike out or allow an amendment is like every other discretion to be exercised judicially . For the reasons I have set out and discussed at length in the foregoing passages of this Ruling and summarized below, I am unable to exercise my discretion to permit the further amendment of the plaint. To do so would as Denning L.J. said in **COLLINS vs JONES [1955]TQB.571 at 571** "**be to allow the Plaintiff to go fishing for a proper case"**.

In summary therefore, the plaintiff's suit is not sustainable on the grounds:-

(1) As against the 1st Defendant, the Plaintiff has not vacated the decision of that body his professional disciplining body. A decision of a disciplinary body cannot be a foundation of a tortious action in defamation, unless first vacated or quashed in a judicial review action.

(2) As against the 2nd Defendant it does not lie because the plaintiff failed to give the 30 days statutory notice which is a condition precedent to filing suit against it.

(3) As against the 1st, 2nd 3rd and 6th Defendants

(a) It discloses no reasonable cause of action.

(b) It is scandalous frivolous and vexatious and

(c) It is an abuse of the process of the court.

For those reasons, the Plaintiff's Further Amended Plaint dated 11th June 2007 and filed on 28th June 2007 is struck out and the suit against these defendants is dismissed with costs to the said defendants. Those are the orders of the court.

Dated, delivered and signed at Meru this 24th day of July 2009

M. J. ANYARA EMUKULE

JUDGE.