



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 272 of 2008

HASHI EMPEX LIMITEDPLAINTIFF

V E R S U S

1. WANGETHI MWANGI

2. NATION MEDIA GROUP LIMITEDDEFENDANTS

R U L I N G

This is an application by the Plaintiff (by **chamber summons dated 11th November, 2008**) for an order to strike out the Defendants' **statement of defence dated 28th July, 2008**, and for judgment on liability to be entered in his favour. The application is stated to be brought under **Order 6, rules 6A and 13 (1) (a), (b), (c) and (d)** of the **Civil Procedure Rules** (the Rules). I cannot see why rule 6A aforesaid has been cited. The same provides for what particulars ought to be pleaded in defamation actions. It does not grant any right to apply to strike out a pleading.

Rule 13(1) (b), (c) and (d) of Order 6 provide for the following grounds upon which a pleading may be ordered struck out or amended:-

- (i) that it is scandalous, frivolous or vexatious; or
- (ii) that it may prejudice, embarrass or delay the fair trial of the action; or
- (iii) that it is otherwise an abuse of the process of the court.

All these grounds raise matters of fact that must be established by evidence. There is no affidavit sworn in support of the application. The application is thus properly brought only under paragraph (a) upon the ground that the Defendants' defence discloses no reasonable defence. I shall proceed upon that basis.

In applications to strike out a pleading under paragraph (a), evidence is specifically precluded. See Order 6, rule 13(2). So, for an application under this ground to succeed, it ought to be plain and obvious from the pleading concerned, that the same discloses no reasonable cause of action or defence.

I have considered the lengthy written submissions filed on behalf of the parties, including the authorities cited. I have also read the plaint, defence and reply to defence.

This action is in defamation. The Plaintiff is a limited liability company. It has pleaded in its plaint that in a publication carried by the Defendants' newspaper, the **Sunday Nation** of 1st June, 2008 and also in its electronic version carried in the **Internet**, it was defamed. The words complained of are as follows:-

“...The Blogger maintained in a telephone interview that he had met Kabuga who is charged with supplying machetes to militia in the 1994 Rwandan Genocide in which at least 800,000 were killed...”

“...according to ICTR documents seen by the Sunday Nation two years ago, 73-year old Felicien Kabuga is a wealthy Hutu businessman who is believed to have vast interests in Kenya. He is associated with three companies, including Hashi Empex Limited of View Park Towers.”

The Plaintiff has further pleaded that the said words, in their ordinary and natural meaning, meant and were understood to mean that:-

“(a) The Plaintiff had business dealings with an international criminal and fugitive from justice responsible for or connected/associated with the genocide of 800,000 persons in Rwanda.

(b)

(c) The Plaintiff was an unscrupulous company that associated itself with an international criminal and fugitive from justice”.

The Plaintiff denies that it has had, or any of its directors have had, any association with the **Felicien Kabuga** mentioned in the words complained of, “or any other criminal or fugitive”. It pleads that by reason of publication of the words complained of it has “been seriously injured in its credit and business reputation nationally and internationally and it has been brought into public scandal, odium and contempt”. It seeks general, exemplary and aggravated damages, and special damages of KShs. 4,450,000/00, plus interest. It also seeks an injunction to restrain the Defendants from publishing or causing to be published the same or similar words defamatory of itself.

In their defence the Defendants do not deny publication of the words complained of. But they have pleaded the following defences in respect to liability:-

- 1. That the suit as against the 1st Defendant is incompetent as he is sued for “alleged acts done by him as an agent of a disclosed principal contrary to the law” (paragraph 4).**
- 2. It is denied that the publications were “either made falsely or maliciously of the Plaintiff” (paragraph 5).**
- 3. It is denied that the words complained of can be understood, “either in their natural and ordinary sense or by way of innuendo” to have any of the “constructions” attributed to them by the Plaintiff. More specifically, it is denied that the words are “capable of carrying any defamatory meaning of the Plaintiff” (paragraph 6).**

The Plaintiff’s application would succeed only if none of these defences raises any *bona fide* triable issue, and if it is plain and obvious that the defence as a whole raises no reasonable defence. Let us look at the defences in turn.

The 2nd Defendant is a limited liability company. It is sued as the **proprietor** and **publisher** of the newspaper that carried the publication complained of. The 1st Defendant, on the other hand, is sued as the **“editorial director”** of the newspaper. The 1st Defendant has pleaded that he is an agent of the 2nd Defendant and therefore cannot be liable for acts done by him as such agent for a disclosed principal. As far as he is concerned the suit as against him is thus incompetent.

As far as I know, the point raised by the 1st Defendant has not been litigated before in defamation cases; at least not in the defamation cases I have tried or otherwise come across. In my considered view, it is not an idle or frivolous issue. It is an issue that is eminently triable. It is not alleged that it was the 1st Defendant who personally wrote the offending words. This is an issue that cannot be simply brushed aside, as the Plaintiff has attempted to do in his submissions.

At paragraph 5 of the defence the Defendants have denied that the publications were **“either made falsely or maliciously of the Plaintiff”**. There is obviously a defence of justification pleaded here. It is not put as clearly as it could have been; but nevertheless the Defendants are saying, in effect, that the words published of the Plaintiff are not false. And if the words are not false, they must be true! An amendment can easily bring out clearly the defence of justification that has been pleaded here. And in an action for defamation, a defence of justification is possibly one of the most serious defences that can be pleaded.

It has been stated many times that a defendant need demonstrate only a single triable issue to be entitled as a matter of law to defend the action. There are at least two here. I am thus not satisfied that this is a plain and obvious case where the Defendants should be denied the right to defend the suit on liability. The action ought to go to full trial.

In the event I must refuse the application by chamber summons dated 11th November, 2008. It is hereby dismissed

with costs. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF JULY, 2009

H. P. G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF JULY, 2009