



GRAIN BULK HANDLERS. APPLICANT/PLAINTIFF

VERSUS

JOHNSTONE MUTHAMA. RESPONDENT/DEFENDANT

R U L I N G

The application before the court is dated 17th April, 2009. It is brought by the plaintiff against the defendant and seeks that: -

- a) The defendant's Statement of Defence herein be struck out for disclosing no reasonable defence.
- b) Interlocutory judgment be there on or thereafter be entered for the plaintiff.

The grounds upon which the application is based are: -

- (i) That the defendant does not have a defence that is tenable in law as the defence filed does not raise any triable issues.
- (ii) That publication complained of in the plaint was not made in good faith without malice, nor does it amount to fair comment on matters of public interest and finally that the facts upon which the defence is made are not contained in the defence.
- (iii) That there was no reciprocity between the defendant and the public entitling the defendant to disseminate defamatory material of and concerning the plaintiff where the occasion lacked qualified privilege.
- (iv) That the defence fails to set out the facts forming truth in the published publication.
- (v) That defence reveals no absolute privilege pleaded as available defence.
- (vi) That the defence raises no constitutional defence.

The Reply to defence filed by the plaintiff infact incorporates the above grounds upon which the application to strike out is based.

By a Notice of Preliminary Objection dated 1st July, 2009 and filed on 2nd July, 2009, the defendant on the other hand, took objection to this application by stating that this application to strike out the defence is bad in law.

To argue the application the applicant/plaintiff filed a written submission dated 14th July, 2009 while the Defendant did the same by a written submission dated 24th July, 2009. There was an agreement between the parties and the court so permitted, that the Chamber Summons aforementioned and the Preliminary Objection also aforementioned were to be argued and determined together.

The application is shown to have been brought under Order 6 Rule 13 (1) (a) of the Civil Procedure Rules and also under section 3A of the Civil Procedure Act. Order 6 Rule 13(1) (a) states as follows: -

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

- a) **it discloses no reasonable cause of action or defence: or**
- b)
- c)
- d)
- e)

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may.”

In view of the fact that the applicant’s approach to strike out the defence is brought under Order 6 Rule 13(1)(a) only and not under the other sub-sub-rules of Rule 13(1), it will be important to also quote sub-rule (2) of Rule 13. It states thus: -

“13(2) No evidence shall be admissible or an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made.”

The court’s discretion provided in the provision above, to strike out a pleading whether it be a plaint or a defence, is clearly wide but also without doubt, discretionary. Indeed, instead of striking a pleading out, the court is given power as well to order that pleadings be amended. It is now settled that the discretion is exercised upon judicially settled principles.

As earlier pointed out this is an application limited to the provisions of Order 6 Rule 13(1) (a) as read with sub-rule (2) thereof. The latter declares that no evidence shall be admissible on the application although the grounds upon which the application is based may be concisely stated. For the court to therefore invoke this jurisdiction the matter or case must be plain and obvious so that it will indeed be a waste of time for the court to allow for proceedings to continue only to be ended after a lengthy hearing has been allowed to take place. What the principle therefore stresses is the fact that the court ought to be slow in exercising this jurisdiction to strike out a pleading, whether it be a plaint or a defence.

As stated by the Court of Appeal in the case of **Industrial and Commercial Development Corporation V Daber Enterprises Ltd (2000)** IEA, 75 at 79

“.....a party to a civil litigation is not to be deprived of his right to have his case determined by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination for the scope of the proceedings in the application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.”

It is therefore where the defence raises a point of law and the court can at once see that the point is misconceived or, if arguable, is plainly unsustainable, that it can strike out the defence and give a judgment. That is to say that summary procedure should not be used for obtaining an immediate trial of the suit. This also means that whether or not a summary procedure should be adopted is a question that is short and depended on few documents.

It was also pointed out by the same Court of Appeal in **DT Dobie & Company (Kenya) Ltd Vs Muchina** (1982) KLR, 1-

“At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

It is the conclusion of this court therefore that a defence which on a glance, stands same chance of success, however little such a chance may seem, will not be struck out as the respondent may well succeed in proving his specific denials. A defendant is entitled to a reasonably liberal view of his defence as a pleading so that the door of justice is not shut on his face.”

In the matter before me the suit is a defamation suit where the allegedly published words are questioned or challenged by the defence. The question as to whether the published words were accurately published is in issue. So is the question as to whether the allegedly published words amounted to defamation or whether the words were interpreted out of context or not. Also it is in issue whether the publication was malicious or honest and whether the statements were made on a matter of public interest, or were a fair comment or were privileged partially or absolutely all of which could raise a defence.

It is the considered view of the court therefore that free evidence which will be tested in cross-examination, will be required to determine the matters and issues raised in the defence herein. They are issues which are prima facie arguable in view of their complication. Even facts or evidence to determine the issues raised will likely be complicated as the law underlying such defamation matters will as well be complex.

On the other hand the plaintiff has gone to great lengths to argue this application. It states that the meaning it has given to the contested words cannot be contested. It avers so even when the defence clearly contests such meaning thus making the simple interpretation an issue. If the plaintiff alleges that the contested words allege that the plaintiff is corrupt and if the defendant denies such meaning or states that the plaintiff is indeed corrupt, then these are issues which can only be determined by evidence in a full trial. The plaintiff has picked on many issues raised in the defence and has tried to dispose of them in lengthy written arguments and onerously. The grounds upon which the application is based are themselves contentious as shown in the written submissions in which the parties, particularly the plaintiff, has gone to great lengths to argue. It is further observed that the plaintiff went to those lengths in an attempt to determine the issues through the written submission which expresses lengthy opinions likely to prejudice a fair trial. Indeed, the plaintiff delves into the merits of the case at this early stage. This court cannot countenance these arguments otherwise it will deprive the defendant of his right to have his case decided on proper evidence and in a full trial.

Finally, the court has in mind that in this early stage, the defendant has not exercised his right to discovery. He may yet wish to seek leave and indeed has sought one in this application to amend which discretion to grant this court has been given under the same rule that gives the plaintiff a right to apply to strike out. To deny the defendant the right to exercise such rights is to shut the door against him to the seat of justice.

For the above reasons the court finds no merit in this application. The application is accordingly dismissed with costs to the defendant. The defendant is at liberty to file formal application for leave to amend, if so inclined, within 21 days. Orders accordingly.

Dated and delivered at Nairobi this 19th October, 2009.

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D A ONYANCHA

JUDGE