REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 795 of 2005

GRACE WANGUI NGENYE.....PLAINTIFF

VERSUS

TOM MSHINDI.....1ST DEFENDANT

THE STANDARD GROUP LIMITED.....2ND DEFENDANT

R U L I N G

The Pleadings

1. This suit is premised on allegations of defamation committed by the Defendants against the Plaintiff. The Plaintiff was, at the time of the alleged defamatory publication, an Acting Resident Magistrate at the Machakos Law Courts. The Plaintiff alleges that on 16/06/2005, the two Defendants published defamatory words of and concerning the Plaintiff in the way of her profession to the effect that the lawyers practicing in Machakos and the surrounding regions found it objectionable that the Plaintiff had been redeployed at the Machakos Law Courts after she had been suspended for alleged involvement in a strike and that the Plaintiff, alongside another Magistrate, was causing delayed justice. The Plaintiff's case was that the publication was malicious and had injured her character, wherefore the Plaintiff prayed for judgment against the Defendants jointly and severally for:-

(a) An injunction restraining the Defendants, their servants, agents and/or employees from writing, printing, publishing and/or causing to be published written, printed, published falsehoods against the Plaintiff.

(b) General damages

(c) Aggravated and/or exemplary damages

(d) Costs of this suit

(e) Interest on (b), (c) and (d).

2. In their defence dated 15/08/2005 and filed in court on the same day, the Defendants denied that the words complained of by the Plaintiff were defamatory. The Defendants averred in paragraphs 5 and 6 of the defence that the words complained of were true in substance and in fact and that they constituted a fair and accurate comment on matters of public interest touching on the events and situation at the Machakos Law Courts at the material time. The Defendants also pleaded the defence of qualified privilege and

urged the court to dismiss the Plaintiff's suit with costs to the Defendants.

The Application and the Response

3. The Plaintiff's application is the chamber summons dated 16/02/2006 brought under Order VI Rule 13(1)(b), (c) and (d) of the Civil Procedure Rules for orders that:-

(1) The Respondent's defence be struck out

(2) Judgment be entered in favour of the Plaintiff/Applicant as against the Defendants/Respondents and this suit do proceed to formal proof.

(3) The Defendants/Respondents do pay the costs of this suit

(4) The Honourable Court be pleased to order any other relief that it may deem mete and just to grant.

4. The application is supported by the affidavit of Grace Wangui Ngenye sworn on 16/02/2006 and the grounds that appear on the face of the application. The Applicant says inter alia that the Respondent's defence is scandalous, frivolous and vexatious and is also a mere evasive denial intended only to prejudice, and embarrass the Plaintiff. The Plaintiff also says that the Defendants have admitted publishing the words complained of to which they have no defence. The Plaintiff wants the defence by the Defendants struck out as they never sought to verify the facts from the Plaintiff or to tender an apology or retract their story after the situation obtaining at the Machakos Law Courts was clarified through a Press Release.

5. The application is opposed. The replying affidavit is sworn by Nelly Matheka, the Company Secretary/Legal Counsel of the 2nd Defendant. The deponent says that the Defendant's defence raises triable issues such as qualified privilege under Section 7(1) of the Defamation Act, Cap 36 Laws of Kenya and that the issue of malice, exaggeration and inaccuracy alleged by the Plaintiff can only be dealt with at the full trial when evidence is taken from both sides. The deponent also says that striking out of a litigant's pleading must always be the last resort when the particular pleading is incapable of being pumped with life through an amendment. The Defendants pray that the Plaintiff's application be dismissed so that the suit can proceed to be heard and determined on merit.

The Submissions

6. The parties filed written submissions to buttress their respective positions in the matter. The Plaintiff's written submissions were filed on 9/03/2009. The submissions were accompanied by a Supplementary List of Authorities dated 9/03/2009 and filed in court on the same day. The Plaintiff's earlier list of authorities is dated 31/05/2006 and was filed in court on the same day.

7. The Defendants filed their submissions dated 19/03/2009 on 20/03/2009. The Defendant's submissions were also accompanied by their Supplementary List of Authorities of the same date. All the authorities cited by the parties are illuminating on many aspects of the law of defamation. I however do not find it necessary to consider all of them in detail, but the court commends learned counsel for thoroughness in their search for these authorities.

8. As the facts of the case are not denied by the Defendants, it is only the law that is critical in this case.

The Law and Findings

9. The relevant law in this case is the one on striking out of pleadings. The Plaintiff/Applicant has brought this application under Order VI Rule 13(1)(b),(c) and (d) of the Civil Procedure Rules which provide:-

"*13(1) 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) It is scandalous, frivolous or vexatious or

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

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

10. The Defendants submit that though the court has wide powers to strike out pleadings, that power ought not to be exercised in favour of the Plaintiff herein because the Defendants have a good defence to the Plaintiffs claim. The Defendants relied on Justice P.J. Ransley's ruling in **George Joshua Okungu – vs- Tom Mshindi & Another – Civil Case No. 348 of 2005** (unreported) where the learned judge said that pleadings should be struck out in cases where allowing such pleadings to go on would amount to a waste of time and be an abuse of the process of the court. The Defendants contend that the Plaintiffs will be required to adduce evidence to show that the Defendant published without verifying the truth of the words complained of; that it is only the court at a full hearing which can determine whether the words complained of are defamatory and that in the circumstances, adopting a summary procedure at this stage would prejudice the Defendants. In the case of **Industrial and Commercial Development Corporation –vs- Daber Enterprises Limited – Civil Appeal Case No. 41 of 2000,** the Court of Appeal reaffirmed the principles to be applied by the courts in deciding applications seeking to strike out pleadings. The court said, inter alia, that:-

"*—unless the matter is plain and obvious, 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 an application for summary judgment is to enable a Plaintiff to obtain quick judgment where there is plainly no defence."*

11. In addition to the above principles the courts have held that since the power to strike out pleadings is so drastic, it should be exercised with great circumspection and only in the clearest of cases.

12. I have read both the plaint and the defence. I have also read the submissions filed by parties herein together with the authorities cited. In light of the above, the Plaintiff has not demonstrated to this court that it is plain and obvious that the Defendants' defence lacks substance. To the contrary, the Defendants' defence raises triable issues that can only be determined at a full hearing where both the Plaintiff and the Defendant's will adduce evidence to assist the court in determining the issues in controversy. The Plaintiff has pleaded malice, but malice is such a weighty issue that evidence must be called to prove it. Affidavit evidence at this interlocutory stage is not sufficient for the purpose of proving malice. Witnesses must give evidence, and be cross examined on oath before the court can reach the conclusion that the Defendant's action of publishing the words complained of was actuated by malice. In the case of **Gupta –vs- Continental Builders Limited [1978] KLR 83,** a case cited by the Plaintiff, Madan JA had this to say at pages 87 and 88:-

"*In any given case it is the duty of the court to examine with minute care the documents and facts laid before it. In this case there is a complaint made that this was done instead of paying compliment to the court's assiduity for going so. If it had not been done, there would be some cause for making a complaint that the court failed in its task to do so, thereby possibly causing a failure of justice. A minute and careful examination of documents and facts laid before that court is carried out by the courts as a part of the daily task in the performance of its judicial duty and understandably (even inevitably) it may lead to both the acceptance or rejection of some documents and some facts which some people, in the case of an application for summary judgment may construe, albeit incorrectly as an actual trial. There is no more in it except to be delivered. The merits of the issues are investigated to decide whether leave to defend should be granted. But the case is not tried upon affidavits, it is that this is the procedure in the main provided for this purposes. Sometimes the prima facie issues which are proffered are rejected as*

unfit to go to trial being by their nature as disclosed to the court, incapable of effectively resisting the claim. The court does not thereby shut out any genuine defences of a defendant, as it is the only proper order to make if no reasonable grounds of defence are disclosed, even as only prima facie triable issues, at this state. What happens is that the court merely does not accept the prima facie issues offered as genuine. This is exactly the task which the court is required to perform on an application for summary judgment."

From the above words of the learned JA (God rest his soul in peace), this court must create no room for the Defendants to make a complaint that the court has failed to examine with minute detail the documents and facts laid before it.

Conclusion

13. In the result, I have no option but to dismiss the Plaintiff's application with costs to the Defendants. As I conclude this ruling, I must say that if the Plaintiff/Applicant had not brought this application, this case would probably have already been heard and determined. The application has delayed the fair trial of this suit.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of October, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Mwaura (present) for the Plaintiff/Applicant

Mr. Mungeri holding brief for Gitonga (present) for the Defendants

Weche - court clerk