



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 553 OF 2005

MWANIKI NYAMU.....PLAINTIFF

VERSUS

TIMES NEWS SERVICES LTD.....1ST DEFENDANT

WILSON KIBET.....2ND DEFENDANT

CHRIS ODWESSO.....3RD DEFENDANT

TOM MSHINDI.....4TH DEFENDANT

THE STANDARD LTD.....5TH DEFENDANT

RULING OF THE COURT

1. By their application dated 17/01/2006 brought by way of Notice of Motion under Orders 1 and 6 Rule 13(1) (a), (b) and (d) of the Civil Procedure Rules and all other enabling provisions of the law, the 4th and 5th Defendants pray for **ORDERS** –

(a) THAT paragraphs 3, 8, 9, 10 and 11 of the plaint disclose no reasonable cause of action against the 4th and 5th Defendants herein and should be struck out;

(b) THAT paragraphs 4,5,6 and 7 of the plaint are scandalous frivolous and/or vexatious and should be struck out as against the 4th and 5th Defendants.

(c) THAT as a result of the above the suit be struck out as against the 4th and 5th Defendants.

(d) THAT costs of the suit and this application be borne by the Plaintiffs.

2. The Applicants have given five grounds in support of their application and contend that the suit is an abuse of the process of court and that the 4th and 5th Defendants are wrongly joined in this suit. It is further contended that the 4th and 5th Defendants are separate and autonomous entities with no connection of any nature that may give rise to obligation, responsibility duty or liability (vicarious or otherwise) at all for any action of the 1st, 2nd and 3rd Defendants for their autonomous and independent actions either severally and/or jointly.

3. The application is supported by the sworn affidavit of **Mrs. NELLY MATHEKA** who works as Company Secretary of the 5th Defendant. She swears the affidavit dated 17/01/2006 in that capacity and says that on the advice of the 5th Defendant's advocates on record, paragraphs 4, 5, 6 and 7 of the plaint are scandalous, frivolous and vexatious as the same do not refer to the 4th and 5th Defendants herein; nor are they directed to or at the said 4th and 5th Defendants. She also says that being separate and autonomous, the 4th and 5th Defendants cannot, either severally and/or jointly take responsibility duty, obligation or liability of whatever or at all for any of the actions of the 1st, 2nd and 3rd Defendants. While admitting that the article complained of was published by the 5th Defendant on 10th May, 2004 the deponent says that the words did not refer to the claimant nor did they contain any innuendos about the Plaintiff and she finally says that the 4th and 5th Defendants are wrongly joined in the suit.

4. The respondents' advocates, **M/s Manyarikiy & Co.** and **M. Ndwiga & Co.** Advocates were duly served with the application but neither firm filed any replying papers.

5. Briefly, the Plaintiff herein commenced suit by way of plaint dated 10/05/2005 and filed in court on the same day. The first three Defendants are all connected with the Times News Services Ltd; the 4th Defendant was described as the Editor in Chief of the then "**East African Standard**" now known as "**The Standard**" while the 5th Defendant was described as "**the Publisher and proprietor** of the then "**East African Standard**", a newspaper with wide circulation in Kenya and East Africa and the Internet now known as "**The Standard**".

6. The Plaintiff's claim is contained in paragraphs 4, 5, 6 and 7 of the plaint. Paragraph 4 refers to the issue of the Kenya Times Newspaper dated 10th May 2004 under the banner headline "**SCRIBE SEEKS GOVERNMENT HELP OVER DELAYED COMPENSATION**". Paragraph 5 of the plaint gives the meaning of the words complained of in paragraph 4 of the plaint while paragraph 6 says that the Plaintiff has, as a result of the said publication by the **Kenya Times Newspaper** been seriously injured in his reputation and credit in the way of his public and intellectual stand and that he has been brought into public odium and ridicule. Paragraph 7 of the plaint sets out the facts on which the Plaintiff seeks to rely to support his claim.

7. Between paragraphs 8 and 11 the Plaintiff complains against a published article by the 5th Defendant in which the Plaintiff was not directly named, but as a result of which the Plaintiff says that it was obvious to those who have associated the Plaintiff with the said Wallace Gichere **and knew of special factors associating the Plaintiff with the said Wallace Gichere, that the Plaintiff was now part of a fraud scheme to kill the said Wallace Gichere to wrestle his award from him and knew that this article partly referred to the Plaintiff.**

8. The 4th and 5th Defendants filed their joint Statement of Defence on 26/08/2008 and made no admission as regards paragraphs 2,4,5,6 and 7 of the plaint. The 4th and 5th Defendants also denied that the words of the article referred to at paragraph 8 of the plaint referred to the Plaintiff; they also denied the contents of paragraph 9 of the plaint and further denied that the said words were capable of having the meaning attributed to them by the Plaintiff at paragraph 10 of the plaint. At paragraph 11 of their defence the 4th and 5th Defendants put the Plaintiff on notice that they would raise a preliminary objection and make necessary application in that regard, hence this application.

9. At the hearing hereof, Counsel for the Plaintiff/Respondent Mr. Gitonga who earlier on (at 9.27 a.m.) had said through Miss Maina who held his brief that he would be ready to proceed with the application did not appear and did not do so throughout the hearing. Miss Omolo for the 4th and 5th Defendants Applicant argued the application *exparte* and wholly relied on the grounds on the face of the application and on the supporting affidavit sworn by Mrs Nelly Matheka. She also relied on the following authorities

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(i) *Mosi –vs- National Bank of Kenya Limited [2001] KLR 333.*

(ii) *J.P. Machira t/a Machira & Co. Advocates -vs- East African Standard [2001] KLR 638.*

(iii) *J.P. Machira t/a Machira & Co. Advocates -vs- Nation Newspapers & Another – Civil Appeal No. 179 of 1997 (Unreported).*

(iv) *Caneland Limited -vs- Dolphin Holdings Ltd. & Another – Nrb HCCC No.1135 of 1998 (Unreported)*

(v) *The Civil Procedure Act, Chapter 21 Laws of Kenya.*

10. In the **Mosi case**, the important points to note are holdings (1) (2) and (3) thereof ?

1. Order 6 rule 13 of the Civil Procedure Rules specifies four distinct grounds on which an application to strike out a pleading may be grounded, namely, it discloses no reasonable cause of action or defence, that it is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the full trial of the action, or that it is otherwise an abuse of the process of the court.

2. It is established practice that an application could be grounded on any or all of the grounds prescribed in rule 13(1) of order 6. All that is required is that the grounds relied on be specified in the application and that if they be other than the first one, then affidavit evidence is expected.

3. when a court is considering to strike out a pleading on the ground of non-disclosures of a cause of action or defence, the court is enjoined to look at the pleadings only as no evidence is admissible to support an application under Order VI rule 13 (1) (a).

11. The Applicants' application is premised on the ground that the plaint discloses no reasonable cause of action against the 4th and 5th Defendants and secondly that paragraphs 4, 5, 6 and 7 of the plaint are scandalous. The question to ask now is whether the suit should be struck out, as against the 4th and 5th Defendants? The Plaintiff/Respondent has put up no fight against the claim by the 4th and 5th Defendants. As indicated above, if I am to find that the suit discloses no cause of action against the 4th and 5th Defendants, I must look at the pleadings only as no evidence is allowed under this ground. I have looked at paragraphs 4, 5, 6 and 7 of the plaint and clearly these paragraphs have nothing to do with the 4th and 5th Defendants. I therefore find and hold that the said paragraphs disclose no reasonable cause of action against the 4th and 5th Defendants are scandalous, frivolous and vexatious and the same are accordingly struck out as against the said 4th and 5th Defendants.

12. What about paragraphs 3, 8, 9, 10 and 11 of the plaint? The contents of paragraph 3 of the plaint are admitted in so far as the same is merely descriptive of the 4th and 5th Defendants but no admission is made as regards circulation of the publication. The 4th and 5th Defendants are alleged to have published the following article on the back page of the issue of the 5th Defendant as stated in part of paragraph 8 of the plaint –

“8. On the back page of the issue of Fifth Defendant, the Fourth and Fifth Defendant published or caused to be published of the Plaintiff innuendoes:

“MY life is in danger, says Gichere”

PHOTO-JOURNALIST Wallace Gichere yesterday claimed his life is in danger, owing to the Shs.9.4m recently paid to him by the Government as compensation.

He further disclosed that the law firm, that represented him in a suit between him and the Government, has adamantly refused to release the money.

Gichere said the firm (name withheld) was demanding that the crippled journalist pay costs amounting

to over Shs.3m.

He claims he has been receiving anonymous telephones calls, warning him of dire consequence unless he surrenders part of the money. “The callers are threatening to have my head chopped off in case I opt to engage them in a circus,” he said.

Speaking at a news conference at a Nairobi hotel, Gichere said he has reported the matter to police and hopes they would offer him protection. “I have already filed a report at Nairobi’s Buru Buru Police Station hoping that the Government will step in, by making sure that necessary security measures are put in place”.

13. The Plaintiff claims at paragraph 9 of the plaint that though the 4th and 5th Defendants were not named in the said article by the 4th and 5th Defendants it was

“--- very clear to those who have associated with the said Wallace Gichere and knew of special factors associating the Plaintiff with the said Wallace Gichere that the Plaintiff was now part of a grand scheme to kill the said Wallace Gichere or to wrestle his award from him and knew that this article referred to the Plaintiff.”

14. I have carefully considered the innuendo attached to the contents of paragraph 8 of the plaint in light of the averments at paragraph 9 of the plaint and it seems to me that the said paragraphs cannot simply be washed away by the 4th and 5th Defendants. In this regard, I am fortified not only by the decision in the **Mosi case** (above) but by what was stated by Madan JA (as he then was in the case of **D.T. Dobie & Company (Kenya) Ltd. -vs- Joseph Mbaria Muchina & Another** Civil Appeal No. 37 of 1978. In a nutshell, the principles are to the effect that the power to strike out in applications brought under Order 6 Rule 13 should be exercised with caution and only in those cases ***“which are clear and beyond all doubt --- the court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments.”***

15. In Halsbury’s Laws of England 4th Edn Vol 36 at paragraph 74, the principle is stated in the following words –

“The power to make an Order striking out a pleading is discretionary, and should be exercised only in plain and obvious cases, but it is the court’s duty to make an order in a suitable case, since a party is entitled to have the case against him presented in an intelligible manner.”

16. On the basis of the above principles, I am satisfied that paragraphs 4, 5, 6 and 7 of the plaint disclose no reasonable cause of action against the 4th and 5th Defendants and are hereby struck out. As for paragraphs 3, 8, 9, 10 and 11 of the plaint, they will be struck out only as against the 4th Defendant who was acting in his capacity as an employee of the 5th Defendant. I decline to strike out those paragraphs as against the 5th Defendant. The 4th Defendant shall have the costs of the application and of the suit while the 5th Defendant shall have half the costs of the application.

17. Orders accordingly.

Dated and delivered at Nairobi this 26th day of September 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

No appearance for the Plaintiff/Respondents

Miss Omollo for 4th and 5th Defendants/Applicants

Mr. Kisebu holding brief for Manyarky for the 1st, 2nd and 3rd Defendants