



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

Civil Case 922 of 2005

SANKALE OLE KANTAI T/A

KANTAI AND COMPANY ADVOCATES.....PLAINTIFF

VERSUS

THE NATION MEDIA GROUP LTDDEFENDANT

RULING

The Plaintiff has filed suit against the Defendant herein. The averments relevant to this ruling are those in paragraphs 3,5,6,7 and 12. It is alleged that on or about the 25th January 2005 the Defendant in its issue of the Daily Nation falsely and maliciously wrote and published and further caused to be written and published to the general public at large of and concerning the Plaintiff an article entitled “***Court warns lawyer in Ngugi***” case which was concerning the Plaintiff. The words complained of are set out in that paragraph. It is his contention that the words complained of are false, scandalous and defamatory. Further that the said words in their natural and ordinary meaning mean what he has attributed to him to mean in paragraph 6 of the plaint. The Plaintiff contends that the publication was actuated by malice, ill-will and were outside the known parameters of objective journalism and calculated purely to injure the Plaintiff as per the particulars set out in paragraph 7 of the Plaint. The said action on the part of the Defendant has seriously injured the Plaintiffs image, credit and reputation in consequence of which he seeks the reliefs set out in paragraph 12 of the Plaint namely:-

- An order that the Defendant make a full and unqualified apology, makes amends and withdraws the said remarks and statements and such an apology amends or withdrawal is to be given the widest possible circulation to the complained of publication
- General and aggravated damages
- Costs of the suit
- Interest on (b) and (c) above at court rates from the date hereof
- Any further or alternative relief as this Honourable Court may deem fit and just.

In response to the plaint the Defendant filed a defence dated 30.8.2005, filed the same date. The averments relevant to the ruling are those in paragraph 3,5 and 6 of the defence. They admit the article was published as headed and on the date it is alleged to have been published but deny that the said words in their natural, ordinary and innuendo meaning, mean what has been attributed by the plaintiff to be their

meaning. They maintain the report was a fair and accurate report of judicial proceedings and in that regard they will avail themselves of the provisions of section 6 of the defamation Act.

In his reply to defence the Plaintiff reiterated the averments in the plaint and added that the words complained of were an un fair and inaccurate reporting of a judicial proceeding and the Plaintiff is entitled to the judgment as prayed against the Defendants.

The Plaintiff has come to this Court by way of Chamber Summons dated 20th day of June 2006 under Order VI Rule 13(1) (b) (c) and (d) of the Civil Procedure rules and all enabling provisions of law seeking orders that the defendants defence be struck out, judgment be entered for the plaintiff as prayed in the Plaint and the matter do proceed for formal proof, the costs of the application be provided for and the court do proceed to award such other or further relief as this Honourable court may deem fit and just to grant in the instances of this matter.

The grounds in support are set out in the body of the application, supporting affidavit, oral submissions in court and the major ones are that:-

- Publication of the offending article which has been annexed to the supporting affidavit as annexure SOK1 has not been denied by the Defendants
- That the Plaintiff took up the issue of the said alleged warning with the learned trial magistrate who was seized of the criminal proceedings, and the said learned magistrate in a ruling on the matter annexure SOK 2 denied issuing the warning and in fact warned the Defendants against mis reporting.
- That following the said learned magistrates ruling, the Plaintiff wrote a demand letter to the Defendants SOK 3 dated March 2, 2005, seeking publication of an apology in respect of the same. The said demand letter has been acknowledged by the Defendants in their defence. But they declined to issue an apology either by way of publication or pleading.
- That the learned magistrate having denied issuing the warning to the Plaintiff in the conduct of a court case, the Defendants have no justification in defending the suit on that basis too they have no good defence and their defence should be struck out.
- They are alive to the fact that striking out a pleading is within the discretion of the court. However, their stand is that this is a proper matter for this court to exercise its discretion in their favour.

The Defendants' response to that is that they oppose the application on the basis of the grounds in the replying affidavit and oral submissions in court. The major ones are that:-

- Publication of the alleged offending article is not denied
- They agree the Plaintiff has raised a claim against them as a result of the said publication and they have put in a defence to the Plaintiffs claim.
- That they should be allowed to defend the claim so that they can avail themselves of the defences in section 6 of the defamation Act Cap.36 of the Laws of Kenya

They maintain that their defence raises triable issues namely whether the publication is defamatory, whether it is absolutely privileged and whether it is malicious as alleged.

- That the correctness of the trial magistrates' ruling annexure SOK 2 cannot be judged now as the proceedings of what transpired on that date in court has not been exhibited.

It is a matter of evidence which will be gone into at the time of trial for the trial Court to really establish what transpired on that date.

- That the defendants plea of a fair and accurate reporting of the proceedings can only be ousted by the production of the court proceedings, for that date.
- They have raised a valid defence in law and they should be heard on the same. If their defence is struck out now they will be robbed of a right to an absolute defence under the law.

The principles of law that this court is supposed to apply in deciding whether to strike out the defence or not are now well settled. The cardinal principle is that the power to strike out pleadings is drastic and draconian. It is a discretionary power that should be exercised only in the clearest of cases. (See the ruling in **NAIROBI HCCC 833 OF 2000. JOSEPH RADING WASAMBO VERSUS THE STANDARD LIMITED AT PG.6**).

The power to strike out is therefore available to this court. It is a discretionary power. It can only be exercised in the clearest of the case where the court is satisfied that there is nothing to defend or prosecute. In order for the court to arrive at a conclusion that there is nothing to prosecute or defend, the pleadings must be bearing certain characteristics which are obvious on the face of the pleading and need no straining to establish them.

Further guiding principles are set out in the case of **DT. DOBIE COMPANY (KENYA) LTD VERSUS MUCHINA [1982] KLR 2**. At holding (a) at pg.2 Mandan JA as he then was observed that “*a suit should only be struck out if it is so weak, that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment it should not be struck out. The redemptability and credibility of a suit are determined by looking at the cause of action or the major complaint of the plaintiff and determining whether that complaint on the facts before the court is maintainable or not*”

Applying the foregoing principles to the facts of this case it is clear that the main reason that the Plaintiff seeks to use in moving to deny the defendant the right to be heard on their defence is because;-

- Publication is not denied
- The court which allegedly issued the warning denied doing so.
- Demand for apology was not responded to.

While the defence on the other hand wish to defend because:-

- They do not deny publication but state that it is a case of accurate reporting which cannot be faulted by the magistrates ruling. That the proceedings which can only be produced at the trial will prove that actually the report was accurate.
- Further that the trial court will be moved at an appropriate time to determine whether the publication is defamatory which they contend it is not, whether.
- It is absolutely privileged and
- Lastly whether it is malicious.
- That the foregoing defences will be considered in line with their absolute defence in section 6 of the Defamation Act Cap.36 Laws of Kenya.

Section 6 of the Cap 36 Laws of Kenya states:-

“A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter”

Since the matter hinges on a publication alleged to be of court proceedings whose record has not been exhibited, there is no way this court can tell at this juncture that the defence in section 6 of Cap.36 is not available to the defendant. When exhibited the said court proceedings will also assist in answering what the defendants have raised in paragraph 5 of the replying affidavit namely whether the publication is defamatory, whether it is absolutely privileged or whether it is malicious.

The defence in Section 6 of Cap.36 Laws of Kenya pleaded in paragraph 6 of the defence can only be shaken by production of the proceedings of that date and not the ruling alone. This defence coils around the entire defence and there is no way any bit of it can be severed by the court and struck out at this interlocutory stage.

It therefore follows that failure by the applicant/plaintiff to exhibit the court proceedings of that day in addition to the Ruling is fatal to the applicants application and there is nothing that this court can use to oust the defendants defence in paragraph 6 of the defence.

Failure to render an apology cannot be used to fault a defence as its use is merely to act as a mitigating factor during the assessment of damages.

For the reasons given the Plaintiff's application for striking out has been faulted. The application dated 20th June 2006 and filed on 12th July, 2006 is refused with costs to the Defendants.

DATED READ AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2007.

R. NAMBUYE

JUDGE