REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1334 of 2005

AMOS MUHINGA KIMUNYA ::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

PROF. PETER ANYANG NYONGO :::::::::::::::::::::: DEFENDANT

RULING

The background information to this ruling is that the Plaintiff has filed suit dated 3.11.2005 and filed 7.11.2005 against the defendant. It is a defamation suit. It arises out of a newspaper publication set out in paragraph 5 and 6 of the Plaint. The Plaintiff became aggrieved of the publication because of the meaning ascribed to the publication set out or particularized in paragraph 7 and 8 of the Plaint. It is his stand that the ascribed meaning of the publication in paragraph 7 and 8 of the plaint go to injure good attributes of his character as particularized in paragraph 9 of the Plaint and therefore suffered the injury specified in paragraph 10 of the plaint and seeks the reliefs specified in paragraph 15 of the plaint.

The defendant was served and he entered appearance and filed a defence. In paragraph 3 and 4 of the defence the defendant denied causing the printing and publication as well as writing or publication of the words complained of in paragraph 5 of the plaint. Paragraph 5 of the defence states "*without prejudice and in the alternative, the said words complained of as set out in paragraph 5 and 6 of the plaint were fair comment made in good faith and without malice upon a matter of public interest namely upon the conduct of the plaintiff in his capacity as a member of the cabinet in the Kenya Government, Minister for Lands and Housing and a member of parliament of Kipipiri in the Republic of Kenya in the un raveling of the so called Anglo Leasing scandal. In so far as may be necessary, the defendant will rely upon the provisions of the Defamation Act and the Defence of Fair comment upon a matter of public interest*".

The defendant went further to deny the meaning attributed to the said words in paragraph 7 and 8 of the plaint. In paragraph 7 it is stated "*Further, the defendant aver that the natural and/or ordinary meaning of the words complained of as particularized in the said paragraph 7 and 8 of the plaint contain certain importations not mentioned in the said words complained of and the defendant accordingly states that the claim is ill founded in the circumstances*"

The defence went further to deny the alleged injury suffered and if any was suffered then the defendant distanced himself from the liability for the same. The plaintiff was put to strict proof on the rest of the averments in the plaint. Lastly defendant gave notice of intention to raise a preliminary objection against the entire suit either before or during the hearing.

Following receipt of service upon them of the defence the plaintiff prepared a request for particulars dated 7th March 2006 and served the same against the defendant. The request for particulars affected paragraph 5 and seven of the defence set out herein above. The Plaintiff sought to know which words in paragraph 5 of the plaint were statements of facts and give particulars of facts and matters relied on in support of allegations that the words are true. Of paragraph 7 of the defence the plaintiff sought to know which words in paragraphs 7 and 8 of the plaint are statements of facts and which words contain importation not mentioned in the article published. The request is annexed to the affidavit in support of the applications as MGI. The defence response to the said request is found in paragraph 2 of MG 2 dated March 27th 2006 and it states "*In the above circumstances and with respect to your request concerning paragraph 5 of the defence, where as we may have elected to furnish an answer to your request vide this letter, we respectfully find no basis for the same. Kindly note that paragraph 5 of the defence essentially raises the defence of Fair comment upon a matter of public interest, whose averments are expressly contained therein, whereas order VI rule 6A (2) makes reference to a plea of fair comment on a matter of public interest, its material provision on particulars as expressly indicated therein is applicable where it is alleged by the defendant that the words complained of are statements of facts that are true in substance and fact. We do not find this to be the position herein.*

With respect to the request concerning paragraph 7 of the defence, we advise that paragraph 7 (a) (ix) 8 (vi) of the plaint contain such importations"

The request MGI had been laid in pursuance to order VI rule 6A (2) of the Civil Procedure Rules. Upon receipt of MG 2 and perusing the same the Plaintiff felt that MGI had not been responded to adequately and so he moved to court and filed the application subject of this ruling. The application is by way of chamber summons under order VI rule 6A and 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act as well as any other enabling provisions of the law. It contains three prayers namely that the defendant do furnish to the Plaintiff the particulars stated in the request for particulars dated 7th March 2006 and served on the defendant's advocates on 8th March 2006. In the alternative paragraphs 5 and 7 of the defence be struck out and that costs be provided for. The grounds in support are set out in the body of the application, supporting affidavit, oral submissions in court both in the main submission and in response to the defence submission and the major ones are:-

1). The request for particulars as regards the averments in paragraphs 5 and 7 of the defence as contained in MGI was proper and it should have been responded to.

2). That the defence raises a statutory defence in terms of section 15 of the Defamation Act cap.36 Laws of Kenya and so they are entitled to seek particulars.

3). That they are entitled to move to court to seek the courts assistance to get the particulars to enable them firstly meet the defence and secondly prepare their case.

4). They have come under the correct provisions of law.

5). They are not fishing out evidence but just particulars.

6). The court should compel the defendant to either comply or have the offending paragraphs of the defence struck out.

The defendant/respondent has opposed the application on the grounds of opposition filed and oral submissions in court and the sum total of the same are:-

(1) They were not obligated to respond because the request was made under a wrong provision of law.

(2) The plaintiff is on a fishing expedition for evidence and they, as defendants are not bound to release that evidence to the plaintiff.

(3) The request for particulars is not relevant to the plaintiff's case contrary to what the plaintiff

alleges that it is relevant to their case.

(4) If the particulars being sought by the plaintiff falls under section 5 of Cap.36 Laws of Kenya, then the same is not applicable here as the particulars envisaged in section 15 of Cap.36 are those required at the trial.

(5) That they do not have a defence rolled up in fair comment and justification and so no particulars are required as theirs is a defence of fair comment.

(6) Still maintain that the application is not proper and it should be refused with costs to them.

In addition to the foregoing submission this court's attention was drawn on drawn to **BULLEN AND LEAKE AND JACOB'S** precedents of pleadings, **TWELFTH EDITION, LONDON SWEET AND MAXWELL PARAGRAPH 999 PAGE 1177** last paragraph. It is stated "*under the general plea of fair comment the defendant must give particulars of the basic facts on which he relies in support of the plea but not which of the words complained of are alleged to be statements of fact"*. The court was also referred to the case of **MAE PROPERTIES LTD VERSUS WILLIAM OLOTCH** Nairobi Milimani Commercial Court CC No.3311 of 2003. The ruling in this case dealt with request for the supply of particulars sought to be supplied under order VI rules 8(2) and 16 of the Civil Procedure Rules in default of which the defence was to be struck out. L.Njagi J. explored case law on the circumstances in which particulars are to be given and in which ones they are not to be supplied. At page 5 of the ruling the learned judge quoting **LORD ESHER MR IN CAVE VERSUS TORRE (1886) 54 LT, 515** had this to say "*There is no law which requires you to give particulars of the evidence which you are going to adduce to prove a particular fact"*. At page 6 the learned judge observed, "*one should not be required to give particulars which are going to be adduced by the other side to prove a particular fact. …… giving the plaintiff the particulars it seeks will also give it the evidence which it is lacking to demonstrate unjust enrichment.. The plaintiffs want the defendant to give them the details, or a portion of the details, of the evidence which they are going to bring forward in support of their case". Q*uoting with approval from the Digest of Annotated British Commonwealth and European cases, Volume 37 (1) 1982 re issue paragraph 1496, the learned judge observed thus "*if you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage. He then may be able although he has no evidence in support of his own case to shape his case and his evidence altogether in such a way as to defeat entirely the ends of justice"*

Quoting **JESSEL M R IN BENBOW VERSUS LOW (1880) 16 Ch. D 93,** the learned judge observed "*They may be surprised at the trial, that is, they may find evidence brought forward which they were not prepared to meet but which if they had time given them they would be able to meet. If such a case should arise, it is provided for in two ways in the rules, they may either apply to the judge at the trial to adjourn the trial in order to enable them to meet it ….. but that does not entitle them to get from the plaintiffs the particulars of their evidence before the trial comes on."*

In refusing to allow the request for particulars in the application under review the learned judge made the following observations at page 7-8 of the ruling "*in all the circumstances of this application I think that the same is meant to extract from the defendant information of which the plaintiffs ought to have been in possession before the filing of the suit. The Plaintiff would like to use the defendant to obtain from him the evidence which will fill a gap in its own case against the defendant*"

The application in **MAE PROPERTIES LIMITED VERSUS WILLIAM OLOTCH NAIROBI MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 331/03** supra was brought under order VI rule 8 (2) and 16 Civil Procedure Rules.

When the argument of both sides is taken in totality three or so issues emerge for determination by this court.

(1) whether the application should have been laid under order VI rule 8(2) as opposed to it having been laid under order VI rule 6A (2) Civil Procedure Rules.

(2) If the application and request have been laid under the wrong procedure whether this is a curable defect curable under any of the provisions of law cited or any other known provisions of law, thereby obligating this court to go ahead and grant prayer (3).

(3) If the procedure followed is proper and or if found improper the same is curable under whatever provision of law that this court finds applicable, then on the merits of the application is the application to be allowed and if so on what terms. In the alternative has MG2 answered MG1.

Issue number one (1) arises because in the course of the argument presented the defence counsel submitted that one of the reasons as to why they did not respond to MGI in the required form is that the procedure followed by the applicant was wrong and were therefore not obligated to respond to the same. On the same footing this court was urged not to allow the application because it has been un procedurally presented to court. MGI which is the request which went to the defendant is headed "***request for particulars pursuant to order VI rule 6A (2)*** *of the civil procedure rules (Revised)"*. Meaning that the said request was being made in pursuance to those provisions of law. They are the same provisions of law that the applicants' Counsel has cited in the application subject of this ruling save with the addition of rule 16 Civil Procedure Rules and Section 3A Civil Procedure Act order VI rule 6A (2) states "*where is an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statement of fact, they are true in substance and in fact and in so far as they consist of expression of opinion, they are fair comment on a matter of public interest or pleads to the like effect, particulars stating which of the words complained of he alleges are statements of facts of facts and matters he relies on in support of the allegation that, the words are true"*

Rule 16 "*Applications under this order shall be made by summons"* order VI rule 8 (2) on the other hand provides *"The Court may order a party to serve on any other party particulars of any claim, defence, or other matter stated in his pleading or of a statement of the nature of the case on which he relies and the order may be made on such terms as the court thinks just"*.

This Court has considered these two provisions in the light of the arguments herein and finds that order VI rule 6A (2) is directed at the defendant seeking to avail himself or herself of that defence. It is an invitation directed at such a defendant instructing him on how to frame or plead such a defence. This is in line with the kind of pleading approved by BULLEN AND LEAKE AND JACOB'S paragraph 999 page 1177 cited earlier on in this ruling. The command or instructions in order VI rule 6A (2) is not directed at the opposite party, by a party who wishes to seek particulars on any pleading. The opposite party can only avail himself of this provision in circumstances where the defendant has not complied with the framing of his pleading in accordance with that provision by asking the court to have that particular pleading struck out for none compliance. It therefore follows that the argument of the defence is right that a wrong format was used to request for particulars. The Plaintiff/applicant should have moved firstly under order VI rule 8 (4) by seeking particulars in form No.14 in Appendix B. Form No.14 Appendix B is found at page 249 of the Civil Procedure Act/Civil Procedure Rules. Its heading shows clearly that the request for particulars is to be laid under order VI rule 8. The format is also given. This court has married that format to MGI and finds that it does not fully agree as regards the provisions of law applicable and the advocate to who addressed. But the content of the particulars tally. Order VI rule 8 (5) does not give an election to follow the format or not. Neither does the format itself specify so.

The response to form No.14 Appendix B is supposed to be in form No.15 Appendix B on the same page. This has been married to MG2 and finds that it does not tally. The aggrieved party could therefore only move to this court after satisfying himself that the above procedural measures had been complied with. The procedure followed by the applicant in MGI and the response given by the defence in MG2 were un procedural and the Plaintiffs/application subject of this ruling is therefore premature. The prematurity arises because the law requires the application to be presented after the correct request for particulars has been made and not complied with.

Having ruled that both the format and procedure followed by the applicant to reach the court is improper the next question to be answered by the Court is whether this is curable under the provisions of law cited or any other law known to the court. Section 3 A Civil Procedure Act has been cited as a saving

clause. It states "*Nothing in this* Act *shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"* From its content this is saving clause. It is to be invoked where no provision of law covering that particular situation is provided. It does not operate to shield a party who has chosen either deliberately or in advertently not to quote the correct provision of law or follow the correct laid down procedure. Applying this reasoning to the application herein, the court finds that the application cannot stand for non-compliance with the clearly laid down procedure of the provisions of law. The applicant has no alternative but to go back on to the drawing board and comply with the command in Order VI rule 8(2), 5 and Appendix B form No.14 of the Civil Procedure Rules.

Having faulted the procedure followed there is no need to go into the merits of the request made as this might prejudice the outcome of the proceedings that may arise in case the applicant goes back to comply with the rules and the defendant fails to comply or complies un satisfactorily.

For the reasons given the plaintiffs application dated 28.7.2006 is struck out but with leave to recommence the correct procedure.

(2) The defendant will have costs of the struck out application.

DATED, READ AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE