



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

**Civil Case 757 of 2004**

**CHARLES GAITHUMA MUNGE.....PLAINTIFF**

**VERSUS**

**PETER ICHARIA MUNGE.....1<sup>ST</sup> DEFENDANT**

**GEORGE MUNGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

By way of a Plaint dated 4<sup>th</sup> March 2004 and amended on 27<sup>th</sup> January 2005, the Plaintiff brought this suit against the Defendant for damages for defamation alleging that on or about the 9<sup>th</sup> August 2003 the Defendants maliciously and without justification caused and published to the Plaintiff's advocates a letter which contained defamatory statement of the Plaintiff.

In answer to the Plaint the Defendants filed a defence dated 12<sup>th</sup> August 2002, and amended on 28<sup>th</sup> April 2005 in which they denied to have written or published the letter referred to by the Plaintiff. Further or in the alternatively and WITHOUT PREJUDICE to the foregoing the Defendants aver that if, which is denied, the letter complained of is defamatory of the Plaintiff, the Defendants shall aver that the letter complained of and the occasion of its publication, if at all is privileged in law and that the defendants published the letter complained of to the Plaintiffs advocates in the reasonable and necessary protection of their own rights.

On the 2<sup>nd</sup> August 2005 the Defendants brought this Chamber Summons under Order VI Rule 13(1) (a) (b) (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders to strike out the Plaintiff's Plaint. The application is premised premises on the grounds:

- (1) That Defendants are not the authors of the letter dated 9<sup>th</sup> September 2003 referred to under paragraph 4 of the Amended Plaint filed herein which is alleged to form the basis of the tort of defamation.
- (2) The Defendants did not publish the said letter.
- (3) The Plaintiff's claim as framed in the Plaint has no realistic prospects of success and there is no reason why the suit should be tried.
- (4) On the whole, the Plaintiff's claim as borne by the Plaint is worthless in that:-

- (a) It discloses no Cause of Action against the Defendants.
- (b) It is scandalous, frivolous and/or vexatious.
- (c) It may prejudice, embarrass or delay the fair trial of the action.
- (d) It is otherwise an abuse of the process of the court.

The application is also supported by an affidavit sworn by Peter Icharia Munge. In response to the Defendant's Chamber Summons, the Plaintiff has filed a Replying Affidavit in which he avers that the Defendants having admitted to have written the letter the subject matter of this suit the Plaintiff raises trial issues which should go on trial and be subjected to the test of cross examination.

On an application to strike out a Plaintiff under Order VI Rule 13(1) (a) of the Civil procedure Rules (the rules on the ground that it discloses no reasonable cause of action, the truth of the allegations contained in the Plaintiff is assumed and evidence to the contrary is inadmissible. This is because the court is invited to strike out the claim in limina on the ground that it is bound to fail even if all such allegations are proved. In such a case the courts function is limited to a scrutiny of the Plaintiff.

It tests the particulars which have been given of each averment to see whether they are sufficient to establish the Cause of Action. It is not the court's function to examine the evidence to see whether the Plaintiff can prove his case, or to assess the prospects of success.

Where, however, the application is made under Order VI Rule 13 (1) (b) (c) or (d) of the rules or the inherent jurisdiction of the court on the ground that the claim is "frivolous" or is an abuse of the process of the court, evidence is admissible to show that this is the case. A Plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. **In Lawlence V. Lord Norreys** 1890 15 APPLICATION CASE 210 at 219 Lord Herschell said:

**"It must not be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which is difficult to believe could be proved."**

If the Defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon the affidavits.

As Darkverts L J, said in *Wenlock Vs. Moloney* (1965) 1 WLR 1238 at 1244:

**".....this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce the trial of the case in chambers, on affidavits only without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of inherent powers of the court and not a proper exercise of that power."**

More recently Salmond L J said in *Nagla Vs. Feilden* [1966] 2 QB 633 at 651:

**"It is well settled that a statement of claim should not be struck out and the Plaintiff driven from the judgment unless the case is unarguable."**

The object of the summary procedure of striking out is to ensure that Defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts.

Based on the affidavit evidence and submissions by both counsel I find that the Plaintiff's Plaint raises triable issues and should be allowed to proceed to trial. Accordingly the Defendants application is dismissed with costs.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of May, 2007.

**J.L.A. OSIEMO**

**JUDGE**