



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 4B of 2006

GEORGE NJENGA WAKAHIU.....PLAINTIFF

VERSUS

1. STANDARD MEDIA GROUP

2. MICHAEL OYIER

3. JAMES NJUNGE MWAURA.....DEFENDANTS

RULING

By a chamber summons dated 22nd May 2007 pursuant to the provisions of order VI rule 13 (1) (a) (b) and (d) and order XVI of the Civil Procedure Rules and section 3A of the Civil Procedure Act the applicant seeks orders:

- 1) That the suit herein be struck out for disclosing no reasonable cause of action as against the 1st and 2nd defendants.**
- 2) That the suit herein be struck out for being scandalous, frivolous or vexatious as against the 1st and 2nd defendants**
- 3) That the suit herein be struck out for being otherwise an abuse of the process of this honourable court.**
- 4) That the costs of this application be provided for.**

The application is based on the following grounds:

- 1) That the cause of action herein is barred by section 4(2) of the Limitation of Actions Act, Chapter 22 of the laws of Kenya as amended by section 20 of the Defamation Act, Chapter 36 of the Laws of Kenya.**
- 2) That the cause of action has been commenced against the 1st defendant in its own name while 1st defendant, as cited, is not a legal entity and is therefore lacking in legal capacity thereby rendering the suit as against it unsustainable.**

And prayers 2 and 3 of the application is based on the grounds:

- 1) *That the plaint filed herein does not state with precision the verbatim statement of the allegedly defamatory words complained of as allegedly published by the defendants as by law required.*
- 2) *That the plaint herein is grounded on alleged publications by the defendants, which alleged publications if at all made, were made on occasion of qualified privilege as duly required by the Defamation Act*
- 3) *That in the above circumstances, the plaint is without substance, fanciful and lacks bonafides.*
- 4) *That in any event, the alleged founding, cause of action is in the circumstances only meant to cause the defendants unnecessary anxiety, trouble and expense and accordingly one for striking out.*

The application is predicated upon the annexed affidavit of Nelly Muthoka sworn on the 22nd day of May 2007.

For the applicant it was argued that, the suit herein does not state with precision the verbatim statement of the alleged offending words complained of as allegedly published by the defendant. The suit is thus bad in law, incompetent and fatally defective

Firstly, there was need in annexing a certificate of incorporation that the Standard Media Group and the Standard Ltd, are different entities by reasons of fact that the issue of mistaken identity has been raised by the defendant/plaintiff at paragraph 4 of the grounds of opposition.

That in any event the cause of action, if any, is time barred by dint of the provisions of Limitation of Actions Act (Cap 22) Laws of Kenya as the same did not arise within 12 months before the commencement of this action.

Moreover, the alleged publication was made on an occasion of qualified privilege hence the suit is vexatious.

Last but not least, that the plaintiff cause of action is based on alleged publication by the defendant which by and large constituted fair comment, made in-good faith and without malice upon a matter of great public interest.

The applicant relied wholly on the affidavit in support of the application several authorities and also on counsel's submissions.

The respondent filed grounds of opposition dated 4th June 2007 in addition to the replying affidavit sworn on the 4th day of December 2007.

At the hearing counsel for the applicant took issue with the filing of both grounds of opposition and replying affidavit. Counsel contended that it is improper to file both in view of the clear provisions of order L Rule 16 (1) and the authority of **NATIONAL INDUSTRIAL CREDIT BANK LTD VS GATHUKU [2002] KLR 295**

That in any case the affidavit in reply is defective in that the same is not based on matters within the deponents own knowledge as required by order XVIII rule 3.

That paragraphs 3-9 and 13-17 are based on counsels advice. The only paragraphs based on counsels knowledge are paragraphs 1 and 12. I was urged to strike out the offending paragraphs of the said affidavit and having done so find that there is no evidence in support of the application. In this regard I was referred to the authority of **CHRISTIAN ATUKU VS. KENYA FOOTBALL FEDERATION HCCC NO. 1330 OF 2005** at page 5.

Counsel for the applicant purported to rely on the grounds of opposition and the replying affidavit filed herein. Counsel contended that the filing of the two documents are not fatal to the application. In

that regard I was referred to the case of **JETLINK EXPRESS LTD VS. EAST AFRICAN AIR EXPRESS LTD MILIMANI COMMERCIAL COURT CIVIL CASE NO. 13 OF 2007.**

Order L Rule 16 (1) provides:

“16 (1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds or opposition, if any, not less than three clear day before the date of hearing.”

In my view the proper interpretation to be given to the said rule is that a party is entitled to elect whether to file a replying affidavit or statement of grounds of opposition but not both. It calls for advocates understanding of the rules of interpretation of statutes or any other legislation. That is an important aspect of an advocate’s training. I cannot in conscience condone failure to give effect to the intention of rules committee in those circumstances. **see NATIONAL INDUSTRIAL CREDIT BANK LTD. V. GATHUKU {2002} KLR Page 295**

Accordingly, I strike out both the grounds of opposition and replying affidavit. Having done so the application must be taken as having been heard ex-parte by dint of the provisions of order L Rule 16(3).

In the premises I have only the affidavit evidence of the applicant in support of the application and no evidence from the respondent in opposition thereto. In the circumstances I adopt the evidence of the applicant and make a finding that this suit discloses no cause of action and/or reasonable causes of action against the 1st and 2nd defendants. Accordingly the plaint dated 17th January 2006 is struck out with no orders as to costs.

Dated and delivered at Malindi this 24th day of October 2007.

N. R. O. OMBIJA

JUDGE