

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

Civil Case 41 of 2003

ROSSELY OLIVIA ADERO OTIENO

JULIUS ORENGE T/a R.O.A. OTIENO & CO. ADVOCATES.....PLAINTIFFS

VERSUS

DEVKISTEEL MILLS LTD.....1ST DEFENDANT

JAMES KARIKI.....2ND DEFENDANT

RULING

The defendant was sued by the plaintiff for defamation. The plaintiff in his plaint claimed that the defendant's letter dated 15th November 2002 written by the defendant of him was defamatory. The defendant after being served with summons entered appearance and filed a defence in which he admitted having written the letter but denied that the contents of the letter were defamatory of the plaintiff and in the alternative and without prejudice he pleaded quantified privilege.

Subsequently he applied to amend his defence where by he pleaded justification based on the fact that criminal charges had been instituted by the CID against the plaintiff.

This defence was successfully challenged by the plaintiff and was struck out by the court on 4th June 2004. The defendant filed this application seeking the following orders:

- (1) Stay of proceedings pending further orders of this court.
- (2) Review of the order made on 4th June 2004 striking out the defendant's defence and leave be granted to the defendant to defend the suit.
- (3) The defendant be granted leave to further amend the defence to plead that the said allegedly defamatory letter was never published or copied to third parties and the defence of justification.

This application is opposed. This application coming after the defendant's defence has been struck out is a clear manifestation that failure by the defendant to include defence fo lack publication and more so after leave had been granted to amend was not an oversight but a calculated move by the defendant to litigate by instalments.

The object of the amendments of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already pleaded or the relief of the remedy already claimed but rather on the basis of the true state of facts or the relief or remedy which the parties really and finally intend to rely on or to claim. The powers of amendments are intended to make more effective the function of the court to determine the true substantive merits of the case to have more regard to substance than to form and thus to free the parties and the court from the technicalities or formalities of procedure. But to allow the amendment sought would introduce a completely new defence which would be prejudicial to the plaintiff who had successfully challenged the

defendant's defence and had it struck out.

The applicant intends to move the court to reconsider the law and the evidence introducing facts which were not available before the judge when he arrived at his decision to strike out the defendant's defence. This would be tantamount to sitting on appeal on a judgment of a judge of similar jurisdiction. The application is dismissed with costs.

Dated at Nairobi this 15th day of February 2006.

J.L.A. OSIEMO

JUDGE