



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

Civil Suit 1059 of 2003

PAUL AGWENGE ANGAR PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED DEFENDANT

RULING

There are two applications before this Court – the first under Order VI Rule 13 (1) (6) (c) and (d) and Order VI A Rule 7 (1) of The Civil Procedure Rules, where Counsel for the Plaintiff wants the amended defence struck out, for want of compliance with the mandatory provisions of the law. The second is under Order 49 Rule 5, Order 6A Rule 6 and Order 50 Rule 1 of The Civil Procedure Rules and Section 3A of The Civil Procedure Act, where Counsel for the defendant seeks leave to file his amended defence out of time.

The facts of this case are that the defendants, being a media house in Nairobi allegedly published or caused to be published against the Plaintiff, material that was of a defamatory nature. The Plaintiff in his plaint dated 13th October, 2003 asked for judgment against the defendant for:-

- (a) *General damages for libel***
- (b) *Exemplary and/or aggravated damages***
- (c) *Interest on (a) and (b) at court rates***
- (d) *Costs.***

The defendant thereby filed its defence dated 24th November, 2003 on 25th November, 2005, where it alleged that the said publication was a fair comment on a matter of public interest made without malice. The Plaintiff on 3rd December, 2003 replied to the defence, raising issue that the publication was not fair comment, as it was done maliciously and recklessly.

On 2nd March, 2004, the defendant filed a chamber summon application seeking leave to amend its defence in terms of the annexed draft amended defence. The defence was to be amended to include the outcome of the Kenya Swimming Federation Probe Committee that had been established to look into claims of wrong conduct of its officials and the defendants wanted to rely on the report of findings. Leave was granted on 21st October, 2004 by Mr Muriithi SDR and the defendant was asked to file and serve the amended defence within 7 days of the order and the Plaintiff was to file a reply within 7 days of service. Three days later, that is on 25th October, 2004 the defendants filed their amended defence in

court and served the parties. The Plaintiff did not reply within 7 days but on 10th February, 2005, the Plaintiff made an application to strike out the amended defence for being defective as it did not disclose either the date of the order allowing the amendment, or the number of the rule in pursuance of which the amendment was made as required by law. This is the first application before this court.

On 16th March, 2005, the Defendant made an application for orders that this honourable court be pleased to grant the applicant leave to file its amended defence out of time and that the defence annexed be deemed as filed within time. This is the second application before this court. On 21st April, 2005, the Plaintiff filed grounds of opposition, as follows:

- (1) ***The application is superfluous, unmerited and an abuse of the process of the honourable court.***
- (2) ***The defendant on 25th October, 2004 filed an amended defence which is still on record.***
- (3) ***The amended defence sought to be filed is different from the one sanctioned by the honourable court on 21st October, 2004.***
- (4) ***The affidavit sworn by James Kinyua in support of the application grossly offends the law and should be struck out.***
- (5) ***No sufficient or justifiable reason has been advanced by the defendant in support of the application.***
- (6) ***In the premises, the application is fatally defective, no valid reasons in law to support the prayers sought have been advanced and it ought to be dismissed with costs.***

At the hearing of the application, Counsel for the defendant submitted that the amendment was necessary to determine the real issues and that no prejudice would be caused to the Respondent. He relied on the cases of ***The British India General Insurance Company Ltd vs G M Parmar & Company (1966) E A 172*** and ***Eastern Bakery vs Castelino (1958) E A 461***.

Relying on the grounds of opposition, Counsel for the Plaintiff submitted that there was already an amended defence on file and hence Order 49 Rule 5 was inapplicable. He argued that if this application was allowed, there would be two amended defences and the application would thus be res judicata. He further stated that the application was not to amend but to extend time of filing the amended defence. The amended defence was also not consonant with that allowed on 21st October, 2004 as it was re-drawn and that the new amendment sought to introduce a new defence of justification which he prayed should not be allowed by the court. He went on to say that leave should have been sought for a further amendment. Counsel further put it to the court that the 'mistake' cited by the defendants was not expounded upon. He held that the ***Eastern Bakery*** case should be used in his favour in that an amendment should not be allowed if it caused injustice. He also relied on the ***British India*** case on page 174 paragraphs F and G on inconsistent pleadings. He therefore prayed that the application should not be allowed as it is an application to file out of time and not for amendment.

I start with the first application, which seeks to strike out the amended defence, for want of form. In the case of ***Castelino vs Rodrigues (1972) E A 233***, it was held that irregularities may be ignored or cured by an amendment. The question to ask is whether the irregularity causes prejudice to the other party. In this case the Plaintiff has not shown how failure to insert the date of the order allowing the amendment, or the number of the rule in pursuance of which the amendment was made, will prejudice his case. Despite the wording of Order VI A Rule 7 (1) being mandatory, the substance of the defence has not been affected and it is therefore not fatal. Similarly in the case of ***Unga Limited vs Amos Kinuthia Civil Appeal No. 175 of 1997*** it was held that deviation from forms is not fatal if the substance is not affected and if the irregularity is not calculated to mislead. For this reason, I will disallow the first application.

I now come to the second application where Counsel for the defendant seeks “to file a proper amended defence out of time and that the draft amended defence annexed hereto be deemed as filed within time”. Now, I do not understand what the applicant means by a “proper” amended defence. To me, this application is pure and simple for extension of time to file the amended defence which the Court approved by its order of 21st October, 2004, and not the proposed re-amended defence annexed with the current application.

The two defences are different. The one annexed to the current application is different from the one approved by the Court on 21st October, 2004. Accordingly, Mr Muri, Counsel for the Plaintiff is correct in saying that the Defendant is now seeking to slip in a new re-amended defence through the back door. I cannot allow that. The application before me is not to seek a further amendment of the defence, rather it is to seek an extension of time to file the previously approved amended defence. This is borne out both by the Rule under which this application is made, and the averments in the supporting affidavit.

I see no prejudice to the Plaintiff in extending the time for the Defendant to file its amended defence dated 25th October, 2004 out of time. I will allow the defendant seven days to do so, and to serve the same promptly to the Plaintiff.

The costs of both these applications shall be in the cause.

Dated and delivered at Nairobi this 13th day of February, 2006.

ALNASHIR VISRAM

JUDGE