REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 91 of 2002

GEORGE P. B.
OGENDO .....PLAINTIFF

V E R S U S

1. JAMES NANDASA

2. MARTIN WANYONYI

3. KENNEDY WEPUKHULU

4. THE STANDARD BANK LTD.

5. GENDER FOR HUMAN RIGHTS &
DEMOCRACY.....DEFENDANTS

R U L I N G

This is a ruling on the application by the Plaintiff, *George P. B. Ogengo*, dated 30-8-05 and made (filed) on 2-9-05 by Chamber Summons seeking orders that the statement of defence of the 3rd and 4th Defendants, *Kennedy Wepukhulu* and the *Standard Limited* respectively be struck out under Order VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules as read with sections 3 and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and that the suit to be set down for assessment of damages thereafter. The application was made on the grounds that the defence of the said defendants is scandalous, frivolous and vexatious and may prejudice, embarrass and delay the fair trial of the suit and is an abuse of the process of court and has no merit and further that it is unreasonable and does not reflect any triable issues. The application was supported by an affidavit of the plaintiff sworn on 1-9-05 which stretched to 27 paragraphs on 6 pages.

The two defendants opposed the application by filing a replying affidavit sworn by Nelly Matheka, the Company Secretary of the 4th defendant, who swore that she was authorized and was competent to make the affidavit on behalf of the 3rd and 4th defendants.

The action herein was commenced by the Plaintiff by plaint on 18.12.02 against the five defendants named. It is a suit alleging libel against the Plaintiff by the defendants and seeking damages. At all material time the Plaintiff was the Land Registrar at Bungoma District Land Registry while the 2nd

Defendant was the Provincial Coordinator of the 5th Defendant and the 3rd Defendant was an Editor and/or journalist with the 4th Defendant. The 2nd defendant is alleged to have written a letter to the Commissioner of Lands and caused it to be published to various persons named in the plaint included the Chief Justice, the Chief Land Registrar, the Provincial State Counsel, and the Director of Public Prosecutions and District Criminal Investigations Officer, Bungoma. The letter was in the following terms –

"*That there's a deliberate conspiracy between the State Counsel-Bungoma (Attention Mr. Kemo), Registrar of Lands Bungoma (Attention Mr. Ogengo) the District Officer-Kimilili Division and Mr. Willis Wachilonga (who purports to own the land) to defeat justice. It seems that they are running a parallel Court whose decisions are superseding those of the genuine Court under Justice Mary Ang'awa.*

It defeats logic and transparency, to wake up one morning and discover that the Chief Land Registrar's order has been shelved and abused by his juniors and a Title Deed is issued while cases over registration are pending in Court. while the Judge is in pain trying to determine the owner of this parcel of land, it seems some officers who have no mandate know the owner.

This negates the roles played by the Court and shows how corruption can take a center stage as procedure is flawed left and right.

Unfortunately, it is a dirty game being played through the unholy trinity between the Bungoma Lands Officer, the Kimilili D.O.'s Office and the Bungoma Law Courts. This is a serious malpractice that can cripple the judicial system.

As we have enumerated the circumstances above, we feel that such officers have peddled malpractices from land grabbing to corruption. Many deaths have occurred over land because of unresearched, dubious and compromised steps taken by such officers. We wonder why government officers should use public offices for personal pecuniary gain at the expense of human life. It is a clique of such officers who are stripping the Court image and operation of government offices. This case has legalized many malpractices, contempt of Court, which is deemed to be no crime, corruption is normal and disregarding of procedure is acceptable.

We believe that at this crucial moment of conflict of roles, abuse of procedures and rampant corruption, you should show guidance and award remedy to injured parties."

The Plaintiff set out in paragraph 9 of the plaint what he conceived to be the natural and ordinary meaning of the words in the said letter or innuendos and contended that he had been seriously injured in his character, credit and reputation and has been brought into public scandal, odium and contempt. He alleged that the 4th Defendant had printed and published in its newspaper, the East African Standard at page 8 an article written by the 3rd Defendant which referred to the Plaintiff and which was false, malicious and seriously defamatory of the Plaintiff. It was headed "Bungoma Residents call for probe of land officers". I do not know that the 4th Defendant has a news paper styled "*East African Standard*" unless of course the Plaintiff was referring to the 4th Defendants daily, "*the Standard"* as it is common knowledge that "t*he East African"* appears to be owned by a different media house. But no matter. The article was alleged to read

"*They said many people lose their land through illegal issuance of title deeds by the syndicate.*

Speaking in Bungoma Town, they said the most vulnerable are the poor. Led by a farmer, Mr. James Nandasaba, who said a title deed was issued on his parcel and to somebody while the case is still in Court.

He said the officers at the office have rendered the role of the Judiciary useless and rendered the rule of law irrelevant.

Center for Human Rights and Democracy Western Province co-coordinator Mr. Martin Wanyonyi supported the residents' claim and said Bungoma was the worst hit district in the province on the malpractice according to his research finding.

He said he was ready to co-operate with the ACPU by divulging information in order to smash the scam and arrest those behind the scam".

In paragraph 12 of the plaint the Plaintiff set out what in his opinion was the natural and ordinary meaning of or innuendos in the words in the said article and alleged that the publication of the article had seriously injured his character, credit, and reputation and that he had been brought into public scandal, odium and contempt.

The 3rd and 4th Defendant filed a statement of defence now sought to be struck out. In the statement of defence, the said Defendants admitted publishing the words complained of which were set out in paragraph 11 of the plaint and published in the Defendant's Standard edition of 4th March, 2002 at page 8. However, they denied publishing the article falsely, or maliciously or being actuated by malice in doing so. They also denied the words carried the meaning or innuendos attributed to them by the Plaintiff. The said Defendants furnished particulars of facts as required by Order VI Rule 6A(2) of the Civil Procedure Rules.

A reply to this statement of defence was filed by the Plaintiff who prayed that it be struck out.

Mr. Mwinanu, learned counsel for the Plaintiff who argued the application before me, urged the court to strike out statement of defence by the 3rd and 4th Defendant because it was, inter alia, frivolous and vexatious. He submitted that the words in the article complained of were false and that malice could be imputed. He also alluded to the genesis of the article which he said was a court order and pointed out that the 3rd and 4th Defendants did not seek confirmation before publishing the article nor give the Plaintiff a chance to defend himself. He emphasized that the said Defendants had in paragraph 9 of their statement of defence alleged that the article was based on true facts when it was not.

Mr. Imende, learned counsel for the 3rd and 4th Defendants, relied on the affidavit of Nelly Matheka in opposing the application. It was his submission that the defence of the Defendants raised weighty issues to be determined on evidence. He contended that the publication complained of did not refer to the Plaintiff by name and that it referred to a class of people. It was his further submission that the 3rd and 4th Defendants had a defence of fair comment and contended that the opinions expressed in the article were fair. He also contended that the application to strike out was ill founded.

The application was premised on Order VI Rule 13(1) (b), (c) and (d) of the Civil Procedure Rules. The Rule reads-

r.13 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(a)

(b) it is scandalous, frivolous or vexatious; o

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) *it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

It is necessary in determining the application to examine first how the power conferred on the court by rule 13(1) should be exercised and secondly the principles that should be considered and applied before the court invokes and exercises that power to strike out. It was in *D. T. Dobie & Co. (K) Ltd. v- Muchina*

(1982) KLR 1 that the Court of Appeal in an obiter dicta by Madan JA, as he then was, expressed the view that "*the power to strike out should be exercised only after the court has considered all facts, but must not embark on the merits of the case itself as this is solely reserved for the trial judge."* He further stated that "*the court should aim at sustaining rather than terminating a suit."* He expressed the view that "*a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment and that as long as a suit can be injected with life by amendment, it should not be struck out."* These views apply *mutatis mutandis* to the striking of a pleading. It goes without saying that Rule 13(1) (supra) is drastic and implies summary procedure. It is for that reason that the policy of the court is that only "*in plain and obvious cases should recourse be had to it."* If any emphasis was required see the judgment of *(Solomon L J in Nole v. Fielden (1966)2 B633 at p.643-651* in which he held that the summary remedy under this rule should be invoked in plain and obvious cases where, in the case of striking out of a suit, it is one which cannot succeed or is unarguable or in striking out generally, a pleading is found to be clearly an abuse of the process of the court.

It is important to also point out that the power conferred on the court by Rule 13(1) (supra) is discretionary and it has been held that it should be exercised where the case is beyond doubt *(see Lindsay LJ in Kellaway v. Bury (1892) 66 L.T. 599 at page 602.* Before exercising it, the court must be satisfied that the defences raised are not arguable *(see Waters v. Sunday Pictorial Newspapers (1961) I W.L.R. 967; (1961) 1 ALL ER 758 CA). In Nagle v. Felder, Danckwerts and Solomon LJJ* held that the summary remedy under the English equivalent of our Rule 13(1) in Order VI is only to be implied in plain and obvious cases where the defence or the action cannot succeed or is in some way an abuse of the process of the court or the case is unarguable. That then seems to be the stance taken by the courts in relation to Rule 13(1) of Order VI.

When should the court strike out a pleading because it is scandalous, frivolous or vexatious under Rule 13(1)(b), or because it may prejudice, embarrass or delay the fair trial of the action under Rule 13(1)(c) or because it is otherwise an abuse of the process of the court under Rule 13(1)(d)?

Let me take Rule 13(1) (b) of Order VI first. Rule 13(1) of Order VI is almost identical to the English Order 18 Rule 19 and that is why the English decisions on the point are of considerable persuasive authority. The court has power under the rule to expunge scandalous matter in pleadings under subparagraph (b) of Rule 13(1). The Supreme Court Practice 1988 Vol.1 at page 322 – 324 in dealing with what constitutes "*scandalous material"* shows that unnecessary matter in pleading containing any imputation on the opponent or making a charge of misconduct or bad faith will be struck out on the ground that it is scandalous. It also shows that the words "*frivolous*" or "*vexatious"* mean and refer to matters that are obviously unsustainable. Embarrassing pleading is said to include unclear statement on how much of the statement of claim the Defendant admits and how much he denies. Therefore, an evasive and vague defence from which the Plaintiff cannot know what defence is being pleaded will normally be struck out on the ground that it is wanting in seriousness and tends to annoy. Gone are the days when liberty existed to engage in too many expedients in pleadings to an extent that the pleadings did not show what line of defence was being pursued by a defendant. R. E. Megary in "*Miscellany-at-law, a diversion for lawyer and others"* at page 46 demonstrates a typical example of what today would be a model defence lacking in seriousness and incapable of showing what defence is relied on. It is an example that takes too far the expedients of pleading. The example concerns an action brought against a neighbour for damaging a borrowed pony cart. "The local sea lawyer advised the defendant to plead "*that he had never borrowed the cart, and that the cart was damaged and useless when he borrowed it; and that he used the cart with care and returned it undamaged; and that he had borrowed the cart from some person other than the plaintiff, and that the plaintiff had never owned any cart, whether pony or otherwise, and so on and so forth .."* This is a defence that would be struck out without the slightest hesitation. *In Dr. Marry Watson versus Renta Plan Ltd. & 2 others (NBI H.C.C.C. NO.2180 of 1994)* Ringera J. as he then was pointed out in his ruling that "*a frivolous claim is ex post facto vexatious for nobody can fail to be vexed by a frivolous allegation against him* or her.

As regards striking out a pleading under Rule 13(1) (c) the courts have held that a defence that may prejudice, embarrass or delay the fair trial of the action is one that is beyond the right of a party to make. A defence that raises irrelevant matter or issue which may involve expense, trouble, and delay to answer

is deemed to be prejudicial to the fair trial of the suit and will be struck out *(see Rossam v. Budge (1893)16B 571).* Embarrassing pleading includes a pleading that does not make it clear how much of the statement of claim is admitted and how much is denied. But a pleading, it has been held, will not be struck out on the basis that it is embarrassing merely because it is alleged to be untrue nor is a pleading embarrassing because the law stated in it or reasons alleged may be bad unless they are not relevant *(see Lord Corp. v. Horner (1914)111 L.T.512.*

With regard to striking out under Rule 13(1) (d) on the ground that the pleading is otherwise an abuse of the process of the court, it has been held that the court will not allow its function as a court of law to be misused *(see Dennis Mathews & 3 others versus British Airways NBI HCCC NO.1400 of 2000* (unreported). Rule 13(1) (d) connotes that the process of the court must be carried out properly, honestly, and in good faith, and that is why it will not allow its function as a court of law to be misused. Whether the pleading amounts to "abuse of the process of the court" will depend on whether it is groundless. The term "abuse of the process of the court" connotes that the process of the court must be carried out properly and honestly and in good faith, and it means that the court will not allow its function as a court of law to be misused. In such cases, the court has power and will not hesitate to strike out the offending pleading if the justice of the case so demands. The commentary in the WHITE BOOK (supreme Court Practice 1999 Vol. 1 page 352 para. 18/19/18 also shows that the court will strike out a plaint (or defence) on the ground that it is an abuse of the process of the court where the claim (or defence) is shown not to be bona fide or where the suit is not instituted bona fide or in good faith for the purpose of obtaining relief but rather for some other ulterior purpose. The categories of pleadings that may amount to abuse of the process of the court can never be closed as they will vary from case to case and will be myriad.

An application for striking out under Rule 13(1) (b), (c) and (d) of Order VI must offer evidence for the order it seeks. Without facts or evidence, there would be no material to sustain the application. An application to strike out must also be brought without undue delay. These then are the principles that are to be applied to each case where, as here, the court is called upon to exercise its discretionary power to strike out a pleading.

There are two publications of alleged libel in the plaint. The first one relates to words in the letter allegedly written on 22-02-02 by the 2nd Defendant which the 2nd Defendant is alleged to have published to the persons referred to in paragraph 8 of the plaint. These allegations have not been attributed to the 3rd and 4th Defendants. In any case, the 3rd and 4th Defendants have in paragraph 4 of their statement of defence averred that they are strangers to the allegations.

The second alleged libel is pleaded in paragraph 11 of the plaint wherein the Plaintiff alleges that the 3rd Defendant wrote the article complained of which the 4th Defendant published on 4th March, 2002 in its newspaper, the "East African Standard" at page 8 under the heading "*Bungoma Residents call for probe of land officers"*. The article has been reproduced hereinabove. It is admitted by the 3rd and 4th Defendants as having been published not in the "*East African Standard"* but in the 4th Defendant's daily, "*The Standard"* edition of 4th March, 2002 at page 8. However, the Defendants have denied publishing the article falsely, or maliciously or being actuated by malice. They also denied that the words complained of referred to or were understood to refer or were capable of referring to the Plaintiff. In the alternative, the Defendants contended in their defence that even if the words were understood to refer to the Plaintiff, they did not bear the meanings pleaded and attributed to them in paragraph 12 of the plaint. Apart from denying the injury alleged to the Plaintiff's name and, the damages claimed, the Defendants furnished particulars of facts required by Order VI Rule 6A (2) of the Civil Procedure Rules in which they showed that the matter relating to the publication was of public importance and disclosed the source of the information was not fictitious. They contended that the words complained of were a fair comment.

From his affidavit in support sworn on 11.9.05 the Plaintiff was particularly irked not only by the fact that the said Defendants did not give him an opportunity to set the record straight before the publication on 4.3.2002, but also by the fact that although the Registry of the High Court of Kenya at Bungoma had records which were accessible to the said Defendants from which the truth could be verified before the publication, the latter had failed to peruse them.

In their replying affidavit sworn on 3-10-05 by Nelly Matheka, the 3rd and 4th Defendants maintained that the publication was a fair comment on a matter of public interest and further averred that the Plaintiff was afforded an opportunity to comment and his views published. Exhibit GPO2 annexed to the affidavit of the Plaintiff shows that the Plaintiff, whose name was wrongly shown as Victor Ogengo instead of George Ogengo was quoted as refuting the allegations. In the opinion of the Defendants, the article was balanced as the views of the Plaintiff were published alongside those of others and there was no distortion of facts.

It is clear from the Plaintiff's affidavit and the Defendants' affidavit that the Chief Land Registrar had conducted investigations into the allegations and found them to be unfounded. The Plaintiff himself averred that the genesis of the complaint that resulted in the publication complained of was a Ruling dated 9-6-99 in Kakamega HCCC NO.55 of 1974 where the court had ordered cancellation by the Bungoma District Land Registrar of entries to the land Register of land title No. Kimilili/Kibengei/642.

The words published as alleged in paragraph 11 of the plaint did not refer to the Plaintiff by name. They referred to illegal practice in Bungoma, and though obliquely, to the Lands office at Bungoma which could be discerned as the one involved in the alleged malpractice. But it is common knowledge that the Plaintiff was not the only person working in Bungoma Lands office. Exhibit "GPO2' on the other hand referred to the Plaintiff, albeit by the wrong name, as the Land Registrar of Bungoma Lands office. While it is implicit that the head of the said office bore the responsibility of what was happening in the office, the words complained of did not allege that the Plaintiff personally engaged in the alleged malpractices. It is one thing to be responsible for the actions of his juniors in the office and quite another to be liable for their actions. The words "responsibility" and "liability" have different connotations.

The issue before me however is not whether the Plaintiff has shown that the Defendants did libel him. That is a matter for the trial court. Rather, it is whether, applying the principles stated above, the defence of the latter falls under any of the paragraphs 13(1) (b), (c) or (d) of Order VI of the Civil Procedure Rules. There is no doubt that the subject of title deeds and service to the public was a matter of public interest. The Defendants did not deny publishing the article complained of. It did not explicitly allege that the Plaintiff was one of the persons involved in the alleged illegal activities. But it did implicitly reflect that he had to take responsibility as the Land Registrar of the station concerned. But this is not the same thing as saying that the publication showed him to be engaged in the alleged activities. The right of fair comment on a matter of public interest was a plausible defence. Unarguably, the media occupy a special position in society as they are a vehicle for the expression of opinions by members of the public on issues of public interest. The Defendants have not been shown to have filed a defence relating to a publication devoid of facts nor can it be said on the material before me that the defence, when one looks at the pleadings, was scandalous, frivolous or vexatious under subrule 13(1) (b) of Order VI. The words in the article were not without a basis. The defence clearly raises triable issues. It cannot be said to prejudice or embarrass or delay the fair trial of the action. The fact that the Defendants have admitted the publication cannot be taken in isolation. A defence of fair comment, without wishing to dwell on it as this is a matter for the trial court, has been raised. It does show triable issues. It cannot be said to be an abuse of the process of the court under Rule 13(1) (d) of Order VI. In a libel action, admission of publication per se does not connote admission of liability nor does the act of publication alone constitute libel.

I have carefully perused the plaint and the defence by the 3rd and 4th Defendants and the affidavits filed by the parties in the application. In my view, the statement of defence of the 3rd and 4th Defendants has raised triable issues not least because in the circumstances of this case the defendants are entitled, inter alia, to the defence of fair comment which they have pleaded but whether or not there was malice will depend on evidence to be adduced at the trial.

In the light of the foregoing, I decline to allow the application which I hereby dismiss. I order that the costs of the application shall be in the cause.

Dated, signed and delivered at Kakamega this 25th day of May 2006.

G. B. M. KARIUKI

J U D G E