REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (Milimani Law

Civil Case 1225 of 1999

FRANCIS OYATSI …….....…… PLAINTIFF

VERSUS

WACHIRA WARURU …….....……1ST DEFENDANT

THE STANDARD LIMITED…….....…….2ND DEFENDANT

RULING

FRANCIS OYATSI sued Wachira Waruru and the Standard Limited jointly and severally seeking special, general and aggravated damages, as well as damages for malicious falsehoods for "**a continuous series of publications made daily between 2nd December 1998 and 17th December when the 1st defendant published and the second defendant caused to be published, printed and re-publised prominently on the front page, back page and inside pages the following words including cartoons or effigies which are defamatory of the plaintiff……..**"

The plaintiff then gives the date and the heading of what was published by the defendants in what portion of the Standard newspaper.

The plaintiff also sought an injunction order to,

"restrain the defendants from further publishing or causing or authorizing the publication of the same or similar malicious falsehoods of the plaintiff'.

There was a prayer for costs on a higher scale.

The defendants entered appearance through Messrs Mohamed Muigai Mboya advocates, and subsequently filed a defence dated 9th July, 1999.

Both parties filed lists of documents as required by the rules of practice and procedure.

When the suit came for hearing me on 20th June, 2006, counsel for the defendant, Mr. Githu Muigai,

raised an objection to the plaint filed on 21st June, 1999, on which the claims of libel is premised as violating the mandatory rules relating to pleadings in libel cases particularly Order 6 Rule 6(A) Rule(1) of the Civil Procedure Rules which require the giving of particulars. That further and in addition, the pleadings are incurably defective by their failure to set out in verbatim the articles and specifically the passages in the articles complained of.

He submitted further that the plaintiff claims that there were ten different articles which were libelous, yet they were not set out in verbatim and in extensio, and this is an incurable defect in the pleadings.

Mr. Muigai submitted further that no court of law should commence a trial if there is a defect on the face of the record such as the one in the plaint herein, and that in the circumstances, the court can even move "**suo moto**", i.e. of its own motion in a situation similar to this.

According to Mr. Mungai, a point of law can be raised by any party at any stage of the proceedings and such a point need not have been raised in the defence. That once the court is satisfied that the plaint does not comply with the mandatory special rules of pleading in libel matters, the same should be dismissed with costs. He based his arguments on a text from **GATLEY ON LIBEL AND SLANDER**, at Section 4, paragraph 26.11 headed,

"**setting out words complained of**", and reads in part,

"In a libel the words used are the material facts and must therefore be set out verbatim in the statement of claim preferably in the form of a quotation. It is not enough to describe their substance, purport or effect. The law requires the very words of libel to be set out in the declaration in order that the court may judge whether they constitute a ground of action……"

He also relied on a High Court decision (Nyamu, J), HCCC No. 1369 of 2003, **HON. NICHOLAS KIPYATOR KIPRONO BIWOTT vs HON. PAUL KIBUGE MUITE & BARAZA LTD** (Unreported), which he said was on all fours with the present suit, on the matter of setting out words complained of.

Mr. Salish Gautama for the plaintiff disagreed with the submissions of his opponent, Mr. Githu Muigai. On his part he submitted that only the question of jurisdiction can be raised at any time and further that the High Court has unlimited jurisdiction. He referred to Order 6 Rule 7 of the Civil Procedure Rules.

He submitted that the object of the pleadings is that a party who wishes to say that an action is not maintainable, should do so in the pleadings. That the defendant was entitled to come to court and seek particulars of the plaint, but it did not do so.

Mr. Satish Gautama asked the court to turn to the defence which does not challenge the plaint as not being in compliance with Order 6R 6A (1) of the Civil Procedure Rules.

He confirmed that his client is not relying on any innuendos, but says that the words in the plaint in their ordinary meaning are defamatory and libellious. That order 6A quoted by Mr. Githu Muigai does not apply.

Turning to the defence, Mr. Gautama submitted that it does not raise any point of law that the plaintiff's suit should not be heard. That this point has not been raised in the defence filed and the oral application by Githu Muigai should be dismissed.

According to Mr. Githu Muigai in reply, the question of a preliminary point being raised without a formal application is a "**point of modern law**". That pleadings are about facts and Order 6 r 7 is an exception to that Rule.

Mr. Muigai's position therefore is that any party may raise a point of Law at any time in the

proceedings, including the competence of the suit, jurisdiction and the standing of the parties.

In considering the submissions of the two learned counsel, I turned to the plaint, particularly at paragraph 5 which contains the plaintiff's cause of action, where he complains of a "**continuous series of publications made daily between 2nd December 1998 to 11th December, 1998…….**"

On page 2 of the plaint the plaintiff gives specific dates, and the headings of what was published. For example, on 2.12.1998, he complains about the bold headline which reads, "**MUMIAS SUGA COMPANY LOSES SHS.1 BILLION TO SWINDLERS".**

The plaintiff goes on to give further dates and the headings of what was published and or printed, and then goes on to say what according to him was offensive.

The plaint does not give in verbatim the full article or articles complained of, only the headline.

How does this compare with the provisions of Order 6R 6(A) on "**particulars of defamation actions**", as well as the text from Gatley's book and the decision of Nyamu, J on HCCC No. 1369 of 2003.

I have scrutinized the defence, which according to Mr. S. Gautama does not challenged the manner in which the plaint was drafted.

Whilst reading the court file, I found the plaintiff's affidavit dated 5th November, 1999, filed in respect of some applications relating to the striking out of the defence.

Of relevance to me were some of the annextures to that affidavit, particularly the newspaper cuttings of articles the plaintiff is complaining about. I did not read them as such, but I am concerned that this vital evidence i.e. the details of the articles complained of is nowhere in the plaint, except for the headings of the said articles.

I have again read through the plaintiff's list of documents filed on 16th June, 2006. I note that documents Nos. 9,10,11,12,13 and 14 in the list are said to be copies of the East African Standard issues of 3rd, 4th, 6th and 10th December, 1998.

This to me meant that the plaintiff is perhaps intending to produce copies of the East African Standard newspaper cuttings containing the articles that he is complaining about, because the wordings are not reproduced in the plaint. If this happens at the trial then I suppose it might draw objections from the defendant side.

The reason I have gone into all this is to show in my considered opinion that Order VI R 6A on "**Particulars in defamation actions" is meant to cure the "mischief" of parties having to rely on and produce either newspaper cuttings and or whatever documents contain the offending texts. That is way the Rule as supported by Gatley on Libel and Slander requires a litigant to "set out in verbatim in the statement of claim the very words of libel, so that the court may judge whether they constitute a ground of action."** In the present plaint, the court will not be able to assess whether the words constitute a ground for action, because the words are not set out in verbatim in the plaint.

Though this point was raised orally when the trial was just about to commence, I find that it is substantial as it goes to the root of the plaint, and that is why I agreed to entertain it.

I have not found any legal backing to the submission that only a point touching on jurisdiction can be raised at any time in the proceedings. I cannot therefore accept that proposition.

I am persuaded by the decision of my brother Judge Nyamu in HCCC No. 1369 of 2003 on the point raised in this case and I have decided to follow it. I find it to be the correct position of the Law, which is

backed up by the Rules of Practice and Procedure in the Civil Procedure Code.

I am therefore satisfied that the preliminary point raised by the defendant's counsel, that, "**the plaint filed on 20.6.1999 on which the claim of libel is hinged, violates the mandatory rules of pleadings in libel cases, particularly Order 6 Rule 6A(1) of the Civil Procedure Rules**", has succeeded and I award the defendant costs to that effect.

Though I was asked to strike out the plaint, I have declined to do so in view of the time the plaintiff has been in this court waiting to be heard. I have instead decided that I will grant the plaintiff time to move the court appropriately for leave to amend his plaint to bring it in line with the provisions of Order 6A Rule 1, or any other relevant law.

The plaintiff can do this within the next 30 days, from today, and the defendant will be at liberty to file an amended defence, if any within 14 days of service of the amended plaint.

Dated at Nairobi this 23rd day of June, 2006.

JOYCE ALUOCH

JUDGE