REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 470 OF 2003

B.M WAMALWA

t/a BERNARD MUBINJA WAMALWA

& CO. ADVOCATES ……………………………………………….…..PLAINTIFF

VERSUS

MANAGING DIRECTOR, THE STANDARD LIMITED…….1ST DEFENDANT

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

RULING

This application comes by way of an amended Chamber Summons dated and filed on 18th May, 2004. It was brought under Order VI, rule 13(1),(b),(c),(d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap. 21). The application has several prayers –

(i) that the amended statement of defence be struck out;

(ii) that the plaintiff's suit do proceed to formal proof;

(iii) that the defendant be made to pay costs.

It is stated as grounds to support the application that the amended defence consists in mere denials and raise no triable issue. It is stated that the publications complained of were unjustified and were malicious, false and defamatory of the plaintiff in his professional capacity. It is stated that the impugned publications were not a fair and accurate report of Court proceedings, and were not fair comment. It is stated that the publication was not on a matter of public interest and the malice of the defendants speaks for itself.

The plaintiff, *Bernard Mubinja Wamalwa* in his supporting affidavit of 18th May, 2004 avers that the publications complained of were published in July, 2002. He avers that the defendants are relying on the defence of justification, calling in aid the criminal case which had been lodged against another

advocate, *Julius Orenge*, in Criminal Case No. 6026 of 2003, *Republic v. Julius Orenge* , whereas the said Julius Orenge had moved the High Court in Misc. Civil Application No. 943 of 2003 for judicial review orders which ended in the proceedings in the Kibera Senior Principal Magistrate's Criminal Case No. 6026 of 2003 being quashed and the accused being discharged. The deponent averred that the defendants have no defence at all and their statement of defence should be struck out, with costs to the plaintiff.

The position of the defendant remains as represented in the replying affidavit to the original Chamber Summons of 10th July, 2003. The replying affidavit sworn and filed on 29th July, 2003 is from Anne Makori , the Legal and Human Resources Manager of the defendant company. She avers that the second defendant did publish articles on 5th July, 2002 titled **"LAWYER ON FRAUD CHAR**GE" and another on 25th July, 2002 titled **"COURT TOLD OF 3.2 M. THEFT AT CO-OPERATIVE",** and another on 22nd February, 2003 titled **"LAWYER DENIES FRAUD CHA**RGE", and that these concerned the plaintiff. She averred that the said reports on suits in Court were "accurate and contemporaneous reports of criminal proceedings before Senior Principal Magistrate Wanjiru Karanja , of the plaintiff being charged with various criminal acts, to wit Criminal Cases Numbers 4935 and 8479 of 2002". The deponent avers that she believes information received from the second defendant's Court reporter, Alphonce Mung'ahu who followed and reported on the proceedings, that the articles published were accurate and truthful, and the defendants had no reason at all to doubt this fact. The deponent averred that she did believe the advice received from the defendants' counsel on record, that the impugned reports were covered by privilege; and that in addition, the defendants had asserted in their pleadings the defence of fair comment , and that this would entitle them to have a day in Court, to adduce evidence and to prove their claim. The deponent further averred that the plaintiff had failed to exercise his right under section 7A of the Defamation Act (Cap. 36), to issue a rejoinder to the impugned articles, to be published by the defendants even though the plaintiff had been invited to do so on 16th April, 2003.

The applicant in his earlier affidavit (attached to the first Chamber Summons) of 10th July, 2003 had deponed that he had, on 3rd July, 2002 been charged at the Kibera Magistrate's Court with several offences, in Criminal Case No. 4935 of 2002; and on 29th November, 2002 he had been charged in Criminal Case No. 8479 of 2002. In Miscellaneous Civil Application No. 87 of 2003 he moved the High Court, which issued orders of prohibition and certiorari in relation to Criminal Case No. 8479 of 2002, and he was then acquitted under Section 210 of the Criminal Procedure Code. Counsel for the applicant, Mr. Odhiambo submitted that the defendants' publication was not on a matter of public interest and was in any case malicious and so qualified privilege as a defence was unavailable to the defendants. He contends that although the charges brought against the plaintiff at the Kibera Law Courts, namely (i) conspiracy to defraud, (ii) making of a document without authority, (iii) uttering a document with intent to deceive, and (iv) forgery, had been withdrawn by entry of nolle prosequi on 28th November, 2002 the defendants had failed to publish this fact. Instead, counsel contended, the defendants had given the impression that their earlier reports that the defendant was a member of a cartel of lawyers and doctors which had defrauded factories, had given valid accounts. Counsel stated that in the judicial review proceedings brought by the plaintiff, in Miscellaneous Application No. 87 of 2003, the representative of the Attorney-General had conceded that the plaintiff had been carrying out his duties professionally as an advocate.

There is conflicting evidence on the question whether it was the plaintiff or the defendant who was responsible for the failure to publish a corrective account in respect of the impugned publications. From the plaintiff's side it is stated that, on 19th March, 2003 the applicant forwarded a rejoinder to the defendants, requesting publication at least three times, correcting wrong impressions contained in the impugned publications – but the defendants took no action. Quite obviously, for the truth to come out the right forum of hearing must be the *full trial* conducted under normal procedure.

Counsel contended that the defendants were making some desperate attempt to establish their "cartel theory", under which the plaintiff with other advocates and doctors were involved in fraud, when they cited the name of one *Julius Orenge,* also an advocate, who had been arraigned before the Magistrate's Court on criminal charges. Mr. Odhiambo contended that the defendant had not shown that the applicant belonged to any cartel of fraudsters.

Learned counsel, **Mr. Odhiambo ,** submitted that it was right that the defendants' defence be terminated without delay. He contended that the defendants could not very well invoke fair comment as a defence. He cited from *Halsbury's Laws of England* , 3rd ed. (1958), Vol. 24, at paragraph 127:

> **"…..the defence of fair comment or criticism will fail if the comment or criticism is not fair.**
>
> **"The comment must not misstate facts, because a comment cannot be fair which is built upon facts not truly stated, and if a defendant cannot show that his criticism contains no, or no material, misstatements of fact he will fail in his defence of fair comment. A material misstatement of any of the facts on which comment is made negatives the possibility of the comment being fair".**

Mr. Odhiambo contended that the facts as stated by the defendants in their impugned publications, amounted to a misstatement; and hence they cannot profit from the defence of fair comment.

Counsel sought to rely on the decision of this Court in ***J.P Wachira t/a Machira & Co. Advocates v. East African Standard Ltd,*** Civil Case No. 612 of 1996, a somewhat similar defamation case in which the Court struck out the defence *in limine* and entered judgment against the defendants on liability. In that case the plaintiff's grounds for seeking the striking out of the defendant's amended defence were as follows: that the amended defence was a sham for delaying the final hearing and determination of the suit; that the amended defence did not raise triable issues; that the amended defence was frivolous, vexatious and an abuse of the process of the Court; that the amended defence was evasive. The findings of the Court in that case are stated as follows.

> **"Having considered the pleadings on both sides, the grounds in support of the instant application as well as those in opposition thereto, plus the copies of the actual newspaper where the [matter complained of] was carried, this Court….. finds that indeed….. the matter complained of was libellous, admittedly published of and concerning the plaintiff, and by the defendants. The Court finds that the amended defence is indeed a sham ……; it is an abuse of the process of the Court; it is frivolous; it is vexatious".**

Learned counsel for the respondents, ***Mr. Majanja,*** contested the applicant's plea that the amended defence be struck out, as the basis for striking out pleadings is that they should be *utterly hopeless and beyond* ***redemption, in the sense that they disclose no triable issues*** . He submitted that the amended defence did raise several defences that ought to go on to the trial stage. On the question whether the publications were a fair and accurate report, counsel submitted that this was a factual matter that can only be established at full trial.

With regard to the defence of fair comment, counsel submitted that there was a basis of facts that led to the comments in question : the plaintiff had been charged jointly with others; and the charge was conspiracy – which showed the existence of a group of persons capable of being referred to as a "cartel". **Mr. Majanja** submitted that a relevant question was whether reasonable persons would conclude that there existed a cartel. He further submitted that the professional conduct of lawyers was a matter of public interest; and thus it was entirely in order for the defendants, in the discharge of their media reporting functions, to take up the matter covered in the impugned publications. In these circumstances, counsel submitted, the application oug*h*t to be dismissed and parties allowed to ventilate their positions in full trial.

Mr. Odhiambo in his reply stated that the applicant was not denying that charges had been laid against him; but he was contesting the report that he had been part of a cartel; would a reasonable person arrive at that conclusion? Counsel wonders why the defendants failed to make a follow-up and to report on the nolle prosequi which had been entered in the plaintiff's favour, as well as on the judicial review proceedings which had resulted in orders favouring the plaintiff. Counsel considered these failings in follow-up by the defendants to be tell-tale signals of malice, which, consequently, nullified any possible

defences of fair comment.

The plaintiff in his plaint admitted that several criminal charges had been laid against him in Kibera Criminal Case No. 4935 of 2002 (conspiracy to defraud contrary to S.317 of the Penal Code; making of a document without authority contrary to section 357(a) of the Penal Code; uttering a document with intent to deceive contrary to section 357(b) of the Penal Code; forgery contrary to section 349 of the Penal Code), and Criminal Case No. 8479 of 2002 (conspiracy to defraud contrary to section 317 of the Penal Code; making a document without authority contrary to section 357(a) of the Penal Code; uttering a document with intent to deceive contrary to section 357(b) of the Penal Code; forgery contrary to section 349 of the Penal Code).

It is common ground that all the charges above-mentioned were subsequently withdrawn, and so there was no trial process that found the plaintiff in any shape or form culpable. On this ground the plaintiff attributes malice to the defendants' reporting; because they had sensationally reported on the prosecution process, but did not follow up to set the record right when all the charges were withdrawn. The plaintiff also claims for libel on the ground that the impugned report had improperly portrayed him as a member of a cartel of professionals who had made it their business to defraud certain industrial establishments. The plaintiff applied for the striking out of the statement of defence and for an interlocutory determination of the suit in his favour, as regards liability.

The defendants in their defence claim absolute privilege, on the basis of the provisions of Section 6 of the Defamation Act (Cap. 36). They assert that –

> **"The words complained of were fair, accurate and contemporaneous reporting of the criminal proceedings before Senior Principal Magistrate Wanjiru Karanja of the plaintiff being charged with various criminal courts to wit, Criminal Case Numbers 4935 and 84479 of 2002".**

The defendants assert that the words complained of consist of substantially true statements of fact , and such expressions of opinion as emanate from these facts, are covered by the defence of fair comment on a matter of public interest.

In paragraph 10 of the amended defence the following assertion appears:

> **"… the defendants aver that a demand and notice of intention to sue was given but the plaintiff refused to exercise his right of reply as provided for by section 7A of the Defamation Act [Cap 36] by failing to issue a rejoinder to be published by the defendants despite being invited to do so by the defendants in their letter of 16th April, 2003.The plaintiff instead chose to file suit before the defendants could publish a rejoinder or correction".**

This is denied by the plaintiff; and so the important issue involved in the contending claims, remains unresolved at this point in time.

It can be stated as a general principle governing judicial practice, that the correct and just determination of the claims in a case, ultimately depends on the *special facts* of that particular case ; and it is not possible to conceive any judicial templates that must yield particular results in given categories of cases. It is not possible, for instance, to categorize the instant matter alongside the Machira cases (J.P Machira t/a Machira & Co. Advocates v. East African Standard Ltd , Civil Case No. 612 of 1996; *J.P Machira t/a Machira & Co. Advocates v. Wangethi Mwangi & Nation Newspapers)* and then determine it automatically in the way in which those cases were decided.

In the course of my analysis I have already flagged those elements in the instant matter which, owing to their considerable importance in determining issues of merit, must be fully resolved, even though the conditions for such a complete resolution do not exist as yet. For example, whether or not there was an opportunity to publish a corrective article once it was clear that the impugned publications had prejudiced the plaintiff, is a contested point which can only be resolved in the course of full trial.

Whether or not there exist legitimate perceptions of possible fraud, in the context in which criminal charges had been brought against the plaintiff, is a matter that cannot be resolved at this interlocutory stage. It must await the full trial. The question whether or not the defendants in reporting on a matter which evidently entailed the motions of the machinery of justice, were serving public cause and so could rely on a defence that rests on the public interest, has been the subject of dispute and obviously must await full trial, to be resolved. The defendants aver that the factual matters upon which they founded their reports, were in substance truthful; but this is denied by the plaintiff. Yet this is a critical question which goes to the root of the defence of fair comment which is relied upon by the defendants. The defendants, without doubt, would be hard done by if their defence were to be terminated in limine , as they would then have no opportunity to prove their case based on the defence of fair comment on a matter of public interest.

Why did the defendants not report the later Court-scene developments, in which all the charges brought against the plaintiff had been withdrawn or nullified? Might there have been malice in the failure to so follow-up? If there was malice, it would go to impair any defence of fair comment that the defendants might have relied on. But as I have already indicated, whether or not the defendants had published matter that was fair comment on a matter of public interest, is a question that ought to go to full trial.

Therefore, the presence or absence of malice must also go to full trial.

What is the significance of the word “cartel”, within the scheme of defamatory words? That this term was used by the defendants in their impugned publications is common cause. But it is only the plaintiff and not the defendants who attributes depreciatory meaning to it. How would the ordinary man or woman perceive it? This can only be ascertained when evidence is adduced orally in Court, being subjected to the normal examination process.

When he attributes falsehood to the defendants’ impugned articles, the plaintiff insists that the truth was lodged within the four corners of the Court record, and why didn’t the defendants draw on it and thereby save the plaintiff’s reputation? The defendants assert that their reports were contemporaneous with the events taking place in Court and were made in good faith. What really was expected of the defendants’ reporters? Justice in the instant matter, I would say quite categorically, cannot be arrived at except by having evidence for the parties led in full trial. There is no basis for a threshold termination of the suit on file, through interlocutory judgment.

I will therefore make the following orders:

1. The plaintiff’s prayer that the defendant’s amended defence be struck out, is refused.

2. The plaintiff’s prayer that his suit should proceed to formal proof, is refused.

3. The plaintiff shall, within 30 days of the date hereof, obtain a date at the Registry for the hearing of his suit, which date shall be given on the basis of priority.

4. The plaintiff shall bear the costs of this application in any event.

DATED and DELIVERED at NAIROBI this 28th day of January, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the plaintiff/applicant : Mr. Odhiambo, instructed by M/s Wilfred C. Odhiambo &

Co. Advocates

For the defendants/respondents : Mr. Majanja instructed by M/s Mohammed & Muigai advocates