



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Suit 126 of 2000

HON. LAWRENCE SIMIYU SIFUNA.....PLAINTIFF

VS

1. BUNGOMA COUNTY COUNCIL)

2. CLLR OSCAR MAKOKHA)

3. LUKE KAPCHANGA)

4 NATION NEWSPAPERS LTD)DEFENDANTS

RULING

Luke Kipchanga and Nation newspapers Ltd the 3rd and 4th defendants respectively filed a chamber summons pursuant to provisions of Order VI rule 13 (1) (a) of the civil Procedure rules in which they prayed for the amended plaint to be struck out for disclosing no reasonable cause of action. The plaintiff filed grounds of opposition to resist the summons. The applicants are of the view that since the plaintiff did not file a verifying affidavit to accompany the amended plaint then the plaint should be struck out.

They cited Order VII rule 2 (2) of the Civil Procedure to buttress their argument. The decision of Lady Justice S. Ondeyo in Nakaru **H.C.C.C. No. 83 of 1998 DANIEL KINYANJUI VS CARTUBOX INDUSTRIES E.A. LTD** was referred to persuade this court. The plaintiff argued that it was not necessary for him to file another verifying affidavit where he filed one to accompany the original plaint. Lady Justice (retired) Ondeyo when faced with a similar situation like the one in this matter held that the action was incompetent and proceeded to strike out the plaint. It is not in dispute that the amended plaint is not accompanied by a verifying affidavit. Critically looking at order VII rule 2(2), it is clear that a plaint must be accompanied by a verifying affidavit. It does not require any verifying affidavit to accompany an amended plaint. Furthermore order VII rule 2 (3) gives this court discretion to either strike out or otherwise refuse to do so. In my view even if it was a mandatory requirement that an amended plaint must be accompanied by a verifying affidavit, this court still has the discretion to give limited time to the plaintiff to file one in line with its calling to do justice in the matter by saving the action.

In the circumstances therefore I respectfully disagree with my learned sister, that the absence of a verifying affidavit renders the plaint invalid.

The applicants also complained that the plaintiff did not provide particulars in the plaint as required under Order VI rule 6 A (1) of the Civil Procedure rules. On the other hand the plaintiff was of the view that the plaint contained all the particulars required in law.

On this issue it is imperative to examine the provision of Order VI rule 6 A (1) which reads as follows:

“Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense after their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.”

At paragraph 9 of the amended plaint the plaintiff states as follows:

“The said outbursts in their natural meaning meant or were calculated to portray the plaintiff as a member of parliament who should not be honourable, an irresponsible person who cannot pay his debts, and or unable to manage his affairs and or obligations and generally therefore a person who is unfit to hold on honourable office. The publications were calculated to hurt the plaintiff in his business relations and in his office as an honourable member of parliament, he has been injured in his pride and exposed to ridicule odium and public scandal.”

I have intentionally reproduced the provisions of Order VI rule 6 A(1) and paragraph 9 of the plaint. The law requires that where a litigant alleges words were used in a defamatory sense other than their ordinary meaning he must give particulars. In this matter the plaintiff clearly states that the defamatory words were used both in their ordinary and defamatory sense. It would appear that the plaintiff therefore had an option of either giving particulars or declining to do so. A close perusal of paragraph 9 of the plaint shows that the plaintiff has given particulars I therefore see no merit in this objection. In my view even if the plaint did not give the particulars, the provisions under which the applicants have premised their application gives this court a wide discretion to either strike out the plaint or alternatively grant the plaintiff leave to amend the plaint. I wish to adopt the statement made by madam J.A. as he then was in the case of **D.T. Dobie & CO. LTD VS MUCHURA & ANOTHER C.A. NO. 37 OF 1978 U.R.** where the learned Judge said:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

I have already indicated that particulars were specified in this hence the objection has no merit.

The final ground argued in support of the summons is that the amended plaint contravenes the provisions of order VII rule 1 (e) of the Civil Procedure Rules. I was therefore urged to strike out the plaint. The plaintiff admitted the fact that the plaint did not comply with the provisions of Order VIII rule 1 (e). Mr. Kituyi who appeared for the plaintiff submitted that the failure to comply with that law did not render the whole plaint fatally defective. He saw the objection over the defect as technical which can be cured by an amendment.

I have anxiously considered the submissions of both counsels over this issue. I find that the rule is mandatory. The rules committee introduced the sub-rule to avoid a mischief. In my view though the wording of the provisions is mandatory in nature, I hold that the same does not go to the jurisdiction of the matter nor does it prejudice the defendants in any way. The applicants have not alleged nor shown the prejudice they would suffer. Again, I must repeat that the provisions of Order VI rule 13 (1) gives this court the discretion either to strike out or allow an amendment.

The legal statement of the late Madan J.A. (supra) comes to play here. I would accordingly grant leave to the plaintiff to amend the plaint within 15 days from the date hereof so as to comply with the provisions of order VII rule 1 (e) of the civil procedure rules. The final order is that I decline to strike out the plaint. However costs of the summons are awarded to the 3rd and 4th defendants in any event.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE