REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 348 of 2005

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GEORGE JOSHUA OKUNGU ……..……. PLAINTIFF

VERSUS

TOM MSHINDI ……...……1ST DEFENDANT

THE STANDARD LIMITED…….……2ND DEFENDANT

RULING

By his Chamber Summons of 6.5.2005 the applicant seeks to strike out the defence filed herein on behalf of the Respondents under O VI rule 13 (1)(b), (c) and (d) of the Civil Procedure Rules and applies for interlocutory judgment and an order for the assessment of damages.

The application is supported by the affidavit of the Applicant in which he depones that despite a letter of demand being sent the Respondents have failed to publish an apology.

He depones that the report in which the words complained of were contained is non existent and fraudulent. In support of this allegation he annexes a letter from the Auditor General (State Corporations) in which he states that his office had not at any time issued a report which is referred to in the publication to which the Applicants allege is defamatory.

He further alleges that the defence is a mere sham. The plaint sets out the contents of the article published in the East African Standard of the 15.2.2005.

It alleges that the words were false, malicious and defamatory as particularized in the Plaint.

The statement of defence from both Respondents admits publishing the words complained about but denies the same were published falsely or maliciously. It denies the words were published in circumstances in which the Respondents could rely on qualified privilege pursuant to Section 7(1) of the Defamation Act and gives particulars thereof.

Further it is alleged that the words published were fair comment on a matter of public importance as particularized. It is denied the words had the meaning ascribed thereto in paragraph 5 of the plaint and denied malice.

It further denies that the Applicant is entitled to damages or that the words published were such that the Applicant suffered scandal ridicule, odium and contempt.

The Applicant relied on the cases of ***London Artists Ltd and Fuller (1969) 2 ALL ER p 193, Joiput v Cycle Trade Publication Company (1964) 2 KB p 292 and Kitho v Chadwich & Another 1975 EALR p.141.*** In each of these cases an appeal court was dealing with appeals against the findings of the lower court and dealt with the law relating to fair comment and privilege. It is not suggested in any of these cases that these defences do not exist but dealt with whether the same had been established on not in a trial on which these defences had been raised.

The jurisdiction to strike out a pleading is there to terminate proceedings at an early stage where not to do so would allow matters to go to hearing which are clearly unsustainable and would amount to a waste of the courts time and be an abuse of the process of the court.

In the case of ***DT Dobie & Company (Kenya) Ltd v Muchina (1982) KLR page 1 in which Madan J.A*** cited with approval a passage from a number of cases including a passage from the case of ***Kellaway v Bury (1892) 66 LT at page 602 where Lindley J stated*** as follow: -

"**It has been said more than once that rule is only to be acted upon in plain and obvious cases and in my opinion, the jurisdiction should be exercised with extreme caution".**

A court will be slow to strike out a pleading where the facts or matters contained therein show a reasonable defence. It is not a time to go into the facts with a view to determining which of the parties is correct or not, indeed to do so would be wrong.

In this case the question of the validity of the report the subject matter of this suit was not denied as being in existence in the plaint. It was only in the Reply to Defence that an issue was raised that no report issued (was written by the Auditor General (State Corporation).

Whether or not such a report was written is an issue to be determined at the hearing. The defences of privilege and fair comment on a matter of public importance are defences permitted in Law not only under the Defamation Act but also the Common Law.

The Applicant referred to the case of ***J.P Machira t/a Machira & Co. v Wangethi Mwangi & ano. C.A No. 179 of 1997.*** I have read the judgment in that case and nowhere do I see that the learned Judges of Appeal held that the defences of privilege and fair comment do not exist. The decision was made on the special facts in that case and do not in my view lay down any special principle of law with regard to privilege fair comment and the question of malice.

Having considered the defence filed I am of the view that it raises triable issues which should go to hearing. In the result. I dismiss this application with costs to the Respondents.

Dated at Nairobi this 12th day of October, 2005.

P.J RANSLEY

JUDGE