

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT 614 OF 2004

PRAXIDES WEKESA PLAINTIFF

VERSUS

**DONALD KIPKORIR T/A KIPKORIR, TITO & KIARA ADVOCATES
DEFENDANT**

RULING

In this application, made under Order 6 Rule 13 (1) (b) and (d) of the Civil Procedure Rules, the applicant wants the suit against the 1st defendant struck out with costs, on the ground that the Plaintiff is frivolous, vexatious and an abuse of the court process.

Mr Imende, Counsel for the Applicant, submitted that the Plaintiff disclosed no cause of action, and that it was “frivolous, vexatious and an abuse of the court process” because the alleged defamation was based on a letter written under Advocate/Client privilege, and was not actionable. He cited Gately on Libel and Slander on “Privilege of Advocates” (pages 292 – 293). He also cited the English case of DDSA Pharmaceuticals vs Times Newspaper Ltd (1972) 3 AER 417 where Lord Denning struck out a Plaintiff that he found was embarrassing and defective because the words complained of had not been set out to explain how they were defamatory of the Plaintiff.

I am grateful to Mr Imende for his industry and good presentation of his case. However, I must disagree with him that the Plaintiff filed here is frivolous, vexatious and an abuse of the process of the court. The Plaintiff clearly sets out the relevant portion of the letter written and published by the Defendant that is alleged to have defamed the Plaintiff. Paragraph 6 of the Plaintiff explains how the words complained of were meant to defame the Plaintiff. The Plaintiff has all the necessary ingredients required of pleadings.

With regard to the argument of “privilege”, that is a matter for the trial Judge to determine whether in the circumstances of this case, and based on the evidence before the Court, the defence of privilege applied. I cannot do that in a summary manner. The Court’s summary powers should not be invoked except in very clear situations.

Madan, J A, as he then was, has placed the law of striking out the pleadings in proper footing in the case of D. T. Dobie & Company (K) Limited vs Muchina & Another (Civil Appeal No. 37 of 1978). He stated:

“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 a 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”.

He has adopted various definitions of a cause of action and one of them is as per Lord Pearson who observed that “a cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.”

In Trade Bank Ltd vs Kersam Ltd (HCCC # 6662 of 1991 – Nairobi) Pall, J, (as he then was) stated that “the exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleading in question is on the face of it unsustainable.” In Samuel Gitonga vs Peter Mugweru (HCCC # 3356 of 1989 – Nairobi) Bosire, J (as he then was) said “striking out pleadings is a draconian measure. It must and can only be done in the clearest of cases – viz. where it is clear that the defence or plaint as the case may be is beyond resuscitation by amendment.”

This is clearly not one of those situations where the Court should invoke its summary jurisdiction.

Accordingly, the application dated 3rd March, 2005 is dismissed with costs to the Respondent/Plaintiff.

Dated and delivered at Nairobi this 1st day of December, 2005.

ALNASHIR VISRAM

JUDGE