REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL CASE NO 353 OF 2001

ALI ONAMU APIDI……..……PLAINTIFF

VERSUS

SHAKEEL AHMED SHABIR & ANOTHER…..... DEFENDANTS

RULING

Shakeel Ahmed Shabir was, until, December 2002 a nominated councilor of the Kisumu Municipal Council (hereinafter called 'the council'). He was also the Mayor of the said Council. In the last quarter of 2001, the Council suspended its Town Clerk and Treasurer.

The matter of suspension was discussed during a visit to the town hall by a Government Minister and later in Nairobi between the Mayor and the then Minister for Local Government. Both visits and the discussions that ensued featured in the Daily Nation issue of 22nd and 27th September 2001, respectively.

Ali Onamu Apidi, the suspended Town Treasurer, being aggrieved by the reports, decided to file a suit against Shabir and the Nation Media Group Limited, who are said to be the proprietors of the Daily Nation amongst others. I shall refer to the two as the 1st and 2nd defendants/respondents respectively.

Apidi avers that in the issue of the Saturday Nation of 22/9/2001, the 2nd defendant falsely, unlawfully, maliciously and without justification printed and published, the following words:

" A Minister yesterday supported the suspension of two Kisumu Municipal Council Chief Officers. Mr Raila

Odinga (Energy) said he had been briefed about the alleged financial improperties in the Council and was satisfied the councillors had made the right decision to through out Town Clerk Tubman Otieno and Treasurer

Ali Onamu Apidi……On Tuesday, Mayor Shabir led Councillors in ousting Mr Otieno and Mr Apidi accusing them of mismanaging council finances

…….Mayor Shabir claimed the suspended officers had failed to account for council funds…….Meanwhile, traders in Kisumu yesterday accused the Chief Officers of illegally trying to obtain money from them."

It is also his averment that in the issue of the Daily Nation of 27/9/2001 the 2nd defendant falsely, unlawfully, maliciously and without justification printed and published the following words;

“Mayor Shakeel Ahmed Shabir yesterday told Mr Kamotho that he (the Mayor) enjoyed the support of Kisumu residents and their elected civil leaders. He warned the Minister of a possible backlash from the town’s councillor if he ignored their allegations against the suspended officers ……We’ll not stand back and allow Chief Officers loot Kisumu like this. We’ve tripped but haven’t fallen. Mr Shabir said his team had vowed to stand by their decision to send on compulsory leave Town Clerk Tubman Otieno and Treasurer, Ali Onamu Apidi”.

He claims that the said statements which he attributes to the 1st defendant were understood to refer him, and were, and that in their material and ordinary meaning, the statements were meant or were understood to mean he is an incompetent, corrupt and dishonest individual who is unfit to be entrusted with carrying out any public work, duty, or to hold any public office, that he has been greatly injured and his credit and reputation brought into ridicule contempt and odium in the eyes of the right-thinking members of society and further, that by their publication the defendants intended to mean, and were understood to mean that he is an extortionsit, a criminal and an undesirable person who is not fit to be employed, as he cannot be entrusted with public funds.

He blames the defendants for the damage, which he claims to have suffered, and he originally prayed for general, and exemplary damages for defamation of character, costs and interest.

He later filed an amended plaint on 11/10/2001, and in which, apart from averring that the 2nd defendant is also a website, he prayed for additional damages by way of aggravated damages for defamation of character and an unconditional apology or damages in lieu thereof.

Though he had filed a verifying affidavit in support of his original plaint, none was filed in support of the amended plaint, an issue that was to be raised by the defendants.

Both the defendants who have filed lengthy and detailed defences, deny all the allegations. Shabir denies that the words purported to have been published contained therein are attributable him, but otherwise pleads justification, and avers that the same amounted to fair comment on matters of public interest, and that the plaintiff being a public officer under public scrutiny, then his action would qualify as a privilege. It is thus his contention that the plaint does not disclose any or any reasonable cause of action against him. The 2nd defendant also denies the plaintiff’s claim that it falsely, unlawfully, maliciously and/or without justification printed or published any statement concerning him in any of it’s publications. It also denies that in it’s Daily Nation issue of 27/9/2001, or in any other issue, it falsely, or unlawfully, or maliciously, or without justification printed and/or published of any matters concerning him as alleged. It takes issue with several of the paragraphs of the amended plaint, which it contends are misconceived, embarrassing and incompetent. It also denies that the said statements in their ‘material’ and ordinary meaning meant and/or were understood to mean what is alleged or that by publication of the said words he has been greatly injured, or that his credit, or reputation has been brought into ridicule, or contempt, or odium in the eyes of the right thinking members of society, as alleged. Like the 1st defendant, it also avers that the plaintiff has disclosed no or no reasonable cause of action against it. It also denies that it has declined to publish an apology and/or retraction of the said words, as alleged, or at all. It also avers that if, which is denied, the words quoted in the alleged paragraphs alleged, the said words were not printed or published with the meanings attributed to them in the plaint, that the alleged words did not mean and were not understood to mean what is alleged, and that the said words without the alleged meanings are not defamatory, and further, that the alleged words or some of them, did not refer and were not capable of referring to the plaintiff at all, or in a libelous context.

Alternatively and without prejudice to the foregoing, it avers that if the words quoted in the amended were printed, or published, then, in their natural and ordinary meaning were true in substance and in fact, or alternatively they consisted statements of fact, or they were printed and published in pursuance of a social and moral duty and in the protection and furtherance of a legitimate interest to the members of public in Kenya who had a common interest with it in the matter of management of the Council and other local authorities in Kenya and the right of tax payers in Kisumu Municipality and in Kenya to know how revenue collected by the Council and other local authorities in Kenya is utilized and that the said words were published bonafide and without malice towards him, under a sense of public duty and in the honest

belief that the words were true.

It thus pleads privilege, and fair comment on matters of public interest, particulars of which it has given.

The plaintiff who did not file a reply to the defenses, has now moved this

Court, by way of a chamber summons application taken out under order

VI rule 13 (I) (b) (c) and (d) of the Civil Procedure Rules, and in which he prays that the defences be struck out and that judgment be entered on liability against the defendants jointly and severally, after which the suit should proceed to formal proof. He also prays for the costs of the application.

The application is made on the following grounds:

"1. That the defences filed herein are scandalous frivolous and vexatious.

2. That the defences filed herein may prejudice embarrassment or delay the fair that of the action.

3. That the defences filed herein are otherwise abuse of the process of the Court'.

Both the defendants oppose the application as misconceived frivolous, fatally defective and incompetent, and that the supporting affidavit and its annexures ought to be expunged from the records. They also oppose the application on the ground that there is no competent suit and that their defenses raise triable issues.

In their very industrious nature, the counsels cited several authorities, I am grateful for their efforts.

The first issue for may determination is whether or not the suit is incompetent, as the amended plaint is not supported by a verifying affidavit. A look at the said plaint which forms the basis of this suit reveals that apart for the plaitniff's averment that the 2nd defendant is "also a website" he also sought additional orders I his prayers for "aggravated damages" as well as an unconditional apology or damages in lieu thereof"

It is a requirement under order VII rule (2) it being mandatory in nature that the plaint shall be accompanied by an affidavit to verify the averments that are contained therein. The amended plaint contains an averment, for which the plaintiff should have filed a verifying affidavit. Lack of such an affidavit would and does render this suit a nullity.

Be that as it may, the grounds upon which an application that has been brought under order VI rule 13 (1) should never be merged, or be complimentary to one another. One can discern this from the manner in which the said order is drafted. It clearly indicates that each of the ground should be a separate ground hence the use of the words "or" at the end of the enumerated grounds. This application is based on three grounds, as shown hereinabove, which in my humble opinion contravene the above requirements, as they are complimentary to one another. In view of the fact that such a situation is undesirable, this application is fatally defective, in which case it is bound to fail.

But even if am wrong in the above finding, the defence counsels have taken issue with the application, whose supporting affidavit, they say, offends section 35 of the Advocates Act (cap 16), which stipulates that:

"(1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be

guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified

person or fine not exceeding five hundred shillings in the case of an advocate;

Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be name and address of such advocate or firm.

(2) The Registrar, the Registrar of Titles, the Principal Registrar of Government Lands, the Registrar-General, the Registrar of Companies and any other registering authority shall refuse to accept or recognize any document or instrument referred to in section 34 (1) unless such document or instrument is endorsed in accordance with this section."

The said affidavit does not disclose the person who has drawn it, or even filed it. This is in contravention of the above legal requirement. Such an omission renders it fatally defective, and it should not have been accepted, to form part of the records. It is hereby struck off, which leaves the application a mere empty shell with no support, and whose chances of success would obviously be nil.

Though the defendants have pleaded fair comment and qualified privilege it is trite law such defenses can be destroyed by malice whether express or implied. It is however for the plaintiff to impute the malice satisfactorily.

It was for the plaintiff to file a reply to the defenses, "giving particulars of the facts and matters from which the malice is to be inferred (order VI rule 6A (3) of the Civil Procedure Rules). This is a mandatory requirement.

It is not for the Court to infer such malice, where none had been satisfactorily pleaded.

But even If I am wrong in the above findings, I am guided by the legal principle that the powers of striking out are drastic and should only be exercised with great caution, and even then only in the clearest of cases.

If, it is clear that no useful purpose would be served by a trial on the merit, orders should be granted.

I do appreciate the fact that where a defendant shows that he has a *prima facie* based on even a single, bona fide triable issue, or that he has an arguable case, he should be given leave to defend the suit. Such was the gist of the finding in *Orbit Chemical Industries Limited v Maytrade Limited and another* HCCC 631 (Milimani) 631 of 1998.

The defendants have denied that their actions were unlawful or malicious. This raises triable issues. The denials that they have set up are a sufficient traverse of the allegations in the plaint. They can only be sustained in a trail on the merits, and it is therefore desirable that the issues that arise herein be heard and determined on *viva* voice evidence in court, for it is only then, and not before that, that a court can determine whether or not the publication was malicious or unlawful.

In my mind this is not a plain and obvious case where the defendants should be deprived of their rights to have their defenses tried by way of proper trial.

It is for the above reasons that I find that the application which is otherwise lacking in merit, is bound to fail. It is thus dismissed with costs.

Dated and delivered at Kisumu this 2nd day of September , 2003

J.W. GACHECHE

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JUDGE