**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**HIGH COURT CIVIL CASE NO. 534 OF 2000**

**BISHOP J. ALFRED NDORICIMPA…….PLAINTIFF**

**V E R S U S**

**THE STANDARD LIMITED……....DEFENDANT**

**R U L I N G**

The Plaintiff is the Presiding Bishop of United Methodist Church in East Africa. The Defendant is the publisher of the East African Standard which is a widely read newspaper in this Country as well as in East Africa and internationally via e-mail distribution channels and subscriptions. The Plaintiff filed this suit against the Defendant claiming general and aggravated damages for defamation. The alleged defamatory matter was contained in various publications of the Defendant dated 20th March, 2000 (at page 3), 22nd March, 2000 (at page 2) and 23rd March, 2000 (at page 2).The substance of the publications complained of was that the Plaintiff was involved in a scheme of luring Kenyan "street children" to be recruited as child soldiers in the civil war then going on in Zaire. On 30th March, 2000 the Vice President Professor George Saitoti, denied in a report published by the Defendant, that Kenyan children were involved in civil wars. On 31st March, 2000 the Defendant attempted to restate the recruitment of child soldiers in Kenya. On 5th April, 2000 the Defendant apologized to the Rwandan envoy to Kenya for having alleged in one of their earlier publications that he had confirmed the substance of the matters complained of in this case.The Defendant admitted having published the matter complained of but denied that they were defamatory as alleged by the Plaintiff. It also averred that the words complained of were fair comments made in good faith and without malice upon a matter of public interest.

On 21st March, 2000, the Plaintiff's Advocates demanded admission of liability and publication of an apology. No admission was made nor apology tendered. The Defendant's response of 29th March, 2000 was as follows:-

> ***"Our story was carried as fair information on a matter of great public interest with no malice towards your client. [W]e will be happy to publish your client's side of the story if you would let us have details urgently by return."***

The Plaintiff's Advocates responded the following day in the following words:-

> ***"Our client is a total stranger to the issues raised in your publications (referred to earlier) …….as he has never been involved in the words or reporting published therein…..our client has no side of story as you put it, as he has no story that he knows of out of your malicious defamatory words, statements and reporting (sic) which amounts to persecution of out client……[T]he so called "great public interest" is (your creation)….."***

Under these circumstances, the Plaintiff has filed the present application under Order VI Rule 13(1) (a), (b), (c) and (d) of the Civil Procedure Rules seeking to have the Amended Defence (what was

referred to as “Defence to Amended Plaint”) struck out and judgment entered in his behalf on the grounds that it is scandalous, frivolous and vexatious; that it may delay the fair and expeditious trial of this action; that it amounts to an abuse of the Court process; that it was bad in law as it had been overtaken by events; that it amounted to a mere denial; and that it was elusive.

There was argument on whether the Amended Defence filed out of time should be disregarded but nothing much would be achieved in this. The original Defence and the Amended Defence are substantially similar. In any event, this Court considers that to disregard a pleading, however, irregularly placed on record would not achieve justice in a draconian procedure such as this one.If the irregular Amended Defence raises any triable issues, that is a matter sufficient to disentitle the Plaintiff to the remedy sought in this application as will be seen later.

The Defendant admitted having published the matter complained of but denied that it was false, malicious or negligently published. It denied that the matter complained of was defamatory. The objection taken to the Plaint in paragraph 5 of the Defence that the suit was incompetent for failure to comply with Order VI Rule 6A (1) of the Civil Procedure Rules appears to have been cured when the Plaint was amended as mentioned earlier and no argument on that matter was raised at this hearing.In paragraph 6 of the Defence it was averred that the matter complained of was “fair comment made in good faith and without malice upon a matter a public interest.” The following particulars were pleaded under Order VI Rule 6A:-

> ***“a. That a terrible war is being waged in the Democratic Republic of the Congo;***
>
> ***b. That mercerizes (sic) from all over Africa are being used in the war;***
>
> ***c. That the Plaintiff is the head of the United Methodist Church in East Africa.***
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> ***d. The church own members have requested the Government of Kenya to investigate the activities of the Plaintiff regarding the export of Kenyan children to the Congo to fight in the war.***
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> ***e. The Permanent Secretary in charge of Internal Security of the Kenya Government has assured the public that the matter is being investigated.***
>
> ***f. In the premises the story carried on the Plaintiff was fair comment on a matter of public interest.”***

Paragraph 7 of the Defence reiterated that the matter complained of was not defamatory and stated that the Plaint did not disclose a cause of action as it did not supply the particulars of defamation. This was also remedied by the amendment of the Plaint and it is no longer relevant for present purposes. In paragraph 8, the Defendant stated that the matter complained of was published innocently without malice and that it offered to “publish a rejoinder and or a correction in its letter of 29th March, 2000 addressed to the Plaintiff’s Advocates but the Plaintiff provided none. As such this claim is compromised under the provision of section 16 of the Defamation Act Cap. 36 Laws of Kenya.” That Section deals with mitigation of damages in cases of defamation and is not relevant to the issue before the Court. Paragraph 9 denied that the Plaintiff had suffered any injury. The other paragraphs are not relevant for present purposes.

The reason I have set out the allegations in the Defence in detail is because I am called upon, in this application, to exercise a draconian power which the Courts have stated should be exercised with the greatest care and circumspection and only in the clearest cases. This is a summary process which may be exercised without the benefit of pre-trial discovery or other pre-trial processes and without a plenary trial, that is, without hearing the evidence of witnesses examined and cross-examined orally in open Court. I have carefully warned myself over these matters by considering the useful authorities supplied by both Counsel as well as others which I have had the benefit to come across in the course of drafting this Ruling.The Learned Authors of PLEADINGS: PRINCIPLES AND PRACTICE (Sir Jack Jacob and Iain

S. Goldrein, London (1990) Sweet & Maxwell) at pp 211 and 212 and HALSBURY'S LAWS OF ENGLAND (4th Edition, Volume 37 (Lord Hailsham of St. Marylebone London (1982) Butterworths) at page 318 state that the Court's power to strike out pleadings are salutary and necessary to not only enforce the basic rules of pleadings but also to dispose of proceedings which are hopeless, baseless or without foundation in law or equity or are otherwise an abuse of the process of the Court. Those authors go ahead and state at pages 215 and 318 respectively that this power is permissive and not mandatory which confer a discretionary power that should be exercised in the light of all circumstances regarding the offending pleading.In exercising this discretion, the Court must weigh between a party's right to a hearing and the principle that a party is not to be harassed and put to expense by frivolous, vexatious or hopeless litigation. This is a fine exercise which requires a judge to act with extreme caution. In this respect, a judge is well guided by what FLETCHER-MOULTON, L.J. said in **Dyson v. A.G**. [1911] 1KB 410 and what our own MADAN, J.A. (as he then was) said in **D.T. Dobie & Co. (K) Ltd v. Joseph Mbaria Macharia & Ano.** NAIROBI C.A. Civil Appeal No. 37 of 1978 (Unreported) (Himself, MILLER & POTTER, JJ.A.). In Dyson, FLETCHER – MOULTON, L.J. said as follows at page 419:-

> ***"To my mind it is evident that our judicial system would never permit a Plaintiff to be driven from the judgment seat in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost inco ntestably bad."***

(See pages 214 and 215 of PLEADINGS, PRINCIPLES AND PRACTICE supra). MADAN, J.A. (as he then was), on the other hand, after setting out a number of authorities which enunciated various principles guiding the power of striking out said as follows at pages 8 – 10 of his judgment:-

> ***"I would sum up. It is relevant to consider all averments and prayers when assessing under Order 6 rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits tha t may be filed in support of an application that a pleading is otherwise an abuse of the process of the court, for under subrule 13(2) as hereafter set out, while evidence by affidavit is not permitted in the case of the first application, it is permi tted in the case of the second application. Subrule (2) provides: -***
>
> > ***"(2) No evidence shall be admissible on an application on subrule (1)(a) but the application shall state concisely the grounds upon which it is made."***
>
> ***The court ough t to act every cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At thi s stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits***
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> ***"without discovery, without oral evidenc e tested by cross - examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomforta ble or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering its elf in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.***
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> ***Normally a law suit is for pursuing it. [N]o 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."***

(Cited in **Moses Karienya Yohanna v. George Cheyne** NAIROBI C.A. Civil Appeal No. 72 of 1990

(Unreported) (GACHUHI, COCKAR (as he then was) & AKIWUMI, JJ.A.)

However, this does not impose upon the Court a duty to hear every case. The Court also has the compelling duty to protect the public and the suitors from being scandalized (see Christie v. Christie (1873) L.R. 8 Ch. 499 at p. 507 per SELBORNE, L.C.)

Under Order VI rule 13 of the Civil Procedure Rules, apart from the power to strike out a pleading for not disclosing a reasonable cause of action or defence the Court is also empowered to strike out or order to be amended any pleading which is scandalous, frivolous or vexatious or which may prejudice, embarrass or delay the fair trial of the action.Express power is also given to strike out or order to be amended a pleading that "is otherwise an abuse of the process of Court." In a decision recently delivered by me early this year in **Brite Print (K) Ltd v. A.G.** NAIROBI HCCC NO. 1096 of 2000, I had the opportunity to consider the question as to when a pleading can be said to be scandalous, frivolous or vexatious; when a pleading may prejudice, embarrass or delay the fair trial of the action; and when a pleading is otherwise an abuse of the process of Court. In doing that I drew heavily from the Learned Editor of MULLA CODE ON CIVIL PROCEDURE (ABRIDGED) (13th Edition, P.M. Bakshi, Butterworths India (2000) New Delhi) (See pages 696, 697 and 698). In that Ruling, I said at pages 3 and 4 that although the law gives the parties freedom to frame their cases as they wish a pleading that is unnecessary and which tends to prejudice, embarrass and delay the trial of the action is one which is beyond that right (see also **Knowles v. Roberts** (1888) 38 Ch. D 270 at p. 271.)

It should be noted that the power of the Court in these matters is drawn both from the rules of procedure and the Court's inherent power (see **Brite** supra at p. 4, **HALBURY'S** supra at p. 318; and PLEADINGS: PRINCIPLES AND PRACTICE at page 212); This Court cannot allow a party in any case to use its record as a means of perpetuating libelous and malicious slanders (see STORY'S EQUITY READINGS (10th Edition at Section 270). Irrelevant pleadings cannot be allowed to stand if their only motive is to delay the fair trial of an action and if their effect is to put a party to undue hardship and expense. Pleadings must always maintain relevancy by dealing only with the important matters raised in the opposite pleading.An averment is useless if it has no base and as the Court of Appeal stated in Raghbir Singh Chatte v. National Bank of Kenya Ltd KISUMU C.A. Civil Appeal No. 50 of 1996 (Unreported) (OMOLO, AKIWUMI, & LAKHA, JJ.A.) – with LAKHA, J.A. dissenting; a general denial is insufficient and, in my view, will fall within the scheme of unacceptable pleadings.

On the same point my Learned Brother RINGERA, J. said as follows in **Lynette B. Oyier & 2 Others (Legal Representatives of Johnson Alfred Oyier (Deceased)) v. Savings & Loan Kenya Ltd** NAIROBI HCCC 891 of 1996:-

> ***"The function of the Court in its jurisdiction of striking out pleadings under Order VI rule 13 of t he Civil Procedure Rules is not to determine whether the action or defence as framed will or will not succeed at the trial. That is the function of the trial Court after hearing evidence and legal submissions. The function of the Court under that juri sdiction is to determine whether the pleadings have been formulated in accordance with established rules of pleading and to impose appropriate sanctions if they have not been so formulated. In other words it is the soundness of the pleading itself which is the concern of the Court at that stage in the litigation."***

I agree with him. If the Court is satisfied by the summary procedure that a pleading is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the Court, it is given express power to stay the suit, dismiss it or enter judgment accordingly. Where the Court on these grounds orders a Plaint to be struck out, the suit is dismissed; and where it orders a defence to be struck out it may enter judgment accordingly. In all cases under Order VI rule 13 of the Civil Procedure Rules the Court can either strike out or order the pleading to be amended. However, if the Court is of the view that the pleading can be remedied by amendment, it may order amendment.Amendment is not an issue here but it is clear from decided authority that a Court in deciding whether or not to allow an amendment must consider whether the amendment can save the pleading.

I have said that I agree with my Learned Brother's statement in the quote above that it is the function of this Court to determine whether the pleading have been formulated in accordance with established rules of pleading and to impose appropriate sanctions. This involves a determination on whether the pleading as framed should be struck out or amended. That aside, the following words stated by my Learned Brother in that case at page 7 of his judgment in explaining what an offending pleading under these matters is worth reproduction here. He said as follows:-

> ***"The learned editors then give several examples of what an offending pleading under the subrule would consist of. From the examples given one discerns that a pleading is embarrassing when it is ambiguous or unintelligible or when it contains a claim or defence which a party is not entitled to make. On the other hand, a pleading is not embarrassing because it contains allegations which are inconsistent or stated in the alternative provided t hey are pleaded clearly and distinctly in separate paragraphs. And it is not embarrassing merely because it is probable that the allegations made may ultimately turn out to be untrue infact or because points of law are stated or alleged which may tur n out to be bad. [A pleading will be held to be one tending to prejudice or delay fair trial if it states matters which are immaterial and thus raise irrelevant issues which may involve expense, trouble and delay or if it does not state the claim or d efence sufficiently and clearly.]"***

That should have sufficed on these matters but I am compelled to consider the case of J**.P. Macharia t/a Macharia & Company Advocates v. Wangethi Mwangi & Ano**. NAIROBI C.A. Civil Appeal No. 179 of 1997 (Unreported) (OMOLO, AKIWUMI & BOSIRE, JJ.A.) which is an authority closer to the matters presently before the Court. In that case, the Appellant, an Advocate of this Court, was depicted in his professional capacity as having behaved disgracefully in the **Daily Nation and Taifa Leo** of 9th October, 1995. The 1st Respondent was the Editor of both newspapers which were published by the 2nd Respondent.

The Appellant supplied the Respondents documents to correct the wrong impression created by the publication but nothing of the sort was done.Upon damage having been done, the Respondents tendered an "apology". On the Appellant's suit in this Court, the Respondents filed a defence in which they denied having printed the offending matter "falsely and/or maliciously". The Appellant applied to have the defence struck out under Order VI Rule 13(1) (b), (c) and (d) of the Civil Procedure Rules. That application was refused (MBOGHOLI-MSAGHA, J.) On appeal to the Court of Appeal the defence was struck out. The Court of Appeal found that the Respondent's defence was scandalous, frivolous and vexatious and an abuse of the process of the Court for insisting in the defence matters which could not be supported by clearly available evidence. In that case, although it had been expressly stated in the "apology" that the offending allegation was false, the Defence attempted to state otherwise.

The importance of the Machira decision is that it tones down the broad statement of the law propounded by MADAN, J.A. (as he then was) in D.T. Dobie which has been misunderstood sometimes by practitioners that a case may not be terminated summarily by the "draconian" procedure of striking out. In a clear and proper case that process is necessary to avoid having to go through an unnecessary process of a full trial without beneficial result. On this matter, OMOLO, J.A. said as follows in Machira at page 11 of his judgment.

> ***"I agree that disputes ought to be heard and determined on oral evidence in open court, but I would at the same time point out tha t there is no magic in the act of holding a trial and receiving oral evidence; in other words a trial cannot be held merely because it is normal or usual to hold trials. A trial must be based on issues, otherwise it would become a farce. Surely, it c annot require any evidence to prove that a lawyer would be hurt in his profession if it is alleged against him that he is being assaulted by his client over money. In my view, that was the substance of what the respondents conveyed by their front pa ge photograph of the appellant being collared by Ms. Njoroge. By their apology or clarification which I have already set out the respondents admitted that the impression was wrong, by which I understand***

***them to mean it was false. Now can they be a llowed to deny the allegations to that effect made by the appellant in his plaint?"***

These principles are all too clear. A Court will not deny a litigant his day in Court and a Court will not allow itself to be used to delay justice. Clear cases must be determined expeditiously with caution to ensure justice prevails. Now I must go back to consider the case before me.

Mr. Kahuthu argued that the matter complained of in this action was malicious as it was published without proof and recklessly without caring as to its truth. In that case, he argued that the Defendant was disentitled to the defence of fair comment. Citing Machira supra and Kitto v. Chadwick & Ano. [1975] E.A. 141 he argued that malice could be inferred in this case since the Plaintiff could be arrested for treason based on the publications complained of.

I have already considered most of what Mr. Majanja said before me in my analysis of the authorities on striking out pleadings some of which were supplied by him. Here, I will only comment on his argument that under Order VI Rule 13 (1) (a) of the Rules the Court cannot consider evidence. That the affidavit filed in support of the application should be ignored. This is quite clear from Order VI Rule 13(2) and requires no more authority. However, as far as the application related to the other grounds, the affidavit is admissible as is the case here.

Having considered the applicable principles, the pleadings and affidavits in this case and having heard Counsel, the question which I will endeavour to determine is this: Are the circumstances of this case clear to warrant the striking out of the defence?

There can be no question that the allegations made against the Plaintiff are quite serious. It touched on his reputation and exposed him to loss of his liberty were the authorities to take action on such information.

However, we must look closely at the Defendant's defence of "fair comment … on a matter of public interest." They considered the story as such. This case is different in one aspect from Machira. Here, the Defendant did not have correct facts when it published the matters complained of. In fact it sought, albeit belately "clarification" which the Plaintiff saw no need of supplying. Again, the Defendants stance in this case, unlike Machira is consistent with its previous conduct. In Machira, an "apology" was issued which would negate the proposed defence. In this case, the Defendant's defence of "fair comment…..on a matter of public interest" is worth exploring. The circumstances of this case are, therefore, not clear to entitle this Court to employ the draconian procedure sought. It would achieve more justice to let the Defendant have their day in Court.

If the Plaintiff will succeed at trial, damages would adequately cover the Defendant's insistence to defend the action. I, therefore, dismiss this application. The costs shall be in the cause.

**DATED and DELIVERED at NAIROBI this 22nd day of October, 2001.**

**ALNASHIR VISRAM**

**JUDGE**