



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 601 OF 2000

TIME MAGAZINE INTERNATIONAL LIMITED.....1ST PLAINTIFF

SENDA WA KWAYERA2ND PLAINTIFF

VESUS

MICHAEL FANUEL ROTICH.....1ST DEFENDANT

NATIONAL HOSPITAL INSURANCE FUND.....2ND DEFENDANT

RULING

The second plaintiff Senda wa Kwayera and the first defendant Michael Fanuel Rotich were at first trading as partners in the firm of Tele-News communications. The same Tele-News Communications was appointed by the first plaintiff Time Magazine International Limited to be the sole agent of the first plaintiff in the Eastern Africa Region. Tele-News Communication was doing among other things, sourcing for advertisement articles to be featured in the first plaintiff publication namely Time Magazine. The Tele-News Communications was also to collect payments from such advertisements articles and to remit the same to the first plaintiff. On 16th November 1998, the same Tele-News Communications entered into a contract with the second defendant National Hospital Insurance Fund for publication in the Time Magazine of an advertisement article entitled Kenya Special Profile Phase II. The total consideration of the same publication was Kshs 5,834,565. The same National Hospital Insurance Fund paid Kshs 1,760,000 as a deposit in advance, leaving Kshs 4,380,157/35 which included advertisement commission. In the intervening period, there arose a misunderstanding between Senda Wa Kwayera and Michael Fanuel Rotich. This was after Kshs 1,760,000 had been paid but before the balance outstanding was paid. The two separated with Senda Wa Kwayera registering another business name called Tele-News African and Atlantic Region. The other partner Michael Fanuel Rotich is alleged to have connived with the National Hospital Insurance Fund (the second defendant) and fraudulently registered another business name in the same and style of Tele-News Communications with himself as the sole proprietor. Having done so, the plaintiffs alleged that he (Rotich) used the same name to raise an invoice purporting it to have been raised by the original Tele-News communications and using the same invoice, he is alleged to have obtained the balance and never remitted the same balance in full to Senda wa Kwayera for payment to the first plaintiff. On 15th July 1999, the plaintiff alleges that an agreement was reached between Senda Wa Kwayera and Michael Fanuel Rotich on the way to disburse the same amount of Kshs 4,380,157/35 which the second defendant had paid and all other disbursements as per agreement were honoured except Kshs 1,573,296/90 as at 31st March 2000 which was to be remitted by the first defendants to the first plaintiff on or before 1st September 1999. The plaintiffs/applicants sued for this amount in the plaint dated 31st March 2000 and filed into the Court on 4th April 2000. They also sought interest at court rates on this amount from 1st September 1999 until payment in full and costs of the suit

plus any other relief the Court may deem just and fit to grant. The 2nd defendant filed defence stating that it paid any payment due from it to Tele-News Communication through its partners and maintains that it is a stranger to the allegation that Michael Fanuel Rotich registered another business name similar to Tele-News Communications and used that to invoice the second defendant and to obtain the money due to the original Tele-News communications. In short it denied the allegations of fraud on its part in the remitting of payment to the same Michael Fanuel Rotich. The first defendant also filed defence but as its application is yet to be heard, I do not feel it prudent to go into its defence.

Upon the close of the pleadings, the second defendant has now filed this application dated 12th November 2000 and filed into the Court on 24th October 2000. It is seeking three orders namely:

First that the suit against it be struck out as it does not disclose any reasonable cause of action. Secondly that the suit against it be struck out as it is scandalous, frivolous and vexatious and lastly that in the alternative and without prejudice to the foregoing, the suit against it be struck out on the grounds that the same is an abuse of the court process. There is only one ground for the same application and that is that on the face of the pleadings, the suit does not disclose any reasonable cause of action against the applicant as the applicant is a stranger to the suit as it has paid up all monies that were due and owing to the first plaintiff. The application is supported by an affidavit sworn by the Chief Executive Officer of the applicant, Ibrahim Hussein and two annexures. The respondent filed a replying affidavit sworn by the second plaintiff/respondent, Senda Wa Kwayera in which a number of annexures were exhibited.

The application is brought under order VI rule 13 (a) (b) (c) (d) and under the inherent jurisdiction of the Court under section 3A of the Civil procedure Act. I will take it that the applicant meant order VI Rule 13 (1) (a) (b) (c) and (d).

Order VI Rule 13 (a) (b) (c) and (d) of the Civil Procedure Rules state as follows:

“13(1) At any stage of the proceedings, the Court may order to be struck out or amended any pleading on the ground that:-

(a) it discloses no reasonable cause of action or defence; or

(b) It is scandalous, frivolous, or vexatious or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

The applicant says that the plaintiff discloses no reasonable cause of action is scandalous, frivolous and vexatious; it may prejudice embarrass or delay the fair trial of the action and/or is otherwise an abuse of the process of Court. What constitutes a reasonable cause of action? And what is a cause of action?

In the *Words and Phrases*, volume 1 page 228, cause of action is defined as follows:

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.”

and Lord Pearson in the case of *Drummond Jackson vs BMA* [1970] 1 WLR 588 at page 696 defines a “reasonable cause of action” as follows:

“No exact paraphrase can be given but I think “reasonable cause of action” means a cause of action with some chance of success when (as required paragraph (2) of the rule) only the allegations in the plaintiff are considered”.

Chitty J in the case of *Peru v Peruvian Gnano Company* 36 Ch Div 489 at page 495 and 496 says of the word reasonable as follows:

“There is some difficulty in affixing a precise meaning to the term “reasonable cause of action”...In point of law, and consequently in the view of a Court of justice, every cause of action is a reasonable cause. But obviously some meaning must be assigned to the term “reasonable”... a pleading will not be struck out unless it is demurrable and something worse than demurrable.”

I will consider later whether the plaint before me discloses a cause of action with some chance of success when only the allegations in the plaint are considered or whether the plaint is demurrable or is something more than demurrable. I need now to consider other reasons for this application. These are that the plaint is scandalous, frivolous and vexatious, or that it may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the Court process. Normally the word scandalous has been understood to mean when applied to pleadings, indecent, offensive or improper. However, in the case of *J Machira vs Wangechi Mwangi and Nation Newspaper* Court of Appeal Civil Appeal No 179 of 1997, Omolo JA after quoting Ringera J in the case of *Dr Murray Watson vs Rent-a-Plane Ltd & 2 others* HCCC No 2180 of 1994 did expand this meaning of the word scandalous. He stated as follows:

“While I would broadly agree with the judge, I can find no warrant for restricting the meaning of the term “scandalous” to only that which is indecent, offensive or improper. Surely if everybody who knows a man, including his parents know his name to be Tom Njuguna Onyango and when he is sued under these names he pleads “I deny that my names are Tom Njuguna Onyango, that kind of denial apart from being frivolous and vexatious can also be properly described as scandalous. What I am saying is that the category of what may be described as scandalous cannot be limited to the indecent, the offensive and the improper. Denial of a well known fact can also be rightly described as a scandalous.”

Again I have to consider whether the allegations in the plaint before me are indecent, offensive, improper or amount to a denial of a well known fact. How about the words frivolous and vexatious? In *Bullen and Leake Precedents of Pleadings* (12th Edition), at page 145 it is stated:

“A pleading or action is frivolous when it is without substance, groundless or fanciful and it is vexatious when it lacks bonafides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense”.

And a pleading tending to embarrass or delay fair trial is described in the same book as a pleading which is ambiguous or unintelligible or which states immaterial matter and so raises irrelevant issues which may involve expenses, trouble and that will prejudice the fair trial of the action and so is a pleading which contains unnecessary or irrelevant allegations. Lastly abuse of the process of the Court means in brief, misuse of the Court machinery or process.

I now turn to the plaint and the second defendant’s statement of defence, the application, the affidavits and the annexures to the same affidavits. Can this plaint before me be said to have fallen into all or any of the matters I have defined hereinabove?

The main issue between the parties here is that first plaintiff claims to have had an agreement with what the plaintiff says was the original Tele- News Communications. In a letter dated 8th July 1999 addressed to the first defendant (Michael Fanuel Rotich) the first plaintiff says that there was an agreement between the first plaintiff and Tele-News Communications which stated at clause 15 *inter alia* that the second plaintiff Senda Wa Kwayera was to remain the Managing Director of Tele-News Communication during the life of the agreement and was to remain personally involved in the services to be performed by representative in the agreement and that personal participation of Senda Wa Kwayera was essential term of the agreement. The Chief Executive of the applicant (2nd defendant) also refers to an agreement between it and Tele-News Communications and it claims to have made the same payment to the same Tele-News Communications, whereas Senda Wa Kwayera says that after he pulled out of the Tele-News Communications where the two of them namely himself and Rotich were partners and which partnership entered into an agreement with the first plaintiff and the second defendant, the first defendant (Mr Rotich) registered another business name of the same name as Tele-News Communications and using this new business in which Senda Wa Kwayera was not involved, he invoiced the applicant and got the money. The plaintiffs say this was with the knowledge of the 2nd defendant which is the applicant. I cannot see

this plaint as demurrable on the face of the plaint. The plaintiff is pleading fraud and has made specific allegations in the plaint citing particulars of fraud on the part of the applicant/the second defendant in which they claim that the applicant remitted the sum of Kshs 4,380,157/35 to the first defendant (Rotich) notwithstanding that they had been instructed to pay the same money to Senda Wa Kwayera and not to the first defendant. It is true that at paragraph 22, of the plaint, the plaintiff do acknowledge that the applicant did pay the money to Rotich and that part of that money has been disbursed to various persons including the second plaintiff, but they are now saying that as a result of the applicant paying this money to a person they feel was a wrong person, the part of the money that should have gone to the first plaintiff has not been paid as Rotich has refused and/or failed to disburse the same and so they still seek the unpaid part from the applicant. Whether the suit will succeed or not is not mine to decide, but even if one were to feel that the plaintiffs have now known that Rotich has their money or even if one were to feel that money could have been paid to Rotich by the applicant pursuant to agreement between Tele-News Communications and the applicant, the fact remains that in so far as the plaintiffs are saying in the plaint that this money was received fraudulently by Rotich with the knowledge of the applicant, in that Rotich registered another Tele-News Communications, there is some cause of action however weak one might view it. In the case of *DT Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another* Court of Appeal Civil Appeal No 37 of 1978, Madan JA had this to say:

“If an action is explainable as a likely happening which is not plainly and obviously impossible the Court ought not to overact by considering itself 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. Normally a law suit is for pursuing it.

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 substance 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”.

In this case the alleged agreements between second defendant (applicant) and Tele-News Communications is not before me and the agreement between Tele-News Communications and the first plaintiff is also not before me. Parties have not availed to the Court the certificate of registration of two business names each having the name Tele-News Communications. These are matters that the Court will peruse during the full hearing for I must when considering whether the plaint discloses a reasonable cause of action confine myself to plaint as it stands on the face of it. It makes the allegation of fraud and whether it may in the end be considered weak is no reason for my striking it out on the ground of want of reasonable cause of action.

Is the plaint scandalous ie is it indecent, offensive and does it deny a well known fact? I cannot say so and I have not been addressed on the same. Paragraph 22 does agree that the applicant had paid this money to Rotich, but it says such payments were not actually made to the partnership in which both of them were partners and which had an agreement with the applicant but rather was paid to a newly registered body albeit with the same name which was now being managed by Rotich and in which the second plaintiff had no interest. Whether that is true or not, I cannot say at the moment, but I cannot say that it amounts to denying a fact known to all parties or denying a fact which the plaintiffs had earlier on admitted and in any case I was not addressed on the same.

I have already stated above that the plaint has substance and is not groundless or fanciful. It thus goes without saying that it cannot be described as frivolous. It is also not vexatious as it does not lack bonafide and is not hopeless or offensive and I have not been told that it is causing the applicant unnecessary anxiety, trouble and expense. The only ambiguous part of the plaint is that Senda Kwayera is put down as trading as Tele-News Communications and Tele-News Africa and Atlantic Region and these two business names are both suing and are called second plaintiff. I do feel however that ambiguity can be cured by amendment and I further feel it has not prejudiced the defence case as indeed they have not even raised it in their statement of defences. Thus the embarrassing part of the plaint can be amended and is not enough to enable me exercise my discretionary powers to strike out the plaint.

Lastly, I do not think the Court machinery has been misused as I have stated above that the allegation of fraud in registering another party and the allegations of applicant paying money to a different party despite instructions to the contrary are matters that the Court needs to probe at a full hearing.

In conclusion, I do find that this is not a proper case for the exercise of my discretionary powers to strike out the plaint as such summary jurisdiction is only exercised in plain and obvious cases, I do not find this such a case.

The application dated 12th October 2000 and filed into the Court on 24th October 2000 is dismissed with costs to the respondents. Orders accordingly.

Dated and Delivered at Nairobi this 17th day of November 2000.

ONYANGO OTIENO

JUDGE