REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. E184 OF 2020

HON.GLADYS JEPKOSGEI BOSS.....PLAINTIFF/APPLICANT

VERSUS

THE STAR PUBLICATION LIMITED....DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the defendant's notice of motion dated 23rd April 2021, brought under Order 2 Rules 15 1(a)(b)(c) & (d), Order 50 Rule 1 of the Civil Procedure Rules 2010, and Sections 1A,3,3A & 63E of Civil Procedure Act and Article 159 (2)(b) of the Constitution of Kenya,2010 seeking the following orders:

> i. That this Honourable Court be pleased to strike out the statement of defence dated 15th February, 2021 and enter judgment for the plaintiff against the defendant as pleaded in the plaint.
>
> ii. That the costs of this application and of the suit be borne by the defendant in any event.

2. The application is supported by the grounds on its face plus the sworn affidavit of Hon.Gladys Jepkosgei Boss the plaintiff. She avers that the defendant in its issue of the Star Newspaper of 17th January, 2020 printed and published a defamatory poem concerning her which was widely circulated both in print, electronic and in social media through: facebook, twitter, instagram and whatsapp.

3. She contends that the defence dated 15th February,2021 discloses no defence in law as the same is scandalous, frivolous and vexatious and may therefore prejudice, embrass or delay the fair trial of the action and is an abuse of the process of court. She further avers that the defence is obscure and evades the real issue in the suit which is that the defendant recklessly published the impugned poem without verifying the veracity of the facts.

4. She deposed that the defendant in its statement of defence has admitted unequivocally that it did indeed publish the said article and that they have confirmed that she did not forward or send it to them and never authored it. She further depones that the defence is a sham as it raises ambiguous and unintelligent issues and that it does not provide reasons why the defendant failed to comply with the Media Council Act, 2013 and the Code of Ethics thereof.

5. She avers that it is disingenuous for the defendant to allege it has a good defence to her claim when it has admitted in paragraph 5 (g) of the statement of defence that:

> "Consequently the defendant immediately pulled down the said article as a sign of good faith "and also paragraph 8 of the witness statement by Paul llado dated 19th February, 2021 states:
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> "On the foregoing, I profusely apologized to the plaintiff for the same and immediately pulled down the said article from the defendant's online platform as a sign of good faith"

6. She lastly avers that the statement of defence filed is a mere denial which does not raise any triable issues that would make the suit to proceed to full trial and therefore in the interest of justice it should be struck out with costs and the matter fixed for formal proof.

7. In opposing the application, the defendant's head of Content swore a replying affidavit on 10th May 2021.He deposed that the plaintiff

pleaded that the article was defamatory while the defendant pleaded the defence of justification and gave particulars in support of the plea. He avers that the question as to whether the defence of justification will succeed or not is an issue for trial and that it cannot be interrogated by way of arguments in an affidavit in the manner sought by the plaintiff.

8. He believes that the plaintiff is not entitled to the orders sought and prays for the application to be dismissed.

9. Directions were given for the application to be disposed of by way of written submissions, which was complied with by both parties.

10. Ondabu and company advocates for the plaintiff/applicant filed submissions dated 16th June 2021 gave brief facts of the case and submitted that the defence dated 15th February,2021. Counsel discloses no defence in law and the same is scandalous, frivolous and vexatiuos. He submits that paragraph 5 of the replying affidavit the defendant alleges that an article published by it on 17 th January,2020 was captioned:

> "Gladys Shollei's last poem to Sam when marriage was anulled" which he contends is not true.

11. This he submits is scandalous and he relied on the case of **Associated Leisure Ltd v Associated Newspaper Ltd (1970) 2 All ER** where Lord Denning MR. adopted and/or restated the rule that;

> "A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages".

12. Counsel submits that a bare denial indeed does not raise any triable issue and in this case the defendant having admitted the plaintiff's claim and apologized, there cannot be a defence raising triable issues to warrant the matter to proceed to full trial. On this he relied on the case of **Nairobi HCCC No.3383 of 1995 (John Patrick Machira t/a Machira & Co. Advocates v Grace Wahu Njoroge)** wherein Justice J.B Ojwang (as then was) stated that:

> "It is clear from the analysis herein that, I do not think the defendant's further amended defence and counterclaim dated 23rd January, 2004 is a proper defence which merits preservation to the trial stage. Not only does the said defence consist in nothing but bare denials, it wholly fails to engage the plaintiff on the issues raised in the claim. That being the case, the said further amended statement of defence has no basis in law for carrying the counterclaim attached to it."

13. In support of such a proposition he relied on the case of **Remmington v Scoles (1897) (at pages 4-5 Romer, J)**

> "The Court has an inherent power to prevent the abuse of legal machinery … Undoubtedly, therefore, the Court has power to strike out a statement of claim; but the power of the Court is not confined to that: it applies also to a statement of defence which is frivolous and vexatious and an abuse of the procedure … It appears to me that evidence may be received in a proper case on a motion of this kind to shew that a pleading is an abuse of the process of the Court …

> "Now, what do I find in this case? The defendant is a solicitor. The facts in the statement of claim have substantially all been admitted in prior proceedings. He clearly has no defence whatever to the action, and no substantial defence is shown by the statement of defence; but obviously he wants to delay and hinder the plaintiffs, and for that reason and no other he puts in a statement of defence, denying or refusing to admit every substantial statement in the statement of claim … I think under the circumstances this is not a real defence at all, but merely an abuse of the process of the Court, and I order it to be struck out."

14. Counsel submitted that the defendant's defence is a sham and should be struck out and judgment entered for the plaintiff as pleaded in the plaint since the defendant has no defence to this suit having not given particulars of truth and fair comment pleaded as defence as required by law. On this he relied on the case of **Nairobi HCCC No.160 of 2015 (Willy Munyoki Mutunga v The Standard Group Limited)** wherein Justice Sergon while striking out a statement of defence stated;

> "….I am minded not to go into the merits or otherwise of the witness statements filed by the plaintiff so that I do not prejudice the trial judge's view since the suit is yet to go for trial. From my short analysis, I am convinced that the defence of justification and fair comment as of now are not available to the defendant. I find the defence lacking in seriousness hence it is frivolous"

15. M/s Gichoya for the defendant/respondent filed written submissions dated 2nd July 2021. She submitted that she would demonstrate to the court that the defendant's defence raises triable issues and as such should proceed to full hearing. She contends that in the said statement of defence the defendant pleaded the defence of justification in accordance with Order 2 Rule 7(2) of the Civil Procedure Rules.2010.

16. She further submitted that the right to fair hearing is provided for under Article 50 (1) of the Constitution of Kenya 2010 and that each party should be accorded an opportunity to be heard on its case/position /issues on merit. On this argument she relied on the case of **Mercy Karimi Njeri & Another v Kisima Real Estate Limited (2015) eKLR** where it was held:

> "In the instant case, the admission by the defendant is not plain, obvious and clear to warrant summary judgment being entered against the defendant. This court employs the principle that the right to be heard is a fundamental right that must not be denied to enable the defendant to ventilate its position. In my humble view, the defendant should be given an opportunity to defend the suit and claim by the plaintiffs against it.

Entering summary judgment against it when the defence as filed raises a triable issue will have the effect of striking out the defence as filed and therefore ousting the defendant from the judgment seat, contrary to the constitutional imperatives on the right to access justice as contemplated in Article 48 of the Constitution and as a result deny it the right to a fair hearing under Article 50(1) of the Constitution and which right cannot be limited by dint of Article 25 of the Constitution, particularly when it is clearly established that the dispute herein can be determined by application of the law."

17. It is counsel's argument that the said statement of defence raises triable issues that require further interrogation by the court and that the defendant admits publishing the contentious article however denies it was defamatory or malicious of the plaintiff. She referred to **Black's Law Dictionary at page 1644** definition of triable issue as follows: -

> "Subject or liable to judicial examination and trial"

18. She further relied on the Court of Appeal case of **Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR.** The Learned Justices of Appeal stated as follows: -

> "Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.
>
> What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

19. She also relied on the case of **Giciem Construction Company v Amalgamated Trade & Services LLR No.103 CAK** which was quoted with approval in **Job Kilach v Nation Media Group (supra)** where it was held:

> "**….**A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend."

20. She contends that the courts have previously held that the defence of justification is one of the most serious defences that can possibly be pleaded in law of defamation and therefore it is important that the suit proceeds to trial.

21. She placed reliance on the case of **Hashi Empex Ltd v Wangethi Mwangi and Another (2009) eKLR.** The court stated that;-

> "At paragraph 5 of the defence the Defendants have denied that the publications were "either made falsely or maliciously of the Plaintiff". There is obviously a defence of justification pleaded here. It is not put as clearly as it could have been; but nevertheless the Defendants are saying, in effect, that the words published of the Plaintiff are not false. And if the words are not false, they must be true! An amendment can easily bring out clearly the defence of justification that has been pleaded here. And in an action for defamation, a defence of justification is possibly one of the most serious defences that can be pleaded.

It has been stated many times that a defendant need demonstrate only a single triable issue to be entitled as a matter of law to defend the action. There are at least two here. I am thus not satisfied that this is a plain and obvious case where the Defendants should be denied the right to defend the suit on liability. The action ought to go to full trial."

22. She cited the case of **John Ward v The Standard Ltd (2006) eKLR** which held as follows: -

> "The defendant having conceded that he published the defamatory words complained of and having pleaded that the said words were true in substance and in fact, he ought to be given opportunity to satisfy the court the statement which is justified is true in substance and in fact and that the defences of opinion and fair comment are available to him.

The defence raises several triable issues that can only be determined at the full trial of the suit upon adducing evidence.

The plaintiff's application is therefore dismissed with costs."

23. Counsel submits that the statement of defence cannot not fail merely because the truth of every word is not proved as having regard to the context of the article. Counsel cited section 14 of the Defamation Act, as being instructive and states as follows: -

> "In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges."

She therefore prays that the Notice of Motion dated 23rd April 2021 be dismissed.

24. With leave of the court counsel for the plaintiff/applicant filed a reply to the defendant's submissions dated 2nd July 2021.He submitted that the defence of justification that the defendant is attempting to cling onto is not sustainable as it is an afterthought. That no evidence had

been tendered in support of the infringement of the plaintiff's right to privacy in contravention of article 12 of the Universal Declaration of Human Rights, Articles 4 & 5 of the African (Bantu) chapter of Human & people's rights, Article 31 of the Constitution of Kenya 2010 and sections 5 & 8 of the Defamation Act Chapter 36 of the Laws of Kenya.

25. He submits that there was no evidence of any agreement between the plaintiff and the defendant that the suit won't be filed in court pursuant to the apology by the defendant to the plaintiff being tendered. He further submits that the defendant having pleaded the defence of justification and at the same time admitted having pulled down from the website the poem that was clearly defamatory to the plaintiff showed that the respondent had no tangible defence.

26. Counsel submits that the authorities relied upon by the defendant in an attempt to oppose the striking out of the statement of defence are distinguishable and have no application before court on defamation and the alleged defence of justification.

Analysis and determination

27. I have considered the application, grounds, affidavits, submissions and authorities cited. The main issue for determination is whether the defence filed herein is a sham and raises no triable issues.

28. The motion is expressed to be brought under **Order 2 Rule 15 of the Civil Procedure Code** which deals with striking out of pleadings and provides as follows;

> "Rule 15. (*1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*
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> **(a)** It discloses no reasonable cause of action or defence in law; or
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> (b) It is scandalous, frivolous or vexatious; or
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> **(c)** It may prejudice, embarrass or delay the fair trial of the action; or
>
> **(d)** It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

29. Striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** restated these principles as follows:

> "The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of **D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1** discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-
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> "The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of **Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506,** where the Lord Justice said:-

> "The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

30. The same sentiments were echoed by Danckwerts L.J when the House of Lords considered a similar matter in **Wenlock V Moloney, [1965] 2 All E.R 871 at page 874**, as follows:

> "There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."

31. A careful consideration of the facts placed before this court reveals that the defendant's statement of defence does not only comprise of mere denials as stated, but also contains the defence of justification. The plaintiff alleged that the defendant agreed to liability for having made the defamatory poem in their newspaper and also that the defendant apologized and pulled down the article. Despite doing so, a reading

of paragraphs 5, 8, and 10 of the defence shows the plea of justification.

32. I am guided by the case of **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR).** Whereas the court found that the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that a plaintiff should not be kept away from his judgment by an unscrupulous defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case.

33. A statement of defence is said to raise reasonable defence if that defence raises a prima facie triable issue. In the case of **Olympic Escort International Co. Ltd. & 2 Others –vs- Parminder Singh Sandhu & Another [2009] eKLR,** the Court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated as follows:

> "It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide."

34. The Court of Appeal in the case of **Ramji Megji Gudka Ltd –vs- Alfred Morfat Omundi Michira & 2 others [2005] eKLR** held as follows:

> "In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in **Dt Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1** in which Madan J.A. at page 9 said: -
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> "The Court ought to act very 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 this 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 "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham."

35. In the case of **Blue Sky Epz limited –vs- Natalia Polyakova & Another [2007] eKLR** the court held that:

> "The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issues."

36. In **Kenya Trade Combine Ltd v M. Shah C.A no. 193 of 1999 (unreported),** the Court of Appeal expressed itself in part as follows:

> "In a matter of this nature, all a Defendant is supposed to show is that a defence on record raised triable issues which out to go for trial. We should hasten to add that in this respect a defence which raised triable issues does not mean a defence that must succeed."

37. The Court of Appeal in **Coast Projects Ltd =vs= M. R. Shah Construction (K) Ltd (2004) K.L.R 119** at page 122 stated in part as follows:

> "The Plaintiff is entitled to proceed with an application for striking out a defence with the consequential entry of judgement for liquidated claim in situations where the defence is frivolous and or vexatious. It is a procedure, which is intended to give a quick remedy to a party which is being denied its claim by what may be described as a sham defence. This is, however, a procedure which is to be resorted to in very clear and plain cases. A mere denial is not sufficient defence in most cases."

38. The defendant also pleaded in his defence that the words were true.

Terminologically, "justification" as used in the law of defamation, means "truth". The defence calls for the defendant demonstrating that the defamatory imputation is true. He cannot get away with it by saying that he believed that the matter complained of was true. He has a burden to prove that the words are true.

39. In **Hon. Uhuru Muigai Kenyatta v Baraza Limited (2011) eKLR Rawal J** (as she then was) observed that the information that causes the defamation, will be assumed to be untrue until the defendant proves otherwise. The learned judge stated:-

> "….While taking defence of justification or qualified privilege in the Defamation Case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the Defendant……."

40. The Supreme Court of Nigeria in **Joseph Mangtup Din vs African newspaper of Nigeria Ltd, Adolphus Godwin Karib Whyte** J.S.C held that:-

> "It is well settled that the onus lies on the respondent to prove the truth of the words in their ordinary and natural meaning: -See

Dumbo v. Idugbo. I n Digby v. Financial News Ltd. Collins, M.R., where the court said:-

> "A plea of justification means that all the words were true and covers not only the bare statements of facts in the alleged libel but also any imputation which the words in their context may be taken to convey"

41. Upon analysis of the material before me as stated above I find that the issue of justification raised herein raises a triable issue which may only be well addressed in a full hearing. It would be unfair to condemn the defendant without hearing its side of the story. A hearing will afford both parties an opportunity to present their case and exercise their right to be heard.

42. The upshot is that, no basis has been made for the prayer for striking out of the defence. Accordingly, the notice of motion dated 23rd April, 2021 fails and is hereby dismissed with costs.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF OCTOBER, 2021 IN OPEN COURT AT NAIROBI

H. I. ONG'UDI

JUDGE