REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 272 OF 2018

SCHON AHMED NOORANI..... PLAINTIFF/APPLICANT

VERSUS

RAJENDRA RATILAL SANGHANI..... DEFENDANT/RESPONDENT

RULING

1. This Ruling is in respect of the notice of motion dated 24th July 2019 which seeks the following orders:

i) That this honourable court be pleased to strike out the defence and counterclaim filed by the respondent/defendant on 30th January 2019

ii) That this honourable court be pleased to enter Judgment in favour of the applicant/plaintiff against the respondent/defendant as prayed for in the plaint filed on November 2019

iii) That the costs of this application be awarded to the applicant.

2. It is premised on the following grounds:

i. The plaintiff/applicant seeks Judgment for a claim of defamation based on statements made and published by the respondent/defendant via an email dated 23rd June 2018 and which the respondent/defendant caused to be broadcast through social media.

ii. The respondent/defendant in his defence has not denied making and publishing the statement via email to various recipients.

iii. Further the respondent/defendant in his defence has not denied the defamatory nature of the statement made and/or the negative and damaging implications thereof.

iv. In not denying publishing the defamatory statements and further not impugning the ordinary construction of the defamatory statements, the respondent/defendant is deemed to have admitted to publishing the statement and further admitted to the construction of the statements.

v. Most notably the defence filed by the respondent/defendant discloses no recognizable or judicially palatable defence in law as relates to the claim for defamation.

vi. Ultimately the defence is vexatious, embarrassing and seeks to delay due process.

vii. In respect of the counterclaim it does not disclose any reasonable cause of action, is embarrassing and vexatious, to wit:

a) The defendant/respondent alleges that the plaintiff/applicant maliciously accused him of fraud in an alleged recorded conversation but does not allege any recipient of the accusations or allege that the accusation was based on falsehoods and

b) The defendant has alleged that the plaintiff wrote to him an email that made false accusations against him, which if at all true (and vehemently denied), does not constitute an actionable claim in law.

3. The applicant also filed a supporting affidavit sworn on 24th July 2019. A summary of both the grounds and affidavit is that the plaintiff/applicant's claim for defamation is clear from the statements made and published by the defendant/respondent via email and broadcast through social media. The plaintiff/applicant has deponed that the defendant/respondent has in his defence not denied making and publishing the statement complained of thus the defence does not raise any issues.

4. As concerns the counter claim the deponent has averred that the same does not disclose any reasonable cause of action and is embarrassing and vexatious. That the defendant/respondent has not alleged that there were any recipients of the alleged accusations. Therefore, the counterclaims is devoid of a cause of action. He urges the court to dismiss both the defence and counter claim.

5. The defendant/respondent filed a replying affidavit sworn on 22nd June 2021. In it he has averred that his defence has raised pertinent triable issues that ought to be determined by the court. He has denied the contents in paragraph 5 – 8, 10,11 and 13 and the rest of the supporting affidavit.

6. Further he states that his counterclaim should be considered for hearing. He therefore prays that the prayers sought by the plaintiff/applicant should not be granted as the averments contained in his defence and counterclaim are not just mere denials.

7. Counsel for both parties agreed to dispose of the application by written submissions. The applicant's s submissions by Asa & Asa Associates Advocates are dated 12th July 2021. Mr. Kibera for the plaintiff/applicant has submitted that the defence filed by the respondent failed to disclose any recognizable and judicially palatable defence to the claim of defamation. Further that it is meant to delay the trial of the action herein.

8. He contends that the defence filed by the defendant/respondent has failed to raise any of the recognizable defences in law to the claim raised by the plaintiff/applicant. On this he referred to the case **of Rassan v Budge [1893] l QB 571** where Lord Coleridge CJ held at page 575 as follows:

> *"In the old common law actions of libel and slander the pleadings were short and were not generally found to be embarrassing. The points to be decided were, whether the words alleged in her declaration were written, or spoken and published, whether those words were true; and whether the publication was privileged" [Emphasis ours]*

In the same case A.L Smith L.J at page 576 stated:

> *"By old practice under the plea of not guilty, the defendant could prove that he did not write or say the words, or that the publication was privileged and he might also plead and prove a justification on the grounds that the words were true."*

9. He named the recognized defences to a claim of defamation to be; Justification, fair comment and qualified privilege; Further that a defendant in response to a claim of defamation is required to either expressly deny writing, saying or publishing the alleged defamatory statement, or establish a defence of justification demonstrating that the alleged defamatory statements were indeed true or statement of fact; or fair comment; or establish a defence of qualified privilege.

10. He submits that at paragraph 4 and 5 of his defence the defendant/respondent admits to writing the email dated 23rd June 2018 and also shared and posted it to various addresses. That he has not in his defence disputed the averments @ paragraph 7 of the plaint with their natural meaning. He argues that with these admissions there would be no need for the matter to proceed to full hearing.

11. Counsel referred to the of **Grace Wangui Ngenye v Chris Kirubi & another [2015] eKLR** where the court of appeal stated thus:

> *"From what we have said above, the fact of publication and the contents of the alleged defamatory statement are admitted. The publication was by the medium of radio broadcast – a wireless broadcasting which as section 8(1) of the Defamation Act stipulates, is publication in a permanent form. It is plain that the words referred to the appellant of and concerning her profession and character. The appellant relied on the natural and ordinary meaning of the words as conveying a defamatory imputation which does not require proof by oral evidence. Further the appellant is not required to prove by oral evidence that the publication was done maliciously……From the foregoing, we have come to the conclusion that this is a plain and obvious case where the appellant is not required to prove defamation by oral evidence and where the defence does not disclose valid defences in law or triable issues"*

He submits further that the defence discloses no triable issue and contains mere denials and fails to raise any triable issue worthy a trial. It should therefore be struck out.

12. He also referred to the case of **J.P Machira T/a Machira and company Advocates [1998] eKLR** where the Court of Appeal stated:

> *"For my part, I have no hesitation whatsoever in agreeing with the appellant that even if the denials set up by the respondents were to be held to be a sufficient traverse of the allegations in the plaint the denials could not possibly be sustained were a trial on the merits to be held. The respondents have themselves agreed that Ms Njoroge was not the appellant's client. The respondents also agree that the dispute between her and the appellant was due to their relationship as vendor and purchaser. Naturally, money would be an issue in such a relationship but the respondents did not, either in their written statement of defence or in anything else, put forward any explanation as to why they had picked on the issue of money and made it the central issue of the dispute. 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 that 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."*

13. Counsel further submitted that the counterclaim does not disclose any reasonable cause of action or triable issue and should be struck out. That the allegation in paragraphs 20 and 29 of the counterclaim is frivolous and does not conform to the requirements establishing the ingredients of defamation laid out in **John Ward v Standard Ltd [2006] eKLR**. He contends that the following are lacking in the said counterclaim:

- Facts to confirm the alleged conversation occurred. Particulars are lacking.

- The excerpts of the purported translated version of the alleged recorded telephone conversation in Gujerati language are unverifiable

- No evidence that the alleged conversation was shared with other persons.

- No allegation that the conversation if it occurred was premised on falsehood.

14. He therefore submits that the respondent's allegation fails to establish the ingredients of defamation in the counterclaim.

15. Counsel has submitted that the court ought to grant the prayers sought in the application by striking out the defence and counterclaim and order the matter to proceed to formal proof. **See** Order 2 Rule 15 of the Civil Procedure Rules. He argues that it has been clearly demonstrated that the defence and counterclaim have failed to disclose any triable issue. He cited the case of **J.P Machira** (supra) where it was held:

> *"I have without any hesitation, come to the conclusion that no triable issues are disclosed either in the defence of the respondents, in the replying affidavit of the first respondent or in anything that was said before us by Ms Janmohamed. Accordingly, no useful purpose would be served by holding a trial on the merits. That being my view of the matter, I would allow the appeal, set aside the order(s) made by the superior court and substitute them with one allowing the appellant's chamber summons, strike out the defence filed and enter interlocutory judgment for the appellant with a further order that the appellant be allowed to formally prove his claim. I would award the costs in the High Court and in this Court to the appellant. As Akiwumi and Bosire, JJ.A. agree, those shall be the orders of the Court"*

16. The defendant/respondent's submissions by Kibera and associates are dated 27th July 2021. Mr. Hassan for the respondent has submitted that the defence and counterclaim have raised triable issues. He contends that before striking out a defence on record, the court must be satisfied upon examination of the defence that it is a sham and it raises no bona fide triable issue worth a trial by the court. He referred to the case of **Jubilee Insurance Company Limited V Grace Anyona Mbinda [2016] eKLR** where the honourable court quoted the case of **Saudi Arabian Airline Corporation V Premium Petroleum Company Ltd [2014] eKLR** where it was held:

> *"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous* ***DT DOBIE case*** *that* ***the Court should aim at sustaining rather than terminating suit****. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the* ***SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.)*** *that* ***"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication."*** *Therefore, on applying the test, a defence which is a sham should be struck out straight away."*

17. Counsel gave a definition of what a triable issue is as stated by the Black's Law dictionary and some decided cases. He has referred to paragraph 4, 8, and 11 of the defence and submits that the defendant/respondent has denied publishing or causing any publication online. Further that the plaintiff had not filed any defence to the counterclaim which should be deemed to be an admission. He submits that the law demands that parties to a suit plead facts and not evidence as evidence can only be adduced and proved at a trial and not by the pleadings. It is his contention that the defence and counter claim raises bona fide triable issues and the defendant/respondent should not be denied an opportunity to be heard on merit and defend himself against the plaintiff's claim herein.

18. He has submitted that the procedure of summary judgment must only be resorted to in the clearest of cases. To support this, he cited the following decisions:

i) Kenindia Assurance Co. Limited V Commercial Bank of Africa Limited & 2 others [2006] eKLR

ii) Dhanjal Investments Limited v Shabaha Investments Limited (Civil Appeal No 232 of 1997 (unreported)

iii) Provincial Insurance Company of East Africa Limited (now UAP provincial Insurance Limited) v Lenny M. Kivuli Civil Appeal No 216 of 1996 (UR).

iv) Kenya Trade Combine Limited v M.M Shah (Civil Appeal No 193 of 1999) (UR).

19. Based on the above he submitted that the plaintiff's application should be dismissed so that the matter can be subjected to judicial examination.

Analysis and determination

20. I have duly considered the application, grounds, affidavits, both submissions and cited cases. The issue for determination is whether the defence and counterclaim by the defendant raise any triable issue.

Order 2 Rule 15 of the Civil Procedure Rules which provides for striking out of pleadings states 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—

(a) it discloses no reasonable cause of action or defence in law; 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 the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made."

21. The main grounds raised by the plaintiff/applicant in this application are:

i) The defendant has admitted the claims

ii) The defence and counterclaim do not raise any triable issues.

22. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trail. The Black's Law dictionary defines the term triable as "subject or liable to judicial examination and trial."

23. As has been stated in several decisions a triable issue is not one that must succeed but one that raises a prima facie defence and which should go to trial for the court to make a determination. Article 50 (1) of the 2010 constitution provides:

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

24. In all instances the court must accord each party who has appeared before it an opportunity to be heard by presenting his/her case. In other words, striking out pleadings must be in the clearest of cases. Even where only one triable issue is raised the court will not strike out that pleading.

25. Bearing the above in mind I proceed to examine the defence and counterclaim dated 29th January 2019. I have noted that there seems to be an error in the numbering of paragraphs in the plaint especially as appears at pages 2- 3 of the plaint. At page 2 there are paragraphs 5, 6 and 7 while at page 3 there is a continuation of paragraph 7 followed by paragraphs 5, 6, and 7 a &b. At paragraph 6 of the defence the defendant besides denying the contents of paragraph 6 of the plaint at page 3 of the defence he specifically denies publishing the alleged postings saying if the postings had gone viral the same could not be attributed to him.

26. Paragraph 8 of the defence pleads justification, while referring to the postings. He says they were not actuated by malice nor based on falsehoods. He has again at paragraph 11 of the defence denied publication of an online article as alleged contrary to the assertions by the plaintiff of admissions by the defendant.

27. There are no straight admissions by the defendant that would call for the striking out of the defence. The plaintiff herein will be expected to adduce evidence to show that indeed the defendant besides sending him the email complained of, caused the same to be publicized online since he has denied it.

28. The defendant has also pleaded justification as was stated in the case **of Rassan Budge** (supra). For the court to determine who between the two is speaking the truth they must adduce evidence which cannot be dealt with at this stage.

29. In the counterclaim the defendant has also made allegations against the plaintiff whether true or not is a matter of evidence. The pre-trial

directions and conference under Order 11 of Civil Procedure Rules are yet to be complied with. It is at that point that the court will know what each party is presenting in terms of evidence. It is at that point that the plaintiff will know whether the defendant has in his possession a certified translated version of the transcript or a certificate of electronic evidence as is required. The court cannot delve into that at this point.

30. Upon considering the missing links, I have pointed out above, I find it unsafe at this point to strike out the defence and counterclaim as provided for under Order 2 Rule 15 of the Civil Procedure Rules. Each party should be accorded an opportunity to present his case for the court to make a determination on merit.

31. The upshot is that the application lacks merit and is dismissed with costs

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

H. I. ONG'UDI

JUDGE