REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 81 OF 2017

BOB MARTIN OMONDI……..…….PLAINTIFF

VERSUS

LORNA OLILO……DEFENDANT

RULING

1. This ruling determines the Plaintiff/Applicant's Notice of Motion application dated 12th October,2017. The same is brought under the provisions of Order 2 Rule 15(1)(b)(c)(d), Order 7 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application seeks the following orders:

a) That the written statement of Defence herein be struck out and/or expunged from the court record.

b) That judgment be entered against the Defendant as prayed in the plaint

c) That the costs of this application and of the suit be borne by the Defendant

2. The application is premised on the grounds on its face which are *inter alia* that:the written statement of defence is scandalous, frivolous or vexatious and may prejudice or delay fair trial of the action;it is an abuse of process of the court;the statement of defence is sham constituting mere denials intended to delay the expeditious determination of the suit and lastly that the statement of defence was filed out of time and without the leave of the Court. The application is further supported by an affidavit sworn by the Plaintiff on 12/10/2017.

3. The Plaintiff's gravamen is that the Defendant authored and transmitted a series of eleven (11) defamatory text messages from her registered safaricom number to the Plaintiff's registered mobile number. Further,that the said text messages were relayed to the Plaintiff's sister-in-law through her registered mobile number which words in their ordinary meaning meant that the Plaintiff is immoral and an extortionist hence ruining the Plaintiff's reputation. The Plaintiff avers that he has suffered considerable distress, embarrassment and public odium including being shunned by family members and loss clientele in his business.

4. The Plaintiff avers that upon expiry of the time stipulated to file a defence, his advocate requested for judgment against the Defendant but the same was rejected on the same ground that a statement of defence had been filed.It is averred that the statement of defence was never served upon the Plaintiff but the Plaintiff managed to make a copy from the court record. The Plaintiff avers that the statement of defence on the court record was filed on 25/09/2017 whereas summons to enter appearance were served on 24/08/2017 hence the same can be explained as that the Defendant never entered appearance nor filed any defence.

5. The Defendant/Respondent is opposed the application vide her replying affidavit she swore on 20/3/2018. According to her, the application is accentuated by malicious desire to vex her through an unwarranted suit. The Defendant avers that there was a series of exchange/correspondence between her and the Plaintiff but the Plaintiff chose to omit his response which would otherwise prove that he approached the court with unclean hands.

6. It is deponed that the Defendant's right to access justice and fair hearing under Articles 48, 50 and 159 of the Constitution of Kenya, 2010 should be protected and not to be watered down by a mere technicality like failure to serve the statement of defence. It is averred that it is more obvious than not that the Plaintiff is aware of the statement of Defence and has even filed a reply to the same hence the instant application is unnecessary.

7. The application was canvassed by way of written submissions. The Plaintiff filed his submissions on 1/04/2019 whilst the Defendant filed hers on 4/03/2020.

The Plaintiff's submissions

8. The crux of the Plaintiff's submissions is that a copy of the plaint and summons were served upon the Defendant on 24/08/2017 and the Defendant acknowledged service by signing on front page. That upon expiry of the time stipulated by law to file defence, the Plaintiff moved the court for an interlocutory judgment but the same was rejected on account that Defence had been filed on 25/09/2017. The Plaintiff avers that the defence was not only filed late in the day but also not served upon him. It is further submitted that the Defendant had admitted liability in the correspondences but upon being sued she denied everything without any explanation. Therefore according to the Plaintiff, the statement of defence is mere denial and should be struck out. The Plaintiff buttressed his arguments by excerpts from the cases of ***Erf Kenya Ltd. –vs-Bustrack Limited & Another [2005] eKLR,*** and ***Kenya Commercial Bank-vs-Suntra Investment Bank Limited [2015] eKLR.***

Defendant's Submissions

9. The Defendant submits that the statement of defence raises triable issues and it denies the threshold for proofing defamation has been met by the Plaintiff. As such, the Defendant avers that the statement of defence cannot be struck out without judgment being given on available evidence before the court. It is the Defendant's case that the Application has not met the principles which warrant the striking out of a defence not even proofing that the assertions that the defence is scandalous, frivolous or vexatious.

However, the defendant admits that the she did not serve the statement of defence upon the Plaintiff but equates the same to a technical issue which should not be a basis of striking out the Defence. She submits that the court should endeavor to do justice without undue regard to procedural technicality as provided under Article 159 of the Constitution. In support of the argument the Defendant relies on the cases of ***Abdirahman Abdi-vs-Safi Petroleum Products Ltd & 6 others [2011] eKLR,*** and ***Nicholas Kiptoo Arap Korir Salat-vs-Independent Electoral and Boundaries Commission & 6 others [2013]eKLR.***

10. Lastly, the Defendant submits that the Plaintiff/Applicant has not proved how the private text messages have caused him damage or loss of business clientele. It is trite law that he who alleges must prove, in line with Section 107 of the Evidence Act hence the issues under controversy can only be determined after full hearing.

Analysis and Determination

11. I have carefully considered the application, the supporting Affidavit and the Replying Affidavit filed herein by the parties. I have also considered the various submissions made and the authorities cited. 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;

> ***"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."***

12. It cannot be gainsaid that 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 principle thus:

> ***"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."***
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> ***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:-***
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> ***"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."

13. 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."***

14. Whereas 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. (See the case of ***Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR).***

15. A careful consideration of the facts placed before the court reveals that the Defendant's Statement of Defence does not indeed comprise of mere denials. Whereas the Plaintiff alleged that the Defendant agreed to liability for having made the defamatory text messages before the suit herein, the Defendant alleged that that there was a series of exchanges/responses between the Plaintiff and the Defendant but the Plaintiff only chose to print the messages sent by the Defendant.

16. In my view, these issues can only be determined after evidence is adduced by both parties. Where there is any single triable issue, the matter ought to go to full hearing. Therefore,it would be unfair to condemn the defendant without hearing her side of the story. This will then give both parties a chance to present their case and exercise their right to be heard.

17. The upshot is that, I find that no basis has been made for the prayer for striking out the defence to be granted. Accordingly, the Notice of Motion application dated12thOctober, 2017 fails and is hereby dismissed.

18. The costs of this applicant to abide the outcome of the suit after full trial.

19.Parties to comply with pre-trial directions and set down the suit for hearing.

It is so ordered.

Dated, Delivered and Signed at Nairobi this 19th Day of May,2020.

D.O CHEPKWONY.

JUDGE.

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes