REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL, COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 59 OF 2019

MICHAEL JESSE MKOK.....PLAINTIFF

VERSUS

ROLAND DE MELLO.....DEFENDANT

RULING

Background Facts

1. The plaintiff instituted this suit on 19th July 2019 seeking among others, damages for libel against the defendant. For a better understanding of the context that informs this ruling, I will begin by setting out the facts pleaded to give rise to the present suit. The origins of this suit can be traced to **Mombasa Chief magistrates court civil suit no. 1621 of 2014- Salim Verjee versus The Attorney General, Mr. Roland de Mello and 2 others.** In that suit, the plaintiff herein in his capacity as state defence counsel represented the 1st and 3rd defendants who were co-defendants with the current. The claimant, Salim Verjee, sought damages for malicious prosecution.

2. It turned out that the defendant herein was not impressed by the conduct of the plaintiff as counsel in the abovementioned case, a situation that led him to write 'complaint' letters to the Ethics and Anti-Corruption Commission and to the plaintiff's employer, the Office of the Attorney General. According to the defendant, the plaintiff was colluding with Mr. Salim to actually lose civil suit no. 1621 of 2014. The defendant further alleged that the plaintiff and Mr. Salim had a deal to share any amount so awarded by the court in case the case was lost. The plaintiff did not take these allegations lying down. In his view, the contents of the defendant's letters were calculated to disparage him and are libellous hence he filed the instant suit.

3. The defendant responded by filing a notice of appointment of advocates, followed by a notice of preliminary objection dated 8th August 2019 and then a defence dated 8th August 2019. Thereafter, the plaintiff filed the notice of motion application dated 1st October 2019. It is the defendant's preliminary objection and the plaintiff's application that are the subject of this ruling. On 17th October 2019, the parties agreed that both the preliminary objection and the application by the plaintiff be heard together. The Court gave directions on filing of submissions and the parties highlighted their submissions on 23rd January 2020.

The parties' Arguments

4. The preliminary objection and the application make numerous pertinent arguments. I will now summarise each party's arguments with a view of framing the appropriate issue(s) for determination. The defendant puts forth four main arguments as contained in the preliminary objection and the attendant submissions.

5. Firstly, the defendant contends that he wrote to the in his capacity as employer and donor of authority to the plaintiff, with regard to the exercise of authority, hence the letter cannot be deemed to have been defamatory. In the defendant's own words "a letter drawn to the delegator of the said authority, with regard to the very authority, cannot be deemed to have been defamatory to the plaintiff." Secondly, it is said that the letter to the Attorney General can be termed as privileged communication under Sections 134 and 135 the Evidence Act and hence cannot be said to be published for the purposes of defamation. Thirdly, that the letter constituted a complaint of alleged unlawful conduct and hence cannot form the basis of a libel action. Fourthly, the defendant argued that this Court does not have the requisite jurisdiction to entertain this suit since the cause of action, being the letter written to the Hon. Attorney General was drawn and served on the addressee in Nairobi. Essentially these are the defences advanced against the suit and I read the Notice of Preliminary objection to assert that on account of such pleaded fact, the suit is fatally defective and incompetent and ought to be struck off with costs.

6. On his part, the plaintiff began by faulting the defendant for entering appearance by way of a notice of appointment of advocates instead of a memorandum of appearance and prays that the said Notice be struck on that account and further that the defence itself be equally struck out on the basis that it admits the authorship of the impugned publication and that the defence of fair comment is not available to the

defendant. The plaintiff further prays that the Court should in the alternative enter judgement on admission in his favour since according to him, the defendant made express admissions in his defence.

Issues for determination

7. From the foregoing arguments advanced by both side I consider the defendant's preliminary objection to raise just one issue while the plaintiff's application two issues. I do frame the issues to be determined in the two matter as follows:

i. Whether the suit is so incompetent as to invite the draconian remedy of striking out? From the onset, I note that if I do determine the question in the affirmative by striking out the suit, then the rest of the issues shall have become moot and unavailable for my consideration. I will remind myself so

ii. Whether the defendant's notice of appointment and statement of defence are amenable for striking out on the grounds advanced?

iii. Whether judgement on admission should be entered in favour of the plaintiff?

8. Since the objection as framed portends possible termination and final disposal of the suit, it is only tidy and advisable to begin with it. When to strike out a pleading is now trite. Trite that no pleading ought to be struck out unless it be so weak, clearly untenable and incompetent as to be incapable of being injected with life by way of an amendment[1]. It is also a remedy that should be availed very sparingly because of its known drastic nature which drives a litigant from the seat of justice unheard[2]. It is therefore only available in the clearest of the clear cases where the court need not set on a path of minute[3].

9. Ideally striking should be sought by a formal application under Order 2 Rule 15 when the reasons advanced seem to suggest that it discloses no reasonable cause of action. It is not the case for striking out that the defence raised is make it doubtful if there is a case that may succeed. Rather, it is the duty of the applicant to prove that a particular pleading is so untenable that to sustain would be to pervert the notions of justice but exposing the parties to uncalled for litigation and underserved delay in court.

10. As said at the beginning of this decision, the defendant takes the view that his defence wholly displaces the plaintiff's claim on the basis that the letter drawn to the delegator of authority and complaining against the delegate cannot be the basis of the suit for defamation but was rather a privileged communication under Sections 134 and 135 the Evidence Act and that the letter was a mere ordinary complaint of alleged unlawful conduct and hence cannot form the basis of a libel action.

11. Those are indeed very weighty issues that go to the merits of the pleadings filed and cannot be determined prior to evidence being led unless the court was ready to cast itself as supplanting the summary procedure of striking out in place of a trial by production of evidence. In **D.T. Dobie and Company (Kenya) Ltd vs Muchina *supra*** the court delineated the power of the court in an application of this nature in the following words: -

> **"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."**

12 At this level of the proceedings and when moved by way of a preliminary objection, it is not open for me to minutely consider the fact and the merits of the claim. The strength, arguability or lack therefore must be left to await proof by evidence. It is however enough to say that as framed and filed, I do not consider the plaint to be so hopeless as to merit being shut out summarily. In addition, a preliminary objection properly conceived should be on fact pleaded by one side and conceded or just uncontested by the opposing side[4]. I therefore find that the preliminary objection was improperly taken and thus cannot succeed but otherwise dismissed with costs.

13. There was another objection on jurisdiction of the court based on the provisions of section 14, Civil Procedure Act which I view not to merit much consideration by the court due the fact that it is mundane regard being had to the fact that the jurisdiction of this court is constitutionally vested and incapable of being curtailed by the statutory enactment outside the constitutional normative that the jurisdiction is unlimited. I hold that section 14 of the act should never be viewed to limit the jurisdiction of this court by confining it to some boundaries of an administrative unit within the country. I interpret that provision to only address the need for convenience and mitigation of costs to the parties so that a suit is tried nearest to the location in which the cause accrued. That is not the same as limiting or just ousting the jurisdiction of this court. Even where the suit is filed in a court outside the boundaries of a court registry where the cause arose, the remedy is never striking out but transfer. In this cause however In this case, however, while it may be true that the defendant resides in Nairobi and his letters were addressed to recipients in Nairobi, there is no indication that the publication was confined to Nairobi. In any event the Court appreciates the long history of litigation that has culminated to the instant suit. That history includes **civil suit no. 1621 of 2014- Salim Verjee versus The Attorney General, Mr. Roland de Mello and 2 others.** In that case, the 2nd defendant (the defendant herein) is described in his own statement of defence as "an adult male of sound mind residing in both Nairobi and Mombasa." A cursory reading of the pleadings in Civil suit no. 1621 of 2014 confirms that the defendant indeed has a house in Bamburi, Mombasa.

14. Apart from the possibility that the defendant actually resides in Mombasa, the court finds it difficult to understand why the defendant has raised the question of jurisdiction in this case and at this juncture. The plaintiff reproduced in his plaint a substantial portion of the pleadings in Civil suit no. 1621 of 2014. That case commenced in 2014 and has been heard in Mombasa ever since. Not once did the defendant allege that he primarily resides in Nairobi and was facing financial hardships attending court in Mombasa. It cannot be the law that for the trial before the lower court, the plaintiff residence is Mombasa or just inconsequential yet the residence when it comes to this court must be Nairobi. Still, that is a contested matter or just not conceded and cannot properly ground a preliminary objection.

15. The plaintiff faulted the defendant for entering appearance by way of a notice of appointment of advocates instead of a memorandum of

appearance. I do understand the plaintiff to be saying "defendant, you did not enter appearance in the right way, meaning you have not entered appearance at all and so your whole case should be thrown out."

16. The defendant in rebuttal cited a long list of statutes and authorities to support his assertion that he had actually entered an appearance. Some of the statutory provisions relied on include **Order 6, Rule 2 (4) of the Civil Procedure Rules (2010)** which provides " Where a defence contains the information required by rule 3 it shall where necessary be treated as an appearance" and **Section 72 of the Interpretation and General Provisions Act** which provides "Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead." Of pertinence is that the defendant also cited **Article 159(2)(d) of the Constitution of Kenya, 2010** which provides "justice shall be administered without undue regard to procedural technicalities."

17. I am persuaded by the defendants submission that in the new constitutional dispensation emphasis is placed on substance rather than form. The ends of justice will of course not be met where a litigant's case is thrown out simply because he did not enter appearance in the right way. Further, the advocate for the defendant admitted that the said notice of appointment was improperly addressed as such and it was indeed the memorandum of appearance as envisaged under the civil procedure rules.

18. For the foregoing reasons it is my decision that the defendant's decision to enter appearance by way of a notice of appointment instead of a memorandum of appearance was not fatal to his case. I hold the view that the entire purpose of an appearance is to provide an address of service and that a party has the liberty to ignore entry of an appearance and file a defence provided that in that defence the address be disclosed.

19. On the request that the defence be struck out on the basis that it admits the authorship of the subject complaint and that the defence of fair comment is not available to the defendant, I remind myself that no pleading is amenable to being struck out unless it be wholly untenable. My reading of the defence on record informs me that it raises points that I consider to be arguable even if the same may not ultimately carry the day. An arguable pleading is not the kind that must succeed. It is enough that prima facie there is a point that deserve court attention to consider and render a determination. That merit consideration, the says, must be reserved for the trial. I decline to delve into detailed and minute consideration of the defendant's defence so as to determine it worthless of being sustained to await the trial.

Whether judgement on admission should be entered in favour of the plaintiff?

20. The established and unmistakable position of the law on when to enter judgment on admission remains that the admission must be clear unconditional and unequivocal. In the case of ***Ideal Ceramics Ltd –v- Suraya Property Group Ltd HCCC No. 408 of 2016 (unreported)*** as quoted in ***Vehicle and Equipment Leasing Limited v Coca Cola Juices Kenya Limited [2017] eKLR*** the court held as follows:

> **"The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.**
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> **The court's power to enter judgment on admission is discretionary… The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous… The admission ought to be obvious on the face thereof and leave no room for doubt.**
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> **An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made".**

21. The above quoted are the principles of law applicable when considering a summary procedure application. Does the defence lodged on 9th August 2019 make express admissions warranting entrance of judgement on admission? To answer this question, the court must bear in mind that firstly, this is a suit for libel. My reading of the defence reveals that the defendant only admitted to writing a letter to the Attorney General but strongly and strenuously denies that the letter was libellous and gives a couple of reasons as to why the letter cannot be said to be published for the purposes of defamation. In my view it is quite clear that the defendant did not admit to publishing libellous information against the plaintiff. On the contrary, I have found the defence to raise triable issues that qualify to be heard on merit.

22. In conclusion, I do find that both the Preliminary objection by the defendant and the notice of Motion by the plaintiff lack merit but were wholly misconceived, I dismiss both and order that each party bears own costs. To this court, the time spent on this ruling and the proceeding leading thereto can best be described as lost judicial time. Good faith and fidelity of the party and counsel to could would have discouraged the filling and prosecution of the two maters. Had that been done we would have by now substantially progressed the dispute toward resolution on the merits. That notwithstanding, the matter remains to be dealt with and I direct that parties do file all outstanding papers within 30 days from today and to come for case conference on the 7.7.2020.

Dated, **signed** and **delivered** at **Mombasa** this **15th** day of **May, 2020**

P.J.O. OTIENO

JUDGE

[1] ***D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1***

[2] ibid

[3]**WENLOCK V MOLONEY, [1965] 2 All E.R 871 at page 874** cited with approval in Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited [2016] eKLR

[4] Mukisha Biscuits Company Ltd vs West End Disributors Ltd (1969)EA 696