REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 05 OF 2018

BETWEEN

JOEL OMONDI ONDU.....APPELLANT

AND

ENG. DAVID ONYANGO.....RESPONDENT

(Being an Appeal from the Ruling and Order in Kisumu CMCC No. 296 of 2017

by Hon. J.Ngarngar (CM) on 20th December, 2017)

JUDGMENT

Background

1. 1. By a notice of motion dated 05.10.17; the Respondent sought orders to strike out the Appellant's defence dated 28th June, 2017.

2. The application was argued *interpartes* and allowed by a ruling dated 20th December, 2017 thereby striking out the Appellant's defence.

The Appeal

3. The Appellant being dissatisfied with the lower court's decision on 19th January, 2019 filed the Memorandum of Appeal dated 18th January, 2019 which sets out seven (7) grounds which I have summarized into two 2 grounds that: -

1) The learned trial magistrate erred in striking out the Appellant's defence

2) The Appellant was denied a chance to be heard

SUBMISSIONS BY THE PARTIES

4. When the appeal came before me for mention for directions on 22nd May, 2019, the parties' advocates agreed to dispose it off by way of written submissions which they dutifully filed.

Appellant's submissions

5. Appellant holds the view that the defence was struck out on a technicality curable under the provisions of Article 159(2) (d) of the Constitution, and sections 1A, 1B, 3A and 3B of the Civil Procedure Rules. In support of this proposition, the Appellant relied on ***Philip Chemuolo & Another vs Augustine Kubenbe (1982-1988) KAR 103)*** *where the court held "****blu*****nders will continue to be made from time to time and *a party* should not suffer the penalty of not having his case heard on merits ……..."*

6. Reliance was also placed on Belinda Murai & 6 Others v Amos Wainaina [1978] KLR in which **Hon Madan JA** (as) he then was defined what constitutes a mistake as follows:

"…… A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate……..".

7. Appellant also submitted that its defence raises triable issues and is not a clear case for striking out in support thereof relied on **DT Dobie & Company (Kenya) Ltd vs Joseph Mbaria Muchina & Another [1982[KLR** and **Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others [2005] eKLR**. Appellant likewise relied on **Olympic Escort International Co. Ltd & 2 Others Vs. Parminder Singh Sandhen & Another (2009) eKLR** where the Court of Appeal stated that a triable issue is not necessarily one that the defendant would ultimately succeed on and need only be bonafide and **Kenya Trade Combine Ltd v M M Shah (Civil Appeal No 193 of1999)** (unreported), where the Court of Appeal emphasized that all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial.

Respondent's submissions

8. The respondent submitted that the law on striking out pleadings in defamation cases was settled in Grace Wangui Ngenye V. Chris Kirubi & Another [2015] eKLR where the Court of Appeal stated as follows:

".....The general principles which guide a Court in exercising its discretion whether or not to strike out a pleading as stated in DT Dobie & Co. (Kenya) Limited V. Muchina & Another [1982] KLR 1 and in other cases also apply in defamation cases. However, in applying the general principles, the Court will have regard to the special rules of pleadings in defamation cases as laid in Order 1 rule 7 and 8 of the Civil Procedure Rules 2010 (formerly Order VI Rule 6A and 6B of Civil Procedure Rules) and also have regard to the provisions of the governing statute – The Defamation Act)".

9. Respondent additionally submitted that the striking out of the defence was made rightfully and relied on various authorities among them **Magunga General Store vs Pepco Distributors Ltd [1987] 2 KAR 89,** where the defendant used such generalized denial, Platt, J.A., said-

"First of all, a mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence or otherwise that there is a good defence."

10. In Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the Court of Appeal stated that:

"When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance……..."

11. Appellant similarly relied on Court of Appeal decisions in **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** and **John Wainaina Kagwe v Hussein Dairy Limited** [**2013**] **eKLR.**

Analysis and Determination

12. I have given due consideration to submissions, the authorities cited and the entire record of appeal in keeping with this court's duty as a first appellate court to re-evaluate and reassess the entire evidence with a view to arriving at my own inferences of fact and independent conclusions thereon. See **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** and **Kenya Ports Authority V Kuston (Kenya) Ltd, (2009) 2 EA 212**.

13. This court is also under an obligation not only to consider the general principles for striking out pleadings but also have regard to Order 2 rule 7 and 8 of the Civil Procedure Rules and the Defamation Act. (See (**See Elizabeth Atieno Ayoo v Nairobi Star Publication Limited [2016] eKLR**).

14. It is the Respondent's contention that the words complained of are defamatory. The Appellant in his statement of defence admits authoring the letter complained of and addressing the media and uttering the words complained of and concerning the applicant but denied that they were defamatory. In view of that admission, it follows that it would not be necessary for the Respondent to prove at the trial, the fact of publication, the content of the publication and the fact that the publication referred to the Respondent. (See **Grace Wangui Ngenye V. Chris Kirubi & Another (Supra).**

15. The defence was struck out mainly for failing to comply with Order 2 rule 7(2) of the Civil Procedure Rules provides as follows: -

"Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."

16. The rule requires the defendant not only give particulars stating which of the words complained of they allege are justified, true and privileged but of the facts and matters they rely on in support of the allegation that the words are true.

17. The foregoing notwithstanding, the power to strike out pleadings must be sparingly exercised in clearest of cases (See **DT Dobie & Company (Kenya) Ltd vs Joseph Mbaria Muchina & Another (supra)** and **Ramji Megji Gudka Ltd v Alfred Morfat Omundi**

Michira & 2 others (supra). The fact that the Appellant did not comply with Order 2 rule 7(2) of the Civil Procedure Rules concerning pleadings in defamation cases is not good a reason to deny him an opportunity to ventilate his case. A perusal of the defence discloses that it raises bonafide issues. It cannot be said to be so weak that it should not go to trial for adjudication.

18. Following the enactment of **Sections 1A**, **1B, 3** and **3B** of the **Civil Procedure Act** and **Article 159(2) (d)** of the **Constitution**, the general trend has been that courts today place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that courts today abhor technicalities that impede dispensation of justice.

DISPOSITION

19. From the foregoing analysis, I am persuaded that this appeal has merit and it is allowed on the following terms:

1) The order made on 20th December, 2017 allowing the notice of motion dated 05.10.17 to strike out the Appellant's defence is set aside and substituted with an order disallowing the application

2) There shall be no order as to costs

DELIVERED AND SIGNED AT KISUMU THIS 17th DAY OF October 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Amondi

For the Appellant - N/A

For the Respondent - N/A