

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 126 of 2018

BENSON BUHURU MABINDA.....PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant based on what is said to be a defamatory communication made by the defendant to the Credit Reference Bureau. It is the plaintiff's case going by the plaint dated 17th April, and filed on 30th May, 2018 that, the said communication was defamatory and has caused the plaintiff to suffer loss and damage for which he blames the defendant.

As a result, he claims damages resulting therefrom plus costs of the suit. Upon service to enter appearance, the defendant filed a statement of defence on 16th April, 2019 denying the plaintiff's claim and sought dismissal thereof. On the same date, that is 16th April, 2019 the defendant filed an application by way of Notice of Motion under Order 2 Rule 15 (1)(a), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1, 1A, 3 and 3A of the Civil procedure Act for an order that the plaint filed by the plaintiff be struck out and the suit be dismissed with costs.

The reasons set out on the face of the application are that, the plaint as drawn discloses no reasonable cause of action against the defendant, and that a claim in defamation cannot lie under the law of defamation because there is no plea or demonstration of any publication. The suit is said to embarrass and prejudice the defendant and is a waste of valuable judicial time. Further, the plaintiff does not have any bona fide grievance under the law of tort entitling him to bring this suit, which is therefore without basis and is frivolous and vexatious.

The application is opposed and there is a replying affidavit sworn by the plaintiff herein. The thrust of the said reply is that the plaintiff has bona fide triable issues and if he is not heard on merit, great injustice would be occasioned on him. Several authorities have been filed which I have taken note of. The defendant has not cited Order 2 Rule 7 of the Civil Procedure Rules which requires that particulars of the words complained of in defamation actions, should be set out in the pleadings. Whereas that is the position, the purpose of any pleadings is to give notice to the other party of the nature of the case against that other party.

I have looked at the plaint. There is some clarity in the plaintiff's case about what his claim against the defendant is from paragraphs 6 to 9 of the said plaint. The defendant filed a statement of defence in which reference has been made to the allegations raised by the plaintiff, which leaves no doubt that the defendant knows exactly what the plaintiff's case against it is.

In fact, paragraph 5 of the said defence is clear in that regard. Additionally, the defendant has expressly admitted the jurisdiction of this court to hear and determine the dispute in paragraph 11 of the statement of defence. There is no prejudice that has been identified by the defendant in the event this suit is sustained. In any case, Order 8 of the Civil Procedure Rules has elaborate provisions for the amendment of pleadings which option is still available to the plaintiff.

Striking out of a suit is a drastic measure which should be invoked sparingly and only in the clearest of cases. In my assessment of the pleadings, that is not the position in this case. The plaintiff should be allowed to have his day in court and therefore the application dated 16th April, 2019 is lacking in merit and is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 7th Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE