



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 154 OF 2017

JINARO KIPKEMOI KIBETPLAINTIFF

VERSUS

BENJAMIN ITOKDEFENDANT

RULING

1. By a Notice of Motion dated 15th December 2017, the plaintiff, *Mr. Jinaro Kipkemoi Kibet* (hereinafter the applicant) approached this court seeking the following orders:

i. That the court be pleased to strike out the defendant's statement of defence dated 18th August 2017.

ii. That consequent upon the grant of prayer 1, interlocutory judgment be entered in favour of the plaintiff as prayed in the plaint and that matter to proceed for assessment of damages.

iii. That costs of the application be borne by the defendant.

2. The application was brought under *Sections 1A, 1B and 3A of the Civil Procedure Act; Order 2 Rules 8, 15 (1) (b), (c) and (d) and Order 51 rule 1 of the Civil Procedure Rules* and all other enabling legal provisions. It is supported by the grounds stated on its face and the depositions in the supporting affidavit sworn by the applicant on 15th December 2017.

3. In the grounds anchoring the motion and in the supporting affidavit, the applicant states that his action against the defendant is for libel published in the defendant's letter dated 4th December 2016 in respect of which he has pleaded the relevant particulars in his plaint; that the statement of defence filed by the defendant is scandalous, frivolous and or vexatious as it consists of bare denials and bears no particulars either justifying or excusing the said malicious publication; that the defence does not disclose triable issues and is not a good defence to the plaintiff's action; that proceeding to trial with such a defence will only delay the fair trial of the action and will amount to a waste of judicial time.

4. The application is opposed. The respondent, *Mr. Benjamin Itok* filed grounds of opposition dated 9th February 2018 which were largely replicated in his replying affidavit sworn on even date. The respondent denied the applicant's claim that his defence was scandalous and amounted to an abuse of the court process. He maintained that the defence raises a good defence to the plaintiff's action albeit in general terms and claimed that the application was meant to deny him a chance to tender in open court the evidence he has against the plaintiff. He urged the court to dismiss the application noting that the applicant does not stand to suffer any prejudice if the suit proceeded to full hearing on its merits.

5. By consent of the parties, the application was prosecuted by way of written and oral submissions. Both parties filed written submissions which were highlighted before me on 26th September 2018 by learned counsel *Mr. Masika* who appeared for the applicant and learned counsel *Mr. Oduor* who held brief for *Mr. Onindo* for the respondent.

6. I have carefully considered the application, the affidavits on record both in support and in opposition to the motion, the rival written and oral submissions made on behalf of the parties and all the authorities cited.

Having done so, I find that the thrust of the applicant's claim is that as the plaintiff's claim is based on defamation, the defendant had an obligation under *Order 2 Rules 7 and 8* of the *Civil Procedure Rules* (the *Rules*) to plead in his statement in defence particulars of his response to the plaintiff's action in the same way that the plaintiff was required to plead facts that gave rise to his cause of action. Relying on the cases of *Mugunga General Stores V Pepco Distributors Limited, [1987] KLR 150, Riley Falcon Security Services Limited V Nairobi Star Publication Limited, [2016] eKLR* and *Trust Bank Limited V Amin & Company Limited & Another, [2000] KLR 164*, the applicant urged the court to find that the respondent's defence contained mere denials; that it did not raise any triable issue that would warrant a trial.

7. *Mr. Oduor* on his part claimed that a statement of defence cannot be struck out merely because it does not contain particulars of the facts relied on by the defendant because *Order 2 Rule 8* of the *Rules* gives a defendant who had not pleaded relevant particulars a 21 days' window to serve such particulars on the plaintiff before the date set for hearing of the suit. It was also the respondent's case that the denial of the words alleged to be defamatory by itself amounts to a triable issue which can only be resolved by way of evidence in the trial.

8. Relying on the cases of *Ternic Enterprises Ltd V Waterfront Outlets Limited, [2018] eKLR* as well as *Patrick Kariuki Muiruri V Barclays Bank of Kenya Limited & Another, [2010] eKLR*, the respondent submitted that the existence of one triable issue which does not mean an issue that must succeed at the trial entitles the defendant leave to defend a suit and that unless a pleading is so hopeless that it cannot be cured by an amendment, it should not be struck out.

9. On the material placed before me, I find that the only issue for my determination in this application is whether or not the defendant's statement in defence raises any triable issue that would justify a trial in this matter or whether it should be struck out to pave way for entry of interlocutory judgment in favour of the plaintiff.

10. *Order 2 Rule 15* of the *Rules* gives this court power to strike out or amend any pleading at any stage of the proceedings on grounds 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;”

11. The applicant's claim that the defendant's defence is frivolous or vexatious and that it does not contain any triable issue is based on grounds that the defendant has not pleaded in his defence particulars required to be pleaded in defamation claims as set out in *Order 2 Rules 7 and 8* of the *Rules*. *Order 2 Rules 7 (2)* of the *Rules* states 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.”

12. On the other hand, *Order 2 Rule 8* of the *Rules* provides that:

“In an action for libel or slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled at the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the court, unless at least twenty-one days before the trial he has given the plaintiff particulars of the matters on which he intends to give evidence.”

13. The import of *Order Rule 7* in my view is that where in an action for libel or slander the defendant has pleaded the defence of justification or fair comment on a matter of public interest, he is required to plead particulars showing which words complained of he alleges are statements of fact and the facts and matters he relies on to support his allegation that the words are true. *Rule 8* on the other hand is concerned with the tendering of evidence at the point of mitigation of damages during the trial if the defence did not contain averments asserting the truth of the statements complained of.

14. I have read the defendant’s statement in defence dated 18th August 2017. I find that in the statement, the defendant does not plead the defences of justification or fair comment on a matter of public interest. It is therefore my finding that the provisions of *Order 2 Rules 7 and 8* of the *Rules* do not apply to the defendant in this case.

15. While as I agree with the applicant’s submissions that for the most part the defence comprises of mere denials, I find that unlike in the case of ***Riley Falcon Security Services Limited V Nairobi Star Publication Ltd, [2016] eKLR*** where publication was admitted, the respondent in paragraph 7 of the defence has specifically denied having published the alleged defamatory words in the manner stated in the plaint. Publication of alleged defamatory words or statements is an essential ingredient of the tort of defamation which must be proved by way of evidence during the trial. A denial of publication of the words complained of in my considered view amounts to a triable issue.

16. In ***Jackson Ngechu Kimotho V Equity Bank Limited, NRB HCCC No. 587 of 2011*** which was cited with approval in ***Raphael Kitur V Radio Africa T/A Star, [2014] eKLR***, the court held that:

“If a pleading raises a triable issue even if at the end of the day it may not succeed, the suit ought to go on trial since in civil litigation as opposed to criminal trials there is no provision for holding mini trials or a trial within a trial. ...”

17. In ***Ternic Enterprises Ltd V Waterfront Outlets Limited, [supra]*** the Court of Appeal held *inter alia*, that a triable issue is an issue which raises a *prima facie* defence which should go to trial for adjudication. It is not an issue that must succeed at the trial.

18. Having found that the respondent’s statement in defence raises at least one *prima facie* triable issue, I have come to the conclusion that his statement in defence is not entirely hopeless as to warrant the draconian remedy of striking out. Striking out of pleadings given the serious consequences attendant thereto which includes the denial of a party’s right to be heard must be employed only in clear and plain cases where the pleadings are so hopeless that they cannot be cured by an amendment.

19. I am fortified in the above finding by the Court of Appeal’s decision in ***Kivanga Estates Ltd V National Bank of Kenya Limited, [2017] eKLR*** where the court held as follows:

“... striking out a pleading is a draconian act, which may only be resorted to, in plain cases... whether or not a case is plain is a matter of fact. A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

20. Given that this case is still at the pretrial stage, in my opinion, any deficiencies in the respondent’s

statement in defence as filed can be cured by an amendment.

21. For all the foregoing reasons, I find that the Notice of Motion dated 15th December 2017 lacks merit and it is hereby dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 21st day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Onindo for the respondent

No appearance for the applicant

Mr. Salach: Court Assistant