REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 100 OF 2016

HON. KIARIE WAWERU KIARIE.....PLAINTIFF

VERSUS

MOSES KANYIRA.....1ST DEFENDANT

HON. JOHN MUTUTHO.....2ND DEFENDANT

MEDIAMAX NETWORK LIMITED.....3RD DEFENDANT

RULING

1. This ruling seeks to determine the 2nd Defendant's application dated 13th March, 2017 seeking to have his name struck out from the proceedings. The Application is brought under the provisions of Order 1 rule 10 (2) and Order 1 Rule 14 of the Civil Procedure Rules 2010. The 2nd Defendant (the "**Applicant**") swore an Affidavit dated 13th March, 2017 in support of the Application and also stated the grounds on the face of the Application.

2. The Applicant depones that his presence in the suit is not necessary in enabling the Court to effectively determine the issues in the suit as no cause of action has been disclosed against him. He further depones that he was not involved in publication of any defamatory statements against the Plaintiff and that the statements he made during the interview with regard to the Plaintiff did not in any way link the Plaintiff to the manufacture of illicit alcohol and did not portray the Plaintiff in bad light or injure his reputation. He states that he made the statements in good faith without malice and in public interest as the chairman of National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA). He further depones that the Plaintiff shall not be prejudiced if his name is struck out from the suit as no relief flows from him to the Plaintiff and that he is not a proper party to the suit. He also avers that the suit is scandalous, frivolous and incompetent.

3. The Plaintiff opposed the Application via Grounds of Opposition dated 19th May, 2017. The Application was opposed on the grounds that it is bad in law and incompetent, frivolous and an abuse of the court process. The Plaintiff also states that the Applicant has already filed a defence to the claim against him and therefore the application lacks merit. That the application is an afterthought meant to scuttle and delay the hearing of the suit on merit.

4. The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated 15th January, 2017 and submitted that the statement he made cannot sustain a cause of action as it did not in any way amplify, confirm or support the statement that, the Plaintiff is connected to the brewery that manufactures illicit alcohol. He therefore submits that the cause of action is unreasonable and relied on the case of **DT Dobie & Company (K) Ltd Vs Muchina & Another (1980) EKLR** where the Court summed up an unreasonable cause of action as "*…A cause of action will not be reasonable if it does not state such facts as to support the claimed prayer*." He also relied on the case of **V.K. Construction Company Ltd vs. Mpata Investments Ltd Nairobi HCC 257/2003** where a reasonable cause of action was defined as ***" a reasonable cause of action is such a factual situation as would entitle a person to obtain a remedy against another person and which has some chance of success when only the averments in the plaint are considered. In other words, the test for the reasonableness of the cause of action is the possibility of the success thereof when only the plaint is considered."***

5. The applicant further submitted that he should not be a party to the suit but rather he can only be called as a witness having been present during the interview where the alleged defamatory statements were made. It is the 2nd Defendant's contention that the case can be heard and a decree passed without his presence. He relied on the case of **Mary Wangai Gachihi & another v Principal Magistrate, Mukuruweini Courts & 2 Other**s. The applicant also relied on the case of **Werrot & Co. Ltd & 3 Others Vs. Andrew Douglas Gregory & 2 Others [1998] eKLR** where Justice Ringera J. stated thus, "*for determining the question who is necessary party there are two tests ; (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and (ii) it should not be possible to pass an effective decree in the absence of the party …*"

6. It was finally submitted that the suit against the 2nd Defendant is scandalous, frivolous and vexatious.

7. On the other hand, the Plaintiff filed submissions dated 28th February, 2018. He submitted that a perusal of the Plaint confirms the existence of serious triable issues. He relied on the case of **Peter Ngugi Kabiri v Esther Wangari Githinji & another [2013] eKLR** where it was stated that *"In judging whether a plaint discloses triable issue the court will assume all the allegations in it to be true… The court cannot strike out pleadings on grounds that it does not raise triable issues unless it is clear and obvious that the action will not lie in law."*

8. The Plaintiff further submitted that necessary parties are those from whom the Plaintiff has claimed relief and that the success or otherwise of the suit is an exclusive preserve of the court hearing the evidence from the parties. The Plaintiff submitted that there are specific statements made exclusively by the Applicant which the plaintiff claims to be defamatory and it is only him who can answer to them hence making him a necessary party to the suit. That there is a need to maintain all the defendants since if the suit succeeds, liability would attach to all of them. In any event, the Plaintiff submits that if the Court was to find that the 2nd Defendant was erroneously enjoined, he would be adequately compensated by an award of damages. It was also submitted that the Applicant is inviting the Court to determine the merits of the suit at a preliminary stage.

9. I have considered the Application and the rival arguments for and against the orders sought. The Applicant is enjoined in a defamation suit as the 2nd Defendant. The Claim against him is that he participated in an interview with the 1st Defendant who is an employee of the 3rd Defendant in which he made statement among them that "*…so if it is true that this judge owns the Company and Alcohol brewed there and many people have died, we will first get his salary and we will go to the same Court if it is true…*". The applicant submits that the statements he made did not defame the Plaintiff as they did not amplify and imply that the plaintiff owned the company that brewed the alcohol. He also stated that he did not publish the statement and therefore he should not be a necessary party to the suit.

10. The main issue for determination in this application should be who is a necessary party to a suit. The case of **Amon v Raphael Tuck & Sons Ltd (1956) 1 All ER 273**, cited in **Pizza Harvest Limited v Felix Midigo [2013] eKLR** sought to establish who a necessary party is. **Devlin, J** held at p. 286-287:

> *"What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately …the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."*

11. The Plaintiff has submitted that the 2nd Defendant was the only participant in the interview and as it can be seen from the Plaint, the Plaintiff has made reference to specific statements uttered by the 2nd Defendant. The Plaintiff has further told this Court that if the Court makes a finding that the statements uttered were defamatory, then liability would attach to all the Defendants including the Applicant. The Applicant has broadly submitted that the statements were not defamatory in that the same did not imply that the Plaintiff owned the subject company. My finding is that at this stage, the Court cannot delve into determination of the issues in the main suit. Whether the statement was defamatory or not is a matter which can only be determined upon hearing the parties in the main suit. The action against the Applicant lies in law and it is my finding that the innocence or otherwise of the Applicant can only be determined upon a full hearing of the suit. This was the determination in **Peter Ngugi Kabiri v Esther Wangari Githinji & another [2013] eKLR** where it was held that *"In judging whether a plaint discloses triable issue the court will assume all the allegations in it to be true… The court cannot strike out pleadings on grounds that it does not raise triable issues unless it is clear and obvious that the action will not lie in law."*

12. For the Applicant to say that the suit does disclose a cause of action against the 1st and 3rd Defendants but does not discloses a cause of action against him is paradoxical since the 1st and 2nd Defendants were engaged in an interview and the alleged defamatory statements were a subject of discussion during the interview. As was correctly held in the case of **V.K Construction Co. Ltd (supra)** that, *"the word reasonable cause of action means an act on the part of the Defendant which gives the Plaintiff his cause of complaint"* as to whether it will succeed or not, that can only be determined after a full trial (*emphasis mine*).

13. In the case of ***D.T Dobie & Company (k) Ltd -VS- Muchera,*** Court of Appeal Nairobi, Madan, Miller & Potter JJA held that "***The words reasonable cause of action in Order vi rule 13(1) means an action with some chances of success when the allegations in the plaint only are considered . A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer."***

14. Therefore a cause of action will arise if the allegation against the defendant **has some chances of success** and **if there is an act against the defendant which gives the Plaintiff his cause of complaint.** In this matter, I find that the allegation against the Applicant amounts to a cause of action thus necessitating the Applicant to be enjoined as a Defendant in the suit.

15. The provisions of **Order 1 rule 10 (2)** of The Civil Procedure Rules is that, " *The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added*."

16. My finding on this application is that the 2nd Defendant was not improperly enjoined in the suit. This suit discloses a cause of action against the Defendants and the application therefore fails and the same is hereby dismissed. Costs shall be in the cause.

Dated, Signed and Delivered at Nairobi this 10th Day of May, 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

.....*For the Respondent*