



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO. 1 OF 2017**

**TOBIAS O. SEE.....PLAINTIFF**

**VERSUS**

**SAMUEL MICHAEL ONYANGO.....1<sup>ST</sup> DEFENDANT**

**SAMUEL OKELO DEYA.....2<sup>ND</sup> DEFENDANT**

**MAURICE ODUOR.....4<sup>TH</sup> DEFENDANT**

**PAUL OTIENO.....5<sup>TH</sup> DEFENDANT**

**GEOFFREY OBWON.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 27.11.17; brought under Article 159(2)(b) of the Constitution; Section 7, 8(1), 15 and 16 (1) of the Defamation Act; Section 1A, 3A, 3B and 63(e) of the Civil Procedure Rules, 2010, Order 2 rule 7 (1) and (2), 8 and 15, Order 13 and Order 51 rule 1 and all enabling provisions of the law, the plaintiff/applicant prays for orders that:

- 1. The statements of defence dated 27th February, 2017 and 24th July, 2017 be struck out**
- 2. The suit be set down for formal proof**
- 3. Costs of this application be provided for**

2. The application is based on the grounds among others that:-

- a. The impugned statements are false and untrue
- b. Publication of the impugned statements to 3rd parties is admitted

3. The application is also supported by an affidavit sworn by the plaintiff/applicant on 27.11.17 in which he reiterates the grounds on the face of the application.

4. In opposing the application, 1st respondent filed grounds of opposition dated 19.12.17. The 2nd, 3rd, 5th and 6th respondents also filed grounds of opposition on 22.1.18 while the 4th respondent filed a replying affidavit sworn on 8th July, 2017 and filed on 11th January, 2018. All the respondents aver that their defences raise triable issues. The 4th respondent placed reliance on the following authorities:

**1. DT Dobie & Company (Kenya) Ltd vs Joseph Mbaria Muchina & another (Civil Appeal No 37 of 1978)**

**2. Kenya Commercial Bank Limited & another v Suntra Investment Bank Limited [2014] eKLR**

5. In a further affidavit sworn and filed on 15th January, 2018, applicant among other averments deposes that the 4th respondent has not specified the triable issues in his defence. Applicant has placed reliance on the following authorities:

**1. J.P Machira T/A Machira & Company Advocates v Wangethi Mwangi & another [1998] eKLR**

## 2. Grace Wangui Ngenye V. Chris Kirubi & Another [2015]eKLR.

### SUBMISSIONS BY THE PARTIES

#### Applicant's submissions

6. Applicant holds the view that since the respondents have not denied publishing the impugned words which according to him are defamatory, they have no defence and their defences ought to be struck out. The words complained of by the applicant are the ones that attribute one Tobias O. See to the awarding of a contract to the applicant to provide security services to Nyanza Club on 24th July, 2016.

#### Respondents' submissions

7. Respondents holds the view that plaintiff's claim which is denied ought to be sustained since they raise triable issues.

### ANALYSIS AND DETERMINATION

8. I have carefully considered the notice of motion vis a vis the affidavits, grounds of opposition, submissions and various authorities cited on behalf of the parties.

9. In *DT Dobie & Company (Kenya) Ltd. V. Muchina (Supra)* it was held that:

**“As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.**

10. In *Grace Wangui Ngenye V. Chris Kirubi & Another (Supra)*, 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”**

11. This court is 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. It is the applicant's contention that the words published in the letters on 12.7.16 by the respondents and others on 25.7.16 and by respondents on 9.7.16 to Nyanza Club Management were defamatory.

12. Applicant has pleaded that the words complained of were defamatory in their natural and ordinary meaning and in addition has at paragraph 26 of the plaint given particulars of the meaning ascribed to them.

13. The 1st respondent in its statement of defence denies that the words in their natural and ordinary meaning meant or could have the meanings attributed to them. He further pleads that the words were true and factually correct.

14. The claim against the 5th respondent was withdrawn by a notice filed on 10th April, 2018. The 2nd, 3rd and 6th respondents in their joint statement of defence also deny that the words in their natural and ordinary meaning meant or could have the meanings attributed to them. They further plead that the words were justified, true and privileged.

15. The 4th respondent in his statement of defence equally denies the plaintiff's claim and additionally pleads that the words complained of were justified, true and privileged.

16. In their statements of defence; the respondents admit the publication of the letters of and concerning the applicant. In view of that admission, it follows that it would not be necessary for the applicant to prove at the trial, the fact of publication, the content of the publication and the fact that the publication referred to the plaintiff in connection with his profession and character. (See *Grace Wangui Ngenye V. Chris Kirubi & Another (Supra)*, *Chrispus Keah v Joyce Mburu [1982] eKLR* and *Geoffrey Ngunjiri Njuguna V Moses Gichohi [2008] eKLR*).

17. 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.”**

18. The rule requires the defendants not only to 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. (See *Riley Falcon Security Services Ltd v Nairobi Star Publication Limited [2016] eKLR*).

19. A perusal of the defenses shows that they do not fully comply with Order 2 rule 7(2) of the Civil Procedure Rules since defendants have not pleaded particulars of the facts and matters they rely on in support of the allegation that the words complained of are justified, true and privileged.

20. On whether the words complained of were malicious, the applicant is not required to give particulars of facts on which it relies in support of allegation of malice in the plaint. Moreover, the applicant is not required to prove that the words were published falsely and maliciously for the law presumes those facts in its favor. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. (See *Grace Wangui Ngenye V. Chris Kirubi & Another (Supra)* and *Phinehas Nyagah v Gitobu Imanyara [2013] eKLR*).

21. The words complained of in their natural and ordinary meaning associate applicant to a contract awarded to Riley Falcon Security Services Limited to provide security services for the KCB Golf Event at Nyanza gold club held on 25th June 2016. The email and letter dated 24.7.16 by the applicant to Head of Corporate Security Kenya Commercial Bank however suggest otherwise. The words complained of are in my considered view, plain and unambiguous and require no further evidence of their meaning. This court therefore holds that a reasonable person would understand them in a defamatory sense.

22. On striking out of pleading, the principles that guide the court were espoused in the case of *DT Dobie & Company (Kenya) Ltd vs Joseph Mbaria Muchina & another (Supra)* in which the court stated that:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendments, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it”.**

23. In the case of *Kenya Commercial Bank Limited & another v Suntra Investment Bank Limited (Supra)*, the court held:

**“It is trite law that triable issue is not one which must necessarily succeed but one that raises bona fide triable issues which should go to trial for adjudication.”**

24. The powers of striking out are to be exercised with great caution and only in the clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits; the court is perfectly entitled to strike out a pleading. (See *J. P Machira T/A Machira & Company Advocates v Wangethi Mwangi & another* and *DT Dobie & Company (Kenya) Ltd. V. Muchina (Supra)*).

25. From the above analysis, it is obvious that no useful purpose would be served by the defences on record and this in my view is a clear and obvious case where striking out of the defences is justified.

26. For the foregoing reasons, this court finds merit in the plaintiff/applicant's notice of motion dated 27.11.17 and the same is hereby allowed striking out the defences of the 1st, 2nd, 3rd, 4th and 6th defendants.

27. In the end, judgment is entered on liability for the plaintiff and it is ordered that this suit be set down for assessment of damages.

**DATED AND DELIVERED THIS 17th DAY OF May, 2018**

**T.W.CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Plaintiff/Applicant - N/A

For 1st Respondent - Mr. Onsongo

For 4th Respondent - Mr. Mwesigwa

For 2nd, 3<sup>rd</sup> and 6th Respondents - Ms. Ayieta