



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 34 OF 2017

SUSAN ROKIH PLAINTIFF

VERSUS

JOYCE KANDIE 1ST DEFENDANT

ROYAL MEDIA SERVICES (CITIZEN TV) 2ND DEFENDANT

STANDARD GROUP (KTN) 3RD DEFENDANT

NAIROBIAN WEEKLY NEWSPAPER..... 4TH DEFENDANT

EBRU TELEVISION 5TH DEFENDANT

RADIO MILAMBO FM (MIGORI) 6TH DEFENDANT

STAR NEWSPAPER 7TH DEFENDANT

RULING

1. This ruling determines two applications. The first application was filed by the 2nd defendant *Royal Media Services (Citizen TV)* by way of a Notice of Motion dated 31st January 2018 while the second application is the 5th defendant's Notice of Motion dated 15th February 2018.

2. Both applications seek the striking out of the plaint dated 14th February 2017 and dismissal of the plaintiff's suit against the 2nd and 5th defendants with costs on grounds that the plaint does not disclose a reasonable cause of action against the two applicants.

3. The 2nd defendant's application is premised on grounds stated on its face which are replicated in the depositions made in the supporting affidavit sworn on 31st January 2018 by *Mr. Njenga Njihia*, the 2nd defendant's legal officer.

The 2nd defendant contends that the plaint does not disclose a reasonable cause of action against it as it does not set out verbatim the actual words allegedly published by the 2nd defendant which are said to be defamatory of the plaintiff as required by the law; that though the plaintiff relies on innuendos, the plaint does not disclose particulars of innuendo as required by *Order 2 rule 7 (1)* or particulars of malice as required by *Order 2 rule 7 (3)* of the *Civil Procedure Rules*.

4. In the second application, the 5th defendant, *Ebru Television* claims that the plaint does not disclose any cause of action against the 5th defendant as the defamatory words and/or statements allegedly made by the 5th defendant in reference to the plaintiff are not disclosed; that the 5th defendant is unable to answer to the plaintiff's claim and in its view, the plaintiff's suit amounts to an abuse of the court process.

5. When the 5th defendant's application came up for hearing on 11th June 2018, the court directed on application by *Mr. Karanja*, learned counsel for the 2nd defendant that both applications be heard together since they sought similar orders.

On the same date, *Mr. Echesa* for 1st, 3rd and 6th defendants indicated that his clients did not wish to participate in the hearing of the applications and he applied to be discharged from the proceedings, an order which the court granted. Learned counsel for the 7th defendant, *Ms Ochieng* also informed the court that the 7th defendant was supporting the applications. On 1st November 2018, *Mr. Ndungu* learned counsel for the 2nd defendant who held brief for *Mr. Odero* for the 6th defendant also notified the court that the 6th defendant did not wish to participate in the hearing of the applications.

6. The two applications are opposed. The plaintiff filed replying affidavits to both applications on 21st March 2018. She opposed the applications on grounds that they lacked merit since they were not supported by any affidavit; that failure to state verbatim the words or statements published by the 2nd and 5th defendants in reference to her or failure to specify particulars of the innuendo contained in paragraphs 11 and 14 of the plaint or particulars of malice was not fatal to the suit as the same was contained in the bundle of documents and the clip which will be produced as evidence in support of her case during the trial.

7. By consent of the parties, the applications were prosecuted by way of written submissions which the plaintiff, 2nd and 5th defendants duly filed.

8. I have carefully considered both applications, the affidavits on record, the pleadings filed by the parties, the rival written submissions and the authorities cited. I find that the only issue that arises for determination before me is whether or not the plaintiff's suit should be struck out against the 2nd and 5th defendants on grounds that the plaint instituting the suit is incurably defective for failure to disclose a reasonable cause of action against each of them.

9. I wish to start by pointing out that under *Order 2 Rule 15* of the *Civil Procedure Rules (the Rules)*, the court has power to strike out pleadings on several grounds which includes striking out where the pleading in question does not disclose a reasonable cause of action or defence in law. *Order 2 rule 15 (2)* makes it clear that applications seeking to strike out pleadings for not disclosing a reasonable cause of action or defence should not be supported by any evidence. All an applicant needs to do is to state concisely the grounds on which the application is premised.

10. In applications of this nature, the court only looks at the pleadings only and cannot go beyond them in order to establish whether the impugned pleading raises a reasonable cause of action or defence. Consequently, the respondents claim that the two applications lack merit because they have not been supported by any affidavit falls by the way side and cannot avail the respondent.

11. The principles which guide a court in the exercise of its discretion when considering an application under *Order 2 rule 15* have been enunciated in several authorities. In *DT Dobie & Co (K) Ltd V Muchina, [1982] KLR*, the Court of Appeal when interpreting *Order VI Rule 13 (1)* of the repealed *Civil Procedure Rules* which is the equivalent of the current *Order 2 Rule 15* defined the term "reasonable cause of action" to mean "an action with some chance of success when 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. ...". The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint. In the same case, *Madan JA* (as he then was) expressed himself as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... 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 amendment, it ought to be allowed to go forward" (Emphasis added)

12. Similarly, in *Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR*, the Court of Appeal emphasized the need for a court to exercise its discretion with utmost care when faced with an application such as the present one because needless to state, striking out pleadings is a draconian action which may have the consequences of slamming the door of justice on the face of one party without according it an opportunity to be heard.

In expounding the rationale for the need to exercise great caution in determining applications seeking striking out of pleadings, the Court of Appeal in the *Crescent Construction Case (supra)*, stated as follows:

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

13. Guided by the above principles, I now turn to consider the merits or otherwise of the two applications.

In the impugned plaint, the plaintiff sued seven defendants seeking general, aggravated or exemplary damages for defamation. Therefore, besides considering the general principles that should guide the court in the exercise of its discretion under *Order 2 Rule 15* as set out above, the court must in addition consider the provisions of *Order 2 Rule 7 (1) and (3)* of the *Rules* which specify particulars that should be disclosed in actions for defamation.

Order 2 Rule 7 (1) states as follows:

"Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense."

Order 2 Rule 7 (3) provides that:

“Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his pleadings give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.”

14. Starting with the application dated 15th February 2018, the 5th defendant contends that the plaintiff’s suit does not disclose any cause of action against it as the plaintiff does not disclose any defamatory word or statement made in reference to her by the 5th defendant.

I have scrutinized the entire pleadings. I have not come across any averment that links the 5th defendant to the publication of any word or statement that is alleged to be defamatory of the plaintiff. Given the definition of the term “reasonable cause of action” in the *DT Dobie case (supra)*, considering that no complaint is specifically made against the 5th defendant in the pleadings, I am persuaded to agree with the 5th defendant’s submissions that the pleadings herein does not disclose any reasonable cause of action against it.

15. In view of the foregoing, I find that no useful purpose will be served by retaining the 5th defendant in the suit. I therefore find merit in the Notice of Motion dated 15th February 2018 and it is hereby allowed with the result that the plaintiff’s suit is struck out with costs against the 5th defendant.

16. Regarding the Notice of Motion dated 31st January 2018, the 2nd defendant’s claim that the plaintiff does not disclose a reasonable cause of action against it is based on grounds that the plaintiff does not state verbatim the words allegedly broadcasted by the 2nd defendant which were said to be defamatory of the plaintiff and that paragraphs 11 and 14 which raises an innuendo do not give particulars of the innuendo as required by *Order 2 Rule 7 (1) of the Rules*; that the plaintiff does not give particulars of malice as required by *Order 2 Rule 7 (3) of the rules*.

17. My reading of the pleadings reveals that though it is inelegantly drafted and may have some gaps regarding some of the plaintiff’s complaints against the 2nd defendant, paragraphs 4, 5, 6, 7, 8 to 18 of the pleadings read together as a whole show that the plaintiff has a reasonable cause of action against the 2nd defendant. Paragraphs 6, 10, 12 and 13 disclose the words that were allegedly published by the 2nd defendant in reference to the plaintiff which the plaintiff considers to be defamatory.

18. In my view, the plaintiff has disclosed in the pleadings the facts which found her complaint against the 2nd defendant. Whether the same presents a strong or weak case is not for me to consider or determine at this juncture in the instant application. A reasonable cause of action is not one that must succeed in the trial of the action but one which has some chance of success. It will be upto the plaintiff to prove at the trial that the words complained of were actually published by the 2nd defendant in reference to her as alleged and that they were defamatory. As the plaintiff has not claimed that the words or statements complained of were used in a defamatory sense which is different from their ordinary and natural meaning, I find that *Order 7 Rule 2 (1)* is not applicable to the plaintiff’s action as currently instituted.

19. As regards failure to plead particulars of malice, the 2nd defendant has asserted that as the plaintiff does not disclose particulars of malice, the same is fatally defective as it contravenes the provisions of *Order 2 Rule 7 (3) of the Civil Procedure Rules*. Though it is true that the plaintiff did not expressly plead malice against any of the defendants and there was therefore nothing to disclose in terms of particulars thereof, my reading of *Order 2 Rule 7 (3)* leads me to conclude that a plaintiff in an action for libel or slander need not plead malice in the pleadings but where malice is pleaded, failure to state particulars on which the claim is made does not automatically render a pleading defective. The plaintiff is given an opportunity to specify the particulars of malice in his or her reply to the defence if the defendant pleads in its defence that the words complained of were fair comment on a matter of public interest or were published upon a privileged occasion.

20. For the foregoing reasons and findings, I am not satisfied that the plaintiff’s suit against the 2nd defendant is so weak as to be beyond redemption. It cannot also be classified as a non-starter. Where a case as pleaded is not obviously hopeless, in the interest of dispensing substantive justice as the courts are enjoined to do under *Sections 1 A and 1 B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution*, the court should lean more towards sustaining a suit so that it can be determined on merit instead of terminating it summarily by striking out the pleadings especially where a suit such as the present one is still in its preliminary stages and there is still room to have the pleadings amended should the plaintiff consider it necessary.

21. I believe I have said enough to demonstrate that I have come to the conclusion that the 2nd defendant’s Notice of Motion dated 31st January 2018 is not merited. It is thus dismissed with no orders as to costs.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 13th day of December, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr Karanja for the 2nd defendant

Ms Opiyo holding brief for Mr Kiprono for the 5th defendant

No appearance for the plaintiff

No appearance for the 1st, 3rd, 4th, 6th & 7th defendants

Mr. Fidel: Court Assistant