



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 225 OF 2017**

**DR. TITUS NAIKUNI .....PLAINTIFF**

**VERSUS**

**DELOITTE CONSULTING LIMITED.....RESPONDENT**

**RULING**

1. Deloitte Consulting Ltd, the defendant herein, took out the motion dated 17.11.2018 in which it sought for **inter alia** leave to amend its defence. The motion is supported by the affidavit sworn by Daphine Kemunto. When served with the motion, Dr. Titus Naikuni the plaintiff herein, filed grounds of opposition to resist the application. Learned counsels made oral submissions when the application came up for interpartes hearing.

2. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavit filed in support of the motion. I have also considered the plaintiff/respondent's grounds of opposition and the rival oral submissions. It is the submission of the defendant/applicant that it requires leave to amend the defence to enable it introduce in its defence, a plea for **justification** and **qualified privilege**. The applicant further argued that the proposed amendments are necessary for purposes of aiding the court to determine the real issues in controversy between the parties. It is also argued that the plaintiff/respondent will not suffer any prejudice if the order to amend is given.

3. The plaintiff/respondent urged this court to reject the application for amendment on the basis that the same was filed in bad faith and that the proposed amendment is intended to buy time for the defendant. It was also argued by the plaintiff/ respondent that the proposed amendments cannot be introduced at this stage because actions based on the tort of defamation are time bound thus divesting the jurisdiction of this court. It was pointed out by the respondent that the defences sought to be introduced are covered by the current defence.

4. This court has unfettered discretion in determining applications for amendments if the amendments will assist the court in determining the real questions in controversy between the parties or to correct errors or defects in any proceedings or pleadings.

5. In the motion before this court the defendant/applicant has beseeched his court to grant the order for leave to amend the defence so that it can introduce the defence of justification and qualified privilege. The plaintiff/respondent is of the opinion that the defendant's application to introduce the aforesaid defence is time-barred. With respect, I am not persuaded by the plaintiff/respondent's argument that the intended amendments are time-bound. The defendant is not seeking to introduce a counter-claim so that one can say that the defendant is introducing new claims which are already time-barred.

6. Even if the defendant had sought to amend the defence for purposes of introducing a counter-claim, the claim sought to be introduced by amendment will relate to the date of filing the initial defence. It has also been argued that the intended amendment would prejudice the plaintiff/respondent.

7. With respect, I do not think so. If the amendment of the defence is allowed, the plaintiff is entitled if need be to amend the plaint to answer the amended defence.

8. The substantive suit is premised on the tort of defamation. The defendant has stated that it intends to introduce the twin defences of **justification** and **qualified privilege**.

9. I have looked at the initial defence and I am convinced that the aforesaid defences were not pleaded. In paragraph 32 and 33 of the plaint, the plaintiffs aver that the words published were defamatory of the plaintiff and were meant to negatively influence his standing in the business circles and that the publications were sensational, false, malicious and calculated to lower the plaintiff's reputation.

10. The defendant has indicated that it intends to state through the amended defence that the publications were justified and that they were published on occasion of qualified privilege. In my view if the amendment is allowed then the question as to whether or not the defendant was justified to publish the information will arise.

11. The second question is whether or not the publication was done on qualified privilege. The amendment therefore will offer an opportunity to the court to determine the real questions in disputes. The defences of justification and qualified privilege are known defences in cases of defamation.

12. In the end, I find the motion dated 17.11.2018 to be meritorious. Consequently, I allow the motion and grant leave to the defendant/applicant to file and serve an amended defence within 14 days from the date hereof. A fair order on costs is that costs of the motion shall abide the outcome of this suit.

**Dated, Signed and Delivered in open court this 14<sup>th</sup> day of December, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant