REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 399 OF 2015

SOLOMON MWANGI MUGO.....PLAINTIFF

VERSUS

TOM O. K'OPERE.....DEFENDANT

RULING

1. The application dated 25th April, 2016 seeks orders that:

> **"1)That at the Pre-Trial and Case Management Conference, this Honourable Court do order that the Plaint and entire action by the Plaintiff herein be struck out with costs to the Defendant.**
>
> **2) That the Plaintiff do pay the Defendant the costs of the suit and this Application."**

2. The application is based on the grounds stated in the application and is supported by the affidavit of the Applicant, Tom O. K'opere. The Applicant, an advocate by profession has stated that the letter dated 19th August, 2015 which the Respondent has complained is defamatory was privileged communication written in the course of professional duty and practice of the law and such privilege having not been waved the letter cannot constitute defamatory publication. That the letter was written on behalf of a client in response to a demand letter written by the Respondent purportedly on behalf of a client. That the communication was strictly Advocate to Advocate and was only copied to the Applicant's client for communication and was privileged and justified. That the Respondent has no cause of action and the suit ought to be struck out as being frivolous and vexatious.

3. The application is opposed. According to the Respondent, the letter in question was communication between the advocates and not advocate to client and it is therefore not privileged communication. That the letter was published to the client and to the secretary and/or clerk who receive such letters. That the claim meets the elements of defamation and ought to proceed to trial. It is further stated that some of the matters raised by the Applicant are matters of evidence and that the case deserves to be heard in full.

4. The application was canvassed by way of written submissions which I have considered.

5. The background facts of this matter are not in dispute. Both the Applicant and the Respondent are practicing advocates by profession. The genesis of the suit is a letter written by the Respondent on behalf of his client, John Irungu Mukoma to the Applicant's client, John Joel Kanyali. The letter was dated 31st August, 2012 but was delivered in August, 2015. The Applicant wrote to the Respondent for

confirmation of the origin of the letter, date it was written and whether the Respondent was acting for John Irungu Mukoma. The Respondent wrote to the Applicant confirming the above and termed the date on the letter as "common typographical errors in legal practice." In response, the Applicant wrote in regard to the said common typographical error in legal practice that **"calling a back-dated letter of three (3) years a common typographical error in legal practice ..... must be a very bad poor backstreet practice"** These are the words that aggrieved the Respondent.

6. The principles of the law applicable in such an application were well set out in the case of **D.T.Dobie &Company (Kenya)Limited v Joseph Mbaria Muchina & Another [1980] eKLR.** Although the court has an inherent jurisdiction to strike out or dismiss a case which discloses no cause of action, is scandalous, frivolous, vexatious and an abuse of the court process, it's a drastic remedy which ought to be exercised sparingly only in plain and obvious cases when it is clear that the action cannot succeed or is in some way an abuse of the court process. The Plaintiff cannot be driven out of the seat of judgment unless the case is unarguable.

7. As stated by Madan, J in the case of **D.T.Dobie (supra)**:

> **"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.**
>
> **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 for a court of justice ought not to act in darkness without the full facts of a case before it."**

8. In the case at hand the Plaintiff's complaint is that the publication by the Defendant is defamatory. The Defendant has pleaded qualified privilege and stated that the publication is privileged and consists of fair comment. Whether the publication in question consists of fair comment and is privileged is the crux of the matter herein. It is a triable issue. At this stage of the case, the court is not expected to engage in a lengthy process of examination of the documents in question to decipher the Plaintiff's case or the Defendants case. That would amount to usurping the trial process (See **D. T. Dobie** case - supra).

9. The Defendant made a request for particulars and the Plaintiff filed a reply to the same. The Defendant is already aware of the case to meet. As stated in the case of **John Mburu v Consolidated bank of Kenya Ltd [2006] eKLR:**

> **"The function of the particulars therefore, is to inform the other side the nature of the case they have to meet as distinguished from the mode which the case is to be proved."**

10. Article 50 of the Constitution provides for the right to a fair hearing. It is a right that cannot be limited (Article 25 of the Constitution). In the case at hand, my view is that the Plaintiff's case ought to see it's day in court. Consequently, the application is dismissed with costs.

Date, signed and delivered at Nairobi this 20th day of July, 2017

B. THURANIRA JADEN

JUDGE