

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO. 20 OF 2014

DAVID MWANGI MUIRURIPLAINTIFF

VERSUS

BRIAN ROBERT POOLEYDEFENDANT

RULING

The plaintiff filed this suit on 11th December, 2014. The plaint was accompanied by a Notice of Motion of the same date seeking restraining orders. The Defendant filed a preliminary objection dated 18th December, 2014 seeking to have the plaint and the Notice of Motion struck out.

Mr. Okoth, Counsel for the Defendant submitted that there is no cause of action against the Defendant. The alleged defamatory words did not refer to the Plaintiff personally. The plaint does not indicate that the Plaintiff is a Kikuyu. There is no reference to the Plaintiff and therefore the suit is an abuse of the court process. It is further submitted that there is a criminal case against the Defendant going on and these proceedings are maliciously brought before the court. Mr. Okoti contends that under Order 51 rule 13, it is mandatory that a Notice of Motion must have a penal notice. Further, the plaint is not signed and the one swearing the affidavit in support of the Notice of Motion is not indicated.

The Plaintiff opposed the Preliminary Objection. He maintains that his suit is properly before the court. The Notice of Motion is supported by an affidavit which raises several issues. The Plaintiff is a Kikuyu by tribe and has brought the suit in his personal capacity as his character has been injured.

The first issue raised by the Preliminary Objection is that the words allegedly used did not refer to the Plaintiff personally. Paragraph four of the plaint indicates that the Plaintiff was insulted and the Defendant was pointing his finger at him. These allegations will have to be proved during the hearing. The Plaintiff has indicated in his statement that he is a Kikuyu. It is clear that the Plaintiff's position is that the alleged uttered words referred to him. Whether the words were uttered or were made in reference to the Plaintiff is part of the dispute. I do find that there is a cause of action in this matter.

The other issue raised relates to Section six (6) of the Civil Procedure Act. Paragraph 13 of the Plaint indicates that the Plaintiff reported the matter to the police. Counsel for the Defendant contends that there are two suits which are going on at the same time as the Defendant is facing a criminal case. Section 6 of the Civil Procedure Act does not bar the filing of a civil case whenever criminal proceedings are initiated in relation to the same issue. I do find that this line of Preliminary Objection cannot determine the dispute. The criminal case will lead to either conviction or acquittal and will not dwell on the issue of damages claimed by the Plaintiff. Further, the criminal case was initiated by the State while the current civil case was initiated by the Plaintiff.

The other issue raised is that under Order 31 Rule 13, its mandatory that a Notice of Motion include a penal notice. Rule 51 requires every application to bear at the bottom the penal notice. However, even if the order is crafted in mandatory terms it does not mean that lack of such penal notice renders a suit or an application null and void. There are issues that can be rectified by an amendment and cannot be the source of striking out pleadings. The Defendant also contends that he was given 24 hours demand notice as opposed to 30 days notice.

I have seen the defence and the replying affidavit. It is clear that even if 30 days notice had been given, nothing could have changed the Defendant's stand on the matter. The short notice given cannot be the

basis for striking out both the suit and the application.

The plaint filed in court was duly signed. Similarly the supporting affidavit to the Notice of Motion was signed and sworn on 11th December, 2014 before a Commissioner for oaths. I do find that the suit was properly filed. A Preliminary Objection should be one that can dispose of the dispute once and for all. Most of the issues being raised by the current Preliminary Objection are not capable of solving the dispute. Even if the notice of motion dated 11th December, 2014 is struck out, the Plaintiff can still file another application containing the penal notice. If the pleadings are shoddy as per counsel for the Defendant, then that gives the Defendant an opportunity to raise a strong defence and defeat the claim. The intention of the judicial system is to hear the parties. For pleading to be struck out, for not raising any claim against a Defendant, it should be clear to the court that indeed the claim was filed is flatly frivolous and an abuse of the court process. The current claim is based on defamation and it can be deduced from the pleadings that alleged the reference to the Kikuyu tribe injured the Plaintiff's reputation.

In the end, I do find that the Preliminary Objection lacks merit and is hereby dismissed. Costs shall follow the outcome of the main suit. The Plaintiff should consider having this matter heard before the Chief Magistrate's Court. This is a simple claim for damages. The Defendant is at liberty to seek the transfer of this suit to the Chief Magistrate's Court.

Delivered and dated at Malindi this **5th** day of **March, 2015**.

Said J. Chitembwe

JUDGE