



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 519 OF 2013

1. HARUN OSORO NYAMBOKI

2. ENSI INVESTMENTS COMPANY LIMITED.....PLAINTIFF

VERSUS

1. ENOCH WAMBUA

2. THE STANDARD GROUP LIMITED

3. JOHN WERE

4. MERCY NJERI GACHARU.....DEFENDANTS

RULING

1. The Plaintiffs' notice of motion dated 17th November, 2014 is expressed to be brought under Order 2 Rule 15(1) (b) (c) and (d) of the Civil Procedure Rules, 2010. The Plaintiff sought to have the 1st 2nd and 3rd Defendants defence struck out. It is averred in the 1st Plaintiff's supporting affidavit that the defences do not raise triable issues, that the defence contains admission of facts and consequently admitted the Plaintiffs' claim, that the defence field are scandalous, frivolous and vexatious, that the defences are prejudicial and are meant to delay fair trial and that the defendants are liable for the published defamatory contents and cannot escape liability by blaming each other.
2. The 1st and 2nd Defendants filed a grounds of opposition dated 12th February, 2014 arguing that this court lacks the jurisdiction to hear this matter by virtue of Article 34(2) of the Constitution of Kenya. They also filed grounds of opposition on the same point and on the grounds that the defence raises triable issues, that the defence does admit facts in so far as to justify the alleged defamatory words, that the statement of defence is neither scandalous nor frivolous and that the application is meant to delay a fair trial and the determination of the issues between the parties.
3. The 3rd Defendant filed grounds of opposition on grounds that; the application is misconceived and an abuse of the court process; that the 3rd Defendant's admission of some facts pleaded by any of the Plaintiffs is not and cannot be the same thing as admission of liability; that the 3rd Defendant has categorically and in no uncertain terms denied that the article published by the 2nd defendant, which is the subject matter of this suit, was in any way defamatory of the Plaintiffs or any of them; that the 3rd Defendant has in his defence denied having defamed the Plaintiff as alleged or at all; that there is nothing frivolous and vexatious in the 3rd Defendant's defence and that the 3rd Defendant's defence raises pertinent triable issues which can only be resolved at the trial.
4. This application was canvassed by way of written submissions. On the preliminary objection, the

Plaintiff submitted that Article 34 (2) of the Constitution does not grant the media power to exercise their freedom freely without limitation. It was stated that like any other person and/or individual, Defendants do not have absolute right to publish any information concerning individuals without exercising due care. It was further argued that the High court has unlimited original jurisdiction under Article 165(3) (a) to hear any matter unless the constitution or any Act of parliament prohibits. The Plaintiff referred to **Kwacha Group of Companies & Another v. Tom Mshindi 2 Others (2011)eKLR** in which the court was of the opinion that human dignity does cover the right of reputation and protection of human dignity is the duty endowed to the court by the constitution. On the issue of striking out the Plaintiff reiterated the averments in the application.

5. The 1st and 2nd Defendants submissions is that the court falls within the definition of the state under Article 260 of the Constitution and therefore has no jurisdiction to deal with this matter but rather bars court from interfering with any person engaged in broadcasting, production or circulation of any publication or the dissemination of information by any medium. The 3rd Respondent's submissions in summary was that the issues raised in the defence are triable and can only be determined by trial. I shall first deal with the issue of jurisdiction considering the case of **Owners of the Motor Vessel "Lilian S" Caltex Oil (Kenya) Ltd (1989) KLR 1** as referred to in **Republic v. Chairman, Uasin Gishu Land Disputes Tribunal & 2 Others, Kaptich Arap Morogo Ex parte (2014) eKLR**. Where it was stated:-

"Jurisdiction is everything. Without it, a court has no power to make one more step." Any decision, however well reasoned, made out of jurisdiction is a nullity and cannot be given effect. That is fate that must befall the award of the Tribunal in this matter. I do not hesitate to issue an order of certiorari, quashing the entire award of the Tribunal. Having found that the award was outside jurisdiction, it is not necessary for me to go into the merits or remedies of it. It follows that once the award is quashed, every other consequential order must automatically be invalidated."

6. A number of rights and freedoms are enunciated under Chapter 4 of the Constitution. These comprise of rights which are not capable of being limited. The said rights are set out in Article 25 of the Constitution. Freedom of expression is not among those expressly mentioned under Article 25. In my view the enactment of Article 34 was meant to control the State's attempt to silence the media. **In conclusion therefore I find that this** court is not barred from adjudicating this matter hence the preliminary objection is dismissed.
7. The second issue is that of striking out. The power to strike out pleadings has been held to be employed only as a last resort and even then only in the clearest of cases. Since the enactment of Section 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, courts strive to sustain rather than to strike out pleadings. In the case of **D. T. Dobie & Company (Kenya) Ltd** (supra), Madan J as he then was held:-

"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."

8. To succeed in this application, it is upon the Defendants to establish that the plaint is frivolous and vexatious or that it may prejudice, embarrass a fair trial. Ringera J (as he then was) in **Mpaka Road Development Limited v. Kana (2004) 1 E.A. 124** stated as follows:-

"A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious."

9. Black's Law Dictionary defines triable issues as "***subject or liable to judicial examination and trial.***" It is for this court therefore to determine whether the defences raise triable issues. With regard to the 3rd Defendant, the Plaintiffs in their plaint alleged that on diverse dates in the month

of August, 2013, the 3rd Defendant caused, solicited and/or offered interviews with the 2nd Defendant's reporters with utter intent to print, publish and/or circulate, defamatory story of and concerning the Plaintiffs and ought to have known that the same was false and defamatory. The 3rd Defendant's response to that allegation was that the words complained of were not defamatory of the Plaintiffs as none of the words complained of referred to the Plaintiffs by name and no reasonable person would have understood the words to be referring to the Plaintiffs. My analysis of the aforesaid averments is that the 3rd Defendant not only denied that the words were defamatory but went ahead to assign a reason as to why the words complained of were to him not defamatory. The issue arising therefrom is whether the words by the 3rd Defendant referred to the Plaintiffs and whether or not they were defamatory. That is an issue that will require court's determination. As to the 2nd and 3rd Defendant's Defence, they admitted to publishing the words complained of but denied that the words in their natural and ordinary meaning bore the meanings stated by the Plaintiff. The 2nd and 3rd Defendants pleaded justification. Among the particulars therein were the 1st Plaintiff was the chairman of the men' fellowship and it was during his term in office that the development project conceived at Christ is the answer ministries(CITAM) and that the 1st Plaintiff appointed ENSI investments Ltd, a four member firm in which he is a director, to be the trustee of the project and registered the land namely Mavoko town block 3/2359 under it. The issues that arise are whether or not the 1st Plaintiff was a chairman of the men' fellowship, if the first issue is answered in the affirmative, whether or not it was during his term that the development project was conceived at Christ is the answer ministries(CITAM) and whether or not 1st Plaintiff appointed ENSI investments Ltd, a four member firm in which he is a director, to be the trustee of the project and registered the land namely Mavoko town block 3/2359 under it. The issues I have pointed herein above to be emerging from the 1st, 2nd and 3rd Defendants' defences will help this court to determine whether or not the words complained of were defamatory of the Plaintiffs or not. These are issues that should go for trial. I therefore find and hold that the defences are not mere denials.

10. In view of the Black's Law Dictionary cited above, these are issues that call for judicial examination and are triable. I am therefore not convinced that the defences are demurrable. Rather they contain issues that ought to be determined on merit. The defences herein are not so hopeless that they cannot be rescued by amendment. I therefore decline to strike the defences out. The upshot of these dispositions is that the preliminary objection and the application are dismissed. Costs shall await the outcome of the suit.

Dated, Signed and Delivered in open court this 8th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

Marihi h/b for Oyugi for the Plaintiffs

Gitonga for the 1st and 2nd Defendants

Musyoka for 3rd Defendant.