REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 177 OF 2014

KANGETHE GEORGE JOSEPHT T/A

KANGETHE & CO ADVOCATES.......................................PLAINTIFF

VERSUS

JOHN GACHORA...1ST DEFENDANT

NATIONAL INDUSTRIAL CREDIT BANK LTD...........2ND DEFENDANT

RULING

1. There are three (3) applications for the court's determination. The first is the 1st and 2nd Defendants' notice of motion dated 4th August, 2014. The said Defendants are seeking for the extension of time within which they should have filed their defence to 28th July, 2014 and that the said defence filed on 28th July, 2014 be deemed to have been filed leave of court.

2. The motion dated 4th August, 2014 is premised on the grounds set out on the face of the application and the supporting affidavit of Kelvin Mbaabu who is the Senior Legal Officer of the 2nd Defendant. Mr. Mbaabu attributed the delay in the filing of the defene within the prescribed time to the difficulty in obtaining the relevant documents and information from the 2nd Defendants' Business Remedial support department and Archives which would enable him to issue instructions to the advocates to prepare a defence. He stated that he furnished the Defendants' advocates with instructions on 23rd July, 2014 leaving a limited window of two(2) days within which a defence had to be prepared. He stated that he was informed by Mr. Kiragu Kimani of M/s Hamilton Harris & Mathews, advocates on record for the 1st and 2nd Defendants that the two days were limited to the extent that it was not possible to conduct relevant research on the nature of defence and prepare and file a statement of defence. Mr. Mbaabu stated that on 23rd and 24th July, 2014 Mr. Kiragu Kimani was involved in a long hearing before Lenaola J. in High ***Court petition No. 58 of 2014 – Okiya Omtatah Okoita and Nyakina Wyclife Gisebbe V. The Attorney General,, The Kenya Railways Corporation, the Public Procurement Oversight Authority and China Road & Bridge Corporation (Kenya) and*** attempts to get the Plaintiff's advocates to agree to an extension of time within which to file the defence was not fruitful. He contended that as a result thereof, the defence was filed on 28th July, 2014. That the defence is meritorious and that the delay in filing the defence is explained and therefore not inordinate.

3. The second motion is the one dated 6th August, 2014 by the Plaintiff and supported by his affidavit. In

the said motion the Plaintiff seeks that the 1st and 2nd Defendants' defence filed on 28th July, 2014 be struck out and this matter be set down for hearing on formal proof. The reasons advanced thereto are that the defence was file out of time without the leave of court contrary to the mandatory provisions of Order 7 rule 1 of the Civil Procedure Rules; that the material paragraphs 5, 6, 7 and 8 of the defence is scandalous, frivolous and vexatious and shall prejudice embarrass and delay a fair trial and that prior to the filing and service of the defence, the Defendants therein admitted to the Plaintiff's claim and sought to apologize for the same.

4. In response to the Plaintiff's motion dated 6th August, 2014, the 2nd Defendant filed grounds of opposition dated 12th August, 2014 and the replying affidavit of Mr. Henry Maina who is the Head of Legal Department of the 2nd Defendant. The grounds upon which the Plaintiff's motion was opposed were that;

The application lacks merit and is an abuse of the court process; that the delay in filing the defence was not inordinate and was explained; that the defence raises triable issues which ought to go to trial including whether there was a publication of the letter dated 24th April, 2014 which is the subject matter of the Plaintiff's claim; that the application does not meet the threshold for grant of an order for judgment on admission in that the Plaintiff has not established a plain and obvious admission of his claim by the Defendants and that this is not a clear case for striking out a defence without affording the Defendant an opportunity to be heard.

Mr. Maina contended that there has been no publication within the meaning of the law and the entire action is an abuse of court. That the words complained of are not defamatory and that the Plaintiff's claim has not been admitted. That leave of court can be sought after the event in an appropriate case as this one and that the Plaintiff's application in effect seeks to try the case through affidavits.

5. The third application is the Defendant's motion dated 17th September, 2014 seeking to strike out the Plaintiff's suit. In his supporting affidavit to this application, Mr. Mbaabu contends that the Plaintiff has no cause of action against the Defendant for the reason that letter dated 24th April, 2014 which the Plaintiff claims is defamatory was not published to a third party and the 1st Defendant is not its author. It was stated that for the aforesaid reason, the Plaintiff's suit is frivolous and vexatious and ought to be struck out.

6. These applications were canvassed by way of written submissions. The Defendants contended that there was only a delay of three(3) days in filing of the defence which delay they argue was explained. It was submitted that the power to extend time is discretionary and should be exercised in a way that shuts no party from being heard. That the court must be mindful that the rules of practice are handmaidens and the courts should not be tied by them at the expense of doing justice. The Defendant cited Article 159 (2) (d) of the constituted and argued that if courts continue to accord procedural technicalities undue prominence in the administration of justice, they will be negating an important constitutional requirement. It was submitted that where an explanation for the delay in doing an act within the prescribed time, the court ought to exercise its discretion in favour of the applicant. That since this court's mandate is to do justice between parties, it has the discretion to extend time even after the defence has been filed upon an application to court.

7. It was further submitted that the Plaintiff has not suggested that he has been prejudiced by the delay in fling of the defence. The Defendant submitted that for the Plaintiff to get a judgement on admission, he has to show that the admission is clear and unequivocal. That the admission must be plain and obvious. It was argued that a judgement on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision. It was submitted that there was no clear and unequivocal admission to the Plaintiff's claim in the letter dated 5th May, 2014. That the 2nd Defendant merely apologized to the Plaintiff as former customer of 2nd Defendant for any discomfort caused to the Plaintiff and that there was no admission to the Plaintiff's claim for defamation.

It was argued that for the court to discern whether the letter dated 5th May, 2014 amounted to an admission, it will have to scrutinize and interpret the correspondence exchanged between the Plaintiff and the 2nd Defendant including the letter dated 5th May 2015. The Defendant submitted that the power to enter judgement on admission is discretionary and ought to be exercised sparingly. That a pleading should not be struck out unless it is so weak and is beyond redemption and incurable by amendment.

8. The Defendants contended that their defence raises triable issues. That one of the major issues raised in the defence is whether there was a publication of the letter dated 24th April, 2014 which is the subject matter of the Plaintiff's claim. It has been submitted that in order to sustain the Plaintiff's claim, he must establish that there was publication of the letter dated 24th April, 2014 by the Defendants to another person other than the Plaintiff . The Defendant argued that the letter was copied to the Plaintiff alone and no other person. That there is no evidence that the letter was published to persons in the credit reference bureau and to the people in the Plaintiff's offices. That it has not also been pleaded in the plaint that the letter was published to anyone.

Finally, it was submitted that for the aforesaid reasons the Plaintiffs claim is frivolous and vexatious.

9. The Plaintiff on the other hand argued that the defence was filed out of time and without the leave of court contrary to the mandatory provisions of Order 7 Rule 1 of the Civil Procedure Rules and that the Defendants are not entitled to the orders sought in the motion dated 4th August, 2014 for the reason that they have not disclosed sufficient reason for the delay in filing the defence and that there is evidence that the Defendance have been indolent.

The Plaintiff argued that the letters dated 24th April, 2014 published under the title "pre-listing notification issued pursuant to Regulation 50(I) (II) of the Credit Reference Bureau Regulations, 2012" contained false and malicious statement against him and stated that for that reason his claim discloses a reasonable cause of action against the Defendant. He maintained that there was publication to the persons in the Credit Reference Bureau and the Plaintiff's offices. He further submitted that prior to the filing of the defence, the Defendants had admitted to the Plaintiff's claim and sought to apologise for the same.

10. I have given due consideration to the applications herein The following issues fall for this court's determination.

i. The effect of filing a defence out of time without the leave of court.

ii. Whether or not the defence raises triable issues.

iii. Whether or not the plaint is scandalous, frivolous and vexatious.

11. Due consideration has been given to the vast authorities that have been cited by the parties in their submissions and the relevant law with regard to the issues stated herein above. While the Defendants admitted to filing the defence out of time without the leave of court, it was argued that sufficient reason was given for the said delay and that the delay was not inordinate. Order 7 Rule 1 of the Civil Procedure Rules provides that where a Defendant has been served with summons to appear, he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit. The Rule does not state what would happen where a defence is filed outside the stipulated period of 14 days. Clearly, the said provision is in mandatory terms. However, the said Rule is silent on the consequences of non-compliance with the said provision. Order 10 of the Civil Procedure which provides for consequences of default of defence too does not state what would happen to a party who fails to file a defence in accordance with the prescribed time in an unliquidated claim such as the instant case. What then is the fate of such a defence? In my considered view, the failure to file a defence within the prescribed time is an irregularity and not necessarily an abuse of the court process and is thereby curable except in very clear cases of prejudice. In making a decision on whether or not to strike out such a pleading, the court ought to consider all facts and circumstances of the case with a view of conforming with the overriding objective enunciated in the Civil Procedure Act and Article 159 of the

Constitution.

12. Mr. Mbaabu explained that it took him sometime to get documents and information that he needed to enable him give the Defendants' advocates instructions. He however failed to establish that he indeed sought the said documents and information and when exactly he got the documents and information. I find that it was not enough to only reveal the correspondence between him and the advocates rather it was important to establish that he indeed made requests for the documents and information from the 2nd Defendant's Business Remedial Support Department and Archives. Further, while it was stated that Mr. Kiragu Kimani attempted to get the Plaintiff's advocate to agree to extend time within which the defence would be filed and that Mr. Kiragu had a lengthy matter before Justice Lenaola, no such evidence was placed before this court. While I appreciate that there was a delay of only about five (5) days, I find that the delay was unreasonable considering the aforegoing.

13. The next question that begs is whether even with that delay justice could still be done for the parties. I note that the Plaintiff has not established that he would be prejudiced in any manner by the said delay. I am fortified by the finding in **<u>Nicholas Kinto Arap Korir Salat v. Independent Electoral and Boundaries Commissions & others (2013) e KLR</u>** where it was held as interalia follows:-

> ***"Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness."***

14. A further challenge was that the defence raised no triable issues since the Defendants had admitted the Plaintiff's claim and sought to apologize for the same. The Defendants have contended that for judgment on admission to be entered, it must be established that the apology was clear and unequivocal. The principles of entering judgment on admission are found under Order 13 Rule 2 of the Civil Procedure Rules which stipulates as follows:-

> ***"Any party may at any stage of a suit, where admission of facts has been made, <u>either on the pleadings or otherwise</u>, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just."*** (Emphasis mine).

15. I am content to cite the pronouncement in **<u>Guardian Bank Limited v. Jambo Biscuits Kenya Limited (2014) eKLR</u> where it was stated as follows**:-

> ***"The principle applicable in judgment on admission is that the admission must be very <u>clear and unequivocal on a plain perusal of the admission</u>. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are:***
>
> ***Choitram v. Nazari (1984) KLE 327 that:-***

'...admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.' Chesoni Ag. JA went on to add that:-

> *'...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was'.*

Cassam v Sachania (1982) KLR 191 –

> *'The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment'."*

16. The letter dated 5th May, 2014 was in the following terms:-

> ***"...We wish to that you do not have a negative record with the credit reference bureaus in regards to the said account and further confirm your IPF loan account has now been closed.***
>
> ***Accordingly, <u>we wish to extend our sincere apologies for any discomfort and inconvenience caused by our pre-listing notification</u> and would like to assure you that you are our long term customer and we value the relationship that exists between you and the bank..."***

17. I have given due consideration to the above letter vis a vis the impugned letter dated 24th April, 2014. The words of the letter dated 24th are partly that ***"Please note that your account(s) in the Bank is/are currently in default and we hereby notify you that we will proceed to adversely list you with the CRDs if the outstanding amount due to the bank is not paid in full."*** The said apology clearly states that the apology is with regard to the pre-listing notification. It however does not in my considered view amount to an admission to the Plaintiff's claim on defamation.

18. Further, this court shall have to determine by way of evidence whether or not the letter dated 24th April, 2014 was defamatory to the Plaintiff and whether or not the said letter was published to any other person other than the Plaintiff to amount to libel as claimed considering that the Defendants have specifically denied having written the letter out of malice with an intent to defame the Plaintiff and having published it to any other person other than him. A statement of defence raises a reasonable defence if it raises prima facie triable issues. The Court of Appeal had this to say on the issue in **<u>Olympic Escort International Co. Ltd & 2 Others v. Parminder Singh Sandhu & Another (2009) eKLR</u>:-**

> **"It is trite that, a triable issue is not necessarily one that the Defendant would ultimately succeed on. It need only be bona fide."**

19. **Black's Law Dictionary 8th Edition at page 186** defines the word "Bona fide" in the following terms:-

> **"[Latin in good faith"] 1. Made in good faith; without fraud or deceit. 2. Sincere; genuine."**

As I have said herein above, I find that the defence is bona fide and I decline to strike it out.

20. **The final issue was that the Plaintiff has not established that the publication was made to any other person and that the Plaintiff had not pleaded that the letter was published to another person. To this controversy I have this to say. The Plaintiff cannot be expected to establish that the publication was made to other persons other than himself in his pleadings. That is something that can only be established by way of evidence. On failure to so plead, we are vast with decisions that discourage striking out of pleadings which can be amended.**

21. **Failure to plead that publication was made to other persons can be cured by amendment. Pleadings are to be struck out only in the clearest of cases where the pleadings are so hopeless to be maintained. In the circumstances I decline to strike out the plaint as well on this point I find fortification in** **<u>The Co-Operative Merchant Bank Ltd. v. George Fredrick Wekesa Civil Appeal No. 54 of 1999</u>** the Court of Appeal stated as follows:-

> **"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did".**

22. The application dated 4th August, 2014 is allowed while those dated 6th August, 2014 and 17th September, 2014 are dismissed. Parties shall bear their own costs. The statement of defence dated 25th July, 2014 is deemed as duly filed and served with prior leave of court.

Dated, Signed and Delivered in Open Court this **10th** day of **July, 2015.**

J. K. SERGON

<u>JUDGE</u>

In the presence of:

………………………………………. for the Appellant

……………………………………….for the Respondent