REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 97 OF 2010

ERICK KYALO MUTUA …….. PLAINTIFF

VERSUS

STEPHEN KING'OO MBUTI ……. DEFENDANT

R U L I N G

The suit herein was initiated by the plaintiff Mr Eric Kyalo Mutua an advocate of the High Court of Kenya, against the defendant Mr. Stephen Kingoo Mbuti on 22nd February 2010.

The plaintiff's claim is for general damages for defamation of character. The defendant who is the applicant in the application before court filed a defence denying that he is liable in damages for defamation.

He denies that he defamed the plaintiff and avers that what he is alleged to have said concerning the plaintiff is the truth which cannot render him liable. He alleges that the plaintiff was involved in corrupt and fraudulent transactions and blames him and others for failing to account for the proceeds of sale of Malili Ranch Limited land to the tune of 5000 acres.

It is worth noting from the court record that before the defendant filed his defence in this matter, and before the pleadings closed, he had already filed an application dated 6th April 2011 seeking orders:-

> "1. That the plaintiff's bank – Barclays Bank Queensway, Nairobi, do give particulars of payment from Malili Fund – the 1,000,000,000 from the counsel's account – E.K. Mutua.
>
> 2. The costs be in the cause."

He relied on the grounds that

a. There is disparity between the charges per acre and what was given to the individual, without explanation of what happened to the balance of 200,000.
b. The Directors have made other sales which are not accounted for in the 400 acres sold to another group – Israelis.

c. The Bank has stated that they require such orders to furnish details to the defendant and which is the basis of correspondences alleged to be defamatory.

In support of his application, the defendant, who from the onset is unrepresented swore an affidavit in which he averred that he needed to know the expenditure as given by the counsel for Malili Ranch to have a breakdown of what was actually paid to the allottees and what was pocketed by the directors as indicated by the counsel's letter, a copy of which he annexed to his affidavit and marked as **"SKM 1"**.

He further averred that the bank had requested for an order of the court by their letter dated 28th December 2010, marked as annexture **"SKM 11"**. The defendant further averred that these were essential and pertinent documents for the prosecution of his case and others related to it.

The record also shows that on 21st April 2010 interlocutory judgment in default of defence against the defendant had been entered. He later applied to have the said interlocutory judgment set aside and on 1st July 2011 **Mwera J** set aside the said judgment, granting him 14 days within which to file and serve upon the plaintiff his defence. The judge took into account the fact that the defendant, being unrepresented, as a lay person, he was not familiar with the court procedures unlike the lawyers.

Following the ruling of 1st July 2011, granting the defendant leave to file and serve his defence upon the plaintiff within 14 days, it was expected that he complies with those court orders by 15th July 2011.

A careful perusal of the court record shows that the defendant only filed his statement of defence on 10th May 2013, nearly two years after being granted leave to do so. There is no record of further leave or enlarged time in his favour. On 28th June 2013, the defendant then issued notice of invitation to the plaintiff's advocates Otieno Kawino & Co Advocates to take a hearing date on the same day.

In his defence, dated 9th May 2013, the defendant denies the jurisdiction of this court to hear and determine the claim herein and avers that he will demand the plaintiff to file in court requirements for sale, payment to individual owners at 1,400,000 as advertised, etc. According to him, the plaint could only be measured in terms of transactions and that if the plaintiff was unscrupulous, then it was not the duty of the defendant to attribute nice language or use euphemism to distort the truth.

He alleged that he had names of complainants who were underpaid and sampled out David Nguku Ngui – 450,000, David Mutuku Mutua – Sh. 1,100,000, Daniel Musyoka Nzuki – Sh. 600,000 among others.

On 4th June 2013 the defendant issued out a notice to the plaintiff indicating that the defendant had filed his defence and two weeks had since lapsed. He had expected the plaintiff to amend or dispute the facts which had not been done hence, he threatened to apply to have the plaintiff's suit dismissed with costs. He gave an ultimatum of one week to the plaintiff upon being served with the said notice, failure to which the defendant would apply to have the plaint struck out with costs.

True to his threats, on 19th June 2013, before prosecuting his application dated 6th April 2011, he filed another application dated 18th June 2013, by way of chamber summons, seeking to strike out the plaintiffs suit with costs and any other relief this Honourable Court may deem fit to grant.

The said application was premised on the grounds that without adjustment of pleadings after defence, there could not be any proceedings as the plaintiff had admitted that there was no cause for his action. He further alleged that there was an admission by the plaintiff that his conduct over the transaction of Malili Ranch Limited for the same were a total mess to the parties. According to him, the issue of words were correct and accurate description which could not constitute liability to the defendant. He relied on his affidavit sworn on 18th June 2013 in which he deponed that the plaintiff having failed to clarify or categorically admitting the non-existent legal relationship that would continue that case between the two parties (sic), the case should be dismissed with costs.

On 2nd July 2013, the plaintiff filed an affidavit in response to the defendant's application dated 18th June, 2013 in which he contends that the defendant's application is incompetent, an abuse of the court process and is meant to delay the fair hearing of the matter herein. He also states that the said application

and supporting affidavit do not raise any legal grounds that may warrant striking out of the suit. He further deponed that this being a defamation suit, he did not comprehend the defendant's assertion that he (the plaintiff) needed to show a legal relationship between him and the defendant.

The defendant filed an affidavit responding to the plaintiff's replying affidavit dated 2nd July 2013. The said affidavit for the defendant is filed on 17th July 2013 and sworn on 9th July 2013. He averred that his application was competent and sought the striking out of the plaintiffs affidavit as being defective, as there were no facts or evidence to support the same, among other grounds which I need not replicate here as they are very clear on record.

Before I proceed further, I wish to make the following observations:-

1. That the defendant/applicant is unrepresented through out these proceedings. He is a prose litigator and therefore I take judicial notice that most unrepresented litigants may not, like the defendant/applicant herein, though well educated be acquainted with the legal procedures and other intricacies of the law as advocates or represented litigants are. At the hearing, the defendant/applicant demonstrated that he was very knowledgeable on the facts giving rise to the suit herein. However I noticed that he had limitations on appreciating the marrying of facts and the applicable law. I find it necessary to mention this as the defendant appeared quite aggrieved that he was unable to hire a lawyer to represent him. He nevertheless indicated that he had no faith in lawyers as they are easily compromised. It was not rosy for the court which had to come to his aid most of the time, in the interest of justice, to ensure that he followed his pleadings as opposed to introducing extraneous matters not related to the applications before court.

2. I also appreciate the patience exhibited by Mr Kenyatta, counsel for the plaintiff. He remained calm in the midst of accusations and open hostility shown by the defendant towards him who nevertheless appreciated that the court understood his predicament.

Back to the hearing of the two applications mentioned herein, the defendant and counsel for the plaintiff agreed that the same be consolidated and heard together. This was done. The respondent filed a replying affidavit in response to the defendant's application dated 6th April, 2011. It was sworn on 5th May2011 pleading advocate/client confidentiality and that the defendant had no capacity to seek such disclosure.

In support of his application dated 6th April, 2011, the defendant/applicant submitted that it was necessary to get an analysis of all transactions that took place in the plaintiff's bank account which was not particularized except that it was Barclays Bank, Queensway Nairobi in payments from the Malili fund totaling one billion as the money which was proceeds of sale of 5,000 acres of Malili Ranch Limited was not accounted for to the members. He stated that as a member of the Malili Ranch Ltd, he was aggrieved and that the proceeds had been fraudulently paid out to individuals who did not merit and when he discovered the fraud, he reported to the Criminal Investigations Department for investigations. Some people were arrested and charged vide **Nairobi Criminal Case No. 2141/2009** before **Hon. Mutembei** but they were acquitted. He did not indicate whether the plaintiff was one of those people charged and no proceedings of the criminal case were attached.

He submitted that the sale proceeds did not reach the bona fide Malili Ranch members him being one of them. He was dissatisfied with the acquittal of the suspects and asked the Director of Public Prosecutions to appeal against the acquittal. He submitted that the plaintiff sued him for defamation when he (defendant) said that the proceeds of sale were paid to other people not the Malili Ranch Limited and therefore in his view, the money was stolen from Malili Ranch Limited.

In his application dated 18th June 2013 the defendant/applicant prays for plaintiff/respondent's suit filed against the defendant to be struck out on the ground that it was filed against him fraudulently. According to his pleadings and submissions based on his affidavit in support thereof, the plaintiff simply accused him of defamation because he; the defendant had questioned and reported what the plaintiff had done.

According to him, the said case has been postponed many times and that sometimes the judges handling it are away whereas at times the matter is never listed for hearing.

He alleges that he even had to testify against Hon. Justice Hatari Waweru at the Judges and Magistrates Vetting Board because the case herein was fraudulently allocated to the said judge who had denied that fact of being allocated the case and that when the defendant perused the court file, he discovered that the judge had been assigned the file.

Mr Kenyatta opposed the defendant/applicant's application dated 6th April, 2011. He relied on the plaintiff/respondent's replying affidavit sworn by E.K. Mutua on 5th May 2011. He submitted that the defendant's application lacked merit and was meant to delay the fair and expeditious disposal of the main suit against him. He further submitted that the plaintiff as an advocate of the High Court of Kenya was only acting as an advocate for Malili Ranch Limited. In addition, he submitted that the defendant has never been a client of the plaintiff. In his submissions, the defendant not being a client of the plaintiff cannot demand for accounts of the plaintiff' s law firm.

He added that the client/advocate confidentiality rule does not permit banks or advocates to disclose the accounts for their clients; and in particular, Malili Ranch Limited who are not parties to this suit and neither is Barclays Bank, cannot be compelled to disclose accounts or transactions for their clients.

He added that given that the defendant alleges that there are other persons who were paid from that account, yet the said people or persons are not parties to this suit, it will be in total breach of the rules of confidentiality to disclose details of advocate/client accounts. He submitted that the defendant/applicant lacked capacity to seek disclosure of the accounts between clients and advocates. He prayed for dismissal of the application with costs. He concluded that the issues of fraud as claimed will be canvassed at the main hearing of the substantive suit.

Mr Kenyatta also opposed the defendant/applicant's application dated 18th June 2013 and relied on the affidavit of E.K. Mutua sworn on 2nd July 2013.

He submitted that the application lacked merit. He added that the plaintiff's suit raises very serious triable issues that touch on the character, integrity and reputation of plaintiff, which is at stake for him not only as an individual, but as an advocate of the High Court of Kenya and being a duly elected chairman of the Law Society of Kenya.

Counsel contended that the defendant/applicant made and published serious allegations against the plaintiff/respondent and the latter filed the suit herein because he was aggrieved by the defendant/applicant's action.

He submitted that since the defendant filed his defence to counter the claim, it is only fair and just that the suit is heard on merit. He submitted that the defendant's application was irrelevant and that striking out a suit was a draconian action which the court should not take except in exceptional circumstances. He prayed for dismissal of the application with costs.

In response to the plaintiff/respondent's submissions, the defendant/applicant submitted to the court that it was the plaintiff who had deliberately delayed the hearing of the suit herein and asked the court to examine the record and see for itself.

According to the defendant/applicant, the plaintiff was the lawyer for Malili Ranch Ltd and that having worked for the company as its Company Secretary, he knew that the land had been sold out fraudulently.

He stated that he (the defendant) being a fully paid member No. 849 out of 2343 members of Malili Ranch Limited, he had/and has the right reason to know what monies come to the company even if he was not a director.

I have carefully perused the record comprising pleadings, documents, statements of witnesses and considered the two applications before me for determination of whether or not the plaintiff's suit should be struck out for being incompetent, with the defendant submitting that what he is alleged to have published against the plaintiff was nothing but the truth, and that as the plaintiff did not file any responses to the defendant's defence, then he, the plaintiff is deemed to have admitted the facts as pleaded by the defendant hence there is no issue before the Court for trial. In addition, that the plaintiff has delayed in prosecuting his suit.

I find it necessary to address this issue first because if I find that the plaintiff's suit ought to be struck out and proceed to strike it out, then there will be no need of ordering Barclays Bank to furnish the defendant with details of how the money deposited in the plaintiff's account for Malili Ranch Limited was paid out.

From the onset, my experience with the defendant/applicant in court during the hearing of this application was reminiscent of the many challenges many Kenyans face in accessing the courts and therefore in accessing justice. In as much as it was clear that the applicant/defendant was a very educated and knowledgeable man in the matters that brought him to court. It was extremely difficult to contain him to the issues that were before the court on that particular day.

To my mind, the defendant/applicant had found the court to be a forum where he could venture into and file all manner of documents gathered from every corner of the Republic with the intention of vexing the plaintiff/respondent. The record has a plethora of all manner of documents filed in a haphazard manner, without clear direction as to what those documents were meant to prove.

In my view, the Civil Procedure Rules are meant to guide parties and the courts in conducting orderly proceedings; and therefore avoid a situation where parties file documents left, right and centre without letting the other party know what kind of documents are on record. In my view, the many documents that have been filed by the applicant/defendant in these proceedings and which do not relate to any particular or specific issue before the Court at a particular time are meant to abuse the process of the court besides vexing the plaintiff/respondent. The file herein is reminiscent of the rule of law thrown into the jungle.

The plaintiff/respondent has been tried, convicted and sentenced without trial. This is conduct which the Court of law should not condone. Accordingly, the in-charge of the High Court registry is directed that all documents due for filing, the parties must comply with the procedure provided. Where leave of the court is required before filing documents, parties are not permitted to sneak in publications and or evidence without notice to the adverse party. To allow this practice is to prejudice the other party. All persons are equal before the law and Courts of law are expected to treat them equally, whether they are advocates with knowledge of the law or lay persons.

The test applicable as to whether or not to strike out a party's suit is governed by the express legal provisions espoused in Order 2 Rule 15 of the Civil Procedure Rules which provides:

> 15(1) At any stage of the proceedings the court may order to be struck out or amend any pleadings on the ground that-

a. It discloses no reasonable cause of action or defence in law; or
b. It is scandalous, frivolous or vexatious; or
c. It may prejudice, embarrass or delay the fair trial of the action; or
d. It is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissal or judgment to be entered accordingly as the case may be. Sub rule (2) of the said Rule 15 provides that no evidence shall be admissible on an application under sub rule 1(a) but the application shall state concisely the grounds on which it is made. The issue before me, therefore, is whether from the material submitted by the applicant/defendant, he has proved that the plaintiff's suit herein falls in the categories outlined above to warrant its dismissal.

As I have stated before, the plaintiff herein sued the defendant vide a plaint filed in court on 22nd

February 2010 seeking for general and exemplary damages for defamation of character. The said plaint sets out the particulars of the defendant/applicant's alleged falsehood and malice in publishing what is alleged to be a defamatory letter concerning the plaintiff/respondent.

Order 2 rule 15 gives the court a discretionary power. The law relating to the exercise of judicial discretion to strike out a suit as set out in Order 2 rule 15 is clear. The issue is whether the said discretion must be exercised capriciously. In my view, that discretion however wide, must only be exercised sparingly and in clear and obvious cases. The court must be very cautious and consider all facts of the case without embarking on a trial to determine the merits of the case and thereby dismiss it on a preliminary point before hearing parties. Therefore, if pleadings disclose triable issues even if at the end of the day it may not succeed, the suit ought not to be struck out. This is not to say that if on the face of it the suit appears baseless or merely fancy and it is instituted to vex the other party on an issue that the law fails to recognize as legitimate use of process, the court will not allow its process to be a forum for such ventures since to do this would be to open up a door for parties to ventilate vexatious litigation which is *mala fides* with the intention of causing the advert party unnecessary anxiety, trouble, embarrassment and expenses, contrary to the overriding objective espoused in Section1 and 1A of the Civil Procedure Act and Article 159 1(d) of the Constitution.

Without belabouring too much into whether or not any of the conditions for striking out suit under Order 2 rule 15 of the Civil Procedure Rules have been met by the applicant in this case, my perusal of the plaint filed by the plaintiff reveals that there are serious issues capable of being tried. On the other hand, the applicant has not demonstrated to court that the Plaintiff does not deserve to be heard. After he had argued his application and upon the plaintiffs' counsel responding thereto on the right to be heard by both parties, the applicant told the Court that he had no objection to the plaintiff being heard on the suit.

The record demonstrates that the applicant herein had in the first instance entered appearance but defaulted to file defence upon which interlocutory judgment was entered against him. He applied to set aside the said interlocutory judgment and the court considered that albeit he had, out of ignorance failed to file defence within the prescribed period, he deserved an opportunity to be heard. The applicant was granted leave to file his defence within 14 days. Regrettably the record further shows that despite being granted leave to run from 1st July 2011, the applicant/defendant only filed his statement of defence on 10th May 2013 nearly two years later. And no sooner had he filed his defence outside the leave granted than he swiftly invited the plaintiff to fix a hearing date, giving ultimatums that he was to move the Court in seven days and have his suit struck out. True to his threats, the application for striking out was lodged expeditiously. In my view, he has no audience to challenge the suit herein as he has no defence on record.

In my perusal of the record herein, there is no evidence that there has been delay or indolence on the part of the respondent in having his suit heard.

It is the applicant who has been filing successive applications that have hampered the fixing of a date for substantive hearing of the suit on merit.

I find no merit in the allegations of delay to set down the suit for hearing on the part of the plaintiff. I also find no ground was laid by the applicant to prove that the plaintiff's suit does not raise reasonable cause of action. The applicant is simply overly ambitious and anxious for nothing.

The applicant submits that the plaintiff admitted the defence hence there is no issue for trial. In my view, this argument is out of misapprehension of the law relating to pleadings. I have perused the defendant/applicant's defence filed out of time without leave of court and I do not find anything in it that suggests that the failure by the plaintiff to reply to or deny would mean an outright admission of those facts. In any event, the provisions of Order 2 rule 12 expressly provides that if there is no reply to a defence, there is a joinder of issues on that defence. In my view, therefore the plaintiff/respondent need not have filed an express denial of what the defendant alleged in his defence.

I am fortified on this point of the Court of Appeal decision in **Joash M. Nyambicha & Kenya Tea**

Development Authority – Vs – Kipkebe Ltd & Attorney General Kisumu CA No. 302/10 where the Court emphatically held that failure to file a reply to defence was not fatal to the plaintiff's case especially where the plaintiff has given particulars of malice in a defamation suit like the one before court. The applicant's application therefore fails miserably in his bid to have the plaintiffs' suit struck out with costs.

In the application seeking the bank to provide an analysis of the transactions that may have taken place between the plaintiff and Malili Ranch Limited where, admittedly, there is a client/advocate relationship, the law is clear. It is on record that there was a fiduciary relationship between the plaintiff and Malili Ranch Limited who are not parties to this suit. The said Malili Ranch Ltd is a limited liability company. The applicant states that he is a fully paid up member and as a *bona fide* shareholder, he is entitled to all information relating to fraudulent transactions that took place between the plaintiff, the company Malili Ranch Limited and other people whom the applicant alleges defrauded the genuine beneficiaries of the proceeds of sale of 5000 acres belonging to members of the said Malili Ranch Limited.

It has not been submitted that the applicant is in the process of following or tracing his share of lost assets in Malili Ranch Limited. If that were to be the case, he would, under the law, be entitled to disclosure orders. But even then, he would have to enjoin the company to the proceedings herein and seek specific orders against them. What is before the court is different. It is a defamation case against him and he submitted at length that he was being victimized by the plaintiff/respondent for writing a letter and lodging a complaint to the police that the plaintiff was part of the syndicate that had defrauded Malili Ranch Limited the proceeds of sale of 5000 acres.

According to him, the police are investigating the matter and he showed the Court a letter written to him by the Criminal Investigations Department informing him that investigations into the matter were still ongoing. In addition, he stated that some people were arrested and arraigned in Court over the corruption and theft of Malili RanchLimited money that was misappropriated but he does not state that the plaintiff was one of those charged in court. Having said all that, it is clear that the applicant is now engaged in a parallel investigative venture to gather his own evidence that can nail the plaintiff/respondent to the alleged theft of Malili Ranch Limited funds, having acted as the company lawyer. In my view, this would amount to the rule of law of the jungle. The Criminal Investigations Department letter clearly indicates that the plaintiff is one of those being investigated in the mater and that the investigations are incomplete. In my view, the applicant's complaint is already being investigated by the Criminal Investigations Department and he cannot be allowed to use this Court to conduct parallel investigations to unravel the truth which he maintains he knows concerning the plaintiff's involvement in the alleged fraud. To allow his application would be to assist the applicant continue demeaning the person of the plaintiff and to vex him thereby subjecting him to multiple anguish. It is not the plaintiff to assist the defendant get the truth, as the defendant has already pleaded justification and truth in what he is alleged to have published concerning the plaintiff.

The plaintiff has come to court because he seeks protection and preservation of his name and character which he claims has been painted negatively in the eyes of the right thinking members of the society generally. However, there appears to be an unimpeded appetite by the applicant to use the court process to malign the plaintiff. The plaintiff has been provoked enough and this was evident during the hearing of the applications herein.

Secondly, the respondent pleads client/advocate relationship with Malili Ranch Limited and that any monies released to his account was for his client and was disbursed on client's instructions. Further, that he is not bound to disclose a client's account transactions as that would go against the advocate/client confidentiality rule, noting that his client is not a party to the suit herein and neither was the applicant the plaintiffs' client in the said alleged transaction involving 5000 acres.

In addition, the applicant has not filed any counterclaim against the plaintiff claiming part of the monies received by the plaintiff from his client with instructions on how to disburse the same.

It is worth noting that the duty not to disclose or misuse information of client by an advocate retained is a

legal duty. The client retains the advocate in a confidential position and imposes on him the duty not to communicate to any third party the information which has been confided to him as counsel to his client's detriment. This duty continues even after the relation of counsel and client ceases. See **Halsbury Laws of England 3rd Edition Vol 3 paragraph 67**. In **King Woolen Mills Ltd – Vs – Kaplan & Stratton Advocates (1990-1994) EA 244**, the Court of Appeal held thus:

> ***"The fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without the client's consent. That fiduciary relationship exists even after the conclusion of the matter for which the retainer was created."***

On the basis of the above authority, taking into account my detailed exposition on this issue, I decline to grant to the applicant the orders sought in the application seeking to compel Barclays Bank Queensway Branch to provide details of transactions in the plaintiff's account with Malili Ranch Limited on how one billion shillings was paid out.

The upshot of all this is that I dismiss the applicant's applications, one dated 6th April, 2011 and the one dated 18th June 2013 with costs to the plaintiff.

I further order that the suit herein be set down for hearing interparties as appropriate, upon compliance with all the pre-trial requirements.

Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of October, 2014.

R.E. ABURILI

JUDGE