



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HCCC NO 240 OF 2010**

**FIDELLIS MUEKE NGULI.....PLAINTIFF**

**V E R S U S**

**NATION MEDIA GROUP LTD.....DEFENDANT**

**R U L I N G**

1. The Plaintiff's claim is for damages in defamation. His case is that he was libelled by a certain publication in a newspaper owned by the Defendant. The offending words have been pleaded in full in the **plaint dated 5<sup>th</sup> May, 2010**. It is the Plaintiff's further case that the publication was actuated by malice.
2. The Defendant filed a **statement of defence dated 23<sup>rd</sup> June, 2010**. It admitted publishing the words complained of but denied the imputation of defamation assigned to them by the Plaintiff. The Defendant also denied that in publishing the words complained of it was actuated by malice. It denied the particulars of falsehood, malevolence and spite pleaded in the plaint.
3. The Defendant also specifically denied that in the natural and ordinary meaning of the words complained of and in their proper context, the words were capable of bearing the meanings or innuendo pleaded in the plaint.
4. The Defendant has further pleaded -
  - i. Fair comment and fair information on a matter of public interest, to wit, how state corporations spend public funds.
  - ii. That the words complained of were published under a sense of public duty without malice and in the honest belief that the information contained therein was true and of public interest.
  - iii. That the words complained of were published on a privileged occasion.
5. The Plaintiff subsequently filed **notice of motion dated 12<sup>th</sup> April, 2011** seeking the main order that the defence dated 23<sup>rd</sup> June, 2010 be struck out. The application is brought under **Order 2, Rule 15(1) (a), (b), (c) & (d)** and **Order 10, Rule 3** of the **Civil Procedure Rules, 2010** (the **Rules**). **Sections 1A & 3A** of the **Civil Procedure Act, Cap 21** (the **Act**) are also cited.
6. The grounds for the application are –
  - i. That the memorandum of appearance and defence were filed out of time and without leave of court.

ii. That the defence consists of general denials and does not raise any triable issues.

iii. That the defence is a sham and may prejudice, embarrass or delay a fair trial of the action.

7. There is a supporting affidavit sworn by the Plaintiff. It not only gives the background to the case, but is also quite argumentative. It is also deponed that the Defendant entered appearance approximately 24 days after it had been served with summons to enter appearance and copy of the plaint (on 14<sup>th</sup> June, 2010), and that defence was filed 11 days later on 23<sup>rd</sup> June 2010 outside the time stipulated by the Rules and without leave of court.

8. The Defendant has opposed the application by **replying affidavit sworn on 3<sup>rd</sup> October 2011** by one **Sekou Owino**, the Legal Officer of the Defendant. The affidavit repeats in detail the Defendant's case as pleaded in its statement of defence. Grounds of opposition emerging therefrom include –

(i) That appearance was entered and judgment filed in time.

(ii) That numerous issues for trial are disclosed by the pleadings.

i. That the Plaintiff's case as pleaded and particularized and as "strenuously denied" by the Defendant militates against granting the orders sought.

9. The application was canvassed by way of written submissions. The Plaintiff's submissions were filed on 3<sup>rd</sup> November, 2011 while those of the Defendant were filed on 10<sup>th</sup> November, 2012. I have considered those submissions, including the cases cited.

**Did the Defendant enter appearance and file defence out of time?**

10. **Order IX, rule 1** of the old Civil Procedure Rules then in place when this matter was filed stated –

**"1. A defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgment is entered against him, or, if no interlocutory judgment is so entered, at any time before final judgment."**

On 14<sup>th</sup> June 2010 when the Defendant entered appearance and subsequently on 23<sup>rd</sup> June 2010 when it filed defence, neither interlocutory nor final judgment had been entered against it. Appearance was thus entered and defence filed within time.

**Does the defence raise any triable issues or is it a sham which may prejudice, embarrass or delay a fair trial of the action?**

11. The guiding principle in applications to strike out pleadings is that the court ought to act cautiously and allow such application only in clear and obvious cases. The court will consider the facts of the case without embarking upon a trial of the same. As Ainley, J said in the Ugandan case of **Jamnadas Sodha –vs- Gordandas Hemraj (1952) ULR 7 -**

**"The nature of the action should be considered, the defence, if one has been brought to the notice of the court however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think it should always be remembered that to deny the subject a hearing should be a last resort of a court."**

12. The court will not be concerned with the merits of the impugned pleading at this stage; that is a function of the trial court. The court must indeed refrain from expressing any opinions upon the merits of the facts pleaded as this may prejudice the fair trial of the action, should it go to trial. If only one triable issue is disclosed, that is enough to permit the suit to proceed to trial. For all these, see the well-known

case of *D. T. Dobie & Company (K) Ltd –vs- Muchina [1982] KLR 1.*

13. The Plaintiff has pleaded in his plaint particulars of falsehood, malice and spite on the part of the Defendant in publishing the words complained of. The Defendant has denied each and every one of them in its statement of defence.

14. The Plaintiff has also pleaded a wide range of meanings and innuendo that may be assigned to the words complained of, from criminality, to abuse of public office, to being an immoral, unethical and dishonest person, to lack of personal integrity, to engaging in and facilitating the misuse of government facilities, etc. Again the Defendant has denied each and every one of these meanings and innuendos that the Plaintiff has assigned to the words complained of.

15. I am satisfied that the various issues raised in both the plaint and the defence can be satisfactorily determined only in a proper trial of the action, tested oral evidence. This is not a plain and obvious case where the drastic remedy of striking out should be granted. The parties must have their day in court in support of their respective cases.

16. In the circumstances the application has no merit. It is dismissed with costs to the Defendant. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2013**

**H P G WAWERU**

**JUDGE**

**DELIVERED THIS 8<sup>TH</sup> DAY OF OCTOBER 2013**