



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NUMBER 107 OF 2011

MOHAMED AMIN.....PLAINTIFF

VERSUS

RADIO AFRICA LIMITED t/a THE STAR.....1ST DEFENDANT

THE NAIROBI STAR PUBLICATION LTD t/a THE STAR.....2ND DEFENDANT

**TOM MBOYA.....3RD
DEFENDANT**

RULING

The parties agreed to rely on their written submissions only.

Application by Notice of Motion is dated 4/11/2011 which seeks orders to strike out the plaint dated 22/3/2011 so far as it relates to the 1st Defendant and that the 1st Defendant be awarded costs of this application and entire suit. There has been amendments to the plaint filed on 27/12/2011 which added 2nd Defendant Nairobi Star Publication Ltd t/a. The Star and 3rd Defendant Tom Mboya.

There has been also other amendments. First Defendant is described as being owner or/and publisher of the star/the weekend star. This allegation was denied in paragraph 2 of defence filed on 26/4/2011 and amended defence filed on 25/1/2012.

In the affidavit of Patrick Quarco the director of first Defendant and he the star/the weekend star are owned and published by Nairobi Star Publication Ltd and not Radio Africa Kenya Ltd. This information is explained in "PQ1" and "PQ2" exhibits.

The plaintiff Respondents suit is based on a libel published in "the weekend Star" On 1st January 2011.

In his replying affidavit the Plaintiff/Respondent relies on materials from internet which indicates the ownership of the Star Newspaper. The Applicant submits that such material has no probative or evidential value. Authorship and publication of newspapers cannot be determined from materials downloaded from internet. The document provided by applicant are conclusive evidence on the authorship/publication of "The Star/the weekend Star".

The 2nd Defendant has admitted in its defence authorship/publication of “the Star/the weekend Star”. It is also submitted that Radio Africa (Kenya Ltd owns shares in Nairobi Star publication Ltd. And has power to sue and be sued.

It is not disputed that the defence denied publication and authorship of the publication complained of by the plaintiff opted to ignore this express plea. Also that the 3rd Defendant is a proper party in these proceedings and negotiations were being held on his behalf.

The Applicant submits that the suit against it is bad in law for misjoinder of parties under Order 4 rule 5 of Civil Procedure Code. It is also frivolous and vexatious and ought to be struck out with all costs to Applicant. On the Plaintiff/Respondent written submissions states that the application dated 4/11/2011 was filed by first Defendant and the 3rd Defendant (Tom Mboya). It is denied that the first Defendant is neither the author nor the publisher of “The Star” Newspaper and does not trade in that name. Further the 3rd Defendant is not an employer/agent/servant of the first Defendant company and the suit against first defendant is bad for misjoinder of parties. Furthermore the suit against the first Defendant is frivolous and vexatious. It is submitted that on 24/1/2012 the first and 3rd Defendants amended their joint defence and admitted at paragraph 4 thereof

“That at all material times relevant to this suit the 3rd Defendant was an employee of the 1st and or 2nd Defendants and that the 1st and or 2nd Defendants were the owners and or publishers and distributors of “The Star” Newspaper and at paragraph 6 thereof “the third Defendant falsely and maliciously wrote, and the 1st and or 2nd Defendants published” The impugned article.

The new enjoined 2nd Defendant by a statement of defence dated 24/1/2012 at paragraph 2, 3 and 5 respectively admit that the 1st Defendant is the owner/co – owner and or publisher of the Star newspaper and the 2nd Defendant is owner, and or publisher of the Star newspaper. The third and 1st Defendants are its employees. The Plaintiff submits that the above parts are sufficient to dispose of the application which now contradicts the written statement of Defences of the Defendants. The Plaintiff submits that order 1 rule 3, 4 and 7 new rules allows a claimant to sue and or enjoin all probable tort- feorsors in an action.

Rule 9 states

“No suit shall be defeated by reason of misjoinder or non joinder”

The Plaintiff has shown that 1st Defendant is liable to be called to answer the Plaintiff’s claim. There is nothing frivolous and vexatious in the suit against the first Defendant.

It is also submitted that the remedy of striking out of pleading is a draconian remedy and it should be used cautiously in the clearest of cases. Upon considering the submissions of both parties and the amendment of pleadings and statements of defence it is clear to me that the Applicant is not entitled to orders sought. There are admissions made which indicate that it is important that 1st Defendant has reason to answer to Plaintiff’s case.

The law of procedure is quite clear that the power to strike proceedings is to be used sparingly since the power is draconian in its nature.

In the circumstances I am persuaded by the arguments of the Plaintiff. I therefore dismiss the application with costs to the Respondent/Respondent

Dated and delivered this 2nd day of March, 2012.

**J.N. KHAMINWA
JUDGE**

2.30 p.m.

2/3/12

Coram: Khaminwa, J

Court clerk Mary

Mr. Nyaosi holding brief for Mr. Imende for Defendant

No appearance for Maweu

Ruling read in his presence.

J.N. KHAMINWA
JUDGE

Later Mr. Maweu appears.

Mr. Nyaosi

I apply for leave to appeal. That is all.

Court

If leave to appeal is needed I grant the same as prayed by the Defendant.

J.N. KHAMINWA
JUDGE