REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 276 of 2011

CHRISTOPHER ORINA KENYARIRI.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LIMITED.....2ND DEFENDANT

R U L I N G

Before me is the Plaintiff's Notice of Motion dated 1st February, 2012 seeking to strike out the defences of the Defendants on the ground that they are scandalous, vexatious, a sham and are meant to delay a fair trial. There is also a further ground that the Defendants have admitted being in contempt of a court order. The motion is brought under Order 2 Rule 15(1) (b) (c) and (d) of the Civil Procedure Rules.

The Plaintiff contended that he maintained an A/c No.075-1404328 with the 1st Defendant through which he obtained credit, that on the 19th July, 2010 he fully repaid the money owing to the 1st Defendant after a demand, that in September, 2010, the 1st Defendant mischievously threatened to list the Plaintiff with a Credit Reference Bureau as a defaulter, that the Plaintiff obtained an order from the Chief Magistrate's Court in Civil Case No.7333 of 2010 restraining such a listing, that the 1st Defendant admitted in those proceedings that the threat was in error. That despite as aforesaid on 18th March, 2010, the 1st Defendant sent the Plaintiff's name to the 2nd Defendant who listed the Plaintiff as a defaulter whereby CFC Stanbic Bank declined the Plaintiff's home loan application, that while replying to an application for contempt in the said CMCC No.7333 of 2010, the 1st Defendant had admitted having erred in sending the Plaintiff's name to the 2nd Defendant, that the Defendants' malicious acts had cost the Plaintiff a credit of Kshs.20 million and subjected him to ridicule, public odium and contempt amongst right thinking members of the society.

Mr. Moibi, learned Counsel for the Plaintiff submitted that in forwarding the Plaintiff's name to the 2nd Defendant for listing as a defaulter, the 1st Defendant had acted contemptuously, recklessly and in utter disregard to the Plaintiff's rights under the law, that the 1st Defendant's action was in breach of the Banking (Credit Reference Bureau) Regulations 2008, Regulation Nos.14(1), 14(5), 17(c), 20(6), 28(3), 28(4) and 18(5), that the 1st Defendant had also breached Sections 31 (2) and (5) of the Banking Act by making false disclosure of false customer information, that the action of the 1st Defendant was also in contempt of court which it purged secretly by instructing the 2nd Defendant to delete the Plaintiff's name from the list of defaulters. That there can be no plausible defence. That as regards the 2nd Defendant, it breached its duty to investigate and authenticate the particulars referred to it before effecting the listing.

Mr. Moibi further submitted that by the letter of 22nd March, 2011, the 1st Defendant had admitted having written the letter of 18th March, 2011 to the 2nd Defendant, that the information contained in that letter was circulated by the 2nd Defendant thereby affecting the Plaintiff's reputation, that the said letter had led the Plaintiff to suffer loss. That the immunity given by Regulation 14 of the Banking Act (Credit Reference Bureau) Regulations 2008 does not extend to the 2nd Defendant, that Section 6 of the Civil Procedure Act is not applicable to this case as the cause of action in CMCC No. 7333 of 2010 was different from the current suit. Counsel referred to, inner alia, the cases of **Rameth Popatlal Shah & Anor –vs- NIC HCCC No. 515 of 2003(UR)** on the issue of the binding effect of a court order that has not been discharged, **Abdul Razak Khalfan & others –vs- Pinnacle Tours and Travel Ltd HCCC No. 623 of 204 (UR)** and **Nicholas R.O Ombija & Anor –vs- NBK, Ksm HCCC No. 213 of 1997 (UR). C**ounsel urged that the application be allowed.

The 1st Defendant opposed the application by a Replying Affidavit of Nereah Okanga sworn on 22nd March, 2012 and written submissions filed on 30th April, 2012. It was contended by the 1st Defendant that this suit is an abuse of court process as it raises issues already raised in CMCC No. 7333 of 2010, that the application was supported by privileged documents contrary to the Evidence Act, that there were several issues that require investigation at a full trial.

Ms Ouma, learned Counsel for the 1st Defendant referred the court to paragraphs 6, 7, 7A, 8, 9, 9A, 11, 12, 13 and 15 9a) – (d) of the 1st Defendant's Amended Defence and submitted the same raised triable issues to the Plaintiff's claim and that the Defence of the 1st Defendant was therefore not a sham, that the 1st Defendant's defence is truth and justification that the Plaintiff owed the 1st Defendant as at the 22nd of March, 2011. Counsel relied on the cases **of D.T. Dobie and Company Ltd –vs- Muchina (1982) KLR 1 and Kinoti Mukindia –vs- David Pius Mugambi & Anor (2007) e KLR** to buttress her proposition that the court should lean towards sustaining the defence for trial than deciding the same summarily. She urged that the application be dismissed.

In opposition to the application, the 2nd Defendant filed two Affidavits by Anthony A. Maseno sworn on 19th February, 2012 and 2nd May, 2012, respectively and the written submissions filed on 2nd May, 2011. It was contended for the 2nd Defendant that the Amended Plaint as drawn had not disclosed any cause of action against the 2nd Defendant since the latter was a disclosed agent of the Central Bank of Kenya under the Banking Act, that the information received by the 2nd Defendant and used by it in its credit report is qualified privilege, that it was the 1st Defendant's duty to provide accurate information to the 2nd Defendant, that under Section 31(5) of the Banking Act, the suit was statute barred, that the existence of CMCC No.7333 of 2010 makes this suit to be in breach of Section 6 of the Civil Procedure Act, that the Plaintiff had not pleaded the specific words that are defamatory of him, that the 2nd Defendant's defence was not scandalous or an abuse of the court process.

Mr. Otieno, learned Counsel for the 2nd Defendant submitted that the Amended Plaint was incompetent as it breached order 2 Rule 3(2) and Rule 7(1) of the Civil Procedure Rules for failure to plead the defamatory words complained of, Counsel relied on the case of **Bedan Moses Kinyongu –vs- Robinson Njagi Gachogu HCCC (2007) e KLR** for that proposition, that the Affidavit in support of the motion

was incompetent as it contravened order 19 Rule 3 and he cited the case of **Albany Taylor & Anor –vs- Stella Nafula Khisa & Anor HCCC No. 2020 of 2007 i**n support of the proposition that an Affidavit in an application for final orders must be by direct evidence, that by the authority of **Dr. Murray Wilson – vs- Rent A Plane Ltd & 2 others HCCC 2180 of 1994 UR** the 2nd Defendant's defence cannot be said to be scandalous as it was not indecent or offensive, that there was a defence of qualified privilege as the acts complained of were done in a performance of a statutory duty. Counsel further contended that having raised a defence of privileged occasion, the Plaintiff had not filed a reply to that defence and there was therefore a proper defence on record to the Plaintiff's claim. Counsel therefore urged that the application be dismissed with costs.

I have carefully considered in totality the pleadings in this matter, the Affidavits on record, the written submissions, the able hi-lights thereon by learned Counsel as well as the authorities relied on.

This is an application to strike out the Defendant's defences and the principles applicable are well known as set out in the case of **D.T. Dobie & Co. Ltd –vs- Muchina (1982) KLR 1** wherein at page 9 the Court of Appeal delivered itself thus:-

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way." (Emphasis supplied).

Although the Court of Appeal was dealing with the striking out of a suit, the same principles apply fully to the striking out of defences. In an appropriate case, a suit or Defence can and ought to be struck out.

Looking at the Amended Plaint, the Plaintiff's cause of action seems to be based on breach of statutory duty owed to him by the Defendants and for defamation. The Plaintiff has pleaded in paragraphs 10 and 11 thus:-

"10. By a letter dated 22nd of March 2011 addressed to the Plaintiff the 1st Defendant confirms and admits that it has written a letter to the 2nd Defendant on the 18th of March 2011 of and concerning the Plaintiff supplying all personal information and details of the Plaintiff and further stating that the Plaintiff had non-performing credit facilities.

11. The said letter of 18th of March 2011 of itself and all the information consequently circulated by the 2nd Defendant to subscribing institutions. By the said words in their natural and ordinary meaning the Defendants meant and were meant and was understood by the right thinking members of the society to mean:-

(a) That the Plaintiff has an existing non-performing loan.

(b) That the Plaintiff is unworthy of credit.

(c) That the Plaintiff never services his loan facilities.

(d) That the Plaintiff is financially unsound.

(e) That the Plaintiff is unworthy to deal with the public.

(f) That the Plaintiff is a person who cannot be trusted with money."

It is clear from the two said paragraphs and the particulars that are supplied in paragraphs 12, 12A and 12B of the Amended Plaint that this is a claim for libel.

In **GATLEY ON LIBEL AND SLANDER 11th Edition Sweet & Maxwell 2008** the learned writers have observed at page 967 paragraph 28.11 thus:-

"In a libel claim the words used are material facts and they must therefore be set out verbatim in the particulars of the claim, preferably in the form of a quotation. It is not enough to describe their substance, purport or effect."

In **Bunt –vs- Tilley (2007) 1 WLR 1243** Eady J observed at page 1244 that:-

"It is notable that the claimant takes the stance that the words complained of in this litigation form only a small part of the totality of defamatory allegations published about him through the internet ……. Nevertheless, he has to recognize that there is no mechanism in this kind of litigation for proceeding on the basis of "Sample" publications. If a claimant wishes to sue over defamatory allegations, and to recover compensation and other remedies in respect of them, they must be set out clearly in the particulars of the claim." (Emphasis mine)

In **Wright –vs- Clemens (1820) 3B and Ald 503** the Court held at page 506 that:-

"The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground of action."

In **Bullen & Leake & Jacops Precedents of Pleadings Sweet & Maxwell 17th Edition Vol. 1. 2012**

At page 636:-

"37-14 libel – the words must be set out verbatim in the particulars of claim. It is not enough to set out their substance or effect (Harris –vs- Warie (1879) 4 C.P.D 125 at 127. Collins –vs- Jones (1955) 1 QB 564."

In **DDSA Pharmaceuticals Ltd –vs- Times Newspapers Ltd (1973) I QB 21 t**he English Court of Appeal held that where the defamatory words form only part of a longer article or programme, the claimant must set out in his particulars of claim only the particular passages of which he complains as being defamatory of him.

Order 2 Rule 3(2) of our own Civil Procedure Rules provides:-

"2. Without prejudice to sub rule (1), the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material"

From the foregoing, this court cannot but fully agree with the submissions of Mr. Otieno that in a claim for defamation the words complained of are themselves material. It is crystal clear that in a suit for defamation, what the court has to decide on is the nature and effect of the very words complained of. The Defendant also must be able to know the exact claim he has to face. Since, in deciding whether a statement bears a defamatory meaning whether in its plain meaning or innuendo, the court has to construe the very words used or complained of. This is the basis upon which it is a requirement that the exact words complained of not only be pleaded but be set out verbatim in the statement of claim.

It is clear that the Plaintiff has not set out the words complained of in his Amended Plaint. This may be partly because the letter he complains of i.e. 18th March, 2011 was never copied to him. But in my view, that does not relieve him of the strict requirement of the law of pleading the words complained of. There is no evidence to show that he has sought a copy of that letter and has been denied. If that was the case, there are legal mechanisms available to him for obtaining appropriate relief.

At page 972 of **GATLEY ON LIBEL & SLANDER (Supra)** the learned writers have observed:-

"28.16 <u>Words unknown to claimant: libel.</u> Sometimes the claimant will have real difficulty in ascertaining the precise words of the libel. The Court has the power to grant early disclosure to enable the claimant to set out the libel in his particulars of the claim."

It is clear from the pleadings and the Affidavits on record that the Defendants have not denied the existence of the letter dated 18th March, 2011 or a letter by which the 1st Defendant advised or notified the 2nd Defendant to list the Plaintiff as a defaulter. In my view therefore, it was open for the Plaintiff to have applied for the production of the same by the Defendants to be able to plead the same. Of course if they failed to do so there would be sanctions. Now, this the Plaintiff did not do and this court cannot be of assistance at the moment.

The other issue to consider is the defence of qualified privilege by the 2nd Defendant. In paragraph 3 of its Further Amended Defence, the 2nd Defendant pleaded:-

"3. The 2nd Defendant further avers that any information it lawfully received from the 1st Defendant in relation to the Plaintiff and proceeded to include in the Plaintiff's credit report is the <u>subject of a qualified privilege</u> under Regulation 14(1) and 28(6) of the Banking (Credit Reference Bureau) Regulations, 2008 and reiterates paragraph 2 above. The Plaintiff is put to strict proof of any allegations to the contrary."

Order 2 Rule 7 (3) of the Civil procedure Rules 2010 provides:-

"(3). Where in an action for libel or slander the Plaintiff alleges that the Defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the Defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the Plaintiff intends to allege that the Defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred. H<u>e shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.</u>"

It is clear that in order for a Plaintiff to succeed in a claim of defamation where a defence of fair comment or privilege is raised, he MUST file a reply to such a defence and set out particulars of malice. In the absence of such a reply, such a defence is but ***cause accompli***.

In the instant case, although the defence of qualified privilege amongst others were pleaded by the Defendants, the Plaintiff did not file any reply thereto. How does he expect to overcome that legal requirement?

On the basis of these two grounds, I think it is clear that the Plaintiffs suit as pleaded has to overcome certain legal hurdles before it can be placed on the scales of being plain and obvious as against the Defendant defences. To my mind therefore, I need not consider any of the other issues raised by the parties to this litigation. This is so because in whichever way I rule on them, the same cannot change the scales either way.

Accordingly, I am not satisfied that the Plaintiff's application has any merit and I dismiss the same with costs to the Defendants.

DATED and delivered at Nairobi this 4th day of July, 2012.

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A. MABEYA
JUDGE