DR KIAMA WANGAI…….....…….PLAINTIFF

VERSUS

JOHN N. MUGAMBI.....1ST DEFENDANT

MUGAMBI & COMPANY….....…..……2ND DEFENDANT

R U L I N G

By a Motion on Notice dated 29th June 2011 expressed to be brought under Order 2 rule 15(1), Order 51(1) (sic), Order 30 rule 9 of the Civil Procedure Rules and sections 3A and 6 of the Civil Procedure Act, Cap 21 Laws of Kenya, the defendants are seeking primarily an order that the plaint filed herein be struck out and the suit be dismissed with costs. There is also a prayer that the Court be pleased to strike out the name of the 2nd defendant "for being enjoined as a party in its name". I must confess that I am unable to comprehend what was being sought by the latter prayer. First, "to join" and "to enjoin" are two totally unrelated phrases and distinct meanings. Secondly the prayer itself does not make sense moreso since it is not expressed to be in the alternative to the main prayer for striking out the plaint.

The application is based on the following grounds:

a) The plaint as drawn and filed discloses no reasonable cause of action against the 1st and 2nd defendant, since the contents of the letters dated 15th and 16th August 2010, to the plaintiff herein at the face of it do not meet the requirements of what constitutes defamatory statements as set out in the Defamation Act Cap 36 of the laws of Kenya.

b) Without prejudice to (a) above, the letters dated 15th and 16th August 2010, was solely drawn and executed by the 1st defendant herein, and facts in issue in the plaint as drawn prove no nexus to the 2nd defendant, this does not bring out any cause of action against the 2nd defendant.

c) The suit is an abuse of the process of the court since the facts pleaded in the plaint do not warrant the filing of the suit as the same cannot be construed at legal wrong as they do not fall within the ambits of what can be rightfully termed as defamation.

d) Mugambi & Company Advocates, the 2nd defendant herein is a sole proprietorship and a legal firm that is an entity that cannot sue or be sued in its own name.

e) The plaintiff has filed several similar suits, with same cause of action and between the same parties with same subject matter in HCCC 432 of 2010 and HCCC 433 of 2010, action which attracts the mandatory provisions of the law as envisaged in section 6 of the Civil Procedure Act CAP 21 of the laws of Kenya under the principal of Res-Sub judice.

The application is supported by an affidavit sworn by John **Mugambi Njagi**, the 1st defendant herein who practices as the 2nd defendant. In his affidavit the deponent states that this suit is a replica of High Court Civil Suit Nos. 432 and 433 of 2010 which were filed in this Court between the same parties and the same subject matter hence *res sub judice*. According to the deponent the 2nd defendant is not an entity with legal personality but a sole proprietorship that can neither sue nor be sued in its name. It is further deposed that the letters constituting the cause of action were solely drawn and executed by the 1st defendant hence the suit against the 2nd defendant is scandalous, frivolous and vexatious. It is further contended that the letters in question do not constitute defamatory material under the Defamation Act and that communication to one's advocate is construed as privileged communication and hence cannot be subject of defamation. Communication which is merely unflattering, annoying, irksome or embarrassing or that hurts the plaintiff's feelings is not actionable and as the deponent puts it people should be tough enough not to be injured by such statements which would flood the courts if actionable. According to the deponent this suit is filed to delay the fair trial of Industrial Court, taxation number 1175(N) of 2009.

In opposing the said application, the plaintiff filed an affidavit sworn on 21st October 2011 in which he deposes that the defendants, while tenants in their premises and while handling a personal claim requested the defendants to procure a cheque in the name of the High Court of Kenya, a request which the defendants acceded to and pursuant to the same, the plaintiff duly paid to the defendants Kshs. 90,000.00 and the matter was filed in the Industrial Court where, according to the deponent, no filing fees was required at the time. The defendants, it is contended, on vacating the said premises left without refunding the monies, without paying the rent and further fled with two of the plaintiff's client's files. When asked to return the files, it is deposed the defendant respondent vide a letter dated 15th February 2010 in a most insulting manner. Further demands elicited similar responses vide a letter dated 16th August 2010 which were copied to one of the plaintiff's clients. According to the deponent despite sending demand letters, no apology was forthcoming from the defendants hence the institution of these suits. According to the deponent, the other suits mentioned emanate from separate, different and specific causes of action and have no relationship with this suit.

The application was prosecuted by written submissions which were highlighted by counsel. In their submissions, the defendants contend that this suit which is a claim for damages for defamation is hinged on two letters dated 15th February 2010 and 16th August 2010 whose contents are reproduced in the plaint. Since the same letters are the subject of the said HCCC Nos. 432 of 2010 and 433 of 2010, it is submitted that this suit is caught by res *sub judice* doctrine which doctrine has been given statutory recognition by section 6 of the Civil Procedure Act. The Court is accordingly urged to strike out the suits as being an abuse of the court process. Since Mugambi & Co. Advocates is a firm rather than a company, it cannot be sued and hence the Court should take judicial notice of the fact and strike out the 2nd defendant's name from this suit. It is further submitted that the author of the subject letters is **John N. Mugambi** and not **Mugambi & Co, Advocates.** Relying on **Geoffrey Ngunjiri Njuguna vs. Moses Gichohi [2008] eKLR** it is submitted that the said letters do not constitute defamation under Defamation Act. It is further submitted that communication to one's advocate does not constitute defamation since such communication is privileged.

In response to the said submissions, the plaintiff submits that the three cases in question have different causes of action and as such are not frivolous, vexatious or an abuse of the process of the court hence *res sub judice* does not apply. With respect to the claim that no cause of action has been established against the 2nd defendant, it is submitted the letter dated 16th August 2010 was drawn for and on behalf of the 2nd defendant and was signed by the 1st defendant on its behalf. On whether the said letters were defamatory, it is submitted that the plaintiff had the intention of causing injury and did cause injury necessitating the cause of action. It is further submitted that the said letters were copied to a firm of advocates who were the plaintiff's clients. The case of **Geoffrey Ngunjiori Njuguna** relied upon by the defendants, it is submitted is not relevant. The plaintiff on the other hand relies on **Barclays Bank of Kenya vs. Domnic Dufu & Others HCCC No. 2064 of 2000** for the proposition that to strike out a pleading is a draconian step to be taken only in the most plain and obvious cases.

It is important to add that in his oral address to the Court, **Mr. Gachie** urged the Court to distinguish and not to follow the decision of **Justice Khaminwa** in HCCC No. 433 in which the learned Judge declined to strike out the suit. On his part the plaintiff urged the Court to follow the said decision since the ground that the said cases are similar was not upheld and no appeal has been filed against the said decision.

As already indicated the application was primarily under Order 2 rule 15 of the Civil Procedure Rules. In the exercise of its powers under the said provision there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a suit, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. 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. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless or fanciful and or is brought or is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

However, the word "scandalous" for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See **J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997.**

But they may not be scandalous if the matter however scandalising is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) *when to put up a defence would be wasting Court's time*; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. GoldsMid (1894) 1 QBD 186.**

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen&Leake and Jacobs Precedents of Pleading (12thEdn.) at 145.**

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

Pleading tend to prejudice, embarrass or delay fair trial when (i) *it is evasive*; or (ii) *obscuring or concealing the real question in issue between the parties in the case*. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs.**

HemanshuSiryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.

A pleading is an abuse of the process where it is frivolous or vexatious or both.

Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further particulars. See **Kemsley vs. Foot (1952) AC 325.**

However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** 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".

In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000**the same court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment".

Those then are, in my view, the principles that should guide the Court in determining an application under Order 2 rule 15 of the Civil Procedure Rules.

In this case it is alleged that there is no cause of action against the 2nd defendant since the second defendant is not a legal person but a sole proprietorship hence incapable of being sued. I must say that from the evidence on record, the Court is unable to find the circumstances under which the phrase "and Company" is added at the tail-end of the 2nd defendant's name in order for 1st defendant to practice in the said name. The Court is aware and is a notorious fact that can be taken into account that most law firms are registered under the Registration of Business Names Act. The Court is also aware of the provisions of Order 30 rule 1 of the Civil Procedure Rules which provide as follows:

"Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct".

Without evidence of the circumstances in which the name **Mugambi & Company** is used by the 1st defendant, I cannot say with certainty that the 2nd defendant has no capacity to sue or be sued not certainly when the letterhead of the said firm indicates that there are more than one advocate in the said firm. In any case the mere fact that the 2nd defendant is improperly joined in the suit does not warrant an order for its name to be removed from the suit. In **Marwaha Vs. Pandit Dwarka Nath Nairobi HCCC No. 599 of 1952 [1952] 25 LRK 45** the Court expressed itself as follows:

"This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27...The point was premature because upon the plaint alone it was not unequivocally clear that he is being sued in tort at all. Paragraph 9 of the plaint might seem to imply this, but it is at least consistent with an allegation of some statutory liability for non-feasance so far as the second defendant is concerned. If the nature of the liability is not made clear in the plaint, as indeed it is not, then the proper remedy would seem to be an application for particulars, or alternatively a denial of tortuous liability in a statement of defence which, if not countered in a statement in reply by an assertion that the liability being imputed was not tortuous but statutory, would establish on the pleadings that the liability being imputed was in tort, whereupon an application to determine the legal point as to liability before trial could be made under Order 6 rule 27".

If on the other hand the defendants' complaint is that since the 1st defendant is the proprietor of the 2nd defendant and therefore both cannot be sued in respect of the same cause of action, the answer is to be found in Order 1 rule 9 of the Civil Procedure Rules which provides that no suit shall be defeated by reason of the misjoinder or non- joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. For the foregoing reason, without deciding on the merits of the suit against the 2nd defendant I am unable to find that it is improperly joined in this suit without being furnished with all the relevant material.

I now proceed to deal with the issue whether the letters in question can sustain a tort for defamation. I must with respect agree with counsel for the plaintiff that this ground was misconceived and premature. The very essence of a suit for defamation is for the Court to make a finding whether or not the facts complained about are in actual fact defamatory and whether or not the defences relevant to the tort of defamation are applicable to the particular case including privilege. Accordingly, it would be pre-emptive for the court to make a determination at this stage whether the contents of the letters in question constitute defamatory material. Again whether the allegations in the said letters are merely unflattering, annoying, irksome or embarrassing or that they only hurt the plaintiff's feelings and therefore not actionable, is not capable of being determined at this stage of the proceedings.

The next issue is whether this suit is caught by the doctrine of *res sub judice*. The doctrine is captured in section 6 of the Civil Procedure Act which provides as follows:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed".

The above provision expressly bars a Court from entertaining a matter in circumstances mentioned therein. Therefore where the Court finds that the suits in question fall within the four corners of section 6 aforesaid the Court has no discretion in the matter but has to stay the subsequent suit or suits. However, it must always be remembered that the Court is clothed with inherent jurisdiction to strike out proceedings which are deemed to be an abuse of the process of the Court. Therefore where a party decides to file suit after suit between same parties with the same cause of action with either an intention of vexing or annoying his opponent, and without pursuing the first suit in the production line to its logical conclusion, that action may be construed to amount to an abuse of the process of the Court. In the case of **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) Hccc No. 363 of 2009 Kimaru, J** dealing with the issue of abuse of the process of the Court stated as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

In HCCC 432 of 2010, the cause of action as can be gathered from the plaint is a letter dated 16th August 2010 and the claim is for general damages for defamation, certificate of service, costs of the suit, interests and any other relief. In HCCC No. 433 the cause of action are two letters dated 15th February 2010 and 16th August 2010 and the claim is for damages for defamation, certificate of service, costs of the suit, interests and any other relief. In this suit the claim is in respect of the letters dated 15th February 2010 and 16th August 2010 and the plaintiff claims damages for defamation, certificate of service, costs of the suit, interests and any other relief. That the parties in all these suits are the same is not in dispute. From the foregoing, the prayers are similarly the same. However, a perusal of the plaint in HCCC No. 432 of 2010 would seem to indicate that the plaintiff's defamation was as a result of the demand he made in respect of Kshs. 50,000.00 he advanced to the 1st defendant while HCCC 433 of 2010 is in respect of him being defamed as a result of the demand he made for the payment of his rent arrears. In this suit, on the other hand, the claim allegedly stems from Kshs. 90,000.00 the defendant procured from the plaintiff in order to institute some legal proceedings when no fees was chargeable in respect of the said proceedings. However the letters which are the subject of the defamatory matter at least in the last two matters are the same. The question is whether a plaintiff can, in a manner of speaking, tear its subject of defamation into pieces and make each piece a subject of a separate suit. If A makes several claims against B and B in response to the said claims writes a letter which is deemed to be defamatory of A can A file several suits arising from the same letter seeking damages for defamation on the ground that the letter addressed more than one claim? This seems to be what the plaintiff is trying to do in these suits. In actual fact the plaintiff's claims are contained in two letters. The defamatory material contained therein cannot be de-compartmentalised so to speak to enable portions thereof to support separate claims. Whereas the two letters may perfectly be the subject of different claims, I am of the view and I so hold that they cannot be

the basis of three different causes of action.

Accordingly I find that the plaintiff's claim in this suit can perfectly be litigated in HCCC No. 433 of 2010 aforesaid and there is no justification to have the two cases being heard parallel to each other. It is not the form in which the suit is framed that determines whether it is *sub judice* but the substance of the suit. To allow this suit to proceed would be contrary to the overriding objective. The overriding objective, in my view, is tailored to enable the court deal with cases justly which includes ensuring that the parties are on an equal footing; ensuring that it is dealt with expeditiously and fairly; and allotting it appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

The Court cannot be said to be allotting appropriate share of its resources while allotting resources to other cases when a matter which properly speaking should be dealt with as one cause is unnecessarily fragmented into several scraps thus hogging the Court's limited resources. In order to deal with cases expeditiously, this course should be discouraged. Under the provisions of section 1A(3) of the Civil Procedure Act, a party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. Such assistance cannot come in form of duplication of causes of action.

I have said enough to show that I agree with the defendants this suit is caught up by section 6 of the Civil Procedure Act. Accordingly in the exercise of the powers conferred by the said section and taking into account the unique circumstances of the three cases as evidenced by the past proceedings, I direct that this suit be stayed pending the hearing and determination of HCCC No. 433 of 2010 or until further orders of the Court.

Ruling read, signed and delivered in court this 12th day of July 2012

G.V. ODUNGA

JUDGE
Plaintiff present in person
No appearance for the defendant