REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS CRIMINAL CASE 847 OF 2005

GRACE WANGUI NGENYE……PLAINTIFF

VERSUS

WILFRED D.KIBORO …….1ST DEFENDANT

NATION MEDIA GROUP LIMITED…….2ND DEFENDANT

AND

HCCC NO.1008

GRACE WANGUI NGENYE ……PLAINTIFF

VERSUS

WANGETHI MWANGI AND

NATION MEDIA GROUP…….DEFENDANT

CONSOLIDATED FOR PURPOSES OF THE RULING ONLY

In the process of drafting a ruling on the application dated 16th day of February 2006 and filed on 17th day of February 2006 filed in Nairobi HCCC no. 847 of 2005, the court, decided to read through the entire content of the file. Being a ware that there is a sister file namely, Nairobi HCCC no. 1008/2005 also pending ruling on an application filed therein, the court, decided to peruse the entire content of this other file as well. It has transpired

that both suits share common factors on various aspects of the dispute. These are:-

1. Both disputes are anchored on the same set of events save that the complaint in HCCC no. 847 of 2005, is that, the set of facts therein were aired, televised, broadcast, published and or caused to be aired broad cast, televised and published repeatedly in their 7.00 p.m., 9.00 p.m. (prime time and NTV tonight news of 11.00 p.m. read by one EPHIE HUNJA and JULLY GICHURU on the 27th day of June 2005 and again on the 28th June 2005 at 7.00 a.m, through out the country and that the plaintiff also posited the said news on their Website www.nationmedia.com. Where as the set of facts complained of in HCCC No.

1008/2005 are stated to have been written, printed, published and or caused to be written, printed and or published at page 1 and continued at page 5 of their issue number 141.60 of the said Daily Nation News paper.

2. In HCCC NO. 847 of 2005 the publication is said to have a country wide coverage in Kenya with viewers all over Kenya and is syndicated with other international television Networks all over the world, and is also available at the defendants website www.nationmedia.com Where as the newspaper publication in HCCC 1008/05 to be having wide circulation throughout Kenya, East Africa and the same is also available at its website above named.

3. The defendant is the same save that in HCCC No. 847 the first defendant is one Wilfred D. Kiboro described in paragraph 2 of the plaint as the chief executive officer Nation Media Group limited the 2nd defendant is described as the proprietor of Nationa television network as known as NTV where as the first defendant in HCCC no. 1008 of 2005 is one Wangethi Mwangi described in paragraph 2 of the plaint as the Editorial Director of the second defendant. By virtue of the said description the first defendants in both suits are nothing but luminary officials of the second defendant, and are therefore part and parcel of the defendants' establishment.

4. Although the content of the words in both publications are not similar, they share a common source of complaint which is that, they relate to the same incident of the Machakos Kyumbi illicit brew tragedy and the linking of the transfer of two magistrates from Machakos law courts to the said incident.

5. The plaintiff is common to both suits. The facts relied upon by the plaintiff to support the defamation complaints in both are the same namely:-

- Allegation that the transfer from Machakos law courts, to Homa-Bay had been effected by the department administratively and routinely on 23rd June 2005 and even communicated to her before the incident of the illicit brew tragedy occurred on 25th June 2005.

- Allegation that the employer issued a press release explaining and refuting the allegations that the plaintiffs' transfer from Machakos law courts, to HomaBay law courts, had nothing to do with the said illicit Brew tragedy, and that the same was a normal routine administrative transfer which did not touch the plaintiff alone but several others county wide.

- Allegation that publication was done by the defendants without first of all seeking clarification either from herself or the employer.

- Allegation that even after the correct position had been brought to the attention of the defendants', by the plaintiff, through her lawyer, the defendants refused, neglected and or failed to retract and publish a correction hence the filing of the suit.

6. The natural meaning and the innuendo meaning attributed to the words alleged to have been published in both files are similar in almost all material particulars. The only difference being limited to the mode of publication one being through television, and another through print, but both of which eventually shared a common website.

7. The layout framework of the defences in both is similar inclusive of the material content.

8. The reply to defences in both including the layout, content and particulars of facts are the same in both suits.

9. The applications for striking out the defences in both suits are similar. Both are presented by way of chamber summons, they are dated 16th day of February 2006 and both filed on 17th February 2006. They are brought under the same provisions of law. They seek similar relief and grounded on the same grounds in the body of the application. The content of the supporting affidavits is similar in both.

10. The written skeleton arguments, and case law relied upon by the plaintiff/applicants' counsel are similar in both suits.

11. The written skeleton arguments and case law relied upon by the defence counsel in opposition to the said application for striking out the defences are similar in all material particulars as well as the grounds of opposition in both suits.

By reasons of the above set out similarities, this court, found it imprudent to write separate and distinct rulings for both as the second one to be written would simply be a repeatation and waste of judicial time and energy. The court, therefore not withstanding absence of a consolidation order found it fit and prudent to write one ruling to operate for both suits. The authority to do so on the part of the courts' is sourced from the court reservoir of its inherent powers namely section 3A of the CPA which provision enjoins the court, to do all that is necessary in any proceedings to prevent abuse of the court, process and for ends of justice to be met to both sides. In this courts', opinion ends of justice will be met if a joint ruling is written and made to operate for both files, in order to save on time and avoid repeatation. Save that the salient features of all the pleadings in both files will be high lighted with greater details being given to the content of the pleadings in HCCC 847/2005, being highlighted in greater detail, with those in HCCC 1008/2005 being highlighted in areas peculiar to itself and not common to those in HCCC 847/2005.

The plaint in HCCC 847/2005 is dated 7th July 2005 and filed on 8th July 2005. The salient features of the same are as follows:-

- At the material time, when events leading to these proceedings took place, she was the then Acting Senior Resident Magistrate stationed at Machakos law courts.

- It is the plaintiff/applicants' assertion that, the defendants falsely and capriciously, contemptuously and in a most vindicitive manner, televised, broadcast, published and or caused to be aired, broadcast, televised and published repeatedly in the 7.00 p.m., 9.00 p.m. (prime time) and of 11.00 p.m. read by Ephie Hunja and Jully Gichiru, repeated on 28th June 2005 at 7. 00 a.m. throughout the country, and also posited on the defendants named website, the words set out in paragraph 5 of the said plaint.

- It is the plaintiff/applicants' stand that the words complained of in paragraph 5 of the plaint bear a defamatory meaning assigned to them by the content of paragraph 6 of the plaint.

- By reason of the said publication the plaintiff has been severely injured in her credit, character, reputation, self esteem as a wife, daughter, mother and professional, and in the way of her employment as an Acting Senior Resident Magistrate, and has been brought into public ridicule scandal, contempt, odium and opprobrium.

- By reason of the said injury to her reputation, the plaintiff sought the relief specified in paragraph 8 and 11 of the plaint.

The plaint in Nairobi HCCC number 1008/2005 is dated 10th day of August 2005 and filed on 11th August 2005. The salient features in the same which are peculiar to itself and not common to the complaint in the HCCC no. 847/2005 are as follows:-

- That on the 28th June 2005, the defendants with malicious intention wrote, printed, published, and or caused to be written, printed and or published at page one (1) and continued at page five (5) of their issue number 14160 of the said daily newspapers, false and defamation words of and concerning the plaintiff in the way of her profession, the words set out in paragraph 5 of the said plaint.

- It is the plaintiff/applicants stand, that the said story coupied with the one carried in the 2nd defendants Nation Television News of the 27th June 2005 at 7.00 o'clock in the evening, 9.oclock, 11,00 p.m. news and 7.00 o'clock in the morning on the 28th June 2005 where the plaintiff was mentioned by

name, the defendants meant and were understood to mean in the story's natural and ordinary meaning to mean what has been set out in paragraphs 6, 9,-r of the said plaint.

- It is the plaintiff/applicants' assertion that the defendants aim of maliciously causing the aforesaid injury to the plaintiffs character, the defendants by writing, publishing and printing the said story were calculating to increase the circulation of the said news paper, and with a view of making profits from the sale of the same.

- By reason of matters afore said, the plaintiff claimed from the defendants the relief specified in paragraphs 9 and 12 of the said plaint.

Upon service upon them of the plaint and summons to enter appearance in HCCC number 847/2005, the defendants therein entered appearance dated 27th day of July 2005, and filed the same date followed by the filing of a defence dated 9th August 2005 and filed on the 10th day of August 2005.

The salient features of the same for purposes of the record are as follows:-

- the second defendant has no syndication with other international Television networks

- Denied publishing the words of the words complained of in paragraph 5 of the plaint.

- Asserts that the alleged words were a distortion of its broadcast of 27th June 2005 and have been reproduced out of context of the said broad cast.

- Denied that the words were televised, broad cast and published either maliciously, capriciously and or contemptuously.

- Asserted that the matter was published in good faith, on a matter of great public interest, and concern namely the Machakos illicit brew Tragedy.

- Contend the alleged defamatory words have not been set out and as such no cause of action has been demonstrated and the defence will apply at the appropriate moment to stricke out the plaint.

- That the words in the broad cast do not refer to the plaintiff.

- They deny the meaning attributed to those words may they be in their natural and ordinary meaning, as well as their inuendoes as alleged in the plaint and contend that the said meaning are speculative.

- Contend that they report fairly and accurately the proceedings of the public meeting held at Kyumbi Market on 27th June 2005 and addressed by Hon. Charity Ngilu which was held for a lawful purpose for discussion of the matter as one of public concern, namely the Machakos illicit brew tragedy, and as such these are privileged under paragraph 6 of the schedule to section 7 of the defamation Act cap 36 laws of Kenya.

- Further contend that the broad casts of facts that were true in substance or were substantially true.

- That the particulars given in pursuance of order VI rule 6A of the CPR are that:-

(a) Indeed Hon Ngilu addressed a public gathering at Kyumbi Market on 27th June 2005 in which she addressed the illicit brew tragedy.

(b) In her address she stated the actions that the government had taken following the tragedy which included the transferring of public officers and public servants

(c) Two magistrates had been transferred from Machakos law courts by judicial service commission in

the immediate past of the June 27th 2005 broadcast.

- They intend to rely on section 5 of the defamation Act cap 36 laws of Kenya.

- Denied allegations of injury allegedly suffered by the plaintiff by reason of their assertion that, the Broad Casts, complained of were not defamatory of the plaintiff in the first instance, and in the second instance they do not make any reference to the plaintiff.

- They also deny liability to pay damages as prayed for in paragraph 8 and 11 of the plaint and on that account prayed for the suit to be dismissed with costs.

In Nairobi HCCC 1008/2005, the defendants entered appearance dated 6th day of sptember 2005 and filed on 7th day of September 2005 followed by the filing of a defence dated 13th day of August 2005 and filed on 13th September 2005. The salient features of the same not common to the defence in Nairobi HCCC 847/2005 are as follows:-

- Concede the article under the heading "Killer *brew Kibaki order probe as toll now hits so"* was published in the daily nation dated 28/6/2005 but deny that the same was done either falsely, and or maliciously as alleged or at all and the plaintiff is put to strict proof.

- Contend paragraph 5 of the plaint is embarrassing, as the plaintiff has simply thrown entire articles to the court, without specifying the specific words thereof , that are allegedly defamatory of her, and as such they are prejudicial to the fair trial of the defendants, have not been presented with a case to answer to, and as such the plaintiffs suit ought to be struck out.

- In the alternative, the words in the article complained of do not make any reference to the plaintiff and no particulars of extrinsic facts, have been pleaded in the plaint, filed herein, that may lead to the inference that the plaintiff was referred to in the article. As such the alleged defamatory words were not published of the plaintiff.

- Denied that the words can be construed in the manner construed in paragraph 6 of the plaint. Neither are they capable of bearing the meaning attributed to them, may it be in their natural and ordinary meaning or innuendoes as alleged.

- Further in the alternative in so far as the said publication consists of facts, the defendants content that they were true in substances and in fact and in so far as they consist of opinions they were fair comment in a matter of public interest namely the Machakos illicit brew tragedy.

- Particulars under order VI rule 6A of the CPR were given among them that in her address to the public gathering Hon Ngilu implied that some of the actions, that the government had taken following the tragedy included transfer of public servants, and judicial officers, a matter also consumed by the Machakos District Commissioner a Mr. Warfa.

- Denied the plaintiffs' claim as laid, alleging that no cause of action, has been disclosed against them and the claim should be struck out.

In response to those defences, the plaintiff/applicant filed separate replies to defences. The one filed in HCCC 847/2005 is dated 15th day of August 2005 and filed on the 16th day of August 2005. whereas the one in HCCC 1008/2005 is dated 8th November 2005 and filed on 9th November 2005. In both of them, the plaintiff applicant has reiterated the contents of the plaints and then stressed the following points:-

- there is no dispute that at the material time she was an Acting Senior Resident Magistrate stationed at Machakos law courts.

- Maintains that her assertion, that both the NTV and as the Nation news paper have wide circulation

through their website and a such her claim has not been ousted by the defendants claims.

- That the words complained of in both suits were verbatim in the case of the claim in HCCC 847/2005, and printed in the case of the claim of HCCC 1008/2005, and in both instances they were published in the manner pleaded by her.

- The defendants' denials in both suits, is nothing but a confirmation of the defendants contemptuous, malicious and capricious manner in publishing the words complained of, which words were simply reproduced.

- Asserted that she is in a position to prove all the innuendoes pleaded by her.

- Maintain the words pleaded refer to her, as they referred to her by name, in the words complained of in HCCC 847/05 and by implication in the words published. In the claim in HCCC 1008/05 because she is one of the two magistrates transferred from Machakos law courts', at the time.

- She stands by the meaning both in their natural and ordinary meaning and by innuendo attributed and or assigned to the words complained of in both suits.

- Maintains her transfer, had nothing to do with the Machakos illicit brew tragedy, as the transfer had been effected and communicated to her as at 23/6/05 two days before the events touching on the Machakos illicit tragedy occurred on 25/6/05, matters that the defendants could have established had they bothered to establish the truth before publication.

- Allegation of truthful ness in the publication has been ousted by the content of the press release, released by the Judicial spokesman to the effect that the plaintiff/applicants' transfer had been undertaken administratively and routinely, along with others country, wide facts that the defendants could have established had they bothered to check the same before publication.

- Even after the judiciary had explained the correct position through the spokesmans' press release, the defendant did not offer an apology neither did they retract.

- It is her stand that, by reason of what has been stated both in her plaints and the replies to the defendants defences, the defendants cannot take refugee under the provisions of the defamation Act s what the defendants reported in both publications was neither fair nor justified as the correct facts were not established before publication. As such the only reasonable explanation that can be attributed to the defendants conduct, is that they did so with the sole aim and or purpose of reaping profits especially from the print publication.

- Maintains that the words complained of were defamatory and as a result she has suffered in her credit, character, reputation and self esteem in the manner pleaded in both suits, which are competently before this court, where as the defendants defences have been ousted by the plaints, and replies to the defences and they should be struck out.

It is against the afore set out background information that the plaintiff/applicant moved to this court, and filed notice of motion applications to stricke out the defendants defence in both suits. The one filed in HCCC 847/05 is dated 16th February 2006 and filed on 17th February 2006. where as the one in HCCC 1008/2005 is also dated 16th February 2006 and filed on the same 17th February 2006. Both as mentioned are presented by way of notice of motion and brought under the same provisions of the law namely order VI rule 13 (1) (b) (c) and (d) of the CPR and section 3A of the CPA.

They are anchored on similar grounds in the body of the application and supporting affidavits deponed by the plaintiff on the same date of 16th February 2006. They seek similar reliefs which are four in number and these are:-

1. *The defendants/Respondents defence be struck out.*

2. Judgement is entered in favour of the plaintiff/Applicant against the Defendants/Respondents and this suit proceeds to formal proof.

3. The defendants/Respondents do pay costs of the suit and the costs of this application.

4. The court, be pleased to order any other or further relief that it may deem meet and just to grant"

In support of the applications, counsel for the applicant filed written skeleton arguments. Also relied on the annexture, case law, and oral high lights in court. The points stressed in the written skeleton arguments are as follows:-

1. Facts and exhibits demonstrated herein show that the plaintiff/applicants was at the material time and she was routinely and administratively transferred from the said Machakos station to Homa Bay, vide a letter dated 23rd day of June 2005, annexture GWn1. It is their stand that the said transfer was grounded on administrative considerations in the judiciary as explained in the press release issued by the judiciary on the 28th day of June 2008. As such the said transfer had nothing to do with the events that took place at Kyumbi within Machakos whereby (50) fifty people perished in the illicit brew tragedy.

2. It is their contention that the publication undertaken by the defendants on the 27th on the T.V and on 28th in the print complained of herein, falsely and maliciously portrayed the plaintiff/applicant herein as having been sacked by the president due to her involvement in the sale, consumption and distribution of the illicit brew that caused the deaths. In the alternative, the publication meant that the plaintiff applicants was sacked, for her failure to present consumption of the illegal brew, thus in the process inisinuating that the plaintiff/applicant was a magistrate of corrupt, in human, negligent, unprofessional unscrupulous character who used her position as a magistrate to enrich herself completely by letting off lightly those that sold the poisoned brew which had caused deaths and misery to so many people.

3. upon the judiciary spokesman clarified in the press release that the plaintiffs' transfer from Machakos to Homa Bay had nothing to do with the deaths that arose from the consumption of the illicit brew in Kyumbi within Machakos District, the plaintiff/applicants instructed her counsel on record to issue a demand letter among others asking the defendants to apologize, retract the publication, and admit liability, which they declined, resulting in the filing of the two suits, to which the defendfants filed defences, sought to be struck out, to which defences the plaintiff/applicant also filed replies.

4. The court, is invited to find that the defence of justification and fair comment, is not available to the defendants in the circumsntances of this case as such, a defence is only available where the words complained of are true. The untruthfulness of the publication has been proved by the fact that whereas the publication presuposes that the plaintiff/applicant was transferred from Machakos law courts following a presidential fiat and yet the correct position is that the said transfer was nothing but a routine administrative transfer affecting other magistrates country wide, which had taken place on 23/6/05 two days before the illicit brew incident occurred. This cannot be disputed by the defendants as the same is demonstrated by existence of the letter of transfer dated 23/6/05.

5. It is also their stand that, the defendants cannot also take refuge under the schedule to section 7 of the defamation Act cap 36 laws of Kenya because the alleged political rally held at Kyumbi by Hon Charity Ngilu does not qualify to be proceedings in terms of the said section.

6. It is also their view that the defendants cannot be excused for publishing wrong information as they could have accessed the correct information by contacting the plaintiff directly or the judiciary. It matters not that the said rally had been addressed by a Hon Minister and a senior police officer. The defendants were in the circumstances of this case obligated to verify the correctness of the story in so far as the plaintiff/applicant is concerned.

7. It is their stand that in the circumstances of the facts demonstrated herein, they all go to show that the defendants were in a position to know that the false hoods they published had the potential to irreparably

damage the plaintiffs' reputation.

8. Also assert that the pleadings on record leave no room for this matter to go to trial.

In their oral highlights in court, in HCCC No. 847/2005 the plaintiff/applicants' counsel added the following:-

- No reason was given by the defendants as to why they never rendered an apology and retracted the publication.

- Malice has been established by the fact that the story was based on facts within the public domain of the defendants which cannot be changed by any amount of evidence tendered by the defendants. As such a full trial will not serve any useful purpose. It will not only embarrass the plaintiff but also to delay the course of justice.

- They are also of the view that the defendant stands faulted on their opposition in that, the law, does not permit them to filee both grounds of opposition and a replying affidavit. They should have elected to file one. As such both process should be struck out and when so struck out, there will be no opposition to the plaintiff/applicants application.

In HCCC 1008/2005 counsel stressed the following, which is not common to the written arguments and the oral highlights in HCCC 847/2005, namely:

- everything pleaded by the plaintiff applicant is true as the defendants do not deny publication. Neither have they controverted the letter of transfer.

- Defendants admit to have received the letter of demand but chose not to apologize or retract the story.

- The legal officer should not have sworn the replying affidavit.

Turning to the defendants opposition in HCCC 847 of 2005, the defendants filed grounds of opposition dated 15th day of March 2006 and filed on the same 16th March 2006. They run as follows:-

1. The defence raises triable issues for determination at the full hearing of this suit to wit;

(a) Whether the article compained of can be understood upon a reasonable construction to refer to the plaintiff in its natural and ordinary meaning.

(b) Whether the article complained of in so far as it consisted of statements of fact, it was true in substance and infact, and in so far as it consisted of opinion, it was fair comment on a matter of public interest.

(c) Whether the plaint as filed is sustainable in support of the claim,

(d) Whether the publication sued upon is covered by qualified privilege under the defamation Act

(e) Whether the publication was malicious as alleged.

2. The application is in competent and vexatious and should be dismissed with costs.

Also filed in apposition of the opplication is a replying affidavit sworn by a legal officer sworn on the 6th day of June 2006, and filed the same date. The court failed to trace similar documents in HCCC 1008/2005, although it appears from the content of the oral highlights of both sides that these were replicated in both files.

In addition to the above, the defence counsel also filed written skeleton arguments dated 13th day of June 2008 and filed on 16th June 2008. The points relied upon by the defence in a summary form are as follows:-

(i). A reading of the relevant provisions relied upon by the applicant indicates at the outset that the jurisdiction being exercised by the court, is discretionary and not mandatory by reason of the use of the word "may" in the rule.

(ii). The policy of the court, is reflected in the court, of appeal decision in the case of **D.T. DOBIE AND COMPANY LIMITED VERSUS JOSEPH MUCHINA (1982) KLR 1,** the policy of the court, has been to only exercise the power in plain and obvious cases.

(iii). It is in their stand that the defences filed in both suits, are not scandalous, frivolous and vexatious. Neither are they otherwise an abuse of the court process. Nor have they been intended to delay, prejudice or embarrass the trial for the following reason:-

(a) As per construction of those in the decision of G.B.M. Kariuki J in the case of GEORGE P. OGENGO VERSUS JAMES NDASABA, they could only qualify to be so called if it had been demonstrated that they contain any matter that contain any imputation on the apparent or makes a charge of misconduct or bad faith.

(b) They do not contain anything that is unsustainable

(c) They are not embarrassing, because they do not contain any facts that are under evasive, vague wanting in seriousness, and tends to annoy.

(d) The defences can not be termed embarrassing merely because what has been pleaded is untrue.

(e) They cannot be taken to prejudice, embarrass or delay the fair trial because as laid, they cannot be said to be beyond the right of any party to make.

(iv) By reason as of what has been stated in number (iii) above, the defence raised by them in both suits do not offend any of the rules set out herein as there is no demonstration from the applicant on how those rules have been offended.

(v) It is their stand that the plaintiff/applicant has not demonstrated that their defences in both suits do not raise any triable issues for the following reasons:-

- They have pleaded in paragraph 5 of the defences that they denied publishing the words complained of. The reason of the said denial is because the words published were a distortion of what was indeed reported, and as such it will be necessary for the court, to establish which version is the truth.

- in paragraph 11 they have pleaded that the broad cast complained of was a fair and accurate report of a public proceedings of a public meeting held at Kyumbi market on or about the 27th June 2005 addressed by the Hon Charity Ngilu,.

-The words quoted verbatim were made by Hon Charity Ngilu and not the defendants.

- The defence raised by them entitles them to take refuge under the provisions of section 7 of the defamation Act Cap 36 laws of Kenya.

- The defence of qualified privilege is available to the defendants as the same has not been defeated by malice and even if malice had been demonstrated it is a matter of facts which requires the determination and establishment by the court.

- The assertion of malice even if pleaded cannot hold as its particulars were not given in accordance with the provision of order 6A rule 6 (2) of the CPR.

- The suit against the 1st defendant as agent of the second defendant cannot lie as they cannot be for sued for actions done in their official capacity for a disclosed principal. More so when there is no averment in the plaints against the 1st and defendants in their personal capacity. As such the suit against them are unsuitable and should be struck out.

(v) It is their contention that on the basis of what they have stated above, the suits do not meet the test for striking out, as the defence in both suits raise several triable issues and since this court, is not called upon to determine at those issues at this stage of the proceedings both application should be dismissed with costs to the defendants and the matter ordered to proceed to trial on their own merit.

In their oral highlights in court, the defence counsel simply reiterated the content of the defences and written skeleton arguments and then added the following points:-

- Since publication was aired on T.V, the same cannot be said to be in a permanent form and this is a triable issue.

- They reiterate their defence of qualified accurate reporting of proceedings of a meeting addressed by Hon. Charity Ngilu.

- Still reiterate that the defence of fair comment, justification and privilege are available to them.

- The court, was urged not to uphold the technical objection raised by the plaintiff regarding the filing of both grounds of objections and replying affidavit in favour of substantial justice..

In HCCC 1008/05 counsel stressed that:

- Their defence do not merit to be struck out, because the power to struck out is merely discretionary, and the aim of the court should be to use its discretion to sustain suits and not fault them.

- The court, is invited to hold that even if only one triable issue is disclosed, the defendants should be allowed to defend the suit.

- It is a mandatory to prove that the words complained of are defamatory and that the plaintiff is the person who has been defamed. Herein the defendants denied that the words are not defamatory and that the plaintiff has not been linked to those words have not been ousted.

- The attempt by the plaintiff/applicant to import into HCCC 1008/05 matters already pleaded in HCC 847/05 makes the suit in HCCC 1008/05 superflous.

- Regarding the print publication, the pleading in respect of the same has been faulted by reason of the fact that the plaintiff quoted an entire article without specifying which words refer to her. In this regard the pleading is therefore embarrassing.

In response to the oral highlights, counsel for the plaintiff/applicant stated that the defendants cannot deny publication of the words complained of, and then at the same time seek to avail themselves of the defence of fair comment, justification and privilege.

- Maintain that their innuendoes are very clear.

- - Deny the suggestion by the defence that proceedings in HCCC 1008/05 are superfluous because to them, each publication form a separate cause of action hence the two proceedings.

- Still maintain that the plaintiff/applicant has specifically been referred to in both publications and the

words complained of bear a defamatory meaning.

On case law the court, was referred to the case of **J.P MACHIRA T/G MACHIRA AND COMPANY ADVOCATES VERSUS WANGETHI MWANGI AND NATION NEWSPAPERS NAIROBI CA 179 OF 1997** decided on the 14th day of June 1998. At page 14 of the said judgement line 5 from the bottom up to page15 the CA, made the following observation:-

"*Nor do I understand the decision of this court, particularly that of Madan J.A, as he then was, in the case of **D.T. DOBIE AND COMPANY (KENYA) LIMITED VERSUS JOSEPH MBARIA MUCHINA AND ANOTHER CIVIL APPEAL NO. 37 OF 1978** un reported (1982) KLR1) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on the merits. If that were to be so, the provision of order VI rule 13(1) and probably those of order 35 rule 1 of CPR rules would be rendered nugatory and there would be no need for their existence in our rule book. I agree that these powers are drastic and as the court, said in the case of **CHATTE VERSUS NATIONAL BANK OF KENYA LIMITED CIVIL APPEAL NO. 50 OF 1996** (un reported), the power are to be exercised with great caution, and only in the clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits the court is perfectly entitled to strike out a pleading, for as I have said, there is no magic in holding a trial on merits, particularly where it is obvious to every one that no useful purpose would be served by it"*

The case of **FIDELIS MWEKE NGULI T/A/ NGULI AND COMPANY ADVOCATES VERSUS NATION NEWS PAPER AND PRINTERS LIMITED NAIROBI HCCC NO. 1896 OF 1999** decided by Rawal J on the 12th day of May 2000. The brief facts are that the plaintiff had sought an order among others for the defendant to make a full and an unqualified apology, make amends and withdraw the said remarks and statements and such an apology, amends or withdrawal, be given the widest possible circulation similar to the complained of publication.

At page 1 line 3 from the bottom observation is made to the effect that:-

"*The nation filed its defence and denied that the contents of its articles were false, malicious or defamatory as alleged and took up a defence of fair comment on a matter of great public interest"*

The plaintiff moved a formal application to strike out the defence. At page 4 of the said ruling line 2 from the bottom it is observed that the nation had published an Article with notoriety on its Wednesday Magazine of 20th January 1999, the title where of is an a very bold letters " *where is my money*" .At page 5 line 15 from the bottom it is observed that:-

"*It is not denied that Nguli went to the office of the nation with the press release prepared by him and saw its managing editor Tom Musindi and Joe Ombuor. For what so ever reasons the said press release was not published. What was published was a follow up feature on 27th January 1999 entitled " Hope Crystallizes as accident victims lawyer files plaint"*

At page 8 line 2 from the top, the court, went on to state:- " *The court does not thereby shut out any genuine Defence of a defendant as it is the only order to make if no reasonable ground of defence are disclosed even as only as prima facie triable issue, at this stage…"*

The case of **LOUTCHANSKEY VERSUS TIMES NEWS PAPERS LIMITED AND OTHERS (2001) 4 AER 115**, in which "*the claimant brought proceedings for libel against the defendants in respect of two News papers articles which had accused him of being engaged in international criminal activities of a very serious nature. There was no substantive plea of justification in the defence. The defendants relied mainly on a defence of qualified privilege contending that the allegations were of great public interest and concern, such that the public were entitled to know of them. It was held inter alia that for the purpose of the defence of qualified privilege, the factors relating to the conduct and decisions of the publisher or journalist were to be considered objectively in the light of the matters known to them at the time and were not to be judged with the benefits of hind sight matters such as the steps taken to verify the information, the urgency of the matter and the circumstances of the publication including the timing,*

words lose much of their potent effect if the law, permitted a publisher to publish in, the defamatory material without sufficient inquiry and then to justify that publication (In the sense of establishing a plea of qualified privilege) by being allowed to rely on after acquired information. More over it was facile to talk about a right to know if there was no duty to publish. The public had no right to know in time, defamatory matter, about which a newspaper had made no sufficient inquiry before deciding to publish it. The right to freedom of expression had never been absolute……The right to freedom of expression carried with it duties and responsibilities and its jurisprudence showed how the right to freedom of expression was circumscribed by what was strictly necessary and proportionate in a democratic society for the protection of individual, reputation. If the public right to know were to be adopted as the sole criteria for conferring immunity from liability for damaging and un true statements, the court, would be turning their back on their duty to prescribe such restrictions on freedom of expression as were needed in order to achieve the public good of protecting an individuals reputation. Some discipline had to be introduced in order to give appropriate effect to the interest recognized"

The case of **BLACK SHAW VERSUS LORD AND ANOTHER (1983) 2 A11ER 311,** whose brief facts are that *the 1st defendant had published an article titled "Incompetence" at ministry, that the concerned department had paid out $ 52m to North Sea Oil Companies which they should not have received and, that the investigations of the House of Commons Committee had led to a number of civil servants being reprimanded, that the plaintiff was the official in charge of the department scheme when the over payments were made, that the plaintiff had resigned from the civil service the previous month, and that the chairman of the House of Commons Committee had described the events as a story of in efficiency, incompetence, in adequate staff, and in adequate supervision. The article did not state that the plaintiff had left the civil service for personal reasons, although in later editions of the news paper on 13th September the defendant published the plaintiff own explanation from the civil services, the defendants refused to publish an apology to the plaintiff, and did not publish vindication of the plaintiff, issued by the government department by the minister in the House of Commons, and by the House of Commons Committee, the plaintiff brought an action for libel against the first defendant and the publisher of the news papers. The defendant denied that the article was defamatory of the plaintiff, and in the alternative alleged that the article was the subject of qualified privilege as being inter alia afair and accurate report of a matter issued on behalf of a government department. (i.e. the information given by the press officer to the first defendant) and therefore privileged.*

It was held inter alia that:-

(i).*The publication was not privileged in accordance with the relevant law applicable.*

(ii). *For a news paper publication to be protected by qualified privilege at common law…. It was not enough that the report was of great general interest to the public, the public at large had to have a legitimate interesst in receiving the information contained in the report, and the publisher had to have a corresponding duty to publish the report to the public at large……determination of existence of this ingredient depends on the circumstance of each case…… It followed that since at the time the first defendant wrote his article, any allegation on competence against the plaintiff had not been made good, the public at large could not be said to have had alegitmate interest in receiving either the press officers' statement or the first defendants inference or speculation that it was the plaintiff to publish what was then mere rumor about the plaintiff."*

The case of **KITTO VERSUS CHADWICK AND ANOTHER (1975) EA 141.** The brief facts are that the appellant clamed that he had been libeled by three letters written by the respondent. All were published on occasion of qualified privilege but malice was pleaded. One letter made detailed allegation against the appellant and no attempt was made to justify the allegation. It was held inter alia that:-

(i).*The allegations made were false, was not disputed by the respondents whether by correspondence or by evidence.*

(ii). *In the absence of any attempt to show some belief in the truth of the allegations malice was established.*

The defence referred the court, to the following alternatives. The case **OF DT DOBIE AND COMPANY (KENYA) LIMITED VERSUS MUCHINA (1982) KLR 1.** It is a court of appeal decision. The principles set out by this decision are as follows:-

1. *The words reasonable cause of action " in order VI rule 13 (1) "means an action with some chance of success, when the allegation in the plaint only are considered. A cause of action will be considered reasonable if it does not state such facts as to support the claim prayer.*

2. The words " *cause of action*" means an act on the part of the defendant which gives the plaintiff his cause of action.

3. As the power to strike out pleadings is exercised without the court, being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously.

4. (Obita Madan J.A.) The power to strike out should be exercised only after the court, has considered all facts, but it must not embark on the merits of the cause itself, as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

5. (Obiter Madan J.A.) The court, should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendments. As long as a suit can be injected with life it should not be struck out.

The case of **JOHN WARD VERSUS STANDARD LIMITED NAIROBI HCCC NO. 1062 OF 2005.** In which the plaintiff applied to strike out paragraphs of the defence and that judgement on liability be entered for the plaintiff against the defendant, and that the suit be set dawn for formal proof or assessment of damages. The suit arose out of publication by the defendant decided by Osiemo J on the 5th day of May 2006. At page 7 of the judgement, line 12 from the bottom, the court, made observations to the effect that the reason why the defendants defence was sought to be struck out therein was because:-

- *Defence pleaded was unsustainable.*

- *words complained of were plainly defamatory*

- *A defence of justification without particulars is unsuitable.*

- *Reputation is no defence in defamation unless the words are true.*

- *That on admission made by the defence, the defence of privilege, as pleaded cannot stand.*

- *The defendants defence as pleaded does not come within the provision of section 6 and 7 of the defamation Act cap 36 laws of Kenya.*

- *The defence of fair comments is unsustaible also because the words complained of are not comment.*

- *In any event there are no facts to support the alleged comments.*

- *Alternatively the admission of facts made in the defence render false and destroy the factual basis of the said comments.*

- *The findings of facts made by this honourable court, in previous proceedings also render false and destroy the factual basis of the said comments.*

- *The comments are plainly not fair or honest and that the said defence scandalous, frivolous and vexatious.*

At page 8 line 6 from the top the learned judge set out the ingredients of defamation as:-

- The statement must be defamatory.

- The statement must refer to the plaintiff

- The statement must be published by the defendant

- The statement must be false.

At the same page 8 line 11 from the top the learned judge set out the salient features of the defences that had been sought to be struck out as:-

- The defendant concedes to have published the words complained of, but submits that they were true in substance and fact" The learned judge went on to state that " *since the law presumes that every person is of good repute until the contrary is proved, it is the defendant to prove affirmatively that the defamatory words are true or substantially true. The defence of justification asserts that the sting of the defamatory statement in its proper context is true in substance and infact. The law presumes that the defamatory words are false and it is upon the defendant to satisfy the court that the statement which is justified is true in the substance and in fact…."*

At page 9 of the said ruling at line 1 from the top, the learned judge quoted with approval the court of appeal decision in the case of **WAWERU VERSUS OYATSI (2002) EA 664 (CAK)** in which the law lords of the CA had quoted with approval L. Wilmer J In the case of **WALTERS VERSUS SUNDAY PICTORIAL NEWS PAPER LIMITED (1961) 2AER 158** at 761 thus:- "*It is well established that the drastic remedy of striking out a pleading or part of a pleading cannot be resorted to, unless it is quite clear that the pleading objected to discloses no arguable case. Indeed it has been conceded before us that the rule is applicable only in plain and obvious case"*

In the learned judges' opinion, the defendant having put forward the defences of fair comment, justification, privilege and publication as agent of a disclosed party, ought to be given an opportunity to satisfy the court, that the statement is true in substance and that it was a fair comment.

The case of **METRO PETROLEUM LTD VERSUS WAMCO PETROLEUM LTD NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 293/2005** decided by H.P Waweru on the 10th day of May 2006 whereby the learned judge made observation at page 4 line 12 from the bottom as follows:-

"*The remedy of striking out a pleading is a drastic one as it denies a party the right to a trial. It is a remedy not to be lightly granted. It will only be granted only on the clearest of cases….."*

The case of **GEORGE P.B. OGENDO VERSUS JAMES NANDASA AND 4 OTHERS KAKAMEGA HCCC NO. 91 OF 2002** decided by G.B.M. Kariuki on the 25th day of May 2006. On an application to strike out the defence of the 3rd and 4th defendants. At page 5 of the ruling the learned judge quoted with approval the decision of the CA in the case of **D.T. DOBIE AND CO. (K) LTD VERSUS MUCHINA (1982) KLR1** whose guiding principle on striking out of a pleading is that:

"*The power to strike out should be exercised only after the court, has considered all facts, but must not embark on the merits of the case itself as this is solely reserved for the trial judge….. The court, should aim at sustaining rather than terminating a suit…… a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment and that as along as a suit can be injected with life by amendment, it should not be struck out……It is for that reason that the policy of the court is that only in plain and obvious cases should recourse be heard to it"*

At page 6 the learned judge drawing inspiration from the case law quoted by the CA in the DT Dobie case, drew out the following additional principles:-

- *The power conferred on the court, by order VI rule 13 (1) CPR is discretionary and it should be exercised where the case is beyond doubt.*

- *Before exercising it, the court, must be satisfied that the defences raised are not arguable.*

- *The summary remedy ……is only to be applied in plain and obvious cases where the defence or the action cannot succeed or is in some way an abuse of the process of the court, or the case is un arguable.*

At the same page 6 the learned judge construed the circumstances under which order VI rule 13 (1) (a) (b) (c) and (d) applicable. After receiving the English provisions which are of a persuasive nature the said provision is available in the following circumstances as summarized by this court as hereunder:-

(a) "Scandalous material- applies on an unnecessary matter in the pleading containing any imputation on the opponent or making a charge of misconduct or bad faith.

(b) Frivolous or vexatious –applies or refers to matters that are obviously unsustainable

(c) Embarrassing pleading is said to include unclear statement on how much of the statement of claim the defendant admits and how much he denies. Therefore evasive and vague defence from which the plaintiff cannot know what defence is being pleaded, will normally be struck out on the ground that it is wanting in seriousness and tends to annoy"

At page 7 paragraph 2 the learned judge went on to state thus:-

"*As regards striking out a pleading under rule 13 (1) (c), the courts, have held that a defence that may prejudice, embarrass or delay the fair trial of the action is one that is beyond the right of a party to make. A defence that raises irrelevant matter or issue which may involve expense, trouble and delay to answer is deemed to be prejudicial to the fair trial of the suit and will be struck out. Embarrassing pleading includes a pleading that does not make it clear how much of the statement of claim is admitted and how much is denied. But a pleading will not be struck out on the basis that it is embarrassing merely because it is alleged to be untrue, nor is a pleading embarrassing because the law stated in it or reason alleged ma*y be bad *unless, they are not relevant"*

On the same page 7, 3rd paragraph as regards striking out under rule 13 (1) (d) on the ground "*that the pleading is an otherwise an abuse of the process of the court.……it connotes that the process of the court, must be carried out properly, honestly and in good faith and that is why it will not allow its functions as a court, of law to be used.……It will depend on whether it is groundless. The term abuse of the process of a court"*

Connotes that the process of the court, must be carried out properly and honestly and in good faith and it means that the court, will not deem its function as a court of law, to be misused.……where it is shown that the plaint or defence is shown not to be bona fide or where the suit is not instituted bona fide or in good faith for the purposes of obtaining relief but rather for some other various purposes."

The case of **WATAN VERSUS SUNDAY PICTORIAL NEWSPAPER LTD (1961) 2A11 ER 758** the brief facts are that the defendant in their Sunday newspaper referred to the plaintiff as a "*notorious, dodgy operator of London Slum properties"* (b) this wily dodger "*and (c) the man whose state agency was described by lord Goddard then lord Chief Justice, as a fraudulent business from beginning to end."* In their defence to an action for damages for libel, the defendants admitted that the words were defamatory but pleaded.

(i).*Justification*

(ii). *Fair comment on a matter of public interest.*

(iii). *The words at (c) above were a fair and accurate report of judicial proceedings and*

(iv). *In mitigation of damages that as a result of certain judicial proceedings the plaintiff had already been brought into scandal, odium and contempt. They cited three judicial proceedings. First a criminal prosecution in 1953 for alleged offences of dishonesty, on appeal the plaintiffs' conviction were quashed by the court, of criminal Appeal on the grounds of defective summing up and the lord chief justices' observation were made, second a civil action by a company in which the plaintiff was interested in which the county court, judge dismissing the claim suggested fraud by the plaintiff and third, proceedings by companies in which the plaintiff was interested in which the court, of Appeal criticized the companies." On an application to strike out the defence, the passage relating to the proceedings under each of the several heads of defence on the ground that they disclosed no reasonable answer to the plaintiff claim, it was held that the allegation would not be struck out because:-*

(i) The plea of justification might answer some meaning that the jury would place on the words complained of.

(ii) It must follow from the decision not to strike out the matter pleaded in justification that the repetition of it in relation to the plea of fair comment should stand

(iii) The question whether the words at (c) above were a fair and accurate report was a question for the jury, and

(iv) The plea in mitigation of damages that the plaintiff had already been brought into public odium by the judgement in the proceedings referred to did not go beyond what was permissible as evidence of bad reputation in a sector of life relevant to the alleged libel.

The case of **OTIENO VERSUS NATION NEWSPAPER LTD (2002) 578** decided by Tanui J, in which objection was raised to the plaintiffs claim by the defence, that since the plaintiff had alleged malice, the plaintiff had to give particulars of facts, and matters from which malice could be inferred in light of the defendants assertion of fair comment, and privilege in its defence. The plaintiffs' reply to defence ought to be struck,
out for failure to comply with order VI rule 6A (3) and that the pleading of innuendo did not comply with order VI rule 6A (1) of the said rules.

It was held interalia that:-

1. In libel actions the plaintiff is bound to give full particulars of facts and matters which lead to an inference of malice on the part of defendant pursuant to order VI rule 6A of the CPA.

2. In a reply to defence in libel actions, the plaintiff must also give particulars of the alleged facts. It is insufficient to merely state that the publication is a distortion. It was necessary to particularized the distortions.

3. Where a party plead malice, particulars must be given of facts or matters which would lead to the inference of malice.

4. The pleading of innuendo in the plaint was inconsistent with the requirement of order VI rule 6A (1) which requires, that where the words complained of were used in a defamatory sense, other than their ordinary meaning, particulars of the facts must be given.

5. Failure to comply with the rules rendered the plaintiffs' suit defective and liable to be struck out.

The case of **LEWIS AND ANOTHER VERSUS DAILY TELEGAPH LTD, SAME VERSUS ASSOCIATED NEWSPAPER LTD (1963) 2ALL ER 151 (H.L)** The brief facts are that "*two news papers each published statements that officers of the city of London fraud squad were inquiring into the affairs of the (R.CO) and its subsidiary companies and that the chairman of the R. Company was LL and the R. company brought action for libel against each newspaper. The two sets of actions were tried separately. L. Pleaded an innuendo to the effect that the statement meant that he has been guilty of fraud*

or was suspected by the police of having been guilty of fraud or dishonesty in connection with R. Company's affairs. R. Company pleaded an analogous innuendo. Both did not plead any special damages. The defendants admitted the words were defamatory in their ordinary meaning but pleaded:-

1. Justification in that the fraud squads were at the time of publication inquiring into the affairs of R. company. The defendants did not seek to justify the extended meaning pleaded in the innuendo. At the trial no extrinsic facts was proved in support of the innuendo.

It was held inter alia that:

(i).*Where words are defamatory in their natural or ordinary meaning, an innuendo does not constitute a separate cause of action unless it is an innuendo that requires the support of extrinsic facts.*

(ii). *Where an extended defamatory meaning of words admitted libelous in their ordinary meaning was put forward by a plaintiff, the defendant was entitled to a ruling whether the words were capable of bearing that particular extended meaning.*

The case of **CHARLESTON AND ANOTHER VERSUS NEWS GROUP NEWSPAPERS LTD AND ANOTHER (1955) 2A11 ER 313.** The brief facts are that "*the defendants were the publishers and editors of a Sunday newspaper which had a readership of more than ten million. In the Edition of 15 March 1992 the News paper published two photographs in which the heads of the plaintiff an actor and an actress who played the parts of a husband and wife in a long running and popular televisions serial, were superimposed on the bodies of two persons engaged in intercourse or sodomy. On the same page there was a photograph where the head of the first plaintiff was superimposed on a woman dressed in a skin tight leader out fit which exposed her breast. Banner at the head line at the top of the page read:- "Strewth what's Haroid up to with a madge? Below the photographs was another smaller, but still prominent headline which read: Porn shocker for neighbours stars. The photographs had been produced for a computer game in which the plaintiff faces had been used without their knowledge or consent and described them as victims. The plaintiffs brought an action against the defendants alleging that the photographs and the head lines were libelous because the ordinary and natural meaning was that, the plaintiff had posed for pornographic photographs.*

It was held interalia that "*it was contrary to a plaintiff to sever and rely on isolated defamatory passage in an article if other parts of the article negated the effect of the libel and to the principle that if no legal innuendo was alleged the single natural and ordinary meaning to be ascribed to the words of an allegedly defamatory publication was the meaning which the words taken as a whole conveyed to the mind of the ordinary, reasonable, fair minded reader."*

There was also an extract of principles on the subject from Halis Burys laws of England:-

(a) Words are not actionable as a libel or slender unless they are published of and concerning the plaintiff.

(b) Where the plaintiff is referred to by name or clearly identifiable the words are actionable.

(c) It is not necessary that the plaintiff be named, so long as readers with special knowledge could understand the words to refer to the plaintiff.

(d) It is not generally necessary that the defendant should have actually intended to make or publish the statement of and concerning the plaintiff, or even that the defendant should have been aware of the plaintiffs' existence if people to whom it was published would reasonably understand it to refer to the plaintiff.

(e) The true or legal innuendo is a separate defamatory meaning different from the natural and ordinary meaning because it is apparent only to those readers possessed of special knowledge of extrinsic facts unknown to the ordinary person

(f) An occasion is privileged where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. The privilege extends only to communication upon the subject with respect to which privilege exist and does not extend to matters wholly irrelevant to and unconnected with the discharge of the duty, or the exercise of the right or the safeguarding of the interest which creates the privilege.

In the courts', assessment of the facts herein, it is clear that all that the applicant seeks from the seat of justice herein is an order to strike out the defences of the defendants. The reasons for seeking so, have already been set out herein. The applicant has gone further to cite for the courts consideration as guiding principles case law from courts', of both concurrent and superior or binding jurisdiction both local and international. It is on the basis of these, that the applicant has urged this court, to hold that the facts demonstrated herein warrant the relief sought.

The defence on the other hand have put up a fight in an attempt to demonstrate to the court, that on the basis of the content of their defences in both suits, principles of case law, relied upon, their defences are not the type that falls into the category that the applicant seeks to urge this court, to act upon. That their defences fell into the category where their content call for a determination of the issues raised at a full trial, as opposed to have the same simultaneously rejected in favour of the plaintiffs' request to proceed by way of formal proof. It is common ground that the principles of law which are to guide this court, in making this decision are already set out in the case law cited by both sides which are already on the record. In so far as striking out a pleading is concerned. In a summary form, the court stands to be guided by the following principles:-

(1) Jurisdiction exists and the court, has donated power to it to strike out a pleading or not to struck out a pleading.

2. This power is discretionary meaning that it may or may not be exercised.

3. It is now established by case law, emanating from the CA and as dutifully followed by this court, that being discretionary, it has to be exercised judiciously and with a reason.

4. In the exercise of the said discretion, the court, is invited to take note that striking out a pleading is a drastic remedy, which the guiding principles state that it should only be exercised in the clearest plain and obvious cases.

5. Where a suit or defence can be saved through an amendment and life injected into it, it should not be struck out.

6. The court, is invited to take note that denying of a litigant a chance to be heard should be a last resort of a court of law.

7. The court is also invited to take note that in all circumstances of a case, courts should be bend on disposing off disputes on their own merits, as opposed to having them disposed off on points of technicalities.

8. So long as there is even one triable issue raised, the pleading should be allowed to proceed to trial on its own merit.

This court, has applied these principles on to the rival arguments for and against the plea for striking out and more particularly the defences put forth by the defendants in both suits as a reason for them having a reason for being heard on their defences on merits and the court, proceeds to make the following findings:

1. It is noted that from the salient features set out herein, the defendants have denied publishing the words complained of forming the basis of the Broad casts mentioned and yet at the same time go to plead that what the plaintiff has purportedly put forward forming the Broad casted words is in fact a distortion

and reproduced out of context. In this courts', opinion a better way of countering what the plaintiff has put forward should have been by way of the defence laying out their version or the content of the Broad cast. In the absence of that, the defendants have no defence to counter what the plaintiff has put forward to be what has been Broad Cast.

2. The defendants have also put forward a defence to the effect that the matter was published in good faith, on a mater of public interest concerning the Machakos illicit brew tragedy. In this courts', opinion, the good faith should be that which went to touch on the plaintiff. The defendants have not demonstrated particulars of good faith in so far as the publication touched on the plaintiffs. This is further fortified by the fact that there is no averment in the defences as to how the plaintiff came to be connected or linked to the Machakos illicit brew tragedy. Neither has justification for that link been provided for in the defences.

3. The defence has also contended that the words in their broadcast did not refer to the plaintiff. Upon the plaintiff asserting that the words broad cast referred to her, and having gone a head to display what she believed to have been broad cast of her, the only way the defendant could have demonstrated that the words they broad casted did not refer to the plaintiff would have been by way of displaying their own version of what they had broad cast to prove that indeed what they themselves had broad cast did not refer to or touch on the plaintiff. In the absence of such a demonstration that defence has been ousted.

4. The defendants have denied the meaning attributed to the words by the plaintiff both in their natural and ordinary meaning of the words as well as their innuendo meaning. It is on record that these words as well as their meanings both in their ordinary and natural meaning as well as their innuendo meaning have been disclosed by the plaintiff in both plaints. There has been no guidance from the defendants as to what meaning both in their natural and ordinary meaning as well as the innuendo meaning that they themselves attribute to those words. This was necessary in order to oust the meanings attributed to those words by the plaintiff. In the absence of such ademonstration, it is the opinion of this court that this defence has been ousted.

5. Another defence asserted by them is that, they reported fairly and accurately, the proceedings of a public meeting addressed by Hon. Charity Ngilu. Due consideration has been made by this court, of this defence and this courts', response is that, as stated earlier, when dealing with other defences, the plaintiff displayed what she alleges had been broad cast and published by them. In response to that display, the defendants have merely alleged generally that they reported fairly and accurately, but they have not set out what they deem to be fair and accurate from the words complained of by the plaintiff. In order to justify their assertion, they should have set out what they believe was fair in relation to the plaintiff in so far as the alleged words are concerned.

6. The defendants have further contended that the said words are privileged by reason of being within the ingredients or pre-requisites specified in the schedule 6 of the defamation Act cap 36 laws of Kenya. Schedule 6 reads:- "*A fair and accurate report of the proceedings of any public meeting in Kenya, bonafide and lawfully held for a lawful purpose and for the furtherance or discussion of any concern, whether the admission to the meeting is general or restricted.*" Applying this to the scenario herein, the issue is not that a report was made or that the proceedings of the public rally addressed by Hon Charity Ngilu were not public. The issue is how the plaintiff came to be drawn into those proceedings, the fairness and accurate reporting of any facts that linked the plaintiff to those proceedings. As mentioned earlier, the particulars and accurateness of how the plaintiff came to be linked to these proceedings have not been demonstrated. As such, the defendants cannot avail themselves of the protection accorded by schedule 6 of the defamation Act cap 36 of the laws of Kenya.

7. The defendants have further contended that the Broad casts consist of words which are true or substantially true. The plaintiffs' centrol theme in her complaint, is that, she had no link to the illicit Brew Tragedy of Kyumbi within Machakos District, and 2ndly that her transfer from Machakos law courts,' was a routine one, just one among many conducted country wide. It follows that in order for the defendant to avail themselves of this defence, they had to give particulars of the words which they allege are true and which ones are substantially true. There is no such demonstration and as such this defence is not available to the defence.

8. One of the particulars pursuant to order VI A of the CPR is alleged to be that Hon. Charity Ngilu in her public address at Kyumbi in which she talked of transfer effected on police officers and other civil servants. It was further alleged that Hon. Charity Ngilu had also mentioned the transfer of two magistrates from Machakos law courts'. In order for the defendants to take refuge under this defence, it has to be demonstrated that Hon. Charity Ngilu mentioned in her speech that the two magistrates had been transferred as a result of the illicit Brew Tragedy at Kyumbi. There is no such demonstration. Neither has it been demonstrated that the said two magistrates made any contribution to the said tragedy, and if so how was the contribution made. It is therefore the finding of this court, that as found earlier on, the public interest relied upon by the defence in so far as the Kyumbi Tragedy is concerned, does not tie up, with the transfer of the plaintiff from Machakos law courts as it could only be the up if it had been demonstrated that the magistrate had any hand in that tragedy.

9. The provisions of order VI rule 6A CPR have featured prominently. These provide:- "*Order VI rule 6A (1) where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.*

(2) Where in an action for libel or slander, the defendant alleges that, in so far as the words complained of consist of statement of fact, they are true in substance and in fact and so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts, and maters he relies on support of the allegation that the words are true.

(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"

When the ingredients of this provision are applied to the rival arguments herein, the plaintiffs' pleading, and arguments in support of the application for striking out, the court finds that the findings in number 1,2,3,4,5,6,7, and 8 have demonstrate that she has brought herself within the ambit of order VI rule 6A (1) and 3 of the CPR, by reason of the particulars set out in both plaints and replies. As for the defendant, the courts' findings are that the defendant has not brought themselves within the ambit of the provisions of order VI rule 6A (2) because they have not ousted the plaintiffs particulars given in paragraph 5 of the plaints as to why the words complained of refer to her as opposed to the defendants allegations that the words do not refer to her.

10. A for the defence of lack of malice in the said publication, this has been ousted by the plaintiffs assertion that;

(i). Publication was done without the defendants ascertaining the correct information either from the plaintiff or her employer.

(ii). Her employers' public relations officer made a publication clarifying the correct position as regards the transfer but the defendants even after being so informed took no steps to publish a correction.

(iii). A demand for apology was made but not responded to.

(iv). There is no remorse demonstrated in the averments in the defendants defence.

This court, having set out what it deems to be the factual basis for ousting or not ousting the defences as drawn out from the pleadings of both sides, it now has to determine whether those facts fit or are in line with the principles of law sought to be relied upon by each side and if so why irrespective of whether these were cited by the plaintiff or the defence.

(1) There is the case of **J.P. MACHIRA T/A MACHIRA AND COMPANY ADVOCATES VERSUS WANGETHI MWANGI AND NATION NEWSPAPERS (SUPRA)** The plaintiff has rightly relied on this decision to demonstrate that the power to strike out a pleading exists, and it is within the power, jurisdiction and ambit of this court, to invoke it in her favour. The centrol theme in the plaintiffs plea is that, she had nothing to do with the illicit brew tragedy of Kyumbi within Machakos District, and that her transfer from Machakos law courts had nothing to do with those events. Further demonstration that, the defendants have failed to provide that link.

The defendants on their part rightly cited the case of **D.T. DOBIE AND COMPANY (KENYA) LTD VERSUS JOSEPH MBARIA MUCHINA AND ANOTHER (SUPRA)** cited with approval in the Machira case, to the effect that the power to strike out a pleading is drastic and has to be used and or employed in only obvious and plain cases. However they have not demonstrated that, this is not a plain and obvious case. The plain and obvious aspect of this case simply touched on the link to be provided by the defence, linking the plaintiff to the said tragedy in the first instance, and her transfer to those events in the second instance. This has not been demonstrated. The defendants have not sought to amend the defence, to provide that link. Neither is there demonstration of wish to do so in order to justify the sparing of the defences on the basis that they can be injected with life through an amendment.

3rdly it has been demonstrated by the plaintiff that a trial on the merits with the defence on board will serve no purpose as no amount of testimony by the defence will provide a link, linking her to the illicit brew Tragedy, and her transfer if there was none as at the time of publication. It is the finding of this court, as found when assessing the facts, that had any existed, it would have been provided in the original defence or a plea to amend subsequently.

(2) In the case of **FIDELIS MWEKE NGULI T/A NGULI AND COMPANY ADVOCATES CASE (SUPRA)**, the principle is that, it is not the business of the court, to shut out a bonafide defence. A bona fide defence to the plaintiffs claim herein would have been provision of a link of the plaintiff and her transfer to the illicit brew tragedy subject of both the Broad Cast and the print publication.

(3) In the case of **LOUTCHANSKEY VERSUS TIMES NEWSPAPERS LIMITED AND OTHERS (SUPRA)** The plaintiff has demonstrated that in as much as the publication of the Machakos Kyumbi Illicit brew tragedy was a matter of public interest, the defendant were not permitted to publish in the defamatory material without inquiry whether she and her transfer were involved in the said tragedy in any way.

(ii) Further demonstrated that the right to freedom of expression carried with it duties and responsibility, namely the duty of the publisher to ascertain the correctness of the information especially in circumstances where an individuals' reputation were at stake.

(iii) Further that a publisher is not immune from liability on account of published, damaging and untrue statements.

(iv) The plaintiff is also entitle to remind the court, that it is duly bound not to turn its back on prescribing restrictions on the freedom of expression as were needed in order to achieve the public good of protecting individuals reputation. This public good is none other than requiring that the publication be effected within acceptable limits and where those bound are over stepped the publisher be made to meet the consequences of that over stepping.

(4) The case of **BLACK SHAW VERSUS LORD AND ANOTHER (SUPRA)** Vide this decision, the plaintiff has demonstrated that although it may be said that the report was of great interest to the public at large, and the said public at large also had a legitimate interest in receiving the same, and that the publisher had a corresponding duty to publish the same, the public at large could not be said to have had a legitimate interest in receiving the defendants inference and or speculation that the plaintiff and the plaintiffs' transfer were connected to the said illicit brew tragedy.

(5) The case of **KITTO VERSUS CHADWICK AND ANOTHER (SUPRA**) by which the plaintiff has

demonstrated that allegations that the plaintiff and her transfer had been linked to the afore said illicit brew tragedy were false as the defence has not countered this by correspondence and or averments in their defence.

(iv) There also has been no demonstration on the part of the defence to show belief in the truthfulness in what they published in so far as it went to affect the plaintiff and her transfer were concerned, and has rightly relied on this as evidencing malice, which assertion the defence has not ousted either by their pleading or submission.

(6) The case of **JOHN WARD VERSUS STANDARD LIMITED (SUPRA),** does not aid the defence in any way, in their claim to a right to be heard on their defence as the plaintiff has demonstrated that the Broad cast and the publication are attributable to the defendants, in some aspect the said publication and Broadcast have referred on to the plaintiff that the linking of the plaintiff and her transfer to the said tragedy by the publication and Broad were false and defamatory.

(ii) Further that the defendants have not demonstrated either in their pleadings and or submissions that the published words were true or substantially true in so far as they referred to the plaintiff as she has demonstrated that she had no link to the Illicit Brew Tragedy, neither did her transfer have anything to do with it as the same had been communicated to her before the Tragedy occurred.

(iii) Further demonstrated that the defendants have not demonstrated that the sting of the alleged defamatory words or statement in its proper context was true in substance and fact because they have not denied that the plaintiffs' employer published the correct state of affairs surrounding the plaintiffs' transfer from Machakos, but the defendants failed to retract what they had published.

6. The decision in the case of **METRO PETROLEUM LTD VERSUS WAMCO PETROLEUM LTD (SUPRA)** cannot operate to shield the defence against the drastic remedy of striking out, as it has been demonstrated by the plaintiff that this is one such clear and obvious case by reason of the defendants failure to provide a link linking her and her transfer to the Illicit Brew Tragedy.

7. The case of **GEORGE B. OGENDO VERSUS JAMES NANDASA AN D 4 OTHERS (SUPRA)** by which the defence has not demonstrated that their defences should not be struck out because they are arguable.

8. The case of **WATAN VERSUS SUNDAY PICTORIAL NEWSPAPER (SUPRA)** does not aid the defence as there is no plea in mitigation of damages which could have been mitigated by the defendants both Broadcasting and publishing a retractions of the story in so far as it related to the plaintiff and her transfer.

9. The case of **OTIENO VERSUS NATION NEWSPAPER (SUPRA**) by which the defendant has not demonstrated non compliance with the provision of order VI rule 6A CPR by the plaintiffs. Instead it is the plaintiff, who has demonstrated that, despite the defence having asserted that what the plaintiff has put forward as regards the broadcast and publication is not true, they have not laid before this court, what they purport to be the correct version of what they Broadcast and published.

10. The case of **LEWIS AND ANOTHER VERSUS DAILY TELEGRAPH LTD, SAME VERSUS ASSOCIATED NEWSPAPER LTD (SUPRA)** which does not aid the defence as the plaintiff has demonstrated that the innuendo pleaded by her does not constitute a separate cause of action, but it is part and parcel of the pleaded natural and ordinary meaning of the words complained of, and the defendant has not put forward any other contrary possible meaning.

11. The case of **CHARLESTON AND ANOTHER VERSUS NEWSGROUP NEWSPAPER AND ANOTHER (SUPRA)** which does not aid the defence as it has not been demonstrated that the plaintiff has severed the story and is only relying on only a portion in her favour. All that the plaintiff did was to lay out all the content of the broad cast and the publication which have no rival, then extracted out possible meanings both in their natural and ordinary meaning, as well as the innuendoes, which have no

rival as the defence put forward no other meaning in order to controvert that which was put forward by the plaintiff.

12. As regards the principles in HalisBurys laws of England, the plaintiff/applicant has brought herself within the ambit of those applicable principles by reason of:-

(i). The words complained of were published of and concerning of her.

(ii). Though the plaintiff was not referred to by name by reason of the mention of the transfer of magistrates of her former station and she was one of those transferred, she was clearly identifiable by readers with special knowledge who could understand the words to refer to the plaintiff.

(iii). It matters not that the defendants never intended the publication to refer to the plaintiff so long as the people to whom published reasonably understood it to refer to the plaintiff.

(iv). The plaintiff has demonstrated that she has been defamed to the obvious, by reason of the natural and ordinary meaning of the words and to those with special knowledge of her by the innuendoes.

(v). Though the defendants had an interest or a duty may it be legal, social or moral to make the said broadcast and publication, and the recipients had a corresponding duty to receive the same, the defence is not protected by reason of their broadcast and publication having been shown to have extended to matters that were wholly irrelevant and un connected with the discharge of that duty. In that, in so far as the plaintiff and her transfer had no link to the Illicit Brew Tragedy, the defendant had no business including the issue of the plaintiff and plaintiffs' transfer to those events.

By reason of the afore set out assessment of both the facts and the legal principles applicable, the court, is satisfied that the plaintiffs' application in both suits dated the 16th day of February 2006 and filed on the 17th day of February 2006 have merits and are allowed and the defendants statement of defence dated 9th day of August 2005 and filed on 10th day of August 2005 in HCCC NO. 847/05, as well as the defendants statement of defence dated the 13th day of August 2005 and filed on 13th day of September 2005 be and are hereby ordered to be struck out for the following reasons:-

1. The defendant failed to put forward their own version of what was Broad cast in order to demonstrate that what the plaintiff had put forward was in fact a distortion.

(i). The plaintiff could not plead denial of publication and then at the same time claim that what has been pleaded by the plaintiff was a distortion

2. No demonstration has been made by the defence both in the averments in the defence and the submissions linking the plaintiff and her transfer to the Machakos Kyumbi illicit brew Tragedy.

3. There has been no demonstration by the defendants that the words both broad cast and published by them did not refer to the plaintiff in the manner asserted by the plaintiff.

4. Though the defendants denied the meaning attributed to the words complained of by the plaintiff, both in their natural and ordinary meaning as well as the innuendo meaning, they did not go a head to lay out or put forward their own meaning of those words both in their ordinary and natural meaning or innuendoes meaning.

5. The assertion by the defence that they reported fairly, the particulars of fairness in relation to the plaintiff in so far as the alleged words were concerned were not given.

6. The right to plead privilege as enshrined in order 6 rule 6A CPR has been ousted, by reason of the fact that issue was not whether the words were published or not. But how the plaintiff came to be drawn into those proceedings and or the fairness and accurate reporting regarding of any facts that went to link the

plaintiff to those proceedings which were not demonstrated.

7. The plea of justification on the grounds that the words pleaded were true or substantially true, cannot hold because there is no demonstration by the defendants of which words published concerning the plaintiff are true or substantially true. In other words particulars of what is alleged to be true or substantially true has not been demonstrated.

8. The defence could not rely on the averment and assertion that Hon. Charity Ngilu had mentioned the transfer of police and other civil servants which has been ousted, as it has not been demonstrated that Hon Charity Ngilu specifically mentioned in her speech that the two magistrates had been transferred as a result of the Illicit brew tragedy at Kyumbi in Machakos.

(ii) There was also no demonstration that the two magistrates in any way contributed to the said tragedy.

(iii) The public interest in reporting the Kyumbi Illicit Brew Tragedy does not thus tie up with the plaintiffs transfer from Machakos law courts.

9. The provision of order VI rule 6A CPR in so far as they go to offer protection, to the defence because the plaintiff by reason of what has been stated in number, 2,3,4,5,6,7 and 8 above has demonstrated that both her plaint and reply to defence are within the ambit of the ingredients required to be met by the said provision where as the defendants on the other hand by their defence have not ousted the particulars given in paragraph 5 of the plaints as to why the words complained of refer to the plaintiff as opposed to the defendants bear allegation that the said words do not refer to the plaintiff.

10. The defence of lack of malice has also been ousted by reason of the fact that the publication and Broadcasts were done without the defendants ascertaining the correct information either from the plaintiff or her employer.

(ii) Upon being confronted with the correct information the defendants declined and or neglected or refused to retract the story.

(iii) The defendants refused to apologize as demanded of them by the plaintiff.

(iii) The defendants are not remorseful.

11. The principles of case law relied upon herein also support the plaintiffs stand herein because:

(i). There is a demonstration that this is one of those clearest, plain and obvious cases which is a proper candidate for striking out as the defences have failed to provide a link between the plaintiff and both the Broadcast and publication, a fact which has not been shown to exist and as such there is no way it can be said that the defence will be injected with life by reason of that link being provided through an amendment.

(ii). The ingredients for defamation namely the words being capable of bearing a defamatory meaning, reference to the plaintiff, publication and falsehood of the statement have been established as there is no possible link of the plaintiff and or transfer to the a foresaid tragedy are true or substantially true.

(iii). There has been no demonstration that the alleged words are true or substantially true. Therefore no demonstration that the sting of the defamatory words in their proper context in so far as they tend to link the plaintiff to the Kyumbi Illicit Brew Tragedy.

(iv). The plaintiff, asserted and demonstrated that the alleged defamatory words are false, in that her employer supported her that the transfer was normal and routine, which has not been ousted by the defendants with contrary information.

(v). That by reason of what has been stated above the defence case are so week and are beyond redemption by amendment.

12. By reason of what has been stated above in number 1,2,3,4,5,6,7,8,9,10,11 and 12 above the defences in both suits are ordered to be struck out for the reason given. The plaintiff is at liberty to fix the matters for formal proof.

13. The plaintiff will have costs on both applications.

DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY 2009

R.N. NAMBUYE

JUDGE