



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 313 of 2008

JACOB JUMA..... 1ST PLAINTIFF/APPLICANT

JACOB CONSTRUCTION CO. LIMITED..... 2ND PLAINTIFF/APPLICANT

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT/RESPONDENT

BEN AGINA..... 2ND DEFENDANT/RESPONDENT

RULING

Pressure from other work not allowing a lengthy ruling, it is my intention to be brief and I hope those who read what I say here will be able to understand it.

Before me is an application by Chamber Summons dated 2nd February 2009 filed by the Plaintiffs under Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules. The application is also said to be brought under “all other Enabling Provisions of Law” whatever that means. The Plaintiffs/Applicants pray in the Chamber Summons for orders

“1. THAT the Defendants Defence herein be struck out with costs.

2. THAT judgment be entered for the Plaintiffs as prayed in the plaint and the suit to proceed for formal proof.”

The Applicants also pray for costs of the Chamber Summons.

The main grounds on the basis of which the Chamber Summons is filed are firstly, that the Defendant’s statement of Defence is not only frivolous, vexatious and scandalous but the same is also an abuse of the court’s process; secondly that the said defence does not raise any triable issues worth proceeding for full trial; thirdly, that the said defence is comprised of mere general denials and it denies even the most obvious facts and points of law.

There are other grounds apart from the above mentioned, numbering from 4 to 19 based on facts and circumstances of the case other than the law.

The Chamber summons is then supported by a supporting affidavit dated 2nd February 2009 deposed by the 1st Plaintiff Jacob Juma – who says is the Managing Director of the 2nd Plaintiff company and that has authority from the 2nd Plaintiff to swear the affidavit.

The Chamber summons aforesaid is filed in a suit which the Plaintiffs have filed against the two Defendants praying for judgment against the Defendants jointly and severally for:-

“(a) General damages for libel together with interest from the date of the offending publication.

(b) Aggravated damages

(c) Exemplary, punitive damages

(d) Costs of this suit

(e) Interest on (a), (b), (c) and (d) at court rates.”

The alleged libel giving rise to the suit is contained in paragraph, 5 and paragraph 8 of the Plaintiff's plaint dated 14th July 2008 instituting this suit and in the said paragraph 5 the two Plaintiffs aver that on page one/front page and page 3 column number one of “THE STANDARD” issue number 28077 of 1st July 2008, the Defendants and each of them falsely and maliciously printed and published or caused to be printed and published in the following and relevant excerpts words defamatory of and concerning the Plaintiffs:-

“UNMASKED!

GRAND REGENCY: WE REVEAL THE FACES OF THE DIRECTORS OF THE KENYAN REGISTERED FIRM THAT BOUGHT THE IMPOSING HOTEL FOR ONLY SH.1.8 B.

BY BEN AGINA

The faces behind the secretive sale of the Grand Regency Hotel can be revealed to-day – they are operating under a Kenyan registered company with Kenyan directors.

And there were more stunning revelations. The hotel was sold for only Sh.1.8 contrary to the Sh.2.9 billion figure that had been bandied to the public earlier by Finance Minister Amos Kimunya.

Yesterday morning the agents of the Libyan Arab African Investments Company Kenya Limited silently walked into the hotel for a massive stocktaking exercise and were expected to take control of the landmark asset at midnight. The new managers were revealed as Finance Controller Mr. Cairo Makhzoun Gilani believed to be a Libyan – and a Ugandan Chief Engineer, John Kubarigire.

Land Minister James Orengo produced documents showing that the Central Bank of Kenya Governor Prof. Njuguna Ndungu witnessed the signing off of the prestigious hotel (and the land on which it stands) that had been at the centre of a drawn – out battle between it and Goldenberg architect Kamleshi Pattni.

In the documents, dated June 20, this year, were the Governor's signature and picture. Alongside them were three others – The Standard could only recognize one belonging to a local contractor, Jacob Juma, of Juma Construction Company. Juma's identify card number was given as 6104260, but a search on the Electoral Commission of Kenya Website of the voters roll indicated that the card belongs to one Kennedy Kaunda Abuga, of Madaraka Primary School Polling Station in Lang'ata Constituency.

The other directors, whose names were not appended had their passport numbers listed as 298071 and 001428 - - - -"

In paragraph 8 of the plaint, the two Plaintiffs aver that at page 1/front page of same newspaper "THE STANDARD" issue number 28077 of the 1st of July 2008, the two Defendants proceeded to mount the photograph of the 1st Plaintiff below those of "Hon. James Orengo and Hon. Amos Kimunya and immediately proceeded to falsely and maliciously print and publish or caused to be printed and published the following words and pictures defamatory of and concerning the 1st Plaintiff:-

"TOP: Lands Minister Jmaes Orengo (left) who blew the whistle on the controversial sale of the Grand Regency Hotel which has put Finance Minister Amos Kimunya (right) on the spot.

ABOVE FROM LEFT: the directors of Libyan Arab African Investments that bought the hotel, holder of passport No.004428, holder of ID card No.6104260, holder of passport No.298071 and CBK Governor Njuguna Ndung'u who witnessed the sale agreement."

The Plaintiffs are therefore saying in their pleadings in this suit that the publication complained of was malicious and defamatory because it informed the readers, the public that the 1st Plaintiff Jacob Juma of Juma Construction Company Limited, the 2nd Defendant, was associated and was a director of the Company known as Libyan Arab African Investments Company Kenya Limited and that the said Libya Arab African Investments Company Kenya Limited had bought Grand Regency Hotel at a throw away price of Kshs.1.8 billion instead of Kshs.2.9 billion that had been mentioned earlier on by the Finance Minister Amos Kimunya; and that the 1st Plaintiff was one of the signatories in the legal documents of the said Libyan Arab African Investments Company Kenya Limited purchasing the said Grand Regency Hotel; that out of the three photographs and signatories, other than the CBK Governor's, the Defendants could only recognize that of the 1st Plaintiff. Here it is not clear whether the Defendants recognized the 1st Plaintiff's signature or photograph but the act of recognition and the person so recognized are specifically and clearly stated in the words complained of

However, the Defendants continued to inform readers or the public through that publication that in connection with the 1st Plaintiff, his identity card number was given as 6104260 but a search on the Electoral Commission of Kenya website of the voters roll indicated that the card belonged to one Kennedy Kaunda Abuga of Madaraka Primary School polling station in Langata Constituency.

Through pleadings in this suit starting with the plaint, reply to defence` and the affidavit in support of the Chamber Summons now before me, the plaintiffs have endeavoured to show that they had no association with the Libyan Arab African Investments Company Kenya Limited. To that effect, the Defendants have not placed before this court any evidence associating the Plaintiffs with the said Libyan

Arab African Investments Kenya Limited.

What comes out through the Defendant's written statement of defence and the Replying Affidavit to the Plaintiff's. Chamber Summons is that the Defendants admit publishing the words set out in paragraphs 5 and 8 of the plaint but deny that the same were published of and concerning the Plaintiffs and also deny that the publications were false or done maliciously or were defamatory of the Plaintiffs and the Defendants are surprisingly going to the extent of telling the plaintiffs that they are "non-suited"

Their case is that though they told the world that from either the photographs or the signatures or both the Defendants could - - - recognize one belonging to a local contractor Jacob Juma, of Juma Construction Company" whose identity card number was given as 6104260, a number which they found that it also belonged to one Kennedy Kaunda Abuga and that though under those circumstances they still told the world in their explanation under photographs complained of in paragraph 8 of the plaint, that the "holder of ID card No.6104260" they (Defendants) had recognized as "Jacob Juma, of Juma Construction Company" was one of "the directors of Libyan Arab African Investments that bought the hotel"; and further that although the head-banner at the beginning of the publication complained of, namely

"WE REVEAL THE FACES OF THE DIRECTORS OF THE KENYAN REGISTERED FIRM THAT BOUGHT THE IMPOSING HOTEL FOR ONLY SH.1.8 B"

left no doubt in the mind of the reading public; the Defendants were now saying that following subsequent investigations by the Defendants, the publication complained of was not about and did not concern the Plaintiffs and had nothing to do with the Plaintiffs because the said publication concerned and was about one Kennedy Kaunda Abuga. As such the Defendants saw no need of apologizing to the Plaintiffs as well as informing the reading public that the DIRECTOR OF THE LIBYAN ARAB AFRICAN INVESTMENTS COMPANY KENYA LIMITED" the Defendants had "recognized" as Jacob Juma of Juma Construction Company" was actually "Kennedy Kaunda Abuga" because "to that extent the publication was fair comment and true."

With all due respect, I must call all that illogical reasoning or argument even before I mention the Defendant's defence that the Plaintiffs ought not complain because the Defendants have a defence of qualified privilege as well as a defence of fair comment.

Moreover, against whom is the defence of qualified privilege and the defence of fair comment set? Is it against Kennedy Kaunda Abuga? Is it against the Plaintiffs in this suit then the Defendants must forget about those two defences because in this suit there can neither be a defence of qualified privilege nor a defence of fair comment when the defence is that what was published was not about and did not concern the Plaintiffs. Otherwise, the Plaintiff's learned counsel Mr. J.P. Machira has said enough to demolish any claim by the Defendants to the protection of any of those two defences. With respect, I entirely agree with what Mr. Machira said in that respect. Further I am fully in agreement with what the Court of Appeal said in the case of J.P. MACHIRA -vs- WANGETHI MWANGI AND NATION NEWSPAPERS, Civil Appeal No.179 of 1997 the authority on the basis of which I am making this ruling.

As far as I am aware, there is no set standard defence format which every defendant must adopt in defamation suits. I therefore do not see why every defendant should be indulging in denials, denials, denials and putting the Plaintiff to strict proof even on obvious matters where no disputes are necessary on issues, to the extent that there are no triable issues; having even claimed protection of qualified privilege and fair comment when those defences are not available to the Defendant.

A defamation suit is always about the Plaintiff and it is dishonest of a Defendant who conducts his defence as if the Plaintiff does not exist or count in the suit. Courts are quite clear about that and Defendants should not think they can get a way with it. The subject of litigation in a defamation suit is always the Plaintiff. Discussing what the Defendant did to the Plaintiff. If therefore the Defendant

claims true statements of fact they should be facts in relation to or about the Plaintiff. If the Defendant claims Fair comment, it should be Fair comment in relation to or about the Plaintiff. If the Defendant is relying on a defence of privilege, absolute or qualified, it should be that defence in relation to or about the Plaintiff. Like in this matter, true Finance Minister and Lands Minister were each talking. But when Jacob Juma is complaining, the person the court is concerned with is Jacob Juma and not any of the ministers as they are not complaining in this suit. What is he complaining about? That is the concern of the court and not otherwise. Don't look at the importance of Ministers and ignore the complaining individual so that you keep on telling the court what the Minister said calling it truth, facts and your comments on them Fair Comment without focusing and telling the court what you did in resolving this individual ordinary Mwananchi's complaint against you before the Court. Understably the Media always covers ministers and political leaders while ignoring other people present but that is not so when the non-politician is a party in a suit in a court of law. The Media may ignore the party but the court and the right thinking members of society will not ignore that party.

In those circumstances why cant a defence be labelled scandalous, frivolous, vexatious and an abuse of the court process or being one which may prejudice, embarrass or delay a fair trial of the suit?

Otherwise in a suit like this one I would have expected a defence like the one saying something to the effect:

Yes I mentioned your name in the publication complained of honestly believing or thinking you were one of the directors of the Libyan Arab African Investments Company Kenya Limited or otherwise involved in the transaction but immediately; I came to learn you were not involved in the transaction as a director or otherwise, I published an apology or a correction to your satisfaction and therefore you are not entitled to the damages you are claiming in this suit;

First, because there was no defamation in the circumstances of this case (showing how and why if that is so)

Secondly, even if there were defamation, which is denied, my having published that apology or correction entitles me to payment of no damages at all (showing how and why if entitled).

That would be a sign of truthful or responsible journalism cherished the world over except in Kenya where it is hardly cherished and never practiced. That was why we got the type of defence that was in the Case of J.P. Machira (supra) as well as the defence in this and a number of other defamation cases – defences that raise no real triable issues under order VI rule 1 of the Civil Procedure rules.

In the instant suit, the Defendants having told the world through the words complained of that the 1st Plaintiff's photograph and signature were among those that were so published and that the 1st Plaintiff was therefore a director of the Libyan Arab African Investments Company Kenya Limited, if it is true that the Defendants later found that the person they had mistaken for Jacob Juma was Kennedy Kaunda Abuga, the Defendants, practicing truthful and responsible journalism, ought to have found no difficulty in promptly and satisfactorily apologizing to the Plaintiffs and carrying that apology and a fitting correction in The Standard Newspaper to let the world know what had happened. That would have amounted to performance of a Public Duty in The Public Interest and that is how those who claim protection under qualified privilege or Fair Comment must conduct themselves and indeed that will be in accordance with what The Code of Conduct And Practice of Journalism in Kenya 2nd Edition" says in relation to "Accuracy and Fairness" as follows among other things:-

“(a)The fundamental objective of a journalist is to write a fair, accurate and unbiased story on

matters of public interest. All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context.

(b) Whenever it is recognized that an inaccurate, misleading or distorted story has been published or broadcast, it should be corrected promptly. Corrections should present the correct information and should not restate the error except when clarity demands.”

The “Code” which was formulated by various stakeholders in the Media Industry in Kenya which established “The Media Industry Steering Committee (MISC)” whose efforts gave birth to “The Media Council of Kenya” has been incorporated in the schedule to THE MEDIA ACT by virtue of section 35 of that Act and has very good provisions for journalists in Kenya who should not therefore be getting into defamation cases as the said journalists observe the Code. In the instant suit the 1st Plaintiff even called a press conference at which the 1st Defendant was also represented. The 1st Plaintiff asked the Defendants to carry out the necessary correction and apology. The Defendants, as I have said, refused; a manifestation, not only of irresponsible journalism but also of malice and spite as the Defendants wanted what they had already published about the Plaintiffs to remain in the minds of the reading public. That clear evidence of malice destroys any defence the Defendants may have had under the Defamation Act whether the Defendants claim the defences of qualified privilege and Fair Comment or not.

I may add the following example and an authority: The example is this that where an Editor or any journalist publishes a report or article about A but members of the public who get the information associate it with C who they know, the Editor or journalist is thereby made responsible, not only to A but also to C as well as the public, so that if the Editor or Journalist is a person of ethics in journalism, is truthful or honest, objective or responsible, he will take the earliest opportunity to explain, or correct or clarify the position and exonerate C apologizing not only to C but also to the public to correctly serve “The Public Interest” journalists always profess to serve consistent with clause 22 of the “Code of Conduct And Practice of Journalism In Kenya” which states as follows concerning the Editor’s Responsibility:

“The editor shall assume responsibility for all content, including advertisements, published in the newspaper. If responsibility is disclaimed, this shall be explicitly stated before hand.”

The Authority is in an old English case of E. HULTON & CO. –vs- JONES (1908 – 1910) ALL E.R. (Rep.) 29 where Lord Loreburn, L.C (at P.47 stated as follows:

“Libel is a tortuous act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame the Plaintiff. He has nonetheless imputed something disgraceful and has nonetheless injured the Plaintiff. A man may publish a libel in good faith believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances, he has no defence to the action.”

Pertinent equally is a passage in the judgment of Fletcher Moulton LC (at p.42) where he said;

“But the most serious aspect of the new doctrine is when we apply it to cases where the description is not by name. ----- There is no difference in the eye of the law with regard to an indication of identity by name or indication by other modes of description. Now suppose that no name is mentioned, but that the description is purely circumstantial, let us take the case of a preacher or speaker who is denouncing some practice may introduce into his discourse some hypothetical case in order to render his meaning clear. Some detail innocently introduced by him or even the choice

of that particular theme may lead his hearers to imagine that he is referring to some particular person in the neighbourhood of whose existence and circumstances he is wholly ignorant and to whom personally he is not in any way referring. The learned judge clearly indicates that in that case he (the preacher) would be liable for defamation ---- nor do I see how a person could guard himself against such liability or what defence he could raise. It is clear law that no commission of the name or statement that it is a hypothetical one, or declaration that he does not intend to refer to anybody in particular, can or ought to protect a person so speaking whose intention is to libel.”

From the two passages, the law holds each Defendant liable in those circumstances. In the last passage the person held liable is an innocent preacher making reference to some person in the neighbourhood whose existence and circumstances the preacher was ignorant of while in the course of denouncing some ungodly practice. Can the same law, and that is the law applicable in this suit, spare the Defendants in this suit?

According to Halsbury’s Law of England 4th Edition at paragraph 40,

“A statement is defamatory of a person of whom it is published if broadly speaking, it is calculated to lower him in the estimation of right thinking members of the society or cause him to be shunned or avoided or expose him to hatred, contempt, or ridicule, or to disparage him in his office, profession, calling, trade or business.”

From pleadings in this suit, the words complained of by the Plaintiffs sufficiently induce the right thinking members of the society to think ill of the Plaintiff and those words expose him to contempt and ridicule. I find no real triable issue and adopting the words of Omolo J.A in the case of J.P. Machira aforesaid

“there is no magic in holding a trial on merits, particularly where it is obvious to everyone that no useful purpose would be served by it.”

Accordingly, I do hereby allow the Plaintiff’s Chamber summons dated 2nd February 2009 and strike out the defence filed by the Defendants herein; enter interlocutory judgment for the Plaintiffs against the Defendants as prayed in the plaint, and order that the suit do proceed on another date before any judge for formal proof of the Plaintiff’s claim. The Defendants to pay costs of this Chamber Summons.

Dated and delivered at Nairobi this 3rd day of July 2009.

J.M. KHAMONI

JUDGE

Present:

M/s Rose Ochieng for the Defendants/Respondents

Court clerk Florence

Leave to appeal granted.

J.M. KHAMONI

JUDGE

3/7/09