



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

Civil Case 327 of 2008

CAPT (Rtd) DR. SIMEON SAGANA KANAIPLAINTIFF

V E R S U S

THE STANDARD LIMITEDDEFENDANT

AND

NATIONAL COUNCIL OF NGO'STHIRD PARTY

R U L I N G

As stated in a ruling dated 7th and delivered on 8th May 2009, the Plaintiff herein sued the Defendant for defamation. The Defendant duly entered appearance and filed defence on 8th August, 2008. By chamber summons dated 19th August, 2008 the Plaintiff then applied for an order to strike out the Defendant's defence, *inter alia*. The Defendant opposed the application. By chamber summons dated 5th September, 2008 the Defendant applied for leave to serve a third-party notice upon the National Council of Non-Government Organizations of Kenya (hereinafter called the 3rd Party). Such leave was granted and the third-party notice served.

The 3rd Party duly entered appearance. On 27th November, 2008 it filed its statement of defence. Subsequently, directions were given that the case as between the Defendant and the 3rd Party be heard along with the main suit.

On 5th March, 2009 the 3rd Party filed an application by chamber summons dated 26th February, 2009 seeking an order to strike out the plaint and the Plaintiff's suit. The Plaintiff opposed this application.

By a consent order entered on 12th March, 2009 it was ordered that both the applications seeking orders to strike out pleadings be heard together by way of written submissions. Such written submissions were duly exchanged and filed. I have given them due consideration, including the authorities cited. I have also read the affidavits sworn in support of and in opposition to the applications. Finally, I have perused the pleadings concerned.

The Plaintiff's application (chamber summons dated 19th August, 2008) is brought under Order, 6 rule 13(1) (b), (c) & (d) of the Civil Procedure Rules (the Rules). An order to strike out the Defendant's defence is thus sought upon the grounds:-

(i) that it is scandalous, frivolous or vexatious;

(ii) that it may prejudice, embarrass or delay the fair trial of the action; and

(iii) that it is otherwise an abuse of the process of the court.

The 3rd Party's application (chamber summons dated 26th February, 2009) on the other hand, is stated simply to be brought under Order 6, rule 13 of the Rules without specifying the sub-rule or paragraphs. But from the grounds on the face thereof, the application has obviously been brought under sub-rule (1), paragraphs (a), (b) and (d). Those grounds are that no reasonable cause of action is disclosed; that the plaint is frivolous and vexatious; and that it is otherwise an abuse of the process of the court.

I will deal first with the 3rd Party's application. I have my own doubts, in the particular circumstances of this case, about the propriety of the 3rd Party's application to strike out the Plaintiff's suit. In its application for leave to serve third party notice, the Defendant claimed indemnity and contribution from the 3rd Party. The Defendant did not claim that any question or issue relating to or connected with the subject-matter of the suit is substantially the same question or issue arising between the Defendant and the 3rd Party, and that it should properly be determined not only as between the Plaintiff and the Defendant, but as between the Plaintiff and the Defendant and the 3rd Party.

The defamation suit is between the Plaintiff and the Defendant, not between the Plaintiff and the 3rd Party. The dispute between the Defendant and the 3rd Party over indemnity and contribution does not concern the Plaintiff. The dispute between the Plaintiff and the Defendant should concern the 3rd Party only if the Plaintiff obtains judgment against the Defendant. Though the 3rd Party appears to be entitled under rule 18 of Order 1 to dispute the Plaintiff's claim as against the Defendant, it has pleaded in its statement of defence disputes between the Plaintiff and other persons over the leadership of the 3rd Party. Those disputes cannot be tried in this present suit. But I will not now decide the issue whether or not the 3rd Party's application is properly before the court. I will decide the application on merit.

Does the plaint disclose no reasonable cause of action? For this ground to succeed, it must be plain and obvious from the pleading itself, without evidence, that no reasonable cause of action is disclosed. Is this the case here? The Plaintiff's action is for damages arising out of defamation. The publication alleged to be defamatory of him has been pleaded. Publication is not denied by the Defendant. The actual words themselves alleged to constitute the defamation have also been pleaded. It is the Plaintiff's case that the words, in their natural and ordinary meaning, and by necessary innuendo, tended to lower his reputation in the estimation of ordinary, just and reasonable members of society. Particulars of facts and matters supporting the innuendo have been pleaded.

It is the Plaintiff's further case that the publication by the Defendant was actuated by malice, spite and ill will. Particulars of the same have been pleaded. It has also been pleaded that upon the Plaintiff's demand the Defendant published a correction, albeit an unsatisfactory one. Publication of the correction is not denied.

In these circumstances it cannot be said that the plaint discloses no reasonable cause of action. It obviously does, and I so find.

Is the plaint frivolous and vexatious? I think not. As I have already shown above, the Plaintiff has pleaded a serious case against the Defendant. The many disputes between the Plaintiff and other persons over the leadership of the 3rd Party do not concern the Defendant. It therefore cannot be said that this suit is simply another battle in those leadership disputes. The Plaintiff's suit is not frivolous or vexatious. Nor is it an abuse of the process of the court. I so find.

It is to be noted that it is not the Defendant who has applied to strike out the plaint. It is the 3rd Party. The Defendant obviously recognises the serious case that the Plaintiff has brought against it. This is plain

from the defence filed.

I will say something about the 3rd Party's statement of defence. I have closely read the third-party provisions set out in Order I, rules 14 – 19 (both inclusive) of the Rules. I can find no provision entitling the 3rd Party to file a statement of defence. Only entry of appearance is required. Even if the 3rd Party were entitled to file defence, such defence would have, in the circumstances of this case, to confine itself to the Defendant's claim for indemnity and contribution. This position cannot be altered by the directions the court gave under rule 18 of Order I for the question of liability of the 3rd Party to the Defendant to be tried together with the suit as between the Plaintiff and the Defendant.

The 3rd Party's defence directly attacks the Plaintiff's case in paragraphs 3, 6, 7, 8 and 9. But what is pleaded are disputes between the Plaintiff and other persons over the leadership of the 3rd Party. It is the kind of defence the 3rd Party would have filed had it been sued by the Plaintiff in the present suit. I have already pointed out that those disputes cannot be properly tried in this present suit. I decline to consider those disputes here. In any event, if it were held that they are properly triable in this suit, they would have to await trial of the action.

The 3rd Party also pleaded a conspiracy between the Plaintiff and the Defendant on account of the correction that the Defendant published (pleaded in paragraph 12 of the plaint). That is also an issue that would have to await trial of the action.

In the event, the 3rd Party's application by chamber summons dated 26^h February, 2009 is hereby dismissed with costs to the Plaintiff.

I will now turn to the Plaintiff's application. Does the Defendant's defence raise any triable issues? In respect to liability, the Defendant has pleaded two defences. The first one is that the Plaintiff is non-suited. The second one is that the words complained of are not defamatory of the Plaintiff in their natural meaning or by innuendo. Let us look at these two defences.

The plea that the Plaintiff is non-suited is not a serious one. How can he be non-suited when the publication concerned has referred to him by photograph and full name? This is not a triable issue.

What about the second defence on liability? In the offending publication the Plaintiff was referred to by name and photograph, as already seen. The publication said that the Plaintiff was "masquerading" as the chair of the 3rd Party. The publication also alluded to "fraudulent schemes" by the Plaintiff while so "masquerading". The Defendant has not pleaded justification. That the words in the publication were defamatory of the Plaintiff cannot be in doubt, both in their natural meaning and by innuendo.

The other defences raised would be relevant only on the issue of quantum of damages. As far as liability is concerned, the Defendant's defence does not raise any triable issue. I hereby order that all the paragraphs of the defence by which liability is denied be struck out. These are paragraphs 3, 5, 7, 9, the first sentence of paragraph 11, and paragraph 12. I will enter judgment for the Plaintiff on liability. The case shall proceed to hearing on quantum of damages.

The upshot is that as far as liability is concerned, I do not find any triable issues raised in the Defendant's defence. I will in the event allow the Plaintiff's application by chamber summons dated 19th August, 2008 with costs against both the Defendant and the 3rd Party as the 3rd Party also opposed the application.

To summarise, the 3rd Party's application by chamber summons dated 26th February, 2009 is dismissed with costs to the Plaintiff. The Plaintiff's application by chamber summons dated 19th August, 2008 is allowed and judgment entered for him against the Defendant on liability. The case shall proceed to hearing on quantum of damages. Costs of the application are awarded to the Plaintiff against both the Defendant and the 3rd Party, each to pay half thereof. Those will be the orders of the court.

DATED AT NAIROBI THIS 1ST JULY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 3RD DAY OF JULY, 2009