



Onyango & 5 others v See & 7 others; Ajulu (Appellant) (Civil Appeal 87 of 2018 & 148 & 149 of 2019 (Consolidated)) [2022] KECA 531 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KECA 531 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 87 OF 2018 & 148 & 149 OF 2019 (CONSOLIDATED)
DK MUSINGA, SG KAIRU & F SICHALE, JJA
MAY 13, 2022**

BETWEEN

**SAMUEL MICHAEL ONYANGO 1ST APPELLANT
SAMUEL OKELO DEYA 2ND APPELLANT
MAURICE ODUOR 3RD APPELLANT
DANIEL O. AJULU 4TH APPELLANT
PAUL OTIENO 5TH APPELLANT
GEOFFREY OBWON 6TH APPELLANT**

AND

**TOBIAS O SEE 1ST RESPONDENT
RILEY FALCON SECURITY SERVICES LIMITED 2ND RESPONDENT**

AND

DANIEL O. AJULU APPELLANT

**AS CONSOLIDATED WITH
CIVIL APPEAL 148 OF 2019**

BETWEEN

DANIEL O AJULU APPELLANT

AND

**TOBIAS O SEE 1ST RESPONDENT
SAMUEL MICHAEL ONYANGO 2ND RESPONDENT**



SAMUEL OKELO DEYA 3RD RESPONDENT
MAURICE ODUOR 4TH RESPONDENT
PAUL OTIENO 5TH RESPONDENT
GEOFFREY OBWON 6TH RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL 149 OF 2019**

BETWEEN

DANIEL O AJULU APPELLANT

AND

RILEY FALCON SECURITY SERVICES LIMITED 1ST RESPONDENT
SAMUEL MICHAEL ONYANGO 2ND RESPONDENT
SAMUEL OKELO DEYA 3RD RESPONDENT
MAURICE ODUOR 4TH RESPONDENT
PAUL OTIENO 5TH RESPONDENT
GEOFFREY OBWON 6TH RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Kisumu (Cherere, J.) delivered on 17th May 2018 in High Court Civil Case No. 1 and 2 of 2017 (consolidated))

JUDGMENT

1. In these consolidated appeals (Civil Appeal No. 87 of 2018 being the lead file) the appellants are aggrieved by the decision of the High Court at Kisumu (Cherere, J.) made in a ruling delivered on May 17, 2018 by which their statements of defence, in answer to the respondents' defamation suits, were struck out on grounds that the same did not raise triable issues for trial.
2. By a plaint dated January 30, 2017, filed Kisumu in Civil Case No. 1 of 2017, the 1st at the High Court at respondent, Tobias O. See, a member and then Chairman of a private club, Nyanza Club, Kisumu, sued Samuel Michael Onyango, Samuel Okelo Deya, Maurice Oduor, Daniel O. Ajulu, Paul Otieno and Geoffrey Obwon, the 1st to 6th appellants respectively, all members of the said Club, seeking judgment for general damages for libel for allegedly publishing words concerning him. He also sought exemplary damages for "malicious libel"; aggravated damages for the appellants' refusal to apologize or retract the statements complained of; and a permanent injunction to restrain the appellants from publishing the words complained of.
3. The 1st respondent averred that on July 12, 2016 the 1st appellant, Samuel Michael Onyango, authored a letter which was published by delivery to the Club and Management Committee of the Club in which he made a defamatory statement of and concerning the 1st respondent that on July 6, 2016 he referred to members of the Golf Club Section "as hecklers" and that his conduct was "unbefitting of a person of his stature as Chairman."; that on 25th July 2016 the appellants jointly with others authored a letter



titled “resignation of Chairman & Secretary” which was published by delivery to the Secretary of the Club and the Club in which they made defamatory statement of and concerning the 1st respondent that whilst in the position of Chairman of the Club, the 1st respondent was deploying guards from Riley Falcon Security Limited where he was a director to guard the golf section during certain tournaments in contravention of Article 33(a) of the Club Constitution as it was tantamount to “trading with or making profit from the Club.”

4. The 1st respondent further pleaded that on 10th August 2016, the appellants authored a letter (petition) titled “Special General Meeting under Clause 29(a) of the Club Constitution” in which they made defamatory statement of and concerning him seeking resolution that he should resign or vacate office on grounds that while serving as Club Chairman he “has been deploying guards from Riley Falcon Security Limited (R.F.S.L) where he serves a director to guard the Golf Section during certain tournaments” in contravention of Article 33(a) of the Club Constitution; that in disregard to members of the Golf Section of the Club, the 1st respondent referred to members as hecklers when called upon to answer questions; and that the 1st respondent and the Secretary of the Club decided without consultation to harvest twelve huge trees from the golf cause without proper club property disposal procedure. The 1st respondent further pleaded that on August 25, 2016, the 2nd to 6th appellants wrote and filed suit in Kisumu CMCC No. 471 of 2016 in which, in their witness statement, they made highly defamatory statement of and concerning the 1st respondent that he had deployed guards from the company in which he was a director to guard the golf section during tournaments and that his action contravened Article 33(a) of the Club Constitution.
5. The 1st respondent averred that in their natural and ordinary meaning, the words complained of meant and were understood to mean, among other things, that he abused his office to benefit a company in which he had an interest; disregarded the Club’s procurement procedures; was guilty of conflict of interest; is corrupt, unethical, unprofessional and condones corrupt practices.

It was the 1st respondent’s case that the appellants were actuated by malice. He prayed for general, exemplary, and aggravated damages and a permanent injunction to restrain the appellants from publishing the words complained of.

6. On its part, the 2nd respondent, Riley Falcon Security Services Limited, by a plaint dated February 9, 2017 also filed suit before the High Court at Kisumu, being Civil Case No. 2 of 2017 in which it sought similar reliefs against the 1st to 6th appellants. The suit by Riley Falcon Security Services Limited was substantially similar to the 1st respondent’s suit save for the averments that contrary to claims by the appellants, Nyanza Golf Club did not and had never procured from it security services or contracted it to provide it with security services for the golf tournaments on June 25, 2016 and July 24, 2016 which were sponsored by its clients, Kenya Commercial Bank Limited and Standard Media Group Limited respectively; and that the publication of the letters complained of were defamatory.
7. In his defences to the suits, Samuel Michael Onyango, the 1st appellant, denied that the publication was defamatory; asserted justification, privilege, and fair comment. He admitted authoring the letter dated July 12, 2006 but denied the words were defamatory; he averred that the words were true and factually correct and pleaded justification; that he and other appellants had the right and privilege to author the letters complained of and to submit the petition in their capacity as members of the Club with the aim of ensuring accountability, transparency and adherence to the club constitution despite the fact that the petition was unilaterally dismissed; that the writings were done honestly and with the best interest of the Club and its members and the petition was a last resort effort after the 1st respondent failed or refused to address the members’ concerns.



8. Daniel O. Ajulu, the 4th appellant, pleaded in his statement of defence that he was not the author of the letter of 12th July 2017 and did not publish it; that the petition did not contain any defamatory remarks considered in the context of the Club Constitution and the facts relied upon in that regard expounded in paragraph 5.1 to 5.5 of the defence; that the averments made in the petition were based on actual observations by members of the club and the intention of the petition “was to bring to light certain observations of events and practices that contravened the club’s constitution”; that the 4th defendant was justified in complaining about the reference to members as hecklers in light of the meaning of that word; that letters of complaint, petitions and institution of legal proceedings are avenues for dispute resolution.
9. Although there is reference to statements of defences by the other appellants, the same appear to have been omitted from the records of appeal.
10. The respondents then moved the High Court, by application dated November 27, 2017, to strike out the statements of defence on grounds that the impugned statements were false and untrue; that the publication referred to the respondents in character and profession; that publication to third parties was admitted; that the pleas of justification, privilege and fair comment were not available and that the defences did not disclose any valid defences.
11. Allowing the respondents’ applications, the learned Judge delivered the impugned ruling dated May 17, 2018, concluding that “no useful purpose would be served by the defences on record and this in my view is a clear and obvious case where striking out of the defences is justified.” The Judge proceeded to enter judgment on liability for the respondents and to order the suits to be set down for assessment of damages.
12. Aggrieved, the appellants filed these appeals. By a consent order made on 3rd September 2019 in Civil Appeal No. 87 of 2018, the three appeals were consolidated. In substance, the complaints by the appellants in the consolidated appeals are that their defences raised serious, plausible, and triable issues that entitled them to a right to be heard; that the defences raised required the respondents to prove their case; that the defences substantially complied with the requirements of the Civil Procedure Rules; that the Judge misdirected herself in holding that the defences were incurably deficient for want of compliance with Order 2 Rule 7(2) of the *Civil Procedure Rules* without addressing whether any deficiency for want of particulars was curable by amendment. The appellant in CA No. 148 of 2019 and in C.A. No. 149 of 2019 complained that the Judge erred in finding that he had admitted publication when in fact there was express denial.
13. During the virtual hearing of the consolidated appeals before us on May 11, 2020, the parties were represented by learned counsel. Mr. Onsongo appeared for the 1st appellant. He indicated that the 2nd, 3rd, and 6th appellants did not file a record of appeal, while the suit against the 5th appellant was withdrawn. Mr. I. Okero appeared for the 4th appellant. Mr. Mwaniki Gachuba appeared for the 1st and 2nd respondents. They relied on their respective written submissions which they briefly highlighted.
14. Mr. Onsongo submitted that the respondents’ claims in the lower court were denied; that it was pleaded that the letters complained of were justified, were true and fair comment in terms of Section 15 of the *Defamation Act* which provides that in any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment, having regard to such of the facts alleged or referred to in the words complained of as are proved.



15. It was submitted that the omission to strictly comply with Order 2 Rule 7 of the *Civil Procedure Rules, 2010* to the extent that the Statement of Defence did not set out particulars “stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true” was a procedural omission that would have been cured and rectified by amendment; that that even without the defences of justification, fair comment and truth, which would require supporting particulars, other defences were pleaded which raised triable issues that should have entitled the appellants to be heard in a full hearing. Counsel referred to this Court’s decision in *Olympic Escort International Co Ltd & 2 others v Parminder Singh Sandhu & another* [2009] eKLR, for the proposition that for an issue to be triable, it must be bona fide and that a triable issue is not necessarily one that the must necessarily succeed. It was submitted that the power to strike out is draconian and must be sparingly exercised and that this was not a proper case for striking out within the parameters in *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR.
16. Counsel concluded by stating that the learned Judge went ahead to enter judgment on liability and to order the matter to be set down for assessment of damages when no such prayers had been made. With that, counsel prayed that the appeal be allowed with costs.
17. Mr. Okero referred to Gately on Libel and Slander, 6th edition at paragraph 221 and submitted that publication of words complained of is the foundation of any action for defamation. He submitted that unless there is a clear and unequivocal admission of publication, it is an allegation that must be proved by evidence to the satisfaction of the court; that it was incumbent upon the respondents to also establish that the words complained of tend to lower him in the estimation of right-thinking members of society. *Sim v Stretch* [1936] 2 All E R was cited.
18. Counsel submitted that his client’s statement of defence did not contain any admission of the publication of the words complained of or of the defamatory nature of those words and the learned judge’s finding that the appellants admitted the publication of the letters is clearly erroneous; that in any case, his client put forth a reasonable defence, having pleaded that the publication was made in the context of privileged occasion being deliberations of the members of a private members club. Reference was made to the case of *University of Nairobi vs. Mbutia* [1980] eKLR and *Juletabi African Adventure Limited & another vs. Christopher Michael Lockley* [2017] eKLR.
19. Counsel drew the Court’s attention to the decision by the learned Judge, in a different case, the case of *Joel Omondi Ondu v David Onyango* [2019] eKLR, which involved an appeal from the subordinate court on similar facts, where the Judge set aside an order striking out a defence for want of compliance with Order 2 Rule 7(2) of the *Civil Procedure Rules* stating that it was not a good reason to deny the defendant an opportunity to ventilate his case.
20. Opposing the appeal, Mr. Mwaniki Gachuba submitted that the appellants have failed to demonstrate that the learned Judge abused her discretionary jurisdiction or otherwise made errors of law and facts or that she arrived at a wrong decision in striking out the defences. Counsel submitted that the Judge properly exercised her discretion; that the statements of defence were mere denials, a sham intended to delay judgement and did not disclose any valid defences in law or triable issues; that the plea of justification is not available as the appellants did not give particulars of facts or truth in the impugned statements; that the plea of privilege does not lie as the impugned statements are not privileged publications under Section 7 of the *Defamation Act* and the Schedule thereof; that the plea of fair comment does not lie as the words complained of are not expressions of opinions but misstatements of true facts; that the publication is malicious; and that the respondents suffered damage after their reputation was injured.



21. Counsel submitted that the appellants did not adduce any cogent evidence in their statements of defence to prove that their letters were truthful and oral evidence at the hearing of the suit would have been hollow; that having failed to prove the truthfulness of the letters, they could not do so through cross examination of witnesses during trial; that they failed to plead any particulars of facts in the statements of defence and consequently failed to specify which particular words in the impugned letters were true and correct; that the defence of justification did not lie in law and was not triable by virtue of Section 15 of the *Defamation Act* and Order 2 Rule 7 and 8 of the *Civil Procedure Rules*, 2010. In that regard counsel made reference to the decision of this Court in *Grace Wangui Ngenye v Chris Kirubi & another* [2015] eKLR for the proposition that in applying the general principles on striking out the court must have regard to the provisions of Order 1 Rule 7 and 8 of the *Civil Procedure Rules*, 2010 and the provisions of the *Defamation Act*.
22. Also cited was case of *Chrispus Keah v Joyce Mburu* [1982] eKLR, for the proposition that publication of the defamatory letters was not a triable issue as the appellants admitted that they authored the impugned letters but denied publishing the same; the High Court case of the case of [Joseph Njogu Kamunge v Charles Muriuki Gachari](#) [2016] eKLR for the proposition that “... a defamatory statement is presumed to be false, unless the defendant can prove its truth.” Counsel urged us to dismiss the appeals with costs to the respondents.
23. We have considered the consolidated appeals and the rival submissions. The power to strike out pleadings under Order 2 Rule 15 of the *Civil Procedure Rules* is discretionary and the circumstances in which we can, as an appellate court, interfere with the exercise of discretion by the lower court are limited. As Sir Charles Newbold P. stated in *Mbogo & another v Shah* [1968] E A 93 at page 96:

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...”
24. We can only interfere with the decision by the Judge to strike out the appellants’ defences if satisfied that the Judge misdirected herself in law or that she misapprehended the facts or that she considered extraneous considerations or that she failed to consider relevant considerations or that her decision is plainly wrong. With that in mind, the only question arising in these consolidated appeals is whether the appellants have demonstrated that the learned Judge did not exercise the court’s discretion judicially. Related to that is the question whether the defences struck out raised triable issues.
25. In answering those questions, we begin by observing that the grounds on which the respondents complained that the defences should be struck out as enumerated on the face of the application included the complaints that: the statements complained of were false; the publication referred to the respondents in their character and profession; that publication to third parties were admitted; the pleas of justification, fair comment and privilege were not available; the publication was malicious; the respondents suffered damage as a result of the publication; defences were mere denials; did not disclose any reasonable defence or triable issues.
26. Although Samuel Michael Onyango, the 1st appellant in Civil Appeal No. 87 of 2018 in his defence admitted that he authored the letter of 12th July 2006, he denied that it was defamatory and averred that the words complained of were true in fact and justified and that he would tender “viva voce and documentary evidence in support”.

Similarly, Samuel Okelo Deya, Maurice Oduor, Daniel O. Ajulu,



Paul Otieno and Geoffrey Obwon, the 2nd to 6th appellants in Civil Appeal No. 87 of 2018 denied the contents of the plaint and pleaded justification, privilege, and fair comment. There was also the plea of privilege and the contention that, as members of a private club, the appellants had a duty to interrogate the activities of the club and the complains they raised in the impugned letters and the petition were legitimate with a view to ensuring accountability, transparency and adherence to the club constitution.

27. In his affidavit in support of the application to strike out the defences, the 1st respondent Tobias O. See deposed that the appellants “failed to annex any evidence to demonstrate that” he cut trees on the golf course or traded with the club; that the statements were published to third parties; that the appellants did not give particulars of facts or truth in the impugned statements; that the impugned statements were not opinions but misstatements of true facts; that he is a public figure and the words injured his reputation; that the defences were mere denials and a sham intended to delay summary trial.
28. In grounds of opposition to the application and in replying affidavit, it was asserted that the defences sought to be struck out set out statutory and common law defences and that the defences raised triable issues and that the matter could only be determined by the court upon trial.
29. However, in striking out the defences, the learned Judge expressed: that “in their statements of defence”, the appellants “admit the publication of the letters of and concerning” the respondents and that “it follows that it would not be necessary” for the respondents to prove the fact of publication at the trial; that under Order 2 Rule 7(2) of the Civil Procedure Rules, the appellants were required to give particulars stating which of the words complained of are statements of fact and of the facts and matters relied upon in support of the allegation that the words are true; that “a perusal of the defences shows that they do not fully comply with Order 2 Rule 7(2) of the *Civil Procedure Rules*” since the appellants “have not pleaded particulars of the facts and matters they rely on in support of the allegation that the word complained of are justified, true and privileged”; that the “the words complained of are in my considered view, plain and unambiguous and require no further evidence of their meaning” and that “a reasonable person would understand them in a defamatory sense.”; and that “it is obvious that no useful purpose would be served by the defences on record and this in my view is a clear and obvious case where striking out of the defences is justified.”
30. Order 2 Rule 15 of the *Civil Procedure Rules*, on the strength of which the learned Judge struck out the Statements of Defence provides, in relevant part, that “at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that- “it discloses no reasonable cause of action or defence in law”. Instructively, no evidence should be presented in support of an application to strike out pleadings on grounds that no reasonable cause of action or defence in law is disclosed.
31. As Madan, JA stated in *D T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another*(above) and it is necessary to quote at length:

“It is relevant to consider all averments and prayers when assessing under Order 6 rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court, for under subrule 13(2) as hereafter set out, while evidence by affidavit is not permitted in the case of the first application, it is permitted in the case of the second application. Sub rule (2) provides:-

“(2) No evidence shall be admissible on an application on subrule (1)(a) but the application shall state concisely the grounds upon which it is made.”



The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

32. In the present case, although alive to those principles, the learned Judge nonetheless appeared to embark on a determination of contested matters based on untested affidavit evidence. The matters pleaded in the appellants' statements of defence to which we have referred warranted a trial and the learned Judge misdirected herself in striking them out. There was for instance the plea that the appellants, as members of the club, were within their rights as such members to interrogate the affairs of the club, which in their view afforded them a defence. The pleas of justification and fair comment were also matters that required interrogation at the trial. Interestingly, in an earlier ruling in the same case while allowing an application to set aside an interlocutory judgment, the Judge had expressed that:

"The overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of cases, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. Consequently, and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant."

33. We think the same approach should have guided the Judge in determining the application leading to the impugned ruling. Moreover, and at the very least the learned Judge ought to have considered whether the omission to provide particulars was curable by amendment.
34. We have said enough, we think, to demonstrate that we are persuaded that the learned Judge misdirected herself in striking out the defences. We therefore allow the appeal and award costs thereof to the appellant. We set aside the ruling of the High Court delivered on May 17, 2018. We substitute therefore an order dismissing, with costs, the respondents' applications dated 27th November 2017.
35. We conclude with an apology to counsel and the parties for the delay in delivering this judgment. We heard the consolidated appeals virtually in May 2020, the early days of the Covid-19 pandemic, and omitted, regrettably, to effectively track the matter thereafter. We sincerely apologize for the delay.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022



D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

