IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & AZANGALALA, JJ.A.)

CIVIL APPEAL NO. 40 OF 2010

BETWEEN

GRACE WANGUI NGENYE…….....APPELLANT

AND

CHRIS KIRUBI……..…….....1ST RESPONDENT

CAPITAL GROUP LIMITED…….. 2ND RESPONDENT

*(Appeal from a Ruling and Order of the High Court of Kenya at Nairobi (**R. N. Sitati, J.**) dated 1st October, 2009*

in

H.C.C.C. No. 1009 of 2005)

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JUDGMENT OF THE COURT

[**1**] This is an appeal from the ruling of the High Court (**Sitati, J**.) delivered on 1st October, 2009 whereby the High Court allowed the first respondent's application for striking out his name from the suit, and in addition, dismissed the appellant's application for striking out the defence by and for entry of judgment against the respondents.

[**2**] By an application dated 20th December, 2005 and filed on 30th January, 2006, the first respondent **Chris Kirubi** applied under **Order 1 rule 10(2) 13,** and **22** and **Order VI Rule 13(1) (b)** and **(d)** of Civil Procedure Rules (**CPR**) that his name be struck out from the suit for improper joinder. Further, by an application dated 16th February, 2006 and filed on 17th February, 2006, the appellant (**Grace Wangui Ngenye**) applied under **Order VI rule 13(1) (b) (c)** and **(d)** Civil Procedure Rules, that the statement of defence filed by the respondents be struck out and judgment be entered in favour of the appellant and that the suit to proceed to formal proof. The two applications were heard together one after the other resulting in the impugned ruling.

The two applications were filed in a pending suit in which the appellant claimed against the two respondents jointly and severally, a permanent injunction and damages for libel. The 1st and 2nd respondents filed a joint defence to the suit denying the claim.

[**3**] The basis of the appellant's claim was a news broadcast on 27th June, 2005 read by one **Eric Latiff** which stated in the material part:

> ***"Machakos Principal Magistrate Grace Ngenye and another magistrate Peter Muriuki have been transferred as the Government swung into action following the death of 50 people who consumed the poisonous brew in Machakos. The two chiefs and an Assistant Chief have also been sacked by the District Commissioner Warfa Osman; President Mwai Kibaki has ordered a nationwide crackdown on illicit brew saying that they must not be allowed to take advantage of poor Kenyans. Machakos Police Chief, Charles Mathenge says that at least 8 people have been arrested so far as the police intensify a manhunt for the woman who is believed to have supplied the killer brew."***

[**4**] The appellant pleaded that at the material time she was an Acting Senior Resident Magistrate posted to Machakos Chief Magistrate's court and that the words were published falsely, maliciously, capriciously, concerning her in the way of her character, profession and service. The appellant pleaded, in paragraph 2 of the plaint, that the 1st respondent was the Chief Executive of the 2nd respondent and in paragraphs 3and 5, that the 2nd respondent was a limited liability company and the proprietor of Capital F.M. Radio which broadcasts its programmes and news throughout the republic of Kenya and could be accessed throughout the world via internet.

[**5**] The High Court considered the 1st respondent's application first and in allowing the application, made a finding thus:

> ***"I note that there is no averment in the plaint to suggest that the 1st defendant procured and or induced the 2nd defendant to commit the tort against the plaintiff. I can see that the only reason why the 1st defendant is joined in this suit is because he is the 2nd defendant's Chief Executive Officer…. the mere fact that the 1st defendant is the chief executive officer of a company is not itself sufficient to make such Chief Executive Officer liable."***

The court ultimately struck off the name of the 1st respondent holding that the joinder was embarrassing, scandalous and vexatious.

The High Court next considered the appellant's application and stated:

> ***"It is not my duty at this stage to go into the merits of the plaintiff's case, for indeed that is the preserve of the judge who may eventually end up hearing this case if applicant/plaintiff fails on this application to strike out. After considering the defence filed by the defendants in light of the law, I do not think that this is a case of summary procedure. It is my view that this is a case on which*** *viva voce* ***evidence ought to be given both by the plaintiff and the defendants. I also think that this is a case on which full discovery must be made and particularly so when there seems to be some discrepancy between the words complained of and set out in the plaint and the words which may have been aired by the 2nd defendant. I also think that it would be highly prejudicial to the defendants to strike out the defence without ever considering the possibility that the defence would be remedied through amendment…."***

[**6**] It is convenient to consider first the appeal against the finding that the 1st respondent was improperly joined in the suit. The application to strike out the name of the 1st respondent was made mainly under Order 1 rule 10(2), Civil Procedure Rules (now Order 1rule 10 (2) Civil Procedure rules 2010) which authorizes the court, amongst other things, to order that any party improperly joined whether as a plaintiff or defendant be struck out.

[**7**] The application was based on the grounds, *inter alia*, that the cause of action was properly against the 2nd respondent who is a body corporate capable of suing and being sued; that no cause of action or relief was sought against the 1st respondent separate and apart from that against the 2nd respondent; and that the

1st respondent was only the chairman of the 2nd respondent who does not assume the liabilities of the company.

It is averred in the memorandum of appeal that the judge erred in finding that the only reason that the 1st respondent was joined was because he was the Chief Executive Officer of the 2nd respondent. The other grounds of appeal state that the judge erred in fact and in law in failing to find that the 2nd respondent's employees, servants and agents, work under the supervision and direction of the 1st respondent as the chief executive officer; in failing to find that 1st respondent was in charge of editorial policy of the 2nd respondent and in failing to find that the 1st respondent, caused the defamatory matters complained of to be published by the 2nd respondent.

[**8**] An action for defamation is intrinsically a personal action. The proper person to maintain an action is the person directly defamed. Likewise, the proper person to be sued as a defendant is the person who published the defamatory words or caused them to be published or ratified the publication.

[**9**] By the plaint, the appellant averred that the 2nd respondent, a body corporate was the proprietor of Capital FM radio which broadcasted words defamatory of the plaintiff. The plaint shows that the 1st respondent was sued in his capacity as Chief Executive Officer of the 2nd respondent but there were no averments in the plaint linking the radio broadcast personally to the 1st respondent. In particular, the plaintiff did not allege that the 1st respondent was in charge of 2nd respondent's editorial policy or that he personally caused the defamatory matters to be published. It is true that the appellant in the replying affidavit to the application to strike out the name of the 1st respondent stated, that, the 1st respondent as Chief Executive was responsible for the decision to publish and that the matters complained of were sanctioned by 1st respondent through his editorial policy. However, those facts were not stated in the plaint as part of the cause of action against the 1st respondent.

The 1st respondent averred in paragraph 13 of the Defence that the suit against him is bad in law as it does not disclose a cause of action against him. The appellant maintained in the reply to the defence that there was a proper cause of action against 1st respondent especially in view of certain admissions. The admissions referred to, made by the respondents are that the 1st respondent was the chief executive; that the 2nd respondent is a limited liability company; that the appellant was an acting Senior Resident Magistrate; and that the 2nd respondent broadcasted the alleged defamatory statement.

[**10**] In considering the application to strike out the name of the 1st respondent, the trial court was properly guided by the averments in the pleadings. As already indicated the basis of the cause of action against the 1st respondent was that he was the chief executive officer of the 2nd respondent. Whereas the 2nd respondent admitted broadcasting the alleged defamatory statement, the 1st respondent did not admit so in the statement of defence. The fact that the 1st respondent was the chief executive of the 2nd respondent does not, without more, render the 1st respondent personally liable for the tort of the corporation. The suit against the 1st respondent, without showing any case except that he was the chief executive officer, is vexatious. We find no merit on this aspect of the appeal.

[**11**] As regards the appeal against the dismissal of the application to strike out the defence, the appeal has to be considered on the basis of the pleadings, the provisions of the relevant rules of pleadings and on the basis of the provisions of the Defamation Act (Cap 36).

The general principles which guide a court in exercising its discretion whether or not to strike out a pleading as stated in **DT Dobie & Co. (Kenya) Limited v. Muchina & Another [1982] KLR 1** and in other cases also apply in defamation cases. However, in applying the general principles, the Court will have regard to the special rules of pleadings in defamation cases as laid in Order 1 rule 7 and 8 of CPR 2010 (formerly Order VI Rule 6A and 6B of CPR) and also have regard to provisions of the governing statute – the Defamation Act).

[**12**] The appellant faults the finding of the learned judge that *viva voce* evidence and full discovery was necessary, that there was discrepancy in the words pleaded and the words aired; for failing to find that the broadcast as set out in the plaint was fully admitted and in failing to address the issues raised in the application that the defence was frivolous, vexatious and an abuse of the process of court.

It was submitted by **Mr. Mwaura** in support of the appeal that there was nothing to take for trial on the issue of liability as the whole suit was admitted. On the other hand, **Mr. Njagi** for the respondent, relying on the principles for striking out pleadings, submitted that there is inconsistency in the words used in the plaint and words aired; that the respondents pleaded that the words published were not defamatory, that the respondent raised the defence of fair comment and that it would be necessary at the trial for the High Court to listen to the broadcast.

[**13**] The major complaint by the appellant is that the trial judge failed to address the issues raised in the application, namely, that the defence is frivolous, vexatious and an abuse of the process of the court. We have already quoted in full the findings of the trial judge.

[**14**] To determine whether or not the learned judge committed the errors complained of, it is necessary to consider the facts pleaded by the appellant in conjunction with the defences raised and admissions made by the 2nd respondent.

[**15**] Firstly, the appellant pleaded that she was an Acting Senior Resident Magistrate posted at the Chief Magistrate's court at Machakos. That fact is admitted by the 2nd respondent in the statement of defence and does not therefore require proof

at the trial.

[**16**] Secondly, the appellant pleaded that the respondents published the words which she has quoted, of and concerning her, in the way of her character, profession and service. The 2nd respondent has admitted, in the statement of defence, that it published the quoted words but states that it did not refer to the magistrate by the name "**Grace Ikenya**". However, the 2nd defendant does not deny that the published words refer to the appellant, of and concerning her profession and character. In view of that admission, it follows that it is not necessary for the appellant to prove at the trial the fact of publication, the content of the publication and the fact that the publication referred to her in connection with her profession and character.

[**17**] Thirdly, the appellant pleaded that the words were published falsely, maliciously, capriciously and in most vindictive manner. The 2nd respondent had denied that allegation. Rule 7(3) of Order 2 aforesaid provides:

> ***"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 matters 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."***

[**18**] The 2nd respondent has pleaded fair comment and privilege, which defences will be considered shortly. Subject to those defences and as the rule stipulates, the appellant is not required to give particulars of facts on which he relies in support of allegation of malice in her plaint. Moreover, the appellant is not required to adduce evidence to prove that the words were published falsely and maliciously, for the law presumes those facts in her favour. Indeed, the intention or motive of the publisher is immaterial except as it relates to damages. So, subject to the defences raised by the 2nd respondent, the appellant is not required to adduce evidence to prove that the 2nd respondent published the words complained of falsely and maliciously.

[**19**] Fourthly, the appellant has pleaded that the words complained of were defamatory in their natural and ordinary meaning and in addition has given particulars of the meaning ascribed to them.

Rule 7(1) of Order 2 CPR provides:

> ***"Where in action for libel or slander the plaintiff alleges that the words or matters complained of were used in 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."***

The 2nd respondent in its statement of defence denies that the words in their natural and ordinary meaning meant or could have the meanings attributed to them, and, in the alternative, sets out what the words mean or were understood to mean.

The 2nd respondent further pleads that the words were a fair comment on matters of public interest namely the transfer of the appellant and another magistrate and the government's action including the President in dealing with curbing of drinking of illicit brews in Machakos and in the whole country upon the death of 50 people after consuming the said poisonous brew in Machakos. The 2nd respondent has given the particulars of the fair comment.

Rule 7(2) of order 2 CPR:

> ***"Where in action for libel or slander the defendant alleges that in so far as the words complained of consists of statements of fact, they are true in substance and in fact, and in 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 matters he relies in support of the allegation that the words are true."***

[**20**] It is plainly clear from the provisions of rule 7(1) that the particulars that a plaintiff is required to give are of the facts constituting an innuendo- that is averment of the meaning in which the words were understood by persons to whom the words were published, other than the natural and ordinary meaning. The meaning of words ascribed in the innuendo is a question of fact which a plaintiff who relies on the innuendo as conveying a defamatory imputation is required to prove by calling witnesses to whom the words were published.

In this case, the appellant did not rely on any innuendo, rather she relied on the natural and ordinary meaning of the words and it was therefore unnecessary to give particulars of the various meanings of the words. In the same vein, it was unnecessary for the 2nd respondent to plead to counter meaning of the words complained of.

[**21**] It is also clear from rule 7(2) that the rule applies to a plea of justification and a plea of fair comment on a matter of public interest and requires a defendant to give particulars of facts constituting a plea of justification. Section 15 of the Defamation Act is also relevant. It provides:

> ***"In an 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."***

[**22**] Having considered the state of the respective pleadings and the rather technical law of defamation, the next question is whether the High Court erred in failing to strike the 2nd respondent's defence on the grounds stated.

From what we have said above, the fact of publication and the contents of the alleged defamatory statement are admitted. The publication was by the medium of radio broadcast – a wireless broadcasting

which as section 8(1) of the Defamation Act stipulates, is publication in a permanent form. It is plain that the words referred to the appellant of and concerning her profession and character. The appellant relied on the natural and ordinary meaning of the words as conveying a defamatory imputation which does not required proof by oral evidence. Further the appellant is not required to prove by oral evidence that the publication was done maliciously.

[**23**] The import of the material words published is that the appellant, a Senior Resident Magistrate had been transferred.

> "***As the Government swung into action following the deaths of 50 people who consumed the poisonous brew in Machakos..***"

The appellant in reply to the statement of defence avers that her transfer was a normal countrywide transfer of magistrates by the Judiciary and was neither connected to the death of the 50 people who had consumed poisonous brew nor related to the Government's swinging into action. Indeed the 2nd respondent in its defence avers that it broadcast a clarification by Judiciary that the transfer of the two magistrates from Machakos was routine and was not linked to the death of 50 people.

[**24**] The broadcast complained of is in ordinary English language and the words are plain and unambiguous thus requiring no further evidence of their meaning. In their natural and ordinary meaning, they associate the transfer of the appellant with the death of the 50 people as a result of consumption of illicit liquor and the entire context conveys the meaning that the transfer was a disciplinary action. The 2nd respondent did not plead justification and without such a plea, it is plain and obvious that the words carry defamatory imputations.

[**25**] The plea of fair comment has no substance. Firstly, a fair comment must be based on facts that are true or substantially true. In the absence of plea of justification, the 2nd respondent would not be entitled to give evidence at the trial to prove that transfer of the appellant was associated with the death of the 50 people.

Indeed that's not the 2nd respondent's case. Secondly, a fair comment is a commentary, an expression of opinion based on true or substantially true facts. The words complained of are not by their very nature an expression of opinion but rather, are a misstatement of true facts. The defence of fair comment is thus not available to the 2nd respondent in law at the trial.

[**26**] The 2nd respondent further pleaded without any elaboration that the broadcasted statement had a qualified privilege under the Defamation Act. Whether or not a publication is privileged is an issue of law. It is sufficient to say that section 7 of the Defamation Act as read with the Schedule thereof, does not include the specie of publication complained of as one of the publications which enjoys qualified privilege under the law.

[**27**] From the foregoing, we have come to the conclusion that this is a plain and obvious case where the appellant is not required to prove defamation by oral evidence and where the defence does not disclose valid defences in law or triable issues.

[**28**] The result is that the appeal partially succeeds. The appeal against the 1st respondent is dismissed. The appeal against the 2nd respondent is allowed. The Ruling of the High Court dated 1st October, 2009 as relates to the application to strike out the 2nd defendant's defence is set aside and substituted with an order that the appellant's application to strike the defence dated 16th February 2006 is allowed with costs to the appellant. Judgment is entered against the 2nd respondent on liability and the suit as against the 2nd respondent shall be set down for proof of damages.

[**29**] As regards the costs of the 1st respondent, we have considered the fact that the two respondents filed a joint defence which as stated above, is not valid in law. This defence has contributed to the long delay

in the disposal of the suit which, no doubt has prejudiced the appellant.

It is just that the costs of the 1st respondent both in the High Court and in this Court should be met by the 2nd respondent. It is so ordered.

Dated and delivered at Nairobi this 11th day of December, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR