
**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: GICHERU, KWACH & SHAH, JJ.A.**

**CIVIL APPEAL NO. 111 OF 2000**

**BETWEEN**

**WACHIRA WARURU ..... 1ST APPELLANT**

**THE STANDARD LIMITED .....2ND APPELLANT**

**AND**

**FRANCIS OYATSI .....RESPONDENT**

(Appeal from the Ruling and Order of the High Court

of Kenya at Nairobi (Hon. Mr. Justice V.V. Patel)

dated 9th February, 2000

in

H.C.C.C. NO. 1225 OF 1999)

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**JUDGMENT OF THE COURT**

The respondent, *Francis Oyatsi* , filed an action for libel against the two appellants *Wachira Waruru* and *The Standard Limited* on 21st June, 1999. The alleged libellous publications by *"The East African Standard"* newspaper which the respondent is complaining about were printed in the said newspaper between 2nd December, 1998 and 17th December, 1998. The plaint filed in the superior court sets out the substance and dates of publications and the respondent pleads that the said publications mean or suggest that he was involved in embezzlement of a colossal sum of Shillings one billion from Mumias Sugar Company Limited; that he had committed offences of theft or misappropriation, corruption, fraud, sabotage etc. For the purposes of this appeal we need not go any further than that.

The two appellants filed a defence, in time. The defence raised several issues including what is called a "rolled-up-plea", namely that "in so far as the words complained of consist 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 those facts which are matters of public interest." The defence also pleaded justification. There is also pleaded a correction and apology.

The respondent filed a notice of motion on 9th November, 1999 seeking to strike out the whole statement of defence on the grounds that the defence was scandalous, frivolous and vexatious. He also sought an order for entry of judgment on liability. The application is supported by an affidavit sworn by the respondent.

It is common ground that the application was served on the law firm of Messrs. *Mohamed Muigai Mboya* on 11th November, 1999. it was received by one Miss Maureen Kiugu a receptionist in that law firm. It appears that the said receptionist did not bring the application to the attention of Mr. David Majanja an advocate with the law firm of *Mohamed Muigai Mboya.* The application was listed for hearing on 2nd December, 1999. No one appeared on behalf of the appellants. No replying affidavit was filed. No grounds of opposition were filed. On 2nd December, 1999 the superior court (Patel, J) ruled as follows:

> *"Having considered the application dated 5th November, 1999, filed on 9th November, 1999 with care I am satisfied that the plaintiff/applicant is entitled to order as ked for therein. Indeed it be noted that the application is not opposed. I make the order as prayed for in prayers Nos. 1,2 and 3 of the application."*

It is not clear from the above quoted ruling what was carefully considered by the learned Judge. We would presume he considered the plaint, the application, the affidavit in support thereof and the annextures thereto. He does not say so. Why we say this is obvious. Striking out of a defence is a drastic remedy and it is incumbent upon a judge to give good reasons for doing so. We quote with approval what Wilmer L. J. said in the case of *Waters vs. Sunday Pictorial Newspapers Ltd*. [1961] 2 A11 ER 758 at page 761:

> *"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 cases. It is perhaps not without signific ance that we managed to spend the whole of the day yesterday in listening to an argument whether or not the matter objected to did set up an arguable case. For the purposes of this appeal, we are not in any way concerned with whether any of the defences r aised is likely to be successful. The sole question in relation to each of the four headings is whether the case sought to be set up is so unarguable that it ought to be struck out in limine. I have come to the conclusion, in relation to each of the four headings, that it is quite impossible for us to take this drastic course."*

It can be said in certain cases, but hardly ever in serious libel cases, that the judge must have considered (when he does not say how) all issues raised in the defence. If the defence be a simple one not requiring serious consideration and if it discloses no reasonable defence it can be struck out. It will not do to simply say that the judge must have considered all the pros and cons when there is nothing to indicate that he has done so.

We digressed a little to go into the principles relating to striking out of a defence in a libel suit. Having said what we have said we propose not to say any more about the merits or the demerits of the defence the reason for which will become obvious in a moment.

The defence having been struck out on an application heard ex-parte the appellants' advocates applied to have the said order set aside under order *1XB rule 8 of Civil Procedure Rules* and section 3A of the Civil Procedure Act. The application to set aside the ex-parte orders was not filed until 11th January, 2000. Mr. Majanja said he became aware of the said application on 13th December, 2000 when reviewing litigation matters his firm handles on behalf of The Standard Limited. It was not a deliberate act, he said.

At this stage we have to decide if the learned Judge should have accepted Mr. Majanja's explanation for non-attendance on 2nd December, 2000. We keep in mind the fact that the explanation was not seriously challenged by the respondent. The respondent's stand in opposing the application to set aside the ex-parte orders was that the judgment was properly entered and that in the face of an unreserved apology the

appellant had no defence on merits. Mr. Gautama who appeared before us for the respondent went into the issue of the apology published by the appellants at some length and argued that such an apology left no room for any defences as pleaded. We cannot decide that issue at this stage. As a last appellate court we would rather have the benefit of the reasoning by a judge of the superior court before we pronounce on Mr. Gautama's argument. That is how our judicial system functions. It is not a simple issue which we can or ought to decide in the first instance as the last appellate court.

We cannot, with respect, agree with the learned Judge when he said that the four-week delay in lodging the application to set aside the ex-parte judgment was too long. We keep in mind the fact that the courts go into Christmas vacation from 21st December to 13th January each year. In all the circumstances we do not think that the delay was so inordinate as to disentitle the appellants from being heard at the inter-parte hearing of the application dated 5th November, 1999.

For these reasons, we allow this appeal, set aside the ruling and all orders made by the superior court on 9th February, 2000, and substitute therefor an order setting aside the ex parte orders made on 2nd December, 1999 and order that the application dated 5th November, 1999 be set down for hearing inter partes before a Judge other than Patel, J. The appellants have liberty to file grounds of objection and replying affidavits if so advised within 15 days from today.

All costs occasioned and thrown away as a result of non-attendance on 2nd December, 2000 on the part of the appellants' advocates and all costs of the application dated 6th January, 2000 lodged on 11th January, 2000 will be paid to the respondent by the appellants. Such costs to be taxed if not agreed.

The appellant would however have costs of this appeal.

*Dated and delivered at Nairobi this 30th day of November, 2001.*

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**R.O. KWACH**

**.....**

**JUDGE OF APPEAL**

**A.B. SHAH**

**.....**

**JUDGE OF APPEAL**

I certify that this is
a true copy of the original.

**DEPUTY REGISTRAR**