



Mwale v Nation Media Group & 5 others (Civil Case E007 of 2022) [2024] KEHC 6384 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE E007 OF 2022
SC CHIRCHIR, J
MAY 30, 2024**

BETWEEN

JULIUS MWALE PLAINTIFF

AND

NATION MEDIA GROUP 1ST DEFENDANT

DAILY NATION 2ND DEFENDANT

TAIFA LEO 3RD DEFENDANT

THE DAILY MONITOR 4TH DEFENDANT

BUSINESS DAILY 5TH DEFENDANT

NATION TV 6TH DEFENDANT

RULING

1. Through Application dated 19th December 2022, the 1st defendant/ Applicant seeks for the following orders;
 - a. Spent
 - b. The plaint be struck out.
 - c. The order issued by this court on 7th December 2022 be set aside.
 - d. The plaintiff pays the first defendant pays the costs of the application and of the suit.
2. The applicants grounds in support are that;
 - a. The plaint does not disclose a reasonable cause of action against the first defendant.



- b. The plaintiff's claim is based on an alleged intention by the first defendant to publish defamatory material against him and that a case of defamation is based on actual publication and not a mere intention to publish.
 - c. That if the plaintiff's claim is based on the publication of the article dated 11th October 2021 as set out at paragraphs 19 to 22 of the plaint , the claim is time barred by dint of section 4 (2) of the *limitation of Actions Act* and the court has no jurisdiction to deal with the claim.
 - d. The first defendant is aggrieved by the ex-parte order made on 7th December 2022 as there was no legal basis for the grant of the order.
 - e. By the order of 7th December 2022, the court granted an interlocutory mandatory injunction based on a claim that is not valid and is time barred.
 - f. The second to sixth defendants as cited are not legal entities capable of suing or being sued.
3. The plaintiff neither filed any response to the Application nor submissions.

The Applicant's submissions

4. On whether the plaint discloses a reasonable cause of action, the Appellant has drawn the attention of the court to paragraph 12 of the plaintiff's plaint, where the plaintiff alleges that the defendant intends to publish false, offensive, spiteful, misleading information against the plaintiff . It is its submission that an offence for defamation cannot stand unless the words are actually published.
 5. The Applicant further submits that the 2nd and the 6th defendants are brands of the 1st defendant; that they don't have independent personality and are therefore incapable of being sued.
 6. On the whether the defendant has published any defamatory material regarding the plaintiff, they aver that the plaintiff has not demonstrated any defamatory publication made against him and that it cannot be held liable for a libel arising from a non-existing publication. In this regard the Applicant has relied on the case of *Time Magazine international Limited & another vs. Michael Fanuel Rotich & another* (2000) eKLR.
 7. The Applicant assert that the publication published on 11th October 2021 is time barred by dint of section 4(2) of the *limitation of Actions Act* and that the court lacks jurisdiction to entertain it therefore. It has relied on the case of *Wycliffe A. Swanya vs. Toyota East Africa Ltd & another* (2009) eKLR to buttress its submission in this regard.
 8. The Applicant feels aggrieved by the order issued by the court on 7th December 2022 on grounds that the plaintiff had not met the standards set out in *Giella vs. Cassman brown and Co. Ltd* (1973) EA 258 and *Micab Cheserem vs. Immediate Media services & 4 other* (2000) eKLR. They aver, for instance that on whether a *prima facie* case has been established the plaintiff had not provided the defamatory statement; that the allegations was based on intention.
 9. On the Article published on 1.10.2021 the Applicant submits that the same is 2 years old and therefore time- barred by dint of section 4(2) of the *Limitations of Actions Act*. Consequently, they further argued , this court has no jurisdiction to entertain it.
 10. They pray that the order granted on 7th December 2022 be set aside since the plaintiff had not met the test required in granting an injunction.
- Determination
11. The following issues arise for determination:



- a). whether this court has jurisdiction to entertain this Application.
 - b). whether the claim is time- barred.
 - c). whether the suit should be struck off
- whether this court has jurisdiction to entertain this suit
12. In this regard , the Applicant argues that if the claim is based on an Article published on 1.10.2021, then it is time – barred pursuant to the provisions of section 4(2) of the limitations of Actions Act and consequently this court has no jurisdiction to entertain it. The cited section of the limitations of ctions Act provides as follows: An action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued: provided that an action for libel or slander may not be brought after the end of twelve months from such date”
 13. In wybliffe swanya Vs Toyota East Africa ltd & Ano(2009)e KLR, cited by the Applicant the court stated that in cases of slander , the cause of action accrues from the date the slanderous remarks were made . In this case it would be the date of publication.
 14. I have looked at the Article complained of . It was published on 11th October 2021. The suit herein was filed in December 2022. It was therefore published two months after the limitation period for the tort of defamation. Within the context of section 4(2) of the limitations of Actions Act that part of the claim was time -barred and I hereby strike it off.
 15. Whether the entire suit should be struck off.
 16. The law on Striking out of pleadings Order 2 Rule 15 (1) of Civil Procedure Rules. It provides as follows: -
 - 1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
 - (2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.
 - (3) so far as applicable this rule shall apply to an originating summons and a petition.
 17. For a court to strike out a pleading, it must be proved that the plaint/ pleading was frivolous and a waste of the court’s time.
 18. The same principles to consider when striking out pleadings was laid down by Madan J.A in the case of “D.T. Dobie & Company (Kenya) Limited – Versus - Joseph Mbaria Muchina & Another Civil Appeal 37 of 1978 (1980) eKLR where he held :-

“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 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” Sellar L.J. (Supra) as far as possible, indeed not at all, there should be no opinion 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 the case before it”.

19. In a nutshell the above decision is a call for caution when striking out pleadings; that striking of suit or a pleading is such a draconian and drastic decision on litigation which should be resorted to sparingly as a very last resort. That if a pleading can be salvaged by an amendment then the plaintiff should be given a chance to amend.
20. In this case the action is based upon the tort of defamation. To sustain an action in libel, it is settled that the words used are material and they must therefore be set out verbatim in the particulars of the claim.
21. In *Royal Media services Ltd vs Valentine Mugure Maina* (2019) e KLR the court held: “A cause of action of an action in defamation suits arises as soon as the defamatory words are published. Indeed, strictly speaking, what is alleged to be libellous or slanderous only assumes that description upon the defendant relaying the words complained of to a party other than the party to whom they refer, only then can it be said that there is publication. It follows that publication, of itself, is an essential and necessary element in proof of defamation.”
22. Further order 2 Rule 7(i) of the *Civil procedure Rules* provide as follows: “Where in an action for libel or slander the Plaintiff alleges that the words or matters complained of were used in a 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.”
23. In this case, the applicant avers that the plaintiff has no reasonable cause of action since there was no defamatory material to start with as the plaintiff’s claim is based on an intention to publish by the 1st defendant, and not on actual publication.
24. In *Wright vs Clements* (1820) 3 cited in *Gatley on Libel and Slander* para 26 11. Abbot CJ. said:-
“The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground for action.”
25. In *Collins Vs Jones* [1955] 1 QB. 564 at page 571 Denning L.J. said
“A plaintiff is not entitled to bring a libel action in a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty. The court will require him to give particulars to ensure that he has a proper case to put before the court and is not merely a fishing one”.(Emphasis added)



26. Further in *Harrison Kariuki Mburu =Vs= National bank of Kenya & Credit Reference Bureau Africa Ltd*, HCC No. 97 of 2012, the court stated that in libel and slander the very words complained of are the facts on which the action is grounded. The court stated that: “a plaintiff in a libel action must set out with reasonable certainty in his pleadings the words complained of but also must be prepared to give such particulars as to ensure that he has a proper case to put before the court and is not merely fishing one in libel and slander the very words complained of are the facts on which the action is grounded if he cannot give the particulars he cannot be allowed to go on with the charge.” (Emphasis added)
27. In the plaint, the plaintiff avers that he learnt that the 1st to 6th defendants intends to distribute offensive, misleading and malicious information against him and the companies associated with him.(Emphasis added).
28. An intend in other words is a plan, aim, propose, aspire, desire, wish contemplate etc (Oxford Dictionary). In effect, in the plaintiff’s own words the act is yet to materialise. Further it is to say that the words complained of, within the finding in Harrison case (*supra*) which would otherwise constitute his cause of action don’t exist and therefore no cause of action exists.
29. For pleading to qualify as a pleading, it must disclose a course of action. That must be a minimum requirement . A pleading without a cause of action is dead on arrival . This what befalls this suit . The plaint as drafted has failed to disclose the tort of defamation.
30. In effect am in agreement with the Applicant that the suit does not disclose any cause of action. The defect in the claim can not be cured by amendment. To let it proceed to hearing will be a complete waste of time, and is not fair to both parties It must be struck off and which I hereby do.
31. On the setting aside the court order issued on 7th December 2022, I agree with the Appellant that to the extent that this suit was time- barred , then the court should not have entertain it. It follows that the Application which was riding on the same suit ,should not have seen the light of day.
32. In conclusion , I hereby proceed to make the following orders:
- a). The suit herein is hereby struck off.
 - b). The orders issued on 7th December 2022 are hereby set aside
 - c). The Applicant/ 1st Defendant shall have the costs of the suit and the present Application.

DATED ,SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 30TH MAY 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant

Mr. Ochieng for the Applicant

