



REPUBLIC OF KENYA



Njuki v Ntwiga (Civil Case E002 of 2024) [2024] KEHC 13854 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL CASE E002 OF 2024
LW GITARI, J
OCTOBER 31, 2024**

BETWEEN

HON ONESMUS MUTHOMI NJUKI APPLICANT

AND

WILBERFORCE NTWIGA DEFENDANT

RULING

1. The matter which was pending before this court is the Notice of Motion which was filed under a certificate of urgency and is dated 16/9/2024. The court granted ex-parte interim orders in terms of prayer 1&2 and directed that the respondent be served for the notice of Motion to be heard and determined inter -partes.
2. Upon being served the respondent filed a Preliminary Objection on the ground that the court lacks jurisdiction to entertain the suit in view of Sections 3, 4, 31, 32, 33, 34, 35, 36, 37 & 38 of the *Media Council Act*. It is also contended that the plaintiff has not exhausted the Statutory Dispute Resolution Mechanism under the Act.
3. The Plaintiff opposed the Pre-liminary Objection. The court directed that the Pre-liminary Objection be canvassed by way of written submissions. The defendant submits that;

Defendant's Submissions:

4. He submits that the only issue for determination is whether the court has jurisdiction to entertain this suit. He relies on the Supreme Court of Kenya decision in Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Limited and 2 Others (2012) eKLR where the Supreme Court stated that;

“ A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law..... that



the issue whether a court of law has jurisdiction is not a procedural technicality it goes to the very heart of the matter.”

5. The counsel has also cited the case of Owners of Motor Vessel Lillian “S” –v- Caltex Oil (Kenya) Ltd (1989) where the Court of Appeal held that, “jurisdiction is everything and without the court must down its tools”
6. The counsel submits that since the issue of jurisdiction has been raised as a point of law the court has to address it. That the nature and scope of a preliminary issue was raised in the case of Mukisa Biscuits Manufacturing Co- Ltd –v- Westend Distributors Ltd (1969) E.A 696 AT 700.
7. It is the contention by the defendant that the dispute is based on the provisions of Media Council Act which the plaintiff has cited at paragraph 16 of the plaint. That the plaintiff is bound by his own pleadings and relies on Patrick Muiru Kamunga –v- Kayliff Services Limited & Another (2021) eKLR for that proposition. The court stated that;

“Parties are bound by their own pleadings and therefore the contents of the plaint rightly bind the appellant.”
8. He has also cited Adetton Oladeji (NIG) Ltd –v- Nigeria Breweries PLC S.C 91/2002 where the court stated that it is trite that parties are bound by their own pleadings. The counsel has referred the court to the following cases where the same proposition was made- Raila Amolo Ondiga & Another-v- Independent Electoral & Boundaries Commission & 2 Others (2017) eKLR Ogando-v- Watu Credit Limited & Another (2024) KEHC 3074 (KLR)
9. The counsel submits that without any amendments, the plaintiff is bound by his own pleadings and his first port of call should have been the media complaints commission. The defendant submits that the plaintiff did not exhaust the dispute resolution Mechanism laid down under the Media Council Act.
10. He has submitted on doctrine of exhaustion and media complaints commission has entertained complaints which claim that the reputations are hurt and esteem lowered. The Counsel cited the Court of Appeal decision in Geoffrey Muthinji and Another- Samuel Muguna Henry & 1756 Others (2015) eKLR, Court of Appeal where the court stated that where Dispute Resolution Mechanism exists outside courts the same should be exhausted before the jurisdiction of the court is invoked. He also relies on Muchiri-Independent Electoral & Boundaries Commission & 3 Others (2024) KEHC 9980 (KLR), Idris Abdi Abudulahi –v- Ahamed Bashane & 2 Others (208) eKLR. Republic –v- Kenya School of Law & 2 Others Ex-Parte Kgaborone Tsholofelo Wekesa 209.
11. The contention is that the plaintiff did not exhaust the Statutory Dispute Resolution Mechanisms anticipated in law before invoking the inherent jurisdiction of the High Court. He submits that the existence of Statutory Dispute Resolution Mechanism denies the court jurisdiction to hear and determine the dispute.

Plaintiff’s submissions:

12. He submits that the fact that the plaintiff claims violations of the Media Council Act in the plaint does not indicate the plaintiff intention to be bound by it. That jurisdiction is determined by the Constitution and the Statute. He relies on Orange Democratic Movement –v- Yusuf Ali Mohamed & 5 Others.
13. The counsel for the plaintiff submits that Article 165(3) (b) of the Constitution vests on the High Court with jurisdiction to determine the question whether a right or fundamental freedom in the bill of



rights has been denied, violated infringed or threatened. That the plaintiff's case is based on violation of Article 33(3) of *the Constitution* where the plaintiff's reputation has been violated by the defendant in his quest to exercise their freedom of expression. That the case is one of violation of a fundamental right which gives the High Court the jurisdiction to hear and determine the matter.

14. The plaintiff argues that the *Media Council Act* only applies to Media Enterprises, Journalists Media Practitioners, foreign journalists and consumers of Media Services in accordance with Section 4 of the Act. That the defendant in this matter does not fall under Section 4 of the *Media Council Act*. The grievances under the Act are limited to grievances arising from publication or conduct of a journalist or media enterprise or actions done against journalists or media enterprise that interfere with constitutional freedom of expression of journalist or media enterprise.
15. The counsel relies on the case of Standard Limited & 2 Others –v- Christopher Darathi Murungaru (2016) eKLR.
16. He submits that the Media Complaints Commission is incapable of issuing the remedies. The plaintiff is seeking and there lacks jurisdiction to hear and determine the matter.

Analysis and Determination:

17. I have considered the Preliminary Objection by the defendant challenging the jurisdiction of this court to hear and determine the dispute at hand. I have also considered the submissions by the counsel appearing for the parties. The counsel for the defendant is contending that this court lacks jurisdiction as there exists an Alternative Dispute Resolution Mechanism which the plaintiff should have ran to before coming to seek remedy in the High Court.
18. I have considered the Pre-liminary Objection. The issue for determination is whether the Pre-liminary Objection has merits. It is trite law that a Pre-liminary Objection must be on a pure point of law. The leading authority on Pre-liminary Objection is the Court of Appeal decision in the case of Mukisa Biscuit Manufacturing Company Limited-v- West End Distributors Ltd (1969) E.A at page 700 where Law JA as he then was stated as follows:-

“ A Pre-liminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are objection to the jurisdiction fo the court, or a plea of limitation, or a submission that the parties are bound by the contract giving use to the suit to refer the dispute to arbitration.”

Sir Charles Newbold, P added the following:

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be pleaded if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

19. The defendant's Preliminary Objection is on the issue of jurisdiction which is a point of law. The plaintiff's claim as pleaded in the plaint is that the defendant published on his face book page some sensational story titled “Incinerator Case” and attached two screen shot photographs of the plaintiff.
20. The plaintiff avers that the words were false, malicious intended to disparage, be little and injure his character and reputation more so as the political big wig of Tharaka Nithi County, a husband, a father and a statesman in the eyes of the public. The plaintiff avers that the words printed by the defendant



are defamatory, are still circulating and is open to public access. In a nutshell the claim in the plaint is for defamation and misuse of the Print Media to maliciously injure the reputation of the plaintiff. The pre-ambule to the [Media Council Act](#) states that it is an Act of Parliament to give effect to Article 34(5) of [the Constitution](#), to establish the Media Council of Kenya, to establish the complainant's commission and for connected purposes.

21. Article 34 of [the Constitution](#) deals with the Freedom of the Media and, Article 34(5) provides that-

“Parliament shall enact legislation that provides for the establishment of a body which shall be independent of control by Government political interests or a commercial interests

- b) reflect the interests of all sections the society and
- c) set media standards and regulate and monitor compliance with those standards.”

22. There is nothing in [the Constitution](#) that outs or limits the jurisdiction of the High Court to hear and determine defamation claims, to the contrary the mandate of the commission is limited and does include the power to award damages in the event of defamation. Article 33 and 34 of [the Constitution](#) provides as follows:

“33. Freedom of expression

- (1) Every person has the right to freedom of expression, which includes—
 - (a) freedom to seek, receive or impart information or ideas;
 - (b) freedom of artistic creativity; and
 - (c) academic freedom and freedom of scientific research.
- (2) The right to freedom of expression does not extend to—
 - (a) propaganda for war;
 - (b) incitement to violence;
 - (c) hate speech; or
 - (d) advocacy of hatred that—
 - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
 - (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).
- (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

34. Freedom of the media

- (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).
- (2) The State shall not—



- (a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
 - (b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
- (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—
- (a) are necessary to regulate the airwaves and other forms of signal distribution; and
 - (b) are independent of control by government, political interests or commercial interests.
- (4) All State-owned media shall—
- (a) be free to determine independently the editorial content of their broadcasts or other communications;
 - (b) be impartial; and
 - (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.
- (5) Parliament shall enact legislation that provides for the establishment of a body, which shall—
- (a) be independent of control by government, political interests or commercial interests;
 - (b) reflect the interests of all sections of the society; and
 - (c) set media standards and regulate and monitor compliance with those standards.”

23. *The Constitution* has expressly recognized the freedom of expression and the media. However those freedoms cannot be expressed in a manner that violates the rights and fundamental freedoms of others. The courts will fight at an interpretation that seeks to express those freedoms in disregard of the rights and fundamental freedoms of others. The Media Freedom under *the Constitution* does not confirm an absolute right to speak or publish without responsibility Article 34 of *the Constitution* cannot be taken in isolation, it must be read together with other Constitutional provisions.

24. In the matter of Kenya National Human Rights Commission, the Supreme Court Advisory No.1/2012 the Supreme Court stated that, holistic interpretation means:

“Interpreting *the Constitution* in context. It is the contextual analysis of Constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history of the issues in disputes and of the prevailing circumstances.”

25. Interpretation of Article 34 should entail interpreting it against other articles of *the Constitution* and more so Article 28 which guarantees the right to human dignity and to have that dignity respected and



- protected. The right to person to the protection from unjustified invasion and wrongful hurt must be rooted in an orderly and decent system that protects the liberties.
26. All the provisions of *the Constitution* must apply in equal measure and Media Freedom cannot be exercised in a manner that denies, violates or threatens the right to human dignity under Article 28 of *the Constitution*. Article 22 of *the Constitution* guarantees a ‘persons’ right to institute court proceedings where his rights and fundamental freedoms are denied, infringed or threatened. Article 23 deals with reliefs which the court may grant.
 27. An analysis of the provisions of the Media Council is important at this point.
 28. Section 3 of the *Media Council Act* provides for the guiding principles and provides the council that committees shall be guided by the values and principle enshrined in *the Constitution*. And “3(2) In exercise of the right to freedom of expression, the persons specified under Section 4 shall-
 - (a) reflect the interests of all sections of the society
 - (b) be accurate and fair
 - (c) respect the personal dignity and privacy of others.
 - (d) demonstrate professionalism and respect for the rights of others. And,
 - (f) be guided by the national values and principles of governance set out under Article 10 of *the Constitution*.”
 29. Section 4 refers to media enterprises, journalists, media practitioners, media practitioners, foreign journalists accredited under this Act and consumers of media services.
 30. Sections 31, 32 and 33 provides for the functions of the complainants commission, the power of the commission in the discharge of its functions and the powers of the complaints commissions respectively.
 31. Section 6 sets out the function of the Media Council which includes to facilitate the resolution of disputes between the government and the media and between the public and media. The question is whether this court has jurisdiction to entertain the claim by the plaintiff. It has been held that jurisdiction is everything and without it a court downs its tools. See *Motor Vessel Lillians .S-v-*
 32. The court of Appeal in the *Standard Limited and two Others- v- Christopher Ndarathi Murungaru (2-16) eKLR* was dealing with an Appeal where the High Court, Ondunga J (as he then was) had dismissed pre-liminary objection raised by the appellant who were contending that the High Court had no jurisdiction to entertain a defamation claim against them because of the Freedom of the Media guaranteed under Article 34(2) of *the Constitution*. The Court of Appeal considered the issue “whether Article 34(2) of *the Constitution* bars the courts from entertaining determining and awarding remedies in defamation claims.
 33. In other words does hearing, determining and awarding remedies in a defamation claim by the courts of Kenya constitute State Control, interference or penalization of the media which is prohibited under Article 34(2) of *the Constitution*.”
 34. The Court of Appeal held as follows:-

“The assertion that Article 34 has ousted or otherwise limited the jurisdiction of the High Court under Article 165 of *the Constitution*, has in our view absolutely no substance. The court of Appeal went on to state that..... In this case we do not see anything in Article 34(5)



of *the Constitution* that even remotely approximates an ouster clause. Article 165 (3) (b) of *the Constitution* in every express terms confers a special jurisdiction on the High Court to enforce rights and fundamental freedoms, as follows:

Subject to clause (5) the High Court shall have-

- (b) jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, infringed or threatened.”

35. Article 34(5) of *the Constitution*, which provides for the establishment of a media regulatory body, there is absolutely nothing that constrains, limits or otherwise affects the jurisdiction conferred on the High Court by Articles 22, 23 and 165 (3) (b) to enforce rights and fundamental freedoms.”
36. The Court of Appeal did not overlook the provision of Section 38 of the *Media Council Act* but had this to say,
37. The commission has no power under Section 38 of the *Media Council Act* to award the kind of remedies that *the constitution* contemplates for violated or infringed rights and fundamental freedoms including a person’s right to reputation and dignity. It cannot therefore be seriously argued that such body is a substitute for the High Court in matters of enforcement of rights and fundamental freedoms as argued by the appellants.”
38. The decision of the court of Appeal binds this court by firstly- the Doctrine of “State decisis” which holds that precedents set by the Court of Appeal binds the High Court and should uphold them in order to ensure the effective functioning of the administration of justice.
39. Secondly by the system of the court which is enshrined under Article 164 (3) (a) of *the Constitution* which provides that the Court of Appeal has jurisdiction to hear appeals from the High Court. The Court of Appeal in the case of Standard Limited (supra) was dealing with the same issue which has been raised by the defendant in this court and the court set the precedent that *Media Council Act* does not oust the jurisdiction of the High Court as donoted by Article 165(3) (b) of *the Constitution* to determine the question whether a right or fundamental freedom in the bill of rights has been denied violated, infringed or threatened. For this reason I find that the Pre-liminary Objection is devoid of merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 31ST DAY OF OCTOBER 2024.

L.W. GITARI

JUDGE

