



REPUBLIC OF KENYA



KENYA LAW
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**Konosi v Adam & another (Civil Case 18 of 2020)
[2023] KEHC 344 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 18 OF 2020
HK CHEMITEI, J
JANUARY 26, 2023**

BETWEEN

WILFRED NYAUNDI KONOSI PLAINTIFF

AND

MAJID MOHAMED ADAM DEFENDANT

AND

JUDICIAL SERVICE COMMISSION THIRD PARTY

RULING

1. In his notice of motion dated February 9, 2021 the applicant prays for the following orders;
 - (a) That the honourable court be pleased to strike out the suit as against the defendant for not disclosing any reasonable cause of action against the defendant, being frivolous, vexatious and an abuse of the court process.
 - (b) That the honourable court be pleased in the alternative to declare the suit as against the defendant contra statute as the same is barred by the provisions of the *Judicial Service act* No 1 of 2011.
2. The application is based on the grounds thereof and the sworn affidavit of the application dated the same date.
3. The applicant admits writing a letter to the third party complaining herein against the plaintiff who is an advocate. The said letter was in respect to the unsuitability of the plaintiff to be considered in a position of judgeship which he was being interviewed for.



4. The plaintiff aggrieved by the contents of the said letter filed this suit seeking damages against the applicant. The applicant did file his defence and at the same time sought to enjoin the third party which application was allowed.
5. The third party has since filed its defence denying the plaintiff's allegation and sought to exonerate itself by arguing that whatever it did during the interview was proper and within the law and it did not find any reason as suggested by the applicant to consider the applicant's impugned letter defamatory or at all.
6. The applicant on his part does not find the suit brought within the proper ambit on the law of defamation. He deponed that the same was contrary to the provisions of section 45 (3) ,30(5) among others of the fifth schedule of the *Judicial Service Act*. He further deponed that the defence by the third party had sanitised and exonerated him.
7. He said that the proceedings against him were causing great anxiety and mental anguish and they ought to be dismissed. He noted that all that he did in writing the letter was purely a civic duty to inform the third party of who the plaintiff was.
8. The respondent vide his replying affidavit dated August 1, 2022 has opposed the application on the grounds that it runs foul the provisions of order 2 rule 15(2) of the *Civil Procedure Rules* by adducing evidence in support of the application.
9. The respondent finds the published letter malicious and defamatory as it was published to the members of the third party who then broadcasted to the whole world during the interview and that the same could still be accessed by whoever desires. He deponed that the provisions of section 45 (3) of the Judicial Service Commission Act does not apply in this case.
10. When the matter came up for directions the court ordered the parties to file written submissions which they have complied. The third party however did not participate in any way in this application.
11. This court does not wish to reiterate the contents of the submissions save to add that it has perused the same together with the cited authorities. Basically the same are reiterating the contents of their rival affidavits.
12. One of the basic issue for determination is whether the plaintiff's suit against the defendant is frivolous for not disclosing any cause of action against him. There is no doubt that what is contentious here is the letter dated May 27, 2019 written by the applicant to the third party. According to the plaintiff the contents therein were not only false but were as well malicious. As a result, he filed the suit for damages among other prayers.
13. The court has perused the pleadings herein by all the parties. The issues raised in the application are a mixture of law and facts. The question of whether the impugned letter was defamatory or not cannot be determined by this court in this application. The parties must subject it to oral evidence wherein cross examination shall be required.
14. In this regard the provisions of order 2 rule 15 of the Civil Procedure Rules requires adduction of evidence. This is not possible for the court to determine its veracity or otherwise at this stage via affidavit evidence. The issue of malice for instance is a factual fact which must be scrutinised by cross examination of the party alleging it.
15. Although the provisions of section 45 of the *Judicial Service Act* are clear, this court is of the considered view that going by the multiplicity of prayers sought by the plaintiff, it will not be safe to interrogate it for now except when all the parties have been granted the chance to state their case in a full trial.



16. For the above reasons, it is my view that it may be prejudicial to discuss the other issues raised by the applicant as they all go into the root of the case. The oxygen rules and the provisions of article 159 of the Constitution which the applicant seeks to rely on does not apply for there are clear provisions under the Civil Procedure Rules and the Judicial Service Act which clearly the parties ought to subject themselves to.
17. Finally seeing that the main contention is the letter mention above, it will be in the interest of justice and the parties herein that the applicant remains in this suit to the very end and demonstrate what he has stated in his defence. The consequence of the letter is critical for all the parties including the third party who despite not participating in this proceedings will play a critical role ultimately in helping the court to arrive at a comprehensive decision.
18. Consequently, the application is hereby disallowed with costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 26TH DAY OF JANUARY 2023.

HK CHEMITEI.

JUDGE

