



REPUBLIC OF KENYA



KENYA LAW
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**Tipper v Rosborg (Civil Case E002 of 2022)
[2022] KEHC 16811 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16811 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE E002 OF 2022
TM MATHEKA, J
DECEMBER 20, 2022**

BETWEEN

ANNIE MARIE TIPPER PLAINTIFF

AND

SARAH ROSBORG DEFENDANT

RULING

1. On January 28, 2022 the Plaintiff Anne Marie Tipper file a suit against Sarah Rosborg seeking orders;
 - a. A permanent injunction restraining the Defendant either by herself, her servants, agents and/or proxies from publishing, printing and/or circulating defamatory material about the Plaintiff or injurious to her reputation.
 - b. General Damages for Libel and/or Defamation.
 - c. Exemplary and Aggravated Damages for Libel and/or Defamation.
 - d. Order for retraction of and suitable public apology for the said defamatory materials or publication.
 - e. Costs of this suit.
 - f. Interests on (b) and (c) above.
 - g. Any other further relief that this Honourable Court may deem fit and just to grant in the circumstances.

The basis of the claim was that the defendant published in a WhatsApp Group named Play Kenya Managers words that were libelous and defamatory.



2. This was denied via the defendant's undated defence filed on February 18, 2022. The defendant at paragraph 8 denied the jurisdiction of this court to hear the case and notified that she would be raising a preliminary objection on the same.
3. The plaintiff's reply to the defence dated February 19, 2022 insisted that the cause of action arose within the jurisdiction of this court as Rafiki Mwema Therapeutic Centre, the locus of this suit is located in Nakuru, Kenya . The defendant is the director of the Rafiki Mwema Incorporated, a registered charity in Australia, Rafiki Mwema Therapeutic Centre is a home in Nakuru, where the plaintiff is the chairperson.
4. The defendant filed Notice of Motion dated March 17, 2022 brought under Sections 1A, 1B, 3A, 15 of the *Civil Procedure Act* seeking;
 1. THAT this Honourable Court be pleased to declare the suit fatally defective and an abuse of the court process.
 2. THAT the suit be struck out
 3. THAT the costs of this application be borne by the respondent.

On the grounds

- a. This honourable court does not have jurisdiction to hear and determine this matter since the applicant resides, carried on business and works for gain in Australia and was in Australia at the time when suit was instituted.
 - b. That the suit offends the provisions of Section 15 of the *Civil Procedure Act*, which provides that a suit should be instituted where the defendant resides, carries on business or works for gain, the defendant in this case resides in Australia and was in Australia at the time the suit was instituted.
 - c. That the said cause of action arose on a messaging platform where several members of the organization 'Rafiki Mwema' were in and therefore the court lacks jurisdiction.
 - d. The suit is fatally defective and an abuse of the court process due to the courts lack of jurisdiction.
 - e. That the plaintiff's suit should be struck out with costs.
5. The respondent opposed the application vide Replying Affidavit sworn on March 28, 2022 where she pointed out that she is the former chairperson and founder of Rafiki Mwema Therapeutic Center a community based organization that conducts community based programs based on the Therapeutic Play Therapy for abused child in Kenya and that the cause of action arose in Nakuru County within the Republic of Kenya and that Rafiki Mwema Therapeutic Centre which defamatory statements by the Applicant relate to is registered in Kenya at Mbaruk in Nakuru.
 6. She averred that the defamatory statements complained of could only refer to the leadership of the home and/or center called Rafiki Mwema and that Rafiki Mwema Incorporated based in Australia is merely a vehicle used by the Applicant to solicit and gather funds to support the physical center here in Nakuru County within the Republic of Kenya and that the information disseminated by the Applicant related to the operations of therapeutic home here in Kenya.



7. The parties agreed to proceed by way of Written Submissions. The applicant set out two(2) issues for determination;
- i. Whether the Preliminary Objection raised on Section 15 of the Civil Procedure Act is relevant.
 - ii. Whether the Honourable court has jurisdiction to hear and determine this case.
8. The applicant argued that based on the definition of Preliminary Objection in *Mukhisa Biscuit Manufacturing Co Limited vs West End Distributors Limited (1969) EA 969* as quoted in *David Karobia Kiiru vs Charles Nderitu Gitoi & Another [2018] eKLR*. Section 15 of the Civil Procedure Act provides for territorial jurisdiction when one is filing suit.

15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—
- (a) a) The defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
 - (b) b) Any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
 - (c) c) The cause of action, wholly or in part, arises.

Explanation.(1)—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation.(2)—A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Explanation.(3)—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

- (i) The place where the contract was made;
- (ii) The place where the contract was to be performed or the performance thereof completed;
- (iii) The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

Illustration.—(a) A is a tradesman in Nairobi. B carries on business in Mombasa. B by his agent at Nairobi buys goods of A and requests A to deliver them to Mombasa by rail. A may



sue B for the price of the goods either in Nairobi, where the cause of action has arisen, or in Mombasa, where B carries on business.

Illustration.—(b) A resides at Kisumu, B at Nairobi, and C at Mombasa. A, B, and C being together at Nakuru, B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Nakuru, where the cause of action arose. He may also sue them at Nairobi, where B resides, or at Mombasa, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court.'

10. Giving emphasis to Section 15(a) the defendant argues that the suit ought to have been filed in Australia, where she works and resides, further that the mobile app where the words were shared contains people who are from different jurisdictions.
11. The defendant relied on;
 - i) *W K & 2 Others vs British Airways Travel Insurance & Another [2015] eKLR*, where the insured who was deceased bought an insurance cover in England where she was resident. The plaintiff in the matter sought to enforce the deceased's insurance policy in Kenya but the 2nd defendant raised a preliminary objection on jurisdiction and it was his argument that since the insurance cover was made in England it should be performed in England and England law should apply to the policy which the plaintiff seeks to enforce. Furthermore, the 2nd defendant did not have a place of business in Kenya and did not reside in Kenya. The court held that the court did not have jurisdiction, it further allowed the preliminary objection, and in extension struck out the plaintiff's suit.
 - ii) *Executive Super Riders Limited vs Alber Jaocquinne Osumba (2020) eKLR* the court relied on Section 15 of the *Civil Procedure Act* and held that it did not have jurisdiction to entertain the suit filed before it and the same was transferred to Milimani Commercial Court for determination. This further emphasizes that if a court does not have jurisdiction it should not by any means entertain a matter placed before it.
12. The plaintiffs/respondent's submissions were filed on April 28, 2022. Two issues set out for determination;
 - i) Whether this court has jurisdiction to hear and determine this case.
 - ii) Whether defendant/applicant has made a case for striking out the suit.
13. Needless to say, it is trite that jurisdiction is everything without which a court must down its tools (see *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Justice Nyarangi of the Court of Appeal (as he then was) held as follows: -

' I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'
14. The above is in respect of general jurisdiction of courts. The question in this application is on the court's geographical or territorial jurisdiction.



15. The plaintiff emphasized the source of the court's jurisdiction, citing the Supreme Court decision in *Samwel Kamau Machar & Another vs Kenya Commercial Bank & 2 Others [2012] eKLR*.
- ' A Court's jurisdiction flows from either the *Constitution* or Legislation or both. Thus court can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law the Court must operate within the Constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.'
16. The respondent relied on Article 165 (3) of the *Constitution* which provides for unlimited original jurisdiction of the High Court. It was argued that on the basis of the nature of the claim, (the tort) of defamation as per the Kenya Law, a civil claim lies within the jurisdiction of this court. Secondly that the cause of action arose within the jurisdiction of this court.
17. It is correct that Section 15 of the *Civil Procedure Act* provides for the territorial jurisdiction of the court giving preference for the place of filing to be where the defendant lives/resides, carries out his business. It states
- ' Subject to the limitations aforesaid, every suit shall be instituted within the local limits of whose jurisdiction
- a) The defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit actually and voluntarily resides or carries on business, or personally works for gain.'
18. There is no dispute that the applicant lives in Australia. However, it is clear that her organization Rafiki Mwema Trust, though incorporated in Australia, has a home based in Nakuru where the plaintiff was working. Her organization in Australia lobby's for funding for the home in Kenya, and the plaintiff was running that place in Kenya. In effect the work of the defendant's organization and that which the plaintiff manages are tied, in effect both the plaintiff and the defendant work for the same organization in different jurisdictions.
19. There is nothing to show that the cause of action arose in Australia. What stands out and is incontrovertible is that the alleged defamatory information disseminated by the Applicant related to the operations of the therapeutic home based here in Kenya. The applicant has not disputed that Rafiki Mwema Therapeutic Centre is registered in Kenya at Mbaruk in Nakuru. However, the issues the plaintiff is complaining about are to do with the defendant's allegations with respect to how the plaintiff managed the Rafiki Mwema Therapeutic Centre in Nakuru. The authorities cited by the respondent have interpreted the application of Section 15 of the *Civil Procedure Act*. That there is both territorial and legal jurisdiction. This territorial jurisdiction is about the courts 'administrative jurisdiction', a convenient forum for 'instituting a suit'. But it is the words of Odunga J (as he then was) Mwera J (as he then was) in *Justus Kyalo Mutunga vs Labh Singh Harnam [2012] eKLR*, that the filing of a case outside the jurisdiction as per the mandatory requirement of Section 15 of the *Civil Procedure Act* does not make it a nullity, because that mandatory nature of s. 15 (a) is qualified by Section 15 (b) where leave can be granted to file suit away from the local limits of the defendant or the defendant can acquiesce to such filing .
20. In the same breath, there is the requirement for reasonableness in determining the issue of territorial jurisdiction; the court must consider the availability of evidence, the conveniences and expertise of the trial with respect to the two (2) countries, in this one Australia and Kenya, more important 'Whether



the defendant genuinely desires trial in a foreign country or [is] only seeking procedural advantage whether the plaintiff will be prejudiced by having to sue in a foreign court.'

21. Clearly in the circumstance of this case and the times we live in, of leveraging technology for purposes of access to justice, the specific physical territorial court loses its hold. Today the use of technology has broken the hold of land and brick and mortar so to speak, and even filing of cases, is not necessarily done at the court house but through electronic filing. A party need not attend court physically and or have their suit heard from wherever they are on the globe.
22. My take is that where the parties had to attend the physical court building, a plaintiff could do the oppressive thing of filing the suit at the furthest court from the defendant, then Section 15 (a) of the Civil Procedure Act would bring a cure to that situation.
23. In the circumstances of this case, the defendant has not established what prejudice she will suffer by filing of this case here. In any event, the plaintiff may suffer prejudice because the issue is the management of Rafiki Mwema Therapeutic Home based in Nakuru, Kenya.
24. The evidence, the witnesses are here, and though the forum where the words were published is an electronic platform, made of people of different jurisdiction, at the end of the day, their testimony can be availed through electronic means by use of technology.
25. Of greater importance is that the court has by virtue of Article 165 (3) of the Constitution, the legal jurisdiction to hear this matter. In the circumstances of this case the defendant does not appear to desire a trial in Australia, but just take advantage of the technicality.
26. Evidently this court has both the territorial and legal jurisdiction to hear and determine the matter
27. That brings us to the issue whether the suit ought to be struck off.
28. In *Yaya Towers Limited Vs Trade Bank Limited (In Liquidation) (Civil Appeal No 35 of 2000)* the court expressed itself thus:

' A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial. It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.
29. The applicant wants the plaintiff's suit struck out for want of territorial jurisdiction. It is clear want of that is not fatal to a suit. In any event I am satisfied that the accuse of action arose within the jurisdiction of this court and the defendant will not suffer nay prejudice as none has been demonstrated, if this case proceeds from here. In the instant case the applicant has not advanced any grounds for striking out the present suit as elucidated in the above precedents.
30. I find the application devoid of merit and dismiss it with costs to the respondent.
31. Orders accordingly

Dated, signed and delivered via email this 20th December, 2022.

Mumbua T. Matheka,



Judge.

C/A Edna

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