



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 414 OF 2011**

**HON.MBUVI GIDEON KIOKO.....PLAINTIFF**

**VERSUS**

**DAVID OCHAMI.....1<sup>ST</sup> DEFENDANT**

**BEAUTTAH OMANGA .....2<sup>ND</sup> DEFENDANT**

**WILLIS OKETCH.....3<sup>RD</sup> DEFENDANT**

**THE STANDARD GROUP LIMITED.....4<sup>TH</sup> DEFENDANT**

**NATION MEDICAL GROUP.....5<sup>TH</sup> DEFENDANT**

**RADIO AFRICA LIMITED.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff instituted this suit vide a plaint dated 26<sup>th</sup> September, 2011 seeking damages for alleged defamatory publications. The claim was denied by the Defendants.

2. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a Preliminary Objection dated 13<sup>th</sup> March, 2018 on the following grounds **that the court’s jurisdiction under Article 165(3) (b) of the Constitution of Kenya 2010 has not been invoked as provided for under Article 22(3) of the Constitution of Kenya 2010 and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 thus the court lacks jurisdiction to hear the suit as filed.**

3. The Preliminary Objection was disposed of by way of written submissions filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the Plaintiff. The 5<sup>th</sup> & 6<sup>th</sup> Defendants took no position in respect of the Preliminary Objection and left the matter for the court to decide.

4. The issue herein is whether this court has the requisite jurisdiction to entertain the suit herein. As encapsulated in the case of **The Owners of Motor Vessel “Lillian s” v Caltex Oil Kenya Ltd [1989] KLR 1** thus:-

**“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”**

5. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted on Article 34(1) of the Constitution on the guarantees regarding the freedom of the media. It was submitted that Article 33(3) does not apply to the media in the same manner that it applies to other persons as Article 34 treats the media as a special person. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants further argued that the jurisdiction exercised by the court in defamation cases is that granted under Article 165 (3)(a) as read together with Article 33(3) of the Constitution and the Defamation Act. That Article 34(1) takes away that jurisdiction in respect of the Media.

6. The Plaintiff’s side in opposition to the Preliminary Objection submitted, *inter alia*, that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants interpretation of Article 34 is lopsided and contended that the freedom of the Media is not absolute.

7. Both parties relied substantially on the Court of Appeal decision in **Standard Ltd & 2 others v Christopher Ndarathi Murungaru [2016] eKLR**. In the said case where the objection raised is similar to the one herein, the Court of Appeal held as follows:

**1. The court found that Article 34 protects the media by summarily stating that the media is a special person with rights and freedoms that are superior to the rights and freedoms of other persons. Such a provision is seen to derive from a long history of censorship and abuse of the freedom of expression and independence of the press.**

**2. Other Constitutions of different jurisdictions for example USA have also expressly provided for freedom of the press and recognized freedom of the press as a specific incidence of freedom of expression.**

**3. The Supreme Court stated that the Constitution of Kenya should be interpreted in a holistic manner, adopting Article 28 which guarantees every person inherent dignity. Therefore only interpreting Article 34 counteracts the meaning of holistic interpretation of the Constitution. This ensures the Constitution maintains a rational explication of what it must be taken to mean.**

**4. The assertion that Article 34 has ousted or limited the jurisdiction of the High Court under Article 165 of the Constitution has absolutely no substance in essence Article 165(3)(b) confers special jurisdiction on the High Court to enforce rights and fundamental freedoms.**

**5. Article 34(5) provides for the establishment of a media body which has absolutely nothing to do with limiting the jurisdiction of the High Court conferred to it by Articles 22,23 and 165(3) (b). In addition Article 23(2) empowers court to grant appropriate relief to any person whose right or fundamental freedom is infringed, violated denied or threatened. The reliefs include declaration of rights, an injunction, a conservatory order, invalidity of any offensive law, an order of compensation and an order of judicial review.**

**6. The appellants argued that the media complaints commission is a self-regulatory body which provides remedies in case of breach of the code of conduct by journalists. It has no powers to award the kind of remedies the Constitution states for violation or infringement of rights and fundamental freedoms. Such a body is therefore not substitute of the High Court in matters of enforcement of rights and fundamental freedoms.**

8. The Court of appeal further encapsulated as follows:

**9. “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.....In our view, such express jurisdiction cannot be ousted or limited by implication, as the appellants assume. In our reading of Article 34(5) of the Constitution, which provides for the establishment of a media regulatory body, there’s 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. The Media Complaints Commission, whose membership is largely drawn from media and related practitioners, is first and foremost in the nature of a self-regulatory body that provides remedies in cases of breach of the code of conduct by journalists. The Commission has no powers 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 a body is a substitute for the High Court in matters of enforcement of rights and fundamental freedoms, as argued by the appellants.”**

9. This court is bound by the said decision. I find the Preliminary Objection misplaced and I hereby dismiss the same with costs.

**Date, signed and delivered at Nairobi this 29<sup>th</sup> day of May, 2020**

**B. THURANIRA JADEN**

**JUDGE**