



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO 39 OF 2018

ANTHONY NJEHU BORO.....PLAINTIFF

VERSUS

STANDARD GROUP PLC.....1ST DEFENDANT

JAMES MWANGI.....2ND DEFENDANT

THE NAIROBIAN.....3RD DEFENDANT

MARGARET KARUNGARI KARANJA.....4TH DEFENDANT

CHRISTOPHER NDUNGU KARANJA alias KRIS KARANJA.....5TH DEFENDANT

RULING

1. On 14th December 2018, the Plaintiff herein, **Anthony Njehu Boro** filed a suit against the five Defendants herein, namely, **Standard Group PLC, James Mwangi, The Nairobiian, Margaret Karungari Karanja and Christopher Ndungu Karanja** aka **Kris Karanja** (the 1st to 5th Defendants, respectively) seeking damages for defamation. The Defendants subsequently entered appearance and filed their defence statements.

2. On 14th February 2019, counsel for the 1st, 2nd and 3rd Defendants filed a Notice of Preliminary Objection (Preliminary Objection) based on two grounds as follows:

“ a. The Court lacks jurisdiction, to hear a suit for defamation against the media , , by virtue of the provisions of Article 34(1) of the Constitution, or (to) grant the remedies sought, by virtue of the provisions Article 34(2) of the Constitution regarding the enforcement of a person’s right under Article 23(3) of the Constitution.

b. The jurisdiction under Article 165 (3) (b) of the Constitution has not been invoked as provided for under Article 22(3) of the Constitution and the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, that the Court lacks jurisdiction to hear the suit as filed and (to) grant reliefs contemplated under Article 23(3) of the Constitution”. (sic)

3. It appears that the counsel for 1st to 3rd Defendants filed submissions directly with the Preliminary Objection, and on 25th March 2019 the Plaintiff also filed written submissions. However, only the Plaintiff attended Court on 20th November 2011 for the oral canvassing/highlighting of the submissions. The 4th and 5th Defendants did not participate in the proceedings relating to the objection.

4. The main thrust of the Preliminary Objection as I understand it is that:

a. This Court is a state organ pursuant to the definition of a state organ contained in Article 260 of the Constitution.

b. Article 34 of the Constitution insulates the media, in the exercise of its freedom under Article 34, from the control of and interference by any state organ including a Court, save with regard to criminal acts proscribed by Article 33(2).

c. Pursuant to the limit on the court’s authority proscribed in Article 34, the Court cannot take cognizance of or adjudicate over a

claim against the media that is based on the tort of defamation as Article 33(3) that places a limit on the exercise of the right to freedom of expression does not apply to the media.

d. By dint of the provisions of Article 34(5) and the provisions of the Media Council Act, the Media Complaint Commission exercises original jurisdiction to hear and determine defamation cases against Media.

e. The High Court has no jurisdiction to hear and determine claims against the media brought whether presented as civil suits or petitions under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (commonly referred to as **“The Mutunga Rules”**).

5. The Court was therefore urged to strike out the Plaintiff’s suit.

6. The Plaintiff’s answer is that the Preliminary Objection raises matters of evidence and therefore does not meet the criteria of a pure point of law as enunciated in **Mukisa Biscuits Manufacturing Company Ltd V West End Distributer Ltd [1969] E.A 696**.

7. The Plaintiff asserts that a suit for defamation falls within the exceptions found in Article 33(3) of the Constitution and that in such instance, the Court plays the role, not of a state organ but that of an arbiter between disputants, and is empowered by Article 23(3) to grant appropriate relief. The Plaintiff takes the view that the Court’s role therefore cannot be said to amount to the specific actions – state control and interference of media - prohibited by Article 34(2). The Plaintiff urged a holistic reading of Articles 23,28,31,33 and 34 of the Constitution and urged the Court to find that the rights and fundamental freedoms of the media ought to be exercised in a manner that does not violate the rights and fundamental freedom of other persons that are also guaranteed by the Constitution. The Plaintiff asserted that the unlimited jurisdiction of this Court to entertain his claim flows from the provisions of Article 165 (3) of the Constitution. The Plaintiff urged the Court to dismiss the Preliminary Objection.

8. The Court has considered the Preliminary Objection and the rival submissions by the parties and the authorities relied on. First of all, as stated in the **Mukisa Biscuits Case**:

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

9. Despite citing several authorities on the nature of a preliminary objection the Plaintiff did not demonstrate the matters of fact raised by the instant preliminary objection. It is fair to state, that the central issue raised in the Preliminary Objection is one of jurisdiction, and from a consideration of all the arguments made by the parties, the basic facts relating thereto are not disputed. Such include the nature of the claim before the Court. The claim before the Court is a civil claim for damages that is grounded on the tort of defamation. The Preliminary Objection is therefore well qualified as it raises a pure point of law.

10. Fortunately, it is not a novel point of law as a similar preliminary objection have been raised before the High Court concerning suits similar to the present one. Indeed, in **Christopher Ndarathi Murungaru versus Standard Limited and 2 Others (2012) eKLR**, the Defendant in the case objected to the jurisdiction of the High Court to entertain the defamation suit by the Plaintiff therein. Having heard the parties, **Odunga J** was not persuaded and dismissed the preliminary objection, prompting an appeal by the Defendant in the Court of Appeal (**Standard Limited & 2 Others vs Christopher Ndarathi Murungaru (2016) e KLR**).

11. The Court of Appeal equally dismissed the appeal and for good measure, ended its judgment with a quote in **Pennkamp versus Florida 328 US 33 (1946) (per Justice Frankfurter)** to the effect that:

“Power in a democracy implies responsibility in its exercise. No institution in a democracy, either government or private, can have absolute power.”

12. Article 33 and 34 of the Constitution by text and spirit embody the above truism. While Article 33(1) guarantees the right to freedom of expression, sub article 2 limits the expression of that freedom from extending 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)

13. Sub article 3 contains the following injunction;

“In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”

These include the right to human dignity (Article 28) and to privacy (Article 31) among others. Article 34 specifically provides for the freedom of the media providing that:

“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) penalize any person for any opinion or view or content of any broadcast, publication or dissemination.

3.....

4.....

5.....”

14. The Court of Appeal in **Standard Limited and 2 others versus Christopher Ndarathi Murungaru** echoed the words of the Supreme Court in **Communication Commission of Kenya and 5 others versus Royal Media Services Ltd and 5 others, SC Petition No. 4 of 2014** in describing the historical background to the inclusion of these provisions in the Constitution of Kenya 2010:

“There is no doubt that the history of egregious favouritism, official interference and arbitrary licensing regimes, coupled with low state tolerance for dissent, informed the constitutional guarantee for freedom and independence by the media. The blatant violation of the right to the private property of the owners of media printing works and newspapers is a path the Constitution and work want to continue.”

15. In considering the true extent of the limitation to the freedom of media guaranteed under Article 34 of the Constitution, this Court can do no better than cite in *extenso* the words of the Court of Appeal in **Standard Limited and 2 others versus Christopher Ndarathi Murungaru**:

“Turning back to Article 34, the appellants contend that the only limitation to freedom of the media allowed by the Constitution is engaging in propaganda for war, incitement to violence, and hate speech or advocacy of hatred of the nature specified in Article 33(2) (d). In arriving at that conclusion, we are afraid that the appellants have chosen to look at Article 34 in isolation, without due regards to other provisions of the Constitutions. A tool of interpretation of the Constitution that confines each provision of the Constitution or guaranteed right and fundamental freedom into airtight silos, without due regard to how they relate to each other and to the whole, is to be completely eschewed. As regards interpretation of the Constitution, the Supreme Court, in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* (*supra*), stated that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. On what constitutes holistic interpretation, the same Court in *In the Matter of the Kenya National Human Rights Commission, S.C. Advisory Opinion Ref. No. 1 of 2012* stated that holistic interpretation means:

“interpreting the Constitution in context. It is the contextual analysis of a 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 dispute, and of the prevailing circumstances.”

Adopting a holistic interpretation of Article 34 of the Constitution entails considering and interpreting it against other provisions of the Constitution, in particular Article 28, which guarantees every person inherent dignity and the right to have that dignity respected and protected. The inexorable link between dignity and reputation was well articulated by *Justice Porter Stewart* of the US Supreme Court in *Rosenblatt v. Baer* (1966) 382(US) 75 at 92, as follows:

“The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.”

Lord Nicholls of the House Lords was of the same mind in *Reynolds v. Times Newspapers Ltd* [1999] 4 All ER 609 when he stated thus:

“Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society, which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one’s reputation.”

(See also *Hill v. Church of Scientology* [1991] 126 DLR 129).

To adopt the interpretation of Article 34 of the Constitution advocated by the appellants would amount to stripping bare the right to dignity guaranteed by Article 28 of the Constitution. An interpretation of the Constitution that destroys one or some of its provisions or renders them otiose, or results in anomalous or illogical conclusions cannot be countenanced. (See *Centre for Human Rights & Awareness & 2 Others v John Harun Mwau & 6 Others*, CA. Nos. 24 & 82 of 2012”).

16. The Court of Appeal further considered the asserted ouster of the High Court’s jurisdiction under Article 34 (2) of the Constitution, and dismissed the notion, by stating:

“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 *Judges & Magistrates Vetting Board & 2 Others v The Centre for Human Rights & Democracy & 11 Others*, SC. Petition Nos. 13A, 14 and 15 of 2013, the Supreme

Court said the following on ouster clauses:

“Ouster clauses are provisions in the Constitution or a statute that take away, or purport to take away the jurisdiction of a competent Court of law. They deny the litigant any judicial assistance in the relevant matter, and at the same time deny the Courts the scope for making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtail the jurisdiction of the Court, as the relevant matter is rendered non-justiciable before the Courts.”

While, as the Supreme Court held in that case, an ouster clause in clear, firm and unequivocal language will be given effect subject to satisfying a number of relevant considerations, 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 very 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-

(a)...

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

Clause (5) to which the provision is subject is not relevant to the issue in this appeal. Article 22 of the Constitution further confers on every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened, and by dint of Article 23(2) the court is empowered to grant appropriate relief, including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any offensive law, an order of compensation and an order of judicial review.

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”.

17. The foregoing is true of petitions brought to enforce rights and fundamental freedoms as well as civil suits seeking remedy in respect of tortious actions. The action before this Court relates to the tort of defamation. Article 165 (3) (a) vests in the High Court an unlimited original jurisdiction in criminal and civil matters. Neither Article 34(5) (c) nor sections 6 and 31 of the Media Council Act can be construed to confer jurisdiction on the Media Complaints Commission to hear and determine a dispute such as the one before the Court and to award damages. Thus, I unreservedly agree with **Odunga J** in **Christopher Ndarathi Murungaru** that:

“However, it was not the desire of the people of the Republic of Kenya to give the media a free hand in publishing offending materials as that conceived (sic) Article 34. Accordingly, I do not accede to the argument that by enacting Article 34 the people of the Republic of Kenya divested themselves of the right to resort to Courts of Law in order to protect their reputation, privacy and dignity under Articles 28 and 31 of the Constitution.”

18. For these reasons, the Court is not persuaded that the Preliminary Objection has any merit and will dismiss of with costs to the Plaintiff.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 25TH DAY OF JUNE 2020

C. MEOLI

JUDGE