



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 247 OF 2016

JASPER NDEKE SHADRACK.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....1ST DEFENDANT

P. KEMOI NG'ENO.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff herein filed suit against the Defendant herein on 23rd September 2016. His Complaint dated 22nd September 2016 sought the following reliefs against the Defendants on account of a defamatory article that was carried in the Defendant's Publication, known as "The Nairobiian":-

- a. General damages.**
- b. Exemplary and aggravated damages.**
- c. Costs of this suit.**
- d. Interest.**
- e. Any other further relief this court may deem fit to grant.**

2. The Defendants filed their Statement of Defence dated 25th October 2016 on the same date. On 20th March 2018 they filed a Notice of Preliminary Objection dated 19th March 2018 in which they stated that the court's jurisdiction under Article 165 (3) (b) of the Constitution had 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" and hence the court lacked jurisdiction to hear the suit herein.

3. The Plaintiff's Written Submissions in respect of the aforesaid Preliminary Objection were dated 5th May 2018 and filed on 9th October 2018 while those of the Defendants and their List of Authorities were both dated and filed on 15th October 2018.

4. When the matter came up on 15th October 2018, the parties requested the court to deliver its decision based on their Written Submission which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. The crux of the Defendants case was that the court had no jurisdiction to hear and determine a defamation matter on the grounds. **THAT:-**

1. The State, which includes the three (3) arms of Government 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 the content of any broadcast, publication or dissemination.

2. Article 34 of the Constitution of Kenya has imposed a limit on the court's jurisdiction to hear matters under Article 33 (3) of the Constitution of Kenya which are matters on tort but donates power to courts to hear criminal aspect of contravention of Article 33 (2) of the Constitution of Kenya.

3. The High Court is required to supervise tribunals such as the Media Complaints Commission under Article 165 (6) of the Constitution of Kenya and make any order or give any directions it considers appropriate to ensure fair administration of justice.

4. The Media Complaints Commission established pursuant the Article 34 (5) is the one mandated to hear and determine defamation cases against the media because defamation as a tort, has not been criminalized under Article 33 (2) of the Constitution of Kenya.

5. A party seeking intervention of the court under Article 165 (3) (b) of Constitution of Kenya to enforce remedies provided under Article 23 of the Constitution of Kenya must only do so as provided in Article 22 (3) of the Constitution of Kenya and comply with the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

6. This court agreed with the Plaintiff that this was a flawed argument. Article 22 (1) of the Constitution of Kenya stipulates that:-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”.

7. Infact Article 22 of the Constitution of Kenya provides the procedure in which to approach the court where a right has been denied, violated, infringed or is threatened. Not being defamed is not a fundamental freedom in the Bill of Rights of the Constitution of Kenya. In essence, an aggrieved party who has been defamed cannot approach a court through Articles 22 and 165 of the Constitution of Kenya for relief.

8. As was correctly pointed out by the Plaintiff, there was no limitation by the Constitution of Kenya of the High Court hearing and determining defamation cases against any party and in particular, the media. The only limitation of the jurisdiction of the High Court is to be found in Article 165 (5) of the Constitution of Kenya.

9. Article 165 (5) of the Constitution of Kenya provides as follows:-

1. The High Court shall not have jurisdiction in respect of matters—

a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;

b. or falling within the jurisdiction falling within the jurisdiction of the courts contemplated in Article 162 (2).

10. Article 162 (2) of the Constitution of Kenya stipulates as follows:-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

a. employment and labour relations; and

b. the environment and the use and occupation of, and title to, land”.

11. If the intention of the drafters was to exclude the jurisdiction of courts from hearing and determining defamation cases, nothing would have been easier than for them to have said so.

12. Going further, a perusal of the Media Council Act No 46 of 2013 does not give one of its functions as hearing and determining complains by private citizens against persons engaged in dissemination of information.

13. The functions of the Media Council have been set out in Section 6 (1) of the Media Council Act as follows:-

1. The functions of the Council are to-

a. promote and protect the freedom and independence of the media;

b. prescribe standards of journalists, media practitioners and media enterprises;

c. ensure the protection of the rights and privileges of journalists in the performance of their duties;

d. promote and enhance ethical and professional standards amongst journalists and media enterprises;

- e. advise the government or the relevant regulatory authority on matters relating to professional, education and the training of journalists and other media practitioners;
- f. set standards, in consultation with the relevant training institutions, for professional education and training of journalists;
- g. develop and regulate ethical and disciplinary standards for journalist, media practitioners and media enterprises;
- h. accredit journalists and foreign journalists by certifying their competence, authority or credibility against official standards based on the quality and training of journalists in Kenya including the maintaining a register of journalists, media enterprises and such other related registers as it may deem fit and issuance of such document evidencing accreditation with the Council as the Council shall determine;
- i. conduct an annual review of the performance and the general public opinion of the media, and publish the results in at least two daily newspapers of national circulation;
- j. through the Cabinet Secretary, table before Parliament reports on its functions;
- k. establish media standards and regulate and monitor compliance with the media standards;
- l. facilitate resolution of disputes between the government and the media and between the public and the media and intra media;
- m. compile and maintain a register of accredited journalists, foreign journalists, media enterprises and such other related registers as it may consider necessary;
- n. subject to any other written law, consider and approve applications for accreditation by educational institutions that seek to offer courses in journalism; and
- o. perform such other functions as may be assigned to it under any other written law.

14. The functions of the Complaints Commission set out in Article 31 of the Media Council Act are as follows:-

The functions of the Complaints Commission are to-

- a. mediate or adjudicate in disputes between the government and the media and between the public and the media and intra media on **ethical issues**; (emphasis court).
- b. ensure the adherence to high standards of journalism as provided for in the code of conduct for the practice of journalism in Kenya; and
- c. achieve impartial, speedy and cost effective settlement of complaints against journalists and media enterprises, without fear or favour in relation to this Act.

15. Appreciably, defamation is not an ethical issue. According to Blacks Law Dictionary, ethical has been defined as:-

“Of, relating to, or involving moral obligations that one person owes another; especially, in law, pertaining to legal ethics. The ethical rules regarding confidences.

16. Defamation is a tort, a civil action, which the High Court can entertain in proceedings before it because it has unlimited original jurisdiction to hear and determine criminal and civil matters as can be seen in Article 165 (3) of the Constitution of Kenya.

17. This court therefore took the view that Section 16A of the Defamation Act Cap 36 (Laws of Kenya) is not inconsistent with the Constitution of Kenya and Pthe High Court can hear and determine a defamation suit. Section 16A of the Defamation Act. It provides as follows:-

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings”.

18. This court therefore fully associated itself with the holding of Onyancha J (as he then was) in the case of **John Ritho Kanongo & 2 Others vs Joseph Ngugi & Another [2015] eKLR** where in dismissing a similar Preliminary Objection that has been raised therein stated that:-

“...The Court’s original jurisdiction to hear civil cases of which defamation matters are part was confirmed by Article 165

(3)...”

19. Going further, in the case of Samuel Kijogi Makunyi vs John Lawrence Odhiambo [2018] eKLR, this very court dismissed a similar Preliminary Objection and pointed out that the Court of Appeal had already expressed itself on the issue when in the case of Standard Ltd & 2 Others vs Christopher Ndarathi Murungaru [2016] eKLR when it stated as follows:-

“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 constraints, limits or otherwise affects the jurisdiction conferred on High Court by Articles 22, 23 and 165 (3) (b) to enforce rights and fundamental freedoms” (emphasis court).

DISPOSITION

20. For the foregoing reasons, the upshot of this court’s decision was that the Defendant’s Preliminary Objection dated 19th March 2018 and filed on 20th March 2018 was not merited and the same is hereby dismissed with costs to the Plaintiff.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of January 2019

J. KAMAU

JUDGE