



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 41 OF 2019

MICHAEL JOSEPH.....PLAINTIFF

VERSUS

KENYA AVIATION WORKERS UNION.....DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT NO. 42 OF 2019

SEBASTIAN MIKOSZ.....PLAINTIFF

VERSUS

KENYA AVIATION WORKERS UNION.....DEFENDANT

RULING

1. The Plaintiff instituted a defamatory claim against the Defendant by way of a plaint dated 8th March, 2019 accompanying a Notice of Motion of similar date. Therein, the Plaintiff is seeking inter alia, general, exemplary and aggravated damages as well as injunctive orders for defamatory publications made by the said defendant. The plaintiff also prays for costs of the suit and interest on the same.

2. The record shows that this suit has been consolidated with another suit of the similar nature, namely: ***HCCC NO. 42 OF 2019 between Sebastian Mikosz and Kenya Aviation Workers Union.***

3. The defendant being the same in both instances has now raised Notices of Preliminary Objections dated 29th March, 2019 in the two (2) suits premised on the following grounds:

(i) THAT this Honourable Court has no jurisdiction to hear and determine the respective disputes under Article 165(5)(b) and 162(a) of the Constitution.

(ii) THAT the respective suits do not disclose any causes of action against the defendant, thus offending Order 2, Rule 7 of the Civil Procedure Rules.

(iii) THAT the respective suits are scandalous, frivolous and vexatious.

4. When the parties appeared before this court on 1st April, 2019, they were directed to file and exchange written submissions. The defendant filed its submissions first, principally arguing that pursuant to Article 165(5)(b) of the Constitution, this court's jurisdiction does not extend to suits falling under the purview of the specialized courts contemplated in Article 162 of the Constitution, arguing that the Employment and Labour Relations Court (ELRC) in particular has jurisdiction to entertain civil actions involving parties who enjoy an employer-employee relationship as is the case herein.

5. The defendant adds that the defamation claims arise out of a labour dispute and hence the ELRC enjoys universal and exclusive jurisdiction to hear and determine the said claims. The renowned case between ***The Owners of Motor Vessel "Lillian S" and Caltex Oil Kenya Limited (1989) KLR 1653 (C.A)*** as well as ***Jane Wanjiku Maina v Kenya Tea Development Authority [2009] EA and Narok County Government v Trans Mara County Council [2000] 1EA 161*** were cited.

6. As relates to the remaining prayers, the Defendant contends that the complaints filed do not set out the particulars of defamation, thus making them scandalous, frivolous and vexatious.

7. In their opposing submissions, the respective Plaintiffs reaffirmed this court's jurisdiction to entertain their suits pursuant to Article 165(3) of the Constitution by virtue of the fact that they constitute civil claims, going further to argue that the parties herein do not enjoy an employer-employee relationship as claimed by the defendant.

8. The Plaintiffs also submit that contrary to the claims brought forth by the defendant, their pleadings constitute reasonable causes of action against it by their very nature and in line with the facts set out therein.

9. I have carefully considered the Preliminary Objections in both instances and the rival submissions filed alongside the various cited authorities. The foremost issue has to do with whether this court has jurisdiction to entertain the suits placed before it. The other issue for determination concerns whether the suits disclose a reasonable cause(s) of action against the defendant.

10. On the first issue, it is worth asserting that jurisdiction is everything, as portrayed in the renowned case of *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* (*supra*) where the court held thus:

"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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

11. Having appreciated the above, I now turn to Article 165(3)(a) of the Constitution which provides thus:

"Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters"

12. Clause (5) above stipulates that:

"The High Court shall not have jurisdiction in respect of

Matters:-

a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b) Falling within the jurisdiction of the courts contemplated in Article 162 (2)."

13. Without citing the provisions of Article 162(2) verbatim, the same address the establishment of specialized courts to hear and determine both employment/labour matters and land matters. These courts are now known as the ELRC and Environment and Land Court (ELC) respectively.

14. Suffice it to say that by dint of Article 165(3)(a) of the Constitution, the High Court enjoys unlimited original jurisdiction in both civil and criminal cases.

15. I am well aware that defamatory claims fall under the ambit of torts and as a result, constitute civil claims. I arrived at a similar finding in *Washington Odera Sideka V. Githaiga Kamwenji & another [2018] eKLR* quoted by the plaintiffs where the court held the following:

"The jurisdiction of the Employment and Labour Relations Court is conferred by section 12 (1) of the Employment and Labour Relations Court Act which provides that, "The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations". Section 12 (3) (vi)...read together with section 12 (1)...is clear that the damages to be awarded by the court ought to relate to employment and labour relations...The Employment and Labour Relations Court does not have the jurisdiction to hear and determine defamation suits."

16. From the foregoing, I am satisfied that the suit is properly before this court.

17. Were we to assume that the parties herein share an employer-employee relationship as contended by the defendant, this mere fact would in no way take away this court's jurisdiction to entertain the suit, which as I have already established, strictly constitutes a civil claim which in no way concerns the parties' purported relationship.

18. That being the case, the defendant's argument that the ELRC has jurisdiction to hear the suit cannot stand as there is no law conferring such jurisdiction upon it. Consequently, the first ground of the Preliminary Objection fails.

19. In addressing the second ground of objection, I will begin by relying on my above-referenced decision of *Washington Odera Sideka v Githaiga Kamwenji & another* (*supra*) where I gave a precise definition of a cause of action in the following manner:

“Cause of action was defined by the Court of Appeal in Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR as,

“...a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

20. Further to the above, **Order 2, Rule 7** of the **Civil Procedure Rules** referred to by the defendant expresses that:

“Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.”

21. I have perused the plaint filed by the respective plaintiffs and ascertained that the defamatory words complained of apply in their ordinary and natural meaning. Moreover, the respective plaintiffs have gone ahead to set out the particulars of malice and bad faith with respect to the defamatory words. That being the case, I find no basis in the second ground of objection.

22. In addressing my mind to the third ground of objection and upon perusing its submissions, I find that the said defendant has not demonstrated that the suit filed is either scandalous, frivolous or vexatious. In any case, the essence of preliminary objections was well illustrated in **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** in the following manner:

“A Preliminary Objection...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 is the exercise of judicial discretion.”

23. At this point in time, it is not possible to ascertain whether the facts pleaded in the plaint are correct as this court would be required to investigate the facts further to determine whether or not the suit is scandalous, frivolous or vexatious. It therefore follows that this issue cannot be addressed as a preliminary ground of objection and it is therefore rejected as a result.

24. Ultimately, I find the Preliminary Objections to be lacking in merit and do not hesitate to dismiss the same with costs to the respective plaintiffs.

Dated, signed and delivered at **NAIROBI** this **27TH** day of **JUNE, 2019**

.....

L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff

..... for the Defendant

IN HCCC NO. 41 OF 2019

AND

.....for the Plaintiff

.....for the Defendant

IN HCCC NO. 42 OF 2019