



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 58 OF 2018

SAM NYAMWEYA.....PLAINTIFF

-VERSUS-

**NICK MWENDWA & ROBERT MUTHOMI (Being sued as representatives of
FOOTBALL KENYA FEDERATION).....DEFENDANTS**

RULING

1. The defendants filed the notice of preliminary objection dated 8th October, 2018 in which they raised the following grounds:

(i) The plaintiff's suit is bad in law, misconceived and an abuse of the court process as the subject matter of the present suit was a matter directly and substantially in issue in Constitutional Petition No. 144 of 2017 instituted by the plaintiff against the defendants at the High Court in Nairobi and which matter is res judicata on account of the court's findings in the petition.

(ii) The plaintiff is relitigating a claim that he has already presented before the High Court at Nairobi and which claim has already been heard and determined conclusively by the High Court.

2. The notice of preliminary objection was opposed by the plaintiff who filed the Grounds of Opposition dated 21st May, 2019 arguing that:

(i) The preliminary objection is misconceived as it has no basis in law and is an attempt to frustrate the plaintiff's case.

(ii) The Constitutional Petition No. 144 of 2017 was a constitutional matter relating to the infringement of the plaintiff's rights while the present case relates to the tort of defamation.

(iii) The issues are not similar as alleged by the defendants and the matter is not res judicata.

(iv) A claim for damages under the tort of defamation requires the assessment of damages through viva voce evidence and not mere affidavit evidence, and the same is yet to be done.

(v) The judgment in Constitutional Petition No. 144 of 2017 was delivered on 28th May, 2018 while the present case was filed on 21st March, 2018 and the issues in both instances are substantially different in nature.

3. The preliminary objection was disposed of through written submissions. In their submissions dated 23rd September, 2019 the defendants restated that both the facts of the case and the parties herein are similar to those presented before the Constitutional Division of the High Court.

4. They further argued that among the reliefs which were sought therein was an order for general and exemplary damages, which the Constitutional Court declined to award.

5. According to the defendants, by virtue of Section 7 of the Civil Procedure Act which establishes the *res judicata* rule, the plaintiff is barred from relitigating the issues already determined by the Constitutional Court.

6. In his opposing submissions dated 7th October, 2019 the plaintiff maintained that the reliefs sought previously before the Constitutional Court differ from those being sought in the current suit, hence the *res judicata* rule cannot apply herein.

7. In furthering his arguments above, the plaintiff contended that he can only pursue his claim for defamation in the Civil Court since the

claim constitutes a tort, placing reliance on the case of **Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR** where the court held that being a civil wrong, any remedy arising out of a defamation claim can only be sought in a civil suit.

8. I have considered the grounds laid out on the face of the notice of preliminary objection; the grounds of opposition; and the written submissions on record supporting and opposing the notice of preliminary objection.

9. A preliminary objection was clearly defined in the prominent case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** in the following manner:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. The above definition was further advanced in the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

11. The preliminary objection in the present scenario is grounded on the *res judicata* doctrine, provided for under Section 7 of the Civil Procedure Act as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

12. I have perused a copy of the constitutional petition annexed to the defendants’ submissions and established that the same was indeed lodged by the plaintiff against the defendants on 5th April, 2017 vide Constitutional Petition No. 144 of 2017. Therein, the plaintiff sought *inter alia*, for various declaratory orders on the premise that his constitutional rights to fair administrative action and a fair hearing had been violated.

13. Further to the above, the plaintiff sought for an order for compensation by way of general and exemplary damages.

14. In the end, the Constitutional Court granted the declaratory orders which were sought but found that the plaintiff had not proved his entitlement to an award of the damages sought.

15. It is not disputed that the claim presently before this court is founded on the tort of defamation which therefore means that defamation constitutes a civil wrong which can only be remedied under the civil law.

16. In supporting my position set out above, I am persuaded by the court’s rendition in **Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR** quoted in the plaintiff’s submissions to the effect that defamation is regarded as a civil claim.

17. Moreover, I refer the parties to the Constitutional Petition titled **Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR** where the court upon deliberation on the subject arrived at the following finding:

“It is to be borne in mind that defamation of an individual by another individual is a civil wrong or tort, pure and simple for which the common law remedy is an action for damages. It has to be kept in mind that fundamental rights are conferred in the public interest and defamation of any person by another person is unconnected with the fundamental right conferred in the public interest...Elucidating the same, I propound that defamation of a private person by another person cannot be regarded as a ‘crime’ under the constitutional framework and hence, what is permissible is the civil wrong and the remedy under the civil law.”

18. From the foregoing, it is apparent that notwithstanding the fact that both cases involve the same parties coupled with the likelihood that the claims arose out of the same facts, the causes of action and consequently the reliefs sought in each instance are distinctive, hence the *res judicata* rule cannot apply.

19. For the above reasons, the notice of preliminary objection is hereby found to be without merit, it is dismissed with costs.

Dated, Signed and Delivered at Nairobi this 22nd day of November, 2019.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants