



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 182 OF 2015

WASHINGTON ODERA SIDEKA.....PLAINTIFF

VERSUS

GITHAIGA KAMWENJI.....1ST DEFENDANT

SCANIA EAST AFRICA LIMITED.....2ND DEFENDANT

RULING

1. The Plaintiff instituted this suit by way of a Complaint dated 15th May, 2015 against the Defendants for defamation. The defendants filed a Statement of Defence dated 7th July, 2015 and indicated that they would be raising a preliminary objection. On 10th April, 2017, the Defendants filed a Notice of Preliminary Objection on four grounds, however, during the hearing, the Defendants' Counsel sought to argue the 1st and 4th grounds only, being that;

(a) the suit is an abuse of the court process as the Plaintiff has filed a previous suit arising from the same facts in Industrial Cause No. 196 of 2015, this Honourable court has no jurisdiction to hear and determine the suit; and

(b) the Complaint as framed and in so far as it claims a cause of action arising from the meeting held on 25th September 2014 offends order 2 rule 7 of the Civil Procedure Rules, 2010 which provides that in an action for libel or slander, the Plaintiff should provide particulars.

2. When the Application came up for hearing on 7th May, 2018, Ms. Lipwop representing the Defendants submitted on the 2nd ground of the Preliminary Objection that the Plaintiff alleges that certain words were uttered in a meeting held on 25/9/2015 but, the particulars are not provided contrary to order 2 rule 7 of Civil Procedure Rules. The plaintiff relied on the cases of **Lucas Ndungu Munyua Vs. Royal Media Services Limited and Elizabeth Atieno Ayoo v Nairobi Star Publication Limited [2016] eKLR**. On the other ground, it was submitted that Order 4 Rule (1) (f) obligates the Plaintiff to disclose previous suits between the parties in that there is a similar cause no. 196/2015 before the industrial and Labour Relations court involving the Plaintiff and the 2nd Defendant relating to the same cause of action. It was also submitted that the Employment and Labour Relations Court has jurisdiction under section 12 (3) (6) of the Employment and Labour Relations Court Act to award damages arising from defamation. The Plaintiff therefore submitted that under section 6 of the Civil Procedure Act, the court is mandated to either stay this suit pending the hearing of the other suit or in the alternative strike it out.

3. Mr. Ogutu submitted on behalf of the Plaintiff and opposed the Preliminary Objection on the grounds that Order 2 Rule 7 means that if the words alleged to have been defamatory were not used in the ordinary sense, then, the particulars must be provided to explain the defamatory sense of the word. Counsel submitted that the defamatory words are contained in paragraph 7 of the complaint in which the plaintiff is referred to as a thief and that the word is used in its ordinary meaning and it needs no explanation. The Plaintiff further submitted that the two authorities cited by the defendant are not relevant to the facts of this case since the contention in those cases was whether the actual words alleged to be defamatory were pleaded in the Complaint. On the other ground of objection, the Counsel submitted that the suit filed in the Employment and Labour Relations Court relates to unfair and unlawful dismissal of the Plaintiffs on allegations of theft, via correspondences written by the 2nd defendant through the 1st defendant. It is submitted that the events leading to his dismissal created another cause of action in defamation from different sets of facts leading to different causes of action and since defamation is a civil suit, he therefore filed the claim in the High court civil division. The plaintiff therefore submitted that there was no obligation to refer to the other suit since it relates to a different cause of action.

4. I have read and considered the application, the affidavit on record and the submissions made by Counsels for both parties, together with the authorities cited. The Preliminary Objection in question touches on the jurisdiction of this Court to hear the matter. Jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it, the moment it holds the opinion that it is without jurisdiction. (see **Owners of Motor Vessel "Lillian S" vs Caltex Oil (k) Ltd (1989) KLR 1** Per Nyarangi JA. See also the Court of Appeal decision in **Owners and Masters of Motor Vessel "Joey" VS Owners and Masters of the Motor Tugs "Barbara" and "Steve B."** [2008]1 EA 367 where, echoing the decision in the case of **Owners of Motor Vessel "Lillian S"**, the Court of Appeal held, inter alia:

“The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step.....”

5. The defendants have raised a preliminary objection on two grounds. One being that the particulars of the defamatory words uttered in the meeting of 25/9/2015 have not been pleaded contrary to Order 2 Rule 7 of the Civil Procedure Rules. Order 2 Rule 7 (1) provides 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.”* Therefore, the issue for determination on this ground is whether the words alleged to be defamatory were used in a *defamatory sense other than their ordinary meaning* to warrant the provision of particulars to explain the sense in which they were used.

6. In response, the Plaintiff submitted that the defamatory words are contained in paragraph 7 of the plaint in which he was referred to as a “thief” and that the said word was used in its ordinary meaning and it needs no explanation. Order 2 Rule 7 requires the provision of particulars of facts only in cases where the words complained of were used in a defamatory sense other than their ordinary meaning. I have examined the alleged defamatory words as captured in paragraph 7 of the Plaint. The words complained of are pleaded at paragraph 9 as being the same words which were uttered in the meeting held on 25th September, 2014, The said words are used in their ordinary and natural meaning and there is, therefore, no need to plead their particulars in order to explain the sense in which they are construed to be defamatory. The cases relied on by the Respondents are not applicable in this matter for the reason that in the case of **Lucas Ndungu Munyua Vs. Royal Media Services Limited HCCC No. 52/2008 Nairobi** the contention was whether the defamatory words were pleaded at all in the Plaint but in this case the words alleged to be defamatory have been pleaded. The other case of **Elizabeth Atieno Ayoo v Nairobi Star Publication Limited Civil Case No. HCCC No.7/2015 Kisumu**, relates to striking out of a defence wherein the Defence was struck out for the reason that the words were admitted in a letter of apology written by the Defendants to have been actually published.

7. Order 2 Rule 7 does not apply here and this ground of Preliminary Objection therefore fails.

8. The other ground of objection is that this court lacks jurisdiction to hear and determine this matter as the Plaintiff has filed a previous suit arising from the same facts in Industrial Cause No. 196 of 2015. The Plaintiff submits that the suit filed in the industrial court arises from different set of facts from the instant one and that the 1st Defendant is not party to the Industrial Court suit. I have compared the two suits. In Industrial cause no. 196 of 2015, the Plaintiff seeks compensation for unlawful and unfair dismissal. The cause of action in that claim is based on the act of unfair dismissal and the plaintiff has annexed the pleadings and the list of documents that he relies on.

9. In the instant suit, the Plaintiff seeks damages for defamation. The statement alleged to be defamatory is contained in the letter of dismissal dated 21/11/2014. It is apparent that the two suits are based on the letter dated 21/11/2014 but the causes of action are not the same. 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 cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. See Letang vs Cooper [1964] 2 All ER 929 at 934, per Lord Diplock. Lord Esher, M. R. in the case of Read vs Brown (1888), 22 QBD 128, defined a cause of action as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”.

10. My understanding of a cause of action is the fact or combination of facts that gives a person the right to seek legal redress or relief against another. In **Elijah Sikona & George Pariken Narok On Behalf Of Trusted Society Of Human Rights Alliance V Mara Conservancy & 5 Others [2014] Eklr, Anyara Emukule J** described cause of action as ,

“23. A cause of action is “a factual situation the existence of which entitles one person to obtain a remedy against another person-”LETANG VS. COOPER [1965] Q.B. 232. If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures.”

11. Cause of action is therefore a factual situation which is derived from the existence of certain facts which gives the Plaintiff the right to seek redress in Court. The facts which led to the industrial claim were the dismissal of the plaintiff which he claims to have been unlawful. The cause of action in this suit is defamation based on the letter dated 21/11/2014 and the words allegedly uttered in a meeting on 25/9/2014. Bearing in mind that cause of action is the existence of fact from which a plaintiff can claim a redress against the defendant, it is apparent that the defamation suit and the industrial claim are based on two different causes of action and the reliefs sought are different. The parties are different in both suits in that the 1st Defendant herein is not a party to the industrial claim.

12. The Defendants have submitted that the Employment and Labour Relations Court also has the jurisdiction to hear defamation cases. 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) which the Defendants rely on ought to be read together with section 12 (1) which is clear that the damages to be awarded by the court ought to relate to employment and labour relations. Therefore the reading of section 12 (3) (vi) in isolation is misleading. The Employment and Labour Relations Court does not have the jurisdiction to hear and determine defamation suits.

13. It was held in the case of **Naqvi Syed Omar v Paramount Bank Limited & another [2015] eKLR**, that, “ *The Court(read Employment and Labour relations Court) has no jurisdiction to deal with malicious prosecution and defamation suits under Section 12 of the Employment and Labour Relations Court Act. The Court adjudicates disputes between an Employer and an Employee.*”

14. Similarly in the case of **Jane Njeri Onyango v Erick Ochieng & 2 others [2015] eKLR**, it was held thus;

“*The jurisdiction of the High court is limited under Article 165(5) in the following terms:-*

5) 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) Falling within the jurisdiction of the courts contemplated in Article 162 (2)

Also under Article 162(2) the jurisdiction of this court is limited in the following terms:-

2) 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.

The Constitution has provided situations or matters which this court has no jurisdiction over under Article 165(5) and 162 (2). It has named those matters in respect of which special courts, with jurisdiction similar to that given to the High Court, shall hear. I therefore find that ELRC Court does have jurisdiction to handle causes of actions in defamation matters.

15. The upshot of the above is that both grounds of the preliminary are hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this **21st Day of June 2018.**

.....

L. NJUGUNA

JUDGE

In the Presence of

.....*For the Plaintiff*

.....*For the Defendant*