



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.70 OF 2017.

HUMPHREY KARIUKI NDEGWA 1ST PETITIONER

DALBIT PETROLEUM LIMITED ALSO KNOWN AS

DALBIT INTERNATIONAL LIMITED 2ND PETITIONER

GREEN CORNER RESTAURANT 3RD PETITIONER

VERSUS

STANDARD GROUP LIMITED 1ST RESPONDENT

SAM SHOLLEI 2ND RESPONDENT

JOSEPH ODINDO 3RD RESPONDENT

KIPKOECH TANUI 4TH RESPONDENT

ROBERT TOROITICH 5TH RESPONDENT

DANIEL WESANGULA 6TH RESPONDENT

NZAU MUSAU 7TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 8TH RESPONDENT

THE NATIONAL POLICE SERVICE 9TH RESPONDENT

JUDGMENT

The parties

1. The 1st petitioner herein describes himself as a law abiding Kenyan Citizen, an entrepreneur, founder, and Chief Executive Officer of the 2nd and 3rd Petitioners. The 2nd petitioner is a limited liability company while the 3rd petitioner provides high end eatery services.

2. The 1st respondent is a limited liability company and a media enterprise that publishes daily newspapers while the 2nd respondent is its director Chief Executive Officer. The 3rd respondent is the 1st respondent's group editorial director while the 4th respondent is the managing editor who works with the 5th, 6th and 7th respondents in editorial matters.

3. The 8th respondent is the Attorney General of the Republic of Kenya, a constitutional office established under Article 156 of the Constitution and is the government's chief legal advisor in all legal proceedings.

4. The 9th respondent is a national security organ established under Article 239 (1) (c) of the Constitution is charged with statutory powers to

maintain law and order.

The petition.

5. The petitioners lodged the instant petition on 6th March 2017 in which they claimed that on 5th February 2017, the 1st to 7th respondent's jointly and severally published and circulated untrue, inaccurate and misleading information linking the petitioners to heinous crimes of money laundering, narcotics, weapon and human trafficking. The petitioner case was that as law abiding persons, the said publication which was circulated widely in both the Sunday newspaper and digital platforms was likely to injure their reputation and standing thereby occasioning them loss and damage unless the said misleading information is corrected and/or deleted.

6. The petitioners' case was that they had a constitutional right to have the misleading information corrected under Article 35(2) of the Constitution.

7. The petitioners contend that they requested the 1st to 7th respondents to delete the untrue and misleading publication but the respondent did not heed the request and instead digitized and archived the information which they continue to sell worldwide over the internet.

8. Aggrieved by the actions of the 1st to 7th respondents, the petitioners filed the instant petition in which they sought the following orders:

a) A declaration that the Government of Southern Sudan, a friendly State of Kenya, having denied the allegations of the 1st to 7th respondents and their sources that Dalbit Petroleum Limited was involved in the crimes of drugs, weapons and human trafficking in Southern Sudan proves, on the preponderance of evidence, that Dalbit Petroleum Limited is not a company involved in the crimes of drugs, weapons and human trafficking in Southern Sudan.

b) A declaration that the allegations of the 1st to 7th respondents and their sources that Dalbit Petroleum Limited is/was involved in crimes of drugs, weapons, and human trafficking in Southern Sudan is untrue and misleading.

c) A declaration that any allegation that Dalbit Petroleum Limited is/was involved in crimes of human, weapon and narcotic trafficking in Southern Sudan is untrue and misleading.

d) A declaration that the petitioners are entitled to the deletion and correction of any allegations linking them to human, narcotics and weapons trafficking and its deletion on the Standard on Sunday of February 5th, 2017 and in any other respondents platforms or media is hereby ordered.

e) A relief in the nature of an injunction be and is hereby granted to compel the 1st and 7th respondents to publish a correction that Dalbit Petroleum Limited/Dalbit International Limited is not in drugs, weapons and human trafficking in Southern Sudan, which correction shall have prior approval of the petitioners and be published with similar prominence as the untrue and misleading allegations.

9. The petition was supported by the 1st petitioners affidavit sworn on 4th March 2017 wherein he avers that his picture was published on the front page of the Standard on Sunday newspaper of 5th February 2017 where he was referred to as a "person of interest" and that on pages 5 of the same newspaper a misleading statement concerning him was made as follows:

"Humphrey Kariuki

Billionaire businessman behind Dalbit brand recently won a lucrative oil deal in Mozambique, he is close to Mwau."

Humphrey Kariuki Ndegwa

Served as a board member of Dalbit Petroleum fuel depot in Southern Sudan that was involved in drugs, weapons, and human trafficking.

Ndegwa's Green Corner account received two billion shilling deposit, allegedly on behalf of Mwau.

The deposit was part of the money laundering operation.

The reports says his green Corner Restaurant in Nairobi was a suspected front company for the drug trafficking.

He is a contractor with interest in petroleum and construction"

Alan Herd

Humphrey Kariuki's business partner.

He is the de facto manager of the Kijipwa Airstrip and the Mombasa Flying Club where he manages a flight training program.

We believe that Herd allows narcotics traffickers to use the Kijipwa Airstrip to smuggle narcotics into Mombasa”.

(Herewith annexed and marked “HKN1” is a copy of the newspaper).

10. He further avers that the 1st to 7th respondents ought to have known that the petitioners had never been involved in any criminal activities as alleged in the said newspaper article. He states that the publication was deliberately intended to permanently injure their reputation including the companies associated with them. He urges the court to take judicial notice of the gravity of the crimes that the 1st - 7th respondents allege against him and states that the allegations ought to be thoroughly investigated and the culprits, if any, brought to book in the interest of justice.

11. He denies having had any association or partnership with one Alan Heard or Kijipwa Airstrip as alleged in the impugned publication and states that the 2nd petitioner is involved in large scale petroleum importation and has dealings with government organs and a few well respected international organizations which have never been in the criminal activities mentioned in the impugned publication.

12. In order to demonstrate that the allegations made against the petitioners were untrue, the 1st petitioner attached annexure “HKN2” to the supporting affidavit being a copy of letter from the government of South Sudan confirming that the 2nd petitioner operates a legitimate business in accordance with the law and has never committed crimes as alleged by the 1st to 7th respondents.

13. Mr Ouma, learned counsel for the petitioners, submitted that under Article 35(2) of the Constitution, every person has a right to the correction of untrue and misleading information. Counsel relied on the decision of Lenaola J.(as he then was) in the case of **Linus Simiyu Wamalwa vs. University of Nairobi & Another [2015] eKLR** wherein it was held that the right to correction of information under Article 35(2) arises on confirmation of the following 3 components namely:

- a) The information complained about must be untrue and misleading.
- b) The information affects the person complaining.
- c) Before moving to court, the complainant must have requested the concerned person to correct or delete the information.

14. On the request to delete the information, counsel referred to annexures “HKN14” and “HKN16” wherein the petitioners requested the 1st to 7th respondents to delete the information. Counsel stated that the 1st petitioner had, in the further affidavit dated 28th July 2017 attached a certificate of good conduct to confirm that the police records show that he has no criminal record and that there are no current or ongoing criminal proceedings against him.

15. He further submitted that annexure “HKN2” to the supporting affidavit to the petition showed that the government of South Sudan had not received any complaints regarding the alleged involvement of the 2nd petitioner in the crimes of drugs, weapons and human trafficking as alleged in the impugned publication.

16. As regards the allegation that the 3rd petitioner had in the year 2005 received the sum of kshs 2 billion as part of a money laundering and drug trafficking scheme, counsel submitted that the 3rd petitioner was patronized by international diplomatic dignitaries and operated under constant security surveillance from its lessor (NCCK) and the Kenya Police such that it would have been impossible to pull off such a huge heist of kshs. 2 billion undetected. Counsel referred the court to annexure “HKN12” which was the 3rd petitioner’s bank statement to demonstrate that the alleged transaction of kshs 2 billion did not take place.

17. Counsel argued that the publication in question was therefore unjustified and adverse to the petitioners who stood the risk of being sanctioned by the international bodies that they have business transactions with unless the offending publication was deleted. He further submitted that if indeed it was true, as alleged by the respondents that the impugned publication was made based on numerous investigations reports, then the respondents were under a duty to avail those reports to the court in order to exonerate themselves from blame.

18. Counsel cited the decision of Majanja J. in the case of **Evans Otieno Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR** wherein it was held that “he who alleges must prove” and argued that since it was the respondents who asserted that petitioners were involved in crimes, they needed to prove that claim.

The 1st to 7th respondents’ case.

19. The 1st to 7th respondents opposed the petition through the identical replying affidavits of Daniel Wesangula and Nzau Musau dated 15th May 2017. They also relied on the written submissions dated 14th July 2017. The 1st to 7th respondents also filed grounds of opposition dated 28th April 2017 in which they listed the following grounds:

- 1. The application is premised on a petition seeking the redress of an alleged violation of Article 35(2) of the Constitution, 2010 whereas the 1st to 7th respondents are not state agencies but private persons for which an alternative legal mechanism for redress is availed by law by the doctrine of constitutional avoidance.**
- 2. The application premised on the petition does not articulate any specific act or omission or violation of any specific right or freedom or the manner in which the petitioner’s rights and/or freedoms have been allegedly violated by the 2nd to 7th individual respondents.**

3. Prayer 2 of the application seeks a generalized coercive order of a mandatory injunction that is untenable at law and in appropriate for an interlocutory application.

4. The threshold for the grant of an interlocutory injunction has not been met.

5. The 1st defendant has societal obligation recognized under the Defamation Act to accurately report on a matter relating to public interest which obligation is entrenched at Article 34 of the Kenya Constitution, 2010 the prayers sought in the application and petition seek to unjustifiably and arbitrarily abridge media freedom.

20. In the aforementioned affidavits of Nzau Musa the 6th respondent herein, he avers that he is a journalist with the 1st respondent and confirms that the impugned publication of 5th February 2017 was indeed published by the 1st respondent of considerable public interest regarding ongoing war against drugs trafficking.

21. He further states that the information that was contained in the publication was information that was already in the public domain based on the “Interim Report of Drug Trafficking Investigations Report” that was made on 1st February 2011 which report was presented to the Commissioner of Police by a special team of 11 officers mandated to investigate drug trafficking in Kenya.

22. He further avers that Police Commissioner’s report made reference to another report known as the “Ranneberger dossier” which contained details of persons suspected to be involved in drug trafficking and money laundering. He adds that the publication merely highlighted finding of the said reports, but did not state that the persons mentioned were actually involved in drug trafficking or money laundering. He further states that the petitioners have not demonstrated how the 1st to 7th respondents violated their constitutional rights.

23. In his submissions before the court on behalf of the 1st to 7th respondents, Mr. Oduor, learned counsel for the respondents submitted that the 2nd - 7th respondents were all employees of the 1st respondent and that since it was not in dispute that the publication complained about was made in the 1st respondents newspaper, only the 1st respondent was the proper party to this petition as the petitioners had not demonstrated how the 2nd to 7th respondents had violated their rights. Reliance was placed on the decision in the case of **Anarita Karimi Njeru Vs Republic [1979] eKLR**

24. Counsel further submitted that the instant case should have been filed before a civil court as it was purely a defamation suit where the petitioners complain about a publication that had allegedly injured their reputation and occasioned them loss and damage. He highlighted the ingredients of defamation as were set out in the case of **B.A. & Another vs Standard Group Ltd & another [2016]eKLR** and submitted that since all the elements of defamation were disclosed in the instant suit, the case should have been placed before a civil court for hearing on the tort and defamation.

25. Counsel urged the court to apply the principle of constitutional avoidance which stipulates that not all matters raise constitutional disputes in which case, if there is another avenue where a party can raise his dispute, then that avenue should be explored. Reliance was placed on the case of **CCK & Another vs. Royal Media Services & 5 Others Petition No. 14, 14A, B and C of 2014** wherein the Supreme Court discussed the principle of avoidance.

26. Counsel also relied on the decision of **E.A. Portland Cement and the Speaker of National Assembly vs. Joseph Njenga Karume [1992] eKLR** wherein the courts was urged to guard against the manipulation of everyday dispute into constitutional issues. It was the respondents’ case that this suit is a defamation case that had been clothed to be a constitutional dispute. Counsel maintained that Article 35(2) (b) that the petitioners relied upon in bringing the present petition does not provide for a right *per se* but for a remedy and argued that the petition does not disclose which right has been violated.

8th and 9th respondents’ response.

27. The 8th and 9th respondents opposed the petition through the replying affidavit of a Commissioner of Police, Moses Ndindi, sworn on 27th June 2017, wherein he confirms that it is true that Ambassador Michael Ranneberger, the then U.S. Ambassador to Kenya, forwarded a criminal complaint to the then Minister for Provincial Administration and Internal Security and other senior government officials.

28. He further states that he deputized the chairman of the eleven member Special Investigations Team that investigated the Michael Ranneberger’s criminal complaint and who also authorized the report dated 1st February 2011 which found that the complaints lodged against the petitioners were untrue and unsupported by facts, evidence, records or credible information.

29. He further states that the claims made by the petitioners against the 8th and 9th respondents were unfounded as no report or complaint was on record regarding the 1st to 7th respondents having reported the activities narrated in the impugned publication. He also confirms that the 9th respondent has no credible report, list, dossier, watch list or any record, document or information linking the petitioners to the crimes of money laundering, drug, weapons and human trafficking.

30. Mr. Marwa, learned counsel for the 8th and 9th respondents, stated that the dispute before the court was purely a dispute between the petitioners and the 1st and 7th respondents as no prayers had been sought against the 8th and 9th respondents and further, that the 8th and 9th respondents did not have the information sought to be deleted. He further submitted that 8th and 9th respondents conducted thorough investigations on the crime allegations referred to in the petition and found them to be incorrect.

31. Counsel argued that the 8th and 9th respondents are not guilty of any wrong doing as they did not publish the impugned article since all they did was to perform their duties of conducting investigations in order to assist in unearthing the truth. Counsel further submitted that

under Article 157(4) of the Constitution, the Inspector General is mandated to carry out investigations but that the 1st to 7th respondents did not lodge any complaint to the investigative agencies to carry out investigations or to recommend prosecution.

Analysis and determination

32. I have considered the pleadings filed herein and the parties' rival submissions together with the numerous authorities that they cited. I discern the main issues for determination to be:

- a) Whether the 2nd-9th respondents are proper parties in this case.
- b) Whether the principles of constitutional avoidance should be applied in this case.
- c) Whether the petitioners are entitled to the orders sought in the petition.

33. On the first issue of the proper parties to the suit, the 2nd and 7th respondents argued that they were merely employees of the 1st respondent and therefore ought not to have been included as respondents in the case in their individual capacities in view of the fact that the publication complained about was carried in the 1st respondent's newspaper.

34. The 8th and 9th respondents, on the other hand argued that they were wrongly included in the case because firstly they played no role whatsoever in the publication of the impugned article and secondly, no specific prayers were sought against them by the petitioner so as to warrant their inclusion in the suit.

35. I have carefully considered the pleadings filed herein and especially the petition. I note that in respect to the 8th and 9th respondents, the petitioners have not disclosed how, if at all, they violated their rights. Indeed, I note that the petitioners do not seek any specific prayers against the 8th and 9th respondents and for that reason I find that they are not proper parties to this case.

36. Similarly, in regard to the 2nd – 7th respondents I note that they are employees of the 1st respondent. The subject matter of this petition is the impugned publication which the petitioners contend is false and misleading. The petitioners seek orders that the misleading information be corrected and/or deleted. My finding is that since the publication was carried in the 1st respondents newspapers, the only proper party respondent to this suit is the 1st respondent and not its employees. The petitioners lumped the 1st- 7th respondents together and sued them as one unit without disclosing what role each of the respondents played in publishing the offending article. Moreover, the orders sought for deletion and/or correction of the information are orders that can only be acted upon and/or implemented by the 1st respondent.

37. Turning to the second issue of whether or not this petition ought to have been filed as a civil suit before the civil division of this court and not as a constitutional petition, the respondents argued that the principle of constitutional avoidance should be invoked in this case in view of the fact that it is purely a defamation claim.

38. On their part, the petitioners argued that the right to reputation is protected under Article 33(3) of the Constitution while the right to correction of untrue information is provided for under Article 35(2) of the Constitution.

39. According to the petitioners, the remedy of deletion is not provided for in the Defamation Act and would therefore not be available in a defamation suit. The question that still arises is whether this court was the proper court for the petitioner to file this petition or whether it ought to have been presented before civil court.

40. Counsel for the 1st-7th respondents drew the attention of the court to the principle of constitutional avoidance which grants the court authority to avoid hearing or determination of a constitutional issue when the matter could have been decided on another basis either civil or criminal.

41. In this case of **Ashwander vs. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)** the American Supreme Court stated that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case would have been disposed of. The Supreme Court went on the state as follows:

“In saying all these, we are not oblivious to the fact a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a pancea for all manners of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes”.

42. In the instant case, it is not disputed that the petition has all the elements of a defamation case which elements were discussed by the Supreme Court in the case of **Joseph Njogu Kamunge vs. Charles Muriuki Gachari [2016] eKLR**, as follows:-

“The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the

audience as defamatory and not simply abusive. Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice, the defamatory words must be shown to have been published by the defendant.”

43. Going by the dictum in the decisions in the above cited cases, it is abundantly clear to me that ideally and strictly speaking, the instant petition ought to have been initiated as a defamation suit. It is however noteworthy that the petitioners have not in this petition, sought any prayers for damages for defamation, but instead seek orders for inter alia, deletion and/or correction of the impugned article. I also note that the issue of whether or not this matter ought to have been filed before this court or before the civil division is an issue which should have been raised at the very beginning of the case, as a preliminary point, and not at the tail end of the proceedings during the submissions before judgment. It is for the above reasons and in the spirit of dispensing substantive justice to all the parties that this court finds that the petition falls within its province and is therefore minded to consider this petition with a view to determining of if the orders sought are merited.

44. Article 35 (2) (b) of the Constitution under which the petition was brought stipulates as follows:

“Every person has the right to the correction or deletion of untrue or misleading information that affects that person.”

The above Article speaks for itself and requires no more than a literal interpretation. In order to enforce the right under the above Article, the petitioner needs to show that there exists untrue or misleading information and further, that the untrue or misleading information affects him in a prejudicial manner.

45. A party seeking to enforce the provisions of Article 35(2) of the Constitution must however first establish that he requested for the deletion of the untrue and misleading information which request was denied, in which case, the court will also interrogate the reasons for the refusal to delete and determine if the said reasons accord with the Constitution. (See **Okiya Omtatah Okoiti vs. Attorney General & 2 others [2012] eKLR.**

46. In the instant case it was not disputed that the 1st respondent published the impugned article which had information that affected the petitioners in an adverse manner. I find that the information contained in the impugned article was untrue and misleading in view of the fact that the investigative agencies cleared the petitioners of any involvement in the criminal activities that were alluded to in the said publication. The petitioners also demonstrated that they wrote to the respondent seeking the deletion of the untrue information but that their request was ignored by the 1st -7th respondents.

47. My finding is that the petitioners have fulfilled the requirements for the enforcement of their rights Article 35(2) (b) of the Constitution which grants them the right to have any untrue or misleading information deleted.

48. In their response to the petition, the 1st-7th respondents contended that the impugned article related to an issue of great public interest as it concerned the ongoing war against drug trafficking and that the information contained in the publication was already in the public domain based on an interim report presented to the Commissioner of Police by a special eleven member investigations team that was tasked with the duty of investigating drug trafficking in Kenya. Contrary to the 1st -7th respondents assertions, Mr. Moses Ndindi, the Commissioner of Police who chaired the said 11 member Special Investigations Team on drug trafficking in Kenya, swore an elaborate replying affidavit in which he stated that all the complaints lodged against the petitioners were found to be untrue and were unsupported by facts, evidence, records or credible information.

49. Clearly, therefore, I find that it is fool hardy and indeed misleading for the 1st respondent to maintain its position that their article was based on the Special Team’s interim report when the said Special Team had already cleared the petitioners of any wrong doing.

50. My take is that no matter how great the public interest in a matter may be, the 1st respondent was still under a duty to practice responsible journalism having due regard to the rights of other people who may be affected by their reporting or publication. In this case therefore, the proper action that the 1st respondent ought to have taken upon receiving the special 11 member team’s report clearing the petitioners of any wrong doing, would have been to immediately delete the publication complained about. This was not done thereby needlessly precipitating the instant case and aggravating the damage done to the petitioner’s reputation and business following the publication of the impugned article.

51. On the last issue of whether the petitioners are entitled to the prayers sought, I have elsewhere in this judgment reproduced the record 31 prayers that the petitioners sought in the petition. I note that the prayers sought by the petitioners have been replicated and duplicated in many respects and may be covered or condensed into three main orders as not all the prayers can be granted in the circumstances of this case.

Conclusion

52. Having regard to my observations and findings in this judgment, I find that there is merit in the petition and I allow it in the following terms:

a) A declaration is hereby issued that the petitioners are entitled to the deletion and correction of any allegations linking them to human, narcotics and weapons trafficking as contained in the Standard on Sunday newspaper of 5th February 2017 and in any of the 1st respondents platforms or media.

b) An order of mandatory injunction is hereby granted to compel the 1st respondent to publish a correction of the untrue and misleading information about the petitioners that was published in the Standard on Sunday of 5th February 2017.

c) The petitioners shall have the costs of this petition.

Dated, signed and delivered in open court at Nairobi this 26th day of September 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ouma for the petitioner

Mrs. Onyuta for the 1st -7th respondents

Mr. Marwa for the 8th and 9th respondents

Court Assistant – Kombo