



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 169 OF 2012

HENSON NIGEL GRAHAM.....PLAINTIFF

VERSUS

THE STANDARD GROUP LTD.....DEFENDANT

RULING

1. This Court has been called upon to rule on the preliminary objection by the defendant to the effect that this court, lacks jurisdiction to entertain and determine the suit herein on the basis that Article 34(2) of the Constitution forbids the state, and by the extension the court being an arm of the state, from exercising control over or interfering with any person engaged in broadcasting, production, circulation, dissemination or publication of any information by any media and further that it, the state, cannot punish any such person for any opinion, view or content of any broadcast, publication or dissemination.
2. To the defendant, the freedom of the media created and enshrined under the article is absolute, intended to protect the media, which has been treated as a special person, with regard being heard to the historical events, which to the defendant tend to show that all the three arms of Government have in one way or the other taken out steps to muzzle, control or just interfere with the freedom of media.
3. Both sides filed submissions in urging and opposing the preliminary objection. I have had the benefit of reading those submissions together with the authorities cited to support each side's position.
4. To this court, the only question that would dispose of the objection is whether or not the provisions of article 34(2) creates an absolute, infallible, unchecked and uncheckable freedom to the press incapable of question by the due process of the law through the court system in litigation.
5. The starting point must of necessity be the rules of constitutional interpretation. In undertaking such task I appreciate and understand the defendant to say and contend that the litigation instituted against it by the plaintiff is contrary and in effect affront the provision of the constitution at article 34(2). The defendant is insisting on its right to broadcast and disseminate information unhindered, irrespective of the effects and ramifications of such broadcast, publication and dissemination on other people. Put the other way, the defendant is saying that to entertain the suit this court will be affronting the constitution and the defendant has therefore come out as the constitutional defender.
6. In doing so the defendant is evidently saying that the interpretation and meaning to be given to the provisions of article 34(2) is that, since 2010, there is no justiciable claim capable of being laid against the media under the tort of defamation and therefore to it, the broadcast media is now immune from being sued for defamation. In other words the preliminary objection is an assertion by the defendant that the

publication complained about was done under its constitutionally guaranteed right and cannot be questioned.

7. If that be the correct understanding of the defendants position then it follows that the first answer is to be found in the same constitution that creates the High Court and vests upon it the jurisdiction.

Article 165(3) provides:-

- a) Unlimited original jurisdiction in criminal and civil matters;**
- b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
- c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**
- d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-**
 - i) The question whether any law is inconsistent with or in contravention of this Constitution;**
 - ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
 - iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
 - iv) a question relating to conflict of laws under Article 191, and**
- e) Any other jurisdiction, original or appellate, conferred on it by legislation.**

8. From the onset it is clear to this court that the plaintiff in filing this suit is alleging that his reputation has been besmirched and damaged by the publication attributed to the defendant. The plaintiff is thus approaching the court and seeks the protection of his rights themselves guaranteed under article 28 for which the Constitution expressly empowers the court to consider the question whether such a right has been denied, violated, infringed or threatened.

9. It is the finding of this court that the jurisdiction vested in this court under the Constitution has not been taken away by the provisions of article 34(2). There has not been divestiture expressly or by implication. For that reason the court finds and holds that the preliminary objection as taken out and argued was misconceived and cannot succeed.

10. Before I rest my determination, I had at the beginning adverted to the fact that this determination will revolve around the interpretation of the article the defendant relies upon to challenge the suit and jurisdiction of the court. The preferred rule of interpretation the courts of this country have preferred is that which achieves the purpose of the constitution. It's hallmark is that not a particular article or provision of the constitution can be interpreted and given a meaning that is divorced from the collective purpose, ethos and general intent of the corpus of the constitution as a whole. It was held in the decision of *Centre for Rights Education and awareness and others vs the Attorney General [2015] eKLR* that various provisions of the constitution must be read together with each sustaining each the other and not each destroying the other. In its own words the court said:-

“In effect the rule is that no provision of the constitution ought to be construed in isolation so as to be seen to be standing alone but all are part of the whole and must be allowed to and

regard to exist for the purpose of the whole and for the sake of harmony”.

11. It may as well be true as Mr. Gitonga asserts that the purpose of article 34(2) was to address the past cruelty and interferences by the state against the press and media practitioners. However a court of law in seeking to understand and discern the spirit and intention of the Constitution is guided by the language of the Constitution. For this matter I have read the entire bill of rights and I am not persuaded that the freedoms under article 34(2) is that absolute and unbridled. It is not unbridled because the article itself acknowledge that in exercise of such freedoms, regard must be heard to article 33(2). Equally it cannot be lost sight of that under article 25 only four (4) rights and fundamental freedoms are incapable of limitation. The right under Article 34(2) is not one of the four incapable of limitation.

12. Without going to the merits of the matter, I hold that this court has the requisite jurisdiction to intertain this matter and that the preliminary objection must fail and it is hereby dismissed. I dismiss it with cost for the reasons that the law as enunciated by the courts in the decisions cited by the defendant itself and some of which the same Advocate, Mr. Gitonga, participated is well settled. Granted that the same are persuasive only upon this court, the same are to this court a correct enunactions of the law and no basis was laid to persuade me to make a departure from them.

13. This matter shall proceed for hearing on the merits for which reason it is stood over to the 25/4/2017 for a case conference. Let the plaintiffs be served.

Dated at Mombasa this 24th day of February 2017.

HON. P. J. O. OTIENO

JUDGE