



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 441 OF 2015

BRIDGE INTERNATIONAL
ACADEMIES LIMITED.....PLAINTIFF/RESPONDENT
VERSUS
JAMES MOMANYI.....DEFENDANT/APPLICANT

RULING

Before the court is a preliminary objection dated the 23rd may, 2016. It is based on the fact that this court does not have jurisdiction to hear and determine this suit as it relates to a defamation action allegedly arising out of and based on the alleged employment of the defendant by the plaintiff, and which dispute is expressly reserved for the employment and labour relations court as per Article 162 (2) (1) of the constitution of Kenya, and section 12 of the Employment and Labour Relations Court Act, Cap 234B.

The plaintiff herein filed the plaint dated 1st December,2015 against the defendant alleging that on or about the 20th July,2015 the defendant in a website <http://www.mediamaxnetwork.co.ke/people-daily/156232/state-must-monitoring-operations-of-donor-funded-academies/ralsely> and maliciously wrote and published or further through his agents, servants and/or employees, caused to be written and published an article entitled “state must monitor operations of donor funded academies which concerned the plaintiff in which it stated inter alia the following;

“ The assertion is merely a marketing gimmick to hood wink poor parents and gullible donors. Further, the schools are not as cheap as they are marketed. If the cost of uniform, exams, the optional breakfast and lunch is accounted for, the cost is over \$ 13 (Ksh.1,300/-).”

A few minutes ago, a local newspaper gave examples of how these schools are operating contrary to the Basic Education Act but two senior government officials, accompanied by officials of an international organization rushed to one of the academies and took pictures with pupils and teachers.

“The photos were shown to the parents as a mark of legitimacy from the government. It, however, won’t take long before what Sossion and the researchers have pointed out come back to haunt the government and parents.....”

The said publication is alleged to be defamatory, misleading, inaccurate and malicious in respect of the plaintiff’s company and or network of academies.

It is further pleaded that at all material times prior to the publication, the defendant was formerly a communications officer with the plaintiff’s company and was well aware that the assertions

communicated in his article of 20th July, 2015 were indeed false and inaccurate but the defendant maliciously chose not to confirm the information about the plaintiff.

The defendant filed a notice of motion dated the 23rd May, 2016 seeking to be granted leave to file appearance and defence out of time but the defendant filed a preliminary objection on the same date. Both were scheduled for hearing on the 9th November, 2016 but the preliminary objection proceeded first as it touches on the jurisdiction of this honourable court. On the said date, the plaintiff and its counsel did not attend court though they had notice of the Preliminary objection and their application dated 23rd May, 2016 was also scheduled for hearing on the same date but it filed submissions in opposition to the preliminary objection.

On the part of the defendant, it was argued that the court has no jurisdiction to hear the matter as it arose out of employment. That the plaintiff had employed the defendant and that during the pendency of that contract he came across private information relating to the plaintiff.

The defendant's preliminary objection is based on Article 162 (2) of the constitution of Kenya and section 12 of Employment and Labour Relations Court Act Cap 234B. It was submitted that the jurisdiction of this court is ousted by those two provisions and therefore the appropriate court to hear the matter is the Employment and Labour Relations Court. He relied on the case of ***J.S.C Vs. Gladys Shollei & Another (2014) eKLR*** in which the court held that the court mandated to handle all matters arising from employment is the ELRC. He also relied on the case of ***Stanley Mungai Muchai Vs. National Corporation of Kenya*** where the court held that defamation cases arising out of employment, the appropriate court to hear the matter is the ELRC. The cases of Naqui syed Omar Vs. Paramount Bank Limited & Another (2015) eKLR and that of R vs Trans National Bank Limited & 3 others Misc. Application No. 109/2016 were also relied on to support the contention that this court has no jurisdiction to hear the matter herein.

The plaintiff filed its submissions on the 24th November, 2016 wherein it is submitted that the court has jurisdiction to hear the matter by virtue of Article 165 (1) B and (5) of the constitution which gives the High Court unlimited jurisdiction in both criminal and Civil matters. It has relied on the case of ***Gedion Mose Onchwati Vs. Kenya Oil Company Limited & another(2015) and that of John Ritho Kanago & 2 others Vs. Joseph Ngugi & another 2015(eKLR)***.

This court has considered the preliminary objection and submissions by the respective parties. In the famous case of ***Mukhisa Biscuit manufacturing Limited Vs. West End Distributors Limited (1969) E.A. 696*** at page 701 the Court of Appeal observed as follows;

“ 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 if any facts have to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasions, confuse the issues.”

The plaintiff in its submissions has averred that the preliminary objection herein fails this test in that the court in order to consider the preliminary objection is being referred to consider the facts by the defendant and has asked the court to dismiss the preliminary objection. The plaintiff has also submitted that the preliminary objection was filed out of time.

It is trite law that the court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. (***see the case of Samuel Kamau Macharia Vs. KCB & 2 others, civil Application No. 2 of 2011. (Supreme Court)***).

The jurisdiction of the High Court is donated by Article 165 (3) of the constitution. Under Article 165 (3) (a), the High Court shall inter alia have unlimited original jurisdiction in Criminal and Civil matters

subject to clause (5).

Under clause 5 (b), the High Court shall not have Jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 16(2) of the constitution.

On the other hand, the ELRC is established under Article 162 (2) of the constitution which provides;

“ Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(a) Employment and Labour Relations; the constitution goes further to state that parliament shall determine the jurisdiction of the courts contemplated in clause (2).

Pursuant to the provisions of Article 162 (2), parliament enacted the Employment and Labour Relations Court Act Cap.234B. Section 12(1) of this Act sets out the jurisdiction of the ELRC and among them :-

“are disputes relating to or arising out of employment between an employer and an employee.”

The sub-section specifically states 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.

I have considered the authorities relied on by the defendant in support of the preliminary objection and especially that of *Naqui Syed Omar Vs. Attorney General and that of Stanley Mungai Muchai Vs. National Oil Corporation of Kenya*. I note that in the case of Stanley Mungai, one of the issues raised is that the claimant was an independent contractor and not an employee within meaning of employment Act. No.11 of 2007 which could only be determined by the ELRC among the other reliefs.

Similarly, in the *Naqui Case* the main prayer sought by the claimant was for unpaid salary for the remainder of his contract ending March, 2016, at Kshs.12,070/-. The claimant also sought general damages for malicious prosecution, unlawful termination of employment and defamation. In my view, the main causes of action in the two matters squarely fell within the jurisdiction of the ELRC.

In the matter before this court, the only cause of action by the plaintiff is for defamation. Granted, the defendant was a former employee of the plaintiff but the article complained of had nothing to do with employment. It cannot be said to be a dispute relating to or arising out of employment between an employer and an employee. The defendant has not even filed his defence and this court does not even know what his defence to the claim is. But going by the facts in the plaint and the reliefs sought, I have no doubt in my mind that this court has jurisdiction to entertain this matter.

On the issue of whether the preliminary objection meets the test in the Mukhisa Biscuit Case, I hold the view that it does, as it is on a point of law regarding the jurisdiction of this court.

As to the submission that the preliminary objection was filed without the leave of the court, the legal position is that a preliminary objection on a point of law can be raised any time and therefore that submission has no basis.

From the foregoing analysis, it follows that this preliminary objection is incompetent and is hereby dismissed but with no orders as to costs.

Dated, signed and delivered at Nairobi this 23rd February, 2017.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiff

..... for the Defendant