



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 353 OF 2016**

**IN THE MATTER OF INFRINGEMENT AND THE CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER THE CONSTITUTION OF KENYA 2010 ARTICLES 22(1) AND 23, 26(1), 27(1)(2)(3), 28, 30(1) & (2), 31, 47(1), 259, 260 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE MEDIA COUNCIL ACT, 2013, SECTION 45(1)**

**AND**

**IN THE MATTER OF THE MEDIA COUNCIL CODE OF CONDUCT FOR THE PRACTICE OF JOURNALISM IN KENYA, RULES 8 & 21**

**AND**

**IN THE MATTER OF THE NEGLIGENT EXPOSURE OF GLORIOUS STELLA NYAMONGO IN THE EXPOSE ON HUMAN TRAFFICKING IN KENYA AIRED ON CITIZEN TELEVISION NETWORK NEWS EDITION OF 23<sup>RD</sup> SEPTEMBER 2014**

**BETWEEN**

**GLORIOUS STELLA NYAMONGO.....PETITIONER**

**VERSUS**

**ROYAL MEDIA SERVICES .....RESPONDENT**

**RULING**

1. This is a ruling on a preliminary objection. By a Petition dated 5<sup>th</sup> July 2016 and filed in Court on 22<sup>nd</sup> August 2016, Glorious Stella Nyamongo (The Petitioner) sought the following orders against Royal Media Services Limited, the respondent namely:-

*i. A declaration that the exposure of the petitioner's true and actual identity on the story of human trafficking aired by the respondent on its Citizen Television 7.00 p.m. and 9.00 p.m News Edition of 23<sup>rd</sup> September 2014 went against the petitioners fundamental right guaranteed under Article 47 of the Constitution.*

*ii. An order for general damages under common law resulting from the Physical, Emotional, Psychological and Financial Harm caused to her as a result of the story on human trafficking aired by the respondent on its citizen 7.00p.m and 9.00p.m. News edition of 23<sup>rd</sup> September 2014.*

*iii. An order for Exemplary Damages under Common Law as a result of the Physical Mental, Psychological and financial harm, caused to her as a result of the story on human trafficking aired by the respondent on its citizen Television 7.00p.m and 9.00p.m. News edition of 23<sup>rd</sup> September 2014.*

*iv. An order for exemplary damages to be awarded to the petitioner arising from the defamatory injuries caused by the maligning of the name and reputation, character, fame and image of the petitioner.*

*v. Costs of this petition to be awarded to the petitioner.*

2. On being served with the petition, the respondent took out a notice of preliminary objection dated 5<sup>th</sup> September 2016 and raised the following points of objection:-

*i. The petitioner's claim if any, is a claim in the tort of defamation and the same is best canvassed in a civil suit or a complaint being made before the media Council, Act 2013 and not through a constitutional petition.*

*ii. The petition is based on an incident which took place on 23<sup>rd</sup> September 2014 and a demand letter sent on 9<sup>th</sup> September 2015, a copy of which was served on the media council of Kenya but the petitioner then slept on her rights for about two years since the incident and therefore has been caught by the limitations of Actions Act.*

*iii. Equity aids the vigilant, not those who slumber on their rights.*

*iv. It is a well settled principle that he who comes to equity must come with clear hands.*

*v. The petitioner is attempting to circumvent section 3(2) of the limitation of Actions Act which makes clear that an action for libel or slander may not be brought after the end of twelve months from such date without applying for extension of the time within which to bring her claim under sections 27 and 28 of the limitations of Actions Act.*

*vi. The petitioner has based her claim on her own wrong contrary to the rule in *Nabra Properties Ltd v Slay Structures Ltd (2002) 2KLR 299*.*

3. The petitioner filed a replying affidavit to the preliminary objection sworn on 24<sup>th</sup> October, 2016, in which she stated that the petition was based on the infringement and or denial of her fundamental rights, that the claim is not only defamation but also infringement of the petitioners rights and has no limitation in time, and maintained that a determination on whether there was breach of fundamental rights or freedom can only be canvassed in this court.

4. Parties then filed submissions on the preliminary objection which they highlighted, **Miss Kamau**, learned Counsel to the respondent, highlighted the submissions and told the court, that the petition was not property before this court because it was based on defamation, and was therefore a civil dispute. Learned Counsel cited on the submissions and authorities. Counsel relied on the case of **USIU V Attorney General 2012 eKLR** which had been cited in the case of **Daniel N Mugendi v Kenyatta University & 3 Others [2013]eKLR** submitting that where there is a remedy, that remedy should be pursued.

5. According to learned Counsel, the issue raised in the petition is about defamation which is different from issues of human rights and referred to the affidavit in response to the preliminary objection on which

was attached a copy of the demand letter, to demonstrate that indeed this was an issue of defamation.

6. Learned Counsel went on to submit that the petitioner delayed in filing her claim for defamation and was only turning to this petition after time had lapsed, for filing a civil claim. She referred to the case of **Githae v Nairobi City Commission** on time limit within which to file a claim of this nature Counsel took the next part arguing that the petition had not particularized the rights allegedly violated and referred to the case of **Peter Muigai Ngegi v Mama Ngina Kenyatta & Another [2015]eKLR** to support this submission.

7. Mr Rono, learned counsel to the petitioner/respondent, opposed the preliminary objection and relied on the affidavit filed in response to the preliminary objection, as well as their submissions. Learned Counsel submitted that that this is a constitutional matter under Articles 31 and 47 of the constitution, arguing that the petitioners rights were infringed in her exposure by the respondent in their prime time news of 23<sup>rd</sup> September 2014 at about 7p.m. and 9p.m. bulletins, which gave the petitioner's full identity to the general public.

8. According to learned counsel, the petitioner had no other recourse but to seek remedy before this court. Submitting that even the media council could not adequately address her claim.

9. Learned counsel in response to the argument that the claim was time barred as defamation claim, submitted, that claims over constitutional rights have no limitation and referred to the case of **Kiluwa Limited & Another v Commissioner of Lands & 3 Others [2015]eKLR** to support his submissions.

10. Counsel further contended that the petition contained other prayers and sought to rely on the case of **Patrick Musimba v National Land Commission & 4 Others Petition No 613 of 2014** where the court stated that despite the issue being land, it had jurisdiction to hear the petition, and urged the court to hear and determine the present petition.

11. I have considered the preliminary objection, submissions by Counsel and authorities relied on. The issue before court for determination is whether this court should hear the petition filed herein. The respondent has objected to the petition proceeding before this court on the grounds that the claim is founded on the tort of defamation, a civil claim hence this court should not hear it.

12. What amounts to a preliminary is a question of law. A preliminary is, argued on the basis that facts are agreed and when raised a preliminary point it has the potential to dispose of the entire suit without the necessity of going into trial. What amounts to a preliminary objection was discussed in the case of **Mukisa Biscuit Company v West end distributors Limited [1969]EA 696** where the court stated:

*“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 if any fact has 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 occasion confuse issues.*

13. This point was also addressed in the case of **Oraro v Mbaja [2005]1KLR 141** where **Ojwang J** (as he then was stated as follows:-

*“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the dispute to refer the dispute to arbitration.*

14. There are two main points of objection raised in the notice of preliminary objection. First that this is a tort of defamation which is a civil claim, and therefore that it should have been filed a such in the civil division. Secondly that this being a tortious claim of defamation, the same is time barred having been

filed outside the statutory period.

15. On the first point, the argument is that the issue herein is about libel or slander which is a tort and the claim should have been filed within twelve months since the acts, complained of took place in September 2014. It is true from the pleadings that the actions complained of took place on that date, and were published by the respondent's television station.

16. However, what is before this court is a constitutional petition through which the petitioner claims that her fundamental rights were violated.

Among the constitutional provision cited in the petition are Articles, 28 on human dignity and 31, right to privacy. These are matters that can only be determined upon hearing the parties so that each of them shows the applicability or otherwise of the Articles of the constitution relied on. Where the claim is in the nature of violation of fundamental rights, It is only fair that parties be given a chance to ventilate their cause so that the court has an opportunity to hear them and decide the petition on merit.

17. Secondly on the issue of limitation, what is before court is a constitutional petition as opposed to a normal civil suit. It has been held that there is no limitation in constitutional petition. In the case of **Kiluwa Limited & Another v Commission of lands & 3 Others [2015]eKLR** the court stated:-

“...there is no statutory period prescribed for commencement of the petitions either under Article 22 or 258 of the constitution. The grant of these reliefs or remedies are consequently not subject to any statute or period of limitation either under the limitation of Actions Act (Cap 22 laws of Kenya) or the law Reform Act... I therefore reject argument by Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents subjecting the reliefs in judicial review granted in a constitutional petition to any period of limitation.”

18. Where a party moves the court by way of a constitutional petition to enforce fundamental rights, the court should hear such a party and make a final determination rather than decide a case on technicalities.

That is not the object and purpose of our constitution. Article 159 encourages courts to decide cases on account of substantial justice and not to pay undue regard to procedural technicalities. I am aware that article 159 cannot be a cure to all ills, but in cases touching on human rights and fundamental freedoms, the court would be reluctant to apply restrictive procedures to lock out a litigant. Whether or not a petition meets constitutional requirements is a matter for determination at the hearing.

19. I have perused this file but have not seen any response to the petition except the notice of Preliminary objection. The court does not know what the respondent's response to the petition therefore is.

20. From what I have stated above, the view I take is that parties should be allowed to prosecute their cause to the end and allow the court to fully interrogate the claim and make a just determination.

21. The upshot is that the preliminary objection is overruled and disallowed, Costs be in the cause.

**Dated, Signed and delivered at Nairobi this 26<sup>th</sup> Day of April 2017**

**E C MWITA**

**JUDGE**