



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 259 OF 2011**

**JOHNSON OTIENO ADERA.....PLAINTIFF**

**VERSUS**

**MOHAN GALOT.....DEFENDANT**

**RULING**

1. By a plaint dated 30<sup>th</sup> June, 2011 was the Plaintiff, Johnson Otieno Adera sued the Defendant, Mohan Galot on claims that the Defendant published a letter that was defamatory to the Plaintiff. The claim was denied through the statement of defence filed herein.

2. The Plaintiff filed the Notice of preliminary objection dated 28<sup>th</sup> February, 2012 which is expressed to be pursuant to Rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (Legal Notice No. 6 of 17<sup>th</sup> February, 2006). The questions raised in the preliminary objection are as follows:

**1. Whether the Respondent's complaint against the Plaintiff contained in the letter dated 6<sup>th</sup> October, 2010 addressed to the Minister for Justice, National Cohesion and Constitutional Affairs are justiciable in libel proceedings.**

**2. Whether the Defendant's right to protection of law, right to equality and freedom from discrimination, right to human dignity and the right to fair and administrative action enshrined in Article 27,28 and 47 of the Constitution read with the Public officers and Ethics Act, 2003 (Act No. 4 of 2003) entitled to the Plaintiff to institute libel proceedings arising from a complaint made against him as a public officer.**

**3. Whether in the light of the Defendant's rights and freedoms under Articles 27,26,47 and 50 of the Constitution the Honourable court has jurisdiction to grant the remedies sought by the Plaintiff in the Plaint dated 16<sup>th</sup> November, 2010.**

**4. Whether the libel proceedings herein subvert and/or violates the principles and values of justice, accountability, transparency, human rights and the Rule of law embodied in Articles 10,47 and 50 of the Constitution.**

3. The preliminary objection was canvassed by way of written submissions. I have considered the said preliminary objection and the submissions filed.

4. The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) Ea 696**. At page 700, Law, JA stated that:

**“...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 or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

Sir Charles Newbold P. added as follows at page 701:

**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 fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

5. Rule 23 of the Constitution ( Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006) states as follows:

**“23.Where a Constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.”**

6. The subject matter of this suit is a letter dated 6<sup>th</sup> October, 2010 written by the Defendant to the then Minister for Justice, Constitutional Affairs and National Cohesion. The letter is not denied by the Defendant. However, the Defendant denied any malice on his part and also denied the publication of the letter. He stated that the complaint was made against the Plaintiff as a public officer and that the subject matter of this suit is the same as in Nbi HCCC No. 44 of 2010. To my mind, these are not issues of pure points of law. There are facts that require to be ascertained. This can only be done during the hearing of the case.

7. On the constitutional rights referred to above, both the Plaintiff and the Defendant have their rights. The matter before the court is therefore justiciable. Whether the letter written by the Defendant is defamatory or not is in my view a matter that is suitable for hearing by this court.

8. With the foregoing, I hold that the preliminary objection does not meet the threshold for the same to be sustained. Consequently, I dismiss the preliminary objection with costs.

Date, signed and delivered at Nairobi this 21<sup>st</sup> day of Sept., 2017

**B. THURANIRA JADEN**

**JUDGE**