



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 5 OF 2017

NAIROBI CITY COUNTY GOVERNMENT.....PLAINTIFF

VERSUS

JOHN KAMAU.....1ST DEFENDANT

NATION MEDIA GROUP LIMITED.....2ND DEFENDANT

RULING

The application for determination by this court is a Notice of Motion dated 23rd January, 2017 filed by the Defendants under Order 2 Rule 15(1) of the Civil Procedure Rules and all other enabling provisions of the law seeking the following orders:-

- a) That the suit against the Defendants be struck out as it discloses no cause of action;
- b) That the costs of this application and suit be awarded to the Defendants;

The application is based on the grounds that;

- (a) The Plaintiff by law cannot maintain an action in defamation;
- (b) It would be in the interest of justice to allow the application; and
- (c) Further grounds to be adduced at the hearing.

When the Application came up for hearing on 31.1.2017, the Plaintiff's Advocate requested for leave to file a Replying Affidavit and the court granted the leave with directions that the same be served within 3 days. The application was canvassed by way of oral submissions on 23.02.2017. On the said date, the Plaintiff had not yet filed a Replying Affidavit or Grounds of Opposition, nonetheless, Counsel indicated that she was ready to proceed.

The Defendants' Counsel submitted that the Plaintiff, Nairobi City County Government cannot maintain a cause of action in defamation and relied on **Halsbury's Laws of England Fourth Edition** where it states that institutions of central or local governments such as local authorities have no common law right to maintain an action for defamation following the reasoning in the case of **Derbyshire County Council versus Times Newspaper Limited (1993) 1 All ER 1011** where it was held that a government should be open to public criticisms. The same argument was advanced in the case of **PTC Vs. Modus Publications (PVT) Limited 1997 (2) ZLR 492** where it was held that a state should not maintain any action in defamation. The Defendants also referred to the case of **Kerajaan Negeri Trengganu & 3 Others**

Versus Dr. Syed Azman Syed Ahmad Namawi & 3 Others HCCC No. 23 NCvC-106-12/2011 Malaya at Kuala Lumpur where the same position was advanced that a government cannot sue for defamation.

Counsel for the plaintiff opposed the application and stated that a local government is a legal person capable of suing and being sued and on this, the Plaintiff quoted section 6 of the County Government Act and Article 260 of the Constitution which defines a person to include a body corporate. She argued that there is a difference between the County Government as a body corporate and the governing authority.

She submitted that the Defendants relied solely on the common law to advance their case whereas we have the Defamation Act. The Plaintiff also relied on Articles 33 and 35 (2) of the constitution which provides that, the rights of others ought to be respected and every person has a right to correction or deletion of untrue or misleading information. The Plaintiff further submitted that striking out a suit is a draconian measure that should be exercised in the rarest and clearest cases and that their suit raises triable issue.

In a quick rejoinder, the Defendants stated that there are no local cases on the issue and that is why they relied on common law and that section 6 of the county Government Act only lists functions of a local authority as a legal entity, but it has not stated that it has locus to sue for defamation. On the submission that it's draconian to strike out the suit, the Defendants submitted that the Plaintiff has no locus to maintain the suit in the first place.

The substantive law governing striking out of pleadings is founded on the provisions of **Order 2 Rule 15 of the Civil Procedure Rules** which provides;

“(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a) It discloses no reasonable cause of action or defence in law; or***
- b) It is scandalous, frivolous or vexatious; or***
- c) It may prejudice, embarrass or delay the fair trial of the action; or***
- d) It is otherwise an abuse of the process of the court;***

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

Having traversed the arguments of the respective parties, I find that the issue to be determined by this court is whether the Plaintiff has the legal capacity to maintain a suit for defamation. I have considered the Defendants/Applicants' argument that the Plaintiff being a local authority does not have the legal capacity to sue for defamation as the same should be open to public criticisms. The Defendants have quoted a number of authorities to which the Plaintiff opposes on the grounds that they are common law precedents and we have our own substantive law as espoused in the constitution and the Defamation Act.

The Plaintiff raises a pertinent issue which indeed calls for interrogation by this court in order to determine whether the Plaintiff is a body corporate or a legal person and whether it can sue for defamation in that regard. The Court is also invited to determine whether common law should apply when we have a substantive law which is the defamation Act.

In regard to the first issue, the Plaintiff relied on the **County Governments Act** to support the argument that the Plaintiff is a legal person and therefore capable of suing and being sued. **Section 6(1)** of the Act establishes County Governments as constitutional authorities and body corporates which in effect means that they are legal persons and can discharge duties independently. The wording of the section is that “*As an entity exercising constitutional authority, a county government shall be a body corporate with*

perpetual succession and shall have all the powers necessary for the discharge of its functions.”

The **Defamation Act** is not express on whether a County Government can sue for defamation or not but its wording espouses the scope in the constitution to include bodies of persons as legal entities who can sue for defamation. For instance **Section 7A(7) of Defamation Act** provides that , *“In any civil proceedings for libel instituted by a person or **body of persons** (emphasis) entitled to a right of reply who or which has failed to exercise such right in accordance with this section the court shall, in the event of it having found in favour of the plaintiff, be at liberty to reduce the amount of damages which it would have otherwise awarded by such sum as the court considers appropriate having regard to all circumstances of the case.”*

Whereas this court appreciates the constitutional and statutory provisions in regard to the locus to sue and to be sued by body corporate, the court also notes the special circumstances of this case. The Plaintiff herein is a County Government which can be defined as government for the people and by the people and not just any other body of persons. It is run using public resources and it is a mini government so to speak. It is different from the former local authorities. I am persuaded by the arguments by Counsel for the defendants that a county government should be open to public criticisms as this is the only way that it can be held to account. The circumstances of this case were even more peculiar as the alleged defamatory statement arose from the contents of the Auditor General’s report which is an official report and which contents are substantially true. I have no quarrel with the provisions of the County Government Act to the effect that a county government can sue and be sued but in cases of defamation such as the one at hand, I hold a contrary view which is that, it cannot sue.

It is also noted that our substantive law on defamation, which is the Defamation Act, is not express on whether a County Government can maintain a cause of action in defamation or not. In the circumstances, and considering that there is no express legal provision in our laws, it would be in order to apply the substance of common law to fill the legal lacuna left out by our laws.

The hierarchy of laws as established in the **Judicature Act, Section 3(1)** provides for the mode of jurisdiction, that,

“(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—

(d) the Constitution;

(e) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(f) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date”

This court is alive to the established legal principle that the power to strike out a pleading is one that a court should exercise sparingly and cautiously. In the case of **DT Dobie & Company (K) Ltd Vs Muchina (1982) KLR 1** page 9 Madam J held that, *“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before striking out a case for not disclosing a reasonable action or for being otherwise as abuse of the process of the court.*

But that notwithstanding, this court finds that the suit herein discloses no reasonable cause of action and I am left with no option but to strike it out.

The upshot of the above is that the Defendant’s application dated 23rd January, 2017 is hereby granted as prayed.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **13th** Day of **October**, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant