



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 100 OF 2015**

**IN THE MATTER OF:           ARTICLES 33(3) THE CONSTITUTION OF KENYA,  
2010**

**IN THE MATTER OF:           SECTIONS 2, 7A(1) & 7A(6) OF HE  
DEFAMATION ACT (CAP 36) LWAS OF KENYA**

**IN THE MATTER OF:           ORDER 2 RULES 7(1), 7(3), 9 AND 10(1)  
OF THE CIVIL                   PROCEDURE RULES, 2010**

**BETWEEN**

**HON. DR. EVANS KIDERO ..... PLAINTIFF/APPLICANT**

**-VERSUS-**

**STANDARD GROUP LTD..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PAUL WAFULA..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DANIEL WESANGULA..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**NATION MEDIA GROUP LTD..... 4<sup>TH</sup> DEFENDANT/RESPONDENT**

**REMENYA GIBENDI..... 5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a Plaintiff dated 9<sup>th</sup> March, 2015, Hon. Dr. Evans Kidero (hereinafter “the Plaintiff”) described himself as the first Governor of Nairobi City County and a former Managing Director of Mumias Sugar Company Ltd. In a 22 paged Plaintiff, the Plaintiff set out his achievements as well as reputation.

2. He claimed therein that despite his said reputation, between 9<sup>th</sup> and 18<sup>th</sup> February, 2015, the Defendants wrote of and concerning him matters that were defamatory of him. He set out in the Plaintiff, specifically paragraphs 31 through 43, the words and/or articles published by the Defendants that he was complaining of. Together with the Plaintiff, the Plaintiff lodged in this Court on 10<sup>th</sup> March, 2015 a Motion on Notice seeking injunctive reliefs against the Defendants. The Motion was certified urgent and fixed for hearing on 18<sup>th</sup> March, 2015. On being served, the 4<sup>th</sup> and 5<sup>th</sup> Defendants took out a Preliminary

Objection on Notice. That objection then is the subject of this Ruling.

3. In that Preliminary Objection dated 17<sup>th</sup> March, 2015, the 4<sup>th</sup> and 5<sup>th</sup> Defendants stated that, the Plaintiff's application and Suit in its entirety are an abuse of the process of the Court as it does not comply with the rules prescribed in filing a constitutional matter.

4. Ms. Janmohamed Learned Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that, on the face of it, the matter before Court was brought under the provisions of Articles 33(3) of the Constitution of Kenya that relates to the freedom of expression and that the Plaintiff sought a declaration that the Defendants have defamed the Plaintiff. According to Counsel, once a party invokes the Constitution of Kenya, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 popularly known as **"the Mutunga Rules"** apply. That under those rules once a right under the Constitution is alleged to have been breached, the applicant is obligated to approach the Court by way of a Petition and not a Plaintiff. Ms. Jan Mohamed referred the Court to the Plaintiff which was intitled, inter alia, **"In the matter of the Constitution of Kenya"** and lamented that the Defendants did not know if they were facing a constitutional matter or a defamation suit. In her view, the Plaintiff being headed as if it was a Constitutional Petition was an outright abuse of the court process and the same should be struck out.

5. Mr. Lutta, Learned Counsel for the 1<sup>st</sup> to 3<sup>rd</sup> Defendants associated himself with the submissions of Ms. Janmohamed and further submitted that in the unlikely event that the Court does not strike out the Plaintiff, the same should be amended to conform with the law.

6. On his part, Mr. Okoth, Learned Counsel for the Plaintiff opposed the objection and submitted that; the Mutunga Rules apply to enforcement of fundamental rights and freedoms; that the prayers in the Plaintiff showed that the Plaintiff was not seeking to enforce any fundamental rights or freedoms and that the suit related to a tort of defamation.

7. According to Mr. Okoth, the Plaintiff had complied with Order 2 Rules 7, 9 and 10 of the Civil Procedure Rules as to how to plead a tort of defamation. That since under Article 1 of the Constitution, the Constitution is the primary source of law, the Plaintiff was at liberty to cite the same pursuant to Order 2 rule 9 of the Civil Procedure Rules. That the form of pleading does not go to the heart of a pleading and should not be a ground to strike out a suit. He urged the Court to dismiss the objection.

8. In rejoinder, Ms. Janmohamed submitted that under Section 7A of the Defamation Act Cap 36, Laws of Kenya, an aggrieved party does not pray for a declaration but rather damages; that by invoking the Constitution in the heading of the Plaintiff the matter was clearly of a constitutional nature. That the Plaintiff has been intitled as directed by the Mutunga Rules on how a Petition is to be; that in the premises, the Defendants were greatly prejudiced as they did not know what they are facing. Counsel therefore urged the Court to uphold the objection.

9. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that:-

***"3(1) These Rules shall apply to all proceedings made under Article 22 of the Constitution -----***

***4(1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected, may make an application to the High Court in accordance to (sic) these rules. -----***

***10 (1) An application under rule 4 shall be made by way of a Petition as set out in form A in the Schedule with such alterations as may be necessary."***

10. Form A to the Schedule provides the format of the Petition as follows:-

**“IN THE HIGH COURT OF KENYA**

**AT -----**

**PETITION NO. ----- OF ----- 20-----**

**IN THE MATTER OF ARTICLE 22(1)**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR  
FUNDAMENTAL FREEDOMS UNDER ARTICLE -----**

**BETWEEN”**

11. It is clear from the foregoing that in an action under the Constitution, one is to be guided or to approach the Court as provided for by the Mutunga Rules. The action must be for an alleged denial, violation or infringement or threat to rights or fundamental freedom and the same must be for the enforcement of those rights or freedoms as provided for under Article 22 of the Constitution of Kenya. Such proceedings must be commenced by way of a Petition in terms of Rule 10 of the Mutunga Rules and Form A of the Schedule. Rule 10 (2) of these rules sets out what should be contained in the Petition.

12. What is then before me? Before me, after page 852 of the exhibit to the Motion is a pleading titled **“PLAINT”**. It is entitled as follows:-

**“REPUBLIC OF KENYA**

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

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**IN THE MATTER: OF ARTICLES 33 (3) OF**

**THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: SECTIONS 2, 7A (1) & 7A (6) OF THE DEFAMATION  
ACT (CAP 36) LAWS OF KENYA**

**IN THE MATTER OF: ORDER 2 RULES 7 (1), 7 (3), 9 AND 10 (1) OF THE CIVIL  
PROCEDURE RULES 2010**

**BETWEEN”**

**-----**

13. Ms. Janmohamed complained that, it was not clear whether the Defendants were facing a Constitutional matter touching on the infringement of the Plaintiff’s Fundamental Rights and Freedoms or an outright civil suit for defamation. A casual look at the impugned pleading, one will be forgiven if he/she concludes that the same is something else than a Plaint. As I have set above, it takes the form of a Petition i.e. it is intituled **“In the matter of -----“**as provided for by the Mutunga Rules. It cites Article 33 of the Constitution of Kenya, Section 7A of the Defamation Act and Order 2 of the Civil Procedure Rules. A party served with such a document, may quickly conclude that what he/she is facing is a claim for contravention of the constitution.

14. Be that as it may, is that anomaly enough to mislead a party as to the nature of the case he is facing? It is expected that apart from glossing over the entitlement of a pleading, a party to a proceeding will look to ascertain the cause of action lodged against him. This will entail him having to look at the several paragraphs of the subject pleading. In this case, a look at the plaint that commenced these

proceedings will reveal that in Paragraphs 31 through 43, the Plaintiff has pleaded defamation. The said paragraphs are in tandem with how a pleading for defamation is to be pleaded.

15. In **Bullen & Leake and Jacobs Precedents of Pleadings Sweet & Maxwell Vol 1 17<sup>th</sup> Edn 2012, at page 636** it is observed as follows: -

***“Libel. The words must be set out verbatim in the particulars of claim. It is not enough to set out their substance or effect (Harris Vs Warre (1879) 4C.PD. 125 at 127: Collins Vs Jones (1955) 1QBD 564). Where the defamatory words form only part of a longer article or programme, the claimant must set out in his particulars only the particular passages of which he complains as being defamatory of him.....”***

***The book, newspaper or other document from which the words are taken should be identified by date and/or description as appropriate.....”***

16. My reading of the pertinent paragraphs of the Plaintiff in this suit lead me towards that end. Whilst the intitlement of the Plaintiff may be misleading as to the nature of the claim, i.e. reference to Article 33 of the Constitution as submitted by Ms Janmohamed, the body of the plaintiff, and in particular the portion that sets out the cause of action, is very clear that this is a claim for defamation and not breach of rights and fundamental freedoms. In any event, Article 22 of the Constitution has not been invoked in the intitlement of the plaintiff as per Form A of the Schedule to the Mutunga Rules.

17. Article 22(1) of the Constitution of Kenya provides:-

***“22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”***

Whilst Article 33(3) which the Plaintiff invoked in his Plaintiff provides that:-

***“33(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”***

18. It is clear from the foregoing that whilst Article 22(1) gives the right to commence certain proceedings; i.e. constitutional proceedings, Article 33(3) only declares the existence of a right to reputation. The latter does not give a right to commence proceedings either to enforce the right provided therein or restrain its invasion. That is the preserve of Article 22(1) of the Constitution.

19. To my mind therefore what there is, is poor drafting of the subject pleading rather than a deliberate act on the part of the Plaintiff or its legal advisers to either mislead the Defendants or confuse them. The inclusion of the words **“In the matter of Section 33 of the constitution” et cetera** in the entitlement as is the declaration in prayer No. (a) of the Plaintiff is a mere suppliance that does not go to the root of the pleading itself. In my view, considering the sum totality of the pleading in question, it is not possible for a party to be misled as to the nature of the case he/she is facing.

20. Accordingly, in the circumstances of this case, guided by the authority of **DT DOBIE VS MUCHINA (1982) KLR 1** and as submitted by Mr. Lutta for the 1<sup>st</sup> Defendant, I am inclined to save the suit rather than terminate the same prematurely. Justice will be done by ordering the amendment of the plaintiff in the intitlement by striking out some parts set out in paragraph 12 hereinabove starting from the words **“In the matter of etc.....”**. Those words, in my view are mere suppliance that do not add value or subtract any from the Plaintiff on record. As to the declaration in the prayers, I do not think that the same is offensive. It can be retained. The Plaintiff is therefore directed to file and serve a compliant amended Plaintiff within seven (7) days of today.

21. Accordingly, I find the objection to be without merit. The same is hereby dismissed with no order as to costs.

DATED, Signed and Delivered at Nairobi this 27<sup>th</sup> day of March, 2015.

.....

**A MABEYA**

**JUDGE**