



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 589 OF 2012

DR. JOHN RITHO KANOGO. 1ST PLAINTIFF

DR. GEOFFREY AVUGWI RITHO. 2ND PLAINTIFF

MARGARET RITHO. 3RD PLAINTIFF

VERSUS

JOSEPH NGUGI. 1ST DEFENDANT

THE STANDARD GROUP LIMITED. 2ND DEFENDANT

RULING

This defamation case was filed by the Plaintiffs against the Defendants on the 13th December, 2012. After the Summons to enter Appearance was served with the plaint, the Defendants filed their Memorandum of Appearance on 29th January, 2013. Filed with the Memorandum of Appearance was a Notice of Preliminary Objection of the same date. Then on the 17th April, 2013, the Defendants filed a joint Defence dated 11th April, 2013. By then the Plaintiffs had on 11th March, 2013 filed a Request for interlocutory Judgment arising from the Defendants' failure to file their defences within the prescribed time a required under Order 10 Rule 4. Such interlocutory judgment was entered by the Deputy Registrar on 8th April, 2014, a week before the Defendants filed their "**Defence**". It validly stands on record as no attempt has been made to set it aside.

What is before this court for Ruling is the Notice of Preliminary Objection dated..... The Notice states as follows: -

"TAKE NOTICE that counsel for the Defendants shall at the hearing of the matter or on the first opportunity raise a Preliminary Objection on the grounds that the court lacks jurisdiction to hear this suit by virtue of Article 34(2) of the Constitution of Kenya, 2010."

On 24th March, 2014 parties were directed to file and serve written submissions on the Preliminary Objection. Submissions were confirmed filed by 5th June, 2014.

I have carefully perused and considered the submissions from both sides. As I understand the issue, the question to be answered is whether or not Article 34(2) of the Kenyan Constitution took away the High Court's jurisdiction to hear defamation cases so that this court lacks jurisdiction to entertain the main suit.

The way I understand this preliminary objection is that if the objection in terms of the point of law is argued on the assumption that all the facts pleaded by the other side are correct, the point of law if successfully argued, would settle the case completely. That is to say, if all the plaintiff's pleadings are true and the point of law raised, is successfully argued, it will bring the suit to an end. That is further to say if the Plaintiff's facts of defamation pleaded herein are true and yet the court by virtue of Article 34 (2) finds that it has no jurisdiction, the court will dismiss or strike out the suit and thus bring it to an end.

In my opinion and finding accordingly, the point of law herein raised by the Defendant, is a proper Preliminary Point of Objection.

I now revert to Article 34(2) of the Constitution which provides thus: -

“The state shall not: -

- a. ***Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium: or***
- b. ***Penalize a person for any opinion or view or the content of any broadcast, publication or dissemination.”***

This article, as far as I understand it, provides for the relationship between the state and the person engaged in broadcasting, production or dissemination of information. It asserts the freedom of the person engaged in the production and dissemination of information through various media.

In my view however, Article 34(2) must be read together with other Articles of the Constitution to make the total sense intended as no single Article of the Constitution should be read in isolation or to the exclusion of others.

To that end Article 33 will have been taken into account before Article 34. It provides thus: -

“Freedom of Expression.

1. ***Every person has the right to freedom of expression which, includes;-***

- a. ***Freedom to seek, receive or impart information or ideas.***
- b. ***Freedom, of artistic creativity; and***
- c. ***Academic freedom and freedom of scientific research.***

2. ***The right to freedom of expression does not extend to: -***

- a. ***Propaganda for war***
- b. ***Incitement to violence***
- c. ***Hate speech; or***
- d. ***Advocacy of hatred that –***
 - i. ***Constitutes ethnic incitement, vilification of others or incitement to cause harm; or***
 - ii. ***Is based on any ground of discrimination specified or contemplated in Article 27(4).***

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

Clearly then, the freedom of expression and information of any person as enshrined in the Articles 33 and 34, is at the same time regulated by the same provisions so that the persons who exercise the freedom do so in such a way or to such an extent that they do not violate the constitutional and natural rights of other

persons. That, in my understanding, is the purpose of Article 33(3) of the Constitution.

Having stated as I have above, however, it is clear in my mind, that article 34(2) has nothing to do with a private person who exercises his/its freedom of expression under Article 33 and whose method or manner of such exercise can be questioned only under Article 33(3).

As I understand the law to state then, the person who exercises his freedom of expression in contravention to Article 33(3), may be called upon to account under the relevant Statutes promulgated under the Constitution. The provisions include those that control the conduct of a person that may amount to criminal conduct in respect of which the State becomes a party and those that regulate the freedom of expression between private individuals; for example the law of defamation.

In the case before me, private individuals i.e. the Plaintiffs have filed a suit claiming that other private individuals, the Defendants, have expressed their right to freedom of expression but in violation to Article 33(3) aforesaid. How then can such a suit between private individuals or persons be said to be violating the provisions of the said Article 34(2)? They are not the State nor do they represent the state.

Furthermore, the jurisdiction of this court to entertain civil suits of which defamation cases are part, arise from Article 165 of the Constitution of which Sub-Article (3) states: -

“3. Subject to clause (5), the High Court shall have

- a. **Unlimited original jurisdiction in criminal and civil matters.**
- b.
- c.
- d. **Jurisdiction to hear any question respecting the interpretation of this constitution.....**

4.

5. **The High Court shall not have jurisdiction in respect of matters: -**

- a. **Reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or**
- b. **Falling within the jurisdiction of the courts contemplated in Article 162(2).....”**

Article 162(2) states: -

“Parliament shall establish court with status of the High Court to hear and determine disputes relating to: -

- a. **Employment and labour relations and**
- b. **The environment and the use and occupation of, the title to land.”**

Clearly, the Constitution has provided situations or matters where this court has no jurisdiction. It has done so with deliberation. It has named those matters in respect of which special courts, with jurisdiction similar to that given to the High Court, shall be established. It has not named a special court to handle libel and slander. If the promulgators of the Constitution wanted to take away the jurisdiction of the High court to entertain defamation cases, it would have specifically done so as it indeed did with matters concerning employment and labour as well as matters of environment. That arose from the fact that matters related to the reputation and dignity of a person and those of employment and environment were in Kenya from the time our legal system came into being, handled by the High Court. To have them handled differently as the Constitution contemplated, therefore, required a special specific effort which became the expression of Article 162(2). Indeed even in such exercise, the Constitution had to specifically restate in Article 165(5) that the High Court remained with the unlimited original jurisdiction in criminal and civil matters subject to the provisions giving the new courts special jurisdiction to those other matters therein specified.

It is also necessary to note that all statutes dealing with any or all matters are constructed or promulgated under the Constitution. Such statutes are valid under the Constitution to the extent they are consistent to the same. The Civil Procedure Act, Cap 21 and the Defamation Act are examples of such statutes. I have not heard the Defendants argue that the two statutes are inconsistent to the Constitution. To that end Section 5 of the Civil Procedure Act provides: -

“any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which it’s cognizance is either expressly or impliedly barred.”

This provision simply effectively, repeats, what the Constitution, Article 165(3) provides. In the same reasoning, the Defamation Act merely provides the nature and composition of the civil suits of defamation.

It is my view accordingly, that the Defendant’s approach in this Preliminary Objection, is a wild fishing expedition whose purpose is not transparent except probably to obstruct or delay the prosecution of this case. I can only repeat what Ibrahim, J (as he then as) said **in Allan K N Mbugua Vs Royal Media Services Limited [2007] eKLR** when he said in relation to a similar point of objection to Section 79 of the former Constitution.

“I do not agree that Section 16A of the Defamation Act is ultra vires Section 79 (similar to Preset Article 34(2)) of Kenya Constitution which protects the freedom of expression. Section 79 Does not give any person including the Media, the license to make and publish slanderous and libelous statements which are actuated by ill-will and malice and geared towards the destruction of another persons’ name, character and reputation.. Many times the right to protect one’s name, image, character and reputation is even more sacred than the right to protect property.”

In my view, the process of balancing rights arising from or imbedded in the provisions of Articles 33 and 34 and other related provisions in the Constitution is a delicate process. I have no doubt in my mind that the Constitutional provision under discussion, i.e. Article 34(2), had given the Media Houses the right to freedom of expression and information protection from the Government. To my mind, however, such protection was not intended to override other rights, including personal rights, also protected in the same Constitution such as those stated in Article 33. Indeed while Article 33(1) assures every person to the right to freedom of expression, Article 33(2) practically limits such freedom in relation to certain matters while Article 33(3), also regulates by limitation, the exercise of the said right in respect to the rights of other persons. As if that was not enough, Article 24 is clear that a right or fundamental freedom such as the right to freedom of expression etc, may be limited by law to the extent that is reasonable and justifiable, in an open and democratic society based on human dignity, equality and freedom.

In the case of **Kwacha Group of Companies and Jimi Wanjigi Vs Tom Mshindi, David Makali and The Standard Limited**, Nairobi HCCC No 319 of 2005, Odunga, J, faced with the same argument by the Defendants, i.e. that the High Court has no jurisdiction to entertain any defamation suit by virtue of Article 34(2) of the Constitution, resoundingly rejected the argument.

I similarly, find that while in cases of defamation this court has to strike a balance between the right to the freedom of expression on the one hand and the right of protection of the reputation of a person on the other hand, nevertheless, the proposition that the High Court with its Original jurisdiction in all civil matters has no jurisdiction to entertain and decide defamation cases, is very bold but totally without legal basis. The courts’ original jurisdiction to hear civil cases of which defamation matters are part was confirmed by Article 165(3). To that end I find the Preliminary Objection to be unmerited and is hereby dismissed with costs to the Plaintiffs in any event. Orders accordingly.

Dated and delivered at Nairobi this 24th day of March, 2015.

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D A ONYANCHA

JUDGE