



**The Standard Limited & another v Mbugua (Civil Suit 270 of 2011)
[2015] KEHC 6968 (KLR) (Civ) (28 April 2015) (Ruling)**

John Kamau Mbugua v Standard Limited & another [2015] eKLR

Neutral citation: [2015] KEHC 6968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

CIVIL

CIVIL SUIT 270 OF 2011

RE ABURILI, J

APRIL 28, 2015

BETWEEN

THE STANDARD LIMITED 1ST APPLICANT

KTN-BARAZA LIMITED 2ND APPLICANT

AND

JOHN KAMAU MBUGUA RESPONDENT

Jurisdiction of the High Court to hear and determine defamation matters.

Reported by Njeri Githang'a and Elizabeth Apondi

Jurisdiction- jurisdiction of the High Court in hearing and determining defamation cases

Constitutional law-fundamental rights and freedoms-freedom of expression versus freedom of the media-whether article 34 of the Constitution excluded the application of article 33(3) and the Defamation Act to the media- Constitution of Kenya 2010, article 33(3) and 34

Brief facts

The plaintiff instituted the suit seeking judgment against the defendants for General and exemplary damages for defamation. The cause of action was alleged to have arisen from a publication attributed to the defendants' publication on 17th, 18th and 19th July, 2010. By a Notice of preliminary objection dated 23rd May, 2013, the defendants contended that the court had no jurisdiction to hear the suit by virtue of article 34(2) of the Constitution. The defendants submitted that article 34 excluded application of article 33(3) and the Defamation Act to the media fraternity. They stated that matters of defamation could be handled under article 34(5). The plaintiff did not file any response to the preliminary objection raised by the defendants.

Issues

- i. Whether article 34 of the Constitution which provided for freedom of the media excluded the application of article 33(3) (right to freedom of expression) and the Defamation Act to the media.



- ii. Whether the existence of the Media Council of Kenya which was responsible for the discipline of journalists ousted the jurisdiction of the High Court.

Relevant provisions of the Law

Constitution of Kenya 2010

Article 25(c)

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—(c) the right to a fair trial.

Article 33

(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 the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Article 34

(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) 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 any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

- a. are necessary to regulate the airwaves and other forms of signal distribution; and
- b. are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall—

- a. be free to determine independently the editorial content of their broadcasts or other communications;
- b. be impartial; and
- c. afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Parliament shall enact legislation that provides for the establishment of a body, which shall-

- a. be independent of control by government, political interests or commercial interests;
- b. reflect the interests of all sections of the society; and
- c. set media standards and regulate and monitor compliance with those standards.

Held

1. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence



2. A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The plaintiff's claim for compensation for injury to his feeling and reputation fell under civil matters which was within the jurisdiction of the court as per article 165 (3) of the Constitution of Kenya 2010 which gave the High Court unlimited jurisdiction in civil matters.

3. The rights guaranteed to the media, like all other rights under the Constitution, had to be enjoyed responsibly and governed, more specifically by the national values and principles of governance espoused in article 10 of the Constitution which bound all state organs, state officers, public officers and all persons.

4. According to articles 20 and 259 of the Constitution of Kenya 2010, the court had to interpret several provisions of the Constitution while giving the effect to another provision of the same Constitution and any right or freedom espoused therein could not be interpreted in isolation with other freedoms enshrined in the Constitution.

5. Under article 25 of the Constitution, that right to a fair hearing could not be limited. Therefore, unlike the right to the freedom of the media under article 34, which was limited under article 33(2) and (3) of the Constitution, the right to a fair hearing could not be limited. It was an absolute right, unlike the right to freedom of expression.

6. Freedom of the media under article 34 was limited under article 33(2) and (3) of the Constitution. However, the right to a fair hearing under article 25 of the Constitution of Kenya 2010 was an absolute right and could not be limited.

7. The rights and freedoms guaranteed to the media under the Constitution did not in any way oust the rights and freedoms guaranteed to other persons by the same Constitution. Neither were the rights and freedoms of the media superior to the rights and freedoms of others.

8. The existence of the Media Council of Kenya did not oust the jurisdiction of the court. The Media Act, 2007 provided for the establishment of the Media Council of Kenya which was responsible for the discipline of journalists and the media and did not make it an exclusive regime to mediate/adjudicate on media issues especially defamation cases. However, the Court could promote Alternative Dispute Resolution mechanisms available and have the matter negotiated and settled out of court in the spirit and letter of article 159 (2) (c) of the Constitution.

9. The rights and freedoms guaranteed to the media under the Constitution did not in any way oust the rights and freedoms guaranteed to other persons by the same Constitution. Neither were the rights and freedoms of the media superior to the rights and freedoms of others.

10. The defendants did not demonstrate that the dispute could not be resolved by application of the law thereby seeking to oust the plaintiff and any other person who may become aggrieved by the defendants' actions in defamation from the seat of justice to ventilate their grievances. That action in effect infringed on the defendants and others' right to a fair hearing as guaranteed under article 50(1) of the Constitution of Kenya, 2010 which enacted that every person had the right to have any dispute that could be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

11. Allowing the preliminary objection would oust the plaintiff from the seat of justice, which would also impede his right to access to justice under article 48 of the Constitution of Kenya 2010.

12. Freedom of the press protected the right to obtain and publish information or opinions without government censorship or fear of punishment or reprisals and included freedom from the government examining or purporting to examine publications and productions by the media and prohibiting the use of material it considered or found offensive.

13. The Constitution had to provide for the media freedom necessary to the establishment of a strong, independent media to provide citizens with a wide array of information and opinions on matters of public



importance. Absolute freedom of the media, like all other freedoms would turn out to destroy itself. When such freedom of the media, however, collides with other rights guaranteed and protected by the Constitution, there must be checks, hence, the limitation provided under Article 34(1) and 33(2) and (3) of the Constitution.

14. Article 35 of the Constitution presupposed that sometimes false information of a public concern or about people or persons, may be published in a variety of contexts, in reckless disregard for the truth and in the dissemination of a calculated falsehood in total violation of a fault based standard of care hence the need to have the same corrected.

15. The media played a very critical role in the democratic governance. However, it cannot be said that the media is some kind of untouchable God somewhere whose actions cannot be questioned in a court of law.

16. The Media Council was not an exclusive and a superior body to the High Court. Court therefore had jurisdiction to hear and determine all suits instituted by persons claiming that their reputation had been tarnished by any person, and the media is no exception. To hold otherwise would be tantamount to applying the law in a discriminatory manner as natural persons would be liable in defamation claims while the media, collectively acting as an institution would seek to extricate itself from blame for publishing information about others in an irresponsible and vilifying manner which would be consoling to them to violate the fundamental rights and freedoms of others.

17. The Defamation Act, Chapter 36 of the Law of Kenya was not unconstitutional and was applicable to the media.

18. In cases of defamation the court had 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 had no jurisdiction to entertain and decide defamation cases, was very bold but totally without legal basis.

Preliminary objection dismissed.

Orders

Each party to bear its costs.

RULING

1. The plaintiff John Kamau Mbugua instituted suit by a plaint dated 11th July 2011 seeking judgment against the defendants The Standard Limited and KTN-Baraza Limited for General and exemplary damages for defamation. The cause of action is alleged to have arisen from a publication attributed to the defendants' publication on 17th, 18th, 19th July 2010. The defendants filed their joint statement of defence dated 1st September 2011 in which, while admitting that they aired the story concerning the plaintiff's arrest and arraignment in court, they nonetheless denied that the publication was under sensational, catchy bold screen titled "PRIEST OF DEATH." The defendants also admitted that on pages 1 and 8 of the Standard News Paper, "Crazy Monday" pull-out dated 19th July 2010 they published an article "THE BOMB PASTOR" that the plaintiff complains of as being defamatory and pleaded in paragraph 5(c) of the plaint.
2. The defendants contend that the words published were true in substance and in fact. They denied that the articles published and complained of in the plaint were defamatory of the plaintiff or at all. In paragraph 2 of their defence, the defendants pleaded that this court has no jurisdiction to hear the suit by virtue of Article 34(2) of the *Constitution* of Kenya, 2010. The defendants put the plaintiff on notice that they would raise a preliminary objection to that effect.



3. By a Notice of preliminary objection dated 23rd May 2013, the defendants contended that this court has no jurisdiction to hear this suit by virtue of Article 34(2) of the Constitution. It is this preliminary objection that is before this court for determination.
4. The defendants submitted that if this court upholds the preliminary objection, then a precedent that gives true meaning to the letter and spirit of Article 34 of the Constitution would have been set, and that the court will be in line with the hopes and conscious decision of the Kenyan people in enacting that Article of the Constitution. The preliminary objection was emphatic that the Article gives specific rights of freedom to the media barring any control by state organs over or interference with any person engaged in broadcasting, production or circulation of information by any medium. The defendants' counsel submitted that the Article restrains the court from penalizing any person for any opinion or view or contents of any broadcast published or disseminated. The defendants maintained that paragraph (2) of the said Article is couched in mandatory terms and as such this court cannot exercise control over the media.
5. The defendants submitted that Article 34 and Article 33 both deal with the general freedoms that are enjoyed by all citizens and persons in Kenya. In support of this position, the defendants referred the court to the case of Kwacha Group of Companies v The Standard Limited & others Civil suit No 319 of 2005. The defendants urged the court not to be persuaded by the decision since the court in that case was fishing for an excuse to decline to enforce the right given to the media under Article 34. The defendants further submitted that the said article has imposed limits on the courts authority in terms of the kind and nature of action and matter of which this court can take cognizance and the area to which its jurisdiction extends.
6. The defendants further submitted that Article 34(5) provides for enactment of legislation that provide for the establishment of a body which shall set media standards and regulate and monitor compliance with those standards. The defendants averred that Parliament has so far not enacted any legislation to implement that constitutional provision. They speculatively declared that under section 2 of Part II of the Transitional and Consequential provisions of the Constitution, the Media Act 2007 remains in force and the Media Council currently remains with the mandate of regulation of the media and the conduct and discipline of journalists. In addition, it was further submitted that section 5 of the Media Act provides that the Council shall be without any political or other bias or interference and it shall be independent from Government, any political party or any nominating authority.
7. In their submissions the defendants also referred the court to the decision in the case of Dr Christopher Ndarathi Murungaru v The Standard Limited & 2 others, Civil Suit No 513 of 2011 where Odunga J on a preliminary objection raised based on similar arguments dismissed the objection holding that the court has jurisdiction. However, they urged this court not to be bound by those decisions which are persuasive.
8. The defendants submitted that Article 34 excluded application of Article 33(3) and the Defamation Act to the media fraternity. They stated that matters of defamation can be handled under Article 34(5).
9. In conclusion the defendants submitted that the court lacks jurisdiction to hear the suit and as such the suit stands abated and invalid in law should the court exceed its jurisdiction. They urged the court to allow the preliminary objection and uphold the spirit, value and purport of Article 34 of the Constitution.
10. The plaintiff did not file any response to the preliminary objection raised by the defendants. On 24th March 2015, the plaintiff's counsel Mr. Njagi indicated to the court that he would not make or file



any response or written submissions since the Preliminary objection is misplaced and a waste of court's time.

11. Having set out the respective parties' positions as above, I am of the view the only issue for determination is whether on the facts, law and circumstances of this case the High Court has jurisdiction to hear and determine this matter.
12. The question of jurisdiction is paramount in any adjudication and whenever raised, the Court or Tribunal seized of the matter must as a matter of prudence inquire into it in limine and resolve the issue before doing anything concerning the matter in respect of which it is raised.
12. In the case of The *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1 at page 14-15, Nyarangi J. stated:

“Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

13. Recently the Supreme Court of Kenya in the case of *Samuel Kamau Macharia v KCB & 2 others*, Civil Application No 2 of 2011 expressed thus:

“A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Const. Appl. No 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law.”

14. Article 165(3) grants jurisdiction to this Court in the following terms:-

- (3) Subject to clause (5), the High Court shall have—
 - (a) Unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this *Constitution* to consider the removal of a person from office, other than a tribunal appointed under Article 144;



- (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

15. The jurisdiction of the High Court is limited under Article 165(5) in the following terms:-

- 5) The High Court shall not have jurisdiction in respect of matters-
 - a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;
 - b) Falling within the jurisdiction of the courts contemplated in Article 162 (2)

16. Under Article 162(2) the jurisdiction of this court is limited in the following terms:-

- 2) Parliament shall establish courts with the 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, and title to, land.

17. From the above provisions of the law, it is my opinion that this court has jurisdiction to hear and determine this matter. The plaintiff's claim falls under civil matters which is within the jurisdiction of this court. The jurisdiction arises from Article 165 (3) of the Constitution which gives this court unlimited jurisdiction in civil matters. In the plaint, the plaintiff is seeking compensation for injury to his feeling and reputation. In my view this court has a duty to grant the appropriate relief as provided for under Article 23 of the Constitution.

18. I do not agree with the defendants' submissions that Article 34(2) ousts the jurisdiction of this court 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.”

19. My appreciation of the law in this Article cannot be read in isolation of Article 34(1) which reads:

“Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to the expression specified in Article 33(2).”

20. Article 33 of the Constitution provides for freedom of expression and information and also limits the same freedom. Article 33 thereof provides:-

“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.” (emphasis mine).

21. From the above provision, the right of freedom of expression and information by the media is regulated to the extent that in the exercise of that right, the media respect the rights and reputation of others, and that they do not violate the rights and freedoms of others.

22. It therefore follows that the rights guaranteed to the media, like all other rights under the Constitution, must be enjoyed responsibly and must be governed, more specifically by the national values and principles of governance espoused in Article 10 of the Constitution which bind all state organs, state officers, public officers and all persons whenever any of them –

- a. Applies or interprets this Constitution;
- b. enacts, applies or interprets any law; or



- c. Makes or implements public policy decisions.
23. And in so doing, we all must be alive to the principles enunciated therein which include:- human dignity, equality, equity, rule of law, non discrimination and democracy.
24. I am also persuaded by the decision by Rawal J (as she then was) in the case of *Kwachu Group of Companies and another v Tom Mushindi & 2 others* where the learned judge held *inter alia* that:
- The rights guaranteed by the *Constitution* should be enjoyed as well as governed equally amongst all persons.
25. This Court is also alive to the provisions of Article 20 of the *Constitution* which guide the courts to interpret the provisions of the *Constitution* and how to apply the provisions of the Bill of Rights. The said Article 20 enacts that:-
- (1) The Bill of Rights applies to all law and binds all State Organs and all persons.
 - (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
 - (3) In applying a provision of the Bill of Rights, a court shall –
 - (a) Develop the law to the extent that it does give effect to a right or fundamental freedom; and
 - (b) Adopt the interpretation that most favors the enforcement of a right or fundamental freedom.
 - (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote –
 - (a) The value that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
 - (b) The spirit, purport and objects of the Bill of Rights.(emphasis added)
26. In addition, Article 259 of the *Constitution* mandates this court to interpret the *Constitution* in a manner that, among other things, promotes its purposes, values and principles and advances the rule of law, and the human rights and fundamental freedoms in the Bill of rights. Thus, the court has to interpret several provisions of the *Constitution* while giving the effect or purport to another provision of the same *Constitution* and any right or freedom espoused therein cannot be interpreted in isolation with other freedoms enshrined in the *Constitution*.
27. This court must therefore adopt the principle of a holistic and harmonious interpretation of the *Constitution*, as laid down in Article 259, and as exemplified in the case of *James v Commonwealth of Australia* [1936] AC 578 where it was held that:
- “A *Constitution* must not be construed in a narrow or pedantic manner and that construction must be beneficial to the widest possible amplitude of its powers...[and] a broad and liberal spirit should inspire those whose duty is to interpret the *Constitution*.”



28. In their submissions, the defendants have argued that that Article 34(5) provides for an alternative forum for redress in the event a person is aggrieved which is the Media Council of Kenya established under the [Media Act ,2007](#). I do not agree. The existence of the Media Council of Kenya does not in my view oust the jurisdiction of this court. The Media Act provides for the establishment of the Media Council of Kenya which is responsible for the discipline of journalists and the media. In my view, the Media Council is not an exclusive regime to mediate/adjudicate on media issues and especially defamation cases. This is however, not to say that this Court cannot promote Alternative Dispute Resolution mechanisms available and in that regard would be more than satisfied to have this matter negotiated and settled out of court in the spirit and letter of Article 159 (2) (c) of the [Constitution](#).
29. In [Wananchi Group \(Kenya\) Limited v Communications Commission of Kenya & another](#) [2013] eKLR, Mumbi J observed that:
- “ 52. The legislative and policy provisions must be looked at and implemented in accordance with the dictates of the [Constitution](#). As public entities, the respondents are required, in implementing their legislative and policy mandates, to be guided by the national values and principles of governance in Article 10, as well as the constitutional provisions that have a bearing on the operation of the media and access to information by the public, specifically Articles 33 and 34 of the [Constitution](#). Article 10 of the [Constitution](#) requires that the State, all State organs and all persons observe, among others, the principles of good governance, integrity, transparency and accountability.”
30. Not to mention the hard truth that the rights and freedoms guaranteed to the media under the [Constitution](#) do not in any way oust the rights and freedoms guaranteed to other persons by the same [Constitution](#). Neither are the rights and freedoms of the media superior to the rights and freedoms of others.
31. The defendants have also not demonstrated that the dispute herein cannot be resolved by application of the law. That being the case, then the defendants in this case is seeking to oust the plaintiff and any other person who may become aggrieved by the defendants’ actions in defamation from the seat of justice to ventilate their grievances. That action in itself would in effect infringe on the defendants and others’ right to a fair hearing as guaranteed under Article 50(1) of the [Constitution](#) of Kenya, 2010 which enacts that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
32. Under Article 25 of the [Constitution](#), that right to a fair hearing cannot be limited. Therefore, unlike the right to the freedom of the media under Article 34, which is limited under Article 33(2) and (3) of the [Constitution](#), the right to a fair hearing cannot be limited. It is an absolute right, unlike the right to freedom of expression.
33. Further, it is the view of this court that allowing the preliminary objection will be ousting the plaintiff from the seat of justice, which would also impede his right to access to justice under Article 48 of the [Constitution](#). The policy for the court, I believe, is to apply the principle of the rule of law and exercise latitude in its interpretation of the [Constitution](#) and other enabling laws so as to facilitate fair and just determination of disputes on merit and thus facilitate access to justice.
34. This court also appreciates that the freedom of expression and of the media as espoused in the [Constitution](#) is a tool of self governance in a democratic society and enables people to obtain and access



information from a diversity of sources, making decisions and communicate those decisions to the government.

35. Freedom of the press, in my humble view, does indeed protect the right to obtain and publish information or opinions without government censorship or fear of punishment or reprisals. That freedom in my understanding includes freedom from the government examining or purporting to examine publications and productions by the media and prohibiting the use of material it considers or finds offensive. Therefore, the Constitution had to provide for the media freedom necessary to the establishment of a strong, independent media to provide citizens with a wide array of information and opinions on matters of public importance. The media is no doubt plays the role of surrogate for the public in gathering and disseminating information on its behalf and for its benefit. Absolute freedom of the media, like all other freedoms, in my view, would turn out to destroy itself. When such freedom of the media, however, collides with other rights guaranteed and protected by the Constitution, there must be checks, hence, the limitation provided under Article 34(1) and 33(2) and (3) of the Constitution. For example, Article 35(2) of the Constitution on access to information provides that:

“every person has the right to the correction or deletion of untrue or misleading information that affects the person.”

36. The above provision presupposes that sometimes false information of a public concern or about people or persons, may be published in a variety of contexts, in reckless disregard for the truth and in the dissemination of a calculated falsehood in total violation of a fault based standard of care hence the need to have the same corrected.

37. I am in agreement with the South African Constitutional Court decision in the case of Khumalo and others v Holomisa (CCT 53/01) [2002] ZACC 12; 2002 (5) S.A.401; 2002 (8) BCLR 771 (14 June 2002) where it was held (pp.13 – 14) cited in Nrb HC Civil Case No 1333 of 2003(Ojwang J) as he then was, that:

“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society...”

38. From the foregoing, undoubtedly, the media is recognized for plays a very critical role in the democratic governance. However, it cannot be said that the media is some kind of untouchable God somewhere whose actions cannot be questioned in a court of law. And would the Media Council be an exclusive and superior body to the High Court or any court of law for that matter? I hold the view that this court has jurisdiction to hear and determine all suits instituted by persons claiming that their reputation has been tarnished by any person, and the media is no exception. To hold otherwise is tantamount to applying the law in a discriminatory manner as natural persons would be liable in defamation claims while the media, collectively acting as an institution would seek to extricate itself from blame



for publishing information about others in an irresponsible and vilifying manner which would be consoling to them to violate the fundamental rights and freedoms of others, which rights and freedoms are equally guaranteed under the Bill of Rights.

39. The issue raised by the defendants is indeed a bold move on the part of the defendants' media house to attempt to find a bearing or the extent to which their rights and freedoms are protected under the Constitution and I fault them not. But I am pretty sure that this is not the first case of defamation that they face since the promulgation of the Constitution on 27th August, 2010. In Christopher Ndarathi Murungaru v Standard Limited & 2 others (*supra*) Odunga J faced with the same argument by the Defendants herein held:
40. In conclusion, whereas I agree that the Court's authority to control, interfere with or penalize the media for any opinion or view or the content of any broadcast, publication or dissemination has to be viewed in light of the current Constitutional dispensation, the Court is not barred from investigating and adjudicating over any dispute where a person alleges that his rights or fundamental freedoms under Article 28 of the Constitution have been infringed and award appropriate remedy. To equate the powers of the Court with that of the Complaints Commission flies in the face of the express Constitutional provisions in Article 165(3)(b) which confers on the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Such reasoning will also go contrary to the powers of the High Court under Article 165(6) to supervise the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function. In the defendants' own submission it is admitted that there is a right of appeal to the High Court from a decision arising from the process under the Media Act, a recognition that even in cases where the Complaints Commission is clothed with jurisdiction the appellate jurisdiction of the High Court is not ousted. In fact even if there was no avenue for appealing to the High Court and even if the said Act had purported that its decision was final that would not oust the High Court's supervisory jurisdiction under Article 165(6) aforesaid."
41. Even after bringing up the rear their argument in the above case of Christopher Murungaru, the defendants are still on a forum shopping spree to find any other judge who is ready and willing to find in their favour instead of appealing to a higher court. There was no disclosure that any appeal has been lodged against the above decision. It is also not the intention of this court to overrule what other eminent judges have decided, unless, for good reasons whose novelty must be stated.
42. Very recent in John Ritbo Kanogo & 2 others v Joseph Ngugi & another Civil suit Number 589 of 2012 [2015] eKLR Onyancha J held:
- "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 am hereby dismissed with costs to the Plaintiffs in any event."
43. I also draw my inspiration from Benjamin Cordozo's wise counsel that:
- "A judge, even when is free, is still not free. is still not wholly free. is not to innovate at his pleasure. he is not a knight-errant roaming at will in pursuit of his own ideal of beauty and



goodness. is to draw his inspiration from consecrated principles.” Benjamin Cordozo, “the nature of judicial process.”

44. Before I conclude, I must mention that I did not find any material that would persuade me to hold that the *Defamation Act*, Chapter 36 of the Law of Kenya is unconstitutional in any material particulars.
45. In Nairobi Civil Case 1333 of 2003 *Hon. Mwangi Kiunjuri v Wangethi Mwangi, Nation Media Group Limited and Royal Media Services Limited*, the 3rd defendants contended that section 16A of the *Defamation Act* (Cap.36, Laws of Kenya) was ultra vires section 79 of the *Constitution* [of Kenya] and was therefore null and void to the extent that it purports to burden the exercise of freedom of expression [with] awards of damages that are manifestly excessive. The 3rd defendants also contended that the broadcast complained of was made during the period the plaintiff was serving as a Member of Parliament when the 3rd defendants was at liberty to subject the plaintiff’s conduct to severe scrutiny. Learned counsel also submitted that the 3rd defendants, in publishing the material complained of, had exercised constitutional and democratic principles, by publishing material that carries severe scrutiny, material that is shocking, in meeting with the interests of the public.
46. The learned Judge, Ojwang J (as he then was) held that:
- “Although learned counsel, Dr. Kuria proposed that the *Defamation Act* is contrary to the *Constitution* and should be declared ultra vires, I think that would not be necessary, since, as already noted, the law of defamation has grown freely, on the basis of common law initiatives – a process which has not been limited by the said statute.”
47. In the landmark decision of the English House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2AC 127, HL, the position was taken, as is depicted in Gately (op. cit., p.455), thus- cited in the *Hon Mwangi Kiunjuri Case(supra)* it was held that:
- “Both Lord Nicholls and Lord Steyn referred to the fact that as the right of freedom of expression was shortly to be buttressed by the implementation of the [Human Rights Act, 1998], it was common ground that in considering the issues the house should proceed on the basis of the reality that the Act would soon be in force and for Lord Steyn it was a ‘new landscape’ in which the ‘starting point is now the right of freedom of expression, a right based on a constitutional or higher-legal-order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need. These are fundamental principles governing the balance to be struck between freedom of expression and defamation’ [p.208].”(Emphasis added).
48. What the above authority espouses is that freedom of the media is guaranteed but that there must be regulation which must be justified. Though persuasive, I find the holding noble.
49. In the instant case, I find no basis or novelty or at all to interfere with what my predecessors have held and which I find to be sound law from my own clarification herein. I am persuaded by the constitutional provisions and the above cited decisions that the defendants’ preliminary objection is a fishing expedition in a boundless sea. It must fail.
50. Accordingly, I dismiss the defendants’ preliminary objection dated 23rd May, 2015 and order that this court has the necessary jurisdiction to hear and determine the suit herein as filed unless otherwise barred by any other competent authority.



51. As the plaintiff did not respond to the preliminary objection and simply left it to the court to investigate, I order that each party bear their own costs of the preliminary objection.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2015.

ROSELYNE E. ABURILI

JUDGE

