



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 238 OF 2015

HON. DR. EVANS KIDEROPLAINTIFF

VERSUS

HON. DR. BONNY KHALWALE.....DEFENDANT

RULING

1. Consumers Federation of Kenya hereinafter referred to as 'COFEK' through its officials namely Stephen Mutoro, Ephraim Githinji Kanake and Henry Meshak Ochieng took out the motion dated 14th July 2015 in which it applied to be joined to this suit as an interested party. The motion is supported by the affidavit of Stephen Mutoro. Dr. Evans Kidero, the Plaintiff herein opposed the motion by filing grounds of opposition.
2. Mr. Kurauka, learned advocate for Cofek, urged this court to grant the order since the presence of Cofek in this suit will enable the court to effectually and effectively determine the issues in question. The proposed interested party argued that it has a direct interest in the outcome of the suit since it is a public interest suit. It argued that the collapse of the largest sugar company cannot be reduced to a defamation suit between the two parties. Cofek being a society registered under the Societies Act Cap 108 Laws of Kenya, further submitted that the outcome of this case has the real potential to prejudice sugar consumers as well as overall public interest since it may reduce the anti-corruption whistle-blowing to defamation may affect the overall parallel investigations carried out by interalia, the **audit firm KPMG(E.A), National Assembly and other competent agencies**. Cofek cited the provision of Article 22(2) of the Constitution of Kenya 2010 to buttress its argument that they are entitled to participate in the suit where fundamental freedoms of consumer rights are denied. Cofek averred that it is acting in public interest.
3. Mrs. Ndungo, who appeared for the Defendant did not file any response to the motion. However, she verbally informed this court that the Defendant does not intend to oppose Cofek's motion. Prof. Tom Ojienda, learned advocate for the Plaintiff opposed the motion by filing grounds of opposition. The learned advocate argued that Cofek has no identifiable or legal interest to claim damages based on the tort of defamation levelled against the Plaintiff. It is argued that the outcome of this suit will not in any way affect sugar consumers. The Plaintiff also argued that this being a purely private suit based on defamation, Cofek has no role to play and in any case there is no public interest to be served in blaming third parties. Prof. Ojienda also pointed out that the Civil Procedure Rules do not provide for interested parties to be enjoined in a suit.
4. I have considered the competing arguments presented by both sides. The main issue before me is whether or not Cofek is a necessary party to these proceedings. The substantive suit is expressed in the plaint dated 1st July 2015 where the Plaintiff has sought for judgement against the defendant

in the following terms:

- a. **General damages;**
- b. **Aggravated damages;**
- c. **Interest on (a) and (b) above at court's rates;**
- d. **An order of mandatory injunction compelling the Defendant, Hon. Dr. Bonny Khalwale the Senator of Kakamega County and any other person colluding with him in the continued slandering of the Plaintiff, jointly and severally, to, within two days of the judgement hereof or such period as directed by court, publish an apology to Hon Dr. Evans Kidero in at least two newspapers of national circulation, unequivocally retracting and revoking the defamatory statements complained of, and in a manner as prominent as the offending defamatory articles;**
- e. **An order of permanent injunction restraining the Defendant, Hon. Dr. Bonny Khalwale, the Senator of Kakamega County and any other person colluding with him in the continued slandering of the Plaintiff from further making the slanderous statements that the Plaintiff complains of herein or any other defamatory statements, words, material, testimony or remarks against, of and concerning Hon. Dr. Evans Kidero in relation to the management of Mumias Sugar Company Limited, in any forum or medium whatsoever;**
- f. **Costs of this suit;**
- g. **And any other or further relief as this Honourable court may deem fit to grant.**

5. From the aforesaid prayers, it would appear the Plaintiff has carefully restricted himself to the portion that he avers are defamatory to him. There is no doubt that the issues surrounding the present and past management of Mumias Sugar Company Ltd attract public interest.
6. In suits based on the tort of defamation and or slander a person who desires to be enjoined as a party must demonstrate that he has an identifiable interest. Cofek has argued that it is a necessary party to bring out issues which may be swept under the carpet by the main combatants (i.e. the Plaintiff and the Defendant) in this suit. It would appear from the submission of Cofek's learned counsel, that he is alluding that a corruption whistle blower may be constrained by this cse from continuing with that noble crusade. A careful interpretation of Article 46 of the constitution, will show that the role of consumer organizations like Cofek have been given a legal framework within which it would operate with the aim of protecting the rights of consumers of goods and services. I doubt whether the law envisaged a situation where a consumer organizations such as Cofek would play a role in a purely private suit.
7. Cofek's position is likely to be complicated by averments in ground 4 of the motion where Cofek has stated as follows:

“That the outcome of the Honourable Court has the real potential to prejudice sugar consumers as well as the overall public interest since the reducing the anti-corruption whistle-blowing to defamation, at the first instance, without substantively investigating the Plaintiff's potential role in the collapse of Mumias Sugar Company, where he was a CEO for 9 years, is likely to affect the parallel investigations carried out by among others the audit firm KPMG East Africa, National Assembly and other competent agencies.”

8. A critical examination of the above paragraph will reveal that Cofek is likely to take sides in this dispute. Cofek has however applied to be enjoined as an interested party but the above averment shows it is likely to side with the defence.
9. This would have been a proper case for Cofek to apply to be enjoined as a Defendant but this court cannot give orders gratuitously nor can it issue orders to indirectly compel a party to sue another through joinder of parties proceedings.
10. The proposed interested party has also argued that the defamation suit will affect intended or ongoing investigations into the affairs of Mumias Sugar Company. Cofek nor any other investigative body has not shown how this case will hamper such investigations in view of our

progressive constitution. The proposed interested party must exhibit a genuine interest affecting it and its constituency. The law did not envisage a situation where a party would ride on the back of another party who is already a party to the suit to urge for similar or near similar remedies.

11. Under Article 258 (2) of the Constitution, court proceedings may be instituted by a person acting in public interest.

The dispute before this court arose from publications, comments or remarks made over the manner in which Mumias Sugar Company was managed by the Plaintiff. In essence it is a public interest case but it would appear the Plaintiff has crafted his suit against the Defendant in such a way that he completely relegated his dispute with the Defendant to private litigation in tort.

12. For the above reasons, I find no merit in the motion. The same is dismissed.

13. Since Cofek is a public interest litigator, I will not punish it with costs. Instead I direct the parties to meet their own costs of the motion.

Dated and delivered in open court this 30th day of July, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant