



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 408 OF 2001**

**BARBARA LYNNE a.k.a DIDI ANANDA RUCHIRA.....1<sup>st</sup> PLAINTIFF**

**ABHA LIGHT FOUNDATION .....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**THE STANDARD GROUP LIMITED.....DEFENDANT**

**RULING**

1. The subject matter of this ruling is the Preliminary Objection dated 9<sup>th</sup> November 2011 in which the Defendant based it on the ground that the court lacks jurisdiction to hear the suit by virtue of article 34(2) of the Constitution of Kenya, 2010.
2. A brief summary of the case is that the plaintiffs alleged that the defendant published false allegations of corruption against the plaintiff on 1<sup>st</sup> May 2011 through their newspaper edition of the Sunday Standard in an article titled "**Concern over NGO'S HIV/ Aids treatment,**" which prompted the plaintiff to file this suit praying for damages.
3. The parties filed their respective submissions. The defendant submitted that, this court lacks the requisite jurisdiction to preside over this suit because under article 34 (2), the word 'State' is used as a noun which means the collectivity of offices, organs and other entities comprising the Government of the Republic of Kenya under the Constitution. It argued that the Judiciary being an organ of the Government is barred from interfering with any person engaged in broadcasting, production or circulation of any publication or the dissemination of information by any medium. The Defendant further submitted that the Constitution is the Supreme Law of the land and any law that contravenes it is void to the extent of the inconsistency, therefore any provision of the Constitution that is unconstitutional should be repealed. It averred that article 24 of the Constitution does not apply to its case. It stated that article 34 of the Constitution provides for freedom of the media, which freedom is only limited by virtue of Article 33 (2) of the Constitution that provides that the freedom of expression does not extend to a situation where it destabilizes social order, or where there is commission of a crime or discrimination. He added that the breach of the right of expression of Article 33 (2) amounts to a crime while breach of article 33 (3) of the Constitution amounts to a tort. It also averred further that article 34 (2) was aimed at ending the political pressure and interference of the media by the State that reigned during the yester years. Hence a breach of article 33(2) amounts to a criminal liability and persons aggrieved by the publication have recourse in the Criminal Courts by reporting the incidences listed under the article to the police or other authorities. It submitted further that breach of article 33(3) amounts to the tort of defamation which the people of Kenya by voting for the Constitution of Kenya, 2010 intended that any publication in the media could not be challenged in a court of Law. It argued

that under section 3 of the Media Act 2007, the Media Council of Kenya is the one tasked with regulating the media, its conduct and discipline of journalists and in case a party is aggrieved by its actions, their remedy lies with the Media Council and not the court. The defendant went further to compare other professions and groups where disputes are resolved through other options including Arbitration, courts and Industrial courts

4. The plaintiffs on the other hand, submitted that this court has jurisdiction.

They referred this court to article 160 of the Constitution which provides for the independence of the judiciary and categorically states that the Judiciary as constituted under Article 161 shall be subject to the Constitution and shall not be subject to the control or direction of any person or authority. They also cited article 159(1)(2) that provides for the judicial authority. They argued that Article 19 should be taken into consideration while interpreting any provisions of the bill of rights including article 34. They stated that in particular article 19(2) and 19(3)(b) provides that the purpose of recognizing and protecting human rights is to preserve the dignity of individuals and the bill of rights does not exclude other rights and freedoms not in the bill of rights, but recognized or conferred by law. They argued further that the value of the Constitution is to preserve human dignity, equality, equity and freedom. According to article 27(2) of the Constitution, equality includes the full and equal enjoyment of all rights and fundamental freedoms. They asserted that none of the rights and freedoms are superior to others except those stipulated in article 25 and that no freedom can be absolute and free from regulation; including the freedom of the media. They added that the freedom of media should not prejudice the freedom and fundamental rights of others since every person has the right to have their dignity respected and protected.

5. I have carefully considered the submissions as highlighted above. I am of the view that the only issue for determination is **whether considering the facts of this case the court has jurisdiction to hear and determine this case of defamation.**
6. Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the celebrated case of **The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1.** Where Nyarangi J.A. held as follows:

*'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*

7. Where does jurisdiction emanate from? A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia Vs KCB & 2 Others, Civil Application No. 2 of 2011** stated 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"***

This court draws its jurisdiction from the Constitution. Article 165(3) provides that:

***"(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.*

The jurisdiction of the high court is however limited as provided 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)**

8. Article 165 (5) is categorical on the limitations of the high court jurisdiction which includes matters reserved for the exclusive jurisdiction of the Supreme Court and those falling within the jurisdiction of the court as per article 162 (2) of the Constitution which basically include employment and relation matters that are heard in the Industrial Court and Environment and occupation of land which are basically heard in the Environment and Land Court. It is only in the matters falling under these two subjects that the High Court lacks jurisdiction to preside over.

9. I have read article 34 (2) of the Constitution, which the defendant has relied on to oust this court's jurisdiction. The article reads: **“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 cannot be read in isolation. All the articles of the Constitution must be read together. The Constitution must be read as a whole. In this particular case, article 34 of the Constitution indeed does provide for the freedom of the media. Article 33 on the other hand also provides for freedom of expression but the same is not absolute, it has its limitations.

**Moreover, Article 259** also expects this court to interpret the Constitution in a manner that, promotes its purposes, values and principles and advances the Rule of Law, and the human rights and fundamental freedoms in the Bill of Rights. The court has to interpret provisions of the Constitution while at the same time giving effect to other provisions of the same Constitution. Therefore, no one freedom at any one time can be construed in isolation from other freedoms enshrined in the Constitution

10. *The defendant in its further submissions has argued that the Media Council of Kenya has the requisite jurisdiction to preside over wrongs committed by the media and the Media Council is well equipped to handle any disputes arising from actions of the media. Under section 4 of the Media Act, the council is vested with mediation or arbitration power where there is a dispute between the media and the aggrieved party. The Council may be in position to mediate and arbitrate over disputes that arise but their scope is only limited to hearing the complaint. They cannot aid the plaintiffs, in so far as compensation is concerned for any defamatory utterances by*

*the media. The least the council can do is to compel the journalist to apologize to the complainant yet the damage has been done. In any case, Article 165(6) gives this court the jurisdiction to supervise the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function, as correctly submitted by the defendant that the decisions of the Media Council can be appealed to the High Court. Furthermore, in my view, the complainant is entitled to an avenue to ventilate his case further if dissatisfied with the decision of the complaints commission of the Media Council. His only option in such a case would be an appeal to the High Court . The upshot of the above is that, the High court has jurisdiction in all matters including appellate jurisdiction which are only limited by article 165 (5) including supervisory jurisdiction.*

11. *In the end, I hold that the High court has powers to preside over civil matters including the tort of defamation. The Defendant's submissions that Article 34(2), ousts the jurisdiction of this court has no basis. In the premises I find the Preliminary objection to be without merit and I dismiss it with costs to the plaintiffs.*

Dated and delivered in open court this 20<sup>th</sup> day of November, 2015

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant