



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 304 OF 2012

PROF. KIAMA WANGAI.....PLAINTIFF/APPLICANT

VERSUS

DR. PAMELA TSIMBIRI.....1ST DEFENDANT

DR. TITUS NGANDA.....2ND DEFENDANT

DR. ELIZABETH K. MBUTHIA.....3RD DEFENDANT

DR. KENNETH MBATI.....4TH DEFENDANT

DR. V.M. KIPRONO.....5TH DEFENDANT

DR. CEASER MUNGATANA.....6TH DEFENDANT

DR. KENNEDY GOGO.....7TH DEFENDANT

DR. S.O. OBURE.....8TH DEFENDANT

RULING

On 9/8/2012, the plaintiff Prof. Kiama Wangai filed this suit against the 8 defendants namely; Dr. Pamela Tsimbiri, Dr. Titus Nganda, Dr. Elizabeth K. Mbuthia, Dr. Kenneth Mbatia, Dr. V.M. Kiprono, Dr. Ceaser Mungatana, Dr. Kennedy Gogo and Dr. S.O. Obure, seeking damages for defamation. On 6/8/2013, the plaintiff/applicant came to court under certificate of urgency with the application dated 5/8/2013 seeking the following orders:-

- 1(a) Court to grant an order of stay of all proceedings scheduled for 13/8/2013, before the Interested Party (IP) Egerton University Council Disciplinary Committee in the matter of Dr. Peter Wangai Kiama, Faculty of Health Sciences, Egerton University notified by a letter dated 1/8/2013 pending hearing inter partes;**
- b. spent**
- c. After the inter partes hearing, the court to order that all proceedings against the plaintiff/applicant before the disciplinary committee of the IP in so far as they concern issues subject in the current suit, be stayed until such time as the application herein is heard and determined;**
- d. The court be pleased to stay all proceedings against the plaintiff/applicant before the**

disciplinary committee of the IP in so far as they concern issues subject in the current suit until such time as the suit herein is heard and determined and;

- e. **The court do issue orders that the defendants/respondents do desist from prosecuting issues subject of the current suit in any other forum other than this Honourable court pending the hearing and determination of this suit.**

The grounds upon which the application was premised are that the decision of the IP contained in its letter of 1/8/2013 will interfere with the fair disposal of this suit and that the allegations therein form the basis of the charges to be prosecuted before the disciplinary committee and are the subject of this current suit; that the proceedings of the disciplinary committee will be further publication of the defamatory material which will injure the applicant further; that the proceedings are subjudice and offend **Articles 41(1), 47(1) and 50(1) of the Constitution, 2010.**

When the applicant came before the court on 7/8/2013 under certificate of urgency, the court granted prayers 1(a), (b), (c) and (d) pending hearing of the application inter partes.

On 2/9/2013, the applicant filed another application seeking to cite Dr. A.K. Serem, Dr. Pamela Tsimbiri and Egerton University Management Board for contempt for having disobeyed the court orders issued on 7/8/2013.

By the time the 2nd application was filed, the IP, Egerton University Council, had filed a notice of preliminary objection on 16/8/2013 seeking the striking out of the notice of motion dated 5/8/2013. The points of objection are as follows:-

1. **The purported IP is not a party to the suit herein and its joinder is bad in law;**
2. **The issues for determination in the subject University disciplinary committee proceedings are different in substance/character from the suit for defamation herein and this cannot be admixed;**
3. **There is no legal entity known as Egerton University Council, that the joinder of the purported IP is bad in law;**
4. **The proceedings sought to be restrained are before a quasi judicial body that enjoys absolute privilege;**
5. **The application violates the principle of subsidiarity that courts can only be invoked through Judicial Review to ascertain legality and adherence to rules of natural justice in a matter before a domestic forum;**
6. **The IP is a public body and therefore an injunction cannot issue against it.**

The application dated 5/8/2013 and 2/9/2013 were urged together with the preliminary objection.

In response to the preliminary objection, the applicant urged that what has been raised is not a pure point of law as was held in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) pg 701**, the court said:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The first point taken by Mr. Kisila, counsel for the IP is that the IP is not party to this suit as envisaged under **Order I Rule 1 of the Civil Procedure Rules 2010** and that at no time did the applicant seek leave of the court to amend the plaint and bring the IP on board. On the other hand the applicant contended that indeed the IP was not yet a party to the suit but the application is for conservatory orders which can be issued against anybody. **Order I of the Civil Procedure Rules** prescribes who the parties to a suit may be, **Order 1 Rule 10 of the Civil Procedure Rules** then deals with situations when parties can be substituted or added. **Order 1 Rule 10(2) and (4)** reads as follows:-

“10(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added;

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

In this case, the court did not find it necessary to add any other parties to this suit. If the applicant so wishes to join another party to the suit, then it must be by way of an application to the court and with leave of the court. Under Rule 4, upon leave being granted, then the court directs that the plaint be amended accordingly. The IP is not properly joined to these proceedings and no orders can issue against a stranger to a suit and even at that point alone, I find the application dated 5/8/32013 is incompetent since the orders are all sought against the IP who is not a party to this suit.

The other point of objection taken was that there is no legal entity known as Egerton University Council. Mr. Kisila urged that public universities are governed by Universities Act No. 42 of 2012 and **Section 71** thereof repealed all previous individual university statutes; that **Section 15** of the **Act** grants letter of interim authority to the institution conferring a corporate character to be able to sue and be sued in its corporate name. He further submitted that Section 20 of the Act provides that after grant of the charter, the institution becomes a corporate body i.e. the University which is able to sue and be sued but that other bodies created under **Section 35(1)(a)** of the **Act** like Council and Senate do not have those powers.

In reply, the applicant argued that **Section 35(1)** of the **Universities Act** establishes a council which shall employ staff and is in charge of running of the institution.

I have considered the above positions taken by counsel. **Section 15** of the **University Act** provides:-

“(1) An institution granted an interim letter of authority under Section 14 shall be a body corporate with perpetual succession and a common seal and capable, in its name of –

- a. **suing and being sued;**
- b. **acquiring, holding and disposing of moveable and immovable property, and**
- c. **doing all such other things or acts as may lawfully be done by a body corporate.”**

Under **Section 16** the letter of authority will last 4 years. **Section 20** then sets out the effect of a charter. It provides:-

“S20 (1) A University granted a charter in accordance with Section 11(a) shall be a body corporate and as such shall continue the activities of the University as undertaken under the letter of interim authority including the employment of staff, except where activity is expressly altered under the charter.”

It is clear from the above two provisions that in the new **Act**, once an interim letter of Authority is issued to a University and then a charter, the institution becomes a body corporate and is capable of suing or being sued in its own name. The bodies set up under Section 35 of the Act merely assist in the administration and governance of the institution but cannot be sued nor can they sue in their own capacities. In the end, I do agree with Mr. Kisila’s submissions that the Egerton University Council is not capable of suing or being sued. The IP is wrongly sued and no orders can be issued against it.

The points of objection taken are sufficient to dispose of both applications dated 6/8/2013 and 2/9/2013. I will also agree with Mr. Kisila’s submission that the applicant intends to challenge the proceedings and

decision of Egerton University Disciplinary Committee which is a quasi judicial body. These are proceedings of a domestic nature. Judicial Review jurisdiction seeks to ensure good administration in accordance to the law and a challenge to the findings of the domestic bodies should be by way of Judicial Review as the applicant was alleging that the said body was in breach of rules of natural justice and guilty of bias. Approaching the court through a plaint is not the proper forum for the challenge of exercise of power of a quasi-judicial body.

I wish to point out that in the application dated 2/9/2013, the applicant also brought on board a Dr. T.K. Serrem and Egerton University Management Board. They are not parties to this suit and cannot be cited for contempt for an order to which they are not party nor were they served with or were aware of.

For all the reasons given in this ruling, I uphold the objection raised by the IP and hereby strike out the two applications dated 5/8/2013 and 2/9/2013 as against the Interested Party. Costs to be in the cause.

DATED and DELIVERED this 28th day of February, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Prof Kiama Wangai for the plaintiff/applicant

Mr. Kisila for the defendants

Kennedy – Court Assistant