



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Suit 63 of 2003

FREDRICK WANYONYI

SIMIYU.....PLAINTIFF

VS

HELLEN MAINDI KIBANANI.....DEFENDANT

RULING

By an application by way of Chamber Summons dated 10th August 2005, the applicant seeks orders:

- 1) That the Honourable Court be pleased to enjoin Nzoia Sugar Company Ltd, to this suit as the 2nd defendant.
- 2) Costs be provided for.

The application is based on the grounds that:

- (a) At all material times both the defendant/applicant and the plaintiff/respondent were employees of Nzoia sugar Company and the matters in issue are in regard to acts done during their time in office.
- (b) The statements in issue made by the defendant/applicant were made in the course of duty and in her capacity as an employee of Nzoia sugar Company.
- (c) Nzoia Sugar Company which is sought to be enjoined has in its possession documents containing the statements alleged to be defamatory being part of its company documents and correspondence.
- (d) Adding Nzoia Sugar Company as a second defendant is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in this suit.
- (e) It is in the interests of justice and fair play that this application be allowed.

The application is predicated upon the annexed affidavit of Hellen Maindi Kibanani sworn on the 10th day of August 2005.

For the applicant, it was argued that the respondent instituted proceedings against her for defamation on 8th October, 2003. That the allegations contained in the plaint dated 5th September 2003, arising from the letter quoted in the plaint, are all true thereby amounting to a defence of justification.

That she made the letter in her capacity as an employee of Nzoia Sugar Company Ltd. That she had a right to do so and the company a corresponding right to receive the information. However there was no malice, spite or ill-will.

That the information on corruption in the said letter is supported by the Auditor-General's report and also the Company Records. A copy of the Auditor General's report is exhibited as HMKI (a) and (b).

That a farmer by the name Baiya delivered his sugarcane in the month of October 2002 and expected payment in the year 2003. When Baiya's expectations failed, he sought assistance of the Kenya Anti-Corruption Commission (KACC). KACC referred the matter to Nzoia Sugar Company Managing Director for appropriate action. A copy of the said letter (from Baiya) is exhibited as "HMK 2(a)" and from KACC exhibited as "HMK 2 (b)."

That due to questionable state of affairs at Nzoia Sugar Company in the year 2003, the administrative officer wrote a letter dated 20th January 2003 petitioning the chairman of the Company to look into corrupt and shabby deals associated with the respondent. A copy of the said letter is exhibited as "HMK 3".

It was the respondent's case that she made the statements in question, in the course of her duty and in her capacity as an employee of Nzoia sugar company. On the premises she opined that the said company holds important information and documents that are pertinent to the issues at hand and hence would support the applicant's defence. As an example, she referred me to exhibits *HMK4* and *HMK 5*.

On the premises the applicant took the position that for a fair dispensation of this matter, it is only meet and just that the said company be enjoined as the second defendant.

The respondent opposed the application and filed grounds of opposition thereto dated 7th December 2005.

For the respondent, it was argued that there is clearly no cause of action established against the intended 2nd defendant. That if the defendant authorized or caused to be authored a letter addressed to the General Manager of the intended 2nd defendant, then the intended second defendant should come as a witness of the plaintiff. That there is no pleadings or evidence to the effect that the defendant published the said letter in her capacity as an employee of the intended second defendant.

That in any event, the claim of defamation as against the 2nd defendant is time barred as the alleged cause of action arose on 18th August 2003 which is in excess of one year period prescribed by the Defamation Act.

That the defendant is an artificial person. The course of action is defamation which requires mens-rea which the defendant lacks.

I have carefully analysed the rivalling arguments. The law on the point is donated by dint of the provisions of Order 1 Rule 10. I have addressed my mind to the law on the point. Accordingly, any persons may be joined in the suit as defendants, if-

- (a) any right too relief in respect of, or arising out of the same act or transaction (or series of acts or transaction), is alleged to exist against such persons, whether jointly, severally or in the alternative, and
- (b) if separate suits were brought against such persons, any common question of law or fact would arise

The thrust of the intended defendant's case is that she made the letter in her capacity as an employee of Nzoia Sugar Company Limited. That she had a right to do so and the company had a corresponding right to receive the information. That she was in no way actuated by malice, spite or ill-will. That it is consequently meet and just that M/S Nzoia sugar Company be enjoined in this suit as the 2nd defendant.

To my mind, it is not necessary that all the defendants should be interested in all the reliefs or that the liability of the defendants should be the same. Nor is it necessary that the evidence as regards each of the defendants should be the same.

The injury complained of arose from the same transaction and it involves a common question of fact hence the suit would not be bad for misjoinder. See *BULLOCK -VS- L.G.O. CO.*, (1907) 1 K.B.264.

Moreover, if several persons are joined together as defendants, and at the end of the day, it is found that only some of them are liable, a judgment may be given against such persons only, without any amendment of the proceedings.

Furthermore, when there are more defendants than one, it is not necessary that every defendant should be interested in all the reliefs claimed in the suit.

In the result, I allow the application in terms of prayer 1 and 2 of the Chamber Summons.

DATED and DELIVERED at Bungoma this 8th day of March 2006.

N.R.O. OMBIJA

JUDGEMR NUNGAI: for the applicant.

MR. MAKALI: For the defendant

MR WATANGA for MAKOHA: For the interested party.