



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 75 OF 2020**

**DR. SAMUEL KAMAU MACHARIA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**JOSEPH G. KIBE.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**SCENERIES LTD.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**JOHN KAMAU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**MUTUMA MATHIU.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**NATION MEDIA GROUP LTD.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. The application dated 15<sup>th</sup> of December, 2020, principally seeks the orders that:

**That this Honorable court be pleased to strike out the names of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs from the main suit as lodged vide the Complaint dated 4<sup>th</sup> June, 2020 and from the Application for interlocutory injunction as lodged vide the Notice Motion Application dated 4<sup>th</sup> June, 2020, for want of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiff's *locus standi***

2. The Application is premised on the grounds set out on the face of it and the depositions in the Supporting Affidavit of Sekou Owino. It is stated that the Plaintiffs vide a Complaint dated 4<sup>th</sup> June, 2021 have instituted a suit against the Defendants seeking *inter alia*, a declaration that the Defendants defamed the Plaintiffs through an article published in the issue of the **Sunday Nation** dated 24<sup>th</sup> May, 2020. That the said Complaint was accompanied by a Notice of Motion Application dated 4<sup>th</sup> June, 2020 seeking to restrain the Defendants from publishing or causing to be published any defamatory words in relation to the Plaintiffs herein.

3. It is further stated that vide an authority to plead, the 1<sup>st</sup> Plaintiff authorized the 2<sup>nd</sup> Plaintiff to plead generally and to take any necessary action in this suit on his behalf. That the 3<sup>rd</sup> Plaintiff has similarly authorized the 2<sup>nd</sup> Plaintiff to plead on its behalf and to take any action necessary in this suit. That the 1<sup>st</sup> Plaintiff being the director of the 3<sup>rd</sup> Plaintiff has passed a resolution authorizing the appointment of Messrs. Kamau Kuruia & Company Advocates and further authorizing the 2<sup>nd</sup> Plaintiff and himself to plead on behalf of all the Plaintiffs in this suit.

4. Further that in the course of proceedings the Defendants have established that the 1<sup>st</sup> Plaintiff is an undischarged bankrupt, which finding was made by this court in **Bankruptcy Cause no. 25 and 26 of 2009: Purity Gathoni Githae & Anor –versus- Oceanfreight Transport Company Limited**. That the finding of bankruptcy has been confirmed by the Court of Appeal in **Civil Appeal No. 62 of 2011: Samuel Kamau Mcharia & Anor. –Versus- Oceanfreight Company Limited** and formalized vide a Receiving Order dated 16<sup>th</sup> October, 2020 and published in the Kenya Gazette Notice No. 7678 on 2<sup>nd</sup> October, 2020.

5. It is further stated that owing to the Receiving Order above, the 1<sup>ST</sup> Plaintiff was from the onset deprived of the capacity to institute this suit, give authority to the 2<sup>nd</sup> Plaintiff to plead on his behalf, receive the authority of the 3<sup>rd</sup> Plaintiff to plead on its behalf or pass any resolution as a Director of the 3<sup>rd</sup> Plaintiff as he lacks the requisite *locus standi*.

6. Further that the decision of the 1<sup>st</sup> Plaintiff to irregularly and illegally vote in passing the 3<sup>rd</sup> Plaintiff's resolution to institute the instant proceedings has consequently impeached the 3<sup>rd</sup> Plaintiff's standing to institute the instant proceedings.

7. It is stated that the 1<sup>st</sup> Plaintiff by failing to tender proof of authority or consent from the Official Receiver and going ahead to institute this suit is in breach of the provisions of Section 9(1) of the repealed Bankruptcy Act, Cap 53 Laws of Kenya as read with Section 733(2) and (3) of the Insolvency Act, 2015. As such he is guilty of material non-disclosure.

8. That accordingly, the joinder of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs in the instant proceedings is illegal, null and void *ab initio* for want of *locus standi* hence warrants an order for striking out their names herein.

9. The Applicant is apprehensive that unless the orders sought herein are granted, there runs a risk of both the Notice of Motion dated 4<sup>th</sup> June, 2020 and the main suit proceeding to its logical conclusion devoid of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs' *locus standi*.

10. The Application is opposed. It is stated in the Replying Affidavit of Samuel Kamau Macharia, the 1<sup>st</sup> Plaintiff herein, that the Defendants have constantly engaged in delaying tactics to delay the hearing of the said application for injunction. It is stated that the 1<sup>st</sup> Plaintiff was wrongly gazetted as an undischarged bankrupt on 2<sup>nd</sup> of October, 2020. That the said information was published by the Defendants on 5<sup>th</sup> of October 2020, yet they took time before filing this application. It is stated that the instant Application is meant to derail the hearing of the Plaintiff's Application as it was brought after their offer in the negotiations was turned down. That in all court attendances, the Applicants have never raised the issue of *locus standi* and curiously served the instant Application on the Plaintiffs' advocates 15 minutes just before the mention of the Plaintiffs' Application.

11. It is further stated that the decision of the Court of Appeal on the 1<sup>st</sup> Plaintiff's status is a subject of appeal at the Supreme Court of Kenya. That following the publication of the said orders the 1<sup>st</sup> Plaintiff made an Application in the Court of Appeal seeking to quash the gazette, which Application was certified urgent and is pending determination. That the receiving order has since been suspended by the High Court.

12. It is the 1<sup>st</sup> Plaintiff's contention that at the time of executing the authority to plead and institution of the main suit and the application for injunction, there was no gazette of his bankruptcy status. Further that in the application for injunction the Plaintiffs had already complied with this court's directions on the filing of a further affidavit and submissions awaiting mention to confirm the said filing and take a ruling date and that in any case, the 1<sup>st</sup> Plaintiff had already obtained an order suspending the gazette.

13. That the pleadings sought to be struck out do not meet the requirements set out in Order 2 rule 15 Civil Procedure Rules. The Respondents urged this court to dismiss the Defendants' Application stating that the same has been brought in bad faith.

14. In a further affidavit sworn on 25<sup>th</sup> January, 2021 by Sekou Owino, it is pointed out that the replying affidavit is undated and therefore defective for want of compliance with Section 5 of the oaths and Statutory Declaration Act Cap 15 Laws of Kenya. Further the use of the name "S.K. Macharia" in the documentation annexed in the replying affidavit was stated to be different from the deponents name in the replying affidavit, "Samuel Kamau Macharia" and that the replying affidavit ought to be struck out.

15. That the 1<sup>st</sup> Plaintiff has admitted being an undischarged bankrupt.

16. That the Defendants were desirous of pursuing an amicable settlement but that their position has changed since the discovery of the issues touching on the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs *locus Standi*. It was denied that the Defendants have been engaging in delaying tactics herein. It was denied that the 1<sup>st</sup> Plaintiff was wrongly gazetted as an undischarged bankrupt. That the finding of Bankruptcy has not been reviewed or set aside. That although the 1<sup>st</sup> Plaintiff has preferred an appeal against the Judgment of the Court of Appeal delivered on 22<sup>nd</sup> February, 2019 the finding of Bankruptcy has neither been stayed nor set aside either by the Court of Appeal or the Supreme Court of Kenya. That the High Court did not suspend the receiving order but that the further orders of the court on the Receiving Order issued on 9<sup>th</sup> February, 2011 were suspended.

17. In response, the Respondent filed a further affidavit sworn on 26<sup>th</sup> January, 2021 by Samuel Kamau Macharia stating that the date on the replying affidavit was inadvertently left out and that the dated affidavit has since been refiled.

18. The Defendants filed a supplementary affidavit sworn on 2<sup>nd</sup> February, 2021 by Sekou Owino. It is stated that the refiled replying affidavit is irregularly on the record and ought to be struck out. He reiterated his position in the earlier affidavits.

19. I have considered the application, the response and the rival submissions filed.

20. The filing of the undated replying affidavit has been explained. This court is not inclined to penalize the Plaintiffs for such an inadvertence. A duly dated replying affidavit has been filed which this court will take into consideration.

21. Section 2 of the Insolvency Act, 2015, hereinafter 'the Act' defines a bankrupt as:

**'bankrupt' means a debtor who has been adjudged bankrupt under Part III and has not been discharged from bankruptcy;**

22. Bankruptcy commences on the date and time the bankruptcy order is made as provided in section 41 of the Act which provides;

**41. A bankruptcy under this Act commences on the date and at the time when a bankruptcy order is made in respect of the debtor.**

23. The said bankruptcy order is only binding on the bankrupt on expiration of the time within which to appeal or if the appeal has been made within such time and the same is withdrawn or the appellate court confirms the order. This is in pursuant to section 46 of the Act which provides that.

**46. A bankruptcy order becomes binding on the bankrupt and all other persons-**

**(a) on the expiry of the time within which an appeal may be lodged against the order; or**

**(b) if an appeal is lodged in respect of the order within that period and the Court later confirms the order or the appeal is later withdrawn-on the confirmation of the order or the withdrawal of the appeal, and the order can no longer be questioned on the ground that it was invalid or that a prerequisite for making it did not exist.**

25. My perusal of the judgment of the High Court **Purity Gathoni Githae & another v Oceanfreight Transport Company Limited [2011] eKLR** and **Samuel Kamau Macharia & another v Ocean Freight Transport Company Limited [2019] eKLR** confirms that indeed the first bankruptcy order against the 1<sup>st</sup> Plaintiff was made on 28<sup>th</sup> January, 2011 and confirmed by the Court of Appeal on 22<sup>nd</sup> February, 2019 respectively and further formalized vide a receiving order dated 16<sup>th</sup> September, 2020.

26. The suit against the Defendants was filed on 5<sup>th</sup> June, 2020. At the time of filing suit, the 1<sup>st</sup> Plaintiff had not filed the application for leave to appeal to Supreme Court of Kenya. The 1<sup>st</sup> Plaintiff was therefore, bound by the bankruptcy order and as such had no *locus standi* to institute the suit and the application therein.

27. With the foregoing, the upshot is that the suit filed by the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs is hereby struck out of the proceedings herein with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOV., 2021**

**B. THURANIRA JADEN**

**JUDGE**