



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO.14 OF 2019

PETER KIMANI NGIGI.....PLAINTIFF/RESPONDENT

VERSUS

STANDARD MEDIA GROUP.....RESPONDENT/APPLICANT

RULING

1. This is a ruling on **preliminary objection** dated **9th May 2019**. The defendant's argument is that **Article 34 (2)** of the constitution ousted the jurisdiction of this court. His argument is that the court fall under the definition of state.
2. Defendant's counsel argued that **Article 34(2) of the constitution** precludes the state from exercising control over people engaging in the media and stops the state from penalizing the media houses for what they report and to the extent it ousts the jurisdiction of this court in regard to a suit for defamation because the suit for defamation makes the court do actions excluded by Article 34 (2) of the constitution.
3. Counsel further submitted that **Article 34 (5)** of the constitution vests the jurisdiction in the media council (Media Complaints Commission created under **Media Act**).
4. Counsel further submitted that freedom of expression is provided under **Article 33** of the constitution and is qualified by **Article 33 (2)** and **33 (3) of the constitution** concerning all persons. He submitted that the creation of **Article 34 of the constitution** which relate to media decided to treat media as a special person and that only limitation to guarantee of freedom of speech is in regard to **article 33(2) of constitution**; that article **33(3) of constitution** is not a qualification of the media.
5. He submitted that a defamation matter stems from the rights granted to a person under **Article 33(3)** of the constitution where the plaintiff in defamation act should approach media body set out under **Article 34(5)** of the constitution. He cited Court of Appeal ruling in **Standard Group Ltd & 2 Others Vs Christopher Ndarathi Murungaru Civil Appeal No.187 of 2014**.
6. Counsel submitted that the plaint herein is not seeking to invoke jurisdiction under **Article 22 and 23 of the constitution** and if that is the case the plaintiff cannot be granted reliefs provided under **Article 23 of the constitution**; that filing of plaint does not invoke jurisdiction; that jurisdiction can only be invoked following procedure set out in **Article 22 and 23** of the constitution and in so far as the suit has not been brought following that rule, then it cannot invoke jurisdiction of the court. He urged court to dismiss this suit and direct that it be heard before a relevant body and if this court find that plaintiff is invoking **Article 165** of the constitution then court to express that it will be handling this matter as a constitutional procedure.
7. **Mr. Githui** for the plaintiff submitted that the defendant's submission does not constitute consistent thought. He submitted that a preliminary objection has to be based on pure point of law or undisputed questions of fact; that preliminary objection cannot arise out of party's perception of how pleadings are. He submitted that the defendant has raised preliminary objection on what he thinks the plaintiff case is about.
8. On submission that the court is a state and is barred from restricting rights of the media and two, **Article 34 (5)** of the **constitution** is an ouster clause, he submitted that court is not a state; state of the Republic of Kenya and courts are established under **Chapter 10 of Article 159** of the **constitution**; it establishes judiciary as an arbiter of disputes and saying judiciary is state is taking matters too far; that submission to the effect that judiciary is a state and barred from hearing matters is erroneous.
9. He urged the court to enquire whether **Article 34 (5) of the constitution** is an ouster clause; that is ousting the jurisdiction of the court and vesting it to media council. He submitted the **Article 34 (5) of the constitution** as ouster clause was considered in the case of **Standard Group Ltd & 2 Others vs Christopher Murungaru Civil Appeal No.187 of 2014** and the conclusion goes beyond the defendant's submissions; the preliminary objection was dismissed.

10. Counsel submitted that the plaintiff has not invoked jurisdiction under **Article 22 and 23** of the **constitution** and what plaintiff is seeking is remedies for libel not enforcement of fundamental rights under the constitution; that in submissions defendant say action of libel ought to be commenced by plaint not petition; that plaintiff has not filed claim by petition but by plaint. Counsel submitted that filing of this preliminary objection is an abuse of court process.

11. Lastly, he submitted that **Article 24** of the constitution provide that rights and freedoms which can be limited and freedom of expression is not absolute; that freedom to disseminate information is limited so that it does not injure reputation of others. He submitted that preliminary objection has no basis and urged court to dismiss it.

12. In rejoinder counsel for defendant agreed that **article 34(5) of the constitution** is not an ouster clause but merely gives jurisdiction to the tribunal that is created under **Media Act** and the ouster clause is **Article 34 (1) and (2)**.

13. He agreed that it is correct to file claim of defamation by way of plaint; that the issue they are raising is whether it is being brought under **Article 22 and 23**; that in **Murungaru's** case the court of appeal found that the High Court retained jurisdiction to protect person's reputation and dignity; rights under **Article 28 of the constitution**; that **Article 34 (2) of the constitution** ousts the jurisdiction of court and **Article 34 (5)** of the constitution vests in media council. He prayed that the matter be referred to media council.

ANALYSIS AND DETERMINATION

14. I have considered arguments by both parties herein. I have also perused authorities cited. I consider the following to be in issue:

Whether article 34 (2) ousts jurisdiction of this court in respect to defamation claim.

15. In the initial arguments, counsel for defendant/applicant said the action for libel is an action to protect fundamental freedom and should have been brought under **article 22 and 23 of the constitution** through petition and if that is the case, it should be entertained by constitutional court. In the rejoinder, he agreed with plaintiff's submissions that actions for defamation should be filed through plaint as filed herein.

16. The issue that court should determine is whether **Article 34(2)** of the constitution ousts jurisdiction of this court and **article 34 (5)** of the constitution vests it in the media council.

17. The assertion that **Article 34 (2)** of constitution has ousted or otherwise limited the jurisdiction of the High Court under **Article 165** of the constitution has, in my view, absolutely has no substance. In *Judges & Magistrates Vetting Board & 2 Others v The Centre for Human Rights & Democracy & 11 Others*, SC. Petition Nos. 13A, 14 and 15 of 2013, the Supreme Court said the following on ouster clauses:

“Ouster clauses are provisions in the Constitution or a statute that take away, or purport to take away the jurisdiction of a competent Court of law. They deny the litigant any judicial assistance in the relevant matter, and at the same time deny the Courts the scope for making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtail the jurisdiction of the Court, as the relevant matter is rendered non-justiciable before the Courts.”

Whereas, as the Supreme Court held in that case, an ouster clause in clear, firm and unequivocal language will be given effect subject to satisfying a number of relevant considerations, in this case I do not see anything in Article 34(5) of the Constitution that even remotely approximates an ouster clause.

23. Before I consider the above I wish to consider the defendant's argument that the judiciary is state and should not therefore interfere with the media as provided in **article 34 (2)** of the constitution.

24. **Article 159** of the **constitution** provide that judicial authority is derived from the people and shall be exercised by the courts and tribunals established by or under the constitution. **Article 34(5)** of the **constitution** provide for enactment by parliament of a legislation that provide for reestablishment of a body which shall be independent from government control which shall set media standard and regulate and monitor compliance with those standards.

25. The body that the provision establishes is not a tribunal but regulatory body, which monitors compliance of set standard.

26. The Court of Appeal in *Standard Limited & 2 others v Christopher Ndarathi Murungaru* [2016] eKLR stated as follows:

"In our view, such express jurisdiction cannot be ousted or limited by implication, as the appellants assume. In our reading of Article 34(5) of the Constitution, which provides for the establishment of a media regulatory body, there's absolutely nothing that constrains, limits or otherwise affects the jurisdiction conferred on the High Court by Articles, 22, 23 and 165(3) (b), to enforce rights and fundamental freedoms. The Media Complaints Commission, whose membership is largely drawn from media and related practitioners, is first and foremost in the nature of a self-regulatory body that provides remedies in cases of breach of the code of conduct by journalists. The Commission has no powers, under section 38 of the Media Council Act to award the kind of remedies that the Constitution contemplates for violated or infringed rights and fundamental freedoms including a person's right to reputation and dignity. It cannot therefore be seriously argued that such a body is a substitute for the High Court in matters of enforcement of rights and fundamental freedoms, as argued by the appellants".
(Emphasis mine)

27. My interpretation is, judiciary remain as the arbiter in matters that relate to libel. The provision does not take the jurisdiction of the court.

28. By saying that **Article 34 (2)** of the constitution bar state from penalizing any person, amount to equating the judiciary with state. The judiciary is an independent arm of government vested with authority to arbitrate disputes between state or state organs and individual or between parties.

29. **FINAL ORDERS**

1. **This court is seized with jurisdiction to entertain this matter.**
2. **preliminary objection is hereby dismissed**
3. **Costs to plaintiff.**

Ruling dated, signed and delivered at Nakuru this 21st day of November 2019

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RACHEL NGETICH

JUDGE

In the presence of:

Schola Jeniffer – Court Assistant

Mr. Orori holding brief for Mr. Githui counsel for plaintiff

No appearance for counsel the for respondent