



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 186 OF 2016

MONICAH WANJIRU MBARU.....PLAINTIFF

VERSUS

GORDON FRED ODHIAMBO OGOLA

T/A GORDON OGOLA, KIPKOECH & CO.

ADVOCATES & 2 OTHERS.....DEFENDANTS

RULING

This ruling relates to a preliminary objection dated the 16th July, 2018 by the 2nd and 3rd defendants/applicants. The objection is based on the ground that the court's jurisdiction under Article 165(3) (b) of the Constitution of Kenya 2010 has not been invoked as provided for under Article 22(3) of the Constitution, and the Constitution of Kenya (protection of Rights and fundamental freedoms) practice and procedure Rules, 2013, thus the court lacks jurisdiction to hear the suit as filed.

When submitting in support of the preliminary objection, Counsel for the Applicants stated that the suit before the court is not filed as provided for under Article 22(3) of the Constitution, and the Constitution of Kenya (protection of Rights and Fundamental freedoms) practice and procedure Rules, 2013.

Counsel contended that filing of the suit under that Article and the rules is what invokes the Court's jurisdiction under Article 165(3) (b) of the Constitution. That the plaintiff has filed her suit under the provisions of the Civil Procedure Act and therefore, she has used the wrong procedure.

Counsel argued that for a person to approach the court under Article 28 and 31 of the Constitution, he must approach it under Article 22 of the Constitution and such a party would be seeking to have the court give a remedy as provided for under Article 23(3) of the Constitution. He contended that the plaintiff ought to have moved the court by way of a petition.

In his response, counsel for the Plaintiff/Applicant submitted that the plaintiff filed her plaint in the High Court as that is where her relief lies. He argued that counsel for the defendant did not tell the court under which provision the plaintiff ought to have filed her suit. He referred to Article 22(3) of the Constitution which states that the court is not bound by legal technicalities and, should there be an error in the way the plaintiff has moved the court, the court can excuse the procedure. He averred that under Article 165(3) the High Court has unlimited jurisdiction in civil and criminal matters and therefore, he urged, the court has jurisdiction to entertain the matter herein.

Counsel contended that Article 34(2) of the Constitution envisages a situation where the state is prohibited from exercising control over or interfering with broadcasting, production, or circulation of any publication, production or dissemination of information by any media but the plaintiff is not such person envisaged by this Article. According to him the jurisdiction of the High Court is unlimited. He argued that counsel for the defendants seems to have misconstrued the context, procedure, the spirit and the letter of the Constitutional provisions they have relied on in that Article 34 does not deprive the plaintiff of her redress. It was urged that the plaintiff has come to court to seek protection of her dignity. According to counsel, the preliminary objection unnecessarily seeks to make the suit expensive for the plaintiff, waste time and achieve nothing. Counsel relied on the provisions of Article 159(2) (d) of the Constitution which provides that justice should be administered without undue regard to procedural technicalities and when it is read with Article 22(2) (d) both seek to remove procedural impediments and hurdles that may be placed in the path of litigants seeking justice.

In a brief reply, counsel for the 1st and 2nd defendants stated that the preliminary objection does not apply to the first defendant. In his view, the plaintiff ought to have moved the court by way of a petition before the Constitutional Court and not by way of a plaint under the Civil Procedure Act. He argued that the form of approaching the court is not a technicality but a main issue.

The court has carefully considered the preliminary objection and the submissions by the learned counsel. The objection raised by Counsel for the defendants is based on the provisions of Articles 22(3), 165(3) (b), 23(3) and 34 of the Constitution. He has taken issue with the procedure the plaintiff has used to move the court for her reliefs. In his view, the plaintiff ought to have moved the court by way of a petition and not a plaint.

Article 22 provides;

“for enforcement of Bill of rights under 22(3), the chief justice shall make rules providing for court proceedings referred to in this Article, which shall satisfy the criteria that;

(a).....

(b) Formalities relating to the proceedings including commencement of the proceedings are kept to the minimum and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.

22(1) “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed, or is threatened.

(d) the court, while observing the rule of natural justice, shall not be unreasonably restricted by procedural technicalities”.

Article 23(3) provides for the reliefs available and which the courts can grant in any proceedings brought under Article 22 of the Constitution. Right to human dignity and privacy are provided for in Articles 31 and 28 respectively of the Constitution and are among the fundamental rights and freedoms, set out in the Bill of Rights.

The High court is established under Article 165 of the Constitution and its jurisdiction is set out under Article 165, 3((a) – 3(e). 165 (3) (a) donates unlimited original jurisdiction to the High Court to hear criminal and civil cases.

While (b) donates to it jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. This is also captured in Article 23(1).

Whereas Article 22(3) has empowered the Chief Justice to make rules providing for the court proceedings referred to in that Article, the formalities relating to commencement of such proceedings should be kept to the minimum and in particular that the court shall, if necessary entertain proceedings on the basis of informal documentation Article 22(b).

Further, Under Article 159(1), judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under the constitution. Under Article 159(2) (d) justice shall be administered without undue regard to procedural technicalities. Article 22 3 (b) is clear beyond peradventure that formalities relating to proceedings under that Article should be kept to the minimum.

In my considered opinion, the fact that the plaintiff has moved the court by way of a plaint and not a petition, and this being a defamation suit, is not fatal.

In view of the foregoing I find that the preliminary objection has no merits and it is hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this 4th day of October, 2018

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....**For the Plaintiff**

..... **For the Defendants**