



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 4 OF 2017

AHARUB EBRAHIM KHATRI..... PLAINTIFF

VERSUS

NELSON MARWA DEFENDANT

RULING

1. There are two applications before me for consideration. The first one is dated 27th January, 2017 filed by the Director of Public Prosecutions. It has been brought under the provisions of Order 1 rules 10(2) and 25 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010.

It seeks the following orders:-

- (i) Spent
- (ii) This court be pleased to admit the intended interested party into these proceedings;
- (iii) This court be pleased to make any other order that it may deem fit and just to grant;
- (iv) There be no order as to costs.

The application is supported by the affidavit of Augustine Shakwila Ayekha dated 27th January, 2017 and the grounds on the face of the application.

2. The second application has been brought by the Attorney General. It was filed on 5th February, 2017 and is based on the provisions of Sections 1A, 1B, 3, 3A of the Civil Procedure Act and Section 22 of the National Government Coordination Act, Sections 12 and 16 of the Government Proceedings Act, Order 1 rule 10(2) and Order 2 rule 7 of the Civil Procedure Rules and all other enabling provisions of the law.

It seeks the following orders:-

- (i) Spent;
- (ii) Spent;
- (iii) That this Court be pleased to enjoin the Attorney General as a defendant in this matter;

(iv) The plaintiff's suit and claim against Nelson Marwa, the defendant be struck out with costs and Nelson Marwa be removed from the proceedings;

(v) That the plaintiff's suit be struck out with costs for non-compliance with the rules and the law; and

(vi) That the costs of the application be borne by the plaintiff.

The application is predicated on the grounds on the face of it and the supporting affidavit of Inspector Kipkemboi Rop dated 2nd February, 2017.

3. The respondent filed two replying affidavits on 6th February, 2017 in response to the said applications.

4. For ease of reference, the Director of Public Prosecutions (DPP) will be referred to in this ruling as the intended interested party and the Attorney General (AG) as the intended 2nd defendant. The plaintiff will be referred to as the respondent

SUBMISSIONS BY THE INTENDED INTERESTED PARTY

5. Mr. Muteti, Learned Counsel informed the court that the respondent filed a suit for allegedly having been a victim of police arrest, incarceration and adverse publicity by the intended interested party. He added that the role of the intended interested party will unfold at the tail end of investigations against the respondent and that the issues to be canvassed during the hearing of the case will bring into focus the issue of investigations and the role of the intended interested party.

6. Counsel drew the court's attention to the provisions of Article 157(4) and sub-article 11 thereof, of the Constitution of Kenya which places an obligation on the intended interested party to ensure that any persons suspected of committing crimes are brought to justice, thus he should be enjoined to ensure that administration of justice is not abused by any party. He stated that the respondent has admitted being under investigations hence operation of criminal law comes into effect.

7. Mr. Muteti relied on the case of **JMK vs MWM & another** [2015] eKLR at p. 13 where the Court of Appeal interrogated the powers of courts to enjoin parties. Counsel submitted that the powers are unfettered and courts are to determine who should be brought if appears that certain parties have been omitted, the court can even *suo motu* make orders that they be enjoined. He referred to the replying affidavit of the respondent who states that no adverse order is likely to be made against the DPP. In that regard the court was informed that the defendant could not have acted in his personal capacity as a public officer and as the chair of the county security team that coordinates the Central Government's function in the County.

SUBMISSIONS BY THE INTENDED 2ND DEFENDANT

8. Mr. Wachira, Learned Counsel for the intended 2nd defendant referred to paragraph 2 of the plaint which describes the defendant as the Coast Regional Commissioner appointed under the National Government Coordination Act. He drew the court's attention to paragraph 4 of the said plaint which states that the defendant's functions include coordination of the National Government functions envisaged in the Constitution. In reference to paragraph 5 of the plaint, Counsel stated that the plaintiff avers that the defendant actively threatened to wage a campaign against drugs, arms and other vices. Counsel submitted that the impression created by the above is that the defendant does not act alone.

9. He made reference to paragraph 7 of the plaint where the respondent has stated that the defendant surrounded by several unknown members of the security forces held a press conference. It is thus apparent that the defendant was acting in his official capacity and that is how the intended 2nd defendant comes in.

10. Mr. Wachira cited the provisions of section 22 as read with Section 15(1) of the National Government Coordination Act which show the reasons as to why the defendant was appointed to the office he holds. He argued that Section 22 of the National Government Coordination Act grants the defendant immunity against any civil claim for actions done in the cause of his work. These actions relating to the present suit are contained in paragraph 7 of the plaint. He further submitted that if the defendant is struck out of the proceedings, the respondent will suffer no loss but the suit shall survive as against the intended 2nd defendant.

11. In reference to paragraph 22 of the intended 2nd defendant's supporting affidavit, Counsel stated that the purpose of the press conference held was to deny the misinformation made to the public by Governor Joho through his facebook account. The respondent however interpreted the press conference as a means of harassing and intimidating him.

12. Mr. Wachira stated that Section 12 of the Government proceedings Act provides that proceedings against the Government shall be instituted against the Attorney General. He cited the case of **Gabriel Mghedi & Others vs Registrar of Societies**, Mombasa civil suit No. 14 of 2005, where Maraga J (as he then was) stated that suits against Government officials unless brought by Judicial Review applications should be brought against the AG. In so submitting, he urged the court to strike out the name of the defendant from the suit herein and enjoin the AG in his place.

RESPONDENT'S SUBMISSIONS

13. Mr. Abeid, Counsel for the respondent opposed both applications and stated that the intended interested party and the intended 2nd defendant have not demonstrated the reasons why they should be enjoined in these proceedings. In his view, the court can deal with the suit without their participation. He submitted that the Order 1 of the Civil Procedure Rules provides that an interested party must show good cause for being enjoined to a suit yet the two parties proposed to be enjoined had not given any grounds in their affidavits for their enjoinder.

14. Counsel stated that the contents of paragraph 2 of the plaint is not an admission that the plaintiff has been sued as a public officer and argued that he has been sued in his private capacity due to his reckless utterances. He added that Section 22 of the National Government Coordination Act is applicable only if a Public Officer acts in good faith. In his view, the act of the defendant does not show that he was acting in good faith.

15. Mr. Abeid argued that the provisions of section 12 of the Government Proceedings Act apply only where the defendant is the Government but cannot apply in this case where the defendant has been sued in his personal capacity as the cause of action is based on the tort of defamation. It was argued that it was erroneous for the intended 2nd defendant to have filed a Notice of Appointment in this matter for the reason that the defendant was on a frolic of his own when he made the utterances the subject of the plaint.

INTENDED INTERESTED PARTY'S REJOINDER

16. Arising from the submissions of the respondent, Mr. Muteti stated that Mr. Abeid had shown that the sole purpose of the suit is to go for the defendant and not the Regional Coordinator, whereas in his pleadings, the respondent refers to the defendant as the Regional Coordinator. Counsel argued that the defendant was acting in his official capacity. He added that this matter touches on law enforcement, thus Government interest and public offices need protection to discharge their duties without fear or favour.

17. He argued that if the defendant gave directions for the arrest and prosecution of the respondent, it means that he was acting in his official capacity but he has no powers to order for the arrest and investigations of anyone. He added that the respondent has admitted that there are investigations against him.

INTENDED 2ND DEFENDANT'S REJOINDER

18. Mr. Makuto, Learned Counsel made a response on behalf of his senior colleague Mr. Wachira. He stated that paragraph 20 of the intended 2nd defendant's affidavit indicates that the respondent's name was never mentioned during the press conference and that was not controverted by the respondent.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If the DPP should be enjoined as an interested party to the suit herein;
- (ii) If the name of Nelson Marwa, the defendant, should be struck out of the proceedings herein and the AG be enjoined in his place; and
- (iii) If the suit herein should be struck out.

19. The provisions of Order 1, rule 10(2) of the Civil Procedure Rules provide as follows:-

“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 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.”

20. Mr. Muteti illuminated to this court the reasons as to why the joinder of the intended interested party is necessary in the present suit. The reasons advanced are that the respondent was a victim of police arrest, incarceration and adverse publicity by the intended interested party. The intended interested party will also have a role to play at the tail end of investigations under the provisions of Article 157(4) and sub-article 11 thereof, of the Constitution of Kenya which empowers him to ensure that any persons suspected of committing crimes are brought to justice. In addition to the foregoing, the respondent has admitted being under investigations. In Mr. Muteti's view, the intended interested party should be enjoined so that administration of justice is not abused.

21. Article 157(4) of the Constitution provides as follows:-

“The Director of Public Prosecutions shall have powers to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.”

Sub – article 11 thereof provides as follows:-

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

22. To fortify his arguments, Counsel for the intended interested party relied on the case of **JMK vs MWM and another** [2015] eKLR where the Court of Appeal stated as follows:-

“Order 1 rule 10(2) of the Civil Procedure Rules empowers the Court, at any stage of the proceedings upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon all questions involved in the suit, to be added as a party.” (emphasis added)

23. In the foregoing decision, the Court cited with approval from Sarkar's Code of Civil Procedure, (11th Ed. Reprint, 2011) Vol. 1, P 887 which states:-

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.” (emphasis added).

24. It thus follows that there has been a shift from the strait jacket that used to constrain the courts on persons to be joined as parties to a suit. The intended interested party has demonstrated that the matter for which the respondent was being questioned about by the police was of a criminal nature. The respondent states in paragraph 3 of the plaint that during a raid at his house three firearms were seized by the police for which he asserts that he is legally entitled to possess by virtue of firearms certificates he has for the same.

25. The intended interested party’s deponent in paragraph 6 of his supporting affidavit deposes that the nature of investigations herein raises issues of national security that the County security team is mandated to deal with. The said deponent further states in paragraphs 8 of the said affidavit that the commotion caused at the police headquarters on that date (13th January, 2017) by the respondent’s sympathizers attracted great public interest.

26. In paragraphs 8 and 9 of his affidavit in response to the intended interested party’s affidavit, the respondent deposes that the presence of the intended interested party is not necessary for this court to effectively and completely adjudicate upon and settle all questions raised in this suit, as the ultimate order or decree that may be delivered by this court can be enforced upon the defendant without the presence of the intended interested party.

27. I do agree with Counsel for the respondent that the decree that may ensue from this case can be enforced without the presence of the intended interested party. My point of departure however is that courts have moved away from the literal and narrow interpretation of the words **“a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit”** and have adopted a wider and more liberal interpretation in line with the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act. In so stating I place reliance on the case of **Brek Sulum Hemed vs Constituency Development Fund Board & Another** [2014] eKLR where the court stated thus:-

“As interested parties, the applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit. I do not think that the phrase “all questions involved in the suit” in order 1 rule 10(2) is to be restrictively construed to mean only such questions as are raised by the present parties. I think an issue may properly be taken to be a “question involved in the suit” if it is so related to the suit as to affect the question in the suit I find therefore that the applicants are “necessary parties” within the meaning of order 1 rule 10 of the Civil Procedure Rules.”

28. After considering the foregoing factors, I am satisfied that the intended interested party has made out a good case for being enjoined to the suit herein, bearing in mind the provisions of Article 157 (11) of the Constitution of Kenya.

29. The court has been requested to strike out the name of the defendant herein and enjoin the AG in his place. The reasons advanced by Messrs Wachira and Makuto were that the defendant has been described in paragraph 2 of the plaint as the Coast Regional Commissioner appointed under the National Government Coordination Act. In paragraph 7 thereof, the respondent avers that the defendant surrounded by several unknown members of security forces held a press conference, thus in the view of the Counsel for the intended 2nd defendant this was an indication that the defendant was acting in his official capacity. Further, in paragraph 5 of the plaint, the respondent states that the defendant actively threatened to wage a campaign against drugs, arms and other vices.

30. Section 15(1) of the National Government Coordination Act provides as follows:-

“ In accordance with the national government functions under the constitution, this act or any

other written law, the public service commission shall in consultation with the Cabinet Secretary, recruit and appoint national government administrative officers to coordinate national government functions and to perform such other functions as may be assigned to them under this Act or any other law.” (emphasis added)

31. In the intended 2nd defendant’s supporting affidavit, the deponent explains the circumstances that led to the respondent being interrogated at the County Criminal Investigation office, Mombasa.

32. In paragraph 12 thereof he deposes that on the evening of 13th January, 2017, the Governor of Mombasa, Ali Hassan Joho misinformed the public through his Twitter updates and Facebook account pages that he and other members of parliament had been arrested by the deponent which was a fabrication intended to mislead the public. Extracts of the said updates and posts were attached to the deponent’s affidavit and marked as KK3A, KK3B, KK3C, KK3D, KK3E, KK3F and KK3G.

33. In paragraphs 8 and 9 of the said affidavit, the deponent states that during the interrogation of the respondent, the Governor of Mombasa County went to the station with several members of parliament and due to interference by politicians, the interrogation and statement recording took far much longer than was expected as the respondent severally requested time to consult both the politicians and his Counsel, Mr. Balala, who was continuously present.

34. In the said supporting affidavit, the deponent states in paragraph 15 that due to misinformation by the said Governor to the public through the said Governor’s Twitter updates and Facebook account page, it was therefore necessary that the public at Mombasa and Kenya at large be informed of the proper and correct position of the occurrences of 13th January, 2017.

35. In paragraphs 16 and 17 of the said affidavit the deponent states that the proper and authorized person to conduct that address was the Regional Coordinator, the defendant herein, as the head of the Regional Security Committee Coast region and that he held a press conference on 14th January, 2017, in his capacity as the Regional Coordinator Coast Region and Chair of the Regional Security Committee.

36. In the respondent’s replying affidavit filed on 6th February, 2017 in response to the above averments, in paragraph 5 thereof, he deposes that this suit has been brought against the defendant in his personal capacity after he proceeded to make defamatory attacks against him personally, devoid of any proof, remarks which were aired and published by all media houses in Kenya. The defendant sought to usurp the powers of the judiciary by declaring him guilty of very serious crimes thereby compromising his safety as provided under Article 29(2) of the Constitution.

37. In paragraphs 7 and 8 of the said affidavit, the deponent states that his Advocate has informed him, among other things, that for a party to be joined as a defendant, it is paramount that there is a relief flowing from that party to the respondent but the same is not true as regards the intended 2nd defendant. He has also been informed that the presence of the intended 2nd defendant is not necessary for the court to effectively and completely adjudicate upon and settle all questions raised in this suit.

38. In paragraphs 9 of the said affidavit the deponent states that the ultimate order that will be delivered by the court can be enforced upon the defendant without the presence of the intended 2nd defendant.

39. In paragraph 10 of the replying affidavit, the respondent states that every litigant has a right to a fair hearing as provided by Article 50(1) of the Constitution but the defendant sought to convict him in the court of public opinion and now seeks to deny him his constitutional right to approach the court for justice and legal redress.

40. In determining if the intended 2nd defendant should be joined as a party, I must consider the provisions of section 12(1) of the Government Proceedings Act which provide as follows:-

“Subject to the provisions of any written law, Civil proceedings by or against the Government

shall be instituted by or against the Attorney General, as the case may be.”

41. The respondent in paragraph 2 of the plaint clearly acknowledges that the defendant is the Coast Regional Commissioner appointed under the National Government Coordination Act. The last page of the plaint shows that it was to be served on the office of the Attorney General, Mombasa. On the last page of the respondent's statement, it indicates that service of the same was to be effected on the said office.

42. In his replying affidavit the respondent shifts goal posts by stating that the defendant has been sued in his personal capacity. It is my view that had that been the position, the plaint and the witness statement would not make any mention of service being effected on the office of the AG.

43. I have looked at the documents filed in this case. In the documents attached to the affidavit of the intended interested party which were initially relied upon by the respondent when he sought orders of an injunction from court 19th January, 2017, there is a copy of a photograph in the annexure marked AEK2 which depicts the defendant addressing the press in Mombasa on 14th January, 2017.

44. The said defendant has donned uniform which this court takes judicial notice of, is normally worn by national government administrative officers who coordinate national government functions. The defendant is in the company of three men, two of whom are dressed in police uniform. It therefore follows that the defendant was on official duties when the events the subject of this case unfolded. He was not on a frolic of his own as submitted by Counsel for the respondent. Whatever the utterances he made, be they defamatory or not, happened in the cause of his duty. The court's duty at this juncture is not to determine the merits of the case but to deal with the preliminary issue of whether the intended 2nd defendant should be joined as a party to this suit or not.

45. I find the case cited by Mr. Wachira of **Gabriel Mghedi & Sayyid Mrera versus the Registrar of Societies**, (supra) to be persuasive to this court. In view of the foregoing decision and the fact that the defendant was in the course of duty when he allegedly made defamatory remarks against the respondent, it is my finding that the application for his name to be struck out and for the AG to be enjoined as a party in his place is well merited.

46. Although Counsel for the intended 2nd defendant, in prayer No.4 of his application sought for orders for the suit herein to be struck out with costs for non - compliance with the rules and the law, he did not expound on the same. He however cited the provisions of section 22 of the National Government Coordination Act which provide as follows:-

"Nothing done by a public officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand."

It is difficult at this preliminary stage to determine whether what was allegedly uttered by the defendant was in good faith or not. That can only be determined after a full hearing of the case. I therefore decline to strike out the suit.

47. Having analyzed the pleadings, submissions of counsel and the authorities they cited in support of their arguments, I apply a wide and liberal interpretation to the provisions of Order 1 rule 10(2) of the Civil Procedure Rules and hereby make the following orders:-

- (i) The DPP is hereby enjoined in this suit as an interested party;
- (ii) That the defendant, Nelson Marwa's name be struck out of the plaint on record;
- (iii) The Attorney General is enjoined as a defendant in this suit;
- (iv) The plaintiff/respondent is granted 14 days to file and serve an amended plaint;

(v) The defendant will file his statement of defence within 14 days of service of the amended plaint;

(vi) The interested party will file any documents he may require within 14 days of service of the amended plaint;

(vii) The plaintiff/respondent will file and serve his response to the statement of defence, if any, within 7 days of service; and

(viii) Costs to the defendant and interested party.

DELIVERED, DATED and SIGNED at MOMBASA on this 14th day of March, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Abeid for the plaintiff/respondent

No appearance for the defendant

Mr. Muteti for the interested party

Oliver Musundi - Court Assistant