



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 158 OF 2016

PETER LAI MUTHOKA.....PLAINTIFF

VERSUS

THE STANDARD GROUP.....DEFENDANT

RULING

1. **Peter Lai Muthoka**, the plaintiff herein took out a motion dated 17th June 2016 whereof he sought for interalia:

a. an order for injunction to restrain the Standard Group the Defendant herein from further publishing or causing to be published words defamatory of the plaintiff pending the hearing and determination of this suit.

b. An order directing the Defendant to retract the defamatory statement published about the plaintiff on 19.02.2016 with an apology.

2. The motion is supported by the affidavit of Peter Lai Muthoka. When served, the Defendant filed a notice of preliminary Objection arguing that the High Court lacks jurisdiction to hear and determine this suit by virtue of Article 34(2) of the Constitution of Kenya 2010. It is also pointed out by the Defendant that this suit was not properly instituted pursuant to the provisions of article 22 of the Constitution of Kenya. The Defendant also filed the replying affidavit of **Millicent Ngetich** to oppose the motion. This court directed the motion to be disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and opposing affidavits. I have also taken into account the grounds stated on the preliminary objection filed by the defendant. I have further considered the rival written submissions. It is important to first determine the merits or otherwise of the preliminary Objection.

4. The defendant submitted that, this court lacks the requisite jurisdiction to preside over this suit because under article 34 (2), the word 'State' is used as a noun that means the collectivity of offices, organs and other entities comprising the Government of the Republic of Kenya under the Constitution. It argued that the Judiciary being an organ of the Government is barred from interfering with any person engaged in broadcasting, production or circulation of any publication or the dissemination of information by any medium. The Defendant further submitted that the state is also restrained from penalizing any person for any opinion or view or the contents of any broadcast, publication or dissemination. It stated that Article 33 of the Constitution provides for freedom of expression which freedom is only limited where it destabilizes social order, commission of a crime or discrimination. It added that the breach of the right of expression amounts to a crime while breach of the qualification under Article 33 (3) of the Constitution amounts to a tort. It also averred further that Article 34 (2) aimed at ending the political pressure and

interference of the media by the State, hence a breach of Article 34 amounts to a criminal offence and the tort only arises where there is breach of article 33 (3). It submitted that under section 11 of the Media Council of Kenya ct 2013, the media is expected to be independent of the control by government, political or commercial interests as stipulated in Article 34 (5) (a) of the Constitution of Kenya 2010. It argued that the Media Council of Kenya is the one tasked with regulating the media, conduct and discipline of journalists and incase a party is aggrieved by its actions, their remedy lies with the Media Council and not the court.

5. The plaintiff on the other hand, submitted that the Court has the requisite jurisdiction and further intimated that the issue of jurisdiction in this matters is settled and insinuated that the Preliminary Objection is a delay tactic on the part of the Defendant.

6. Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of **The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR 1**. Where Nyarangi J.A. held as follows:

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

7. Where does jurisdiction emanate from? A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia Vs KCB & 2 Others, Civil Application No. 2 of 2011** stated thus:

“A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

The court draws its jurisdiction from the Constitution. Article 165(3) provides that:

“(3) Subject to clause (5), the High Court shall have:

(a) Unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to Constitutional powers of State organs in respect of county governments and any matter relating to the Constitutional relationship between the

levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

The jurisdiction of the high court is however limited as provided under **Article 165(5)** in the following terms:-

5) The high court shall not have jurisdiction in respect of matters-

a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;

b) Falling within the jurisdiction of the courts contemplated in Article 162 (2)

8. Article 165 (5) is very categorical on the limitations of the high court jurisdiction which includes matters reserved for the exclusive jurisdiction of the Supreme Court and those falling within the jurisdiction of the court as per Article 162 (2) of the Constitution which basically include employment and relation matters that are heard in the Industrial Court and Environment and occupation of land which are basically heard in the Environment and Land Court. It is only in the matters falling under the two subjects that the High Court lacks jurisdiction to preside over.

9. I have read the Article 34 (2) of the Constitution, which the defendant has relied on to oust this court's jurisdiction. The article reads: **“The state shall not: -**

a. Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium: or

b. Penalize a person for any opinion or view or the content of any broadcast, publication or dissemination.”

This article cannot be read in isolation. All the articles of the Constitution must be read together. The Constitution must be read as a whole. In this particular case, article 34 of the Constitution indeed provides for the freedom of the media. Article 33 also provides for freedom of expression but the same is not absolute, it has its limitations.

Moreover, Article 259 also expects this court to interpret the Constitution in a manner that, promotes its purposes, values and principles and advances the Rule of Law, and the human rights and fundamental freedoms in the Bill of Rights. The court has to interpret provisions of the Constitution while at the same time giving effect to other provisions of the same Constitution. Therefore, no one freedom at any one time can be construed in isolation from other freedoms enshrined in the Constitution

10. The defendant has argued that the Media Council of Kenya has the requisite jurisdiction to preside over any breaches of media rights. I must say that the council is vested with mediation or arbitration in case of a dispute between the media and the aggrieved party as stipulated under section 4 of the Media Act. The Council cannot aid a complainant in this case the plaintiff, in so far as compensation is concerned for any defamatory utterances by the media. The least the council can do is compel the journalist to apologize to the complainant yet the damage has been done. In any case, Article 165(6) gives this court the jurisdiction to supervise the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function. Furthermore, I believe that the complainant is entitled an avenue to ventilate his case further if dissatisfied with the decision of the complaints commission of the Media Council. His only option in such a case would be an appeal to the High Court . The high court has jurisdiction in all matters including appellate jurisdiction which are only limited by article 165 (5) including supervisory jurisdiction.

11. This position has been extensively addressed by the court in various cases.

In the case of **Christopher Ndarathi Murungaru v Standard Limited & 2 others [2012] eKLR**, G V Odunga J stated that:

"To equate the powers of the Court with that of the Complaints Commission flies in the face of the express Constitutional provisions in Article 165(3)(b) which confers on the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Such reasoning will also go contrary to the powers of the High Court under Article 165(6) to supervise the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function."

12. The High court has powers to preside over civil matters and defamation is a tort in civil law. The Defendants submissions that Article 34(2), ousts the jurisdiction of this court has no basis. In the premises I find that the Preliminary objection as raised lacks merit and I hereby dismiss it.

13. Having said that, I move on the merits or demerits of the application.

The plaintiff is seeking an injunction against the Defendant restraining it from further publishing words defamatory to the plaintiff pending the hearing and determination of the suit. In his submissions, the plaintiff avers that he has a prima facie case with a probability of success since the Defendant published an article in the Standard Newspaper alleging that the plaintiff was a sole director of Transcend Media Group which had allegedly benefitted from questionable deals with the NYS and proceeded to state that the number provided to KRA as belonging to the alleged sole director was answered by a taxi operator who had no knowledge of the company or the directors implying that the plaintiff was a fraudster. He argued that the article was published online and in the newspaper which is widely read as a result of which the entire world read the article which inferred the plaintiff as a sham and a person who had benefitted from corruption. He further stated that the Defendant failed to retract the statement and issue an apology despite demands by the plaintiff to do so. He added that he will suffer irreparable damage if the injunctive orders are not issued since he is a director of a company of international repute with a large clientele. He further averred that any further publication by the Defendant will cause further damage to his reputation that cannot be quantified or compensated by an award of damages. He argued further that the balance of convenience tilts in his favour since the defendant will suffer no harm or convenience if the restraining order is issued. He claimed further that injunction in defamation cases can only be issued in the clearest of cases as in this case. In particular he pointed out that the words complained of concerned the plaintiff and published by the Defendant, the words were false and defamatory and that they were published with malice.

14. The Defendant on his part submitted that it is a national newspaper with wide spread coverage and with it comes the social responsibility to the nation to comment on core issues that affect the society. It claimed that it should be free to discuss freely and openly in a democratic society. It argued that the plaintiff has not adduced any evidence that shows the intention on the part of the Defendant to further publish the alleged defamatory articles relating to the plaintiff hence no reason for the court to grant injunction orders. It averred further that the plaintiff has not met the principles for granting an injunction as laid out in the case of **Giella vs Cassman Brown and Company Limited (1973) EA 358**. It is the Defendants submission that it has the freedom of expression s provided by the Constitution under Article 34(1) of the Constitution. It urged the court to balance the interest of the public with respect to the information.

15. While dealing with injunctions in defamation cases courts ought to weigh between the freedom to express oneself and the impact on the information against the respect for other's rights and reputation. The general principles for grant of injunctions have thereby been modified to suit the uniqueness of defamation cases. I am on this point fortified by **Cheserem v. Intermediate Media Services [2000] 2 EA 371** where it was held as follows:-

"An interlocutory injunction is temporary and only subsists until the determination of the main suit...In defamation, the question of injunction is treated in a special way although the conditions applicable in granting injunction as set out in the case of Giella v. Cassman Brown &

Co. Ltd (1973) EA 358 generally apply...In defamation cases, those principles apply together with special law relating to the grant of injunctions in defamation cases where the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in clearest possible cases. The court must be satisfied that the words complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside perse...The reason for so treating grant of injunction in defamatory cases is that the action for defamation bring out conflict between private interest and public interest, and more so in cases where the country's Constitution has provisions to protect fundamental rights and freedoms of the individual including the protection of the freedom of expression."

16. It is trite law that while dealing with an injunction, a court ought not to delve into the merits of the suit rather consider whether a prima facie case has been made out and that irreparable loss which cannot be compensated in costs shall be suffered in the event the orders sought are denied

17. It was the Defendant's contention that the article published touched on a matter of public interest as the issue of corruption and misappropriation of funds in the Ministry of Devolution and National Youth Service is in the public domain. The Defendant argues that the plaintiff is a director and shareholder of Transcend Media Group that was awarded the tender to rebrand the National Youth Service by the Principal Secretary Ministry of Devolution and Planning to an amount of kshs 326,214,462.96 for a period of 6 months. The Defendant averred that the words published are true. On the other hand the Plaintiff, has exhibited various documents including the memorandum and articles of association of transcend Media Group Ltd, copy of credentials of the company, copy of the request for expression of interest for the rebranding of the National Youth Service (NYS), copy of the award letter from the Ministry of Devolution and Planning amongst others, which show that the company tendered as advertised and was awarded the tender. In view of the foregoing, I find that the Plaintiff has a prima facie, that the publication may be false and is damaging to the Plaintiff's reputation. In the case of **Bonnard v. Perryman (1891) 2 Ch 269** it was held that exceptional caution ought to be taken by courts while exercising jurisdiction to interfere by way of injunction. The court in that decision highlighted that:-

"...The right of free speech is one which it is for the public interest that individuals should possess, and,...until it is clear that an alleged libel is untrue, it is not clear that any right at all...has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions." (Emphasis own).

18. I hereby find that there is high likelihood that the publication was false.

I am therefore inclined to grant injunctive the orders in favour of the Plaintiff. Accordingly, the application is allowed. Costs shall abide the outcome of the suit.

Dated and delivered in open court this 3rd day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant