



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NUMBER 158 OF 2010

MARGARET CHUGHU MWAKIO. PLAINTIFF

VERSUS

DR. J. P MUTONYI. 1ST DEFENDANT

KENYA ANTI CORRUPTION COMMISSION. 2ND DEFENDANT

R U L I N G

By a Chamber Summons dated 23rd April 2015 expressed to be brought under Sections 1A, 1B, Order 1 Rule (10) 2 of Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act the 1st Defendant seeks the following orders: -

1. That the name of the 2nd Defendant be struck out.
2. That subject to (1) above the Plaint be struck out as against the 1st Defendant.
3. The costs of this Application be in the cause.

The Application is premised on the following grounds: -

1. The Plaintiff filed suit against the Defendants on the 19th March, 2010 and summons to Enter Appearance together with the Plaint were served on the Defendants on the 24th March, 2010.
2. The Defendants filed a written Statement of Defence on 16th April, 2010.
3. The 1st Defendant was at the material time subject of the suit employed by the 2nd Defendant as Assistant Director, Investigations and Asset Tracing and was discharging the duties of the Director in acting capacity.
4. That the 1st Defendant was discharging his duties in his official capacity and no personal liability should be visited on him in accordance with the provisions of Anti-Corruption and economic Crimes Act, No. 3 of 2003.
5. That there is a misjoinder of the 1st Defendant by operation of Rule 9 (1) as read with Rule 9 (2) of the First Schedule of Anti-Corruption and Economic Crimes Act, No. 3 of 2003.
6. The Acts complained of were done in the ordinary course of duty and the name of the 1st Defendant ought to be struck out.
7. The hearing of the matter is yet to commence and the Plaintiff will not be prejudiced if the Application is allowed.

The Application is supported by an Affidavit sworn by Dr. J P Mutonyi the 1st Defendant on the 23rd April, 2015. At the material time subject of this suit, he was the acting Director of Kenya Anti-Corruption

Commission the 2nd Defendant herein though he had been employed as an Assistant Director Investigations and Asset Tracing.

In his affidavit, he depones that at this particular time, there were investigations being undertaken by the 2nd Defendant relating to purchase of land for use as Cemetery by the then City Council of Nairobi which matter had elicited great public interest leading to the enquiry by the Rt. Hon. Prime Minister and the head of the public service and Secretary to the cabinet on status of the investigations.

The allegations leading to the investigations as captured in his Affidavit are that officers of the City Council of Nairobi conspired with private business persons to irregularly procure land parcel Number 14759/2 situated in the South of Athi River in Machakos District measuring 48.30 hectares at an inflated price of Ksh.283,200,000/- as opposed to Kshs.110,000,000/- paid to the vendor one Henry Musyoki Kilonzi.

It is further deposed that after the investigations the commission wrote to the Office of Rt. Hon. Prime Minister and the Head of Public Service and the Secretary to the Cabinet informing them of the status of the investigations which communication was made in the ordinary course of official duty and in his capacity as the acting Director of the 2nd Defendant?

He further states that the Communication to the Prime Minister and the Head of the Public Service and the Secretary to the cabinet was confidential and done in good faith. According to him he was at all material times an Employee of the 2nd Defendant and in accordance with the provisions of Rule 9 (1) as read with Rule 9(2) of the first schedule of Anti-Corruption and economic Crimes Act No. 3 of 2003, no proceedings should be brought against him for actions/omissions made in good faith while discharging official duties. The allegations of malice made against him as a person by the Plaintiff and the claim, is based on actions alleged to have been done in the cause of duty.

In opposition to the Application, the Plaintiff relied on grounds of opposition dated 12th October, 2015 and filed on the 12th October, 2014 in which it is stated: -

1. The 1st Defendant by the nature of the pleadings, the statements filed therein and his conduct that will be shown in evidence to have been an abuse of office, malicious and personal makes him a necessary party to the proceedings.
2. The Application is pre-mature, misplaced and meant to circumvent a fair trial in the suit, as matters raised in the application can be conclusively dealt with at the full trial.

The Application was prosecuted by way of written submissions. In his submissions, the Applicant while reiterating the contents of the Application and the Supporting Affidavit relied on the provisions of paragraphs 9(1) and (2) of the First Schedule to the Anti-Corruption Commission and Economic Crimes Act Cap 65 Laws of Kenya which provides: -

“No action or proceedings for compensation or damages shall be brought against the Director or an Assistant Director, an investigator or any staff of the Commission in respect of anything done or omitted in good faith under this Act.”

Paragraph 9(2) of the 1st Schedule to the Anti-Corruption Commission & Economic Crimes Act provides that: -

“This paragraph shall not relieve the commission of any liability.”

He also made reference to the Constitution of Kenya 2010 which makes provision for protection of Public Officers under Article 236 which states: -

A Public Officer shall not be

- a. *Victimized or discriminated against for having performed the functions of the office in accordance with the Constitution or any other law; or*
- b. *Dismissed, removed from the office, demoted in rank or otherwise to disciplinary action without due process of the law.”*

The Applicant also submitted on the transition clause and told the court that though the suit was instituted before the Constitution came into force, Clause 7 of the Transitional and Consequential Provisions of the sixth Schedule of the Constitution obligate the court when construing a statute that was in existence before the New Constitution to do so in uniformity with the Constitution.

He further submitted that the Application is pre-mature , misplaced and meant to circumvent a fair trial in the suit as matters raised in the Application can be conclusively dealt with at the trial. He further argued that there is no evidence that the 1st Defendant acted mal fides and all the allegations of abuse of office and malice remain unfounded. The pleadings, the statements do not in any way show that the 1st Defendant acted in bad faith.

It was also submitted that the commission is a body corporate which can sue and be sued in its corporate name and, therefore, suing the 1st Defendant is uncalled for and that the Plaintiff will not be prejudiced in any way should the application herein be allowed as prayed. He further submitted that protection from personal liability protects public officers for their discretionary actions taken in the course of their official duties as long as their conduct was not malicious.

In support of his submissions the Applicant relied on the case of **Patrick Wanyonyi Khaembe Vs Secretary T.S.C and Another (2014) eKLR** and also the case of **Githu Muigai & another Vs Law Society of Kenya & Another (2015) eKLR**. In the case of Patrick Wanyonyi the Petitioner had sued the Principal of Rhamu Girls Secondary School and the Secretary – Teachers Service Commission. The Respondents contested that 2nd Respondent was wrongly enjoined in the suit and that having been sued as public officers they are protected from personal liability. The court held that it was not proper for the Petitioner to sue the 2nd Respondent in her personal capacity. It was further held that this contravened the Provisions of Section 22(1) of the Teachers Service Commission and Section 62 of the Basic Education Act (2013).

In the Githu Muigai case the court held: -

“the acts which the respondents seek to censure through the “certificate of dishonour” resulted from acts performed by the petitioner in his capacity as the Attorney General of Kenya. The respondents are therefore seeking to hold the petitioner personally liable for acts performed in his official capacity as the Attorney General. In our view, even had such an attempt been made by a party with the statutory mandate to call the Attorney General to account, they would have been unsustainable unless it had been shown that the acts were not done in good faith. This is because the provisions of section 8 set out elsewhere in this judgment insulate the Attorney General and other officers from personal liability when acting in good faith in the discharge of their official functions.”

The Plaintiff in her submissions relied on her grounds of opposition. According to her, the 1st Defendant by nature of the Pleadings, the statements filed therein and his conduct that will be shown in evidence to have been abuse of office, malicious and personal makes him a necessary party in these proceedings.

In addition, she submitted that the 1st Defendant is a necessary party to the proceedings given that the Plaintiff’s claim is for defamation and as averred in the plaint at paragraph 4, the 1st Defendant acted on his own and signed the report that leaked into the hands of unauthorized persons in the Government and in the premises, it is his duty to prove the contrary. According to her, the Director is only exempted from liability if the act was committed in good faith and that during the full hearing of the matter, the Plaintiff will show malice, abuse of office and lack of good faith on the part of the 1st Defendant.

Regarding the case of Patrick Wanyonyi relied on by the 1st Defendant, he submitted that there was misjoinder only because the court found the 2nd Respondent was acting as the Secretary of the School Board and did not have made a decision on her own but on behalf of the Board and that she made the decision in good faith and therefore, she could not have been personally liable.

I have carefully considered the Application, the Affidavit in support, the grounds of opposition and the submissions made by the learned counsels for the Plaintiff and the 1st Defendant.

The issue that the court will have to determine is whether the 1st Defendant ought to have been joined as a party to the suit.

This issue revolves around the provisions of Section 9 (1) of the Anti-Corruption and Economic Crimes Act 2003 and the said provision is very clear that the immunity is only in respect of action done or omitted in good faith. Clearly, it is not an absolute immunity.

Article 236 of the Constitution makes provision for the protection of public officers and I agree with the counsel for the 1st Defendant that I am obligated when construing a statute that was in existence before the New Constitution to do so in uniformity with the Constitution and while I am alive to the Provisions of Article 236 (supra) I am also aware of the provisions of Article 250 of the Constitution which is more relevant in the case herein as it relates to composition, appointment and terms of office for members of commissions or holders of independent offices: -

Article 250 (9) provides: -

“A member of a Commission or the holder of an independent office, is not liable for anything done in good faith in performance of a function of office”

Which provision is in tandem with Section 9(1) of the Anti-Corruption Commission and Economic Crimes Act Cap 65 and in both provisions the operative words are **“in good faith”**. The question therefore is: - What is good faith and at what point is the court supposed to determine whether there was good faith or not?

In my humble and honest view, this question can only be determined by way of viva voce evidence during the trial. At this point, the court has not taken sufficient evidence on the basis of which it can be able to determine whether there was good faith on the part of the 1st Defendant in the manner he discharged his duties in carrying out and handling the investigation report which is the subject matter of these proceedings.

It is worth noting that the causes of action in the plaint are defamation and the tort of negligence and in paragraph 4 of the Plaint, the 1st Defendant is sued as acting on his own and as the Director of the 2nd Defendant.

In the written statement of defence by the 1st and 2nd Defendants filed on 16th April, 2010 in paragraph 5, the 1st Defendant denies having on his own signed and causing a report captured **“Procurement of Cemetery land by the Nairobi City Council Land L.R No. 14759/2 Machakos”** to be leaked to unauthorized persons in government and print media and puts the Plaintiff to strict proof thereof.

As I had pointed earlier, these are matters that can only be canvassed during the full hearing of the matter and not at this stage. More so taking into account the nature of the causes of action herein which revolves around the torts of negligence and defamation which can only be proved by way of oral evidence during the hearing. As was held in the case of **John Gitata Mwangi & 3 others Vs Jonathan Njuguna Mwangi & 4 others, Civil Appeal No. 213 of 1997** – Viva voce evidence fully tested on cross-examination places the court in a better position to evaluate the same. For the court to be satisfied as to the existence of good faith, it must act on evidence and that evidence must be tested by cross-examination before being acted upon.

I will conclude by making reference to the case of Marwaha Vs Pandit Dwarka Nath, Nairobi HCC No. 599 of 1952 25 KLR where the court expressed itself as follows: -

“This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27...”

In view of the foregoing the 1st Defendant’s Application dated 23rd April, 2015 is hereby dismissed with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Nairobi this 11th day of February, 2016.

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L. NJUGUNA

JUDGE

In the presence of

..... *For the Plaintiff/Respondent*

..... *For the Defendant/Applicant*