



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 574 OF 2012

HON. ENG.NICHOLAS GUMBO.....PLAINTIFF

VERSUS

THE STANDARD LIMITED

ISAAC ONGIRI

DAVID OCHAMI.....DEFENDANTS

RULING

The plaintiff has instituted a defamation suit against the defendants vide a plaint dated 30th November 2012 for General damages, exemplary damages and an injunction to restrain the defendants from making similar publications and costs.

The claim arose from an article published by the 1st Defendant on the 3rd December 2011, in the 'Saturday Standard' Newspaper titled '**uproar over house contract to MP's Firm**'. The alleged defamatory article is to be found in paragraph 7 of the plaint.

The defendants jointly filed their defence in which they admitted publishing the article in the newspaper, but denied that it was libellous or defamatory. They pleaded that the statements complained of were fair comments on a matter of public interest.

Before the suit could be confirmed for hearing, a preliminary objection was raised through notice filed on the 28th January 2013, to the effect that this Court lacks jurisdiction to hear this suit by virtue of Article 34(2) of the Constitution of Kenya, 2010.

The defendants filed submissions in support of the preliminary objection as did the plaintiff in opposition to the same. I have considered both submissions together with the authorities. In the event I do not refer to any specific cited authority that should not be construed as wanting in substance.

In the case of **The Owners of Motor Vessel "Lillian S". v Caltex Oil Kenya Ltd [1989] KLR 1 at page 14** Nyarangi J opined -

"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it

holds the opinion that it is without jurisdiction.”

Having stated the importance of jurisdiction it would also be trite to also state what a preliminary objection entails. In the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd[1969] E.A.969** at page 700 Law J.A had this to say -

".....so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

at page 701 he went on to state -

a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

The preliminary point of law raised in this case is with regard to article 34(2) of the constitution which reads as follows -

34(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) 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 any person for any opinion or view or the content of any broadcast, publication or dissemination.

This, according to the Defendants, takes away the right of the Court to adjudicate on the issue. The cannons of interpreting the constitution require that a constitution must be interpreted as whole with each provision sustaining each other and not destroying each other.

The Court of appeal in the case of the **Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others civil appeal no 74 of 2012 [2012] eKLR** reaffirmed and set out the principles of interpreting the constitution. It stated thus -

”These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise..... The court as an independent arbiter of the Constitution, has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.”

Consequently, Article 34(2) therefore cannot be read in isolation and must be read together with Article 33 of the constitution which reads as follows,

- 33. (1) Every person has the right to freedom of expression, which includes—**
- (a) freedom to seek, receive or impart information or ideas;**
 - (b) freedom of artistic creativity; and**
 - (c) academic freedom and freedom of scientific research.**
- (2) The right to freedom of expression does not extend to—**
- (a) propaganda for war;**
 - (b) incitement to violence;**
 - (c) hate speech; or**
 - (d) advocacy of hatred that—**
 - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or**
 - (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).**
- (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.**

It therefore follows that Article 34(2) of the Constitution with regards to media freedom is limited to the extent that it respects the rights and reputation of others as per Article 33 (3) of the Constitution. Any other interpretation would result or produce an absurd or illogical result. Certainly if the interpretation espoused by the defendant were to stand, the media institutions would run amok as there would be no way of checking them. This would certainly place the media above other institutions in the Constitution.

It must also be kept in mind that these Articles fall under Chapter Four on the Bill of Rights and as such Article 20 of the Constitution directs on how the same should be interpreted. It provides -

- 20 (1) The Bill of Rights applies to all law and binds all State organs and all persons.**
- (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.**
- (3) In applying a provision of the Bill of Rights, a court shall—**
- (a) develop the law to the extent that it does give effect to a right or fundamental freedom; and**
 - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.**
- (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—**
- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and**
 - (b) the spirit, purport and objects of the Bill of Rights.**

The Defendants submitted that the media council is the institution clothed with jurisdiction to deal with defamation on the basis that Article 34(5) mandates Parliament to create a body independent of the government to regulate the media. It was submitted on their behalf that the Media Act, 2007 creates the Media Council to deal with various disputes involving the media as opposed to coming to this Court.

I have gone through the Media Act 2007 and nowhere have I come across a provision that ousts the jurisdiction of the High Court. In any case if such a provision were to exist it would have to derive its foundation and express authorization from the Constitution which is the supreme law.

According to Section 29 of that Act, the Complaints Commission established under Section 23 to deal with disputes resolution between the media and any other person is only empowered to; dismiss a complaint if it finds that it is devoid of merit or substance; order an offending party to publish an apology and correction in such manner as the Council may specify; issue a public reprimand of the journalist or media enterprise involved or make any or a combination of the orders set out.

Going back to the Plaintiff and the orders sought would reveal that the Plaintiff seeks much more than the Complaints Commission is empowered to grant.

On the other hand, the Constitution in Article 165 establishes the High Court. **Article 165 (3) (d)** grants this Court jurisdiction to hear any question regarding the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution. Sub-Article 3 stipulates -

“(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; ”

From the foregoing, the assertion that the High Court has no Jurisdiction or the mandate to deal with defamation cases is without any legal basis and as such. The preliminary objection is dismissed with costs to the plaintiff.

The parties shall now comply with pre-trial steps so that this suit may be listed for hearing.

Dated, signed and delivered at Nairobi this 6th day of October, 2015.

A. MBOGHOLI MSAGHA

JUDGE