



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 64 OF 2013

JAMES OGUNDO.....PLAINTIFFS

VERSUS

THE STANDARD GROUP LIMITED.....DEFENDANTS

RULING

1. The subject of this ruling is the Preliminary Objection dated 13th March 2013 in which the Defendants raised it on the grounds that the court lacks jurisdiction to hear the suit by virtue of article 34(2) of the Constitution of Kenya.
2. A brief summary of the case is that the defendant is alleged to on 23rd January 2013 published false allegations of corruption against the plaintiff through their media including the Kenya Television Network Channel, Standard Newspaper and Standard Digital Outlets prompting the plaintiff to file this suit praying for damages.
3. The parties filed their respective submissions and highlighted them in court on 6th October 2015.
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 which 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, or where there is commission of a crime or discrimination. He 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) was 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 argued that under section 3 of the Media Act 2007, the Media Council of Kenya is the one tasked with regulating the media, its 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 this court has jurisdiction. He stated that the argument by the defendant that the court lacked jurisdiction is hinged on the interpretation of article 34(2) of the Constitution which provides that the state shall not interfere with any person engaged in broadcasting, production or circulation of any publication or dissemination of information. He argued that, this position is founded on a literal interpretation of the Constitution but the fact that the Constitution is the supreme law of the land excludes it from being given a literal interpretation, instead it should be subjected to broad construal. He added that, the word 'state' should not be interpreted in a restrictive manner, instead, it should be construed to mean the 'executive and not the judiciary.' He submitted further that the Constitution should be read as a whole without focusing on one provision to the detriment of the others. Article 33 (3) should be read together with article 24 which provides that the enjoyment of rights and freedoms of an individual should not prejudice the rights and fundamental freedom of others. He averred that, the defendant interpretation of article 34 (2) seeks to protect it from prosecution which it should not be immune to. The plaintiff referred this court to various authorities.
6. I have carefully considered the submissions as highlighted above. I am of the view that the only issue for determination is **whether considering the facts of this case the court has jurisdiction to hear and determine this case of defamation.**
7. Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the celebrated 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.'

8. 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"

This 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)

9. 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 these two subjects that the High Court lacks jurisdiction to preside over.

10. I have read 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 does provide for the freedom of the media. Article 33 on the other hand 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

11. The defendant has argued that the Media Council of Kenya has the requisite jurisdiction to preside over breaches of media rights. I must say that the council is vested with mediation or arbitration power 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, in my view, 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 . Bottom line is, the high court has jurisdiction in all matters including appellate jurisdiction which are only limited by article 165 (5) including supervisory jurisdiction.

12.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."

13.In the end, the High court has powers to preside over civil matters and cases based on the defamation. The Defendants submissions that Article 34(2), ousts the jurisdiction of this court has no basis. In the premises I find the Preliminary objection to be without merit and I dismiss it with costs to the plaintiff.

Dated and delivered in open court this 6th day of November,2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant