



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 327 OF 2008

CAPT (Rtd) DR. SIMEON SAGANA KANAIPLAINTIFF

V E R S U S

THE STANDARD LIMITEDDEFENDANT

AND

NATIONAL COUNCIL OF NGO'STHIRD PARTY

R U L I N G

The Plaintiff herein sued the Defendant for **defamation**. The Defendant duly entered appearance and filed defence on 8th August, 2008. By **chamber summons dated 19th August 2008** the Plaintiff applied for an order to strike out the Defendant's defence *inter alia*. The Defendant opposed the application. By **chamber summons dated 5th September, 2008** the Defendant applied for leave to serve a third-party notice upon the **National Council of Non-Government Organizations of Kenya** (hereinafter called the **3rd Party**). Such leave was granted and the third-party notice served.

The 3rd Party duly entered appearance. On 27th November, 2008 it filed its statement of defence. Subsequently, directions were given that the case as between the Defendant and the 3rd Party be heard along with the main suit.

On 5th March, 2009 the 3rd Party filed an application by **chamber summons dated 26th February, 2009** seeking an order to strike out the plaintiff and the Plaintiff's suit. The Plaintiff opposed this application.

By a consent order entered on 12th March, 2009 before Waweru, J. it was ordered that both the applications seeking orders to strike out pleadings be heard together by way of written submissions. Such written submissions were to be filed and exchanged within 14 days of 24th March, 2009. The matter was then fixed for mention on 22nd April, 2009 when a date for ruling was expected to be taken.

When the matter was mentioned on 22nd April, 2009 all the parties had filed and exchanged written

submissions. But then Mr. Kaluma, learned counsel for the 3rd Party, stated that there were other matters closely connected with the present suit which he said were pending hearing before Khamoni, J. Mr. Kaluma further stated that the issue in those matters is **whether or not the Plaintiff herein is the chair person of the 3rd Party**. In his view the outcome of the applications for striking out pleadings upon which the parties filed and exchanged written submissions would depend upon whether or not the Plaintiff was the chair of the 3rd Party. To avoid a situation where different Judges may give inconsistent or conflicting decisions, opined Mr. Kaluma, the present applications ought to be placed before Khamoni, J for the learned judge to deal with them. He so applied. Mrs. Ochieng', learned counsel for the Defendant, agreed with Mr. Kaluma.

Mr. Ongoya, learned counsel for the Plaintiff, was of a different view. He submitted that it was too late in the day to refer the applications to Khamoni, J as directions on how to proceed with them had been taken before a different Judge. In any event, further submitted Mr. Ongoya, the suit now before the court is for defamation, not a leadership dispute over the 3rd Party.

I have considered these rival submissions. The other suits alluded to by Mr. Kaluma have been mentioned in the Plaintiff's plaint (**Nairobi HCCC No. 801 of 2007**) and in the 3rd Party's written submissions (**Nairobi HCCC Nos. 7 of 2008 and 35 of 2009**, and **Nairobi HC Misc. Application No. 330 of 2008**). It appears that all these four suits involve the issue of leadership of the 3rd Party between the Plaintiff herein and other persons.

However, only one decision of Khamoni, J has been brought to the attention of the court. It is a "final ruling" delivered on 8th May, 2008 in Nairobi HCCC Nos. 801 of 2007 and 7 of 2008. This ruling is exhibited in the Plaintiff's application to strike out. In this ruling Khamoni, J, *inter alia*, declined to issue an interlocutory injunction against the present Plaintiff to restrain him from holding himself out as the chairperson of the 3rd Party.

I do not, with respect, subscribe to the view advanced by Mr. Kaluma that the outcome of the two applications now before this court will depend on the issue whether or not the Plaintiff is the chair of the 3rd Party. That is not an issue that can be tried and decided in these present interlocutory applications. It is an issue of fact (and probably law as well) that is obviously hotly disputed and which, if germane to the present defamation suit, must await trial of the action. In that event, it may then be necessary to defer trial of the suit pending determination of that issue in those other suits.

But the applications now before the court are simply to determine whether the Plaintiff's suit should be allowed to proceed to trial, and whether in that event the Defendant should be permitted to defend the suit. I do not see how determination of these two applications can possibly be in conflict with any eventual determination of the disputes over leadership of the 3rd Party now pending in the other suits.

In any event, it is rather late in the day to seek that the applications be referred to Khamoni, J to determine. The applications have, in effect, already been heard before me by way of written submissions pursuant to the consent of the parties. I am still available to prepare and deliver ruling. Why then should Khamoni, J be required, and thereby vexed, to prepare and deliver a ruling on a matter heard by another judge who is still available to prepare and deliver the ruling?

The 3rd Party's oral application is clearly misconceived. It is hereby dismissed with costs to the Plaintiff. I shall at delivery of this preliminary ruling give a date for ruling on the two applications to strike out pleadings. Those will be the orders of the court.

DATED AT NAIROBI THIS 7TH DAY OF MAY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 8TH DAY OF MAY, 2009