Sanitam Services (E.A) Limited v Nyaga & another (Civil Application 89 of 2021) [2023] KECA 386 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 386 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 89 OF 2021

HM OKWENGU, MA WARSAME & JM MATIVO, JJA

MARCH 31, 2023

BETWEEN

SANITAM SERVICES (E.A) LIMITED ..... APPLICANT

AND

RENTOKIL INITIAL (K) LIMITED ..... 1ST RESPONDENT

PATRICK NYAGA ..... 2ND RESPONDENT

(An application for certification and grant of leave to appeal to the Supreme Court against the Judgment of the Court of Appeal delivered at Nairobi (Gatembu, Murgor & Kantai, JJ.A.) on 5th February 2021 in Civil Appeal No. 10 of 2019)

RULING

1. The parties herein are business competitors engaged in the supply of foot operated sanitary bins. The applicant, Sanitam Services (EA) Limited who is the registered owner of patent No AP 773 in respect of a foot operated sanitary bin instituted a suit against the respondents; Patrick Nyaga and Rentokil Initial Limited, in CMCC No 6289 of 2008 at Nairobi, claiming general damages for defamation. The applicant alleged that the respondents had written letters to various customers stating that the applicant was attempting to acquire services through unscrupulous means thereby depicting the applicant as "unscrupulous" and "Illegal" in the manner in which it acquired its business.

2. The trial court rendered its decision in favour of the applicant for Kshs 7 million and found that the respondents had defamed the applicant and its directors. The respondents appealed the decision in the High Court and the Learned Judge (Kamau J) found that the applicant had proved the tort of defamation on a balance of probability. However, the High Court proceeded to reduce the sum awarded by the trial court to Kshs 2,000,000/-. Aggrieved by that decision, the respondents appealed to this court while the applicant filed a cross appeal challenging the reduction of the damages awarded. The appeal was allowed and the decision of the High Court set aside. The court held that the necessary

ingredients of the tort of defamation were not established and that there was no proof of injury to the applicant's reputation.

3. Consequently, the application before us dated March 17, 2021 seeks certification and leave to challenge this court's decision delivered on February 5, 2021 to the Supreme Court. The application is anchored on the provisions of Article 163 (4) of the *Constitution*, Rule 24 & 26 of *Supreme Court Rules* and Rule 40 of the *Court of Appeal Rules*. It is premised on grounds, inter alia, that the findings of the court was not supported by law; that the principle relied upon by the court is erroneous and has no foundation in law; that the court's findings were unconstitutional and a violation of the applicant's rights. The applicant further asserts that the anticipated appeal raises important constitutional issues and that it relates to uncertainty in the law thereby making it of great and general public interest.

4. In support of the application for certification the applicant has stated a myriad of important questions for determination in the orders sought and in the body of the application. We reproduce verbatim some sections of the pertinent questions set out for determination by the Supreme Court:

    i. That is the principle that third party evidence one of the principles of the law requisite in defamation proceedings.

    ii. That is the third party's evidence the best evidence in defamation proceedings.

    iii. That were Sections, 17,20,22,23,100,107,117,119,143,162 and the entire part II of the Law of *Evidence Act* Cap 80 of the Laws of Kenya violated.

    iv. That should Sections, 17,20,22,23,100,107,117,119,143,162 and the entire part II of the Law of *Evidence Act* Cap 80 of the Laws of Kenya therefore be amended to conform with the ratio in the findings and judgment of the Court of Appeal.

    v. That did the court of Appeal by its findings and judgment oust the Applicant's inherent right to dignity under Article 28 of the *Constitution of Kenya* .

    vi. That was there a violation and infringement of the applicant's rights under Article 25(c) and 28 of the *Constitution of Kenya* .

    vii. That is time for the court to reinterpret and correct the precedent set out in the legal Dicta in regard to defamation in light of Article 25(c) and 28 of the *Constitution of Kenya* .

    viii. That should the entire body of law as relating to the Principle of Admissions as presently known, be therefore altered and changed so as to be in conformity with these erroneous findings and judgment of the court of appeal.

5. At the hearing of the application, learned Counsel Mr Mutiso represented the applicant while the respondent was represented by learned counsel Mr Maina.

6. Submitting on the focal point of the application, Counsel for the applicant stated that the crucial question of law to be determined by the Supreme Court which was a question of general public importance was whether 3rd party evidence was required to show that a person's reputation and dignity has been lowered. He maintained that Kenyan Courts had been applying an erroneous jurisprudence in light of the right to dignity guaranteed under Article 28 of the Kenyan constitution and that if the Court of Appeal Judgment was allowed to stand it would invalidate various sections of the *Evidence Act*. In his view, it was sufficient to provide compelling evidence of false publication without relying on third party opinions on the lowering of esteem especially where the words in themselves were inherently defamatory or injurious.

7. In opposing the application, the respondents' advocate submitted that the application was incompetent as it had been filed outside the statutory 14 days. He further emphasized that the application did not disclose any issues of public interest and that the question of law now raised was not in issue in the High Court and Court of appeal. Lastly, Mr Maina emphasized that there was no contradictory precedent demonstrated by the applicant on defamation cases which would warrant escalation of the matter to the Supreme Court. Consequently, he urged us not to grant the leave sought. In a brief rejoinder the applicant stated that they had demonstrated that the issue of law in the instant case concerned reframing of the law of defamation which applied in rem.

8. We have carefully perused the application before us and considered the submissions on record. It is imperative at this juncture to consider the preliminary question of whether the instant application is competently before us. The respondents have challenged the jurisdiction of this court on the basis that the application was filed outside the statutory timeline of 14 days provided under Rule 40(b) of the *Court of Appeal Rules (The Rules)*. For expediency, the rule provides:

> " 40. here no appeal lies unless the superior court certifies that a point of law of general public importance is involved, application for such a certificate may be made—
>
> a. informally, at the time when the decision against which it is desired to appeal is given; or
>
> b. by motion or chamber summons according to the practice of the superior court, within fourteen days of that decision".

9. A brief reading of Rule 2 of the Rules, reveals that "Superior court" means a court of unlimited jurisdiction from which an appeal lies to the Court and "Court" means the Court of Appeal. It is therefore clear that Rule 40 does not apply to certification to the Supreme Court as envisioned under Article 163 (4)(b) of the *Constitution* but only applies to instances of certification from the High Court to the Court of Appeal should they arise.

10. It is well settled that there is no time- limit within which to apply for the certification of a matter as one "of general public importance". However, Courts will consider, on a case-by-case basis, whether the application has been filed without unreasonable delay in filing a particular matter as provided under Article 259(8) of the *Constitution of Kenya*. (See *Teachers Service Commission v Simon P Kamau & 19 Others* [2015] eKLR).

    Therefore, the only consideration for this court is whether the application was filed without unreasonable delay. The applicant filed its application one month and 12 days after the impugned decision was delivered, which in the circumstance is not inordinate delay. We therefore find that that the application is competently before us.

11. Turning to the merits of the application, the Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* [2013] eKLR crystalised the principles governing what constitutes matters of 'general public importance' as follows:

    i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the *Constitution*;

vi. the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

12. Applying the above criteria to the application at hand, we are of the view that the intended appeal does not pass the test. The main issue raised by the applicant is whether third party evidence is required to prove defamation especially where the words used are inherently defamatory.

13. The law on defamation is well settled by the courts and we see no ambiguity whatsoever that requires the intervention of the Supreme Court. The applicant has not demonstrated a lacunae or uncertainty in the law as pertains the interpretation of the ingredients of the law of defamation in Kenya. As rightly stated by this court in the impugned decision, the ingredients of defamation are that the statement must be defamatory; the statement must refer to the plaintiff; the statement must be published by the defendant and the statement must be false. A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling.

14. In other words, it must be shown that the nature of the defamatory statement affected a person's or an entity's reputation and not their estimation of themselves or their reputation. The estimation has to be that which a person is held by others or character imputed in the community. With respect, we cannot agree with the applicant's submission that the words used by the respondents were inherently defamatory.

15. Again, we are not convinced that the issues raised involve a substantial point which will have a significant bearing on the public interest given that if the impugned decision is left to stand then the provisions of the *Evidence Act*, Cap 80 of the Laws of Kenya regarding presumption and Admissions will stand repealed. In our considered view, it is not the function of the applicant to interpret a judgment or to impute apprehension to words or phrases in a judgment. A judgment speaks for itself and the decision of the court in this matter was based solely on the facts and law. Consequently, we do not think the same transcend the circumstances of the case.

The upshot of the foregoing is that we find that the application has no merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. M. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR