



Freytas-Tamura v Maingi & 2 others; Media Council of Kenya (Interested Party) (Civil Appeal E683 of 2023) [2024] KEHC 8380 (KLR) (Civ) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E683 OF 2023

JK NG'ARNG'AR, J

JUNE 26, 2024

BETWEEN

KIMIKO DE FREYTAS-TAMURA APPELLANT

AND

PRISCILLA MUTHONI MAINGI 1ST RESPONDENT

ELIZABETH NYAGUTHI KABARI 2ND RESPONDENT

MEDIA COUNCIL COMPLAINTS COMMISSION 3RD RESPONDENT

AND

MEDIA COUNCIL OF KENYA INTERESTED PARTY

(Being an application for stay of execution of the determination of the Media Complaints Commission Complaint No. 1 of 2019 rendered on 20/7/2023)

JUDGMENT

1. The 1st and 2nd respondents filed a complaint before the 3rd respondent (herein after 'the commission') on 23/1/2029 challenging the conduct of the appellant during and after the terrorist attack on Hotel Du Sit, Riverside Complex Nairobi, which happened on 15/1/2019. The 1st and 2nd respondents complained of the publications made by the appellant in the New York times on 15/1/2019 and 16/1/2019 regarding the incident wherein the New York Times published 4 photographs of the victims and survivors of the attack who were either killed or seriously injured.
2. It was complained that publishing of such photos was a violation of the victim's and survivors right to dignity under Article 28 of [Constitution](#) and right to privacy under Article 31 of [Constitution](#) . That it was also a breach of Paragraph 4 of the Code of Conduct as well as Section 451 of the [Media Council](#)



Act. The 1st and 2nd respondents thus sort for Kshs. 100,000/= under Section 381 of the Media Council Act against the appellant for the violations, suspension of the appellant's accreditation as a journalist, and in the alternative if the appellant was not accredited, her application for accreditation be denied on grounds of being unethical, irresponsible and insensitive.

3. In its decision of 20/7/2023, the commission found that it had jurisdiction to hear and determine the compliant. It also found that the appellant had intruded into the grief of the victims of the terrorist attack. However, as regard the order for a fine of Kshs. 100,000/=:, the commission found that the accreditation status of the appellant was unknown and she was out of the commission's jurisdiction and such an award would be logistically difficult to enforce. The commission thus issued a public reprimand against the appellant.
4. Aggrieved with that decision, the appellant filed the instant appeal on 11 grounds which can be summarized as: - that the commission erred in dismissing the appellant's objection on the commission's jurisdiction over a foreign journalist not accredited to practice in Kenya; the commission acted suo moto by including an allegation of breach of Code 15 of the Code of Conduct for the practice of journalism in Kenya which was never pleaded or addressed by parties thus breached the parties right to be heard; the commission erred by determining the entire complaint on merit yet the directions were for parties to file submissions on jurisdiction only thereby breaching the parties right to a fair trial; the commission failed to give regard to all material before it including that the appellant was not the author or publisher of the photos; the commission relied on extraneous factors in arriving at its decision; the commissioner did not address all the issues raised before it and failed to give its reasons thus breached the right to administrative action; the commission issued orders that were not pleaded or prayed for and were directed to a third party which was not a party to the complaint; the commission erred in finding it had jurisdiction over breach to the right to privacy; and that the commission reached its decision without any supporting evidence.
5. On those grounds, the appellant prayed that: - the appeal be allowed with costs and the determination of 20/7/2023 be set aside and complaint filed on 23/1/2019 be dismissed, and that the 3rd respondent be directed to retract the public reprimand against the appellant and the same be substituted with a public apology to the appellant within 7 days.
6. The appellant filed submissions dated 7/12/2023 and 5/6/2024 in support of the memorandum of appeal. The 3rd respondents' submissions were dated 30/5/2024.
7. I have considered those submissions alongside the entire record before court. I will begin with the first ground challenging jurisdiction as the same is preliminary in nature and is capable of disposing of the suit preliminarily. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...v ... West End Distributors Ltd* (1969) EA 696 to mean;

“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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

8. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) the court pronounced itself thus: -

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

9. It then follows that without jurisdiction, the court cannot take a further step towards continuation of any proceedings and any orders made void of constitution become null and void.
10. The 3rd respondent herein derives its jurisdiction from the [Media Council Act](#) which establishes the complaints commission under Section 27 of the Act and confines its powers under Section 31 thereof.
11. Section 2 of the [Media Council Act \(The Act\)](#), defines a journalist and foreign journalist as: -
 - “journalist” means any person who is recognised as such by the Council upon fulfilment of a criteria set by the Council;
 - “foreign journalist” means any journalist who is not a citizen of Kenya and accredited as such under this Act;
12. Section 4 of the [Act](#) provides that the Act shall apply to foreign journalist accredited under the Act. It then follows that for a foreign journalist to properly come under the jurisdiction of the Act and the media council of Kenya, the foreign journalist must be accredited under the Act. The accreditation process is provided for under Section 46 of the [Act](#).
13. I have considered the decision of the commission on its jurisdiction. At paragraph 58, the commission rejected the submission that it lacked jurisdiction on grounds that the appellant did not deny publishing the article that was supported by the impugned photographs. Respectfully, that was a wrong approach to the issue of jurisdiction. Jurisdiction cannot be ousted by estoppel or admission and the tribunal ought not to have considered the merit of the case and cause it to overshadow the preliminary issue of jurisdiction. The Court of Appeal held in [Niazons \(K\) Ltd. v. China Road & Bridge Corporation \(K\) Civil Appeal No. 187 of 1999](#) that jurisdiction cannot be conferred by estoppel, consent acquiescence or default.
14. The commissioner went to the merit of the case in determining whether or not it had jurisdiction. It failed to address itself to whether or not the appellant was indeed an accredited foreign journalist under the Act so as to establish whether the commission had jurisdiction over her. Instead, the commission went directly into determining the merits of the claim. I am inclined to agree with the appellant’s submission that the commission indeed failed to properly address itself on jurisdiction.
15. I have carefully gone through the entire record and note that there was nothing placed before the commission to satisfy itself that the appellant was an accredited foreign journalist within the meaning of the Act. Interestingly, though the commission found that it had jurisdiction to hear the compliant, at the very tail end at paragraph 89 of its decision, the commission admitted that the accreditation status of the appellant was unknown and she was out of the jurisdiction of the commission. The commission stated that: -

“The accreditation status of the respondent is not known and she is also out of the jurisdiction so the commission cannot issue orders in vain and disregards the award of any fine due to the logistical difficulty of enforcement as well as any order to deregister the respondent.”



16. It was indeed contradicting for the commission to on the one hand find that it had jurisdiction to hear and determine the complaint, and on the other hand deny the orders sought for lack of jurisdiction. Having been aware that the accreditation of the appellant had not been established, the proper finding was that the commission lacked jurisdiction to hear the matter.
17. Though the 3rd respondent submitted that the commission had jurisdiction under the definition of a media enterprise, I note that the complaint before the commission was brought against the appellant in her personal capacity and not again the media enterprise that she worked for at the time, New York Times. Consequently, it cannot be said that the complaint was brought against a media enterprise or practitioner to properly invoke the jurisdiction of the commission. It cannot also be said that the appellant was a media practitioner in Kenya with nothing to show that she had been accredited as a journalist in accordance with the Act.
18. It then follows that without establishing that the appellant was an accredited foreign journalist as provided for in the Act, the commission lacked jurisdiction to hear the complaint. Once the preliminary objection was raised, it was crucial for the accreditation status of the appellant to be determined/proven before the complaint was heard on merit, more so considering that the 1st and 2nd respondents averred that the appellant practiced journalism in Kenya and ought to have upheld Kenyan law though she worked for New York times which was admittedly not under the purview of Kenya Law. It was upon the 1st and 2nd respondents to establish that the complaint was well within the jurisdiction of the commission. Without such proof, the commission lacked jurisdiction to hear the complaint. Consequently, any order made by the commission was null and void.
19. Having arrived at that decision, the determination of the other ground of appeal would only be a mere judicial exercise.
20. The upshot is that the memorandum of appeal dated 25/7/2023 is found to be merited, and the same is allowed with no orders as to costs. The determination dated 20/7/2023 by the 3rd respondent herein and any consequential orders is hereby set aside and the complaint filed on 23/1/2019 is hereby dismissed with no orders as to costs.

It is so decreed.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:-

Ochieng for the Appellant

Isinta for the Respondent

Court Assistant- Peter Ong'idi

Further Order;

30 days stay granted.

J.K. NG'ARNG'AR, HSC

JUDGE

