



REPUBLIC OF KENYA



Mutua v Mwangi (Civil Case E025 of 2021) [2024] KEHC 7640 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL CASE E025 OF 2021

FROO OLEL, J

JUNE 24, 2024

BETWEEN

HON DR ALFRED MUTUA PLAINTIFF

AND

BONIFACE MWANGI DEFENDANT

RULING

A. Introduction

1. Before this court for determination is the Notice of Motion Application dated 25.10.2021 brought under provisions of Article 28,33(2),(d),(1) and 34(1) of *the Constitution* of Kenya, sections 1A,1B, 3,3A and 63(e) of the *Civil Procedure Act* and Rule 40, Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules,2010 and all other enabling provisions of law. The plaintiff/applicant seeks for orders that;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue an interim injunction order restraining the Respondent by himself, his servants and or agents or otherwise howsoever from publishing in any print or electronic media, on any electronic or web hosted platform, and from repeating any publication of, any innuendos, insinuations, allegations or statements that the plaintiff either as having destroyed , actually caused the damage to the Defendant's house in Lukenya, and /or having contributed to such damage and that the Defendant is a rapist, a thief, a corrupt individual , a molester, a murdered, a philanderer, a charlatan, or otherwise any material defamatory of the Plaintiff as contained in the Defendants Video posted and hosted on 21st October 2021 on the Defendant's Facebook Page under the address http://web.facebook.com/BonifaceMwangiBM/?_rdc=1&_rdr and specifically the part complained of at the Defendant's Facebook posting <http://web.facebook.com/BonifaceMwangiBM/videos/555033798899999/>



_so_channel_tab&_rv_=all_videos_card commencing at minute 4.06 thereof in the said Facebook webpage or any subsequent versions of the said publication or otherwise howsoever publishing such defamatory material of and concerning the Plaintiff Hon. Dr. Alfred Nganga Mutua.

- d. Costs of this motion be awarded to the Plaintiff in any event.
2. The said application is supported by the affidavit of Hon. Dr. Alfred Mutua deposed on 25.10.2021 and his supplementary Affidavit dated 03.12. 2021. The respondent, Boniface Mwangi on his part did file his replying affidavit dated 22.11.2021 opposing the said Application.

B. The Application

3. The applicant deponed that he was the (then) Machakos county Governor and was a journalist, lecturer, researcher and film producer of good repute having worked in Kenya, Australia, UAE-Dubai and Abu Dhabi. Further he was an investor and proprietor of Woni TV and had diverse interest in hotel industry, aviation and real Estate. Finally, he had also been a public servant and employee of the government as Public communications secretary and there was no doubt that his portfolio extends to all of Kenya territory, regional, continental and international fora. Against this background he had strived to achieve his success based on hard work, professional ethics, respect for others, and principles of Good governance/integrity as espoused under the Kenyan constitution.
4. The applicant deponed that his application was underpinned by right to protection of the law under Article 27(1) of *the constitution* of Kenya and the enforcement of the respect of a persons reputation as envisaged under Article 33(2)(d)(i) & 33(3) of the said constitution of Kenya, which protected his right not to be wrongly vilified and/or his reputation, character injured by utterly false, malicious and untrue slanderous words defamatory of, and concerning him as spewed by the respondent on his Facebook page under the address http://web.facebook.com/BonifaceMwangiBM/?_rdc=1&-rdr and specifically the part complained of at the Defendant's Facebook posting http://web.facebook.com/BonifaceMwangiBM/videos/555033798899999/?_so_channel_tab&_rv_=all_videos_card.
5. In the said Facebook video posted by the respondent, it was alleged that the respondent, clearly and unambiguously uttered these (inter alia) defamatory words, of and concerning the plaintiff; -

Start 0.00

“Yo.... Alfred Mutua, you are an abusive man. You're a molester. You physically abuse women and rape women. You're a bad man! But am not afraid of you.

You blowing up my house, it's just physical thing.....You can blow it up.

You can even kill me. But I'll expose you... as long as I live.

You've blown up my house.

A house we've worked so hard with my family to build.

But I shall come after you. And truth will come after you. You're not gonna rest easy.

You can use the government to come and harass me. But I am not one of your women that you can molest.

Me..., I won't go down easily. You have to fight harder.

I am not Juliani, am not Lilian.....and am not afraid of you.

So let me tell you.... There's a Government and there's God. This government will not act on you.



But there is a God in Heaven.

So you have blown my house.... Its fine. Its fine.... It's gonna collapse.

Tomorrow morning am going there to document and show how evil you are as a man.

You don't fffff.....

They say you don't drink.....but you want to get into every hole that you see.

You are an evil man!!

And you'll never amount to anything.

You might have money but you are (f....expletive) NOTHING!!

You are nothing.

You have blown up my family's house. I and my family have worked so hard to build. It's okay. Hii ni mali ya dunia inaishanga tu.

But God will serve me justice, man. God...

You wanted to kill my fired Juliani. You couldn't kill him coz we exposed you.

You went to harm Lilian and she can't share because I am scared of you

You want to harm everyone.....because you are a jilted man who thinks that this World belongs to you. It doesn't belong to you.

There's God in Heaven, Alfred There's God in Heaven. There's God in Heaven and God will avenge me and the many women you have raped, molested and the money you have stolen from the county.

You are (expletive) thief.....and we know that as a fact

You are thief....you are a murderer, and you are a rapist

May you rot in Hell.

You can harm me but you can't harm my soul cause I'll go to Heaven.

F... expletive) you Alfred.”

End 2.24

6. The words and matters complained of were clearly indefensible within any context, and constituted wholly unwarranted and unjustifiable slander published to such of the applicants friends, family business associates and colleagues who have had the said video disseminated to them. Further the said video publication had been shared on a webpage, called Chaimoto.co.ke at <https://chaimoto.co.ke/you-tried-to-kill-julian-and-lillian-bonface-mwangi-exposes-alfred-mutua/>.
7. It was wrong and unlawful for the respondent to allege that the applicant was a rapist, murderer, thief and a corrupt person without the respondent being possessed of, or citing a single decided case and/or conviction by a court of law against the applicant bearing such respective finding. The respondent's action therefore without doubt infringed on the applicants right to dignity and constituted irresponsible, and untruthful conduct.
8. It is deposed that the alleged publication on 21.10.2021 by the Respondent were forwarded to him on his cell phone by many of his friends and relatives and he also did visit the said online page, and confirmed that it contained defamatory words, which were being shared online across the world through the said respondents Facebook and twitter accounts. The words in its entirety either naturally



or ordinarily meant or by innuendo was meant or intended, calculated and understood to directly injure his reputation.

9. The applicant reiterated that the words complained of, were meant to libel, slander, and defame him as the elected Governor of Machakos County and negatively influence his standing as a leader of good standing/repute. The implications thereof touched on his leadership abilities and qualities germane as a person seeking further elective position and also as a businessman involved in trans world business networks, Singly and in partnership with others.
10. Despite sending an email to the respondent through his advocate, the respondent had not ceased/stopped his defamatory publication and in consequence whereof his reputation, character, credit and general standing in the public, political, business and religious spheres had been gravely injured. Further he had been deeply traumatized and left distraught by the whole incident, and he had suffered loss and damage.
11. The applicant therefore submitted that had established a prima facie case, to warrant issuance of the orders sought.

C. The Replying Affidavit.

12. The Respondent filed his Replying affidavit dated 22.11.2021, wherein he denied all the allegations raised by the Applicant and did contend that prior to the criminal and violent destruction of his house Situated in Lukenya, Machakos County, LR No. Athiriver/Athi River Block 5/92, by use of explosives, he had publicly offered moral support and solidarity to the former First Lady of Machakos County and partner of the Applicant (Lillian Ng'ang'a) and her new partner Julius Owino, and they had confided in him that they were receiving threats to their lives and limbs on account of the said Lillian Ng'ang'a severing her relationship with the plaintiff herein.
13. The threats extended to harm to the lives, limbs and property of those who were close to her. When his property was subsequently targeted, he was shocked, angry, disturbed and traumatized by the unjustified and criminal destruction of his house that he had worked so hard to buy and build and could not figure out any other person, who would wish him harm by brazenly "bombing" his house save for the person that "Lillian Ng'ang'a" had told him had the vendetta to harm, her and persons close to her.
14. That on 21.10.2021 he expressed his opinion and disgust at the destruction of his house and the person he thought was responsible for the incident in the video clip complained of. On the same day he also made a complaint at Athi River Police station, where he stated the person he regarded as the principal culprit as per the said video clip. Further on 24.10.2021 he presented confidential evidence to the DCI Director Goerge Kinoti linking the plaintiff/Applicant to the bombing of his house and the matter was still under investigations.
15. He believed that he was entitled under provisions of Article 33 of *the constitution* to freedom of expression and to state his mind publicly and his intention was to make public the unjustified and brazen criminal attack made on his property and destruction of his house. The said video was not made out of Malice towards the Applicant and nor was it made with the aim of defaming him. The video viewed objectively and, in the context, complained of, did not defame the applicant and merely contained his opinion of facts concerning the attack on his property and destruction of his house.
16. The respondent further particularized two articles where the respondents first wife, "Josephine Thitu" and immediate former first lady of Machakos county "Lilian Ng'ang'a" had both expressed danger to their lives and alluded to the applicant's criminal behaviour. The applicant as the governor of Machakos



County where he was a resident had also not demonstrated any concern, care nor sought expedited investigations into this incident. His expressions were therefore a fair comment on matters of public interest, (the incident of his house being bombed) and therefore this case had been filed to intimidate him and stop him from pursuing justice for the criminal act perpetrated and stifle/ suppress police investigations into the said incident.

17. Finally, it was deponed that the applicants political and public affairs life continued as usual and he had continued to hold public meetings with his fellow governors and other prominent political and public personalities without the slightest evidence of being shunned or held in different esteem prior to the said publication and therefore the said publication had not dented the applicant's reputation nor did he intend to do so. The respondent therefore urged this court not to grant the orders of injunction as sought as that would have the effect of stifling his right to freedom of expression and to pursue justice for the attack on his property.

D. The Plaintiffs Supplementary Affidavit.

18. The applicant further deposed that the respondent had barely denied his averments and did not produce any evidence of threats made by him allegedly made as against "Julius Owino" and "Lillian Ng'ang'a". The respondent also did not have a blanket right to defame him and could not seek solace under Article 33 of *the constitution*, which did not provide him with any immunity to defame others. It was also worth noting that the respondent did not deny publishing the defamatory video, whose contents were subject of these proceedings.
19. The applicant urged the court to find that the words complained off, in the impugned video were indeed defamatory, expletive-laden and constituted a direct threat of divine wrath made as against him. This was clear and unequivocal evidence of the defendant's malice and could not pass as a "fair comment" as the said allegations were false and untrue in content. The applicant reiterated that the allegations levelled as against him by "Josephine Thitu and "Lillian Ng'ang'a" as contained in the various newspaper citations did not have any factual backing, and he had no conviction as against him, the basis upon which any of such allegations could be justified.
20. He had not lodged this suit to intimidate the respondent and under Article 27(1) of *the constitution* had a right to protection of the law and his sole purpose was to seek protection as against the defamatory statements made of, and concerning him, which were injurious of his character, reputation and social standing especially in light of his presidential aspirations in 2022 elections.
21. The applicant reiterated that he had no intention of harming the respondent, and given the pleadings herein, it was the respondent who had failed to discharge the burden of proof that he was acting in good faith. This was a clear case of unmitigated and deliberate defamation of his character and was calculated to injure his reputation, and he therefore urged the court to grant the orders sought.
22. The parties took direction as to the hearing of this application and filed written submissions to support their respective positions. They further highlighted the same orally before court.

E. The Applicants Submissions.

23. The plaintiff/applicant recited a paragraph in the decision of Reynolds v Times Newspapers Ltd [1999] 4 All ER 609, Where Lord Nichols of the house of lords stated that; Reputation was an integral and important part of the dignity of an individual and was fundamental to his/her wellbeing. Once besmirched by unfounded allegations in a national newspaper, a reputation could be damages forever, especially if there was no opportunity to vindicate one's reputation. Further reliance was placed on Alnashir Vishram v standard limited [2016] eklr to emphasis on this point too.



24. The Plaintiff/Applicant rehashed the facts of the case and relied on the cases of Christopher Ndarathi Murungaru v Standard Limited & 2 others [2012] e KLR, where the Justice G.V. Odunga (J) (as he was then), did find that the right not to be defamed stems from Article 28 as read together with Article 33 (2)(d)b(i) and 34(i) of *the Constitution* of Kenya and there could not be no open ended right vested on the Defendant/respondent to publish defamatory material injurious to the Plaintiff's reputation in the name of promoting the freedom of expression. The Applicant also made reference to Article 17 of the International Covenant on civil and political rights (ICCPR), which protected a party from unwarranted and unlawful attack to his honour and reputation.
25. Secondly, the Applicant submitted that he had established a prima facie case as illustrated in the plaint and this was a clear case which warranted the granting of the orders as sought, as his right had been infringed by the defamatory utterances made in the impugned defamatory video, which clearly referred to him. Reliance was placed on the case of Brigadier Arthur Ndoj Owuor v Standard Limited [2011] e KLR, Megascope Healthcare Kenya Limited vs Nation Media Group Limited and 4 others [2021] e KLR, Micah Cheresem v Immediate Media Services & 4 others , [2000] 2 EA 371, where the court found in favour of the applicants and granted injunctive orders preventing further defamation.
26. The Applicant also submitted that there was no justification to front the defence of "fair comment" or "No malice", as the said defence did not extend to cover misstatement of facts however bonafide. The respondent had retweeted the said defamatory statement even after the injunction had been issued and that pointed to his vitriolic/ malice as his driving motivation. No prejudice or harm would therefore be suffered by the Defendant/respondent if the court granted the orders of injunction as sought. Lastly, that the balance of convenience also tipped in favour of granting of the Interlocutory injunction. Further reliance was placed on the cases of Samuel Ndungu Mukunya v Nation Media Group Limited & Another [2015] e KLR, Adan Keynan Wehliye v Standard Limited & Another [2020], West Kenya Sugar Company Limited v Moses Malulu Injendi & Anothers [2021]e KLR, Philomena Mbete Mwilu v Standard Group Limited [2018]e KLR, Paul Gitonga Wanjau v Gathuthis Tea Factor Company Limited & 2 others [2016] e KLR ,Safaricom Limited v Porting Access Kenya Limited and another [2011] e KLR, JPM t/a M & Co Advocates v Wangethi Mwangi & Another [2017] e KLR and Abno Softwares International Limited & another v Hemandra Singh & another [2020] e KLR.
27. They had served the respondent with a demand letter to cease and retract the said defamatory publication complained of, but the respondent declined to do so. It therefore behoved the court to protect the applicants right as he had meet the threshold for the grant of interlocutory relief in order to preserve the integrity of his claim before trial.

F. The Respondents Submissions.

28. The Respondent filed submissions on 26.02.2024 and averred that he was a hard-working Kenyan pursuing his dreams in the right way. On 20th October 2021, he woke up to the shocking news that his home (within Lukenya Mountain view area) had been bombed. The result of his lifetime of hard work, dedication and sacrifice lay in ruins. He firmly believed that the genesis of his conflict/this incident had its roots in a very public deterioration of the applicant's relationship with one "Lillian Ng'ang'a", the one-time first lady of Machakos county, and his public support for her and her new partner "Julius Owino".
29. It was submitted that despite reporting the incident of the bombing of his home to the police at Lukenya police station; via OB NO 2/21/10/2021, Athi River police station, & DCI Headquarters the police had been dragging their feet and no apprehensions or criminal proceedings instituted as against the suspects. The applicant has not met the requirements for the grant of injunctive orders as required



in the case of *Giella vs Cassman Brown & Co Limited* [1973] e KLR and his comments amounted to justification and fair comment to which he need to be given an opportunity to prove at the hearing of suit, as Plaintiff has no reputation to protect and therefore nothing to loss.

30. The applicant was a state officer and had voluntarily submitted himself to the spotlight and had to develop thick skin because in the nature of public service, one had to attract criticism and finger pointing from all directions. The applicant had failed to table any evidence of ridicule, contempt or embarrassment, since he continued to enjoy the trappings of power and prestige as a cabinet secretary, which suggests that he had not suffered any misfortune nor had his reputation been lowered in the eyes of right-thinking member of the society.
31. It was contended that the injunction sought would act more as a gag order and its issuance would not be in public interest. The court was thus urged to deny the injunctive orders as sought as the material complained of comprised of legitimate expression of opinion that constituted fair comment on matters of public interest. Reliance was placed on *Fraser v Evans & Another* [1969] 1All ER 8, where it was emphasised that that public interest in a matter was sufficient to deny the issuance of injunctive orders.
32. The respondent further submitted that he was not a mad man in the market, but a victim of a crime and ought to be allowed to cry for justice until he gets it. He further had a right of free speech protected by *the constitution* and had to be allowed to express himself. Reliance was placed on the cases of *Cytonn Investments Management PIC v Kaikai & another* [2022] KEHC, *Endmor Steel Millers Limited v Royal Media Services Limited*, *John ORIRI Onyango v Standard Group Limited group & 4 others* [2018], *Micah Cherem v Immediate Media Services & 4 others* [2000] e KLR, *Media Council of Kenya v Eric Orina* [2013] e klr and *Andrew Oloo Otieno v Benjamin Shamala Imbogo*, to support this contention.
33. The respondent therefore urged the court to find that the applicant was not deserving of the order sought and proceed to dismiss the said application under consideration.

G. Analysis & Determination

34. I have considered the Application before this court, the affidavits for and against it as well as the submissions filed by both parties and find that the only issue for determination is whether the Applicant has met the parameters for granting injunctive orders and is entitled to the interim orders of injunction as sought.
35. The tort of defamation is anchored on the recognition that an individual has the right to have his good reputation protected, and the law confers a cause of action on any person of whom a defamatory matter is published, Subject to the various defences offered in response and balancing of the interest between freedom of speech and an individual's good reputation. *Gatley on libel and slander* 12th Edition, sweet and Maxwell at page 25.2 sets out the factors the court should consider, in granting an interlocutory prohibitory injunction in defamation cases. The court had to be satisfied of the following;
 - a. That the statement(s) complained of is/are unarguably defamatory;
 - b. That there are no grounds for concluding the statement to be true;
 - c. That there is no other defence which might succeed;
 - d. That there is evidence of an intention to repeat or publish the defamatory statement.
36. The law on injunctive relief in defamation cases is well established. The principle being that, generally, a court will not grant an interlocutory injunction to prevent defamation, where the defences of justification; fair comment on a matter of public interest; qualified privilege or such other recognized



defence is raised; unless the plaintiff can demonstrate that the matters complained of are false or if true in the case of fair comment and qualified privilege that they are actuated by malice. The locus classicus on the subject is *Bonnard v Perryman* [1891] 2 Ch 269. In that case, Coleridge C. J, stated as follows:

“the court will not restrain the publication of an article, even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest” (emphasis supplied)

To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore, jurisdiction is of a delicate nature. It ought only to be exercised in the clearest of cases where any jury would only say that the matter complained of was of a libelous nature and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel is untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It followed from those three rules that the court only on the rarest of occasions exercise the jurisdiction.”

37. These principles were also considered in the case of *Evans Kidero v John Kamau & another* [2017] eKLR where it was stated:

“The same sentiments were expressed in the case of *Micah Cheserem v ImmediateMedia Services* [2002] 1EA 371 where the court held;

“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in *Giella v Cassman Brown & Co. Ltd* [1973] EA. 258 generally apply in defamation cases, those conditions operate in special circumstances. Over and above the test set out in *Giella’s* case in defamation, the court’s jurisdiction to grant an injunction is exercised with greatest caution so that an injunction is granted only in the clearest possible cases. The court must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Normally the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a human, responsible, truthful and trustworthy defendants”

38. The above position in law also found favour of the court in *Selina Patani & Another Vs Dhiranji v Patani* [2019] eKLR, where the court of Appeal stated that the law of defamation was concern with protection of reputation of persons, that is, the estimation in which such persons are held by others. In the said case the court stated that;

“In rehashing, we note that the ingredients of defamation were summarised in the case of *John ward v Standard Ltd* HCC 1062 of 2005 as follows:

- i. The statement must be defamatory.
- ii. The stamen must refer to the plaintiff
- iii. The statement must be published by the defendant.
- iv. The statement must be false.



39. In the said case of Selina Patani (Supra), while referring to the case of Elizabeth Wanjiku Muchina v Standard ltd [2011] eKLR, it was stated that whether a statement is defamatory or not is not so much dependant on the intention of the defendant, but on the “probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published. - Clerks & Lindsell on Tort 17th Edition 1995- page 1018.”
40. The plaintiff clearly set out (verbatim) the defamatory words uttered by the respondent in his video posted on his Facebook page and circulated worldwide through various webpages. He averred that the words uttered in the said video in their natural and ordinary meaning or by innuendo meant and were intended, calculated and understood to injure his reputation. The respondent admitted in his replying affidavit that he did make the said video. At paragraph 13 thereof, he averred that, “I wish to state that when I made the complained video clip my intention was to make public the in justified and brazen criminal attack on my property and destruction of my house and I did not make the said complained video clip out of malice towards the Applicant/plaintiff nor with any intention to defame him.”
41. Further the respondent stated that he verily believed that he had a right to do so and his action was protected by virtue of Article 33 of *the constitution*, which allowed him to express his state of mind publicly about those that he suspected to have committed crimes as against him. The law of defamation also afforded him the defence of fair comments on public matters such as the said incident of criminal destruction of his house and therefore his comments were on matters of public interest and was therefore justified, and it was best, not to grant the orders sought and allow the suit to proceed for trial.
42. There is no doubt whatsoever that the impugned video is defamatory, it did expressly refer to the plaintiff and the respondent admitted to publishing the same. It is also not in doubt that the said video has been disseminated worldwide, through the respondents Facebook page, twitter (X) handle and other online forums. The evidence presented further proved that despite the injunctive orders being in place the respondent continued to make further disparaging and defamatory publications touching on the applicant’s character/person. These publications were made on; 6th January 2022, 9th January 2022, 18th January 2022, 22nd January 2022, 21st and 27th February 2022 and finally on 2nd March 2022, all on his social media accounts.
43. The repeated nature of the respondent’s action in republishing the defamatory publication and making other similar disparaging videos/ comments does prove bad faith and malice on the part of the respondent and clearly infringes on the applicants right not to be defamed as protected under Article 28 as read with Articles 33(2)(d)(i) and 34(1) of *the constitution*. The applicant has therefore clearly made out a prima facie case that there exists a right which has apparently been infringed and calls for an explanation or rebuttal from the respondent. See *Mrao Ltd v First American Bank of Kneya Ltd & 2 others* [2003] eKLR.
44. On irreparable harm and balance of convenience, it is clear that unless the court intervenes, there is likelihood that the impugned publications will still be disseminated unabated, as a result of which the applicant will continue to suffer character, reputation and public image “assassination.” In the case of *Brigadier Arthur Ndoj owour v Standard limited* [2011] eKLR, the court while allowing the defamed plaintiffs injunction application did hold that;

“once a reputation is lost, in my view, monetary damages might not be an adequate compensation. Monetary damages might be a consolation, yes but they will never be adequate compensation for lost reputation. In the eyes of the public, once a person’s reputation has been damaged it will remain in the memory possibly throughout his life.”



45. Similarly Hon Justice Serگون in the case of Megascope Healthcare Kenya Limited v Nation Media Group Limited & 4 others [2021] eKLR, did find that;

“In this matter I agree with the applicants that there is a high probability that they stand to suffer irreparably if the injunction is not granted. Having come to the above conclusion, I find that the balance of convenience as a result tilts in favour of the applicants herein.”

46. Finally, to buttress this point, in the case of Paul Gitonga Wanjau v Gathuthis Tea Factory company ltd & 2 others [2016] eKLR, where the court in dealing with the question of balance of convenience in a defamation claim stated that;

“Where any doubt exists as to the applicants rights, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory application should be granted, takes into consideration the balance of convenience to the parties and the nature of injury which the respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.....

Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

47. It is my finding that the plaintiff will suffer more harm to his reputation as public figure and businessman should the injunction sought not granted. Hence the balance of convenience tilts in favour of granting of the interlocutory injunction orders.

48. The respondent raised the defence that he had no malice in making the remarks complained of, and further that his remarks/publication constituted fair comments on a matter of public interest and was therefore justified. As already stated above the repetitive publications/tweets and the respondent’s use of expletives therein is indicative of the respondent’s malice in making the said defamatory statements.

49. Further calling the applicant a thief, a murderer, a philanderer, a criminal as captured in the offending publication, cannot be deemed to be fair comment especially, where no proof of the same has been presented. This court also entirely agrees with the finding in the case of Samuel Ndung’u Mukunya v Nation Media Group limited & Another [2015] eKLR, where it was stated that;

“If the words complained of contained allegations of facts the defendant must prove such allegations of fact to be true. It is not sufficient to plead that he bona fide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however bonafide.”

H. Disposition

50. Flowing from the above, I do find that the plaintiffs application dated 25th October 2021 has merit and allow the same in terms of prayer (3) thereof;

- a. Pending the hearing and determination of this suit herein, an order of temporary/prohibitory injunction be and is hereby issued restraining the Respondent by himself, his servants and or agents or otherwise howsoever from publishing in any print or electronic



media, on any electronic or web hosted platform, and from repeating any publication of, any innuendos, insinuations, allegations or statements that the plaintiff either as having destroyed , actually caused the damage to the Defendant's house in Lukenya, and /or having contributed to such damage and that the Defendant is a rapist, a thief, a corrupt individual , a molester, a murdered, a philanderer, a charlatan, or otherwise any material defamatory of the Plaintiff as contained in the Defendants Video posted and hosted on 21st October 2021 on the Defendant's Facebook Page under the address http://web.facebook.com/BonifaceMwangiBM/?_rdc=1&_rdr and specifically the part complained of at the Defendant's Facebook posting http://web.facebook.com/BonifaceMwangiBM/videos/555033798899999/?_so_channel_tab&_rv_=all_videos_card commencing at minuted 4.06 thereof in the said Facebook page or any subsequent versions of the said publication.

b. The costs of this Application is awarded to the Plaintiff/Applicant.

51. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF JUNE 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 24th day of June, 2024.

In the presence of;

No appearance for Applicant

Ms C. Njeri for Respondent

Sam Court Assistant

