



REPUBLIC OF KENYA



KENYA LAW

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Ali & another v Ali (Civil Case 7 of 2023) [2023] KEHC 971 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 971 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 7 OF 2023
DKN MAGARE, J
FEBRUARY 16, 2023

BETWEEN

ALI JOHO ALI AKA JUMBE 1ST PLAINTIFF

ABOUBAKAR ALI JOHO AKA ABU 2ND PLAINTIFF

AND

**AL BUSAYYID ABDULMAJID ALI ALSO KNOWN AS LUQMAN QASSIM
ISSAC (A.K.A DR. AMKENI) DEFENDANT**

RULING

1. This matter came before me on February 14, 2023 where the plaintiff argued that he had served Defendant/Respondent and such I should grant him prayer c of the application dated February 10, 2023.
2. He prays that prayer (b) be held in abeyance. He served the defendant on February 9, 2023 in Prison. I expected as an officer of the court that he will note that circumstances have changed and there was need to reconcile his application concomitantly. It was not done. I was however satisfied with service.
3. Reading the grounds, I don't find any reason given for the request on the prayers sought. I am unable to understand, how the court will order an individual to comply with the Constitution, when article 3(1) places the obligation to respect, uphold and defend the Constitution on every person. The prayer for compliance with the Constitution is tautological and as such untenable.
4. Further, to restrain someone from further breach of the Constitution presupposes a finding of breach, which cannot be done at the interlocutory stage.

There can be no interim declaration of a right or breach of a right.



5. I agree there is from time to time a need to protect rights. In The *Centre For Human Rights And Democracy & 2 others v The Judges And Magistrates Vetting Board & 2 others* [2012] eKLR, the court stated: -

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission. Our determination is not in any way a final definition or determination of the dispute. It is meant to give an interim protection as sought by the applicants.

6. My view is that the court has authority, power and jurisdiction to issue interim orders. However, the orders must be discernable and clear in the Application for interim relief. The duty of the party who is seeking orders, especially orders of the nature of *Quia Timet*, has a higher burden to establish the entitlement to the orders they are seeking.
7. On enquiring on which allegations that are said to be false about each of the plaintiff, from the affidavit, the court was informed that they are clear in the plaintiff. The court was to read the plaint and scour through and find all the facts. I was also directed to a CD filed with the suit. Nothing could have been easier that the Plaintiffs to set out the documents they wish the court to rely on.
8. The court only peruses the plaint, at the interlocutory stage, to check congruence of prayers sought. A plaint or a pleading, even a witness statement is not evidence. The Plaintiff know which allegations are false. It cannot be that the court will know from allegations in the Plaint. The danger of accepting allegations not on oath, is that it will turn the court into an investigator.
9. I have perused the plaint and note that the plaint is based on the following prayers:
- a. pending the hearing and determination of this suit, the defendant be ordered to deposit in this court, his Kenya passport number AK 11***** and United Kingdom of Great Britain and Northern Ireland passport number 112*****.
 - b. An injunction be issued to restrain the Defendant by himself, his agents and or Servants, prohibiting him in deliberating on merits or otherwise of these proceedings in social media or in any other forum, with intention of either vexing or disparaging the Plaintiff herein, and or in further breach of the provisions of Article 28, until the hearing and determination of this suit.
 - c. Judgment be entered in favour of both plaintiffs against the defendant for both aggravated and punitive damages for defamation, libel and slander.
 - d. General damages for defamation, libel and slander.
 - e. ...
10. Prayers a and b are in their nature interlocutory. Allowing them, there is nothing to go to trial in respect of those.
11. The other prayers relate to defamation that has allegedly been concluded. There is nothing to stop.



12. The only pray remaining to be heard in the impugned application, according to the Plaintiff is prayer (c) as follows:-
- c. an injunction be issued to restrain the Defendant by himself, his agents and or Servants, prohibiting him in deliberating on merits or otherwise of these proceedings in social media or in any other forum, with intention of either vexing or disparaging the Plaintiff herein, and or in further breach of the provisions of Article 28, until the hearing and determination of this suit.
13. I note that this prayer was made before the defendant was served in prison where he is resident pursuant to criminal charges preferred by inter alai the plaintiffs herein.
14. It is hard to issue orders based on intention and subjective judgment. The orders sought are quite wide but has no supporting grounds. Recently in Voi HCEPA No 1 of 2023 -[*Josephat Peter Shambi v Doreen Taabu Rodgers And Another*](#)(2023)eKLR, I dealt with the issue of intention, where I stated: -
- “ ... unless there were other motives, probably to delay the main petition. We will never know since the words of Lord Brown L J in *Edington versus Fitzmaurice*(1885)29 Ch D 459, ring true in this case,
- “ the state of a man’s mind is as much a fact as the state of his digestion.”
15. Ipso facto the defendant has not discussed the merits of the case, anywhere. In that connection the only other aspect available is the threat to discuss. However, there is no evidence of such a threat. The order sought, although indicated as a normal injunction is in reality a quia Timet injunction. Such an injunction seeks to stop that which is imminent and has not yet occurred. To be able to qualify for such an order, there is a necessity to show and prove three aspects.
- a. That there is actually an imminent threat or threatened action
 - b. The threatened injury will be irreparable
 - c. It will be impossible to protect the plaintiff
 - d. I dare add, that compliance with such an order will not cause undue hardship on the Defendant.
16. There was absolutely no evidence that the Defendant threatened the plaintiff at all. There is no evidence of any threatened injuries resulting in the action that they have not described. The first Plaintiff has not sworn any affidavit as to any threat to him, in fact the only reference was in Plaint about one Jumbe but the first Plaintiff has not drawn a nexus by way of affidavit between words that are alleged to be defamatory, the perpetrator, each of the plaintiffs and the Defendant. Or even between the plaintiff and Jumbe.
17. There is no threat that the defendant will be doing so. There is no similar evidence that he has discussed the merit of a case in the past. In any event, parties know or ought to know the limits of sub judice..
18. In [*Kwality Candies & Sweet Ltd v Industrial Development Bank Ltd*](#) [2005] eKLR, Hon justce Anyara Emukule as then he was stated as doth:-
- “(The) principles upon which a quia timet injunction is granted are not different from those upon which restrictive injunctions are granted with one important exception. In an application for a quia timet injunction a heavy burden is placed upon him to prove its case for a preventive injunction than in an application for a restrictive injunction. The principles



for grant of a restrictive injunction are set out in the case of *Giella v Cassman Brown & Co Ltd & Another* [1973] EA 358.

These are that an applicant must or show establish a prima facie case with high probability of success, that damages would not be an adequate remedy, and that where there is a doubt decide the application on the basis of the balance of convenience.

19. In the same case, the court stated as doth_

“So in an application for a *quia timet* injunction, the Court, proceeding upon what Lord Brougham said in 1834, "a practical view of human affairs, the law will guard against risks which are so imminent that no prudent person would risk them, although they do not amount to absolute certainly of damage."

20. In the persuasive case of *Liverpool Household Stores Association Vs -Smith* [18 87] L 2938, the court held that the court can only issue an interlocutory injunction in the clearest cases.

21. The question to pose at this point is whether the plaintiff's case is such a clear case for the granting of an interlocutory injunction. This is particularly so in cases where the action sought has not occurred.

22. In *Martha Greene Vs Associated Newspapers Limited* [2004] EWCA Civ 1462, the court quoted with Approval the famous words of Lord Denning MR in *Fraser vs Evans* [1969] IQB 349, 360 as doth :-

“The court will not restrain the publication of an article even though it is defamatory, when the defendant says he intends to justify it or make fair comment on a matter of public interest. That has been established for many years since *Bonnard vs Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the Constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out. There is no wrong done if it is true, or if (the alleged libel) is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication”.

23. I equally decline to listen to a recording at this interlocutory stage. The court decides application on the basis of the evidence annexed is the application. The only time the court looks at the plant is to confirm that the prayers sought in the main suit and the application have congruence.

24. All the other evidence has to be annexed and all affidavit property identify the same. Making a general reference to the plaint cannot be correct this fatal error. The 1st plaintiff reiterates in paragraph 2 the averments in the plaint. Which of those averments are true and whose one is false, is a mystery only known to the 2nd Plaintiff.

25. Further as regarding the 1st plaintiff, he has not sworn any evidence. Defamation is personal. It cannot be defended through another party in the case of *Simeon Nyachae V Lazarus Ratemo Musa & Another* [2007] eKLR where the court stated: -

“In my humble view, words are not defamatory per se, there has to be a statement of fact or expression of opinion or imputation conveyed by them, which will have the effect of defaming an individual. The question which I must answer is where is the evidence that the plaintiff has suffered actual damage whether in material or otherwise.



Admittedly, the plaintiff has nominated his son to prosecute this case meant to repair, restore and vindicate his character, reputation and dignity through a registered power of attorney. I think the power of attorney given to the son cannot be a substitute to the direct testimony of the plaintiff. And that the fact the son was given power to conduct and give evidence on behalf of the plaintiff cannot put him in the same shoes with the plaintiff.

26. The conditions for the granting of an interlocutory injunction are now, we think, well settled. In *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at pg 360, it was stated as follows:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (EA Industries v Trufoods, [1972] EA 420.)”

27. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court stated:-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd V Afraba Education Society* [2001] Vol 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

28. The court of Appeal held that the tests are sequential. The Court is first to be certified that on basis of evidence on the application there is a prima facie case before moving to the irreparable loss. The court cannot consider irreparable loss when there is no prima facie case.

29. Paragraphs 3 to 8 of the supporting affidavit are about the prayer on the passport. This was abandoned and correctly o. The plaintiff had not in the pleading justified why the travel document were to be confiscated. The standard set under Article 24 of the *Constitution* is that a party must be able to show, ‘relation between the limitation and its purpose and whether there are less restrictive means of achieving that purpose.’

30. The mere fact that the defendant may travel is not and cannot of its own be the purpose for restraining a party. In a hearing of this nature, all allegations in the plaint are deemed just that, allegations. Till these is cogent evidence, that the purpose of the travel is to, ‘remove himself from the jurisdiction of the court, with a view to evade any decree that many be passed against him.’

31. I have perused charge sheets and noted that parties are litigating over events that are alleged to have occurred between March 9, 2021 to January 20, 2023. The defendant does not appear to be a person on flight. He looks like a person with sustained campaign.



32. In any case the charge sheets are not evidence of any wrong doing. They are subject to proof in the criminal case. I have my reservations regarding the other process in the new democratic dispensation
33. I note with concern that in spite of clear provisions of the section 4(2) of the *limitation of actions Act*, the parties still had the Defendant charged for events prior to February 6, 2022. The said section provides as doth: -
- “(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”
34. Given the mixed state claims of defamation exceeding a period of one year, it was necessary in the pleadings the plaintiff deals with only current claims in the Application Anything not said to have been done before February 6, 2022 cannot be subject of this suit.
35. In the affidavit the plaintiff has not stated which of the several words were true in fact and which ones were false. It is not enough to list in the plaint the words said by the defendant.
36. The words must indicated to be false and the meaning to ordinary members of society who heard them. at the said time, indicate which of them are false. Without such an indication, it is not enough to say your name is disparaged. It can only be disparaged by falsehoods. As at the time of writing ruling, I do not know which words, refer to any of the plaintiff, were uttered by the defendant and refer to the plaintiff directly and if not, by innuendo and how they were published and to whom. Such should also be pleaded.
37. Lastly the working of prayer b such that, it cannot be granted. It is a combination of conclusions, of fact, intentions and such other words like vex or disparage that make the order, an order in vain.
38. Consequently, the applications does not disclose on the face of it a prima facie case.
39. Further, the people of requiring the court to read the plaintiff at interlocutory stage is not proper. The parties ought to understand that they should set out succinctly the references to the plaintiffs, the defamatory words and anything showing the connection to the words offered by the defendant.
40. It may well that the Plaintiffs know the connection between the names Abu and Jumbe as used in the plaint. There is no evidence of any right thinking member of society who understood these words to mean the plaintiffs. An averment to that effect would have settled.
41. I do not find the plaintiff to have a *prima facie* case. In any case, even these are no averments of evidence that damages are not adequate. Without a prima facie case, I am constrained to dismiss that application in its entirety for lack of merit.
42. Given that the application was not defended each party will bear their own cost.
43. I decline the invitation to have the application heard by installment.

DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 16TH DAY OF FEBRUARY THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:



Adhogi and Paul Buti the Plaintiff/ Applicant

N/A for the Defendant/ Respondent

