REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. E236 OF 2021

KENYA NUTRITIONIST & DIETICIANS INSTITUTE...................PLAINTIFF/APPLICANT

VERSUS

MICHAEL OUMA ODERO,.. DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant herein has brought the notice of motion dated 27th September, 2021 supported by the grounds set out on the body thereof and the facts stated in the affidavit of David Omondi Okeyo. The applicant sought for the following orders:

i. Spent

ii. Spent

iii. The honourable court be pleased to grant a temporary injunction to restrain the defendant by himself, or through any of his servants and agents from uttering any defamatory information, verbally or in writing to individuals, groups on social media platforms concerning the plaintiff pending the hearing and determination of this suit.

iv. Pending the hearing and determination of the plaintiff's suit, an INJUNCTION be issue RESTRAINING the defendant, whether by themselves,agents,servants or any persons acting on their instruction/under direction ,from further posting ,publishing or causing to be posted, published on any social media platform or any other means be it oral, print or electronic.

v. Pending the hearing and determination of the plaintiff's suit a MANDATORY INJUNCTION be issued COMPELLING the defendant, whether by themselves ,agents, servants or any persons acting on their direction, to take down/retract/delete/purge the said publications on social media.

2. The defendant/respondent swore a replying affidavit dated 19th November 2021 to oppose the Motion.

3. The Motion was canvassed by way of written submissions.

4. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits supporting and challenging it, the contending written submissions and authorities cited.

5. A brief background of the matter is that the applicant instituted a suit against the respondents by way of the plaint dated 27th September, 2021 and sought for *inter alia*, various forms of damages and an order for permanent injunctions against the respondent, arising out of the tort of defamation. The plaint was filed together with the instant Motion.

6. The crux of the matter is that the respondent has been posting and or publishing defamatory allegations on WhatsApp and other social media forums of financial impropriety against the applicant, its officials and council members which touch on its integrity.

7. From my study of the Motion, it is clear that the applicant is seeking two (2) key orders: the grant of an interlocutory injunction and the grant of a mandatory injunction. I will first deal with the interlocutory injunctive order sought.

8. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA** as follows:

> ***a. The applicant must first establish a prima facie case with a probability of success.***
>
> ***b. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.***
>
> ***c. Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.***

9. The above principles were restated in the case of **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** cited by the respondents and in respect to defamatory claims, thus:

> ***Firstly, the applicant must establish a prima facie case with a probability of success. Secondly, the applicant must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages. Thirdly, where the court is in doubt, then the balance of convenience should tilt in favour of the applicant.***

10. Under the first principle, it is the position of the applicant that the defamatory publication made by the respondent on WhatsApp and other social media forums of financial impropriety against them which words meant or understood by the right thinking members of society to mean the institute has misappropriated funds and also exploits the professionals.

11. The applicant states that the respondent has uploaded or published inaccurate posts on several times without verification or good cause, and despite the applicant's demand for an apology and retraction, he has ignored it, forcing the applicant to file this suit.

12. In its submissions, the applicant contends that the respondent slandered one of the applicant's officials by implying that he was involved in malpractice just because he was the applicant's CEO.

13. The applicant further contends that without the grant of the interlocutory injunction, it will suffer irreparable injury which would not be adequately compensated by an award of damages.

14. In response, in its replying affidavit, the respondent avers that the remarks did not mention the applicant by name and did not make defamatory assertions about the official of the applicant's character.

15. According to the respondent, the impugned publication was not defamatory or malicious and that it was a fair comment directed to the applicant at the heat of the moment.

16. Furthermore, in his submissions the respondent argues that the court ought not to grant the orders sought to prevent defamation where the defences of justification, fair comment on a matter of public interest, qualified priviledge unless the plaintiff can demonstrate that the matters complained of are false.

17. The respondent relied on the case of **Gulf Oil (GB) Ltd v Page & Others (1987) 3 ALL ER 14** where Lord Denning said;

> ***"The principle has been established for many years ever since Bonnard v. Perryman [1891] 2 Ch 269. 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 come out. As the court said in that case 'the right of free speech is one which should be exercised without impediment, so long as no wrongful act is done'. There is no wrong done if it is true or if it is fair comment on a matter of public interest."***

18. Having considered the arguments by the respective parties together with the annexed documents and pleadings filed, I am of the view that on the face of it, the aforementioned impugned publication(s) would cause any reasonable person to perceive the applicant unfavourably.

19. Moreover, it is not in dispute that the impugned publication was made by the respondents and/or their representatives. It is also noteworthy that whether the said publication was defamatory of the applicant and whether the defences pleaded by the respondents will stand can only be investigated at the trial stage.

20. For now, I am satisfied that the applicant has established a prima facie case with a probability of success.

21. In respect to the second principle on irreparable damage/loss, the applicant through its Head of Legal David Omondi Okeyo, states that as a result of the impugned publication made by the respondent constantly threatens, coerces and blackmails other professionals into agreeing with every move of the applicant which if the respondent had checked their facts would have found to be false.

22. It is the averment of the applicant that the respondent's publication was motivated by malice, serious ill will, and hostility, and that it was done on purpose, premeditated, and intended to harm the applicant's image, professional reputation, and general honest standing in society.

23. On their part, the respondent is of the view that there will be no irreparable loss or damages that will be suffered by a public office being called upon to be accountable, transparent and exercise good governance values as per our constitution of Kenya in good faith.

24. Upon considering the rival positions above and upon studying the material which was placed on the record, I am of the view that one's reputation is invaluable and once tarnished, cannot adequately be compensated by way of damages. In this regard, I opine that the applicant is more likely than not to continue suffering irreparable loss unless granted an interlocutory injunction restraining the respondents from making further publications of a similar nature.

25. Having come to the view that the applicant has satisfied the first two (2) principles warranting an interlocutory injunction, it would be fair to state that the applicant stands to suffer a greater inconvenience if the injunction is not granted in comparison to the inconvenience that would befall the respondents were the same to be allowed. It therefore follows that the balance of convenience tilts in favour of the applicant.

26. The second facet of the Motion concerns the subject of a mandatory injunction. In this respect, the applicant states the continued publication poses a grave threat to their reputation and business operations. The applicant further states that they have proved on a balance of probabilities that it warrants the granting of an order of injunction against the respondent as sought.

27. In retort, the respondent states that the applicant has failed to prove that the words have injured one's reputation, character or dignity and should be dismissed for failing to disclose a reasonable cause of action.

28. In the case of **Kenya Breweries Limited v Washington Okeyo (2002) 1 EA 109; (2002)eKLR** cited in the case of **Paul Mwaniki Gachoka & another v Nation Media Group Limited & another [2019] eKLR** referenced above, the court reasoned that:

> ***"A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances it will not normally be granted. However, if the case is clear, and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the plaintiff. A mandatory injunction will be granted on an interlocutory application." …From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a mandatory injunction at this stage. I also find that the applicant has not brought any credible evidence to show that the injury to his reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage.***

29. In the present instance, it appears not to be in dispute that the applicant was for whatever reason not consulted or granted an opportunity to respond to the contents of the impugned publication beforehand. It is also apparent that the said publication has wide coverage, both locally and internationally.

30. I therefore find that though the applicant will continue to be exposed to ridicule and contempt, it is not appropriate at this stage to grant a mandatory order of injunction. If the order is granted, crucial evidence may be lost which evidence is necessary at the substantive hearing.

31. In conclusion therefore, the Motion partially succeeds and I will allow it, giving rise to issuance the following orders:

> ***i. Pending the hearing and determination of this suit*** **a temporary injunction be and is hereby issued restraining the** ***defendant/respondent by himself, or through any of his servants and agents from uttering any defamatory information, verbally or in writing to individuals, groups on social media platforms concerning the plaintiff***
>
> ***ii. Pending the hearing and determination of the plaintiff's suit, an injunction be and is hereby issued restraining the defendant, whether by themselves, agents, servants or any persons acting on their instruction/under direction, from further posting ,publishing or causing to be posted, published on any social media platform or any other means be it oral, print or electronic.***
>
> **iii. Costs of the Motion shall abide the outcome of the suit.**

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF APRIL, 2022.

……………..…………….

J. K. SERGON

JUDGE

In the presence of:

……………………………. FOR THE PLAINTIFF

……………………………. FOR THE DEFENDANT