Kenya National Union of Teachers v Linus Kaikai & another (Civil Suit E023 of 2022) [2022] KEHC 12619 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12619 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT E023 OF 2022

JK SERGON, J

JULY 22, 2022

BETWEEN

KENYA NATIONAL UNION OF TEACHERS ..... APPLICANT

AND

LINUS KAIKAI ..... 1ST RESPONDENT

ROYAL MEDIA SERVICES ..... 2ND RESPONDENT

RULING

1. The plaintiff/applicant herein has brought the notice of motion dated May 23, 2022 supported by the grounds set out on the body thereof and the facts stated in the affidavit of Collins Oyuu whereof the applicant sought for the following orders:

   i. Spent.

   ii. Spent ,

   iii. Spent.

   iv. That the Honourable Court be pleased to grant a Mandatory Injunction directing the Respondents, jointly and severally whether by themselves and/or through their servants, agents and/or employees to forthwith remove the defamatory statements published on November 18, 2021 on the 2nd Respondents' television channel and YouTube page at https://youtu.be/R7KIKoRA8gE and all online platforms, against the plaintiff, pending the hearing and determination of this Suit.

   v. That the Honourable Court do hereby issue an order of Temporary Injunction restraining the Respondents jointly and severally whether by themselves and/or through their servants, agents and/or employees from uttering or publishing any defamatory material against the plaintiff

in their various television channels, print, online or any other media platforms pending the hearing and determination of this suit.

2. In opposing this Motion, the 1st and 2nd respondents filed Grounds of Opposition dated February 17, 2022. The Motion was canvassed by way of written submissions.

3. I have considered the grounds set out on the face of the motion and the facts deponed in the rival affidavits and the Grounds of Opposition and the contending written submissions and authorities cited.

4. A brief background of the matter is that the applicant instituted a suit against the respondents by way of the plaint dated February 2, 2022 and sought for inter alia, various forms of damages and an order for permanent and mandatory injunctions against the respondents, arising out of the tort of defamation. The plaint was filed together with the instant Motion.

5. The crux of the matter is that the defendants/respondents are likely to continue to publish and publicize the said defamatory statements in the publication titled "TSC's Nancy Macharia under pressure on teachers 'transfers" on their website and You Tube channels thereby attracting millions of viewing globally.

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

7. 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:

   i. The applicant must first establish a prima facie case with a probability of success.

   ii. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.

   iii. Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.

8. 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."

9. Under the first principle, it is the position of the applicant that it has demonstrated prima facie case with a likelihood of success through its pleadings supported with the evidence filed

10. The applicant states that the respondents have jointly and severally designed a concerted plan to besmirch and defame the applicant's character by publishing malicious, offensive, inaccurate and defamatory statements as a means of attracting viewership for commercial gains.

11. In its submissions, the applicant contends that the words published by the respondents are so manifestly defamatory and that in the mind of right thinking members of the society, especially those in the education sector the words are going to be construed as to mean that the applicant as a Union is unable to fulfill its legal mandate as prescribed by law.

12. The applicant put reliance in the case of *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another* [2019] eKLR where the court in addressing the issue of balance of convenience stated as follows;

> "The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer."

13. The applicant further submitted that the respondents did in fact utter or cause to be uttered, defamatory statements against the applicant as the utterances border on personal attack went beyond the purview of fair comment and acceptable journalistic standards.

14. In response, the respondents in their grounds of opposition stated that the applicant has not demonstrated a prima facie case with a probability of success as the applicant has not set out with particularly the alleged words or innuendos which it alleged to have been particularly defamatory of it.

15. The respondents further submitted that the effect of the words as defamatory to the applicant are matters for trial and not matters to be decided on the basis of affidavit evidence and that there no special circumstances in this case to warrant the granting of the orders sought.

16. The respondent relied on the case of *Media Council of Kenya v Eric Orina* [2013] eKLR where the stated as follows:

> "It is to be noted however, that in defamation cases, the above principles are applied in a special way. That is to say that the principles or conditions are applied with the greatest of caution so that the injunction sought is granted only in the clearest of cases. The court has to be satisfied that the words or matters complained of are clearly libellous and that they are so manifestly defamatory that any verdict to the contrary would likely be set aside as perverse."

17. The respondents stated that the applicant lacks a cause of action as it has not pleaded special actual damage which is an element of the tort of malicious falsehood.

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 unfavorably.

19. 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. After considering the material placed before this court, 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 Secretary General Collins Oyuu, states that the said publication are solely intended to embarrass, humiliate,

demean, degrade and damage the applicant's reputation and depict the applicant as a ruthless, brutal, cruel and effectively a dead union, not fit to serve and fulfill its legal mandate.

22. The applicant a;sp avers that the publications have impacted the applicant's public standing and reputation, the defamatory publications have damaged its reputation caused considerable distress and embarrassment.

23. On their part, the respondents are of the view that the applicant is barred from instituting a claim of defamation against the respondents by the rule in *Derbyshire County Council v Times Newspaper Ltd* [1993] AC 534. It is not in dispute that the applicant is a non-trading entity and could not have been defamed as a result of a robust discussion of the goings on in the Education sector touching on the rights of both the teachers and students at large.

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 am of the opinion 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 that it has a clear-cut case and that unless this particular injunction is granted, then its reputation will continue to suffer.

27. The second facet of the Motion concerns the subject of a mandatory injunction. In this respect, the applicant states that the respondents will continue with the defamatory statements to humiliate the applicant and further statements that will injure its personality, reputation and destroy the applicants character built over the years.

28. In its submissions, the applicant has made reference inter alia, to the case of *Newstead v London Express Newspaper Ltd* [1940] 1KB 377 !939 ALL ER 319 as quoted with approval by the High Court of Kenya in *Selina Vukinu Ambe v Fernandez Sajero* [2021] eKLR where it was held as follows:-

> "Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him."

29. In retort, the respondents state that the applicant has not presented any special circumstances to warrant the granting of such an injunction.

30. 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.

31. 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.

32. I therefore find that the applicant will continue to be exposed to ridicule and contempt if the publications continue to be accessible on the various platforms.

33. Consequently, I am convinced that the present circumstances would entitle the mandatory injunction sought.

34. In conclusion therefore, I find the Motion dated May 23, 2022 to be meritorious. It is allowed this giving rise to issuance of the following orders:

    i. Pending the hearing and determination of the suit, a Mandatory injunction be and is hereby issued directing the Respondents, jointly and severally whether by themselves and/or through their servants, agents and/or employees to forthwith remove the defamatory statements published on November 18, 2021 on the 2nd Respondents' television channel and YouTube page at https://youtu.be/R7KIKoRA8gE and all online platforms, against the plaintiff.

    ii. Pending the hearing and determination of the suit, an order of Temporary Injunction be and is hereby issued restraining the Respondents jointly and severally whether by themselves and/or through their servants, agents and/or employees from uttering or publishing any defamatory material against the plaintiff in their various television channels, print, online or any other media platforms.

    iii. Costs of the Motion shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF JULY, 2022.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1st Respondent

.....for the 2nd Respondent