



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 91 OF 2020

EDWIN WATENYA SIFUNA.....PLAINTIFF

VERSUS

AYUB SAVULA ANGATIA.....DEFENDANT

RULING

1. The application dated 24th June, 2020 principally seeks the orders that **pending the hearing of this suit, the Defendant whether by himself, agents, servants or otherwise howsoever be and is hereby restrained from further uttering, holding press conferences, publishing or causing to be broadcasted or published in any way whatsoever, any statements, articles or words linking the Plaintiff with any wrangles within or purported takeover of Amani National Congress Party.**

2. It is stated in the supporting affidavit that the Applicant is an Advocate of the High court of Kenya, Secretary General of the Orange Democratic Movement Party of Kenya and the Vice Chair of the Centre for Multi-party Democracy. That on 18th June, 2020 the Respondent issued a press statement where he falsely and maliciously made the following allegations against the Applicant:

“I have received an invitation by our affiliate party in NASA through one of the top officials that I engage in some activities against my Party Leader, Musalia Mudavadi. The gist of the matter is they have arranged some delegates so that I can overthrow my party leader Mudavadi.”

3. That on 9th June, 2020 the Respondent issued another false and malicious statement against the Applicant as follows:

“I was approached by Sifuna himself three (3) weeks ago in a meeting and Sifuna told me, work with us we are planning on how we can make sure that the Luhya Community follows one course, then later we can change course towards the Luhya Community”

4. It is further averred that the said words were aired and published through nationwide broadcasters including **NTV** and **KTN**. That as a consequence of the Respondent's reckless and malicious utterances the Applicant's reputation was disparaged. That despite a demand letter having been written to the Respondent requiring him to desist from uttering the false statements the Respondent has continued to utter and publish the false statements and repeated them at a radio show on **Radio Citizen**, other Radio Stations and public fora. The Applicant is apprehensive that unless restrained by this court, the Respondent will continue uttering and publishing the defamatory words or similar words against the Applicant.

5. The application is opposed. It is stated in the replying affidavit that the prayers sought are vague and will restrict the Respondent's freedom of speech. It is contended that the utterances complained of are factual and were not false, malicious or defamatory.

6. In a supplementary affidavit filed by the Applicant, the averments made in the replying affidavit are denied. The Applicant reiterated the contents of his supporting affidavit and further stated that the publications in question are still available on **NTV** and **KTN** sites.

7. I have considered the application, the response to the same and the written submissions filed by the respective counsel for the parties.

8. On whether to issue the restraining injunctive orders, the principles applicable were well settled in the case of **Giella v Cassman Brown & Co. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.

9. As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

“.....a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

10. The general principles for a grant of an interlocutory injunction in defamation cases were stated in the case of **Cheserem v Immediate Media Services (2000) 1EA 371 (CCK)** where it was held that:-

“Applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases because they bring out a conflict between private interest and public interest, though the conditions applicable in granting interlocutory injunctions set out in *Giella v Cassman Brown and Co. Ltd (1973) EA 258* generally apply, in defamatory cases those conditions operate in special circumstances. Over and above the test set out in *Giella’s case*, in defamation cases 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 the verdict to the contrary would be set aside as perverse.”

(See also **Hon. Dr. Evans Kidero v John Kamau & another [2017] eKLR.**)

11. In the case at hand, the prayer sought by the Applicant seeks to have the Respondent by himself, agents, servants or otherwise restrained from further uttering, holding press conferences, publishing or causing to be broadcasted or published in any way any statements, articles or words linking the Applicant to any wrangles within or purported takeover of Amani National Congress Party. To my mind, the Applicant seeks to have the Respondent restrained whether the publications are defamatory or not. One of the elements in a defamation suit is that the publication complained of must be false (See for example **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008**)

12. No *prima facie* case is established if the publications sought to be restrained are not *prima facie* defamatory. The prayer sought as crafted herein would generally, if granted, amount to a gag on the Respondent’s exercise of his freedom of expression even on factual matters. In other words, the Applicant’s case is based on the Tort of defamation, yet he seeks to have the Respondent restrained even in respect of matters that are not stated to be defamatory. Consequently, the application fails and is hereby dismissed with costs.

Date, signed and delivered at Nairobi this 21st day of Jan., 2021

B. THURANIRA JADEN

JUDGE