



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. E280 OF 2021

JUSTICE SANKALE OLE KANTAI.....PLAINTIFF/APPLICANT

-VERSUS-

ROYAL MEDIA SERVICES LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant herein has brought the Notice of Motion dated 26th October, 2021 supported by the grounds set out on the body thereof and the facts stated in the affidavit of the applicant, who sought for the following orders:

i. Spent.

ii. Spent.

iii. THAT pending the hearing and determination of the suit, a temporary injunction be issued restraining the defendant/respondent, whether by itself, its agents, employees or any person acting under its instruction, from further publishing, posting, broadcasting or causing to be posted, published or broadcasted in any media or platform, any defamatory statements against the plaintiff, especially those related/linking him to the murder of Tob Cohen.

iv. THAT pending the hearing and determination of the suit, an order be issued directing for the defendant/respondent whether by itself, its agents, employees or any person acting under its instruction, to remove all audio-visual clips in the defendant's YouTube channel, website and social media platforms that bears a recording of the plaintiff's cellphone number.

v. THAT pending the hearing and determination of the suit, an order be issued compelling the defendant/respondent whether by itself, its agents, employees or any person acting under its instruction, to remove all audio-visual clips from its YouTube channel, website and social media platforms that contain recordings or reporting on the allegation of the plaintiff's alleged involvement in the murder of Tob Cohen.

vi. THAT costs of the application be provided for.

2. The defendant/respondent put in the replying affidavit sworn by Nimrod Taabu on 24th November, 2021 to resist the Motion.

3. At the hearing of the Motion, the parties' respective advocates opted to rely on the averments made in the Motion and the respective affidavits on record.

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.

5. A brief background of the matter is that the applicant instituted a suit against the respondent by way of the plaint dated 10th November, 2021 and sought for *inter alia*, various forms of damages and an order for permanent injunction against the respondent, arising out of the tort of defamation.

6. It is apparent from the motion that the orders sought are two- fold: that is, the grant of an interlocutory injunction and a mandatory injunction respectively. 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 prominent case of **Giella v Cassman Brown & Co. Ltd (1973) EA** and are 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.

8. The above principles were restated in the case of **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** 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 the defamatory publications made by the respondent is false and malicious.

10. The applicant further states that the impugned publications which were made on 27th and 28th September, 2021 in the respondent's television station commonly known as Citizen TV and its online platforms concerning the story of the murder of one Tob Cohen and allegedly linking the applicant to the said murder have portrayed him in bad light in the eyes of the public.

11. In retort, Nimrod Taabu states on behalf of the respondent that the applicant has not demonstrated a prima facie case since the impugned publications were derived from an accurate report of the contents of the replying affidavit sworn by John Gachomo on 20th September, 2021 in Nairobi High Court Constitutional Petition No. E334 of 2021 (*Justice Sankale Ole Kantai v Inspector General of the National Police Service & Another*).

12. It is noteworthy that the question on whether the impugned publications are defamatory of the applicant; in addition to any other substantive issues raised in respect to the claim; can only be adequately investigated and considered at the trial stage.

13. At this stage, upon considering the averments made by the respective parties together with the pleadings and material on record, I am satisfied that the applicant has established a prima facie case with a probability of success.

14. In respect to the second principle on irreparable damage/loss, the applicant states that given his reputation and standing in society as a serving judge of the Court of Appeal, it is likely that unless the interlocutory injunctive order sought is granted, the respondent will plausibly continue to publish further defamatory material against him, thereby resulting in further injury to his reputation.

15. In reply, Nimrod Taabu states that in the event that the applicant succeeds on his claim, damages would constitute adequate compensation for any injury suffered.

16. 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 given his professional and personal standing in society, the applicant is more likely than not to continue suffering irreparable loss unless granted an interlocutory injunction restraining the respondent from making further publications of a similar nature.

17. 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 interlocutory injunction is not granted in comparison to the inconvenience that would befall the respondent were the same to be allowed. It therefore follows that the balance of convenience tilts in favour of the applicant.

18. The second facet of the Motion concerns the subject of a mandatory injunction. In this respect, the applicant states that by publishing his cellphone contacts on national television and on its online platforms without his express consent, the respondent has exposed him to unwarranted calls and messages from members of the public, and that unless the injunctions sought in that regard are granted, then his reputation will continue to suffer.

19. On its part, the respondent is of the view that injunctions of a mandatory nature cannot be granted at this stage.

20. 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** 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...”

21. In the present instance, it is apparent that the applicant was not granted an opportunity to respond to the contents of the impugned publications beforehand and the respondent has not disputed the averment that the applicant's cellphone contacts were disclosed on the aforementioned platforms. It is also apparent that the impugned publications have wide coverage, both locally and internationally.

22. 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.

23. Consequently, I am convinced that the present circumstances would warrant the mandatory injunctions sought.

24. In conclusion therefore, I find merit in the Motion dated 26th October, 2021. The same is allowed thus giving rise to issuance of the following orders:

i. Pending the hearing and determination of the suit, a temporary injunction be and is hereby issued restraining the defendant/respondent, whether by itself, its agents, employees or any person acting under its instruction, from further publishing, posting, broadcasting or causing to be posted, published or broadcasted in any media or platform, any defamatory statements against the plaintiff, especially those related/linking him to the murder of Tob Cohen.

ii. Pending the hearing and determination of the suit, an order be and is hereby issued directing for the defendant/respondent whether by itself, its agents, employees or any person acting under its instruction, to remove all audio-visual clips in the defendant's YouTube channel, website and social media platforms that bears a recording of the plaintiff's cellphone number.

iii. THAT pending the hearing and determination of the suit, an order be and is hereby issued compelling the defendant/respondent whether by itself, its agents, employees or any person acting under its instruction, to remove all audio-visual clips from its YouTube channel, website and social media platforms that contain recordings or reporting on the allegation of the plaintiff's alleged involvement in the murder of Tob Cohen.

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

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30TH DAY OF DECEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent