



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 140 OF 2019**

**MARGARET NJOKI MWANGI.....PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED THE EDITOR...1<sup>ST</sup> DEFENDANT**

**NATION MEDIA GROUP LIMITED.....2<sup>ND</sup> DEFENDANT**

**BRIAN WASUNA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. In her Notice of Motion application dated 25<sup>th</sup> June 2019 and filed on 1<sup>st</sup> July 2019, the Plaintiff sought for orders that pending the hearing and determination of the suit herein, the Defendants, their agents, servants and/or anyone acting on their behalf be restrained from writing, printing, publishing, distributing/circulating, discussing, uttering and/or conveying defamatory and/or disparaging information in any manner against her, particularly, the allegations that had been published at pages (1) and (4) of Daily Nation newspaper of 26<sup>th</sup> November 2018 in an Article titled “**How we’ll deal with drug-link big shots and, Haji: How we’ll deal with Akasha-link fat cats**”.

2. The said application had also sought for orders that pending the hearing and determination of the suit, the Defendants be compelled to remove and erase all various posts, website, blogs or other forms of electronic and social media or any form or nature whatsoever the article or similar words or statements or content, of like effects relating to her.

3. In her affidavits in support of the said application that were sworn on 25<sup>th</sup> June 2019 and 10<sup>th</sup> September 2019, respectively she stated that the words complained of were understood to refer to her and were defamatory either on their face and/or by insinuation and innuendo. It was her contention that in singling her out in the said Article which had dealt with the measures the Deputy Public Prosecutor (DPP) was taking to deal with highly placed public officials who were said to have been frustrating the fight against drug trafficking, the words created an impression that she was one of the highly placed officials that were being targeted by the DPP for prosecution, that she was one of the judges the United States of America (USA) was investigating for possible extradition there, that she had been bribed by the Akasha brothers, that she was one of the corrupt judicial officers in the Kenyan Judiciary system and also one of the judges watering down the hard work that was being done by the other judicial officers in Kenya.

4. She also set out the various innuendo, the particulars of falsehood and the particulars of malice that could be discerned from the said Article. It was her contention that she had suffered and continued to suffer embarrassment, shame, discomfort and stress as a result of loss of reputation and the risk of being investigated by Judicial Service Commission (JSC) triggered by false and baseless allegations.

5. She further averred that the words were published without the 3<sup>rd</sup> Plaintiff having verified the same. She was emphatic that she did not intend to stop the Plaintiffs from making publications regarding the Akashas but that her concern was that they should not make any defamatory statements about her because reputation was all that a judge had. She therefore urged this court to allow her application as prayed.

6. In opposition to the said application, on 16<sup>th</sup> August 2019, the 2<sup>nd</sup> Defendant’s Head of Legal and Training, Sekou Owino, filed his Replying Affidavit on behalf of the Defendants herein. Notably, he did not execute the said Replying Affidavit. In addition, his said Replying Affidavit was not commissioned by a commissioner for oaths as provided in Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya).

7. In addressing the competency or otherwise of the said Replying Affidavit, this court had due regard to Order 19 Rule 7 of the Civil Procedure Rules, 2010 which states that:-

**“The court may (emphasis court) receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”**

8. It also considered Section 5 of the Oaths and Statutory Declarations Act which stipulates that:-

**“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall (emphasis court) state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”**

9. Notably, whereas in Order 19 Rule 7 of the Civil Procedure Rules, the court could exercise discretion to accept an affidavit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality as it makes reference to the word “**may**”, Section 5 of the Oaths and Statutory Declarations Act was couched in mandatory terms as it expressly sets out the word “**shall**.”

10. It was thus the considered opinion of this court the failure by Sekou Owino to execute his Replying Affidavit and/or swear the same before a commissioner for oaths who ought to have indicated the date and place where the oath was taken was made or taken was not a technicality that could be cured by Order 19 Rule 7 of the Civil Procedure Rules or Article 159(2)(d) of the Constitution of Kenya, 2010. It was not a matter of form but rather of substance for the reason that it was an oath that had not been properly administered by a commissioner for oaths. This therefore meant that the Plaintiff’s application was technically unopposed.

11. The above notwithstanding, this court noted that the Defendants could still rely on points of law in opposing the said application. They had duly filed their Written Submissions in which they had raised the said issues of law and in the circumstances this court considered the same in opposition to the Plaintiff’s present application.

12. In support of her case, the Plaintiff relied on several cases amongst them the cases of **Evans Kidero vs Standard Group Ltd & 4 Others [2015] eKLR**, **Jacob Mwando Wangora vs Hezron Mwando Kirorio [2017] eKLR** and **Alnashir Visram vs Standard Limited [2016] eKLR** that were listed in her List and Bundle of Authorities dated 17<sup>th</sup> September 2019, where different courts set out the principles of what constitutes defamation.

13. Notably, the said List and Bundle of Authorities did not bear the court stamp. However, the court noted that it was paid for as was evidenced in the court receipt Serial Number 0556593. The importance of filing documents in the proper manner cannot be understated because that is the only way that justice can be dispensed fairly as it avoids ambush because a court would be proceeding on only those documents that were properly before it and served on all participating parties in a matter. It was only on that ground that this court found it prudent to touch on the said List and Bundle of Documents for completeness of record.

14. On their part, the Defendants placed reliance on the cases of **Transcend Media Group vs Standard Group Limited [2017] eKLR**, **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] eKLR**, **Nahashon Ngige Nyagah vs Abdullahi Ahmednasir Maalim & 2 Others [2017] eKLR**, **Phineas Nyagah vs Gitobu Imanyara [2013] eKLR** amongst several other cases in support of their cases.

15. This court restrained itself from analysing and/or considering many of the decisions that had been cited by both the parties herein because they were in respect of the tort of defamation and there was risk of the court delving into the merits or otherwise of the Plaintiff’s case. Indeed, as was rightly pointed out by the Defendants, if the case on libel was interrogated at this point, it had the potential of embarrassing the trial court as this court’s conclusion would not necessarily be the conclusion the trial court would arrive at.

16. Having said so, it was evident from the submissions by both parties that they were on diametrically opposite sides on the question of whether or not the Article complained of was defamatory of the Plaintiff. The Plaintiff had argued that it was defamatory on the basis of innuendo and insinuations. On the other hand, the Defendants contended that the said Article was a fair and accurate report of the proceedings before a court of law in Kenya while exercising its judicial function and hence there was nothing defamatory about the said Article. Clearly, those were matters of evidence, best determined during trial.

17. At this juncture, the only concern of this court was to establish whether or not the Plaintiff had satisfied the conditions of being granted an order for interlocutory injunction as had been set out in the case of **Giella vs Cassman Brown & Co Ltd (1973) EA 358**. These principles were:-

**i. That an applicant must establish that he had a *prima facie* case with high chances of success;**

**ii. That the applicant would suffer irreparable loss that can be compensated by an award of damages if the order for interlocutory injunction is not granted; and**

**iii. That if the court was in doubt, it would decide the application on a balance of convenience.**

18. In the case of **Mrao Limited vs First American Bank of Kenya & 2 Others**(Supra) that was relied upon by the Defendants herein, the Court of Appeal held as follows:-

**“A prima facie case in a civil application includes but not confined to a genuine case and arguable case. It is a case on which the material presented court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

19. Applying the case of **Mrao Limited vs First American Bank of Kenya & 2 Others**(Supra) to the facts of this case, it was clear that the Plaintiff had an arguable *and/or prima facie* case. If it was to be determined by the Trial Court that the said Article was defamatory of her and an interlocutory injunction would not have been granted, she would have suffered ridicule and embarrassment for as long as the Article remained intact in the aforesaid platforms. This would have caused her to suffer irreparable harm that could not be compensated by way of damages. This is because the information remained firmly in the electronic, social media platforms and wide world web yet as a judge, she would have been expected to be above reproach in the discharge and/or performance of her judicial functions.

20. As it was not clear in whose favour the case would be determined after trial, it was the considered view of this court that it would be in the interests of justice that an interlocutory injunction be given on a balance of convenience.

21. This court was therefore satisfied that the Plaintiff had met all the conditions that had been set out in the case of **Giella vs Cassman Brown Co Limited** (Supra).

22. Turning to the question of removal the Article from the various platforms aforesaid, this court noted that this was a very final order. In the case of issuance of an interlocutory mandatory injunction, an applicant must demonstrate existence of special circumstances. In the **Halsbury's Laws of England Volume 24 4<sup>th</sup> edition at Paragraph 98**, the authors observed 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 ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application.”**

23. It was this court's considered opinion that this was not an open and shut case as the parties wished it to believe of their cases. Indeed, the facts by both sides ought to be presented and tested during trial to determine whether or not the Plaintiff would have been able to prove her case on a balance of probability, which is the standard to be adopted in civil cases and whether or not the Defendants would have persuaded the Trial Court that the Article was a fair comment on a matter of public policy written on an occasion of qualified privilege.

24. This court was aware that the Defendants' freedom of expression ought not to be gagged for the reason that their fundamental right of freedom of expression is enshrined in Article 33 (1) (a) of the Constitution of Kenya, 2010. On the other hand, as this court had found, there was likelihood of the Plaintiff suffering irreparable loss that would not be compensated by way of damages if it was eventually determined that the Article had been defamatory of her hence the need to protect her reputation.

25. This was particularly because while the Defendants had argued that they reported what actually transpired in court, she had based her case on the implications of mentioning her name in an Article that purported that there were fat cats in the case of the Akashas who were frustrating the war on drug trafficking. In such circumstances, there was a duty on the part of the court to do substantive justice and balance the parties' respective rights as guaranteed in the Constitution of Kenya, 2010. The Plaintiff had a right to have a fair trial as envisaged in Article 50(1) of the Constitution of Kenya while the Defendants had a right to freedom of expression as guaranteed in Article 33(1)(a) of the Constitution of Kenya.

## **DISPOSITION**

26. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 25<sup>th</sup> June 2019 and filed on 1<sup>st</sup> July 2019 was merited and the same is hereby allowed in the following terms:-

**1. THAT pending the hearing and determination of the suit herein, the Defendants, their agents, servants and/or anyone acting on their behalf be and are hereby restrained from writing, printing, publishing, distributing/circulating, discussing, uttering and/or conveying defamatory and/or disparaging information in any manner against the Plaintiff, particularly, the allegations that had been published at pages (1) and (4) of Daily Nation newspaper of 26<sup>th</sup> November 2018 in an Article titled “How we'll deal with drug-link big shots and, Haji: How we'll deal with Akasha-link fat cats”.**

**2. THAT pending the hearing and determination of the suit herein, the Defendants be and are hereby directed to expunge and/or redact in whichever and whatever means available, from all various posts, website, blogs or other forms of electronic and social media or any form or nature whatsoever the following words concerning the Plaintiff:-**

**“On the day of their extradition, Mombasa High Court Judge Njoki Mwangi issued an order barring police boss Joseph Boinett and then Director of Criminal Investigations Ndegwa Muhoro from extraditing the drug barons. She also ordered that the Akasha brothers be produced before her.”**

**3. The Plaintiff be and is hereby directed to file an undertaking as to damages within the next fourteen (14) days from the date of this Ruling.**

**4. Costs of the application will be in the cause.**

27. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **28<sup>th</sup>** day of **May** 2020

**J. KAMAU**

**JUDGE**