



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL CASE NO.E1 OF 2020

HON ELISHA OCHIENG ODHIAMBO.....PLAINTIFF/APPLICANT

VERSUS

BOOKER NGESA OMOLE.....DFENDANT/RESPONDENT

RULING ON AN INTERLOCUTORY INJUNCTION

1. The plaintiff/applicant herein is **ELISHA OCHIENG ODHIAMBO**, Member of Parliament for Gem Constituency in Siaya County. He brings this suit against the Defendant/Respondent **BOOKER NGESA OMOLE** vide plaint dated 24th September 2020 and simultaneous with the said suit, he brings this application dated 24th September 2020 seeking for interlocutory injunctive orders namely:

1. Spent

2. Spent

3. That this court be pleased to rant a temporary injunction to restrain the defendant by himself, or through any of his servants and agents from uttering any defamatory words, publishing any defamatory information, verbally or in writing to individuals, groups, on social media platforms, newspapers or magazines, of or concerning the plaintiff pending the hearing and determination of this suit

4. And an order restraining the Defendant from holding or conducting demonstrations or public protest of or concerning the Plaintiff pending the hearing and determination of this suit.

5. That the Officers from Akala Police Station and Yala Police Stations to ensure compliance of the orders issued

6. Costs of the application be in the cause.

2. The application is predicated on eight grounds on the face of the Notice of motion and a supporting affidavit sworn by **HON ELISHA OCHIENG ODHIAMBO** the plaintiff/ applicant herein on 24th September 2020. The applicant also annexed several documents in support of his depositions.

3. The plaintiff/ applicant claims that on 3rd September 2020, the Defendant circulated on various social media platforms a letter dated 23rd August 2020 concerning the Plaintiff whose contents are false and defamatory. The allegations where that the Plaintiff had stolen about **KES. 1,000,000.00** which amount was to go towards the building of **Masinde Primary School** Administration Block (hereinafter referred to as the Project) that the Defendant claimed to have already built save for some minor works worth less than **KES. 100,000.00** to complete the building block.

4. On the same day, the Defendant is alleged to have attended an interview at Ramogi FM station which has a wide audience of the Plaintiff's tribe and constituents and uttered words which were false and defamatory against the Plaintiff.

5. The Defendant is further alleged to have organized and conducted chaotic demonstrations within Gem constituency where the Defendant continued to defame and falsely accuse the Plaintiff of theft of public funds without verifying the correctness of such claims.

6. The plaintiff claims that the Defendant continued to defame the Plaintiff on social media platforms and public gatherings until this Honourable Court granted temporary orders restraining the Defendant.

7. It is on the basis of the above allegations that this suit and application was initiated by the plaintiff against the Defendant.

8. Opposing the application by the applicant/ plaintiff, the defendant/ Respondent filed a Replying affidavit and supplementary affidavit contending among others that he never published any defamatory matter against the plaintiff and that the Application is devoid of any merit, and is intended to drag this Honourable Court into a political and an anti-corruption dispute therefore bringing the Honourable Court into disrepute.

9. The defendant also provides what he considers to be the genesis of the dispute between him and the plaintiff, being political rivals and maintains that the plaintiff was using the development carried out by the defendant to his credit yet it was NGCDF money that completed the construction project which the defendant had commenced and substantially constructed with his own resources.

10. The application was canvassed by way of written submissions which this court has considered together with the constitutional, statutory and case law cited by both parties' advocates on record, in reaching this determination and finds no reason to reproduce the said submissions here.

DETERMINATION

11. I have carefully considered this application, the replying affidavit and further/supplementary affidavit together with the detailed rival submissions by and the authorities relied upon by the parties.

12. The main issue for determination is whether the plaintiff/applicant is entitled to injunctive orders sought in the application dated 24th September, 2020. The application before court is not an ordinary injunction application. It is for an injunction in a suit for defamation. This court will, however, not reinvent the wheel. The legal threshold for grant of injunctions in defamation cases is beyond the type espoused in the **Giella v Cassman Brown & Company Ltd** case [173]EA.358. The principles were well captured in the case of **MICAH CHESEREM Vs IMMEDIATE MEDIA SERVICES (2000) 1EA 371** where it was held:

*“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in **Giella vs Cassman Brown & co. Ltd (1973) EA 258** generally apply. In defamation case 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 the greatest caution so that an injunction is granted only in the clearest possible cases(Emphasis mine) The court must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Normally the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a humane, responsible, truthful and trustworthy defendant.”*

13. The dynamic nature of law on injunctive relief is well enunciated in the case of **SULEIMAN vs. AMBOSELI RESORT LTD (2004) E KLR 589** by Ojwang Ag. J (as he then was) at page 607 when he the learned Judge rendered himself as follows:

*‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in **Giella Vs Cassman Brown, in 1973** cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before.*

14. It follows that in defamation cases, while applying the traditional and the well-accepted principles set out by the Court of Appeal in **GIELLA vs. CASSMAN BROWN** the court should also consider other special factors which will be largely founded on the circumstances of the case, freedom of expression and public interest that the truth should be out. In such case, the court must establish whether it is a clear case in which an injunction should issue, balancing out the freedom of speech and right not to be defamed. The court in such cases is expected to take a course that appears to carry the lower risk of injustice if it should turn out to have been “wrong”. See Justice Hoffman in the English case of **FILMS ROVER INTERNATIONAL (1986) 3 All ER 772** at page 780-781.

15. On whether there is prima facie case established against the Respondent Defendant, Prima facie case in the context of the law was set out in the case of **MRAO LIMITED Vs FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) IKLR 125** at page 137, to be:-

“..... 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.”

16. The question in this case is whether the Plaintiff/ Applicant established a prima facie case with a probability of success. The Plaintiff/ applicant claims that on 2nd September 2020 the Defendant/Respondent falsely and maliciously published and posted or caused to be published and posted on various social media platforms a letter dated 23rd August 2020 concerning the Plaintiff in the following words:

“To stop all the flagrant theft under your watch and stop the primitive accumulation of wealth, I had made several efforts to appeal to your conscience, that men are not respected by how much money they steal but the ideals they defend when they were entrusted in positions of service.”

I was shocked to realize that you have used the project to account for the funds of over KES.1, 000,000.00 at the CDF Kitty. I have been informed that the CDF office managed to complete the 10% of works that were pending on the said project. It has been widely covered in the local press of your corrupt activities, so this did not get me by surprise. What I found wanting is the arrogance of the theft and your courage and the school head to try and cover the truth.”

“ I would also like to remind you that you will be held personally responsible for your economic and criminal crimes.”

17. I note that the impugned letter which is alleged to bear defamatory meaning as against the plaintiff/applicant herein is addressed to the plaintiff and is not copied to any other person. However, the Plaintiff deposes that the said letter was sent to him by one of his constituents on the same day that it was written and at 11am, which letter the defendant is said to have stated during his radio interview to have written to the plaintiff over the allegations that the plaintiff had fraudulently obtained from Gem NG CDF funds. The said letter was also alleged to have been circulated in various WhatsApp groups that deliberate on Gem Constituency matters. The plaintiff claims that the allegations by the defendant against the plaintiff are false, malicious and defamatory of him.

18. The applicant further deposed that the defendant had organized a series of demonstrations against the plaintiff/ applicant from 28th September 2020 within Gem Constituency where the defendant would continue to malign and defame the plaintiff.

19. The plaintiff/applicant also annexed to is supporting affidavit copies of writings posted on Facebook account in his capacity as Vice Chairman of Communist Party of Kenya, exposing what he calls **FLAGRANT THEFT AND MISAPPROPRIATION OF PUBLIC RESOURCES IN GEM Constituency under the watch of ELISHA OCHIENG ODHIAMBO, Member of Parliament, over Kshs 1, 000, 0000 which has been stolen in the MASINDE PRIMARY SCHOOL ADMINISTRATION Case,**

20. In another post the defendant is calling on **all Kenyans to escalate the offensive and says the big demonstration will be held on Monday September 28th1 DRIVE THE THIEVES OUT!. Other posts call on the arrest, trial and jailing of the applicant herein.**

21. The defendant is further alleged to have given an interview at Radio Ramogi station on 2nd September 2020 wherein he allegedly repeated the same words contained in his letter of 7th September 2020.

22. The defendant denies defaming the applicant and contends that he stands for accountability in the usage of resources. Further, that having been the person who contributed substantially to the construction of the Administration Block at **Masinde Primary School. He** was shocked to find that he plaintiff was bragging in the social media that he had spent Kshs 1 million CDF funds towards construction of the same building which was not true. He claims that he is the plaintiff's political opponent and that his freedom of conscience, belief and opinion, speech, expression and the right to picket as guaranteed by the Constitution should not be curtailed by this court.

23. Having considered all the above, I reiterate that in defamation cases, the court's discretion in granting an injunction is exercised with the greatest caution such that an injunction will be granted only in very clear cases. The reason for this position of the law is that on the one hand is freedom of speech and right of information, and on the other hand is right not to be defamed or. **See Article 33 of the Constitution).** These two rights and freedoms are competing in a sense and will have to be balanced by the court to an almost symmetrical bound in order not to impede free and legitimate expression of speech but also prevent injury to persons through libel or slander. Thus, the court must be satisfied that, on prima facie basis, the evidence presented before court, the words or matter complained of are so manifestly libelous and defamatory that any verdict to the contrary would be perverse.

24. I have examined the words published in the defendant's Facebook page. The defendant does not deny publishing the said words. The words used in their plain meaning and purport carry libelous and defamatory remarks. Calling a person a thief, and a fraudster in a Facebook page and in a radio station interview, which radio is widely listened to by third parties, writing a letter to a person and disseminating it to other persons through social media and other platforms smells of libelous and defamatory odor.

25. More so, it is not lost to this court that Defendant Respondent is of sufficient understanding that such serious allegations which border on corruption and economic crimes ought to be raised before the relevant state organs such as the EACC which deal with such issues. In addition, calling out **on all Kenyans to escalate the offensive** smacks of what Article 33 (2) of the Constitution expressly prohibits. The Article provides:

“The right to freedom of expression does not extend to-

(a) Propaganda to war;

(b) Incitement to violence;

(c) Hate speech; or

(d) Advocacy of hatred that-

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27(4)

26. Further, **Article 33(3) of the Constitution provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.**

27. In the humble view of this court, the Defendant is entitled to formally lodge his complaint to the relevant agencies that tackle corruption and economic crime for appropriate investigations and not to try and convict the plaintiff through mobs. Mob injustice is not one of the recognized modes of justice delivery and is not the same as the right to picket and picket or demonstrate peacefully. Once a complaint

regarding misappropriation of public funds is lodged, there are other procedural safeguards that will kick in and the matter will assume a different complexion altogether.

28. To that extend I find that the applicant has established a prima facie case with high probability of success to warrant grant of the injunction sought.

29. On whether there will be any irreparable harm occasioned to the plaintiff/applicant unless the injunction sought is granted, I reiterate that the right to freedom of expression must be balanced against the other party's right to inherent dignity and not to be vilified by others or to propagate for war or advocate hatred or incitement to violence.

30. The defendant calling out on all Kenyans to escalate the offensive is a language that can easily be encoded to generate violence during demonstrations. As correctly submitted by the plaintiff's counsel, the right to assemble, demonstrate, picket and petition as enshrined under Article 37 is not absolute. It is not one of the Article 25 rights. It may be limited by law and where it is shown that it has been justifiably limited or ought to be limited, the court has to intervene and stop the enjoyment of such rights. Further, it is true that the Constitution itself has provided claw-backs. Demonstrators, picketers and petition-presenters must do so "peaceably and unarmed." Assemblies, picketing and demonstrations which are not peaceful are excluded from the protection of the Article, if they consist of violence or intimidation of the public. This right is regulated by the **Public Order Act, Chapter 56**.

31. In **Hon. Ferdinand Ndung'u Waititu & 4 others Vs. The Hon. Attorney General & 9 Others Petition No. 169 of 2016** the court stated that:

"It certainly would be an antithesis of constitutional values and principles if picketers and demonstrators are allowed to participate in non-peaceful demonstrations or pickets whilst armed with implements set to stimulate aggression. It is therefore no surprise when the Constitution itself limits the right to assemble, to demonstrate, to picket and to present petitions."

32. In my view, there will be more irreparable harm to the plaintiff/applicant than to any public if the defendant, his agents or servants are not tamed by a restraining order from uttering /disseminating such publications of and concerning the plaintiff, and or undertaking demonstrations which by their very nature, from the defendant's Facebook publication, call "**out to all Kenyans to escalate the offensive.**"

33. On the other hand, I do not phantom any injury that the public is likely to suffer should the defendant be restrained from disseminating similar information to the public concerning the plaintiff. In other words, the balance of convenience tilts in favour of the plaintiff. In **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR** the court in dealing with the issue on balance of convenience stated:

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies. "

34. In my humble view, prima facie there are special circumstances in this case that warrant a temporary injunction to issue, restraining the defendant, **BOOKER NGESA OMOLE** his agents, servants or proxies from publishing any defamatory matter or information verbally or in writing to individuals, groups, on social media platforms, newspapers or magazines of or concerning the plaintiff **HON ELISHA OCHIENG ODHIAMBO** of or concerning the plaintiff, pending the hearing and determination of this suit and I so order.

35. For record purposes, this court is apolitical and cannot be intimidated with statements such as being brought into disrepute for hearing and determining a dispute of this nature as alleged by the defence. Article 159 of the Constitution is clear that Judicial Authority is derived from the people and vests in and is exercised by the courts and tribunals established by or under the Constitution. In exercising judicial authority, this court is guided by the principles espoused therein including-justice shall be done to all irrespective of status; and the purposes and principles of the Constitution shall be protected and promoted.

36. In addition, under Article 160 of the Constitution, this court in exercise of judicial authority is subject only to the Constitution, and the law and shall not be subject to the control or direction of any person or authority

37. Under Article 50(1), every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court, or, if appropriate, another independent and impartial tribunal or body. It follows that the fact that the dispute is between two political rivals and that it concerns matters accountability of public resources, this court cannot be cowed from hearing and determining such disputes for fear of being brought into disrepute. This is because in determining the dispute, this court being apolitical, cannot be drawn into the arena of the dispute and be clouded by the dust therein. The court remains an independent arbiter to the end, and will hear and determine any dispute before it, where it has jurisdiction to do so, without fear or favour.

38. Having allowed the application, I order that Costs shall abide the outcome of the main suit.

39. I further order that pursuant to Order 40 Rule 2(2) of Civil Procedure Rules, and in order not to let the plaintiff get the temporary injunctive order herein and develop an inertia, the plaintiff shall file all documents intended to be relied upon in the prosecution of this suit within 15 days of this ruling and the Defendant too do file and serve his documents within 15 days of the date of service and that both

parties shall comply with pretrial requirements under Order 11 of the Civil Procedure Rules within 30 days of this ruling and set in motion the process of readying this suit for hearing and determination within a period 90 days of the date hereof failure to which the temporary injunction granted herein against the defendant shall lapse unless otherwise ordered by the court.

40. Mention on 24th November 2020 to confirm compliance with Order 11 of the Civil Procedure Rules and for pretrial conference.

41. Orders accordingly.

Dated, signed and delivered at SIAYA this 22nd Day of October, 2020

R.E.ABURILI

JUDGE