



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO. E106 OF 2020**

**PETER KENNETH.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**TONY GACHOKA.....DEFENDANT/RESPONDENT**

**RULING**

1) Peter Kenneth the plaintiff herein, took out the motion dated 4<sup>th</sup> September 2020 whereof he sought for the following orders to be given:

***i. This application be certified as urgent and service of thereof be dispensed in the first instance.***

***ii. Pending the hearing and determination of the application inter parties, a temporary injunction be issued restraining the respondent from keeping posted, tweeting/posting publishing and broadcasting the offensive tweets, posts, words, publications and utterances and the statements attributed to one Peter Kenneth which were published on the respondent's twitter handle on 22<sup>nd</sup> August 2020.***

***iii. Pending the hearing and determination of the application inter parties, a temporary injunction be issued restraining the respondent from divulging and/or causing to be divulged or published, any story and/or documents relating and/or connected to the case herein.***

***Inter-parte orders***

***iv. Pending the hearing and determination of the suit, a temporary injunction be issued restraining the respondent from keeping posted, publishing or causing to be published in any way whatsoever, any news items, statements, articles, words, images, pictures and caricatures on internet, newspapers, facebook, twitter, youtube and whatsapp or any medium whatsoever statements make reference to the applicant PETER KENNETH in any manner or designation whatsoever.***

***v. Pending the hearing and determination of the suit, a temporary injunction be issued restraining the respondent from divulging and/or causing to be divulged or published, any story and/or documents relating and/or connected to the case herein.***

***vi. Pending the hearing and determination of this suit, a mandatory injunction be issued compelling the defendant/ respondent to pull down/withdraw defamatory remarks and or statements about the plaintiff/applicant posted on his twitter account and other social media outlets.***

***vii. An order be issued compelling the defendant/respondent to post an apology on her twitter account as well as all other social media outlets within her scope of operation.***

***viii. This honourable court grants any other relief that it may deem fit.***

2) The plaintiff filed a supporting and a supplementary affidavit he swore in support of the motion.

3) When served with the motion, Tony Gachoka, the defendant herein, filed a replying affidavit he swore to oppose the motion. When the motion came up for interpartes hearing this court issued orders to have the application disposed of by written submissions.

4) I have considered the grounds stated on the motion dated 4<sup>th</sup> September 2020 and the facts deponed in the affidavits filed in support and against the application. I have also taken into account the rival written submissions plus the authorities cited by both sides. The plaintiff

averred that on 22<sup>nd</sup> and 23<sup>rd</sup> August 2020, the defendant published statements defamatory of the plaintiff on his twitter handle.

5) He pointed out that the defendant identified the plaintiff both in name and description and even published his photograph. The plaintiff further stated that the defendant alleged that the plaintiff is involved in the suspected looting of public funds which allegation the plaintiff stated damaged his reputation and character.

6) The plaintiff further averred that he has not been adversely mentioned as under investigation of the allegations. The plaintiff attached to his affidavit copies of the excerpts of the defendant's alleged offensive statements as follows; On 22.8.2020 the defendant wrote besides the plaintiff's photograph with a group of friends:

**“Are there ..... the Covid 19 billionaires T.G.....”**

7) On 23<sup>rd</sup> August 2020 at 7.48hrs it is alleged the defendant referred to the plaintiff by name and description as follows:

**“Kenya good morning. When will Peter Kenneth who funded comen to KEMSA ever speak out against the Covid 19 scandal. He is part of David Murathe. T.G”**

8) On the same date at 10.35hrs it is alleged that the defendant published while referred to the plaintiff both by name and description as follows:

**“Peter Kenneth FUNDED Murathe with the money to attempt the mass looting of Covid 19 billions. It took great courage for Mutahi Kagwe to cancel the 4.5 billion tender that E.A.C.C is investigating. T.G Peter is associated with the bank that funded the Covid 19 billionaires. T.G”**

9) At 11.45hrs on 23<sup>rd</sup> August 2020 the defendant is alleged to have referred to the plaintiff by name and description in his publication as follows:

**“David Murathe was behind the Covid 19 billionaires scandal with Peter Kenneth funding. T.G”**

10) The plaintiff stated that he was not involved in any way in the alleged misappropriation and or theft of public funds. He averred that he is a distinguished businessman with a stellar record in corporate world and a law abiding citizen. The plaintiff averred that the publications depicted him as a looter of public funds and that he became a Covid 19 billionaire by looting public funds appropriated to deal with a public health emergency.

11) It is further the submission of the plaintiff that the defamatory tweets, posts, utterances or statements have been trending widely in social media hence exposing him to immense losses, damage and prejudice. It is also argued that the publication is being widely shared and members of the public are making comments and that there exists no means to aid or stop the unceasing defamation save for the injunctive relief from this court.

12) The defendant opposed the motion arguing that he is a professional journalist of many years standing and therefore has a duty and right to inform the public on all matters touching on the nation. He pointed out that there have been ongoing investigations by Ethics and Anti-corruption Commission and the Directorate of Criminal Investigations into the plunder of billions of money meant to cushion Kenyans from the adverse effects of Covid 19.

13) The defendant further averred that the alleged publication of the statements were done in discharge of his professional calling, a duty he has done with candour and as a fair comment on a matter of public interest. It is argued that the complaint raised by the plaintiff is in respect of embezzlement of Covid 19 funds which is a matter of great public interest which interest far outweighs the personal interest of the applicant.

14) The defendant further stated that Article 34(1) of the Constitution of Kenya, 2010 guarantees him freedom of electronic, print and all other types of media subject to the limitation under articles 24 and 33(2) of the Constitution of Kenya 2010.

15) The defendant also argued that the determination of the question as whether or not the statements in questions are defamatory is the preserve of the trial court in a full trial court and not at this interlocutory stage. The defendant further argued that an order of injunction can only be granted in defamatory matters only in the clearest of cases.

16) Having considered the rival arguments put forward by both sides, it is apparent that the defendant does not dispute having published the statements the plaintiff complained of. It is also not in dispute that the question as to whether or not the statements complained of are defamatory can only be answered in a full trial.

17) The principles to be considered in determining an application for injunction were restated in the case of **Micah Cheserem vs Immediate Media Services (2000) 1EA 371** where the court held *inter alia*:

**“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they being out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunction 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. 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.”*

18) I think the first principle this court should consider is whether this case can be categorized a clear cut case. The defendant has stated that this case is one of the clearest cases. The defendant cited the case of **Ibrahim Mukhtar Abasheikh =vs= Royal Media Services & Another (2020) eKLR** in which it was held *inter alia* that a clear case would have been proved where the applicant after showing that the words are manifestly defamatory the plaintiff must also show that they were made with malice.

19) The defendant further argued that where the defendant has raised the defence of justification, public interest or as fair comment, an order of injunction should not be granted.

20) The plaintiff is of the submission that his case is a clear cut case therefore the order for injunction should be granted.

21) Having considered the rival submissions, it is apparent that a clear cut case will manifest itself where the statement or words complained of is prima facie defamatory and appear to have been made in a reckless manner. A cursory look at the statements complained of in this case will reveal that the same depicts the applicant as a thief who enriched himself through the looting of public funds.

22) It also depicts the plaintiff as a corrupt person and a financier of criminal activity. The statement further depicts the plaintiff as connected to conmen at KEMSA. The defendant has stated that the statements were made in public interest and justified the same as fair comment.

23) The defendant also stated that the scandal at KEMSA is being investigated by Ethics and Anti-Corruption Commission together with the Director of Criminal Investigations. The defendant did not offer any iota evidence to back up his claim.

24) Having considered the material placed before this court, I am convinced that this is one of those clearest cases that may necessitate issuance of an interlocutory order of injunction.

25) The second principle to be considered is that an applicant must show that he has a prima facie case with probability of success. The plaintiff/applicant has stated that statements published in the defendant's twitter page clearly identified the applicant including his photograph. The plaintiff pointed out that those statements are defamatory and untrue.

26) The defendant has admitted having published the statements.

The defendant avers that those statements are fair comment and in public interest. The determination of the above issues can only be done in a trial.

27) The third principle to be considered is that an applicant must show that unless the order for injunction is granted he would suffer irreparable loss. The plaintiff submitted that he stands to suffer irreparable damage unless the order for injunction is granted. He pointed out that he is a well known Kenyan as a former Member of Parliament, a businessman and an outstanding Christian. He argued that the false statements by the defendant serve to erode the reputation he enjoyed throughout his personal, political, religious and business life.

28) The plaintiff argued that such a reputation once damaged, cannot be redeemed by way of payment of damages since reputation cannot be quantified in monetary terms.

29) On his part, the defendant submitted that the plaintiff has failed to prove that he will suffer irreparable loss if the injunctive order is refused. He pointed out that an injunction will not issue where the public interest override the private interest and also where the defendant can be compensated by way of damages.

30) The defendant went ahead to argue that the issue complained of by the applicant on embezzlement of public funds is of utmost public importance since it involves corruption.

31) I have considered the rival submissions and I am persuaded by the plaintiff's submission that he will suffer irreparable loss which cannot be compensated in monetary terms if the order of injunction is denied. The question as to whether the defendant's defence of fair comment and public interest is valid can only be established through a full trial. A personal reputation and integrity once lost cannot in my view be compensated in monetary terms. I am therefore convinced that unless the order for injunction is granted the plaintiff will suffer irreparable loss.

32) The final principle is the balance of convenience. Where the court is in doubt, it would decide the application on a balance of convenience. It is the plaintiff's submission that the balance of convenience tilts in his favour. The plaintiff further argued that his reputation has been damaged by the defendant's twitter posts. It is pointed out that the defendant's twitter post is about the ongoing corruption investigations where the defendant has alleged that the plaintiff has been involved in theft of public funds.

33) The plaintiff averred that the allegations by the respondent are continuous defamation on a public platform that is viewed by anyone who can access twitter and in any case a simple online search engine will generate the posts by the respondent which is defamatory of the plaintiff. In sum, the plaintiff argued that he stands to suffer damage as members of the public can comment on it without him defending himself while the defendant stands suffer no prejudice other than twitter page.

34) The defendant is of the submission that if an order of injunction were to be granted to the plaintiff, he and the public will suffer since the matter at hand is of utmost public importance and interest. According to the defendant the harm to the public overrides that of an individual.

35) Having considered the rival submissions, I am satisfied that the plaintiff has been able to show that the balance of convenience tilts in his favour. The question on whether the defendant's statement were published in public interest is a matter which can only be established in a trial. At the moment there is no credible evidence to establish the defence of public interest. I am convinced that if the order of injunction is not given the plaintiff may stand to suffer as the public can continue to comment since the statement or the publication are on a public platform that is viewed by the public. Therefore the balance of convenience tilts in favour of the plaintiff.

36) The defendant has argued that the freedom of expression is guaranteed under Article 33(1) of the Constitution 2010 hence this court should not limit the same. The plaintiff pointed out that the freedom of expression guaranteed under Article 33(1) is also limited under Article 33(3) of the Constitution.

37) With respect, I agree with the submissions of the plaintiff that though the freedom of expression is guaranteed under Article 33(1) of the constitution the same is limited under Article 33(3) which placed the responsibility upon any person to respect the rights and reputation of others. The plaintiff has clearly pleaded that his reputation has been damaged by the defendant's statements.

38) At the trial, this court will determine whether the defendant damaged the plaintiff's reputation contrary to the provisions of Article 33(3) of the constitution.

39) In the end, I find the plaintiff's motion to be well founded. I am of the view that prayer 7 which seeks for an order to compel the defendant to post an apology cannot be issued at this stage. It can only be issued after a full trial has been conducted.

40) Consequently, the motion is allowed thus the following orders are issued:

*a) Pending the hearing and determination of the suit, a temporary injunction be issued restraining the respondent from keeping posted, publishing or causing to be published in any way whatsoever, any news items, statements, articles, words, images, pictures and caricatures on internet, newspapers, facebook, twitter, youtube and whatsapp or any medium whatsoever statements make reference to the applicant PETER KENNETH in any manner or designation whatsoever.*

*b) Pending the hearing and determination of the suit, a temporary injunction be issued restraining the respondent from divulging and/or causing to be divulged or published, any story and/or documents relating and/or connected to the case herein.*

*c) Pending the hearing and determination of this suit, a mandatory injunction be issued compelling the defendant/respondent to pull down/withdraw defamatory remarks and or statements about the plaintiff/applicant posted on his twitter account and other social media outlets.*

*d) Costs of the application to bide the outcome of this suit.*

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 27<sup>th</sup> day of November, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

.....for the Defendant/Respondent