



**REPUBLIC OF KENYA**

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

**HCC NO. 19 OF 2020**

**WINNIE JEMATOR BORE.....PLAINTIFF/APPLICANT**

**VERSUS**

**MOSES CHIRCHIR.....DEFENDANT/RESPONDENT**

**RULING**

1. This a ruling on the plaintiff's application dated **16<sup>th</sup> June, 2020** seeking to **restrain the defendant either by himself, agents and/or proxies from posting, publishing and/or uttering information about the plaintiff pending the hearing and determination of this suit.**
2. Grounds on the face of the application is that the applicant is the Chief Officer, Preventive-Promotive Health Service within the County of Baringo and the defendant/respondent has on several occasions been posting and/or publishing defamatory allegations on WhatsApp forum of financial impropriety against the plaintiff which touch on her integrity.
3. That the respondent has continued to post and or publish the said defamatory remarks even after filing this suit thus continuing to disparage her name and unless restrained, the respondent will proceed with publication and posts riddled with false information.
4. The application is supported by affidavit sworn by the applicant on 16<sup>th</sup> June 2020.
5. She averred that the respondent who is the Sub-County Public Health Nurse has on diverse occasions and without verification and or reasonable cause, posted and/or published on WhatsApp forum for health professionals, various allegations of impropriety against her which posts are untrue and defamatory; and despite issuing demand for apology, and retraction of defamatory posts and publications by the defendant, he ignored the same prompting her to lodge this defamatory claim on 27<sup>th</sup> May 2020.
6. She averred that the defendant has continued to post and publish the defamatory claim despite this suit being filed and served on him; that the posting and/or publications by the defendant and his co-conspirators are meant to assassinate her character for their own gain.
7. She further averred that she has been subjected to mental and/or emotional torture by the continued publication and or posting the defendant/respondent.
8. In response the 1<sup>st</sup> respondent filed grounds of opposition dated 15<sup>th</sup> July 2020. The grounds are that the application is bad in law, misconceived, incompetent and an abuse of Court process.
9. That the application has not provided any evidence to demonstrate that the WhatsApp transcripts annexed to her affidavit are directed at her and/or gave reference to her person in any way; that there is no mention of the plaintiff and/or inference can be drawn to impute ill will and/or malice in the postings against the applicant and/her person; that she has not provided prove of how she has been defamed through the transcripts attached to the supporting affidavit.
10. The respondent stated that the applicant has failed to establish a prima facie case and the balance of convenience therefore tilts against granting orders sought; that the plaintiff has not shown that she has suffered or is likely to suffer any loss. That the prayers sought if granted shall have the effect of limiting the defendant's constitutional freedom and should not be granted without concrete evidence.
11. Counsels herein argued the application orally. **Ms. Amulabu**, Counsel for the applicant relied on the grounds on the face of the application already captured above. She argued that the respondent does not deny uttering defamatory statement but all he is saying is that the statement does not refer to the applicant. She referred to paragraph 6 of the plaint and said it refers to Chief Officer and the plaintiff is the Chief Officer; she submitted that the texts of 19<sup>th</sup> October 2020 and 25<sup>th</sup> April 2020 refer to Chief Officer by saying CEO as a usual thief. She submitted that these messages were sent after filing of this suit and if the respondent is not restrained, he will continue defaming the applicant and it will affect her service, standing in the society and hinder her career progression.

12. Counsel for the applicant submitted that restraining orders if granted will not cause any suffering to the defendant; she prayed that the orders be granted so as to promote the principles of constitutionalism and rule of law.

13. In response, **Mr. Nanda** for the respondent submitted that in addition to grounds in opposition of the application, the application is not merited and urged Court to dismiss it as it seeks drastic orders aimed at restraining the respondent's right to expression; further that the applicant has failed to prove any prima facie case to warrant orders sought; that the nature of orders sought can only be granted in the clearest of circumstances.

14. Counsel for the respondent submitted that the jurisdiction of this Court in granting the orders sought is so delicate as it may curtail one's constitutional right and curtailing individual's expression can only be done under **Article 33(2) of the constitution** and grounds under **Article 33(2)** have not been satisfied. He submitted that the grounds presented by the applicant are clearly to cover the mind of this Court so that orders sought may be granted.

15. Counsel cited the case of **Ahmed Adan Vs Nation Media Group & 2 others [2016] eKLR** where the Court held that the High Court has jurisdiction to grant interlocutory injunction in defamation cases but only in the clearest cases and submitted that this is not one of those clearest cases; that the plaintiff has not demonstrated that the statement was made in reference to her.

16. In a rejoinder, **Ms. Amulabu** submitted that the plaintiff has demonstrated a prima facie case as set out in the case of **Cassman Brown**; that they have established that the plaintiff has suffered injury; that his reputation has been injured as the remarks have been read by all the employees and the injury cannot be compensated by damages. She submitted that the balance lies with the applicant.

17. In respect to provisions of **Article 33(2) of the constitution**, counsel submitted that the remarks amount to hate speech and is advocating hatred among nurses in Baringo.

18. She submitted that the remarks were directed to the applicant as the defendant/respondent has not brought up another person who holds the office; that the WhatsApp messages are referring directly to the office the applicant holds in Baringo County. She urged Court to allow the application.

#### **ANALYSIS AND DETERMINATION**

19. I have considered arguments by both parties herein. I have also perused the plaint and in particular paragraph 6 together annexures to the affidavit in support of this application.

20. The application before Court is not an ordinary injunction application. It is for an injunction in a suit for defamation. I do not, however, wish to re-invent the wheel. The legal threshold for grant of injunctions in defamation cases is well captured in the case of **Micah Cheserem Vs Immediate Media Services (2000) 1EA 371** where the court held as follows:-

**“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. 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.”**

21. The respondent's argument is that the applicant has failed to establish prima facie case to warrant grant of orders sought; that the applicant has failed to demonstrate that the alleged posts are directed to her and if orders sought are granted, it will curtail the respondent's constitutional right to expression.

22. **Gatley on libel and slander, 10th Edition** paragraph 7.2 state as follows:-

**“It is sufficient if he is described by nickname, his initial letters, or by the first and last letter of his name, or even by asterisks, or blank, or if he is referred to under the guise of an allegorical, historical, fictitious or fanciful name, or by means of description of his status, physical peculiarities, or by recognizable likeness or caricature or his residence, the place where he has visited on his travels, his products or, indeed, if he is not mentioned at all; there need be no peg or pointer for his identification in the words complained of themselves. Thus if there is a statement that X is illegitimate there is sufficient reference to X's mother....”**

23. From my reading of WhatsApp extracts set out in paragraph 6, I am of the view that the applicant has reasonable apprehension of her reputation being subjected to injury if the respondent is not restrained from posting or publishing any defamatory allegation pending hearing and determination of this suit.

24. Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation, reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation.

25. The Court of Appeal in **Ken Odondi & 2 others Vs James Okoth Omburah T/a Okoth Omburah & Company Advocates [2013] eKLR** cited with approval the English case of **Uren V John Fairfax & Sons Pty. Ltd., 117 C.L.R. 115, 150** which stated:

**“It seems to me that, properly speaking, a man defamed does not get compensation for his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.**

26. I do agree with counsel for the applicant that once a person’s reputation is injured money may not be adequate compensation. It would be in the interest to protect the applicants from any allegations that may damage her reputation in the right thinking members of the society.

27. In view of the above, I find that the balance of convenience lies with the applicant; the applicant deserves an order to restrain the respondent from publishing, posting and or uttering any defamatory information about the plaintiff pending hearing and determination of this suit.

**28. FINAL ORDERS**

1. The defendant/respondent is hereby restrained the respondent from publishing, posting and or uttering any defamatory information about the plaintiff pending hearing and determination of this suit.

2. Costs of this application to abide by the outcome of this suit.

**Ruling dated, signed and delivered via zoom at Nakuru This 19<sup>th</sup> day November 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Ms. Amulabu Counsel for Applicant

Mr. Nanda Counsel for Respondent