



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL CASE NO 160 OF 2018**

**SHAWN BOLOUKI.....1<sup>ST</sup> PLAINTIFF**

**THE AGA KHAN UNIVERSITY HOSPITAL....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DENNIS OWINO.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 3<sup>rd</sup> July 2018 and filed on 4<sup>th</sup> July 2018 was brought pursuant to the provisions of Section 3, 3A, 63 (e) of Civil Procedure Act, Order 40 Rule 2, Order 51 of the Civil Procedure Rules 2010 (**sic**) the inherent powers of the court and all other enabling powers and provisions. Prayer Nos (1), (2), (3) and (4) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. Spent.**

**4. Spent.**

**5. Pending the hearing and determination of this suit, an interim injunction issue directed at the Defendant restraining him by himself, his agents, servants or otherwise howsoever from posting on any electronic media or publishing or disseminating in any manner whatsoever the defamatory words, statements or content or any similar words or statements or content, of like effect, relating the Plaintiffs herein.**

**6. Pending the hearing and determination of this suit, a mandatory injunction be issued directed at the Defendant compelling him, by himself, his agents, servants or otherwise howsoever to erase and remove from their various posts, websites, blogs or their other forms of electronic and social media or any form or nature whatsoever the said defamatory words, statements, or content or any similar words or statements or content, of like effect relating to the Plaintiffs herein.**

**7. The costs of this application be provided for.**

2. The Plaintiffs' List and Bundle of Authorities was dated 22<sup>nd</sup> August 2018 and filed on 23<sup>rd</sup> August 2018. Their Written Submissions and Supplementary List and Bundle of Authorities were dated 9<sup>th</sup> October 2018 and filed on 11<sup>th</sup> October 2018. The Defendant's Written Submissions were dated 22<sup>nd</sup> October 2018 and filed on 24<sup>th</sup> October 2018.

3. When the matter came up in court on 1<sup>st</sup> November 2018, the parties requested it to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE PLAINTIFFS' CASE**

4. The Plaintiffs' present application was supported by the Affidavit of the 1<sup>st</sup> Plaintiff. The same was sworn on 3<sup>rd</sup> July 2018.

5. The Plaintiffs' case was that the Defendant had posted a defamatory article on his twitter handle @kinyabo that had over sixty five thousand (65,000=) followers, which words had injured their reputations as a senior executive in the health care profession and premier health facility respectively.

6. They contended that the Defendant had threatened and continued posting, publishing and disseminating the said defamatory words against them and that if he was not restrained, he would continue to post the malicious statements about them.

7. It was their averment that contrary to the Defendant's assertions, the 2<sup>nd</sup> Plaintiff had twenty one (21) divisions which were headed by eight (8) Kenyans, three (3) Canadians, six (6) Pakistanis and three (3) Indians.

8. They added that the Management Committee consisted of thirty one (31) members being twenty one (21) Kenyans, one (1) Australian, two (2) Americans, one (1) British and four (4) Pakistanis.

9. They therefore urged this court to grant them injunctive reliefs against the Defendant herein as they had sought in their present application.

#### **THE DEFENDANT'S CASE**

10. In opposition to the aforesaid application, the Defendant filed Grounds of Opposition dated 16<sup>th</sup> August 2018 on 29<sup>th</sup> August 2018. On 6<sup>th</sup> September 2018, he also filed a Replying Affidavit that he swore on 5<sup>th</sup> September 2018.

11. His case was that the grant of an interlocutory injunction would amount to a restriction of his freedom of expression entrenched in the Constitution of Kenya, 2010. It was his averment that the publication was of public interest as it concerned health provision to the general public and thus it outweighed the Plaintiffs' private interests.

12. It was also his contention that the publication was fair comment. He denied that his twitter handle had over sixty five thousand (65,000) followers as had been averred by the Plaintiffs. He pointed out that the figures of managers was evident that the number of non-locals far outweighed the locals.

13. He added that the fact that employment matters were still pending in court and the fact that the 2<sup>nd</sup> Plaintiff was outsourcing employees painted a true reflection of its state of affairs and his publication therefore had no malice.

14. He therefore urged this court not to allow the Plaintiffs' application as he had the freedom to seek, receive or impart information or ideas as enshrined in the Constitution of Kenya.

#### **LEGAL ANALYSIS**

15. It was clear that the orders sought by the Plaintiffs were injunctive in nature. They placed reliance on the case of **Giella vs Cassman Broun & Co Ltd [1973] EA 358** and pointed out that a balance must be created when dealing with defamation cases.

16. In this regard, they relied on the case of **Micah Cheserem vs Immediate Media Services Ltd [2000] 2 EA 371** where it was held that before granting an interlocutory injunctions "courts must be satisfied that the words complained of are libelous and are also so manifestly defamatory that any verdict to the contrary would be set aside as perverse."

17. They submitted that they had established a *prima facie* case as was set out in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

18. They also referred the court to several other cases to demonstrate that the ingredients of defamation were present in this case and that the publication were malicious – See **CFC Stanbic Bank Ltd vs Consumer Federation of Kenya [2014] eKLR**, **Phineas Nyaga vs Gitobu Imanyara [2013] eKLR.**

19. They were emphatic that the Defendant did not establish the truth before he published the offending article and that he had also not provided proof that a racist policy exists, hence he had not demonstrated fair comment or justification. It was their argument that the Constitution of Kenya did not grant those engaged in the publishing, communicating and disseminating information absolute freedom because their freedom was subject to freedom of other people.

20. In this regard, they relied on the case of **Brigadier Arthur Ndonj Owuor vs The Standard Ltd [2011] eKLR** where it was held that the freedom of expression is limited as it should respect the reputation of others.

21. It was their submission that once reputation was lost, the same could not be compensated by way of an award of damages because the image would not be erased from the memory of those who consumed the information.

22. They therefore averred that the balance of convenience tilted in their favour in being granted an interlocutory injunction as was held in the case of **American Cynamide vs Ethican Ltd [1975] All ER 504.**

23. On his part, the Defendant submitted that the Plaintiffs had not denied the averments contained in his Replying Affidavit.

24. He agreed with them regarding what had to be proved before an applicant could be granted an interlocutory injunction. He further relied

on other cases that the Plaintiffs had relied upon to demonstrate when defamation is proven.

25. It was his contention that their application did not demonstrate any reasonable apprehension, threat or his intent to publicise further articles or that special circumstances existed so as to be granted the injunctive relief.

26. In this regard, he placed reliance on the case of **Kenya Breweries Ltd vs Washington Okeyo Civil App No 332 of 2000 (UR)** where it was held that a mandatory injunction can only be granted where special circumstances exist.

27. This court carefully analysed the parties Written Submissions and noted that the issue for determination before it was not whether or not the Plaintiffs had proven that the Defendant had defamed them but rather whether the Plaintiff had satisfied the criteria set out in the **Giella vs Cassman Brown Co Ltd** (Supra) so as to be granted an interlocutory injunction pending the hearing and determination of the suit herein.

28. In determining the said issue, this court had due regard to the provision of Article 33 (1) (a) of the Constitution of Kenya that provides as follows:-

**“Every person has the right to freedom of expression which includes freedom to seek, receive or impart information or ideas.”**

29. Article 33 (3) of the Constitution of Kenya further stipulates as follows:-

**“In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”**

30. It is evident that both the Plaintiffs and the Defendant’s rights in respect of the freedom of expression are guaranteed in Articles 33 (1) (a) and 33 (3) of the Constitution of Kenya. The court therefore has to cut a balance to ensure that no party’s rights are infringed and/or contravened.

31. In the mind of this court, it is similar to the balance that a court has to cut when deciding whether or not to grant a stay of execution pending appeal *vis-à-vis* the rights of a litigant to enjoy his fruits of judgment.

32. The affidavit evidence pointed to a situation of it being one party’s word against the other. On the one hand, the Defendant contended that the 1<sup>st</sup> Plaintiff was a person who was not fit to work as the 2<sup>nd</sup> Plaintiff’s Chief Executive Officer. On the other hand, the 1<sup>st</sup> Plaintiff averred that he was known internationally in the private sector and the publication had therefore continued to injure him and the 2<sup>nd</sup> Plaintiff.

33. This court agreed with the Plaintiffs that any information consumed by any person is likely to be retained in that person’s memory. The consequences of negative publication cannot be quantified. Any compensation would only assuage a person who has been defamed but would not be adequate compensation for any damage that he would suffer.

34. In view of the likelihood of memory of negative publication about a person not being erased, this court was satisfied that the Plaintiffs had demonstrated that in the event an interlocutory injunction was not granted, they would suffer irreparable that would not be compensated by way of damages in the event they were to succeed in their case against the Defendant herein.

35. This court restrained itself from concluding that the Plaintiffs had demonstrated a *prima facie* case because doing so would be delving into the merits or otherwise of this case.

36. As this court was in doubt as to which party was being truthful, the balance of convenience thus tilted in it granting the Plaintiffs an interlocutory injunction pending the hearing and determination of their case.

37. Going further, before a court can consider granting a mandatory injunction, it must consider if an applicant has demonstrated the three (3) tests for the grant of an interlocutory injunction set out in the case of **Giella vs Cassman Brown Co Ltd** (Supra) in which Spry V.P held as follows:-

**“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First a Plaintiff/Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Plaintiffs/Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on a balance of convenience. “**

38. As this court found that it could not make a determination as to whether or not the Plaintiffs had demonstrated a *prima facie* case due to their and the Defendant’s rights under Article 33 (1) (a) and Article 33 (3) of Constitution of Kenya, it did not find that there were any special circumstances to warrant it granting a mandatory injunction. A mandatory injunction is granted in the clearest of cases. The same is granted to save judicial time when a court is satisfied that after assessing affidavit evidence, it would still grant the mandatory injunction at the conclusion of trial.

39. Indeed, as the Defendant pointed out and which this court agreed with is that a determination of whether his publication was defamatory or not could only be canvassed during the full trial. This court could not therefore order for the erasure and removal from the Defendant’s various posts, websites, blogs or other forms of electronic and social media any publication as the Plaintiffs had sought in their present application.

**DISPOSITION**

40. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs' Notice of Motion application dated 3<sup>rd</sup> July 2018 and filed on 4<sup>th</sup> July 2018 was merited and the same is hereby allowed in terms of Prayer No (5) therein on the following conditions, **THAT:-**

**1. The Plaintiffs shall file and serve an undertaking as to payment of damages within seven (7) days from the date of this Ruling.**

**2. In the event the Plaintiffs shall not comply with Para 40 (1) herein above, the interlocutory injunction pending hearing and determination of the suit will be automatically discharged.**

**3. The Plaintiffs shall take all necessary steps to prosecute their case forthwith failing which the Defendant will be at liberty to take appropriate steps to safeguard his interests.**

**4. Costs shall be in the cause.**

41. It is so ordered.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of January 2019**

**J. KAMAU**

**JUDGE**