



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 149 OF 2018

JEAN PAUL ILUNGA PLAINTIFF

VERSUS

NICHODEMUS ASUMWA DEFENDANT

RULING

1. The plaintiff *Jean Paul Ilunga* (the applicant), filed suit against the defendant *Nichodemus Asumwa* (the respondent) seeking *inter alia* general damages for defamation and orders of permanent injunction restraining the respondent, his employees and/or agents from publishing any defamatory articles or statements against him.

2. Subsequent to the filing of the suit, the applicant filed a Notice of Motion dated 20th June 2018 on 22nd June 2018 seeking to have orders of temporary injunction issued against the respondent and/or his agents restraining them from publishing further defamatory statements against him on social media namely Facebook pending the hearing and determination of the suit.

3. The motion is predicated upon the grounds stated on its face and the depositions made by the applicant in his supporting and further affidavits dated 20th June 2018 and 17th July 2018 respectively together with annexures thereto. In the grounds supporting the motion which are replicated in the supporting affidavit, the applicant contends that on diverse dates between the months of May and June 2018, the respondent falsely and maliciously published and/or caused to be edited on his Facebook page under a heading titled “bad news to Congolese” the following words in reference to the applicant:

“Alleged Congolese promoter who brought Ferre Gola Jean Paul Ilunga is a serial conman. Ilunga who lies to people that he is the president of Congolese in Kenya has been arrested today by criminal investigative department of Kenya for conning a 73 years old woman from Congo, the woman who lives in Paris Emma was conned millions of shillings by Ilunga who lied to her that he deals with gold business in Kenya. Jean Paul Ilunga failed to produce the gold and that’s the reason he was arrested. The brother to the woman who narrated the story to our news desk while crying said he never knew Ilunga was a conman, until he conned his sister. The public is warned against this man Ilunga who is now under police custody. Below are the transaction of cash and the passports.”

4. According to the applicant, prior to or during the publication of the said words, the respondent knew or ought to have known that the said words were entirely false but he maliciously published the same with the aim of portraying him in bad light in the eyes of his business associates, family members and the world at large. It is the applicant’s case that the words in their natural and ordinary meaning meant and were understood to mean that he was a fraudulent, corrupt and manipulative individual who was unworthy of public trust; that he was a rogue businessman; a criminal who was in the business of defrauding members of the public who deserved public condemnation.

5. The applicant further stated that though he issued a demand letter to the respondent on or about 12th June 2018 directing him to retract the aforesaid post and to publish an apology of equal prominence to the post, the respondent has failed, neglected or refused to comply with the said demands and has continued to post obscene and defamatory statements about the applicant and his family on his Facebook page and will continue to do so unless stopped by an order of injunction pending disposal of the suit.

6. The motion is opposed. The respondent swore a replying affidavit dated 8th August 2018 in which he basically denied the applicant’s claim that he had falsely and maliciously published the offending words with the aim of defaming the applicant. He averred that the content of the Facebook post was true as he knew as a fact that the applicant in cohorts with other partners including his daughter were in the business of fraudulently obtaining money from unsuspecting persons through a web of organized crime by pretending that they were in a position to sell to them various amounts of gold which they never did; that as a concerned citizen he published the post to warn members of the public not to fall victim to the applicant’s schemes. He urged the court to dismiss the application with costs.

7. On the date the motion was scheduled for hearing, both parties agreed to have the same disposed of by way of written submissions. The court directed the parties to exchange and file their respective written submissions on or before 6th November 2018 when the motion was to

be mentioned for further orders. On that date, only the respondent had filed his written submissions dated 2nd November 2018. The applicant had not filed his submissions. The court granted him a further thirteen days to file and serve his submissions and fixed the application for mention on 19th November 2018. On the mention date of 19th November 2018, the applicant had still not filed his submissions and the court set down the motion for ruling on 20th December 2018. The court graciously granted the applicant an opportunity to file his submissions before the application was determined by directing that he was at liberty to file and serve his submissions if any before the ruling date. The ruling was however not delivered on 20th December 2018 as scheduled for reasons that are on record. By the time I was preparing this ruling, the applicant had not filed any submissions.

8. The failure of the applicant to file his submissions knowing fully well that the motion was supposed to be prosecuted by way of written submissions is perplexing to say the least because technically, it means that the applicant failed to prosecute his motion despite being given more than sufficient time to do so. It would appear that the applicant may have lost interest in pursuing the interim reliefs sought in the motion but since he has not withdrawn the motion and it is still pending determination by the court, I will in the interest of substantive justice proceed to determine it on merit on the basis of the affidavits filed by the parties; the respondent's submissions and the pleadings in the main suit.

9. Having considered the application, the affidavits on record, the pleadings and the respondent's written submissions, I find that the only issue arising for my determination is whether or not the applicant has demonstrated that he is deserving of the orders of temporary injunction on terms sought in the motion.

10. The principles that guide the court in the exercise of its discretion in determining whether or not to grant orders of temporary injunction in defamation cases have been enumerated in several authorities. These include the cases of *Micah Cheserem V Immediate Media Services, (2002) 1 EA 371*; *Evans Kidero V John Kamau & Another, [2017] eKLR* and *Philomena Mbete Mwilu V The Standard Group Limited [2018] eKLR*.

The common thread in all those authorities is that though the general principles enunciated in the case of *Giella V Cassman Brown & Company Limited, [1973] E.A. 358* applies to actions in defamation, the standard of proving the existence of a *prima facie* case with a probability of success in defamation cases is much higher than in other civil suits. In defamation cases, orders of temporary injunction should only be granted in the clearest of cases. This is so because defamation cases, unlike other civil suits bring to the fore a conflict between rights of citizens or the media to enjoy their constitutional guarantee of freedom of expression and a private individual's right to privacy and good reputation.

11. In this case, the applicant has claimed that the respondent has published defamatory words about him on Facebook and continues to do so despite being served with a demand for retraction and an apology. The respondent has denied this claim both in his statement of defence filed on 9th August 2018 and in his replying affidavit filed on even date. He has proceeded to give a narration of the facts surrounding the alleged defamatory posts as proof of his claim that the content of the impugned post was true.

12. The applicant though served with the replying affidavit did not file a supplementary affidavit to controvert the claims made by the respondent in the replying affidavit. By claiming that the words complained of were true, the respondent was in effect raising the defence of justification which if proved is an absolute defence to an action in defamation.

Since the facts deposed in the replying affidavit have not been disputed, I find that *prima facie*, the applicant has failed to demonstrate that the words published by the respondent were false and not true as alleged by the respondent. For words to be defamatory, it must be proved that they were not only published in reference to the plaintiff but that they were false and malicious, and that they had been published with the aim of disparaging the plaintiff's reputation and character. From the material placed before me, I find that the applicant has totally failed to demonstrate at this stage that the words complained of were false and that they were maliciously published by the respondent.

13. In view of the foregoing, it is my finding that the applicant has failed to meet the threshold of proof required for grant of temporary injunction in defamation cases. I am thus satisfied that the Notice of Motion dated 20th June 2018 is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of March, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wepo holding brief for Mr. Musudi for the respondent

No appearance for the applicant

Mr. Salach: Court Assistant