



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 85 OF 2018

ERNEST MBALANYA..... PLAINTIFF

VERSUS

ELVIS MARTIN OMIKHLU..... 1ST DEFENDANT

PHANUEL OLOO OCHIENG.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated and filed on 18th October 2018 the Applicant prays for the following orders:-

a. Spent

b. spent

c. A Temporary injunction restraining the defendants whether by herself, themselves, servants or agents or otherwise from further publishing or causing to be published, posting, circulating and/or disseminating the said words complained of or any words similarly defamatory to the plaintiff's reputation and career pending the hearing and determination of the suit.

d. Costs

2. The Application is brought under Order 40 rule 2 of the Civil Procedure Rules and Sections 1A, 3A of the Civil Procedure Act and Article 28 of the Constitution, and supported by the affidavit of **Ernest Mbalanya** sworn on 18th October 2018, in which he depones:-

a. That he is the Assistant Training Officer –Equipment Operations at Bandari College and an employee of the Kenya Ports Authority.

b. That the defendants have on the 23rd September 2018 and 3rd October 2018, without any valid justification published or caused to be published defamatory words concerning him and the same was addressed to five of his workmates.

c. That he believes that the defamatory words against him were maliciously published in order to disparage him and destroy his professional career.

d. That he has suffered embarrassment, contempt, odium and obloquy and continue to suffer irreparable damage to his reputation as a result of the defendants acts.

3. In response to the said Application, the 1st Respondent filed an undated Replying Affidavit on the 28th November 2018 in which he avers that:-

a. He authored the letter annexed and marked as E-2 on the plaintiffs bundle but avers that. The said letter was addressed only to the plaintiff and the content of the letter is not defamatory because they are true.

b. He denies that the Email annexed and marked E1 in the plaintiff bundle of documents originated from him but denies that he copied it to five others persons. He averred that all the statements he made in the letter are the truth.

c. He averred that the plaintiff suit is in bad faith and in a bid to evade an administrative action against him as he is currently being investigated by the Anti-corruption unit of the Kenya Ports Authority over the contents of the subject letter.

4. The 2nd defendant though served with the Applicant's Application did not file a response.

5. The parties were directed to canvass the application dated 18th October, 2018 by way of written submission. The Applicant/Plaintiff counsel file their written submissions on 5.3.2019 while the 1st defendant filed his on even date. The 2nd defendant did not file any written submissions.

SUBMISSIONS BY THE APPLICANT.

6. Mr Anagwe, counsel for the Applicant submitted that the Defendants without any lawful justification, injured the plaintiff's reputation by publishing defamatory statement and sending them to the Plaintiff colleagues on email an social media.

7. The Applicant's evidence with regard to the complaint is in the supporting affidavit paragraphs 7 to 9. According to Mr Anagwe , counsel for the applicant, the defamatory words against the Applicant/Plaintiff, were maliciously published by the defendant to cause damages, and or disparage the Plaintiff/Applicant and destroy his career and profession as a respected Assistant Training officer – Equipment Operations at Bandari College as deponed at paragraph 10 of the supporting affidavit. Counsel of the Applicant relied on the decision in PHINEAS NYAGA VRS GITOBU IMANYARA (2013) e KLR .

8. Mr Anangwe also submitted that the defamatory statements were causing irreparable damage to the Applicant /Plaintiff reputation as a public officer in that he had suffered embarrassment contempt, odium and obloquy and continues to suffer irreparable damage to his reputation following the defendant's acts for reasons enumerated at paragraphs 18,19, 20 and 21 of the supporting affidavit . He relied on the case of CHESERET VRS IMMEDIATE MEDIA SERVES (2000) IEA 371 (CCK)

1ST RESPONDENT'S /DEFNDANT'S SUBMISSIONS.

9. Mr Obonyo, counsel for the 1st Defendant /Respondent in reference to the case of PHINEAS NYAGAH, submitted that it is by the plaintiff's own admission vide item number 8 in the supporting affidavit dated 18th October,2018 that information was sent to him directly. He also submitted that on further examination of the statement and the annexure thereto in support, one cannot fail to notice that the 1st Defendant actually did not send an email but wrote a letter and addressed the same to the plaintiff alone.

10. And while referring to the case of HEZEKIEL OIRA VRS STANDARD LIMITED & ANOTHER (2016) e KLR, Mr Obonyo submitted that the Plaintiff herein has not refused the contents of the letter

dated 4th October 2018 annexed to his supporting affidavit and marked as “E-2” and as such cannot be claimed to be defamatory.

11. He further submitted that defamatory is a very serious offence and the same has a very high threshold to be proven considering the implications. He stated that the right to a fair comment is one for the essential elements of freedom of speech and must not be written down by legal refinements. He then urged the court to dismiss the Plaintiff’s suit/Application for the reason that the Applicant/Plaintiff has filed to prove their case

ANALYSIS AND DETERMINATION.

12. In trying to analyse the application and replying affidavit filed herein so as to determine the issues raised herein, this court has noted that the Replying affidavit by the 1st Defendant was not dated and still remains so. Section 5 of the Oaths and Statutory Declaration Act provides:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

13. The jurat or attestation clause of the affidavit by the 1st Defendant does not bear the date and month it was sworn contrary to Section 5 of the Oaths and Statutory Declaration Act.

14. In the case of **Bayplan Credit Limited v. Gesa Building & Civil Company & 2 Others (2015) eKLR**, the Court addressed the question of undated replying affidavit and held thus:-

“For the reason that the said Replying Affidavit did not comply with the statutory and mandatory provisions of the law, the Court will not have regard to the same. The Court therefore considered the Defendants’ Grounds of Objection only.”

15. Similarly in the case of **Talewa Road Contractors Ltd v. Kenya National Highways Authority (2014) eKLR**, Court had on record an undated affidavit and held thus:-

“For the reason that the said supporting affidavit did not comply with the statutory and mandatory provisions of the law, the Court hereby expunges and strikes out the said Supporting Affidavit of John Kihonge Wainaina. The Plaintiff’s Notice of Motion application stands automatically dismissed as it has no limb to stand on. The effect of this striking out of the said Supporting Affidavit is that all the exhibits attached to the said Notice of Motion application are also hereby struck out.”

16. In view of the fact, that the 1st Defendant’s replying affidavit has failed to comply with the mandatory statutory provisions of the law, the same is expunged and struck out, hence the Plaintiff’s Application shall be determined as undefended.

17. I have read the pleadings filed by the parties to the application. I have also considered the submissions filed by the parties to this application in support of their respective positions. The issue for determination by this court is whether the plaintiff has established a prima facie case as to entitle this court to grant him the orders of injunction sought. As was held by the Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A.** 86 at page 89:

“The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. (See Giella –vs- Cassman Brown and Co. Ltd. 1973 E.A. 358 at page 360 letter E). These conditions are sequential so that the second condition can only be addressed if the

1st one is satisfied and when the court is in doubt then the third condition can be addressed.”

18. In this case, for the Plaintiff to establish a prima facie case, then he needs to annex affidavits and/or witness statements from the third parties (work colleagues) who he alleges were copied the email from the defendants and their understanding of the Email ought to come out in the affidavits and/or witnesses' statements and not from the plaintiff himself.

19. In **GEORGE MUKURU MUCHAI vs. THE STANDARD LIMITED (2001) KLR...Aganyanya J** (as then was) held as follows...

“In my view the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complaint and not how he/she himself/herself feels the words portray about him/her.”

20. I have looked at the Plaintiffs pleadings and have noticed that the plaint is not accompanied by a list of document, list of witness and/or witnesses' statements. The application is not accompanied by any affidavit from the alleged work- colleagues of the Plaintiff and the annexed document do not contain any statement from the third parties.

21. Therefore in the circumstances of this case, the plaintiff has failed to establish a prima facie case to enable this court grant him an order of injunction. An injunction being an equitable remedy is discretionary. The Plaintiff has placed no material before this court to enable this court exercise its discretion in his favour.

22. It will be unnecessary for me to consider the other principles laid down in the case of **Giella – vs- Cassman Brown**. The Plaintiff having failed to establish a prima facie case, the application herein fails and is dismissed with no orders as to costs.

23. Orders Accordingly.

DATED and DELIVERED at MOMBASA this 27th day of June, 2019

LADY JUSTICE D. O. CHEPKWONY