



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 281 OF 2018**

**ISAIAH M. KUBAL.....PLAINTIFF**

**VERSUS**

**DUNCAN MUTHUSI.....1<sup>ST</sup> DEFENDANT**

**ALPHONSE WERE.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 5<sup>th</sup> December 2018 was brought pursuant to the provisions of Order 40 Rule (1) and (2) of the Civil Procedure Rules and all other enabling provisions of the law. Prayers Nos (1), (2) and (3) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. THAT the Honourable Court to issue an order directed at the defendants/respondents restraining them from interfering in any way whatsoever the smooth running of the banking insurance finance union pending the hearing and determination of the instance it instant suit.**

**3. THAT the Honourable court to issue an order directed at the Defendants/Respondents restraining them from interfering in any way whatsoever with the smooth running of the banking insurance finance union pending the hearing and determination of the instant suit.**

**4. THAT the Honourable court be pleased replaced issue any other appropriate order to safeguard the interests of the Plaintiff/Applicant while in office as a national general secretary of banking insurance finance union pending the hearing and determination of the instant suit.**

**5. THAT the costs of the application be provided for.**

2. The Defendants' Written Submissions dated 13<sup>th</sup> May 2019 and filed on 20<sup>th</sup> May 2019 while those of the Plaintiff were dated 5<sup>th</sup> December 2018 and filed on 12<sup>th</sup> April 2018.

3. Parties requested the court to render its decision based on the written submissions which they relied upon entirety. The Ruling herein is therefore based on the said state Written Submissions.

**THE PLAINTIFF'S CASE**

4. In support of his application, the Plaintiff swore an affidavit on 5<sup>th</sup> December 2018. He also swore a Supplementary Affidavit on 12<sup>th</sup> April 2019. It was filed on same date.

5. His position was that he had held the office of the National General Secretary office since his election in the year 2016- June but that in September 2018, the Defendants started posting on social media and print media falsehoods and defamatory statements to injure his person and office and intended to malign and injure his reputation.

6. It was his intention that the malicious actions of the Defendants jointly and severally had continued for the last three (3) months despite his counsel's letter to them to cease the injurious statements and actions which they had failed to do.

7. He added that they had gone a step further to stage some demonstrations intended to whip sympathy for the union members to rise against him and his office which had led him to seek police intervention. It was his further averment that the defendants had a well calculated malicious move of interfering with his leadership at the helm of the union's unconstitutional requirements touching on elections.

8. He stated that unless the Defendants were estopped from carrying on their malicious activities, then the union and himself stood to suffer injury to his reputation and character as well as irreparable loss in the eyes right-thinking members of public. He was emphatic that the defendants had not managed to malign him in the alleged name of BIFU when they had no expressed authority to do so.

9. It was for that reason that he sought that the application be allowed as prayed.

### **THE 1<sup>ST</sup> DEFENDANT'S CASE**

10. In response to the Plaintiff's application, the 1<sup>st</sup> Defendant swore a Replying Affidavit on 23<sup>rd</sup> January 2019. The same was filed on the same date.

11. He stated that he was a bonafide member of BIFU and that he had questioned the Plaintiff's financial impropriety. He denied authoring the subject article sought subject of this suit or holding a press conference on 19<sup>th</sup> of November 2018 or issue a defamatory statement against. It was his contention that he was wrongly enjoined in the suit herein.

12. It was his averment that the plaintiff was abusing the court process to avoid the glaring financial impropriety questions that had been raised against. He stated that it would not be in the interests of the greater BIFU to be restrained and/or gagged at this interlocutory stage and thus urged this court to dismiss the Plaintiff's application.

### **THE 2<sup>ND</sup> DEFENDANTS' CASE**

13. In response to the Plaintiff's application, the 2<sup>nd</sup> Defendant swore a Replying Affidavit on 25<sup>th</sup> January 2019. The same was filed on 30<sup>th</sup> January 2019.

14. It was his contention that the Plaintiff had issues regarding financial impropriety raised on his leadership and he had resorted in different forms of harassment clothed in legal suits. He averred that the Plaintiff was complainant in Criminal Case No 2298 of 2018 against him through his proxy in O.B. No 34/09/01/2019.

15. Further, it was his further averment that the Plaintiff had a scheme to frustrate the vocal members and elected officials of Banking Insurance Finance Union all in the name of preventing legitimate agitation of financial impropriety queries and demands for leadership change constitutionally.

16. He said that he was advised by his advocate that enquiries on financial misappropriation as a constitutional right under Constitution at Article 10 and as such, it was a matter of public interest of qualified members and elected officials of the BIFU to pursue the same. He also denied authoring the subject article sought subject of this suit or holding a press conference on 19<sup>th</sup> of November 2018 or issue a defamatory statement against. It was also his contention that he was wrongly enjoined in the suit herein.

17. He also stated that it would not be in the interests of the greater BIFU to be restrained and/or gagged at this interlocutory stage and thus urged this court to dismiss the Plaintiff's application.

### **LEGAL ANALYSIS**

18. Both the Defendants also filed a Statement of Grounds of Opposition dated 23<sup>rd</sup> January 2019 on the same date. The issues raised therein were similar to those raised in their respective Replying Affidavits.

19. The Plaintiff submitted that he had demonstrated that his integrity as a leader of the Banking Insurance and Financial union was at stake and thus that he needed protection. It was his averment that the Defendants did not deny that they had participated in WhatsApp chats but were hiding behind the Union membership to stage a coup against leadership.

20. He pointed out that he had laid a basis that the orders he had sought should be granted to protect his Constitutional rights to dignity and privacy without being subjected to ridicule mission.

21. He relied on the case of **HCCC No 398 of 2000 Micah Cheserem vs Immediate Media Services** and the case of **HCCC No 137 of 2013 Safaricom Ltd vs Robert & Alai** in support of his case.

22. On their part, the Defendants submitted that the Plaintiff had only made general denials but had established a *prima facie* case as was contemplated in the case of **Giella vs Cassman Brown & Co Ltd** where the court set out the principles to be considered before an interlocutory injunction could be granted. These principles were:-

**i. the plaintiff must establish that he is a *prima facie* case with high chances of success,;**

ii. but the plaintiff will suffer irreparable loss that can be compensated by an award of damages; and

iii. if the court is in doubt, it will decide on a balance of convenience

23. They also referred to several other cases including the case of Mrao Limited vs First American Bank of Kenya & 2 Others where the Court of Appeal held as follows:-

**“A prima facie case in a civil application includes but not confined to a genuine case and arguable case. It is a case on which the material presented court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

24. They further argued that for an interlocutory mandatory injunction to be issued, an applicant must demonstrate existence of special circumstances. In this regard, they referred to Halsbury’s Laws of England Volume 24, 4<sup>th</sup> edition at paragraph 98 where the authors observed that:-

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application.”**

25. This court carefully considered the Plaintiff’s application and submissions noted that he had not demonstrated a *prima facie* case with the probability of success or that he would suffer irreparable loss that could not be compensated by an award of damages if the application was not allowed because save for relying on the cases of HCCC No 398 of 2000 Micah Cheserem vs Immediate Media Services and the case of HCCC No 137 of 2013 Safaricom Ltd vs Robert & Alai, he did not demonstrate how the said cases had relevance to the circumstances of this case.

26. The court is a neutral arbiter and must not at any given time descend into the arena of a dispute and purport to assume what a party really intended to submit on. This will be disadvantageous and prejudicial to the other party.

27. A perusal of the documentation that was placed before this court by the Plaintiff showed a disgruntled membership that was agitating for change. There was strong & abusive language that was used in the WhatsApp messages. However, the court did not largely discern any defamatory statements. If there were any defamatory statements, then he did not demonstrate the same. He did not also demonstrate how the words in the WhatsApp chats were interfering with smooth running of the Union. There was also no evidence that was placed before this court to show how the Defendants had interfered with the smooth running of the Union.

28. It was the Plaintiff’s case. He was expected to demonstrate, at this interlocutory stage why the Defendants ought to be stopped from making any further comments about his leadership. Indeed, the court must at all times be cautious not to infringe on parties’ rights of expression of opinion of any person unless of course, it has been demonstrated that the words complained of are only intended to bring that particular person into disrepute.

29. Accordingly, having considered the parties’ Written Submissions and case law that they had each relied upon, this court came to the firm conclusion that the Plaintiff had not demonstrated that he was entitled to an interlocutory injunction pending the hearing and determination of this case. This was a matter that was best dealt with at trial so as not to interfere with the normal process of elections, if any were to be held.

#### **DISPOSITION**

30. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Notice of Motion application that was dated and filed on 5<sup>th</sup> December 2018 was not merited and is hereby dismissed. Costs of the application will be in the cause.

31. It is so ordered.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of November 2019**

**J. KAMAU**

**JUDGE**