



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 310 OF 2016

EP.....PLAINTIFF

- V E R S U S -

MIGUNA MIGUNA..... 1ST RESPONDENT

JEFF KOINANGE 2ND RESPONDENT

THE STANDARD MEDIA GROUP LTD 3RD RESPONDENT

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST INTERESTED PARTY

LAW SOCIETY OF KENYA 2ND INTERESTED PARTY

THE ADVOCATES

COMPLAINTS COMMISSION..... 3RD INTERESTED PARTY

THE MEDIA COUNCIL 4TH INTERESTED PARTY

RULING

1) EMP, the plaintiff herein, filed an action against Miguna Miguna, Jeff Koinange and The Standard Media Group Ltd being the 1st, 2nd and 3rd defendants respectively for defamation before this court. Independent Electoral and Boundaries Commission (I.E.B.C), Law Society of Kenya (L.S.K.), advocates by the defendants.

2) The applicant has now taken out the motion dated 25th November 2016, in which she sought for the following orders:

1. THAT pending the hearing and determination of this application and the suit, the 1st defendant is prohibited by injunction from further defamation of the plaintiff by word or usage and/or dissemination of the plaintiff's image on the various media platforms including social, print and electronic media, or in any other forum whatsoever.

2. THAT pending the hearing and determination of this suit, the 1st defendant be ordered to deposit in this honourable court such sum of money or bond as the honourable court shall deem sufficient as security for costs.

3. THAT the 1st defendant do deposit to the court registrar his passport and all other travel documents in his possession pending the hearing and determination of this application/ suit or until further orders of this honourable court.

4. THAT the cost of this application be provided for.

3) The motion is supported by the affidavit of EMP. When served, the 1st defendant herein, Miguna Miguna filed a replying affidavit, and grounds of opposition to resist the application. When the motion came up for inter partes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

4) I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival written submissions. The plaintiff/applicant and the 1st defendant appeared on a live television talk show Jeff Koinange Live, aired on KTN and hosted by Jeff Koinange, the 2nd defendant herein. It is the submission of the plaintiff that during the show, the 1st defendant unleashed a tirade of malicious and libellous insults against the plaintiff, in which he stated:

“On 26th October, 2005, you EP was named in parliament as having obtained a contract for adopt a light un-procedurally you are very corrupt. Your files in City Hall stand to the high heavens.”

“On 27th December, 2007 at pentagon house, you announced to the gathering that ... you would take a 30 day’s sex holiday in Seychelles. A woman who has absolutely no integrity. A socialite bimbo whose only claim to fame is because of looking for billionaire sponsors. Yesterday it was M of Equity. The other day it was G of electricity, the former Kenya Power, crying for a man to marry you because you believe that the man promised to marry you and for that reason you took a man to court. EP you can sue me a million times, it does not bother me.”

“I don’t take bites from mosquitoes like E.”

The plaintiff/applicant avers that the 1st defendant continues to appear on television talk shows in which he continues to defame and malign the applicant without any restraints whatsoever and causing irreparable damage to her reputation. The plaintiff has instituted this legal proceedings owing to the defamatory damage caused by the said words to her reputation. The plaintiff further avers that the words uttered by the 1st defendant have greatly injured the plaintiffs reputation as they describe and depict her as a sexually immoral and corrupt woman who is unfit to serve in a public office.

It is also the submission of the plaintiff/applicant that the 1st defendant has defamed and continues to malign her without any restraints, and this is causing irreparable damage to her reputation.

The 1st defendant on the other hand states that the plaintiff has not established a prima facie case with any probability of success. The 1st defendant pointed out that the suit is in any event fatally defective for misjoinder of parties and issues and it is frivolous and vexatious. He further states that he has not shown that he intends to publish defamatory words against her. The 1st defendant avers that the plaintiff has subsequently published defamatory words against him and has even organised and led public demonstrations against him. The 1st defendant states that he intends to rely on the defence of truth, fair comment, justification, privilege and qualified privilege which have a substantially high probability of success under the circumstances and further states that the plaintiff has not shown that she will suffer any damage or irreparable damage that cannot be compensated an award of damages.

5) The plaintiff further states that she is not aware of any property that the 1st defendant owns that can be attached in the event that she is successful in her claim. That view has been challenged by the 1st defendant who stated that he owns property in Kenya.

6) The applicant argued that there is a risk of the 1st defendant fleeing from the jurisdiction of this court by virtue of his dual citizenship, a claim that was rejected by the 1st defendant stating that he lives and works both in Kenya and in Canada, and lives in Kenya for more than half a year and now that he is vying for the position of Governor, Nairobi County in the 2017 General Elections and therefore there is no risk posed by him whatsoever to flee from the jurisdiction of this court before the hearing and determination of the suit.

7) The principles to be considered in determining an application for injunction were laid down in the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** as follows:

a) The applicant must make out a prima facie case with a probability of success; and

b) The applicant must show that if he is denied the order for injunction he would suffer irreparable loss which cannot be adequately compensated by an award of damages; and

c) If there is doubt as to either of the above, the court would decide the application on a balance of convenience.

8) The threshold for grant of interlocutory injunction in defamation cases, was further reiterated in **Cheserem vs Immediate Media Services (200) 1 371 (CCK)** in which this court held *inter alia* that:

*“Applications 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, 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 libellous and so manifesting defamatory that any verdict to the contrary would be set aside as perverse.”

9) After considering the material placed before this court and the rival submissions, I am convinced that the plaintiff has shown that she has a prima facie case with a high probability of success. Considering the statements and utterances labelled against the plaintiff by the 1st defendant, one of the issues which may arise is whether or not those statements and utterances are defamatory or are they fair comment. It is an issue which can conclusively be determined at the trial. The 1st defendant however submits that this test has not been met by the plaintiff/applicant and further states that the said words are true in fact and in substance as per his knowledge of the 1st defendant. In my humble assessment, I think this is one of those cases where one can say it is clear. The plaintiff/applicant is apprehensive that unless an order is issued to restrain from further making those statements and utterances, he will repeat the words. A reading of the utterances and statement reveals that the 1st defendant is likely to republish the same.

10) Secondly, an applicant must show the irreparable damage he/she would suffer if the order is denied. The applicant has clearly stated that her reputation will seriously be damaged if the 1st defendant continues with his utterances, because the utterances will portray her as sexually immoral and corrupt person unworthy of trust and respect. According to the plaintiff/applicant such utterances cannot be compensated by an award of damages. This argument has been contested by the 1st defendant who has stated that the plaintiff has not shown that her reputation has suffered injury as a result of the 1st

defendant's utterances and words. In my view at this interlocutory stage, such utterances and statements cannot be justified until the suit is heard and determined. It cannot be said that the injury caused can be compensated in monetary terms. I think no amount of money can repay damage of reputation.

11) The third and final principle is that, where the court is in doubt, the application should be decided on a balance of convenience. In the matter before this court, I am not in doubt, hence I do not intend to consider this principle.

12) On the prayer for provision of security for costs, the law is settled that an order for security for costs by the court is a discretionary one under Order 26 Rule 1 of the Civil Procedure Rules.

13) The discretion is however to be exercised reasonably and judicially by taking into account such matters as the known assets of the parties within the jurisdiction of court, the absence of an office within the jurisdiction of the court, insolvency or inability to pay costs, the general financial standing or wellness of the parties, the bonafides of the claim or any other relevant circumstances touching on the conduct of the parties.

14) In this case the 1st defendant is a citizen of both Canada (Toronto) and Kenya (Nairobi) He is a barrister and an advocate of good standing of both countries. The 1st defendant travels, works and lives in Kenya more than half the year. At the moment, the 1st defendant is vying for the position of Governor Nairobi County in the 2017 General Elections therefore there is no risk on his part to flee from the jurisdiction of this court hence there is no need for him to deposit his passport with the Registrar of the court. Consequently, I decline to grant prayers 2 and 3 of the motion.

15) In the end, the motion dated 25.11.2016 is allowed in terms of prayer 1. Costs of the motion to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 23rd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent