



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL SUIT NO. 5 OF 2017

DAVID SARUNI.....APPLICANT

VERSUS

DENNIS NTHIWA MULINGE.....1ST RESPONDENT

STANDARD GROUP LTD.....2ND RESPONDENT

NATION MEDIA GROUP LTD.....3RD RESPONDENT

R U L I N G

1. **David Saruni**, the Applicant, approached this Court by way of Notice of Motion seeking orders that:

- In the first instance pending the hearing and determination of the application herein, the Honourable Judge be pleased to issue an order compelling the 2nd and 3rd Respondents to immediately pull down the offensive post regarding the Applicant from Facebook and any other social media sites managed by them.
- In the first instance pending the hearing and determination of the main suit herein, the Honourable Judge be pleased to issue an order restraining the Respondents by themselves, their agents, employees and/or servants, or any other person working under their instructions, from uttering or publishing any further untrue and malicious statements regarding the Applicant.
- The costs of this application.

2. The application is premised on grounds that: On **28th March, 2017** the 1st Respondent wrote a confidential letter to the County Commissioner, Kitui County copied to the Cabinet Secretary and Principal Secretary Ministry of Interior and Coordination, National Government titled “**Mental Interference by Senior Office – Interior**”; On **31st March, 2017** the 3rd Respondent published a segment in the Daily Nation titled “**Man Accused Boss of Wrecking his Marriage**”, reference was made to the confidential letter and the Applicant’s name was mentioned; On the **7th April, 2017** the 2nd Respondent’s paper, **the Nairobi** published a story titled “**County Commissioner has gone kuku over my wife-clerk**”; on the same day, the same post was posted on the 2nd Respondent’s **KTN Kenya** Facebook Page complete with pictures alleged to be for the Applicant.

3. On the **1st April, 2017** the 1st Respondent's wife wrote a letter to the 1st Respondent copied to the County Commissioner refuting the allegations.
4. That on receipt of the letters the 2nd and 3rd Respondents failed to ascertain the truthfulness of the story therefore published it with the knowledge that the allegations were false, malicious and only meant to defame the Applicant. As a result of the publications, the Applicant and his family have suffered mental anguish, agony and distress. His character and public standing have suffered serious injury. He is viewed as a corrupt and adulterous person.
5. The Applicant swore an affidavit in support of the application where he deponed that he is a career Public Servant who has served in different capacities for many years. He discovered the offensive allegations made against his person and character; following writing of the confidential letter he was summoned to record a statement by the police; he learnt of the publications from his colleagues and on reading the newspapers he found that the lady he was accused of having a relationship with, **Eunice Mutisya Mbithe** wrote a letter to his superior refuting the allegations. The post on Facebook has been shared across the Country.
6. That he has a right to dignity and privacy under the Constitution which should be respected; the action of the 1st Respondent is aimed at tarnishing his name and causing his removal from the Public Service.
7. The 1st Respondent failed and or neglected to respond to the application.
8. The 2nd Respondent filed grounds of opposition where it stated that there was no justification at the interlocutory stage; the threshold of grant of an interlocutory injunction has not been met; the prayer for an interlocutory injunction is not premised on any substantive prayer which makes the application fatally defective; and orders sought infringe the Respondent's freedom of expression guaranteed by the **Constitution of Kenya, 2010** which is an invitation for the Court to interfere with freedom of Media.
9. The 3rd Respondent filed a Replying Affidavit in response to the application. **Sakou Owino**, the Head of the Legal Department of the 3rd Respondent deponed that the application is misconceived bad in law and an abuse of the process of the Court as it seeks final orders against the Respondents at an interlocutory stage; that the Court is required to weigh and balance the right of the Plaintiff against the constitutionally enshrined right of freedom of speech and freedom of the media then balance the private rights of the Plaintiff and public interest.
10. That the application does not meet the threshold for grant of an interlocutory injunction as the Article complained of is based on true facts and touches on Public Office and is a matter of public importance; They published a replica of contents of a letter written by the 1st Respondent complaining about his boss who was destroying his marriage. The Article complained of is a fair comment on a matter of public interest; He denied existence of any intention to defame the Applicant.
11. At the hearing of the application, **Mr. Kanyonge**, Counsel for the Applicant submitted that the letter written to the Applicant's Immediate Supervisor insinuated that he had a relationship with the 1st Respondent's wife. The publication appeared in the newspapers and Facebook page owned by the 2nd and 3rd Respondents respectively. Referring to the case of **Bugadier Arthur Ndory Owour vs. The Standard LTD Nairobi Civil Case Number 511 of 2010** he argued that an order like the one sought was granted where monetary damages would not be an adequate compensation. Further, that special circumstances existed warranting issuance of the orders sought as set out in the case of **Kenya Breweries LTD and Another vs. Washington Okeyo (2002)**. He concluded by seeking issuance of the orders sought to protect the rights of the Applicant.
12. In response **Mr. Echessa** learned Counsel for the 2nd Respondent opposed the application on grounds that the Applicant was not clear with the prayer he was seeking. He submitted that the Applicant had not shown that this is a clear case of a mandatory injunction. The issue being between the 1st Respondent, his

wife and the Applicant what is false and what is not would be determined at trial. The prayer sought is a final substantive one but at the Exparte stage. There is no substantive prayer for an injunction, that looking at the specific prayers made if proved monetary compensation would do; but the minimum threshold for granting of an injunction has not been satisfied.

13. **Ms. Muhoro** learned Counsel for the 3rd Respondent submitted that the 3rd Respondent only reported what was written by the 1st Respondent that was in public interest. She stated that an injunction would not issue where a party pleads justification. Citing the case of **Gilgil Hills Academy LTD vs. The Standard LTD (2009) eKLR** she argued that it was in public interest for the truth to be known and the grant of an injunction only existed where circumstances are special.

14. I have considered oral submissions by all parties herein and the authorities cited.

15. Affidavit evidence adduced established the fact that some publication was made by the Respondents herein that the Applicant deems libelous in nature. Other than the 1st Respondent who did not challenge what was averred the affidavit in support of the application the 2nd and 3rd Respondents have pleaded justification and fair comment.

Prayer 3 of the application was spent as the relief sought was not granted at the outset.

Prayer 4 is for a restraining order. I have been asked to grant an order protecting the Applicant by formally forbidding the Respondents from uttering or publishing any further untrue and malicious statements regarding the Applicant. Such an order would issue if an injunctive order is sought.

16. Parameters of granting an interim/interlocutory injunction were stated in the case of **Giella vs. Cassman Brown & Co. LTD (1973) EA 358**. The Applicant is obligated to demonstrate that:

1. He has *prima facie* case with a probability of succeeding.
2. He must show that he will suffer irreparable damage if the order sought is not granted and an award of damages will not adequately compensate the damage suffered.
3. If in doubt the Court should decide on a balance of convenience.

17. In the English case that deals with issuance of an injunction at an interim stage, **Bennard vs. Perryman (1891) 2 CH 269** it was stated that:

““In all but exceptional cases,” they should not issue an interlocutory injunction to restrain publication of a libel which the defence sought to justify except where it was clear that the defence would fail. Where the defendant contends that words complained of are true and swears that will plead and seek to prove the defence of justification, the court should not grant an interlocutory injunction unless, exceptionally it is satisfied that the defence is one which cannot succeed. The plaintiff must demonstrate that it is clear that the alleged libel is untrue.”

18. The statement as pleaded are damaging to ones reputation. Annexure “DS3” is a copy of letter purportedly written by **Eunice Mbithe Mutisya** the alleged wife of the 1st Respondent denying allegations set out in the confidential letter written by the 1st Respondent. The same is not signed which is subject to proof. At this stage it cannot be stated with certainty if the defence the Respondents will come up with of justification will fail.

19. In the case of **Francis P. Lotodo vs. Star Publishers & Ano. Nairobi High Court Civil Case No. 883 of 1998** the Court stated thus:

“An injunction will not be granted where the defendant pleads justification unless the court can be sure that his defence cannot be sustained at the trial and that the plaintiff will receive more

than nominal damages..... The court would not restrain the publication of an article, even though it was defamatory, when the defendants said that they intended to plead justification or fair comment.....”

20. It is therefore not clear if indeed the Applicant has a clearly defamatory case.

21. Looking at the relief sought in the substantive suit it is for: an apology and retraction of similar prominence as defamatory statements and generally damages.

22. It has not been demonstrated that the Respondents herein intend to publish similar words against the Applicant and this is a clear case where damages would compensate the Applicant adequately in case he succeeds.

23. In the result I find the application lacking merit. Therefore, I dismiss it with costs to the 2nd and 3rd Respondents.

24. It is so ordered.

Dated, Signed and Delivered at Kitui this 25th day of July, 2017.

L. N. MUTENDE

JUDGE