



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 286 OF 2016

STELLAMARIES KERU MUTUA APPLICANT

- V E R S U S -

PAUL MUTHEE KANYI RESPONDENT

RULING

1. Stellamaries Keru Mutua the plaintiff/applicant herein filed a defamatory suit against Paul Muthee Kanyi, the defendant/ respondent herein seeking for general and aggravated damages, and a permanent injunction vide the plaint dated 2nd November 2016. It is alleged that or about the 27th day of September 2016, the defendant published by an email to one Pauline Kihara the in-flight performance manager of Kenya Airways, where the plaintiff is employed and caused to be published defamatory statements, words, remarks and or utterances concerning the plaintiff as follows:

“I hope this find you well, I am well with my family. As earlier pointed out, one of your staff (Stella Mutua) and her sister (Winnie Mutua) issued a bouncing cheque and completely refused to settle the issue out of court. I thus had to go to court. This case is on for full hearing on the 13th December 2016. Besides this, the sister Winnie Mutua also fraudulently obtained cash from my company. This issue is also in court. I have forwarded a document from the Registrar of Companies showing the company that issued the cheque. I am requesting you to talk to Stella, she is an accomplice in this crime.”

2. On 30th September 2016, the defendant wrote a similar email to Emmy letting the Head of Corporate Quality at Kenya Airways, with the same content as was in the first email sent to Pauline Kihara on 27th September 2016. The plaintiff/applicant has now taken out the notice of motion dated 2nd November 2016, in which she sought for the following orders:

1. THAT the application herein be certified urgent and be heard ex parte.

2. THAT a temporary injunction do issue restraining the respondent from in any way sending emails, publishing, circulating or in any way conveying, defamatory material to Kenya Airways, its managers or any other person or body either by himself, agents or servants against the applicants herein pending the hearing and determination of the application inter partes.

3. THAT a temporary injunction do issue restraining the respondent from in any way sending emails, publishing, circulating, conveying defamatory material to Kenya Airways, its managers or any other person or body either by himself, agents or servants against the applicants herein pending the hearing and determination of this suit.

4. THAT the respondent bears the costs of this application.

3. The motion is supported by the affidavit of Stallamarie Keru Mutua. When served, the respondent filed the replying affidavit of Paul Muthee to oppose the application..

4. 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.

5. 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.

6. The applicant avers that the respondent herein falsely and maliciously published vide emails sent on 27th September 2016 and 30th September 2016 to managers at her work place at Kenya Airways. The emails contained defamatory statements, words, remarks and utterances. That the words published by the respondent in totality are false, malicious and without any iota of truth and the words have interfered with the applicant's personal integrity and corporate image. The applicant avers that it was the respondent intention to mislead the applicant's employer into believing that she is corrupt, an incessant violator of laid down laws and procedures, a scheming conspirator, imprudent, reckless, despicable, a person without integrity and unworthy of holding any office.

7. The applicant states that she has already explained the true facts to her employer in an attempt to mitigate the situation which had invariably gotten out of hand due to the damaging acts of the respondent. The applicant also states that she knows the respondent and have had both business and friendly relations and the claims set out in the emails by the respondent are before court and should therefore not be discussed outside the walls of court, as it constitutes sub judice. The applicant avers that the sole intention of the publication by the respondent was to injure her standing among right thinking members of the society. The applicant is convinced that the said words are beyond the frontiers of the freedom of expression as recognised under the constitution of Kenya 2010.

8. The respondent on the other hand avers that he knows the applicant and him enjoy both business and friendly relations. That he knew the applicant's sister called Winnie Syonidi Mutua who is mentioned in the emails. It is on the basis of the cordial relationship that he advanced some money to the applicant and her sister without security. The money advanced was to be repaid to the respondent. A cheque issued to repay the debt bounced forcing the respondent to have criminal proceedings instituted against the applicant.

9. The respondent further avers that he had no malice in writing mthe emails because he was desperate. The applicant had started evading him and not paying back his money. The respondent states that applicant has not come to this court with clean hands and the applicants affidavit is full of falsehood and she is hiding vital information and the aforesaid from the court hence does not deserve the orders sought in her motion.

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

- i. *The applicant must make out a prima facie case with a probability of success; and*
- ii. *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*
- iii. *If there is doubt as to either of the above, the court would decide the application on a balance of convenience.*

11. The threshold for the 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.”

12. 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 probability of success. Considering the statements and utterances labelled against the plaintiff by the defendants, one of the issues which may arise is whether or not those statements and utterances are defamatory or whether or not are they fair comment. It is an issue which can conclusively be determined at the trial. The defendant/ respondent however states that this test has not been met by the plaintiff/applicant and further states that the said email are true to the best of his knowledge and information.

13. Secondly, an applicant must show the irreparable damage he/she would suffer if the order for temporary injunction is denied. The applicant has clearly stated that her reputation will seriously be damaged if the defendant/respondent continues with his injurious emails because, she will be portrayed as a despicable person unworthy of trust and respect and unable to hold any office. According to the plaintiff/applicant the injury cannot be compensated by an award of damages. This argument has been contested by the defendant/respondent who has stated that the plaintiff has not shown that her reputation has suffered injury as a result of the email he sent relating to issue in dispute. In my view at this interlocutory stage, such publication cannot be justified until the suit is heard and determined.

14. 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.

15. In the end, the motion dated 18th April 2016 is allowed in terms of prayer 3. Costs of the motion to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 8th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent