REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYAAT MERU

CIVIL SUIT NO.13 OF 2015

JOHN NTOITI MUGAMBI Alias KAMUKURU ……PLAINTIFF

Versus

HON. MOSES KITHINJI ALIAS HON. MUSA …….DEFENDANT

RULING

[1] I have before me a Notice of Motion expressed to be brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The significant order sought in the Motion is:-

1. **A temporary injunction to restrain the defendant, his servants, agents, employees associates or otherwise from further authorizing, uttering, writing, distributing and or otherwise publishing any interviews, articles, comments and or words that are libelous or injurious falsehood or any similar words defamatory of the plaintiff pending the hearing and determination of this suit; and.**
2. **Costs of the application.**

[2] The application is premised on the following grounds:

1. **That the defendant published or caused to be published untrue, false and a highly defamatory interview at Baite TV during a programme known as "ugambi" on 2nd June 2015 at around 9PM and repeated it thereafter.**
2. **That the said action of uttering the said words and causing to be published matters that he knew or ought to have known before to be false, defamatory, malicious libelous were meant to be scandalous, humiliate, ridicule and vex the plaintiff.**
3. **The allegations contained in the said article had a clear intention to scandalize, defame and injure the reputation of the plaintiff and exposé him to hatred, contempt, and ridicule with the sole aim of causing damage and injury to his reputation in general.**
4. **The defendant's intention has been to defame and injure the reputation of the plaintiff and expose him to hatred, contempt, ridicule and with the sole purpose of causing damage and injury to his reputation in general.**
5. **That the defendant has no legal right to publish or propagate malicious publications against the plaintiff.**
6. **Therefore, the defendant's article complained off was actuated by malice, extreme ill will and hatred. The same was deliberately and calculated and planned to injure the plaintiff in his personal image, professional reputation with a view of affecting his general honest standing in the society.**
7. **The defendant intentionally, deliberately and maliciously manufactured and made false facts and used libelous and empathic language calculated to cause the deepest injury to the**

plaintiff. The plaintiff further avers that the interview aforesaid published by the defendant was not published in the public interest.

8. **The publication of the said interview has greatly injured the reputation of the plaintiff. He has suffered great loss and damage as an honest businessman whose probity has been recklessly and cruelly impugned by the defendant.**
9. **Unless this application is immediately heard, the plaintiff will suffer loss and damage.**

[3] The plaintiff stated that he shall crave for leave of the court at the hearing to produce the said interview recordings and rely on them for their full tenor, effect and meaning. The plaintiff contended the action of uttering the said words and causing to be published matters that he knew or ought to have known before to be false, defamatory, malicious, libelous were meant to scandalize, humiliate, ridicule and vex the plaintiff and that the words in their natural and ordinary meaning meant and were meant to understand to mean that he was;

1. A thief
2. Corrupt
3. Corrupting innocent children while protecting his own children
4. Exploiter
5. A fraudster
6. A criminal
7. Dishonest, immoral and unethical
8. Evil
9. Hateful
10. Greedy and ravenously insatiable
11. Morally unfit to be a leader or a businessman
12. Politically inept
13. Untrustworthy
14. Land grabber
15. Not God fearing
16. A robber
17. Anti-social
18. Manipulative
19. Ignorant
20. A miser and incorrigibly stingy
21. Malicious and sadistic
22. A coward and useless to society
23. A non entity and not deserving of respect by decent society
24. Selfish and self-centered
25. An accomplice of criminals and schemes to impose a shoot of low moral standing on the electorates
26. An irritable tribalist

[4] The Respondent opposed the application through grounds of opposition filed in court on 11th January 2016. The Respondent contended *inter alia* that this was not a clear case to grant an injunction in a defamation suit as the restraint sought was so wide, general and imprecise; it leaves no room for the Respondent to say anything about or concerning the plaintiff which would be inappropriate and untenable in law. He stated further that, the injunction sought was futile for two reasons; (1) there was no evidence of possibility of re-airing the TV interview; and (2)an award of damages (in lieu of an injunction) would be adequate remedy for the Applicant who is already seeking damages in the suit.

[5] Parties also filed submissions to amplify their respective standpoint stated above. The Applicant was categorical that the defendant's article complained of was actuated by malice, extreme ill-will and hatred and deliberately calculated and planned to injure the plaintiff in his personal image, professional reputation with a view of affecting his general honest standing in society. On the other hand it was submitted for the defendant that the plaintiff had not made out a sufficient case for the granting of interlocutory injunction namely that he had not shown that he had a prima facie case with a probability of

success, that award of damages would not adequately compensate the plaintiff and the balance of convenience would tilt in his favour. It was further submitted that in defamation cases there was yet a fourth principle that an injunction would only be issued in the clearest of cases. The Respondent anchored their said proposition on the case of **FRANCIS ATWOLI &5 OTHERS V HON KAZUNGU KAMBI & 3 OTHERS HIGH COURT CIVIL SUIT NO.60 OF 2015.**Consequently it was submitted that it would be inappropriate and unnecessary to grant an interlocutory injunction at this stage.

DETERMINATION

[6] I have carefully considered this application, the rival submissions by and the authorities relied upon by the parties. The application before court is not an ordinary injunction application. It is for an injunction in a suit for defamation. I do not, however, wish to re-invent the wheel. The legal threshold for grant of injunctions in defamation cases is well captured in the case of **MICAH CHESEREM Vs IMMEDIATE MEDIA SERVICES (2000) 1EA 371** whereit was held that:-

> ***"Application 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, in defamation cases 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(Emphasis mine) The court must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Normally the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a humane, responsible, truthful and trustworthy defendant."***

[7] Needless to state that the dynamic nature of law on injunctive relief is well enunciated in the case of **SULEIMAN vs. AMBOSELI RESORT LTD (2004) E KLR 589** by Ojwang Ag. J (as he then was) at page 607 when he delivered himself that:-

> **'…….counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before.**

Therefore, in defamation cases, while applying the traditional and the well-accepted principles set out by the Court of Appeal in **GIELLA vs. CASSMAN BROWN** the court should also consider other special factors which will be largely founded on the circumstances of the case, freedom of expression and public interest that the truth should be out. In defamation cases, therefore, the court must establish whether it is a clear case in which an injunction should issue. Quite an act of balancing of freedom of speech and right not to be defamed is needed in defamation cases. That is why I say that in a case such as this, a fundamental principle here should be that the court should take a course appears to carry the lower risk of injustice if it should turn out to have been "wrong". See Justice Hoffman in the English case of **FILMS ROVER INTERNATIONAL(1986) 3 All ER 772**at page 780-781.

On prima facie case

[8] Prima facie case in the context of the law was set out in the case of **MRAO LIMITED Vs FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) IKLR 125**at page 137, to be:-

> **"..... a case in which on the material presented to the court a tribunal properly**

directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

Has the Applicant established a prima facie case with a probability of success?

[9] Two matters of preliminary significance have been urged by the defendant *inter alia* that; (1) the Kimeru version of the words allegedly uttered by the defendant have not been pleaded in the plaint; and (2) failure to join Baite TV, the station that aired and published the alleged interview was fatal to the plaintiff's case. In my opinion actual proof of these matters will be canvassed in the main suit. Nonetheless, *I note that a lengthy translation of the interview and certificate thereof has been pleaded and provided with the pleadings respectively. The exact words used in the interview in Kimeru language are not pleaded in the plaint. The omission may be a basis of an objection that the plaint violates rules on pleadings. But, I observe that a transcript of the interview in Kimeru language as well as the CD of the interview have been annexed to the application. Without determining this issue as it will require an application specific to it, I must mention that* this is a case involving audio visual presentation in a Television broadcast, and I should think it may not be subjected to strict rules as to particulars which apply to written statements. There is, therefore, nothing major which will prevent the court from considering this application and the annexures provided thereto. See the case of **LONGHEED vs. CBC (1978) 4 WWL 338 at pp 349.**

[10] Going back to the substantive issues; in defamation cases court's discretion in granting an injunction is exercised with the greatest caution such that an injunction will be granted only in very clear cases. The reason for this position of the law is because, on the one hand is freedom of speech and right of information, and on the other hand is right not to be defamed. These two rights and freedoms are competing in a sense and will have to be balanced by the court to an almost symmetrical bound in order not to impede free and legitimate expression of speech but also prevent injury to person through libel or slander. Thus, the court must be satisfied that, on prima facie basis, the evidence presented before court, the words or matter complained of are so manifestlylibelous and defamatory that any verdict to the contrary would be perverse. I have looked at the words used and the entire interview. The words used in their plain meaning and purport carry libelous and defamatory remarks. Calling a person a thief, land grabber, a manipulator etc. in a television of a wide coverage smells of libelous and defamatory ordour. But, I am tempted to state that the Respondent is of sufficient understanding that such serious allegations which border on corruption and economic crimes ought to be raised before the relevant state organs which deal with such issues. And when they are formally lodged through the right channels, other procedural safeguards will kick in and the matter will assume a different complexion altogether. The above notwithstanding, there is a more serious problem with this application. The way the orders sought are styled- borrowing from the words of Justice Ringera- is a net cast too wide over a large body of water, and out of all the lake or sea, it will catch all manner of creatures. In defamation cases, it is not possible to issue such boundless injunction which restrain any and all persons from saying anything about the Applicant; that will be a complete impairment of freedom of expression and public interest that truth should be out. An injunction in such cases must be specific in order to prevent such impairment or impediment of freedom of free speech and expression. Care should be taken, therefore, not to issue injunctions which will rapture the law and the Constitution. See the underlined words in the order sought as reproduced below:-

A temporary injunction to restrain the defendant, his servants, agents, employees associates or otherwise from further authorizing, uttering, writing, distributing and or otherwise publishing <u>any interviews, articles, comments and or words that are libelous or injurious falsehood or any similar words defamatory of the plaintiff</u> pending the hearing and determination of this suit

If this order is granted as prayed, what yardstick will a person confronted with the order use to know or discern which interviews, articles, comments and or words are libelous or injurious falsehood or are similar words defamatory of the plaintiff? On this subject, see what Mabeya J said in the case of **FRANCIS ATWOLI &5 OTHERS –V HON KAZUNGU KAMBI & 3 OTHERS NAIROBI HIGH COURT CIVIL SUIT NO.60 OF 2015,**that;

> "**One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid; the order sought was too general to have any precise meaning."**

[11] Despite the foregoing misgivings, in the interest of justice, I think this case calls for appropriate orders to be made. First, I note that the Respondent submitted that there is no remote possibility that the Defendant will give another interview about the Plaintiff. Accordingly, on that basis, the Respondent will not be aggrieved if he is told and I hereby do direct him not to give similar interview and based on similar facts and information about the Applicant while this suit is pending. In addition thereto, the particular interview subject of these proceedings shall not be published or printed or reproduced or aired by the Respondent or any other person until determination of this suit. Given the nature of these proceedings and the result thereof, it is not appropriate to make an order for costs. Instead, each party shall bear own costs of the application. It is so ordered.

Dated, signed and delivered in open court at Meru this 25th day of February 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Kurauka advocate for plaintiff/applicant

Mr. Nyayire advocate for Wamae advocate for defendant/respondent

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F. GIKONYO

JUDGE