



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 285 OF 2015

ALS.....PLAINTIFF

V E R S U S –

EVS.....DEFENDANT

RULING

1. ALS, the Plaintiff/Applicant took out the motion dated 14th August 2015 in which he sought for the following orders against EVS, the Defendant/Respondent:

1. THAT the defendant whether by herself, her servants, agents or in any other manner howsoever be restrained from communicating, publishing, further publishing or causing to be published to the plaintiff's employer, fellow employees or to any other person, either by email or otherwise words or any publication defamatory of the plaintiff pending the hearing and determination of this suit.

2. THAT costs of this application be borne by the defendant.

2. The aforesaid motion is supported by the affidavit sworn by the Applicant.

3. When served, the Respondent filed a notice of preliminary objection and a replying affidavit she swore to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the matter made oral submissions.

4. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and replying affidavits. I have also taken into account the preliminary points of law plus the oral submissions of learned counsels. In the substantive plaint dated 14.8.2015, the Applicant is seeking for judgment in the following terms:

a. General damages for libel.

b. Aggravated and/or exemplary damages

c. A permanent injunction restraining the defendant, whether by herself, her servants, agents or howsoever from communicating or publishing or further publishing or causing to be published to the plaintiff's employer, fellow employees or to any other person either by email or otherwise words or any publication defamatory of the plaintiff.

d. A formal written retraction and apology for the false allegations published to Catherine Mogambi and Eric Coffie at Ecobank.

(e) Costs of this suit and interest on(a) and (b) above.

5. Pending the hearing and determination of this suit, the Applicant has sought for an interim order of injunction to restrain the Respondent from inter alia communicating, publishing or causing to be published to the Applicant's employer, fellow employees or any other person either by email or otherwise words or any publication defamatory of the Applicant. It is the submission of the Applicant that the defendant has been writing and publishing to the plaintiff's fellow employees false and defamatory allegations concerning the plaintiff for no lawful or justifiable cause. It is also the Applicant's submission that the Respondent has threatened to continue unleashing the defamatory words to other persons including the plaintiff's employer, relatives and children.

6. The Applicant further argued that the defendant's actions are actuated by malice and is meant to cause maximum damage which may include loss of employment with [Particulars withheld].

7. The Respondent on the other hand opposed the motion arguing that this court lacks jurisdiction to hear and determine the same because the same is resjudicata and that the publication between her and the Applicant is privileged communication between spouses. The Respondent pointed out that there is a pending divorce cause between them namely divorce Cause no. 272 of 2015 with similar prayers like what is being prayed for in this suit. It is the submission of the Respondent that this court lacks jurisdiction to hear and determine this matter since the same ought to be determined in the Divorce Cause.

8. I have carefully considered the rival submissions. Let me consider the two preliminary points of law raised by the Respondent. The first issue which was ably argued is to the effect that the matter before this court is res-subjudice. The Respondent has stated that there exists Divorce Cause no. 272 of 2015 which raises similar issues involving same parties. The Applicant admitted that there is a pending Divorce Cause between them before the chief magistrate's court but denied that the same raises similar issues. When determining whether a matter is res-subjudice or not, the court is required to examine the pleadings. In this case the Respondent did not avail any pleadings to establish the first preliminary point. I cannot therefore rely on the preliminary objection which is backed by facts to post a positive finding that this matter is res- subjudice.

9. The other preliminary point is whether the communication between the parties is privileged on the basis that it is a communication between spouses. There is no dispute that these parties to this suit are spouses. There is also no dispute that the parties have a pending Divorce Petition before the chief magistrate's court. In other words, the marriage between the parties herein still subsists pending the outcome of the Divorce proceedings. The question as to whether or not a communication between a husband and wife can be defamatory was partly considered in **Wenhank =vs= Morgan and wife (1888) QB 635** in which it was held inter alia, that

“In an action for libel the fact that the defendant has disclosed the libel to his wife is not evidence of publication. According to a well recognised principle, husband and wife are in the same position, and therefore that the uttering of a libel by a husband to his wife is no publication..”

10. I have examined the words complained of and they would appear defamatory in nature but these are communications between spouses which are privileged in law. With respect, I agree with the submissions of Kivumbi, learned advocate for the Respondent that the communication between spouses cannot be regarded as defamatory since they are protected by law. On this ground alone, I find that the Applicant's has not established a prima facie case with a probability of success.

11. Consequently the motion lacks merit, it s dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 13th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant