



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 225 OF 2015

JOHN KENNEDY WANJALA WAFULA

ALIAS KEN WAFULA.....PLAINTIFF

VERSUS

HON. ADEN DUALE.....DEFENDANT

RULING

The Plaintiff's suit herein is for damages for defamation and injunction. Together with the plaint the Plaintiff has filed an application by Notice of Motion dated 18th June, 2015 seeking the main order that, pending the hearing and determination of this suit, the Defendant be restrained from **“further causing to be published, publishing and/or printing any further defamatory words and/or similar words of and concerning the Plaintiff....”**. The application is stated to be brought under Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 40, rules 2 and Order 51 Rule 1 of the Civil Procedure Rules. The application is supported by the Plaintiff's affidavit. The only germane ground for the application appearing on the face thereof is that **“unless the honourable court intervenes and grants the restraining orders prayed for, the applicant faces security risk from the public who have been incited by the defamatory words of the Respondent and his family too risks suffering the same as well as mental torture”**.

The Defendant has opposed the application as set out in the replying affidavit filed on 28th August, 2015. The main grounds of opposition emerging from the affidavit are that the statements complained of by the Plaintiff are true and amount to fair comment on a matter of public interest; the Plaintiff has not indicated any instance of alleged defamation after 7th January 2015 therefore he has no foundation or basis upon which to seek orders to restrain future defamation; that the defamatory statements consist of questions formulated after serious allegations were raised in parliament touching on the Plaintiff's involvement in the saga of disappearance of Meshack Yebei for which he has been interrogated by the authorities; that Section 2 of the National Assembly (Powers and Privileges) Act, Cap 9 provides for immunity from legal proceedings against any member for any words spoken by that member within the precincts of the National Assembly.

The defences as pleaded in the statement of defence are put forward. A massive report titled **“Report of the investigation on the authenticity of documents on allegations against the United Kingdom relating to the International Criminal Court”** is annexed to the replying affidavit. Submissions were filed on behalf of the parties which the Court has duly considered.

The Defendant has strongly indicated in his replying affidavit and Statement of defence that his defence to the action will be justification and fair comment on a matter of public interest. Apart from that, aggravated and exemplary damages are always available against a defendant who persists in the defamation even after action has been instituted against him. So, it cannot be said that the Plaintiff stands to suffer irreparable loss unless the order of temporary injunction is granted.

If the court has to weigh the Defendant's constitutional right of self-expression against the Plaintiff's right to protection of his good reputation, the court will favour the constitutional right because appropriate damages will be available to the Plaintiff.

The Plaintiff must satisfy the court -

- (i) that he has a *prima facie* case against the Defendant with a probability of success; and
- (ii) that he stands to suffer irreparable loss unless the order sought is granted.

Over and above these requirements, for the court to grant interlocutory injunction in defamation cases, it has to be assured that it is in the clearest of cases. The jurisdiction has been said to be **of a delicate nature** and will only be exercised with great restraint. See **Gatley on the law of Libel and Slander, 8th Edn, para 1571.**

The jurisdiction will in general not be exercised unless there is strong *prima facie* evidence that the statement complained of is untrue. Until it is clear that an alleged libel is untrue, it will not be clear that any right has been infringed.

Whether or not there is libel is primarily a question of fact. In order to grant an interlocutory injunction the court would have to come to a decision upon that question of fact before trial and upon unverified affidavit evidence which is not an appropriate thing to do. It must be obvious that the matter complained of is libelous and that the fact is unlikely to change at trial. Should the court entertain a doubt that the words complained of are libelous, interlocutory injunction will not be granted. It is in the public interest that the truth be known.

There are also instances when interlocutory injunction will not be available no matter how strong the plaintiff's case is. These instances include:-

- (i) Privilege:** where the words are *prima facie* privileged, unless the court is clearly satisfied that the defendant was actuated by malice.
- (ii) Justification:** where the defendant pleads that he will be able to prove that the words complained of are true, unless the court is clearly satisfied that he will not be able to do so.
- (iii) Character of the plaintiff in issue:** if the decision at the hearing may substantially turn upon the plaintiff's character, it would be best that the court expresses no opinion at interlocutory stage.

Justification and character are primarily matters of fact that would rather be left to trial of the action.

The present case revolves around occurrences involving the International Criminal Court and certain witnesses in the cases that were before that court. The cases came before that court and involved high profile personalities in this country charged with grave atrocities witnessed after the disputed presidential election results in the year 2007. The whole matter therefore remains of vital national importance.

The Defendant has pleaded, *inter alia*, privilege, justification in stating and publishing the words complained of by the Plaintiff. His replying affidavit contains a mass of evidence by way of documents in form of a report. It would be inappropriate at this interlocutory stage for the court to examine and interpret that report without the benefit of tested evidence.

The present case is therefore far from clear as far as grant of interlocutory injunction is concerned. The public interest in all the circumstances that gave rise to this suit far outweighs the Plaintiff's private interest to a good name and character. I must therefore refuse the application. It is dismissed with costs to the defendant.

Dated and delivered at Nairobi this 28th day of July, 2016.

A.MBOGHOLI MSAGHA

JUDGE