



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT KISII

CIVIL CASE NO. 33 OF 2015

MUSA OGARO OSORO.....PLAINTIFF

VERSUS

WAKENYA PAMOJA SACCO LTD.....1ST DEFENDANT

FRED MIRUKA.....2ND DEFENDANT

RULING

1. By an amended Plaintiff dated 23rd September 2015 the plaintiff herein, Musa Ogaro Osoro, sought both general and exemplary damages for defamation against the defendants. He subsequently filed a Notice of Motion application dated 25th November 2015 under Order 40 Rules 1 and 2 and Order 50 rule 1 seeking, inter alia, orders for a permanent injunction against the defendants to restrain them from using the Ethics and Anti-Corruption Commission officers to harass, summon and/or question him pending the hearing and determination of this application and suit. The plaintiff also sought costs of the application and orders to restrain the Ethics and Anti-Corruption Commission (hereinafter "the EACC") from summoning, interrogating, harassing, arresting and or in any manner interfering with his employment with Kisii County Government on instigation of the defendants.

2. The application is supported by the plaintiff's supporting affidavit in which he states that the defendants, through the EACC, want him arrested and prosecuted on false allegations that border on defamation. He contends that the defendants have instigated the EACC officers to summon, arrest and charge him in court. He attached a copy of the said summons to his affidavit as annexure "M001".

3. He further depones that the defendant had earlier on written a defamatory letter to his current employer (Kisii County Government) that led to his suspension from duty even though the said suspension was eventually lifted. He attached a copy of the letter lifting the suspension marked as annexure "M002". The plaintiff's case is that his current employer suspended his services immediately with effect from 1st October 2015 after receiving the defamatory letter from the defendants. He attached a copy of the suspension letter marked as "M003". The plaintiff contends that the defendants are now using the EACC officers to get him arrested and charged in court so that he can lose his current job.

4. The plaintiff's case is that the defendants' actions are actuated by malice and are geared at having him convicted by all means so as to satisfy the defendant's own selfish interests.

5. The application was opposed through the 2nd defendant's replying affidavit dated 4th February 2016 in which he states that he is an employee of the 1st defendant. In the said affidavit sworn by the 2nd defendant in his capacity as an employee of the 1st respondent serving in the Human Resource Department. The 2nd defendant depones that the application is misconceived and bad in law because

neither the EACC nor the plaintiff's alleged current employer are parties to this case so as to warrant the issuance of the orders sought in the instant application.

6. He further depones that the EACC has been unjustifiably dragged into this matter in a bid to soothe the plaintiff in his pursuit of a frivolous claim against the defendants. He thus contends that the substance of the plaintiff's application and orders sought are misdirected thereby rendering the entire application a legal fallacy. He termed the application by the plaintiff as unmeritorious, bad in law and thus craving for a dismissal.

7. When the above application came before me for hearing on 16th February 2011, parties agreed to canvass it by way of written submissions.

8. Upon considering the pleadings and written submissions filed by both parties, I note that the only issue that presents itself for determination is whether the applicants application meets the threshold for the grant of orders of injunction. As I mentioned at the onset of this ruling, the plaintiff has filed a substantive suit (plaint) seeking general and exemplary damages for defamation.

9. The instant application seeks orders of injunction. The principles applicable in such an application were well spelt out in the celebrated case of **Giella –vs- Cassman Brown [1973] 358 E.A** in which it was held that an applicant in an application for orders of injunction must demonstrate that he has a prima facie case against the respondent with high chances of success, that he will suffer loss that cannot be compensated in damages and if the court is in doubt about the first two factors, the court grant the injunction on balance of convenience.

10. A fourth principle which has emerged in the grant of orders of injunction in defamation cases is that such an order will be granted only in the clearest of cases.

11. In **Micah Cheserem –vs- Immediate Media Services and 4 others [2000] 2 E. A 371**, the court held:-

“An interlocutory injunction is temporary and only subsists until the determination of the main suit...in defamation, the question of injunction is treated in a special way although the conditions applicable in granting injunction as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358, generally apply.....In defamation cases, those principles apply together with the special law relating to the grant of injunctions in defamation cases where the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in the dearest possible casesthe reason for so treating grant of injunction in defamatory cases is that the action for defamation bring out conflict between private interest and public interest and more so in cases where the country's constitution has provisions to protect fundamental rights and freedoms of the individual including the protection of the freedom of expression.”**

12. In **Gilgil Hills Academy Ltd –vs- The Standard Ltd [2009] eKLR**, Maraga J. (as he then was) held that, whilst the three principles in **Giella –vs- Cassman Brown** (supra) apply, other factors fall for consideration in the case of defamation cases. He stated as follows:-

“This being a defamation case, however an array of other factors fall for consideration only two are relevant to this case. They are public interest in the matter and whether on the material before the court at this stage, it is clear that the alleged defamatory publication is true or not. On the factor of public interest it is trite law that public interest demands that truth be out. For that reason, it is in public interest that individuals should possess the right to free speech and indeed that they should exercise it without impediment, so that that right is not whittled down, the jurisdiction to grant an injunction at an interlocutory stage is a delicate and special one and ought to be exercised only in the dearest of cases.”

13. From the decisions in the above cited authorities, it is crystal clear that apart from the requirements

for the granting of orders of injunction enumerated in the Giella Cassman (*supra*) case another fourth requirement is that an injunction can only be granted in the clearest of all cases. The question that this court needs to answer is whether the plaintiff's application falls in the category of the clearest of cases. I am afraid that the answer to the above question is negative for the following reasons:

14. Firstly, with I note that the office of the EACC has been mentioned severally by the plaintiff and indeed the main gist of the plaintiffs instant application is to obtain orders of injunction restraining the said EACC from summoning, questioning, harassing or charging the plaintiff in court. It is however noteworthy that the said EACC is not a party to this suit thereby making the issuance of an order against such a party not only irregular and untenable but also an exercise in futility.

15. In the determining who a necessary party to a suit is, **Derlin, J. in Amon –vs- Raphael Juck & Sons Ltd [1956] 1ALL ER 273** held at p. 286-287 that:-

“What makes a person a necessary party? It is not a course, merely that he has relevant evidence to give on some of the questions involved, that would only make him a necessary witness, it is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately...the court might often think it convenience or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer but one would suggest that it would be necessary to hear them for that purpose. The only reason which make it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.” (my emphasis)

16. In the instant case, I find that the fact that the EACC is not joined as a party to this suit invariably means that injunctive orders cannot be granted against it since a party who is not joined in a suit cannot be bound by the said injunctive orders. My above finding is anchored on the fundamental principle of natural justice that a party cannot be condemned unheard and therefore, if the plaintiff intended to seek orders to compel or restrain the EACC from doing something then nothing would have been easier to do than to enjoin the said EACC to the suit. Furthermore, I find that the plaintiff's claim against the defendants is disjointed as he has not established the nexus between the EACC and the alleged defamation claim against the defendants.

17. In the case of Errest Orwa Mwai – vs Abdul S. Hashid & another Civil Appeal No. 39 of 1995, the court of Appeal was of the view that an order made in proceedings to which the appellant was not a party could not bind the appellant – see Also the decision in **the Town Council of Ol’Kalou vs Ng’ang’a General Store Civil Appeal No. 269 of 1997**.

18. In view of my above findings and even before applying the threshold for granting injunction enumerated in the **Giella case** (*supra*), I find that the plaintiff's application falls short of the threshold set for the granting of injunctive orders in defamation cases as stated in the **Micah Cheserem Case** (*supra*) since he has not established a clear cut case to warrant the grant the said orders.

19. For the above reasons, I dismiss the plaintiff's Notice of Motion application dated 25th November 2015 with costs to the defendants.

Dated, signed and delivered at Kisii this 18th day of August, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Omwega for Ochako for the Applicant
- Mr. Nyagwecha for Nyamwange for the Respondent
- Omwoyo: court clerk