



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 449 OF 2015**

1. **THE KIAMBU COUNTY PUBLIC SERVICE BOARD**
2. **JUSTIN NDUNG’U KIMANI**
3. **LUCY WANJIKU KIBIA KAMAU**
4. **ERIC KELVIN MWAURA KIRIKO**
5. **DR. BARHAM DEV VASISHT**
6. **ALEXANDRIAH MUHANJI.....PLAINTIFF/APPLICANTS**

**VERSUS**

**KARUNGO WA THANGWA.....DEFENDANT/RESPONDENTS**

**RULING**

1. The application before this court is a notice of motion dated 22<sup>nd</sup> June, 2016. It is brought under section 1, 1A, 1B, 3, 3A, 63 (c) and(e) of the Civil Procedure Act and Order 40 rules 1,2,4 and 8 and Order 51 rule 1 of the Civil Procedure Rules. The Applicants seek an order that the Defendant whether by himself, agents, servants or otherwise be restrained from further publishing or causing to be published in any way whatsoever, any news, items, statements, articles, words, images, pictures and caricatures on internet, newspapers, facebook, twitter, you tube and whatsapp, or any medium whatsoever concerning the ongoing case pending hearing and determination of this suit.

2. The motion is supported by the affidavit of the 2<sup>nd</sup> Applicant who swore it on behalf of the other Applicants and on his on behalf. He stated that the Defendant created a website, [www.istandwithkarungo.com](http://www.istandwithkarungo.com) in which the pleadings in respect of this case have been uploaded. That the Defendant urged his supporters to follow up on the case as he updates them on the development of the same in the said website. It was stated that the Defendant is deliberately misleading members of the public in that front page of the website titled Kiambu County Government v. The People’s MCA. That the said title has created a wrong impression that the case is between the County Government and the Defendant and that he is being wrongly targeted. He stated that Kiambu County Government is not involved in this case in any way therefore the Defendant’s contention that the government has sued him is only aimed at misleading the members of the public to generate sympathy. That prior to the launching of the website, the Defendant through his facebook account and twitter handle made posts which castigate the case and aimed at drawing negative criticism against the same from the members of the public. Among the articles said to have been written on his twitter handle and facebook page are as follows:

- i. Know why they want me muffled! Launching tomorrow. #iStandwithKarungo #MasterPuppeteer #iGotyourBack*
- ii. Know why they want me muffled! Get to know why they are using your money (public finance) to ‘solicit’ money from me. Launching tomorrow. #iStandwithKarungo #MaterPuppeteeratWORK #iGotyourBack*

iii. In a matter of hours, find out why Kiambu government want to muffle and muzzle me...check [www.istandwithkarungo.com](http://www.istandwithkarungo.com) #istandwithkarungo #Masterpuppeteeratwork

iv. @KarungoThngwa @bonifacemwangi @MwangiMuthiora @citizenkenya board is wasting tax payers money. Same tactics used on nyoro& now waititu

v. I will be LIVE on Ebru TV today at 1pm. Join me as I explain what prompted me to design and launch [www.istandwithkarungo.com](http://www.istandwithkarungo.com) #istandwithkarungo we are now at 782 I believe we will hit 1000 by noon. Check it out [www.istandwithkarungo.com](http://www.istandwithkarungo.com)

vi. I will be LIVE on @ebruafricanews today at 1pm. Join me to know why I designed and launched <http://t.co/CJJeAOcp5M><http://t.co/i61pkoT9N8>

vii. @KarungoThangwa I designed the website myself from the scratch. #UptoDateAt1 <http://t.co/hpJLO2YEpL>

viii. Retweeted EBRU AFRICA NEWS(@ebruafricanes): @KarungoThangwa when the government east money, it's my work to say that. #UptoDateAt1 <https://t.co/uCUeMtU10u>

ix. 1,700 hits and counting. Check it out <http://www.istandwithkarungo.com/.../statement-of-defence-ci.../>

3. In response thereto the Respondent filed a replying affidavit on 25<sup>th</sup> August 2016. He stated that this suit was instituted by the Applicants in their individual and corporate capacities as members of the Kiambu County Public Service Board. That since the Applicants exercise their powers and functions on behalf of Kiambu County Government, the subject matter of this suit directly relates to operations of Kiambu County Government. That in their pleadings, the Applicants make substantive reference to insinuation touching on the person of the County Governor and County Government. That it is curious that the Applicants get visibly agitated when reference is made to the County Government and Governor of Kiambu as if they are holding forte for unnamed aggrieved persons. That if the matter is not personal to them then such reference should not provoke such resentment. That the matters complained of do not violate sub judice rule. That upon filing of pleadings, they become public record. He contended that freedom of expression and information is guaranteed by the Constitution of Kenya, that such freedom can only be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. That sub judice rule is not automatic bar to public discussion on matters pending in court. That no justification has been provided by the Applicant for limiting such freedoms. That it is preposterous how uploading pleadings as filed in court can amount to misleading the public. That disseminating information to the public is perfectly within the law. He contended that the Applicants' grievance is alleged reference to Kiambu County Government. That such reference if at all, can only injure Kiambu County Government and not the Applicants. That it is not clear on what basis the Applicants would be injured. That court renders decisions not based on facebook posts or tweets but objective decisions on the material and parties before it as such, no conceivable prejudice can accrue to the Applicants. That the Applicants seek to gag free press, freedom of expression and information and rolls back the gains made in the bill of rights set out in the Constitution of Kenya.

4. The motion was dispensed with by way of oral submissions. Mr. Busiega learned counsel for the Applicants submitted that the matter revolves around sub-judice rule which prohibits public discussions of matters pending in court. He stated that the Respondent has a right to freedom of expression but the same can be limited if the alleged words constitute vindication of others. Counsel relied on Article 24 of the Constitution. He submitted that the Applicants are aggrieved by the conduct of the Respondent. That he created a website where he uploaded the pleadings that are before this court. That the Respondent has posted certain statements (enlisted in the supporting affidavit). That the Respondent has stated that the reason why he is uploading pleadings is because he is muffled. That the Applicants aver that the said words are defamatory a fact which counsel submitted that the Respondent has not denied. That in as much as the Respondent has the freedom of expression, he should not defame others. Counsel cited

**Masumbuko Yerry Kombe v. Kibiwott Koross & Another [2014]eKLR and Ahmed Adan v. Nation Media Group Limited & 2 others [2016] eKLR in reliance.**

5. Learned counsel for the Respondent Mr. Ng'ang'a on the other hand submitted that by uploading the pleadings the Respondent was merely informing the public that he is facing a court case. That being a public servant, there is nothing wrong in doing so. He referred court to the decision of **Gladys Nthenya Kivati v. USA-Africa Management Co. Ltd & Ano. [2016] e KLR** where the doctrine of sub judice was discussed. He submitted that the court has the capacity to deal with this matter without any influence as a result of the materials before it. That this is a matter of public interest and it is difficult to gag members of the public to question how their money is being used. It was submitted that the Applicants have not justified that they are within the purview of Article 33 of the Constitution of Kenya. That in the alleged facebook page there is nothing that one considers as touching on the case before court. That the alleged statements contained in the affidavit are not in the Complaint and have been brought as a ground in the application. That the decisions that are referred to are not relevant since they are not on sub judice rule. That the tweets from the members of the public are not defamatory but are fair comments.

6. Mr. Busiega responded that the words complained of have been attached at paragraph 45 of the supporting affidavit.

7. The court has considered the application herein and the arguments by both parties. The *sub judice* rule is a common law principle that generally prohibits public discussion on matters pending before the court. At common law, the principle was particularly appropriate in cases of trial by jury where there was genuine fear that lay jury members would be swayed by public opinion. The repealed Constitution of Kenya at section 79 (2) secured the common law position on *sub judice*. However, under the Constitution of Kenya, 2010 any limitation on the freedom of expression guaranteed under Article 33 must be justified. I share the same view as the one in **Okiya Omtatah Okiiti v Attorney General & 2 Others [2013] eKLR**, that it is no longer enough to front *sub judice* as an automatic bar to public discussion on matters pending before the court.

8. Kenyan courts are manned by apt judicial officers who are capable of rising above the discordance of public debate to render objective and just decisions based on the facts before the court and the applicable law. The only permissible limitation on the freedom of expression guaranteed under Article 33 must be as provided under Article 24. The Respondents did not advance any arguments on this score.

9. This matter having a political touch, it involves members of the public who are entitled to information concerning the going-ons of the affairs of their County and considering that the Defendant is a member of the county assembly. However, the question that arises next is whether or not the impugned words were defamatory or not.

10. The court has jurisdiction to grant interlocutory injunction in defamation cases, but only in the **clearest of cases**. The jurisdiction has been said to be **of a delicate nature** and **'ought to only be exercised in the clearest of cases'**. See ***Gatley on the law of Libel and Slander, 11<sup>th</sup> Edn, Para. 27.2***. The jurisdiction will in general not be exercised unless there is strong *prima facie* evidence that the statement complained of is untrue. Unless it is plainly 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 untested affidavit evidence. It must therefore be manifest that the matter complained of is libelous and that that fact is unlikely to change at trial. The defamation complained of must be **obvious, atrocious and wholly unjustified**. It must be a kind inflicting the **most serious injury** to a plaintiff's character and reputation. Should the court entertain a doubt that the words complained of are defamatory, interlocutory injunction will not be granted, for it is important, in the public interest, that the truth be known. The **test in defamation cases should therefore go beyond that obtaining in ordinary cases**. It will not be sufficient merely for the plaintiff to establish a *prima facie* case with a probability of success and irreparable loss. There are also instances when interlocutory injunction will be very difficult to obtain no matter how strong the plaintiff's case is. These instances include where **justification** is pleaded. 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, it will not grant interlocutory injunction. See **Gatley para. 27.5**,

11. In **Bonnard vs Perryman [1891] 2 Ch. 269**, it was explained –

***“the right of free speech is one which it is for the public interest that individuals should possess and indeed that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed...”***

12. The court has perused the posts that have allegedly been posted on the Defendant’s twitter handle and facebook page and this court sees nothing defamatory about the posts. There would be nothing wrong with the Defendant informing the people he represents about the case as long as the correct reporting is done. After all, he is their representative in the country assembly, and the cause of action herein arises in the course of his duties as a member of county assembly.

13. I have also considered the pleadings filed in this case and I note that the matters complained off by the Plaintiffs were raised in the county assembly and there are several correspondences to that effect. The Defendant has averred that though he raised the issues complained about by the Plaintiffs, the alleged remarks were not published at his behest and he has relied on the defence of privilege communication.

14. Having analysed the evidence on record by way of affidavits and arguments by the learned counsels, this court finds that the Notice of Motion dated 22<sup>nd</sup> June, 2016 has no merit and the same is dismissed with costs.

Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of November, 2106.

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**L NJUGUNA**

**JUDGE**