

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 90 of 2007

ANDREW OLOO OTIENO..... PLAINTIFF

VERSUS

BENJAMIN SHAMALA IMBOGODEFENDANT

R U L I N G

The Plaintiff's suit herein is for damages for defamation. Together with the plaint the Plaintiff filed an application by chamber summons dated 29th January, 2007 seeking the main order that, pending the hearing and determination of this suit, the Defendant be restrained from "further writing, printing or publishing defamatory statements of the Plaintiff". The application is supported by the Plaintiff's affidavit. The only germane ground for the application appearing on the face thereof is that the Plaintiff is "justifiably apprehensive that unless this...court issues an injunction against the Defendant, he will continue to write, print and publish statements defamatory of the Plaintiff".

The Defendant has opposed the application as set out in the replying affidavit filed on 8th February, 2007. 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. There is a supplementary affidavit filed on 21st March, 2007 in answer to the replying affidavit. It joins issue with the Defendant upon its plea of justification.

When the application came up for hearing on 20th February, 2008 there was no appearance for the Defendant, despite the hearing date having been taken in the presence of both parties before the Duty Judge. A preliminary objection on a point of law to the application taken by the Defendant by notice dated 8th of February, 2007 was thus not pursued.

I have considered the submissions of the learned counsel for the Plaintiff. No cases were cited. I have also perused the court record. This suit was filed on 30th of January, 2007. It appears that summons to enter appearance may not have been served yet. Indeed, it appears that they have never been issued.

By this application, what the Plaintiff is asking the court to do is to interfere with the Defendant's constitutional right of self-expression. Would an order to that effect be justified in the circumstances of this case?

There is no defence filed by the Defendant, apparently because he has not yet been served with summons to enter appearance and copy of the plaint. But he has strongly indicated in his replying affidavit 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 that,

- (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.

I have no doubt that the plaint discloses a *prima facie* case. But the Plaintiff has not succeeded in demonstrating that he stands to suffer irreparable loss unless temporary injunction is granted. I must therefore refuse this application. It is dismissed with no order as to costs.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 13TH DAY OF JUNE 2008