Mboya v Standard Group Limited & another; Gitau (Interested Party) (Civil Suit E137 of 2020) [2023] KEHC 2014 (KLR) (Civ) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2014 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E137 OF 2020

CW MEOLI, J

MARCH 9, 2023

BETWEEN

APOLLO MBOYA ..... APPLICANT

AND

THE STANDARD GROUP LIMITED ..... 1ST RESPONDENT

JEROTICH SEII ..... 2ND RESPONDENT

AND

JAMES GITAU ..... INTERESTED PARTY

RULING

1. Before the court are two motions dated 02.10.2020 and 02.12.2021. For ease of reference, the court will refer to them as the 1st and 2nd motion respectively. The Plaintiff herein, Apollo Mboya (hereafter the Applicant) brought this action for defamation against the two Defendants, namely, The Standard Group Limited and Jerotich Seii (hereafter the 1st and 2nd Respondent(s)). Contemporaneously filed with the plaint was the 1st motion seeking inter alia that pending the inter partes hearing and determination of the motion and suit, an injunction does issue to restrain the Respondents by themselves, servants, agents or proxies from further publishing or causing to be published in any of their twitter handles including @SpiceFMKE, #SwitchoffKPLC@JeroticSeii and #HumnityKE@JerotichSeii, KTN Television or any other media platform, any statement and videos defamatory concerning the Plaintiff or any judicial officer.

2. The Applicant's further prayer was that pending the inter partes hearing and determination of the 1st motion and suit, the Respondents be compelled to pull down all publications and videos in their twitter handles and in any other media platform that are defamatory of the Applicant. The motion is

expressed to be brought under Section 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*, Order 5 rule 17, and Order 40 Rules 1, 2 & 4 of the Civil Procedure Rules.

3. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Applicant. To the effect that he was a Petitioner in Nairobi High Court Petition No. 6 of 2018 and Nairobi High Court Petition No. 59 of 2018 (hereafter the Petitions) which were determined by way of a consent orders, adopted as judgments of the court on 22.10.2018 and 15.11.2018, respectively. That on 19.12.2019 Spice FM Radio under the aegis of KTN Television published or caused to be uploaded, broadcast, tweeted and published in the twitter handle @SpiceFMKe and radio program the words "#SwitchOffKPLC campaigner. @ JerotichSeii discusses the possibility that a prominent advocate could have been bribed as much as 75 Million to facilitate an out of court settlement with Kenya Power @EricLatiff@EricLatiff @Nduokoh@NjeriThorne". (sic)

4. He further deposes that on the said broadcast and video by Spice FM Radio and KTN Television uploaded on the twitter handle @SpiceFMKe, the 1st Respondent published the words of the 2nd Respondent to the effect "Apollo Mboya settled the case out of court...We have heard that allegedly money was poured somewhere between 60-75m...."; that on 02.09.2020 on her twitter handle #HumnityKe@JerotichSeii the 2nd Respondent wrote that "Msaliti @MboyaApollo in action almost 2yrs ago. Nothing Changed for Electricity Consumers. His bank balance did. Today, he is nothing more than a liability for @KenyaPower @EPRA_Ke @EnergyMink @StateHouseKenya & perhaps the Judiciary".

5. The Applicant goes on to depose that the 2nd Respondent has in a series of tweets published several statements or allegations of or concerning him which are false unsubstantiated, baseless and unsupported and therefore defamatory. And that on 31.08.2020 after serving the 2nd Respondent with a letter of demand, using her twitter handle #HumnityKe@JerotichSeii she responded by a tweet to the effect that "@MboyaApollo 1.Shame on you 2. I was born ready. 3. Your days on the roll of advocates are numbered; you have our affidavits from PETs 6 & 59. Semeni cross-examination. James Gitau @WanjeriNderu @hotshotcreative @eva_m_mutua @KingFredAsira. Let's do this #SwitchOffKPLC". That earlier on 02.08.2019 the 2nd Respondent using her twitter handle #SwitchOffKPLC@JerotichSeii tweeted that "We will, in court, see how Sh75M was paid out to kill Pets 6 & 59."

6. He further deposes that the 2nd Respondent was relentlessly scandalizing and harassing him, the court and judicial officers using social media in respect of a ruling in Petition No. 59 of 2018 by inter alia tweeting on her twitter handle #SwitchOffKPLC@JerotichSeii that "For less than 1 min judgment, why not have the ruling ready to enable movement to the Court of Appeal? Or is Justice Makau busy retrofitting the ruling to reflect his decision? Sh 2.14T in capacity charges for energy cartels is enough to make one bend the pen."

7. The Applicant further states his acquaintances brought to his attention the tweets and videos by the Respondents that were not only false and malicious but were highly defamatory of his person as an advocate. That the Respondents tweets and broadcasts have been viewed by thousands of radio listeners, television viewers and retweeted, eliciting numerous comments which further aggravated the defamation given the wide circulation. Resulting in infinite injury to his character, reputation, image and good standing in his professional capacity. In conclusion, he asserts that the publishers did not contact him in advance to verify matters related to publication and circulation of the defamatory words whereas the Respondents were aware of the extensive reach of the publication from which the 1st Respondent derived substantial commercial gain.

8. The 1st Respondent opposed the motion through grounds of opposition dated 08.10.2020 and a replying affidavit sworn by the Brian Obara, who describes himself as an employee of the 1st Respondent. The grounds are to the effect that there is no subsisting prayer for consideration inter partes against the 1st Defendant prayer (1) of the application being spent at the ex parte stage; that no evidence has been presented demonstrating any future intention by the 1st Respondent to further publish any article on its twitter handle including @SpiceFMKE or on any of its media platforms; that the orders sought are intended to abridge the guaranteed freedom and independence of the media under Article 34 of *the Constitution*; that the Plaintiff has not satisfied the legal hurdles and requirements for the grant of a temporary injunction; and that the prayers in the motion are generalized, vague and an indeterminate.

9. The deponent to the 1st Respondent's affidavit asserts that the petitions in question touched on matters in the public domain and of great public interest as the proceedings were in open court. That Spice FM had invited the 2nd Respondent to give an insight on the matter in good faith and the tweet posted on 19.12.2019 in respect of the foregoing was not defamatory as it was based on discussions between the 2nd Respondent and the Spice FM hosts; and therefore the 1st Respondent did not give any insight of its own, but merely captured information which was directly provided by the 2nd Respondent.

10. He asserts further that the contents of the publication complained of by the Applicant are absolutely privileged, being fair and accurate reporting of proceedings that occurred in open court in Nairobi High Court Petition No. 6 of 2018. The deponent asserts that in addition the 1st Respondent has a duty to freely disseminate information to the public on matter of public interest which duty it discharged without malice. In conclusion, he deposes that since reports on judicial proceedings enjoy absolute privilege, the Applicant's motion offends the provisions of Article 34 of *the Constitution*, as public interest precedes private interest.

11. The 2nd Respondent equally filed grounds of opposition dated 03.11.2020 and a replying affidavit dated 28.10.2020 in opposition to the motion. The grounds are to the effect that the motion is bad in law and is an abuse of the court process; that the Applicant is guilty of material non-disclosure and of laches and is thus not entitled to the order sought. The 2nd Respondent swore that in early 2018 along with a fellow concerned citizen, she had approached the Plaintiff with the idea of rallying like-minded and frustrated electricity consumers to challenge the legality of what she describes as inflated, estimated, doubled and fraudulent electricity bills issued to consumers by Kenya Power and Lighting Co. Ltd.

12. That having struck a collaborative rapport with the Applicant she coined the social media hashtag #SwitchOffKPLC and proceeded to mobilize electricity consumers to solicit information, efforts culminating in a class action, namely, Nairobi High Court Petition No. 6 of 2018. She goes on to depose that as an aggrieved electricity consumer she campaigned to educate electricity consumers and in rallying support for the Applicant as counsel and petitioner. That from May of 2018 the Applicant ceased communication with her and on the last physical meeting in July of 2018, she learned that the Applicant had on 23.10.2018 entered into an out of court settlement between himself and the respondents in the petition, contrary to his prior public messages on his commitment to fight for all electricity consumers, and the legitimate expectation that public interest matters ought to be settled in public and not in a secret and self-interested manner.

13. That on 06.01.2019 she received information from one Robert Alai that the Applicant had received a significant monetary incentive to abandon Nairobi High Court Petition No. 6 of 2018 and in a subsequent meeting on 09.07.2019 the informant had deposed an affidavit on the circumstances leading to the consent recorded in the petition. She asserts that the absence of public consultation and

or prior disclosure regarding the Applicant's decision to record the consent demonstrates a deliberate misleading of the public by Applicant, despite his use of consumer data and experiences to build a convincing case in Nairobi High Court Petition No. 6 of 2018.

14. That on account of the foregoing she believes that the Applicant fraudulently negotiated and accepted monetary compensation to circumvent the course of justice for electricity consumers. She further acknowledges having appeared on the 1st Respondent's Spice FM to articulate matters concerning #SwitchOffKPLC. She takes the view that there has been inordinate delay in presenting the instant motion and that hashtag #HumnityKE@JerotichSeii attributed to her by the Applicant in the instant proceedings does not exist. In conclusion, she asserts that the motion does not disclose any reasonable grounds for granting of the orders sought and ought to be dismissed with costs.

15. Vide a ruling delivered on 25.02.2021 by Mbogholi, J. (as he then was), James Gitau was enjoined as an Interested Party. On his part, James Gitau (hereafter the Interested Party) opposed the 1st motion by way of a lengthy replying affidavit dated 23.03.2021. The gist of the depositions therein appear to raise issues that are the preserve of the trial court.

16. The Applicant thereafter proceeded to file the 2nd motion dated 02.12.2021 seeking inter alia that summons be issued for the 2nd Respondent to appear in court to show cause why she should not be committed to civil jail for contempt of court and that the 2nd Respondent be cited for contempt of court and be committed to civil jail for a term of six months or penalized on such terms as the court may determine. In that the said Respondent had committed contempt of court by inter alia deliberately defying the orders of this court issued on 19.10.2020 and as extended from time to time. The motion is expressed to be brought inter alia pursuant to Section 5 of the *Judicature Act*, Order 40 Rule 3 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*.

17. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Applicant. To the effect that despite the interim orders in respect of the 1st motion which were subsequently extended from time to time, on 08.11.2021 and 29.11.2021 the 2nd Respondent had posted defamatory words on her twitter handle #LindaKatiba@JerotichSeii to the effect that

> "Wakenya: you recal I was sued for defamation by Apollo Mboya in 2020? The gag orders he obtained lapsed on Nov 17th, 2020. Justice Mbogholi allowed James Gitau to be enjoined as an interested party cross-examination will be (fire emoji). ... When Apollo Mboya recently settled Petition 6 of 2018, he was awarded costs to be paid by @KenyaPower & EPRA_Ke. This is in addition to an amount he allegedly received to kill the case focusing on the theft of our Shs. 10.1B by KPLC... Wakenya: we raised this alarm loudly because had our notice of appeal not been filed, Apollo Mboya would have gone ahead to obtain his fee. At our expense. Those monies are mingi sana. A balance from Usaliiti part 1 perhaps? Tumekataa Justice will be ours."

18. He asserts that the said statements are defamatory and in contempt of the court and that the actions of the 2nd Respondent are maliciously calculated to aggravate the defamation by statements that are the subject of these proceedings. In conclusion, he asserts that it is in the interest of justice that the motion be allowed else the 2nd Respondent will continue to act in contempt of the court.

19. The 2nd Respondent opposes the 2nd motion by way of a replying affidavit dated 28.02.2022 in which she deposes that the motion is predicated on interim orders that lapsed on 17.11.2020; that she was well within her rights and obligations as a Kenyan and active citizen to express her views on a matter of public interest and that she had she had complied with court orders and directions given in this case.

That the statements alluded cited by the Applicant are not contemptuous of the proceedings herein and that the motion is based on false allegations, is dilatory and a waste of judicial time.

20. The Interested Party equally filed an affidavit in response to the 2nd motion. Again, the Interested Party canvassed substantive issues for trial. He pointed out however that the interim orders were only extended until 17.11.2020, and therefore lapsed. He defended the alleged statements by the 2nd Respondent and took a dim view of the 2nd motion.

21. The 1st Respondent opted not to participate in the 2nd motion. On 07.12.2021 parties took directions to canvass both motions by way of written submissions.

22. On the part of the Applicant, counsel submitted regarding the 1st motion that a prima facie case had been established, citing the case of Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] 1 KLR 125. Contending that reputation is an interest worthy of protection and that the slanderous statements had caused serious harm to the Applicant's reputation in his profession and title as an Advocate of the High Court of Kenya, counsel asserted that the statements are prima facie defamatory. Here, counsel recited the imputations thereto as pleaded in the plaint.

23. Concerning the question of irreparable damage, counsel called to aid the decisions in Ahmed Adan v Nation Media Group Limited & 2 Others [2016] eKLR and Ochieng Rapuro v Tatu City Limited [2019] eKLR to contend that the protection of reputation is consistent with public good as it was in the public interest that a person's reputation ought not to be falsely debased. Counsel asserted that the balance of convenience tilts in favour of the Applicant, and citing Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR and Philomena Mbete Mwilu v Standard Group Limited [2018] eKLR argued that the Applicant stands to suffer irreparably if the motion is not allowed whereas no prejudice will be visited on the Respondents. It was further contended that the Respondents have not pleaded a tenable defence and therefore the motion ought to be allowed as prayed.

24. In respect of the 2nd motion counsel relied on the definition of contempt found in Black's Law Dictionary, 9th Edition, the provisions of Order 40 Rule 3 of the Civil Procedure Rules, and several local cases including Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] eKLR, Katsuri Limited v Kapurchand Depor Shah [2016] eKLR. He also cited the Indian case of T. N Gadavarman Thiru Mulpad v Ashok Khot & Anor [2006] 5 SCC, Mahinderjit Singh Bitta v Union & Others 1 A No. 10 of 2010 and the decision in the Canadian case of Carey v Liaken 2015 SCC 17. All to support the submission that courts punish for contempt for the purpose of upholding the dignity and authority of the court, to ensure compliance with directions of the court, observance and respect of due process of law, to preserve an effective and impartial system of justice and to maintain public confidence in the administration of justice by courts. That in the foregoing regard, the 2nd Respondent ought to be cited for contempt for disobeying court orders.

25. On behalf of the 1st Respondent, counsel asserted that the prayers in the 1st motion are untenable. Citing Giella v Cassman Brown Co. Ltd. (1973), John Ward v Standard Ltd [2006] eKLR, Hon. Uhuru Muigai Kenyatta v Baraza Ltd [2011] eKLR and the English Case of Adam v Ward [1917] ALL ER 151 regarding proof of a prima facie case, he pointed out that the publication in question did not expressly name the Applicant. That besides, the publication was privileged as the information therein was derived from facts in proceedings in Nairobi Petition No. 6 of 2018 that were of great public interest and which matters were published without malice. Counsel further invoked the duty of media institutions to publish a fair, accurate and unbiased story that was of public interest in furtherance of the right of the public to access information as envisioned under Article 35 (1) of *the*

Constitution. Counsel asserted the Plaintiff had not established how his reputation suffered as a result of the publication complained of.

26. Counsel relied on the a raft of American decisions including Madsen v Women's Health Center, Inc. 512 U.S 753, 764 (1994), Caroll v Princess Anne [1968] 393 U.S 175 and Gertz v Robert welch Inc 418 US 323 (1974), as well as the local case of and Ahmed Adan v Nation Media Group Limited & 2 Others [2016] eKLR in support of the view that the net effect of the broad orders sought is the curtailment of the constitutional right to freedom of expression and to information. In conclusion, it was submitted that this is not a clear case for the grant of injunctions, and the motion ought to be dismissed with costs.

27. Counsel for the 2nd Respondent in addressing the 1st motion anchored her submissions on the decisions in Transcend Media Group v Standard Group Limited [2017] eKLR, George Mukuru Muchai v The Standard Limited [2001] eKLR and Giella v Cassman Brown & Co. Ltd (1973) E.A 360. He argued that a temporary injunction in such a matter as the present ought to be granted in the clearest of cases, with the court striking a balance between the protection of public interest and the rights of the parties. Further that, the Applicant had failed to demonstrate that the alleged publication by way of tweets tended to lower his reputation, and were therefore defamatory. Counsel asserted that the publications were in respect of matters in the public domain and of interest to the public and were published in good faith, and without any malice and thus the motion ought to be dismissed with costs.

28. Regarding the 2nd motion, counsel stated that the court would have to determine whether the orders allegedly disobeyed were subsisting at the material time. Citing Black's Law Dictionary 9th Edition and the decision in Esther Kakonyo Wanjohi v Julian Wambui Gakuru [2018] eKLR as to the definition of contempt, counsel submitted that it was incumbent on the Applicant to prove that the 2nd Respondent's conduct was a deliberate and or willful disobedience of the court's order. He emphasized that the order was served eight days after issuance and therefore pursuant to the provisions of Order 40 Rule (3) of the Civil Procedure Rules, the order had lapsed by date of service and the 2nd Respondent cannot be held to be in contempt. Alternatively, that the interim orders were not extended after 17.11.2020 and hence a party could not be held in contempt of expired orders. That on account of the foregoing the 2nd motion was without merit and ripe for dismissal.

29. Counsel for the Interested Party in submitting on the Applicant's 1st motion premised his submissions on the decision in Micah Cheserem v Immediate Media Services [2000] 1 EA 371 and contended that the publication complained of was made on a matter of general public interest and therefore passed the test of fair comment. While calling to aid the decision in Giella (supra) counsel asserted that the Applicant had failed to demonstrate that irreparable damage; that the publications complained of are not libelous in nature as the same were made in the public interest, in good faith and without malice or intention to injure the Plaintiff's reputation. And therefore, the 1st motion ought to be dismissed with costs.

30. Concerning the 2nd motion, counsel relied on the decision in Kimanja Kamau v Francis Mwangi Mwaura & Another [2018] eKLR and reiterated that the Applicant having failed to have the interim orders extended there were no subsisting orders to be obeyed. The court was urged to dismiss the motion with costs.

31. The Court has considered the affidavit evidence on record and the parties' respective submissions. I propose to deal with the 2nd motion first, and the substantive 1st motion thereafter. However, at this juncture, it would be remiss not to address the role of the Interested herein. This court has looked at the Interested Party's affidavit material and submissions before this court the scope of issues raised thereby. It is settled that the scope of an Interested Party's role in non-public interest litigation is limited.

32. The Supreme Court in Francis Karioko Muruatetu & Another v Republic & 5 others [2016] eKLR held that: -

> " [41]...We are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us" ....

33. The same court proceeded to state that: -

> " The issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court...." [Emphasis added]

34. Through his voluminous affidavit material, the Interested Party purported to canvass peripheral issues that are either the subject of ongoing litigation before a different court or that are not core to the dispute between the Applicant and the Respondents. What is before this court is a defamation suit and only issues pertinent thereto ought to be articulated before the court.

35. Now turning to the 2nd motion, it is expressed to be brought, pursuant to Section 5 of the *Judicature Act*, Order 40 Rule 3 of the Civil Procedure Rules, and Section 3A of the *Civil Procedure Act*. According to Black's Law Dictionary (Ninth Edition), contempt of court is "Conduct that defies the authority or dignity of a court." It was held in Stewart Robertson v Her Majesty's Advocate, 2007 HCAC 63 it was held that:

> " Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings."

36. In Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR, the Court of Appeal held that in punishing contempt the court exercises ordinary criminal jurisdiction. The Supreme Court of Kenya in Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR spelt out the rationale behind the court's power to punish contempt, as follows:

> " (24) In Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990 (unreported), where the Court of Appeal stated as follows:
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> > "It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In HADKINSON v. HADKINSON (1952) 2 All E.R. 567, it was held that:

> It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."...

(26) The Court of Appeal in A.B. & Another v R.B., Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in Burchell v. Burchell, Case No.364 of 2005 where it was held:

> "Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law." ...

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen" ...

37. Regarding the applicable standard of proof, the Court stated:

> " .... We are also conscious of the standard of proof in contempt matters.
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> The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:
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> "In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."

38. Explaining the rationale for the high standard , the Supreme Court stated as follows:-

> "(29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order. [Emphasis added]

(30) The question that begs an answer, thus, is: did the applicant willfully disobey this Court's Orders?"

39. The two related ingredients of willful disobedience and knowledge of the order are critical in a successful contempt proceeding. In the past, it was held by the superior courts that for an Applicant to succeed in contempt proceedings, he must prove personal service of the subject orders and the attendant penal notice upon the alleged contemnor. See the Court of Appeal dicta in in Nyamogo & Another v Kenya Posts and Telecommunications Corporation (1994) KLR 141. In recent years however, the courts have stated that where the applicant is able to demonstrate awareness by such alleged contemnor of the orders and not necessarily via personal service of the order upon the contemnor, such awareness is sufficient. See Kenya Tea Growers Association vs Francis Atwoli & Others (2012) eKLR.

40. There is no dispute that interim orders issued in respect of the 1st motion were to last until 19.10.2020 and were subsequently extended from time to time until 17.11.2020 and that the 2nd Respondent had full knowledge of the orders. The alleged contempt by the 2nd Respondent according to the Applicant occurred on 08.11.2021 and 29.11.2021 through defamatory statements published on her twitter handle #LindaKatiba@JerotichSeii.

41. The record of proceedings shows that on 17.11.2020, the Applicant appeared in person while Mr. Limo represented the 1st Respondent, Ms. Martha Karua for the 2nd Respondent and Ms. Nambirige for the Interested Party. The day's proceedings are as follows:-

> " Ms. Nambirige: I confirm I served my learned friends with all the documents.
>
> Mr. Mboya: I confirm service.
>
> Ms. Karua: I also confirm.
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> Mr. Mboya: I will be objecting to the Application
>
> Ms. Karua: The 2nd Defendant will be supporting that Application.
>
> Mr. Limo: I do not object to the Application.
>
> Mr. Mboya: I need 7 days to file and serve the response to the Application.
>
> Court: The Plaintiff has 7 days from today to file and serve the response to the Application. Intended Interested Party has 2 days corresponding leave to file supplementary affidavit if need be after service. Further mention on 24.11.2020 to confirm compliance." (sic)

42. The initial interim orders were not granted as prayed in the motion but limited to last for a specific period and thereafter extended in the same fashion until 17.11.2020. However, the orders were not extended on 17.11.2020 or during subsequent proceedings. The alleged contempt occurred on 08.11.2021 and 29.11.2021, about or more than a year since 17.11.2020. A case of contempt cannot be premised on non-existent orders. The 2nd motion must fail on that account alone and is hereby dismissed with costs to the Applicant.

43. However, by way of a caveat, it is appropriate to state here that parties involved in a live dispute must exercise restraint in their public comments on the dispute, to avoid impinging upon the fair administration of justice. While reporting of court proceedings and fair comment are necessary and important components of the right to free expression and to information, no party should be seen to prosecute their court case in the public space. More so in the age of instant public communication via social media.

44. Regarding the 1st motion that is substantively for determination, the Court of Appeal had this to say in Musikari Kombo v Royal Media Services Limited (2018) eKLR:-

> " The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:
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> > "The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbor. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

45. Actions founded on the tort of defamation bring out the conflict between private and public interest. Article 33(1) of *the Constitution* guarantees every person's right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that "In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others". Article 34 guarantees the freedom of the media but the exercise thereof is subject to the provisions of Article 33(2). Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*.

46. In contemplating these competing rights Lord Denning MR stated in Fraser v Evans & Others [1969]1 ALLER 8

> " The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed."

47. In Halsbury's Laws of England 4th Edition Vol. 28 paragraph 10- a defamatory statement is defined as follows:

> " ....a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business".
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> See also the Court of Appeal definition of a defamatory statement in SMW v ZWM (2015) eKLR.

48. Additionally, Gatley on Libel and Slander 6th Edn. states that:

> " A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another".

49. In Selina Patani & Another vs Dhiranji V. Patani [2019] eKLR the Court of Appeal stated that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. The Court restated the ingredients of defamation as follows;-

> " In rehashing, we note the ingredients of defamation were summarized in the case of John Ward v Standard Ltd. HCC 1062 of 2005 as follows:
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> i. The statement must be defamatory
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> ii. The statement must refer to the plaintiff
>
> iii. The statement must be published by the defendant
>
> iv. The statement must be false."

50. The undisputed background to this action as gleaned from material on record is as follows. The Applicant is an advocate of the High Court of Kenya and has had relatively prominent career as a legal practitioner. On 19.12.2019, 31.08.2020 & 02.09.2020 the 1st and 2nd Respondents published material on their social media platforms (Twitter), in respect of the Applicant, in connection with two matters pending in court at the time. Namely, Nairobi High Court Petition No. 6 of 2018 and Nairobi High Court Petition No. 59 of 2018.

51. It would appear that the Applicant was one of the petitioners in these cases and, with the 2nd Respondent was a prime mover in the petitions that were apparently brought to challenge inter alia the alleged inflated electricity charges or unfair tariffs applied by the Kenya Power utility company against consumers. A campaign had also been mounted by the parties to mobilize consumers under the tagline: "#SwitchOffKPLC". Apparently, the relationship between the Applicant and the 2nd Respondent became strained following a consent recorded in one of the petitions by the Applicant, allegedly without consultation. Subsequently, the 2nd Respondent used various media to express her displeasure with this turn of events, which she attributed to underhand dealings. The publications irked the Applicant prompting the filing of the instant suit.

52. The principles governing the grant of an interlocutory injunction as enunciated in Giella v Cassman Brown & Co. Ltd [1973] EA 358 are settled. Similarly, as to what constitutes a prima facie case, this is settled too since the decision in Mrao v First American Bank of Kenya Ltd & 2 Others C. A. No. 39 of 2002; (2003] eKLR. Both decisions have been reaffirmed and applied by superior courts in countless subsequent decisions, including the decisions cited in this case by the parties.

53. The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR restated the principles governing the grant of interlocutory injunctions as enunciated in Giella's case and observed that the role of the Judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles. The Court cautioned that such a court ought to exercise care not to determine with finality any issues arising. The Court expressed itself as follows:

> " ...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

a) establish his case only at a prima facie level

b) demonstrated irreparable injury if a temporary injunction is not granted.

c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."

54. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no prima facie case is established, the court need not investigate the question of irreparable loss or balance of convenience. As to what constitutes a prima facie case, the Court of Appeal delivered itself as follows;-

> " Recently, this Court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
>
> "In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."
>
> We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed." (Emphasis added)

55. In addition, this being a suit founded on defamation, the counsel contained in Micah Cheserem's case (also founded on defamation) is pertinent to the consideration of the 1st motion. Khamoni J (as he then was) stated in that case that:-

> " Maybe counsel did not address me fully on the relevant law because it is not appreciated that the question of an injunction in defamation cases is treated in a special way. Here

injunction is not treated in the way it is treated in other cases. I looked at the relevant authorities and considered the matter in the case of Francis P Lotodo vs Star Publishers & Magayu Magayu in HCCC No 883 of 1998 and found that though the conditions applicable in granting an injunction as set out in the case of Giella vs Cassman Brown & Co Ltd [1973] EA 358 generally apply, in defamation cases those conditions operate in special circumstances. Those conditions have to be applied together with the special law relating to the grant of injunction 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 clearest possible cases. The Court must be satisfied that the words or matter complained of are libelous. It must be satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.

But how will the Court be so satisfied when the application for an injunction in a defamation action is, like in the instant case, filed at the initial stage? It is filed before pleadings are closed. How will the Court be so satisfied?

Further, even when the Court is satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse, can the Court grant an injunction where the respondent has the defence of qualified privilege or where the respondent is pleading justification or fair comment? We will be at a stage where the Court has not yet heard and seen witnesses testify. Their evidence has not therefore been tested, canvassed and evaluated. The respondent or defendant is pleading qualified privilege and therefore justification or fair comment, being a defence which defendants in actions which are not for defamation normally do not have. Does the Court grant an interlocutory injunction?

From the authorities and the law, I considered in the case of Francis P Lotodo, I found that defamation cases are special actions as far as the granting of injunctions is concerned. This is because generally and basically, actions or cases of defamation bring out a conflict between private interest and public interest, and this is more so in Kenya where we have the country's Constitution which has provisions to protect fundamental rights and freedoms of the individual including the protection of freedom of expression".

56. None of the Respondents herein dispute the publications attributed to them and which clearly refer to the Applicant. The 1st Respondent by its affidavit in response appears to stand by its publication, asserting that the contents of the publication complained of are absolutely privileged, as it was fair and accurate reporting of proceedings that occurred in open court in Nairobi High Court Petition No. 6 of 2018. That in addition to being privileged the 1st Respondent has a duty to relay information freely to the public on matters of public interest and in so doing discharged it duty without malice. The 2nd Respondent on her part appears to plead justification on the basis of an affidavit by one Robert Alai marked as Annexure JS-1.

57. The verbatim record of the publication of 19.12.2019 attributed to the 1st Respondent was to the effect that:

> "#SwitchOffKPLC campaigner @ JerotichSeii discusses the possibility that a prominent advocate could have been bribed as much as 75 Million to facilitate an out of court settlement with Kenya Power @EricLatiff@EricLatiff @Nduokoh@NjeriThorne". (sic)

58. And apparently reporting the 2nd Respondent's statement on 2.09.2020 the 1st Respondent published a statement to the effect that:

> " Apollo Mboya settled the case out of court...We have heard that allegedly money was poured somewhere between 60-75m....".

59. The statements attributed to the 2nd Respondent in the material period but on different occasions, and said to relate to proceedings in Nairobi High Court Petition No. 6 of 2018 are inter alia that:-

> " Msaliti @MboyaApollo in action almost 2yrs ago. Nothing Changed for Electricity Consumers. His bank balance did. Today, he is nothing more than a liability for @KenyaPower @EPRA_Ke @EnergyMink @StateHouseKenya & perhaps the Judiciary".
>
> "@MboyaApollo 1. Shame on you 2. I was born ready. 3. Your days on the roll of advocates are numbered; you have our affidavits from PETs 6 & 59. Semeni cross-examination. James Gitau @WanjeriNderu @hotshotcreative @eva_m_mutua @KingFredAsira. Let's do this #SwitchOffKPLC".
>
> "We will, in court, see how Sh75M was paid out to kill Pets 6 & 59."
>
> "For less than 1 min judgment, why not have the ruling ready to enable movement to the Court of Appeal? Or is Justice Makau busy retrofitting the ruling to reflect his decision? Sh 2.14T in capacity charges for energy cartels is enough to make one bend the pen."

60. At face value, the publications tend to impute underhand or corrupt dealings against the Applicant in connection with the petitions. The court is not spared either. The conduct alluded therein would amount to criminality attracting penal sanctions, or at best gross professional misconduct on the part of the Applicant. The Applicant asserted that the imputations are false and if eventually found as such, and or not covered by the various defences raised by the Respondents, the imputations made by the Respondents against the Applicant would comprise an egregious form of defamation. By depicting the Applicant, as a dishonest lawyer involved in corrupt dealings in court proceedings, to his own benefit, and at the expense of his clients or other parties. The Respondents assert that the above publications are not defamatory, and they variously plead absolute privilege and justification, respectively.

61. The court is fully alive to the words of Lord Coleridge C.J in Bonnard and another V. Perryman (1891 -4) ALLER 968, later quoted by Denning MR in Fraser v Evans & Others, to the effect that:

> " Until it is clear that an alleged libel is untrue, it is not clear that any rights at all have been infringed, and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions".

62. In the court's view however, while the evidence of the respective parties will be fully tested at the trial, the duty lay even at this stage with the Respondents to furnish prima facie tangible material tending to support the alleged truthfulness of their publications. In Uhuru Muigai Kenyatta V Baraza Leonard [2011] eKLR the Supreme Court stated:

> " While taking the defence of justification, or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification of qualified privilege does not inure the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication."

63. The defence of justification and privilege may be displaced by evidence of malice. It was held in Adam v Ward (1917) AC 309:

> " A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or .... to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential."

64. Further in Shah v Uganda Argus (1972) EA 80 it was held that a defendant is only entitled to protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose, but he will not avail himself of such protection if he uses the occasion for improper or indirect motive. The circumstances in which publications are made could lead to a suggestion of malice. The 1st Respondent apparently published the statements of the 2nd Respondent without seeking comment from the Applicant; and while indeed the publications arose from live court proceedings, the publications appear to center on happenings outside the court that allegedly influenced outcomes in the proceedings.

65. Regarding the 2nd Respondent and her informant, there was no indication that any report had been lodged against the Applicant to appropriate investigative authorities and or institutions that deal with misconduct by advocates to inquire into the circumstances leading to the compromise of Nairobi High Court Petition No. 6 of 2018 and Nairobi High Court Petition No. 59 of 2018. The alleged informant did not deem it necessary to swear an affidavit specifically in this cause, detailing the alleged dubious circumstances in which the disputed compromise was arrived at. Suffice to say that the depositions in the affidavit of Robert Alai are of a grave nature and touch on parties not involved in this case. The depositions will have to be tested through cross-examination of the deponent if he will be called as a witness for the defence. It appears however that the 2nd Respondent's publications were primarily based on the said affidavit.

66. In Phineas Nyagah v Gilbert Imanyara [2013] eKLR the court held that; -

> " Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.
>
> ....malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely."

67. As stated in Dorcas Florence Kombo V. Royal Media Services [2014] eKLR:

> "--- qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or the use of the privileged information for an improper purpose. "

68. The court is wary of saying more concerning this matter at this stage, for obvious reasons. Suffice to say that the Applicant has demonstrated a prima facie case. The loss of or the serious sullying of the Applicant's reputation as an advocate, through repeated publication of the kind of allegations pleaded

herein appears real. The assertions made by each party will be determined through evidence at the trial, but clearly, no award of damages could possibly compensate the Applicant for such loss if it were eventually found that the allegations are false and defamatory. See the case of Brigadier Arthur Ndoj Owuor v The Standard Limited (2011) eKLR.

69. Freedom of the media and of other persons to expression or information is not absolute and in proper cases, the court may intervene on behalf of deserving parties. The court having reviewed all relevant matters herein is not persuaded that this is a proper case for granting a temporary mandatory injunction as sought in the 1st motion.

70. As held by the Court of Appeal in Kamau Mucuha v Ripples LTD (1993) eKLR in reiterating the decision in Kenya Breweries Ltd. v Washington Okeyo [2002] eKLR:

> " A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then, only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple ... act which could be easily remedied, or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction."

See also Nation Media Group & 2 Others V. John Harun Mwau [2014] eKLR where the Court of Appeal held that a temporary mandatory injunction "can only be granted in exceptional and in the clearest of cases".

71. The court is of the considered view that the 1st motion ought to be allowed with costs in the terms that: -

Pending the hearing and determination of this suit, an order is hereby issued to restrain the Defendant/Respondents by themselves, servants, and agents from further publishing or causing to be published in any of their twitter handles including @SpiceFMKE, #SwitchoffKPLC@JeroticSeii and #HumnityKE@JerotichSeii, or on any other media platforms, any statement and videos defamatory of the Plaintiff/Applicant in connection with Nairobi High Court Petition No. 6 of 2018 and Nairobi High Court Petition No. 59 of 2018.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 9TH DAY OF MARCH 2023

C.MEOLI

JUDGE