



**Angwenyi v Ethics & Anti- Corruption Commission & another (Civil Suit E100 of 2022) [2023] KEHC 18641 (KLR) (Civ) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18641 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT E100 OF 2022**

**JN MULWA, J**

**JUNE 8, 2023**

**BETWEEN**

**HON JIMMY NURU ANGWENYI ..... PLAINTIFF**

**AND**

**ETHICS & ANTI- CORRUPTION COMMISSION ..... 1<sup>ST</sup> DEFENDANT**

**NATION MEDIA GROUP ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a plaint dated 10/06/2022, the Plaintiff who is the Applicant herein sued the Defendants for an alleged defamatory statements published at the 2<sup>nd</sup> Defendant's newspaper on the 2/06/2022 that he deemed to have been false, malicious and thereby defamed, disparaged and maligned his character.

He therefore sought orders of permanent injunction to restrain both Defendants from further publishing, discussing, writing or circulating the words captured in the plaint or such similar words defamatory of the Plaintiff.

Simultaneously with the plaint, the Plaintiff/Applicant filed an application of even date (10/06/2022), under provisions of Section 1A and 3A of the *Civil Procedure Act*, and order 40 Rules 1, 2, 3 and 4 of the *Civil Procedure Rules 2010*, seeking orders that:

1. Spent
2. Spent
3. Pending hearing and determination of the suit, the Hon. Court do issue an order of temporary injunction restraining the Defendants/Respondents either by themselves, servants, agents, assigns employees or through whomsoever or howsoever from further publication of malicious and defamatory statements against the plaintiff and particularly publishing his name and



photographs against any story on the graft report by the 1<sup>st</sup> Defendant to the Independent Electoral and Boundaries Commissions (IEBC)

4. Costs of the application be provided for.
2. The grounds for the application are stated at its face, and is further supported by the affidavit of the Plaintiff sworn on the 10/06/2022; and a further affidavit sworn on the 25/07/2022/
3. In opposition to the application, the 1<sup>st</sup> Respondent/Defendant (Hereinafter referred to as EACC) filed a Replying Affidavit sworn by one Emily Ibeere, the Assistant Director, Monitoring and Compliance Department, but it is undated, and therefore incompetent.

The 2<sup>nd</sup> Respondent, Nation Media Group also filed its Replying Affidavit, sworn by one Sekou Owino, head of Legal and Training, on the 26/07/2022.

Also filed are submissions on the application by all the parties, dated 3/08/2022, 6/09/2022 and 22/09/2022 respectively.

The court has carefully considered the pleadings, the affidavits for and in opposition to the application the submissions and cited authorities.

4. In the first instance, the Applicant seeks injunction orders against the Respondent's, particularly further publishing any story on the graft report by EACC to IEBC.

This is at the backdrop that the applicant was the longest serving member of the National Assembly of Kenya for Kitutu Chache North Constituency, vying to retain his seat.

It is therefore evident that it was during the electioneering period prior to the 9/08/2022 General Elections in Kenya.

5. There is no dispute that on the 9/06/2022, the 2<sup>nd</sup> Defendant published a photograph of the Applicant at its newspaper heading: "Knock them out of the race, IEBC told".

Unfortunately, for the applicant, the court (Sergon J.) on the 10/06/2022 found the application inappropriate to grant interim orders, at that stage.

6. EACC averred that under Chapter Six and codes of Ethics the Director of Public Prosecutions pursuant to Section II(1)(d) of the *EACC Act* and Section 43(1)(b) of *LIA*, and Section II(i)(j) of *EACC Act*, in context of elections it is mandated to constitutionally and statutorily to enquire into the eligibility of candidates presenting themselves for elective positions.

7. It is further deponed that upon request by IEBC, it carried out an integrity verification exercise to establish the nature and the then current status of investigations and/or prosecutions against any candidate including educational credentials of any person seeking and elective position; and therefore, desiring to participate in the Parliamentary election, the applicant was required to meet the eligibility criteria under Article 9a(1)(B) of the *Constitution*.

8. Acting upon the above mandate, EACC therefore upon investigations prepared the impugned report and send it to IEBC for its further action and thus averred that the report was made without any malice as it also touched on the ongoing land case pending at Kakamega ELC no. 906 of 2018 over a serious fraudulent acquisition of public land.

9. The EACC therefore states that it was discharging its Constitutional and Statutory mandate and it did not publish any of the articles in any newspaper, nor does it have control over the 2<sup>nd</sup> Respondent.



10. On its part, the 2<sup>nd</sup> Respondent Nation Media Group deponed that it is vested with a Constitutional duty under Article 34 of the Constitution and a statutory duty under Section 3 of the Media Council Act to inform the members of the general public including viewers, readers and listeners of matters which directly impact on the public interest, and therefore based on a true accurate account of events as set out in EACC report to IEBC.
11. It further states that the complained of articles were legally privileged within the meaning of section 6,7 and the Schedule of the Defamation Act and therefore no violation of his legal rights were demonstrated; nor any irreparable loss of harm that he would suffer by a denial of the orders sought.
12. The issues that fall for determination in my view are two:
  - i. Whether the applicant has met the threshold for grant of an order of interlocutory injunction.
  - ii. Who bears the costs of the application?
13. The tests that a party must meet are well stated in the celebrated case of *Giella v Cassman Brown* [1973] EA 358, and which our courts religiously cite in matter of injunctions.
 

These are that:

  - i. The plaintiff must establish that he has a prima facie case with high chances of success
  - ii. The plaintiff would suffer irreparable loss that cannot be compensated by an award of damages; and
  - iii. if the court is in doubt, it will divide on a balance of convenience.
14. In the case *Hon. Ukur Yatani v Hon. Rebema Dida Jaldes* [2021] eKLR the court held that
 

“.....over and above the test set out in *Giella’s* case, in defamation cases, 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.

... normally the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a humane, responsible truthful and trustworthy defendant.... that in a tort of defamation the court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.
15. A prima facie case is one with high chances of success upon trial.
 

The 2<sup>nd</sup> Respondent has clearly demonstrated that the matters contained in the impugned report are matters pending for hearing in a Court of Law at Kakamega law Court. Without a doubt, such matters as stated earlier are matters of public interest as they touch on the leadership and integrity of leaders seeking elective positions, and other leaders as well.
16. Section 7 of the Defamation Act provides: -
 

S.7(4) ” A notice, advertisement or report issued or published by or on the authority of any court within Kenya or any judge or office of such court or by any public officer or received or trustee acting in accordance with the requirements of any written law”



17. In my considered view, the impugned report to IEBC by EACC was one such as provided under Section 7(4) and such report made in the newspaper based on the report issued by the public officers is privileged, unless it is proved to have been made with malice – Section 7.
18. Further, section 6 of the said Act provides: -
- “ A fair and accurate report in any newspaper or proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged:
- Provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter”.
19. The applicant has not denied the existence of the ELC case pending at the Kakamega Law Courts. It is upon hearing and determination of the said case ELC no. 906 of 2018 that the court will pronounce itself whether the case was maliciously filed and whether, it was or is defamatory of the applicant.
20. It is not the duty of this court to make a firm finding whether or not the report or statement alleged to be defamatory of the applicant was so made maliciously as to bring the Applicant to public ridicule or to be scorned by the public during the electioneering period; but the Defendants/Respondents were performing their statutory and constitutional mandates as earlier on stated.
- To state the least, to allow the order of interlocutory injunction would no doubt be curtailing the two defendants from performing their duties.
21. Article 88(4)(f) of the Constitution mandates EACC to register candidates for election who meet provisions of Chapter 6 of the said Constitution on Leadership and Integrity and particularly Article 73, 75 and 76 thereof; responsibilities of Leadership, conduct of state officers and Financial probity of state officers.
22. The graft report cited by the applicant is, in my view, a matter of public interest more so to the citizens of Kakamega who were, at the material times entitled to know the leadership qualities and status of their leaders who were vying for elective position.
23. Order no. 3 as crafted was to bar the defendants from further publication of the said report to EACC. The elections came and went. If an order of interlocutory injunction is granted at this point after the elections, what purpose would it serve? Would it then gang the press and particularly the 2<sup>nd</sup> Defendant from further publication, for instance, during the hearing of the ELC case? The answer is in the affirmative, if by now the ELC matter has not been heard and determined.
24. As pronounced in *Micah Cheserem v Intermediate media services & 4 others* [2000] eKLR.
- “...an injunction is granted only in the clearest of cases... this is because generally and basically, actions in cases of defamation bring out a conflict between private interest and public interest, and this is more so in Kenya where we have the County’s Constitution which has provisions to protect fundamental rights and freedoms of the individual including the protection of press.
25. Article 34 and 35 of the constitution provide for freedom of the media, and access to information by the citizens, respectfully.
- Such freedoms are rarely curtailed unless, as stated under Section 6 of the Defamation Act where the information of publication is either blasphemous, seditious or indecent.



26. The elections having been concluded, the Applicant has not told the court what further publication of the impugned report would cause him irreparable loss that cannot be compensated by an award of damages.

Indeed, at paragraph 23 of the EACC submissions, the Applicant is described as the current sitting Member of Parliament for Kitutu Chache Constituency; meaning that the impugned report issued by EACC and published by the Nation Media Group did not have any negative impact on his re-election as a Member of Parliament. These submissions were prepared and dated 6/09/2022 after the General Elections, 2022

27. As for the balance of convenience, it is without a doubt that an order to gang the Media (2<sup>nd</sup> Defendant) would have severe consequences as the public would in effect be barred from information on the ongoing of the case at the Kakamega Law Courts which is against the fundamental freedom of both the press, and information as stated under Article 34 and 35 of the Constitution.
28. The court in Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 others (2016) eKLR held that: -

“As for the balance of convenience, I reiterate what I stated above, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies”.

29. Denial of the interlocutory injunction orders to the Applicant will not prejudice the Applicant as much as granting the same to the Respondent. Therefore, the balance of convenience in this matter tilts in favour of the Respondents.
30. Consequently, the Application dated 10/06/2022 is dismissed.  
Costs shall be borne by the Applicant to the 2<sup>nd</sup> Respondent.  
Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JUNE, 2023.**

**JANET MULWA**

**JUDGE.**

