



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Itumbi (Civil Case E231 of 2021)
[2023] KEHC 18422 (KLR) (Civ) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18422 (KLR)

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

CIVIL

CIVIL CASE E231 OF 2021

JN NJAGI, J

JUNE 2, 2023

BETWEEN

MIKE MAINA KAMAU PLAINTIFF

AND

DENNIS ITUMBI DEFENDANT

RULING

1. The Plaintiff/Applicant has instituted a defamatory suit against the Defendant/Respondent before this court. The suit was accompanied by an application dated 23rd September 2021 seeking for orders that:
 1. Spent.
 2. Spent
 3. Spent
 4. That pending the hearing and determination of the main suit, a temporary injunction be issued directed at the Defendant restraining him from making any defamatory statements and/or publishing any defamatory posts in reference to the Plaintiff.
 5. That pending the hearing and determination of the main suit, a mandatory injunction be issued directed at the Defendant to pull down the defamatory Facebook and Twitter posts published in his accounts @OleItumbi and @DennisItumbi on 22.09.2021 making reference to the Plaintiff.
 6. That the costs be borne by the Defendant/Respondent.



2. The application was premised on grounds on the face of the application and supported by the affidavit of the Applicant. The Applicant contends that on the 22nd September 2021 the Respondent posted on his Twitter handle and on his facebook page statements that were defamatory of the Applicant, to wit:

That Maina, the Marble Ark owner successfully got 3,500 workers at his flower farm to vote UDA despite collecting money from the deep state to do the opposite. Consequently, the deep state has decided that as a punishment, he will be arrested and falsely charged with the murder of a world renowned environment activist that happened in July this year.
3. The Applicant says that he filed this suit against the Respondent and the court issued temporary orders of injunction that restrained the Respondent from making any defamatory statements and or publications in reference to the Applicant.
4. The Applicant contends that the defamatory Twitter post is still circulating on social media thereby continuously injuring his reputation. That it is in the interest of justice that the reliefs sought in the instant application are granted.
5. The application was opposed by the Respondent who in response filed an application dated 30th September 2021 seeking for orders that:
 1. Spent
 2. That pending the hearing of this application interpartes, the Honourable Court be pleased to set aside, discharge, vacate or vary the orders issued on 24th September 2021 on such terms as are just.
 3. That the Honourable Court be pleased to strike out in limine the Plaint dated 23rd September 2021 and all attendant pleadings and documents therein lodged contemporaneously.
 4. That costs of and incidental to this application be provided for.
 5. That such further and other relief that the Honorable Court may deem just and expedient to grant.
6. The application was based on the grounds that the suit herein falls squarely within the jurisdiction of the magistrates' court. That the Applicant has procured orders against the Respondent without him being accorded an opportunity to be heard which orders have occasioned him unnecessary anxiety and unfairly cast his reputation in bad light. That the suit is brought in bad faith and is calculated to achieve collateral objectives of a political nature and is meant to unfairly gag him and interfere with his freedom of expression as secured under Article 33 of the *Constitution*. That he has never published any defamatory material against the Applicant. That no prejudice will be suffered by any of the parties if the orders issued on 24th September 2021 are discharged.
7. Directions were given that the two applications be heard together. They were canvassed by way of written submissions.

Applicant's Submissions -

8. The Applicant through the firm of TripleOKLaw LLP submitted that the orders of injunction were merited in that the Respondent made baseless and offending allegations against the Applicant about the murder of a renowned environmental activist which allegations have negatively affected the Applicant's reputation. That the publications are still circulating on social media and have seriously



damaged the Applicant's reputation. That the Respondent is a political blogger and it was therefore likely that he would continue defaming the Applicant. Therefore, that the orders sought should issue.

9. The Applicant submitted that the court has jurisdiction to grant the orders sought and referred to [*Halsbury's Laws of England*](#), 4th Edition, vol 28 at page 127 para.258, where it is stated thus:

“Injunction to restrain publication. The High Court has jurisdiction to grant an injunction at the trial of an action to restrain publication of defamatory words or matter in all cases in which the court thinks it just and convenient to do so. The court will accordingly grant an injunction if it is satisfied that the words complained of are defamatory of the plaintiff or, in the case of slander, calculated to disparage him in his office, profession, calling, trade or business held or carried on by him at the time of publication, and there is reason to apprehend a repetition of the wrong. The jurisdiction is not confined to libels or slanders which affect the plaintiff's property, trade or business; there is no logical distinction between a case affecting property or trade or one affecting character. The jurisdiction extends to actions of slander as well as to actions of libel although the court naturally exhibit greater caution in granting an injunction in the case of spoken words than in the case of written or printed statements.”

10. Further reliance was made on the case of [*Brigadier Arthur Ndoi Owuor v Standard Limited*](#) (2011) eKLR where the High Court granted a temporary injunction in a defamation matter stating thus:

“In my view, with the facts placed before me, the applicant has demonstrated a prima facie case. The proof or otherwise of his case will be determined after the substantive hearing. His reputation is at stake in view of the content of the reports. Once a reputation is lost, in my view, monetary damages might not be an adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for a lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in memory possibly throughout his life.”

11. The Applicant submitted that the Respondent should be ordered to pull down the defamatory posts pending the hearing of the case. It was submitted that the Applicant is a resident of Kiambu and owns property near that of the renowned environmentalist who was murdered in 2021. That the allegations touching on the murder are grave and have occasioned the Applicant disrepute in his area of residence as the public believes that he had a hand in the murder based on the facebook post and tweet. That the same are circulating causing more harm to the Applicant.

12. The Applicant cited the [*Halsbury's Laws of England*](#), vol.24, 4th Edition at paragraph 948 where the authors observe that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application.”



13. The Applicant also relied on the case of *CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK) Being sued through its officials namely Stephen Mutoro & 2 others* (2014) eKLR where the court stated as follows:

I have considered that the article complained of is not only defamatory but its continued publication on the world wide web may continue to damage the Plaintiff's international business, the Plaintiff is a bank of repute operating not only in Kenya but throughout Africa; the continued circulation of the article in the worldwide web of the Defendant may hinder or affect the Plaintiff's reputation and business operations; most of the averments by the Plaintiff in the Affidavit in Support and Further Affidavit were not denied. In addition, the act done can be summarily be remedied by removal of the offending publication. In my view, there exists special circumstances to warrant the granting of the interlocutory mandatory injunction.

14. On the Respondent's application dated 30th September 2021 the Applicant submitted that the High Court has original jurisdiction to hear a high value defamation case such as the one before this court. Reliance in this respect was made on the case of *John Ritbo Kanongo & 2 others v Joseph Ngugi & another* (2015)e KLR where the court while dismissing a similar argument as raised in this case held that:

...The Court's original jurisdiction to hear civil cases of which defamation matters are part was confirmed by Article 165(3)...

15. It was further submitted that both the High Court and the magistrate's court have original jurisdiction to hear defamation matters. That the Applicant has invoked the jurisdiction of the High Court because he will be seeking for damages in excess of Ksh.20,000,000/= considering the gravity of the allegations and his stature in society. He in this respect relied on the case of *Shabeed Ali Khan & 3 others v Yasmin Kouser Mugbai* (2020) eKLR in which the High Court stated as follows:

30. It is not disputed that the High Court has unlimited original jurisdiction in both civil and criminal matters but the fact that the respondent deliberately chose to file the suit in the subordinate court can only be understood to mean that he was hoping to be awarded damages of not more than KShs.20,000,000 if his suit was successful. The fact that the High Court equally has jurisdiction to entertain such a suit cannot oust the jurisdiction donated by statute to the Magistrates Court to hear and determine civil suits including actions founded on defamation.

Respondent's Submissions –

16. The Respondent through the firm of Andrian Kamotho Njenga & Co. Advocates submitted that the proceedings were instituted contrary to the provisions of section 11 of the *Civil Procedure Act* which provides that every suit shall be instituted in the court of the lowest grade competent to try it. It was submitted that the suit lies within the jurisdiction of the magistrate's court and is thus incompetent and fatally defective. That though the Applicant has submitted that he hopes to be awarded damages in excess of Ksh.20,000,000/= he has not pleaded for liquidated damages. That sheer expectation cannot be the legal basis for leapfrogging the judicial hierarchy. It was submitted that the suit is an outright abuse of the process of this court.
17. The Respondent submitted that the proceedings herein run counter to the provisions of Article 163(7) of the *Constitution*. The Respondent relied on the Supreme Court decision in the case of *Michael Mungai v Housing Finance Co. (K) Ltd & 5 others* (2015) eKLR where it was held that:



- (9) Justice has to be sought within the justice system, which has rules and regulations that govern how one pursues his cause of action. It is not enough for a person to plead pursuit of justice and approach a court of law. Before one approaches a court in pursuit of justice, he or she must be cognizant that he has a justiciable cause of action. Even with such a cause of action, one has to follow the legal regime that informs him as to which court to approach, and in which manner: hence the rules of procedure in our statute books.
18. The Respondent also cited the case of *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others* (2014) eKLR where the Supreme Court stated that:
- (16) This Court can only assume jurisdiction bestowed to it by the *Constitution* and/or Statute. Just as in the S. K. Macharia case, the Court said that it cannot assume jurisdiction by way of judicial craft; this Court will not assume jurisdiction by way of a litigant's pestering. The Court's mandate is to do justice, however that justice can only be dispensed through the laid down legal framework. A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice.
19. It was submitted that the Applicant has not established that the twitter and facebook accounts complained of belong to the Respondent, yet the Applicant is seeking for the Respondent to be ordered to pull down the accounts when there is no evidence that the same belong to him. Moreover, that the Applicant is not expressly or impliedly mentioned in the tweet. That there is danger of the court issuing orders against the Respondent when the accounts are not under his control. That courts of law do not make orders in vain as observed in the case of *B v Attorney General* (2004) 1 KLR 431.
20. With regard to the Applicant's application for conservatory orders, the Respondent submitted that the primary concern is whether the threshold for grant of conservatory orders have been met. The Applicant has to establish a *prima facie* case with a likelihood of success. The Respondent cited the case of Board of Management of *Uburu Secondary School v City County Director of Education & 2 others* (2015) eKLR where the court posited that:
- It is in my view not enough to merely establish a *prima facie* case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The *prima facie* case ought to be beyond a speculative basis.
21. It was submitted that the Applicant has not established a *prima facie* case in that there is no clarity on the cause of action. More so that the application is groundless and devoid of substance.
22. It was further submitted that the Applicant has not shown that the suit would be rendered nugatory if the orders sought are not granted.

Analysis and Determination –

23. I have considered the grounds in support of the Applicant's application and the Respondent's rival application as well as the pleadings in both applications and the submissions by the respective advocates for the parties. The issues for determination are:
1. Whether this court has jurisdiction to hear and determine the Applicant's application.
 2. Whether the orders sought by the Applicant are merited or should they be discharged.



Jurisdiction –

24. The Respondent argues that the Applicant’s application is fatally defective and an abuse of the process of the court as it was not filed in the court of the lowest grade competent to try it as required by Section 11 of the *Civil Procedure Act*. That it should be struck out for want of jurisdiction and competence. The Applicant on the other hand argues that the suit is properly before this court as the High Court has unlimited original jurisdiction in civil and criminal matters as stipulated in Article 165(3) of the *Constitution*. Therefore, that the court has jurisdiction to hear defamation cases in civil matters. Further that the reason why the Applicant filed the suit before the High Court and not the Magistrate’s court is because they will be seeking for an award in excess of Ksh.20,000,000/= which is beyond the jurisdiction of the magistrate’s court. In response to that the Respondent submitted that there was no basis laid out for claim of the said sum and the matter should have been filed at the magistrate’s court.

25. Article 165 (3) of the *Constitution* provides that:

Subject to clause (5) the High Court shall have –

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) – (e)

26. Section 11 of the *Civil Procedure Act* provides as follows:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

- (i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and
- (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.

27. In view of the express provisions of the *Constitution* that the High Court has unlimited original jurisdiction in civil matters, the said court cannot be limited by any Act of Parliament in its jurisdiction. Section 11 of the *Civil Procedure Act* cannot therefore limit the jurisdiction of the High Court in hearing defamation matters. In the case of *Selina Vukinu Ambe v Ketan Shashikant Khatri* [2020] eKLR where a similar argument was raised before Githua J. she opined that:

16. The other objection taken by the defendant is that the suit ought to have been filed in the Magistrates’ Court which has jurisdiction to hear and determine the plaintiff’s claim and not in the High Court. While as I agree with the defendant that Section 11 of the *Civil Procedure Act* requires that a suit should be filed in the court of the lowest grade competent to try it, this provision in my view cannot be used to challenge the civil jurisdiction of the High Court to



entertain and determine suits filed before it. Besides the fact that the provision clearly regulates the filing of suits in subordinate courts, it is pertinent to note that the jurisdiction of the High Court is derived from the Constitution of Kenya 2010 which at Article 165 (3) confers on the court unlimited original jurisdiction in both criminal and civil matters.

17. With reference to the matters at hand, this means that the High Court is constitutionally mandated to hear and determine all civil suits irrespective of their nature or the value of the subject matter. The High Court's jurisdiction being a creature of the Constitution which is the supreme law of the land cannot be limited or fettered by any other written law including the Civil Procedure Act. In my view, any statute that would purport to limit the High Court's jurisdiction as conferred by Article 165 (3) would to that extent be unconstitutional by virtue of Article 2 (4) of the Constitution.
28. In Interactive Gaming & Lotteries Limited v Safaricom Limited (Commercial Civil Case E684 of 2021) [2021] KEHC 335 (KLR) (Commercial and Tax) (Ruling), Majanja J. agreed with the view expressed above by Justice Githua. I am also in agreement. The argument by the Respondent that the High Court has no jurisdiction to hear matters related to defamation is not sustainable in law. It is clear that both the High Court and the magistrate's court have jurisdiction in defamation matters except that the magistrate's court is limited by pecuniary jurisdiction of up to Ksh.20,000,000/=.
29. It has to be noted that Section 18 of the Civil Procedure Act gives the High Court power to transfer a matter from the High Court to the Magistrate's Court where it is of the view that the pecuniary jurisdiction fell within that of the magistrate's court. The reason given by the Applicant for filing the suit at the High Court and not at the magistrate's court is that they will be seeking for damages in excess of Ksh.20,000,000/=. The advocates for the Applicant submitted that the Applicant is an international businessman with various business interests in flower export, hotel and real estate. This is however an issue that has to be proved by way of adduction of evidence in a full hearing. In view of the purported standing of the Applicant as stated by his advocates, I am not at this stage able to ascertain whether or not the amount the Applicant can be awarded in case he is able to prove the tort of defamation lies squarely within the pecuniary jurisdiction of the magistrate's court. I consequently hold that the matter is properly before this court.

Whether the orders sought by the Applicant are merited –

30. The Applicant is seeking for orders of injunction pending the determination of the main suit to restrain the Respondent from making any further defamatory posts in reference to the Applicant and for a mandatory injunction to issue to the Respondent to pull down the defamatory posts pending the hearing and determination of the main suit.
31. The guiding principle in issuance of injunctions in defamation cases was stated in the case of Cheserem Vs Immediate Media Services (2000) 1EA 371 (CCK) where it was held that:-

“Applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases because they bring out a conflict between private interest and public interest, though the conditions applicable in granting interlocutory injunctions set out in Giella Vs Cassman Brown and Co. Ltd (1973) EA 258 generally apply, in defamatory cases those conditions operate in special circumstances. 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 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 and also that the words are so manifestly defamatory that the verdict to the contrary would be set aside as perverse.”

32. The conditions to be met in deciding whether to grant or disallow an injunction as established in the case of *Giella v Cassman Brown & Co.* (1973) EA 358 are that the applicant must establish a *prima facie* case with a probability of success; satisfy the court that he/she will suffer irreparable loss that cannot be adequately compensated by award of damages and where the court is in doubt to decide the matter on a balance of convenience.
33. The Court of Appeal *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined a ‘*prima facie*’ case as follows:
- “.....a *prima facie* case” I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter.”
35. The court before issuing orders of injunction at interlocutory stage in a defamatory case must be satisfied that there is a *prima facie* case established. In *Standard Ltd* (2000) eKLR, Maraga J. (as he then was) held that:
- “To justify the granting of an injunction in defamatory cases at interlocutory stage therefore, the court must have *prima facie* evidence to come to a decision that the two words complained of are untrue. See *Bonnard v Perryman*, (1891). If on the material placed before the court at the interlocutory stage, it entertains any doubt on the efficacy of that defence, then that should be one of the factors to be considered whether or not an injunction should be granted. “
35. The Applicant herein has deposed that the Respondent posted defamatory material about him on his twitter handle and face book page. According to the Applicant the statements meant that he had pocketed money from “Deep State” to influence the Kiambaa by election; that he was to be arrested and falsely charged with the murder of an environmental activist and that he had committed a criminal offence under the *Elections Act* and is therefore a person of questionable integrity. The Respondent has so far not filed a defence in the case. He only denied in passing in his supporting affidavit that he has never published defamatory material against the Plaintiff. In the premises, I find the Applicant has established a *prima facie* case that the statements complained of are defamatory to him.
36. The Applicant has deposed that he is an astute businessman and that the statements have had the effect of disparaging his character and bringing him into public ridicule. The Applicant has demonstrated that he will suffer irreparable damage that cannot be compensated by way of damages if the Respondent is not restrained from further publication of the statements. It is trite that not even money can compensate a battered reputation as stated in the case of *Brigadier Arthur Ndoj Owuor v. Standard Limited* (supra).
37. The Respondent in his application dated 30th September 2021 sought to have the interim orders discharged on the basis of lack of jurisdiction. His application did not answer to the merit of the Applicant’s application for issuance of temporary orders of injunction pending the hearing and determination of the suit. The Respondent further argued that he was not given an opportunity to be heard before the orders were issued against him. He also argued that the proceedings in this matter are inherently incompatible with the Defendant’s unlimited right to a fair trial secured under Article 25 (c) of the *Constitution*. It is however the holding of this court that in a case of defamation, the court



has powers to issue injunctive ex parte orders where it thinks it just and convenient to do so pending the hearing of the matter inter partes. The argument that the right to fair trial of the Defendant was breached is not tenable as he has been given the right to be heard in these proceedings. I find no merit in the application by the Respondent. Instead, I find sufficient grounds to allow the application by the Applicant to restrain the Respondent from making defamatory statements and or publishing any defamatory posts in reference to the Applicant pending the hearing and determination of the suit. Prayer 4 of the Applicant's application dated 23rd September 2021 is granted as prayed.

38. The Applicant is further seeking for mandatory injunction for the Respondent to be ordered to pull down the material complained of. It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstances. In *Kenya Breweries Limited v Washington Okeyo* (2002) 1 EA 109; (2002)eKLR as cited in the case of *Paul Mwaniki Gachoka & another v Nation Media Group Limited & another* [2019] eKLR the court stated that the same can be granted where the case is clear and one which the court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied.

39. In *Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR, the Court of Appeal cited with approval the Indian case of *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva*, AIR 2003 and observed as follows:

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd V. Haro Chand Sachdeva*, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

40. In this case the statements complained of were made in September 2021. It is now a period of over one-and-a-half years since then and there has not been a complain of a repeat of the publication. It therefore cannot be said that the injury complained of is immediate and pressing. Taking into consideration that the Respondent has not filed a defence in the case, I am not persuaded that this is a compelling and clear-cut case where mandatory injunction should issue at interlocutory stage. Prayer 5 of the Notice of Motion dated 23rd September 2021 is thereby declined.

41. In the final end, the court makes the following orders:

1. The court finds no merit in the Defendant/Respondent's application dated September 30, 2021 and the same is hereby dismissed.



2. The Plaintiff/Applicant's application dated September 23, 2021 is allowed in terms of prayer 4 of the Notice of Motion that: Pending the hearing and determination of the main suit herein, a temporary injunction be and is hereby issued directed at the Defendant restraining him from making any defamatory statements and/or publishing any defamatory posts in reference to the Plaintiff/Applicant.
3. Prayer 5 of the Notice of Motion dated September 23, 2021 is declined.
4. The Plaintiff/Applicant to have the costs of both applications.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JUNE 2023

J.N. NJAGI

JUDGE

In the presence of:

Mr Akatch holding brief for Mr Obuya for Plaintiff/Applicant

Miss Kurgat holding brief Dr Kamotho for Defendant/Respondent

Court Assistant – Amina

30 days Right of Appeal.

