



REPUBLIC OF KENYA



KENYA LAW
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**Wang'ombe v Muiruri (Civil Appeal E007 of 2022)
[2023] KEHC 18280 (KLR) (Civ) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18280 (KLR)

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

CIVIL

CIVIL APPEAL E007 OF 2022

JN MULWA, J

JUNE 8, 2023

BETWEEN

DAVID WANG'OMBE PLAINTIFF

AND

JOSEPH KAGWA MUIRURI DEFENDANT

RULING

1. The plaint in this suit dated 31/12/2022 was filed on the 18/01/2022 together with the application of even date by the plaintiff, Prof. David Wangombe who was then the Vice Chancellor of Tangaza University College for the period 2020-2023.

By the application premised on provisions of Order 40 Rule 2, 3 and 4 of the *Civil Procedure Rules* and Section 63 (C) and 3A of the *Act*, he seeks the following orders:

1. Spent
 2. Spent
 3. That pending the hearing and final determination of the suit, a temporary injunction be granted compelling the Defendant whether by himself or his servants or agents from writing, publishing and circulating any defamatory statements about the Plaintiff.
 4. The costs of the application be provided.
2. The application is supported upon grounds stated at its face together with a supporting affidavit he swore on even date.
 3. The alleged offensive and or defamatory letter is dated 3/11/2021 and is alleged to have been addressed to various congregations affiliated with Tangaza University College, which he opines was meant to



impugn him as unethical and corrupt, incompetent and lacks candour, that he was involved in financial impropriety with suppliers and contractors of the University college, that he lacks leadership and servanthood qualities among others.

4. It is averred that the Defendant continues to circulate the memorandum through social media despite receiving demand notice to desist from further circulation.
5. The Vice-Chancellor further depones that the said publication has caused unrest among the students, and the management which impact negatively on the college's name.

It is as a result of the above that this application was filed to seek for orders as stated.

6. In opposing the application, the Respondent/Defendant who states to be the Director of Finance at the University filed a replying affidavit sworn on the 30/06/2022 and particularly avers to be a stranger to the averments and complaints by the Applicant, but states that the impugned letter was a mere statement of opinion intended for fair reporting and action addressed to the management at the workplace for intervention and send vide the University's official communication channels.
7. The Director further depones that he had been intimidated and mistreated by the Applicant and sent on compulsory leave when he decided to write and sent the impugned letter to the chair of the University Council, and Chair of the University Sponsors, but denies having circulated the same to the public, or social media.

He therefore avers that the application has been brought in bad faith, and that as at the date of this replying affidavit, the Applicant had resigned as the Vice Chancellor of Tangaza University College; and has urged that the application lacks merit and ought to be dismissed.

8. The court has carefully considered the parties' submissions dated 18/08/2022 and 31/08/2022 respectively.
9. The impugned letter is dated 3/11/2021. I have perused it. It is addressed to four (4) persons and headed

“The truth will set you free – Tangaza University College Finance Revealed”.

10. A further perusal of the said letter reveals what the author, the Respondent, states what he deemed to be unethical practices in the institution, the University College's Finance Department. It is signed by the Respondent as the Director, Finance. The persons the letter is addressed to are members of the Institution in various capacities and not to any members of the public.

If the said publication was later released to the public as alleged, and denied by the respondent, is a matter to be determined at the hearing of the case, including determination on whether or not the same was maliciously and recklessly authored and published by the Respondent.

11. The issues that fall for determination at this stage are two: -
 - a. Whether the Applicant has established a prima facie case with probability of success to warrant a grant of a temporary injunction.
 - b. Whether the Applicant shall continue to suffer irreparable loss and damage if the injunctive orders are denied.
12. In his statement of defence dated 17/02/2022 which I have perused, the Respondent denies all and singular the allegations by the Applicant, and states that he made the statement in public interest, and



sent to only four (4) persons being the trustees and Chair Consortium of Sponsors of the university and not to the public as alleged.

13. The Applicant alleges that the said letter was published to the public and through social media platforms.

I have not seen any proof that the impugned letter of 3/11/2021 has been or was circulated to the public through social media or any other platform before the filing of the application. It is important that such allegation must be proved items of Section 107, 108 and 109 of the Evidence Act, because, it is not enough to allege, proof must be tendered.

14. For the court to justify grant of an interim injunction in defamation cases before hearing and determination, the Defendant must show that the impugned defamatory publication was made as a fair comment on a matter of public interest.

In the case *Bonnard v Perryman* (1891) 2ch 269 and cited in *Endmor Steel Mills Ltd v. Royal Media Services Ltd & 2 Others* (2020) eKLR

“The Court will not restrain the publication of an article even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest.”

15. The court further rendered that the court’s jurisdiction and discretion to grant injunction orders ought only to be exercised in the clearest of cases; and the court must also be satisfied that in all probability, the alleged libel is untrue, and if written on a privileged occasion, that there was malice on the Defendant.

16. To sum it, as in the case of *Gulf oil (GB) Ltd V. Page & Others* (1987) Aller 14

Where Lord Denning M. R. said:

“... there is no wrong done if it is true or if it is fair comment on a matter of public interest ...

We cannot pre-judge this defence by granting a injunction against them.”

17. In another pronouncement, Lord Denning M. R. in *Harakas v Baltic Mercantile & Shipping Exchange* (1982) I. W. L. R. 958, emphasized the role of the court not to restrain the right to free speech by way of a court order, where the defendant claims the matters complained of, are actually true; in the following manner;

“This court never grants an injunction in respect of a libel when it is said by the defendant that the words are true and that he is going to justify them”

18. Back to our Kenyan Jurisdiction. It has not been shown in any manner that the Respondent has or had had an intention to repeat the impugned publication, if at all it was publicized to the public.

However, an injunction will be granted to protect an applicant from irreparable injury, which is substantial in nature and cannot be remedied or atoned for or by damages.

19. At the celebrated case of *Giella v. Cassman Brown & Co ordinarily Ltd* (1973) EA 358, and ordinarily cited in all matters defamation, whether libel or slander, in our courts, the three tests that the court must consider before issuing an in injunction, whether interim or permanent, are whether the applicant has established:

- a. A prima facie case with a probability of success



- b. The likelihood that the Applicant might suffer irreparable injury which would not adequately be compensated by an award of damages.
- c. If the court is in doubt, it will decide an application on the balance of convenience.
20. I agree with the Applicant's submissions that on the face of it, the words published in the impugned letter are arguably defamatory and circulating them on social media platforms is out rightly causing extreme condemnation and prejudice to the applicant.
- I have however not found any shred of evidence that the letter was published in any social media, or any of the National Daily Newspapers or to any persons other than the four, who are the managers of the university college where the respondent is an employee.
21. As to irreparable loss or damage to the Applicant, there is no doubt that if indeed the alleged letter was published to the public, the applicant's reputation and character would be on the line. This however is a matter for decision by the trial court.
22. On the balance of probability, it is my view that as at this stage of proceedings, nothing has been proved, and the court would be doing an injustice to the parties to assume that the Applicant as the plaintiff would come out victorious at the end of the trial, more so when the defense on record raises serious matters that may only be fully elucidated at the trial.
- It therefore culminates in my finding that the balance of probability falls in favor of the Respondent.
23. In the case *Edmor Steel Millers Ltd (supra)*, the court taking guidance from Lord Denning's M. R. in *Gulf Oil (GB) (supra)* rendered:
- “There are some things which are of such public concern that the newspapers, the press, and indeed everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression”
24. Of importance here, and not to be accused of repetition, is that the 3/11/2021 letter was sent to only four persons whose names were duly stated, as managers of the university college. Without proof that the letter found its way to social media, by an act perpetuated by the Respondent, there would be no reason whatsoever to issue an order of injunction in vain. Once more, as nothing was placed before the court to demonstrate that the Respondent had repeated and had intentions to continue or continues to publish the contents of the impugned letter not only to the four named recipients, but to other parties and the public in general, then an order of interim injunction would not be appropriate or available to the Applicant.
25. This is not to state that the Applicant may not be able to establish and prove his claim during the hearing of the suit, but for now, there are no factors and or exceptional circumstances which the court may invoke under Section 3A of the *Civil Procedure Act*, to grant such orders. It provides:
- 3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.
26. For the foregoing, the Applicant's application dated 31/12/2022 is devoid of merit. It is dismissed with costs to the Respondent.
- Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JUNE, 2023.

JANET MULWA



JUDGE.

