



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. E002 OF 2020

BETWEEN

KIRAITU MURUNGI.....PLAINTIFF/APPLICANT

AND

MPURU ABURI1ST DEFENDANT/RESPONDENT

BONTEN MEDIA GROUP LTD.....2ND DEFENDANT/RESPONDENT

RULING

Background

1. By a plaint dated and filed on 09th October, 2020, the Plaintiff/Applicant seeks damages and injunctive orders as against the Defendants/Respondents whom he indicts of committing acts of defamation against him.
2. Simultaneously with the Plaint, the Plaintiff/Applicant filed a Notice of Motion dated 09th October, 2020 seeking mandatory and temporary injunctive orders as against the Defendants/Respondents from committing further acts of defamation of and concerning him.
3. In response to the said Notice of Motion, the Defendants/Respondents on 19th October, 2020 filed a Notice of Preliminary Objection on the grounds among others that the application was defective for contravening section 5 of the Oaths and Statutory Declarations Act and Order 51 rule 4 of the Civil Procedure Rules, 2010.
4. On 21.10.2020, the Plaintiff/Applicant withdrew the application dated 09th October, 2020 and filed the current application dated 21st October, 2020 seeking orders that:

1) The Honourable Court be pleased to issue an order of temporary injunction restraining the Respondents, by themselves, or through any of their servants, from uttering any defamatory words, publishing any defamatory information, verbally or in writing, on Facebook pages or any other social media platforms, on radio or television or anywhere else to individuals, groups, body or bodies, companies or to any other institutions linking the Plaintiff to the Anglo Leasing type contracts, theft of public resources, money laundering and operation of foreign bank accounts or any similar or related words defamatory of the Plaintiff and/or against the Plaintiff pending the hearing and determination of this suit

2) An order of mandatory injunction requiring the Defendants/Respondents to expunge from their Facebook pages all the defamatory contents posted thereon concerning the Plaintiff/Applicant and failing which the Plaintiff to be at liberty to serve the provider of the Facebook platform with the court order and for them to enforce the court order

3) Costs be borne by the Respondents

5. The motion is premised on the grounds among others that since August, 2020, the Respondents have maliciously published defamatory words of and concerning the Plaintiff who is an advocate of the High Court of Kenya and the current Governor of Meru County, on radio, television and social media platforms such as Facebook as a consequence of which the Plaintiff's reputation has been brought into public scandal, odium and contempt among right thinking members of the society; that the 1st Respondent commands a large audience on his public Facebook page with 11773 followers as at 28th September, 2020 and he did on 18th September, 2020 post a defamatory video on his Facebook page and that the 1st Respondent has no intention to stop posting, publishing, uttering defamatory statements against the Plaintiff.

6. The summons is supported by an affidavit sworn by the Plaintiff/Applicant on 21st October, 2020 in which he reiterates the defamatory words of and concerning the him uttered and published by the Respondents on radio, television and Facebook social media platform on various dates.

7. In response to the application, the Defendants/Respondents on 28th October, 2020 filed Grounds of Opposition and a Notice of Preliminary Objection on the grounds among others that the orders sought are wide, general and imprecise and leaves no room for the Defendants/Respondents to critique the Plaintiff/Applicant; that the orders sought are final and further that the application is couched in a manner to intimidate the Defendants/Respondents and the court in total disregard of the Oaths and Statutory Declarations Act.

8. The Application was argued by way of written submissions.

Applicant's submissions

9. The Plaintiff's/Applicant's counsel submitted that the P.O does not raise any pure point of law and ought to be overruled. In support thereof, counsel relied on the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696.**

10. Concerning the application for temporary injunction, counsel

submitted that the defamation complained of was obvious and thus the Plaintiff/Applicant had established a strong *prima facie* case for granting the orders sought. Reliance was placed on **Ahmed Adan Vs. Nation Media Group Limited and 2 others (2016) eKLR** where the court held that:

The jurisdiction will in general not be exercised unless there is strong *prima facie* evidence that the statement complained of is untrue.

11. In the same case, the Court further stated that:

It must therefore be manifest that the matter complained of is libelous and that that fact is unlikely to change at trial. The defamation complained of must be obvious, atrocious and wholly unjustified. It must be a kind inflicting the most serious injury to a plaintiff's character and reputation. Should the court entertain a doubt that the words complained of are defamatory, interlocutory injunction will not be granted, for it is important, in the public interest, that the truth be known.

12. Counsel also relied on the the case of **Micah Cheserem vs Immediate Media Services & 4 Others**

[2000] eKLR for the proposition that the question of an injunction in a defamation case is treated in a special way, and the court's jurisdiction must be exercised with the greatest caution and only in clear cases where the Court is satisfied that the words or matters complained of are libelous and manifestly defamatory that any verdict to the contrary would be set aside as perverse.

13. Reliance was additionally placed on **John Ntoiti Mugambi Alias Kamukuru v. Moses Kithinji Alias Hon. Musa [2016] eKLR** for the proposition that the court has to balance the freedom of speech and the right not to be defamed.

14. In conclusion, counsel for the Applicant urged the court to grant the injunction for the reason that the Respondents had not filed a replying affidavit to discount or rebut the grave issues raised in the application and the supporting affidavit and in support thereof relied on **Mustano Rocco v Aniello Sterelli [2019] eKLR** and **Mohamed v Haidara [1972] EA 166.**

Respondents' submissions

15. Respondents mainly faulted the Applicant for withdrawing the application dated 09.10.2020 without leave of court and on that basis urged the court to find that the application dated 21.10.2020 is an abuse of the court process. In support of this proposition, counsel placed reliance on **Theluji Dry Cleaners Ltd vs. Muchiri & 3 Others [2002] 2 KLR 764, Riverside Farm Nursery School LLD & Anor v Cooperative Bank of Kenya Ltd. [2008] eKLR, Karisa Chengo Nguma V Kache Ruwa Kalama & Anor [2019] eKLR, Samson K.A v D.M. Machage [2019] eKLR and Commercial Exchange Limited & Anor v Barclays Bank of Kenya Ltd [1997] eKLR.**

ANALYSIS AND DETERMINATION

16. I have considered the application in the light of the supporting affidavit, the grounds of opposition, the P.O and submissions made on behalf of the parties and I have deduced the following issues for determination

1) Whether the P.O is merited

2) Whether the Applicant has established a *prima facie* case

1. Whether the P.O is merited

17. There is no dispute that the Plaintiff/Applicant withdrew the application dated 09th October, 2020 after the Respondents had filed grounds of opposition. The notice of withdrawal was filed and duly received by the court on 21st October, 2020 which was the same date that the current application was filed.

18. Whereas there is no specific court order pronouncing that the notice of motion dated 09th October, 2020 had been withdrawn, the filing and service of the notice of withdrawal on the Respondents clearly demonstrates the Plaintiff's/Applicant's desire not to proceed with it. Respondents' argument that the current application dated and filed on 21st October, 2020 is an abuse of the court process is therefore untenable for the reason that that **Article 159(2) (d) of the Constitution** places heavy premium on substantive justice as opposed to undue regard to procedural technicalities. I however must add that the Respondents are entitled to costs of the withdrawn application.

2. Whether the Applicant has established a *prima facie* case

19. **Halsbury's Laws of England, 4th Edition, Vol. 28** at page 127 para. 258, states:

"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. (Emphasis added)

20. I have considered the Defendants'/Respondents' grounds of opposition. Contrary to the contention that the orders sought are wide, general and imprecise, a reading of the application clearly demonstrates that Plaintiff/Applicant specifically seeks to restrain the Defendant/Respondents from posting, publishing, uttering defamatory statements against and concerning him.

21. With reference to the Preliminary Objection, the legal delimitations for a P.O were set a long time ago in the case of **Mukisa Biscuit case** (supra). The principle (preliminary objection) is not in dispute and I do not think anything novel could be said about it. Nonetheless, I shall restate the principle for purposes of clarity.

22. As per Law J.A:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

23. As per Sir Charles Newbold P:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

24. In the case of **Oraro v Mbajja [2005] eKLR**, J.B. Ojwang J (as he then was) stated:

"I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement that „"where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

25. The contention by the Defendants/Respondents that the application is couched in a manner to intimidate the Defendants/Respondents and the court is not a point of law worthy determining as a preliminary matter and in any case, this court would have no reason to be intimidated when it is exercising judicial authority vested by the Constitution.

26. Similarly, the Defendants/Respondents contention that the orders sought leave no room for the Defendants/Respondents to critique the Plaintiff/Applicant is equally unsustainable for the reason that the right to freedom of expression guaranteed under Article 33 of the Constitution places an obligation on every person exercising the right to respect the rights and reputation of others.

27. Defendants/Respondents did not file a replying affidavit to controvert the issues of fact raised in the application and the supporting affidavit. It is therefore safe to conclude that the words complained of

concerning the Plaintiff/Applicant were indeed uttered and published on radio, television and Facebook social media as averred by the Plaintiff/Applicant.

28. Whether in fact the words are true or not will be a matter for trial, but it cannot be argued that there was no publication.

29. I have considered the holding in of **Brigadier Arthur Ndoj Owuor vs The Standard Limited [2011] eKLR** where the 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."

30. As correctly stated in the ***Brigadier Owuor case (supra)***, in the nature of defamation, once a reputation is lost, it is virtually irreversible and therefore damages may not be a suitable remedy. I think in this case, it is just that the Defendants/Respondents be restrained from publishing further defamatory information of and concerning the Plaintiff/Applicant until the main suit is heard and determined.

31. As regards the prayer for a temporary mandatory injunction on interlocutory application, such orders have to be issued only in rare cases mainly in cases where with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.

32. There is no evidence that the Defendants/Respondents have continued to commit further acts of defamation against the Plaintiff/Applicant since the institution of the Plaintiff/Applicant's suit and the prayer made for an injunction made in it to restrain the defamatory acts. The prayer for a mandatory injunction is therefore declined for to grant it would amount to the grant of a major part of the relief claimed in the action.

33. From the foregoing analysis, I have come to the conclusion that the P.O has no merit and further that the Plaintiff/Applicant has established a *prima facie* case.

34. Accordingly,

a) The Preliminary Objection by the Defendants/Respondents is overruled

b) An order of temporary injunction is hereby issued restraining the Respondents, by themselves, or through any of their servants, from uttering any defamatory words, publishing any defamatory information, verbally or in writing, on Facebook pages or any other social media platforms, on radio or television or anywhere else to individuals, groups, body or bodies, companies or to any other institutions linking the Plaintiff to the Anglo Leasing type contracts, theft of public resources, money laundering and operation of foreign bank accounts or any similar or related words defamatory of the Plaintiff and/or against the Plaintiff pending the hearing and determination of this suit

c) Costs of this application shall abide the outcome of the main suit

DATED IN MERU THIS 04th DAY OF *February* 2021

T.W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For the Applicant - Mr. Muriuki for Munga Kibanga & Co. Advocates

For the Respondents - Mr. Kimaita for Thurania Atheru & Co Adv