



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 135 OF 2019**

**ERICK KIMATHI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JUSTINE KENDI.....2<sup>ND</sup> PLAINTIFF/ APPLICANT**

**EXECUTIVE SUPER RIDES LIMITED.....3<sup>RD</sup> PLAINTIFF/ APPLICANT**

**DRIVERS UNIVERSE COMPANY LIMITED.....4<sup>TH</sup> PLAINTIFF/ APPLICANT**

**VERSUS**

**BENJAMIN WAMBUA NDOLO..... DEFENDANT/RESPONDENT**

**RULING**

1. This is the application dated 21<sup>st</sup> June 2019 filed by the plaintiffs seeking the following orders:

*Prayers 1-4 spent*

5. ***THAT*** pending the hearing and determination of this suit, an interim injunction issue directed at the defendant restraining him by himself, his agents, savants or otherwise howsoever from posting on any electronic media, or publishing, or disseminating in, any manner whatsoever the defamatory words, statements or content or any similar words or statements or content, of like effect, relating the plaintiffs herein.

6. *That* pending the hearing and determination of this suit, a mandatory injunction be issued directed at the defendant compelling him, by himself, his agents, servants or otherwise howsoever to erase and remove from their various posts, websites, blogs or their other forms of electronic and social media of any form of nature whatsoever the said defamatory words, statements, or content or any similar words or statements or content, of like effect relating to the plaintiffs herein.

7. *The costs of this application be provided for.*

2. The same is supported by the several grounds on its face and the supporting affidavit of Erick Kimathi. The plaintiffs/applicants refer to the following tweet by the defendant between 18<sup>th</sup> and 19<sup>th</sup> June 2019 on his personal Twitter handle @ BenjiNdolo:

*“WARNING: Guys, avoid EXECUTIVE Super Rides and DRIVERS UNIVERSE both owned by the same person Eric Kimathi and his wife Justine. Together with a guy called Wambugu they are using, conning customers BIG TIME in the name of fake financing. Details to follow.”*

*“Do not buy cars from Drivers Universe or you will regret. Cc @CofekRebranded deeper investigation ongoing. Watch out!!”*

*“Will do. Executive Super Rides just past Adams Arcade. Eric operating this sleek robbery with his wife.”*

*“How do you pay a car dealer millions of cash straight into his account then he tells you if you publicize and tarnish his name he will ensure you are jailed?? No to oppression of any kind. Eric Kimathi retrace your steps, I have dossier even on your family. FACT Caution!”*

*“In the cash office of Drivers Universe on Ngong Road is a curious notice, it says: If you pay cash be sure because no refund under any circumstances. This is the kind of non-customer centric stuff wahindiz used to do in the 1980s. Ungoverned greed. #IfkieExecutiveSuperRides”*

*“Details coming. It will be long and sweet. Agreement Kes 3.3 Million....receipts 3.3 MILION. Magistrate allegedly bribed ....stay tuned.”.*

3. In the supporting affidavit the 1<sup>st</sup> plaintiff/applicant has explained the role of each of the plaintiffs/applicants. He depones that the defendant's Twitter handle has over one hundred thousand (100,000) followers, who read and comment on these tweets. He avers that prior to this tweet complained of the defendant wrote a letter to Transparency International which he copied to key Government officials including the Central Bank Governor and Directorate of Criminal Investigations (EK.2)

4. The deponent has given a detailed examination of a motor vehicle KBZ 888G which they sold to the defendant who has not fully paid for it. The defendant filed Milimani Civil Suit No. 10957 of 2018 against the plaintiffs where he was ordered to pay the outstanding debit to the 4<sup>th</sup> Plaintiff. The matter was last in court on 14<sup>th</sup> 2021 when orders were made by the court declining to grant him the orders sought.

5. On 18<sup>th</sup> June 2019 upon the defendant's failure to pay the 4<sup>th</sup> plaintiff, Ale Auctioneers proceeded and attached the motor vehicle KBZ888G in compliance with the court orders issued on 24<sup>th</sup> May 2019. It is after this that the tweets started. He annexed copies of dishonoured cheques, court applications and orders (EK4-8) respectively.

6. He denied all the contents of the tweets by the defendant and averred that the said tweets had pointed the plaintiffs as people who do not respect the legal process, manipulate the Judiciary, which are criminal activities. He further depones that the tweets were published by the defendant recklessly without caring to establish the truth. It is therefore the plaintiffs' prayer that the defendant be restrained from publishing or causing to be published similar tweets that are defamatory.

7. The defendant/respondent in opposing the notice of motion dated 21<sup>st</sup> June 2019 filed a replying affidavit sworn on 17<sup>th</sup> July 2019, in which he introduced himself and stated what he does (annexture BN01). He denied all the plaintiffs' allegations. He has averred that the plaintiffs have not met the threshold for grant of the orders sought. He states that the tweets EK-2 are suspect, inadmissible and illegal as they have been selectively printed out and quoted out of context to the exclusion of the whole conversation on social media on the subject. He depones that his was a fair comment in his own personal capacity and as an agent of an NGO known as Organization for National Empowerment (ONE) or his experience with the plaintiffs.

8. He referred to the **Nairobi CMCC No. 10957/18** involving him and the 4<sup>th</sup> defendant. He gave a brief of the facts forming the basis of the suit between him and the 4<sup>th</sup> plaintiff, which I will not fully state here. He confirms having been ordered by the lower court to pay the 4<sup>th</sup> plaintiff an unspecified amount of money in 14 days. On 14<sup>th</sup> June 2019 the said court declined to extend the interim orders issued to him. He annexed copies of the said court matters (BN 2, 3).

9. On the bounced cheques he averred that the same had been paid and acknowledged by the 4<sup>th</sup> Plaintiff. He equally accuses the plaintiffs of publishing tweets of his motor vehicle being forcefully attached and towed away (BN4). There was also an article in the Star Newspaper by the plaintiffs around 16<sup>th</sup> June 2019 calling him a bank loan defaulter hence the towing away of his vehicle. Annexures BN-5 is an excerpt from the newspaper. These publications he says are false and have been republished in various social media platforms (EK2).

10. He has deponed that the letter dated 10<sup>th</sup> June 2019 to various institutions was for purposes of investigations. To him this suit is an attempt to gag and obstruct Justice. He claims to have fully paid for the vehicle in question and is being oppressed by the plaintiffs whom he accuses of coming to the court with unclean hands. He referred to some tweets which are defamatory against him by the plaintiffs and/or their agent, (BN-6).

11. He depones that the orders sought are meant to gag him against making fair complaints against unfair trade practices and also an infringement on the public's right to information to certain things. He therefore urges the court to disallow the application since no prejudice will be caused to the plaintiffs.

12. The 1<sup>st</sup> Plaintiff/applicant in his supplementary affidavit sworn on 13<sup>th</sup> August 2020 denied all the assertions by the respondent in paragraphs 2,3,8,9,10 and 12 of the replying affidavit. He avers that the outcome of this suit will in no way impact on the other two suits mentioned. He further denies the averments in paragraphs 14-18, 21 and 21, 23-25 of the replying affidavit. He has denied publishing any article in the newspaper (BN-5). He also insists that the tweets by the defendant cannot be said to be fair comments, as they are not true and they impute them to be criminals. Basically the plaintiffs deny the contest in all the paragraphs of the replying affidavit and rely on the supporting affidavit in rebuttal.

13. The application was canvassed by written submissions. Mr. Ochieng for the plaintiffs'/applicants' has submitted that the tweets by the defendant were defamatory. He has referred to a definition of "defamation" in Halsbury's Laws of England, 3<sup>rd</sup> Edition Vol.24 pages 6 which provides:

**“A defamatory statement (a) is statement which if published of and concerning a person, is calculated to lower him in the estimation of right thinking men or cause him to be shunned or avoided 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.”**

14. Relying on the case of **Nation Media Group Ltd and 2 others Vs John Joseph Kamotho and 3 others {2010} eKLR** he identified

what a plaintiff must prove in a defamation case to be as follows:

- i) The statement must be published by the Defendant.
- ii) It must be defamatory
- iii) It must refer to the plaintiff.
- iv) It must be malicious

15. It is his submission that the defendant has not denied publishing these tweets which he never bothered to verify before publishing them. The said tweets he says may vanish with time but can be retweeted.

16. He referred to the case of **SMW Vs ZWM {2015} eKLR** where the court stated”

**“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”**

17. He further referred to the case of **Reynolds Vs Times Newspaper Ltd {1999} ALL E.R 609** where Lord Nicholls stated:

**“Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society, which are fundamental to its well-being; whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one’s reputation.”**

18. Submitting on the above two cases counsel states that the right to freedom of expression is not an absolute right and it must be balanced with human dignity, and in appropriate cases one’s privacy. He contends that reference to the plaintiffs as robbers is a very serious thing which has not been backed by any evidence. No report was shown to have been made to the police he argued.

19. On whether the words complained of are malicious he referred to the case **of Phinehas Nyagah Vs Gitobu Imanyara {2013} eKLR** where Justice Odunga held that:

***“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice. ....Malice may also be inferred from the relations between the parties.... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”***

*He therefore submits that the words in the tweets were malicious as they did not represent a true picture of the acts on the ground.*

20. Litoro and Omwebu advocates for the defendant/respondent filed submissions dated 7<sup>th</sup> June 2021. After setting out the facts of the case counsel has submitted that the publication in the Star Newspaper (BN) is prima facie admission that the plaintiffs were involved in unfair and illegal trade practices as stated by the respondent in EK-2. Further that the respondent’s motor vehicle is not a chattels mortgage to any bank and so the photo of it being towed has subsequently been republished in various social media platforms e.g plaintiffs’ EXB2.

21. On whether the applicants merit a grant of an interim injunction counsel referred to the case of **Performance Products Limited and another Vs Hassan Wario Arero and 7 others [2017] eKLR** which referred to the decision of **Cheserem Vs Immediate Media Services {2002} E.A 371 (CCK)** where it was held:

***“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in Giella vs Cassman Brown & co. Ltd (1973) EA 258 generally apply. In defamation 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 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 and also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. 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 come out and the court aims to protect a humane, responsible, truthful and trustworthy defendant.”***

22. Further in the case of **Gilgil Hills Academy Ltd V. The Standard Ltd (2000) eKLR** Maraga J (as he then was) stated:

***“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. The defendants maintain that they have not published and neither do they intend to publish any defamatory words concerning the plaintiff hence an injunction against them would not lie.”***

23. Counsel submits that the tweets @ paragraph 6 of the supporting affidavit are neither defamatory nor malicious and they have been cherry picked to serve the applicants' narrative to gag the respondent's right of speech. He adds that the averments in paragraph 6 are inconsistent with exhibit EK-2. He concludes on this by stating that the respondent's tweets were the truth which was neither scandalous nor malicious.

24. It is counsel's argument that in view of the facts in respect to the vehicle in issue and his position as executive director and secretary of a non-governmental organization the respondent only did what he was ethically and morally expected to do given the circumstances. Counsel points out that the words "a sleek robbery" as introduced in the applicants' submissions are not contained in the screen shots of tweets presented in court by the applicants vide the supporting affidavit. He explains that robbery in business does not refer to the meaning assigned to it by the applicants herein.

25. Counsel in further reference to the case of **performance Products Limited and another (Supra)** quotes the court having stated thus:

*"The above position is reiterated in **Gatley on Libel and Slander, 12 Edition, Sweet and Maxwell at paragraph 24.2** that:*

*The jurisdiction to grant interim injunction to restrain publication of defamatory statements is "of a delicate nature" which ought only to be exercised in the clearest cases"....." Thus the court will only grant an interim injunction where:*

- a. The statement is unarguably defamatory;*
- b. There are no good grounds for concluding the statement may be true;*
- c. There is no other defence which might succeed;*
- d. There is evidence of an intention to repeat or publish the defamatory statement."*

On this he submits that the applicants' case is not one that falls in the category if the clearest of cases of defamation.

26. He submits that the respondent has a defence of truth and justification and privilege. That his complaint to the various institution is a genuine one. On this he relied on the case of **Harakas and others Vs Baltic Mercantile and shipping Exchange Ltd and another (1982) 2ALL E.R 701** where Lord Denning held:

*"where there was a defence of justification or qualified privilege in respect of a libel, an injunction restraining further publication would not be granted unless it would be shown that the defendant dishonestly and maliciously proposed to say or publish information which he knew to be untrue."*

On this he also referred to the case of **Joseph Njogu Kamunge Vs Charles Muriuki Gachari (2016) eKLR.**

27. It is his further submission that the applicants have failed to prove a prima facie case and is underserving of the orders sought as was held in the cases of:

**i) John Ntoiti Mugambi alias Kamukuru Vs Moses Kithinji alias Hon. Musa 920160 eKLR.**

**ii) Micah Cheserem Vs Immediate Media Services (supra)**

28. Counsel contends that granting the appellants an interim injunction to stop him from tweeting on similar matters relating to the plaintiffs would limit his right to freedom of expression expressed in Article 33 (1) of the constitution. He referred to the case of **Media Council of Kenya Vs Eric Orina {2013} eKLR** to support this argument. Further that compelling him to delete his tweets before he is heard on his defence would in effect be granting the prayers in the main suit. To support this, he cited the cases of

**i) I.N.N Vs N.K {2020} eKLR**

**ii) Lucy Wangui Gachara Vs Minudi Okemba Lore {2015} eKLR.**

29. He submits that the applicants have approached the court with unclean hands by using one **Ann Mwikali** to do a smear campaign against the respondent. In it all he urged the court to dismiss the application with costs to the respondent.

### **Analysis and determination**

30. I have considered the application, affidavits, annexures, both submissions and cited authorities. The main issue for determination is whether the applicants have met the threshold for issuance of the orders of:

**i) temporary injunction.**

**ii) mandatory injunction.**

31. The applicants claim is based on a claim of defamatory by the respondent.

32. Defamation is defined by **Gatley on Libel and Slanders** as follows:

*"The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of **right-thinking persons generally**. To be defamatory an imputation needs have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory."*

33. I also refer to Justice Mativo's definition of defamation which I agree with in the case of **Joseph Njogu Kamunge Vs Charles Muriuki Gachari {2016} eKLR** where the honourable Judge stated:

*"The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory."*

*Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice The defamatory words must be shown to have been published by the defendant."*

34. After the definition of the word "defamation" I now move to set out what must be established before a temporary injunction is granted in a case of defamation. It was held in the case of **Micah Cheserem Vs Immediate Media Services (supra)** that the principles of grant of interlocutory injunctions are applicable but with special care and attention because they are not ordinary cases. Such an injunction will be granted in the clearest possible cases.

35. From the material before this court, the respondent and the 4<sup>th</sup> applicant have related as a buyer and seller of motor vehicle registration no KBZ 888G. There arose a disagreement between the two parties and the same ended up in court vide **CMCC (Milimani) No 10957 of 2018** which is now the subject of appeal in **Nairobi HCCA No 342 of 2019**. It is this disagreement that culminated in the tweets complained of.

36. The respondent does not deny having done the tweets. He however pleads Justification and that the tweets represent the truth of the matter. He further claims that the applicants were selective in the parts of the tweets which they have presented to the court. This last claim is interpreted to mean the defendant is in possession of more detailed tweets. There is nothing that stopped him from producing the full tweets between him and the plaintiffs for the court to see. What is contained in BN-4 is communication between the defendant and other persons responding to tweets originating from him.

37. The issue of payment or nonpayment of the motor vehicle KBZ 888G is a matter before other courts and I will not want to rely on what both parties have stated and even submitted on in respect to that sale agreement to make the decision on this matter. So what is the Justification of the tweets according to the defendant/respondent? The answer still goes to the evidence in respect to the sale agreement the subject of the matter before the Magistrates court and the **High Court Civil Appeal No 342/2019**.

38. In one of the tweets the defendant states that the Magistrate was allegedly bribed and this was copied to @Okiya Omutatah and @KenyasOmbudsman. I find this to be going to far if at all there is any justification. No evidence was placed before the court to prove that indeed it is the applicants who instigated the persons who responded to the respondent's tweets to state whatever they did.

39. Going by the case of **Joseph Njogu Kamunge (supra)** cited by the defendant/respondent he had a duty to demonstrate the truth of the defamation imputed. The burden fell squarely on him and it was not discharged. The material before court and even in the tweets shows that the plaintiffs /applicants are business people. The right to freedom of speech and expression must be exercised with a lot of caution.

40. From the foregoing it is clear that the tweets complained of are defamatory and if left to continue would negatively affect the applicant's personal lives plus their businesses. Even if the plaintiffs/applicants and the defendants had, had an issue over the motor vehicle in issue that was not a reason for the defendant to publicize the issue through his tweets to the entire world, and hide behind protecting members of the public.

41. My finding is that the said tweets are negatively affecting the applicants. I find the applicants deserving of the order of a temporary injunction.

42. In respect to the mandatory injunction, I refer to the case of **Kenya Power and Lighting Company Ltd Vs Sheriff Molana Habib {2018} eKLR** in which the High Court sitting on appeal held that:

*"It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction*

*perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.*

*A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”*

43. The same position was held in the case of **Lucy Wangui Gachara (supra)**. A mandatory injunction may only be granted in the extreme of cases or where the court has heard all the evidence and arrived at a conclusive decision. In this case the matter is still at the interlocutory stage.

44. The upshot is that this court finds merit in the application dated 21<sup>st</sup> June 2019 and grants the following orders:

**i) THAT** pending the hearing and determination of this suit, an interim injunction to issue directed at the defendant restraining him by himself, his agents, servants or otherwise howsoever from posting on any electronic media, or publishing, or disseminating in, any manner whatsoever the defamatory words, statements or content or any similar words or statements or content, of like effect, relating to the plaintiffs herein

**ii)** Prayer no. 6 of the notice of motion is declined as it is one of the main prayers in the plaint and issuing it at this point would be determining the suit.

**iii)** Costs to be in cause

**DELIVERED ONLINE, SIGNED AND DATED THIS 15TH DAY OF JULY, 2021 IN OPEN COURT AT NAIROBI.**

**H. I. ONG’UDI**

**JUDGE**