



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. E029 OF 2021

HON UKUR YATANI.....PLAINTIFF/APPLICANT

VERSUS

HON. DIDO ALI RASO.....DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the plaintiff's notice of motion dated 8th February 2021, brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The application seeks the following orders:

i. and ii Spent

iii) That this Honourable Court be pleased to issue interim injunctive orders restraining the respondent by himself, his servants and/or agents or otherwise from uttering any defamatory statements against the applicant or further disseminating or causing to be disseminated any defamatory material of or concerning the applicant pending the hearing and determination of the suit filed herewith.

iv) That costs of this application be provided for.

2. The application is premised on the following grounds:

i. On the 18th of January, 2021 the respondent convened a press conference and maliciously uttered false and defamatory statements against the applicant.

ii. The defamatory statements make an array of false and defamatory insinuations against the applicant including: -

a) The applicant is 'the owner of militias' and bandits that have been involved in diverse criminal activities and has overrun the state security apparatus in Marsabit County

b) The applicant orchestrated and mobilized cattle rustling which was ostensibly.....undertaken by 200 armed rustlers' in Saku Constituency on 15th January 2020;

c) The applicant is 'sponsoring', funding' and providing logistics for militias in Marsabit County;

d) The applicant interfered with the enforcement of law and order in Marsabit County by...calling the county commissioner, the police commanders and intimidating them;

e) The applicant '...has blood on his hands'. The natural implication of this allegations is that the applicant is responsible for the alleged insecurity and loss of lives in Marsabit County. That allegation is clearly designed to tarnish the applicant's image.

iii. The respondent is in the habit of making malicious and false statements against the applicant and that the recent utterances by the applicant are evidence of a repeated pattern by the respondent to discredit and defame the applicant since he was appointed to the cabinet. The trend is one that manifestly points to the malicious intention of the respondent towards the applicant.

iv. The incessant defamatory statements made by the respondent have the effect of continually and irreparably harming the professional reputation, social standing and character of the applicant.

v. Unless this Honourable court intervenes and restrains the respondent from uttering defamatory statements against the applicant, the applicant will continue to suffer harm to his reputation and integrity.

vi. It is in the interest of justice that this Honourable court urgently intervenes and issues the orders sought to safeguard the integrity of the judicial process whilst the substantive suit is pending before the Honourable court.

3. The application is further supported by an affidavit by the plaintiff/applicant Hon. Ukur Yatani sworn on 8th February 2021. He deponed that on the 18th day of January, 2021 the defendant/respondent convened a press conference and maliciously uttered false and defamatory statements against him. (Attached and marked "HUY-1").

4. He avers that since the publication of the said defamatory statement, he has been treated with suspicion by many government officials, and groups that previously respected and regarded him highly. He further avers that based on the respondent's habitual and repetitive pattern of making defamatory remarks against him, this court in the interest of justice should intervene and issue an injunction restraining him or his agents from further disseminating or causing to be disseminated the said or similar words defamatory against him in print or electronic media.

5. In opposition to the application, the defendant/respondent Hon.Dido Ali Raso swore a replying affidavit on 4th of May 2021.He confirmed that he convened a press conference on 18th January 2021 and made statements of fact pertaining to Saku constituency and Marsabit County. He avers that the statements he made were a fair comment of public interest and not defamatory as alleged.

6. He deposed that he made the said statements in exercise of his democratic right as a leader and as a citizen of the Republic of Kenya. He further avers that the defamatory phrases have been handpicked and interpreted out of context merely to hoodwink the court to believe that the statements were defamatory. He avers that the plaintiff/applicant as advised by his advocate has not satisfied the requisite threshold for grant of interim injunctive orders sought as which threshold was set out in **Giella vs Cassman Brown & Company Ltd [1973] E.A 358**. That in the interest of justice, fairness and expediency in all circumstances of the case this application should be dismissed with costs to the defendant/respondent.

7. With leave of the court the plaintiff/applicant filed a further affidavit sworn on 31st May 2021.He deponed that the series of issues raised in paragraph 6 of the replying affidavit are divergence from the direct issues at hand which were made with the intent to cause reputational damage. He further avers that the defamatory statements made referred to him and were shared widely to the global audience. He depones that the respondent uttered the following words:

"that one Ukur Yatani is the Cabinet Secretary in the Treasury is actually the owner of these militias he is the one who is sponsoring them, he is the one who is funding them and is providing logistics to them"

"We call on President Kenyatta Uhuru, for the immediate sacking of Ukur because he has blood in his hands and is a liability to his government"

8. He avers that the statements in paragraph 6, 8 and 9 of the replying affidavit confirm that the respondent not only made the utterances but also intends to defend his defamatory statements by relying on defence of truth/justification and fair comment. He depones that having established a prima facie case with proof of irreparable damage, the balance of convenience tilts in his favour.

9. The application was disposed of by written submissions. The plaintiff/applicant's submissions are dated 2nd June 2021. M/s Saina identified the issues for determination to be follows:

a) Whether a prima facie case has been established.

b) Whether the applicant will suffer irreparable harm if the injunction is not granted which would not adequately be compensated by an award of damages; and

c) On a balance of convenience, whether the applicant stands to suffer greater harm should the interlocutory Orders not be granted pending the decision on merits

10. On the first issue she relied on the case of **Mrao Limited Vs First American Bank of Kenya Limited & 2 others (2003) I KLR 125** at page 137 where the court held:

".....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."

11. Counsel submitted that reputation is an interest worthy of protection and that the said slanderous words have caused serious harm to the applicant's reputation as they disparage his profession and title as a cabinet secretary and hence need no proof of tangible loss as per sections 3 and 5 of the Defamation Act. Section 3 provides:

“In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.”

12. She further submitted that the respondent’s statements are prima facie defamatory as they sullied the applicant’s reputation for the reason they meant that the applicant is responsible for the insecurity, planning and mobilizing of militia for meting out violence within Saku constituency. That all his defamatory utterances were aimed at the applicants.

13. On the second issue counsel contends that protection of reputation is conducive to public good as it is in the public interest that reputation of public figures should not be debased falsely. On this she relied on the case of **Ahmed Adan v Nation Media Group Limited & 2 Others (2016)eKLR** which held as follows:

“.....in some instances damages may not be enough to restore reputation.” The court further added that *“reputation like a name is priceless. No amount of damages therefore may be adequate compensation were the defendants to be found liable”*

14. She further relied on the case of **Ochieng Rapuro v Tatu City Limited (2019) eKLR** where it was held:

“Once reputation is damaged, it is a near impossible task to repair it. Statements go viral by moving like wildfire especially in social media. They move like water in a stream because they are irreversible. Indeed, no amount of damages can be adequate to compensate a party who has been defamed. The damages that are awarded are merely to offer consolation to him that the offender has been punished to pay him damages but are not remedial.”

15. On the third issue she submitted that the balance of convenience seeks to answer which party will suffer greater harm from granting or not granting the remedy pending the decision on merits. In this case she urges that the applicant stands to suffer irreparably if no measures are in place and that no prejudice will be suffered by the respondent if the orders sought are granted.

16. She relied on the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others (2016) eKLR** where the court held:

“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 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 on convenience lies.”

17. Learned counsel submitted that no defence advanced by the respondent will succeed against the defamatory suit by the applicant and this is because a mere pleading of a defence does not mean that the same will carry the day at the trial. On this she relied on the case of **Philomena Mbete Mwilu v Standard Group Limited (2018) eKLR** where the court held as follows:

“In my considered view, the mere pleading of the aforesaid defences does not by itself mean that they will eventually carry the day after the suit is heard since as stated earlier, they must be established by way of evidence and the court may not know at an interlocutory stage whether that evidence will be available in the course of the trial or not.”

18. Submissions by learned counsel for the respondent Mr. Ogeto are dated 25th June 2021. He submitted that the applicant misunderstood, misapprehended the correct legal threshold in determining on whether to grant interim injunction reliefs in defamation cases as set out in **Giella vs Cassman Brown (supra)**.

19. He relied on **Gatley on Libel and Slander, 8th Edition by Philip Lewis M.A at Paragraph 1574** which states as follows;

“When once a defendant says that he is going to justify the words complained of, there is an end of the case so far as an interim injunction is concerned, although in a proper case it may be that the court will intervene on the ground of a breach of confidence”

20. He further relied on Richard Kuloba J (as he then was) in his book **“Principles of Injunctions” at page 102** that states:

“When once a defendant says that he is going to justify the words complained of, there is an end of the case so far as a temporary injunction is concerned; and it will be refused even if the words complained of are prima facie libelous and untrue”

21. He further relied on several authorities on the threshold for grant of interim injunctions in defamation cases some of which are:

a) *Mumias Sugar Company Limited & 5 Others v Musa Ekaya (2017) eKLR* where the court relied on *Cheserem vs Immediate Media Services & 4 Others (2000) eKLR*

b) *Australian Broadcasting Corporation and O’Neill (2006)227 CLR 57.*

22. Counsel submitted that courts have held that where the defence of fair comment and justification is raised then the court does not grant an injunction until the evidence is analyzed and witnesses examined which can only be done at trial and not through an application. He cited the case of **Transcend Media Group v Standard Group Limited (2017) eKLR** where the court stated that where the court held that

temporary injunction to prevent the publication of a defamatory statement can only be granted in the clearest cases and that courts have been hesitant to grant such orders where the defence of truth and fair comment has been pleaded.

23. He further relied on the Court's reasoning in **Evans Kidero v John Kamau & Another (2017) eKLR** where it was stated: -

*"The same sentiments were expressed in the case of **Micah Cheserem v Immediate Media Services (2002) 1EA 371** where the court 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, 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 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 be out and the court aims to protect a human, responsible, truthful and trustworthy defendants".*

24. In his submissions, counsel contends that the court should not grant the orders sought for the reason that they are too wide, obscure and incapable of being performed. He relied on the case of **Francis Atwoli & 5 Others v Kazungu Kambi & 3 Others (2015) eKLR** where the court stated:

"One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid; the order sought was too general to have any precise meaning."

25. Counsel further submitted that the granting of interim injunction orders would be akin to a gagging order to prevent the defendant from making any factual statements on matters of public interest affecting Saku constituency and Marsabit County at large. He relied on the case of **John Ntoiti Mugambi Alias Kamukuru v Moses Kithinji alias Hon.Musa (2016) eKLR** where the court held that:

"The above notwithstanding, there is a more serious problem with this application. The way the orders sought are styled- borrowing from the words of Justice Ringera- is a net cast too wide over a large body of water, and out of all the lake or sea, it will catch all manner of creatures. In defamation cases, it is not possible to issue such boundless injunction which restrain any and all persons from saying anything about the Applicant; that will be a complete impairment of freedom of expression and public interest that truth should be out. An injunction in such cases must be specific in order to prevent such impairment or impediment of freedom of free speech and expression. Care should be taken, therefore, not to issue injunctions which will rapture the law and the Constitution"

26. He also relied on the cases of **Bestobell Paints Limited v Bigg 9(1975) F.S.R 421** where the court held that;

*"There is an old and well-established principle which is still applied in modern times and which is in no way affected by the recent decision in the house of Lords in the **American Cyanamid Corporation v Ethicon Ltd [1975] (No.1) AC 396**, that no interlocutory injunction will be granted in defamation proceedings where the defendant announces his intention of justifyingThat was established towards the end of the last century and it has been asserted over and over again....Interlocutory restraint in any case that is not obvious would operate as an unjust fetter on the right of free speech and the defendant's liberty (if he is right)to speak the truth."*

27. According to counsel, the respondent has intimated to the court his intention to justify the alleged defamatory remarks during trial and that is reason enough for the court not grant the interim injunctive reliefs sought by the applicant. On this he relied on the case of **Endmor Steel Millers Ltd v Royal Media Services Ltd & 2 others (2020) eKLR** where the court in reiterating what Lord Denning M.R said in **Harakas v Baltic Merchantile and Shipping Exchange [1982] I.W.L. R. 958** stated:

"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. So also when an occasion is protected by qualified privilege this court never grants an injunction to restrain slander or libel..... unless it is shown that what the defendant proposes to say is known by him to be untrue so that it is clearly malicious..."

28. Finally, counsel submits that the instant application is unmerited, devoid of any legal grounding and should be dismissed with costs.

Analysis and Determination

29. I have duly considered the application, affidavits and the written submissions plus authorities cited by both counsel. The issue falling for determination is whether the plaintiff/applicant has satisfied the threshold for grant of an interim injunction.

30. The case of **Giella vs Cassman Brown [1973] EA 358** sets out the conditions to be established before an order of injunction is granted which are as follows:

- (i) The plaintiff must establish that he has a prima facie case with high chances of success.
- (ii) That the plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
- (iii) If the court is in doubt it will decide on a balance of convenience.

31. It is however noted that besides the conditions set out in the **Giella case** (supra) the need to be more cautious in a defamatory case is high. In the case of **Cheserem v Immediate Media Services & 4 others [2000] eKLR** Justice Khamoni (*as he then was*) had this to say of such cases:

“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 (emphasis mine). 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 be out and the court aims to protect a humane, responsible, truthful and trustworthy defendant.”

32. The law of defamation is concerned with the protection of a person’s reputation. **Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1** expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...’ Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. ‘The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”

33. The issue here, is clearly one of freedom of expression versus the protection of reputation. The question arising for the determination of the court is whether an order of injunction can be issued to prevent publication of defamatory material of the plaintiff, where the defences of justification or fair comment on a matter of public interest, are raised. The plaintiff/applicant has been described as a state officer currently serving as the cabinet secretary national treasury and planning, while the defendant/respondent is described as the member of Parliament of Saku Constituency. The defendant/respondent does not deny uttering the alleged defamatory statements and that it was an expression of opinion being fair comment on matters of public interest.

34. On the other hand the plaintiff/applicant a state officer is keen on maintaining his reputation. This is where the court is called upon to balance the public and private interest. Does this court gag the defendant/respondent from informing the people he represents about the happenings in their country? Does it let the defendant/respondent say all manner of things citing justification?

35. In the case of **Gulf Oil (G B) Ltd. v Page & Others [1987] 3 ALL ER 14** Lord Denning M. R. said:

“The principle has been established for many years ever since Bonnard v. Perryman [1891] 2 Ch 269. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge; but a better reason is the importance in the public interest that the truth should come out. As the court said in that case ‘the right of free speech is one which should be exercised without impediment, so long as no wrongful act is done’. There is no wrong done if it is true or if it is fair comment on a matter of public interest”.

At page 11, Lord Denning MR went on to state:

“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. It must not be whittled away.... The Defendants admit that they are going to injure the Plaintiff’s reputation, but they say that they can justify it; that they are only making fair comment on a matter of public interest; and therefore, that they ought not to be restrained. We cannot pre-judge this defence by granting an injunction against them”.

36. We should also be able to recognize the need to advance the fundamental right of speech, media and expression that are guaranteed under Articles 33 and 34 of the Constitution. The rationale being that there is important public interest that wrong doing must be exposed. This must however be done with decorum as individuals too have rights which must be respected.

37. In the case of **Albert Cheng & Another v Tse Wai Chun Paul Paul (2000) 3 HKCFAR 339** a decision of the Hong Kong Final Court of Appeal, Lord Nichols stated:

“The law now is that the Defendant who pleads fair comment is only guilty of malice if he has no belief in what he says. If he has such a belief, there is no malice even if he is pursuing his own private agenda or ambitions.”

38. Further in the case of **Fraser v Evans [1969] 1 Q B. 349** the court stated:

“The right of speech is one which it is for the public interest that individuals should possess and indeed, that they should exercise without impediment. So long as no wrongful act is done. There is no wrong done if it is true or it is fair comment on a matter of public interest.”

39. The tort of defamation is anchored on the recognition of the individual’s right to his good reputation. Subject to the various defences protecting the balancing of interest between freedom of speech and an individual’s good reputation the law confers a cause of action on any person of whom defamatory matter is published. The defence of justification rests on the premise that the words complained of are true. Hence, a defendant who pleads justification must give particulars of the facts relied on as showing that the defamatory statement is true. In the case of **McDonald Corp v Steel [1995] 3 ALL ER 615** it was held that:

“The defendant should not plead justification unless he

(a) believes the words complained of to be true;

(b) intends to support the defence at trial;

(c) has reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegation will be available at trial.”

40. Justice Mabeja in a similar scenario in the case of **Francis Atwoli & 5 others v Hon. Kazungu Kambi & 3 others Nairobi High Court Civil Suit No. 60 of 2015** stated as follows at paragraph 23:

“One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case, must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid, the order sought was too general to have any precise meaning.”

41. Coming to the present case and the notice of motion filed herein I have looked at the statement complained of and the respondent’s response to it. The words allegedly uttered relate to very serious issues of security of the country and the community at large. The defendant is alleged to have stated that Marsabit was primarily under bandits, who are more powerful than the public etc. That the leaders had established that the plaintiff/applicant is the one who owns the said bandits, sponsors them, funds them and provides logistics for them. Further that the defendant/respondent and his team want to appeal to His Excellency the President to remove the plaintiff/applicant from Government.

42. By “justification” it means that the respondent has all material evidence to support these utterances. Being a matter touching on security I would only accept the element of justification if the defendant demonstrated what action he as a leader has taken on the same. There is no evidence that he has reported this to the relevant authorities that deal with security matters of this country. He cannot hide behind the privileges he enjoys as a member of parliament to incite people to violence and destroy the character of the plaintiff. He should have tabled that evidence before this court.

43. I do find this to be a clear case where the court should step in and issue the temporary injunction sought for the sake of security of the counties of Marsabit and Isiolo and even the country at large. I am satisfied that the plaintiff /applicant is deserving of the orders sought in prayer no (iii) of the notice of motion dated 8th February 2021.

44. I therefore allow the application and grant prayer no. iii of which an interim injunction is issued as prayed

Orders accordingly

DELIVERED ONLINE, SIGNED AND DATED THIS 21ST DAY OF SEPTEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG’UDI

JUDGE