



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. E030 OF 2021**

**HON UKUR YATANI.....PLAINTIFF/APPLICANT**

**VERSUS**

**HON. QUALICHA GUFU WARIO.....DEFENDANT/RESPONDENT**

**RULING**

1. The application for consideration is the plaintiff's Notice of Motion dated 8<sup>th</sup> February 2021, brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, 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***

***ii. That this Honourable Court be pleased to issue interim injunctive orders restraining the respondent by himself, his servant 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.***

***iii. That costs of this application be provided for.***

2. The application is premised on the following grounds:

***i. On the 18<sup>th</sup> 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) That the applicant is involved in planning and mobilizing militia for meting out violence in Saku and Moyale Constituencies within Marsabit County. In its context, this false allegation means and is capable of being understood to mean that the applicant has committed crimes under domestic and international law, including purported forcible transfer of population, fanning violence, cattle rustling, theft and other felonies;***

***b) That the applicant has conspired with other leaders and with government to orchestrate violence and attacks which have led to loss of lives within Marsabit County. The natural implication of this allegation is that the applicant is responsible for the alleged insecurity in the County. That allegation is clearly designed to sully the applicant's image; and***

***c) That the applicant seeks to achieve ulterior political ends through regular visits and sponsoring violence in the region. This falsehood is clearly calculated at evoking disaffection against the applicant both in government and within the community;***

***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 8<sup>th</sup> February 2021. He deponed that on the 18<sup>th</sup> 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 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 opposing the application, the defendant/respondent Hon.Qualich Gufu Wario swore a replying affidavit on 11<sup>th</sup> March 2021.He confirmed that he and his colleagues held a press conference on 18<sup>th</sup> January 2021 for purposes of informing his members on the state of security in the area which is most affected by cattle rustling and tribal clashes. Further that there has been tribal hostility involving different communities in Marsabit county as such they have a duty to preach peace and breach the gap among these communities.

6. He avers that his speech was not about the applicant and anything said about him was true. He depones that the statements were not made with malice neither were they defamatory. Further that the applicant had during a state function made several stop overs and addressed members of his community inciting them against other communities. Annexure HQGW is his evidence picked from diverse video clips containing speeches made by him which threaten the peace in the area.

7. He deposed that as a member of parliament representing the people of Moyale within Marsabit County he has a right to engage in peace making exercises which the applicant is not happy about. He further believes that the application is a diversion from the real politics on the ground and is orchestrated in view of the 2022 elections which he is not interested in as a person.

8. With the leave of the court the plaintiff/applicant filed a further affidavit. He deponed that the respondent did not answer specific issues raised in his affidavit and instead persisted in making falsehoods. That he used his response to reiterate his defamatory statements. On this he refers to paragraphs 20, 24 and 32 of the replying affidavit.

9. He noted that in paragraphs 8-12 of the said affidavit the respondent has alleged that the press conference was on cattle rustling and tribal hostility which averments do not refute the fact that during the said press conference he made defamatory statements that referred to the applicant. Further the defamatory statements were made with malice and the respondent has defended his statements by stating that everything he stated about the applicant was true.

10. He deponed that the respondent had requested for a statement on insecurity and displacement of residents in Moyale Constituency and Marsabit County which contained the findings of the security agency's investigations of the matter that the respondent is aware of (Annexure "HUY-1B"). He averred that annexure HQGQ1 containing the transcript of the translated version of the applicant's speech was not a true reflection of the purported speech he made.

11. On a without prejudice basis he noted that the transcripts have no bearing on the application and nothing in them indicates that he incited one community against the other. Further that in paragraphs 26-27 and 33 of the replying affidavit the respondent has made obscure and irrelevant assertions to the present case.

12. With the leave of the court the defendant/respondent filed a further affidavit dated 22<sup>nd</sup> April 2021. He deponed that the applicant did not deny the speech presented to court as exhibit as well as the contents of paragraphs 6,7 and 8 of the said affidavit. He avers that contents of his speech to parliament is privileged as it is a statement presented to parliament.

13. He further asks to be allowed to play the videos, clips presented as exhibits for determination by the court. He denies publishing any statements, saying he only addressed the public in a press conference in response to the applicant's public speeches within the county of Marsabit. He insists that the applicant has not shown the damage he suffered in respect of his speeches. He still denies defaming the plaintiff/applicant in any way.

14. The application was disposed of by written submissions. In her submissions M/s Saina for the applicant gave a brief background of the matter and 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 which will not be adequately compensated by an award of damages if the injunction is not granted.*

*c) On a balance of convenience, whether the applicant stand to suffer greater harm should the interlocutory Orders be granted pending the decision on merits*

15. On the first issue she relied on the case of **Mrao Limited v 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.”*

16. 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 proof of tangible loss as per **sections 3 and 5 of the Defamation Act, Cap. 36 Laws of Kenya** which 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.”*

17. She contends that if a defamatory statement is made available to any party other than the subject of the defamation then in principle it is published which ultimately leads to a broader circulation in other social media platforms. She adds that the respondent's statements are prima facie defamatory as they sullied the applicant's reputation for the reason that they meant that the applicant is responsible for the insecurity, planning and mobilizing of militia for meting out violence within Marsabit constituency.

18. 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”*

19. She further relied on the case of **Ochieng Rapuro v Tatu City Limited (2019) eKLR** where the court 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.”*

20. On the third issue counsel 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 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.

21. To support this, 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.”*

22. 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 Mbeti 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.”*

23. She further submitted that the defamatory statements were motivated by malice. It is demonstrated in the replying affidavit where the respondent states that the applicant and respondent have had a political history that has given rise to political differences because of personal ambitions. She relied on the case of **Stanbic Bank Limited v Consumer Federation of Kenya (COFEK) which cited Phineas Nyagah Vs Gitobu Imanyara (2013) eKLR** to support this submission.

24. According to counsel, the respondent will publish similar defamatory statements if not restrained. She submitted that the said statements as seen in the respondent's replying affidavit demonstrate the more reasons why the court should issue the interim injunctive orders as prayed.

25. In rebuttal, Mr. Otieno for the defendant/respondent gave brief facts of the case and submitted that their submissions were based on four points;

i. The defendant was responding to statements made by the applicant to antagonize the community both from the north and the south of the county and whose result was to destroy the peace in the area.

ii. The defendant's speech is privileged under the law as a member of parliament under the circumstances.

iii. There was no malice aforethought at all.

iv. The plaintiff/applicant is a civil servant and does not deserve damages, punitive or otherwise.

26. On whether the applicant qualifies to be compensated, counsel relied on the case of **Ali Onamu Apidi v Onesmus Mutinda & 5 Others [2019] eKLR**. The plaintiff in this matter had sought three (3) prayers; General and punitive damages as well as costs of the suit. The plaintiff therein failed to prove his case on balance of the probabilities and the suit was dismissed with costs to the defendant. It is counsel's submission that an interlocutory injunction in such a case must be based on sound legal principles and evidence. He noted that the defence was a response addressed to the public and not directed at the applicant.

27. He submitted that the defendant acted in good faith as he had no malice and only expressed his opinion to the public on behalf of his constituents. He relied on sections 199 and 200 of the penal code that define a defamatory statement which is privileged and made in good faith. He further relied on freedom of speech under Article 33 of the constitution, it was submitted that the respondent exercised his right in speech to previous utterances by the applicant.

28. Counsel argued that both parties made utterances that affected their communities but the applicant is making accusations and wants the court to determine the fairness in his favour. To support this counsel cited the case of **Corporal Francis Cheronu Ngeny & 11 Others vs. Sammy Kiprop Kilach [2017] eKLR**

a) *Reynolds v Times Newspaper Limited (2001)2 AC 127*

b) *Ali Onamu Apidi vs Onesmus Mutinda & 5 Others [2019] eKLR*

### **Analysis and Determination**

29. I have 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. These are:

(i) The plaintiff must establish that he has a prima facie case with high chances of success.

(ii) That the plaintiff will suffer irreparable loss that cannot be compensated by an award of damages.

(iii) If the court is in doubt it will decide the application 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:

*"Applications 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 be out and the court aims to protect a humane, responsible, truthful and trustworthy defendant."*

32. The issue here, is clearly one of freedom of expression versus the protection of reputation. The question arising for determination by this court is whether an order of injunction can be issued to prevent publication of defamatory material of the plaintiff, where there is the defence of privilege under the law as a member of parliament under the circumstances. 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 Moyale constituency.

33. The defendant/respondent does not deny uttering the alleged defamatory statements made as a member of parliament who is privileged to make certain statements as he was responding to the applicant's speech. On the other hand the plaintiff/applicant as 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 county/country?

34. In the case of **Harakas v Baltic Mercantile & Shipping Exchange [1982] 1 W.L. R. 958** the court emphasized its role of not restraining the right to free speech by way of a court order, where the defendant claims the matters complained of, are actually true. He said:

*"This court never grants an injunction in respect of alibel 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 libel shown that what the defendant proposes to say is known by him to be untrue so that it is clearly malicious...”

35. In the case of **Ahmed Adan v Nation Group Limited & 2 others [2016] eKLR** the court had this to say:

*“Whether or not there is libel is primarily a question of fact. In order to grant an interlocutory injunction, the court would have to come to a decision upon that question of fact before trial and upon untested affidavit evidence. 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.*

*The test in defamation cases should therefore go beyond that obtaining in ordinary cases. It will not be sufficient merely for the plaintiff to establish a prima facie case with a probability of success and irreparable loss. There are also instances when interlocutory injunction will be very difficult to obtain no matter how strong the plaintiff’s case.*

*These instances include where justification is pleaded. Where the defendant pleads that he will be able to prove that the words complained of are true, unless the court is clearly satisfied that he will not be able to do so, it will not grant interlocutory injunction. See Gatley para. 27.5, 27.6 In *Bonnard vs Perryman [1891] 2 Ch. 269*, it was explained –*

*“the right of free 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; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed...”*

36. Justice Mabeya 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.”*

37. A keen look at the notice of motion and in particular prayer no. 3 reveals that the plaintiff/applicant wants the defendant/respondent barred from uttering **any** defamatory remarks, which is so general. A defamatory remark would mean anything not pleasant to the plaintiff/applicant but very accommodative to the defendant and the people he represents. The defendant has admitted uttering the words complained of but has given justification to the effect that it was a response to what the plaintiff/applicant had told his constituents and what he said in response is true. That is why it was imperative for the plaintiff/applicant to clearly spell out what the defendant/respondent is to be gagged from uttering. This can only clearly come out during the full hearing. Secondly, the dissemination of any such material is by other persons or bodies who are not parties in this suit. How would they be enjoined?

38. The best the two parties can do for themselves is to respect each other and know what to speak in public whenever an opportunity presents itself. Secondly let the plaintiff move fast and have the main suit heard and determined.

39. For the above reasons I find that the plaintiff/applicant has failed to demonstrate that he is deserving of the general orders sought in the application dated 8<sup>th</sup> February 2021. The application is dismissed.

40. Costs shall be in cause.

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

**H. I. ONG’UDI**

**JUDGE**