



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E102 OF 2021

DR. DONALD OYATSI.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH WANGUL.....1ST DEFENDANT/RESPONDENT

NATION MEDIA GROUP.....2ND DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion Application herein dated 29th April 2021 seeks orders that:

a) Spent

b) Pending the hearing and determination of this suit, a mandatory injunction be granted that the Defendants do obey the law as enacted in mandatory terms under Section 7A of the Defamation Act Cap 36 Laws of Kenya and publish the correction delivered by the Plaintiff to the Defendants on 12th April, 2021;

c) Pending the hearing and determination of this suit, a mandatory injunction be granted that the Defendants do obey the law as in mandatory terms under Section 7A of the Defamation Act Cap [36 Laws of Kenya and publish on or in all their distribution channels including the Defendant's website the correction delivered to them by the Plaintiff on 12th April, 2021;

d) Pending the hearing and determination of this suit, a temporary injunction be issued restraining the defendants, their agents or servants or otherwise from further printing, circulating, distributing, publishing in any form or manner the words or allegation that the Plaintiff was found liable and punished by the Medical Board for overdosing a one year old epileptic baby or words to that effect

e) Costs of this suit be provided for.

2. The application is premised on the grounds on the face of the Application that;

a) The Defendant have jointly and severally violated the Plaintiff's Constitutional right to inherent dignity, or reputation and equal protection under the law by publishing in their newspaper and other distribution channels worldwide that the Plaintiff overdosed a one-year-old epileptic baby;

b) That the said words are false and ruin the Plaintiff's reputation, inherent dignity and professional career;

c) The law as enacted in Section 7A of the Defamation Act states in mandatory terms that the immediate relief available to the plaintiff to restore or salvage his reputation and inherent dignity is for the defendant to publish a correction and give it the same prominence as the offending article;

d) In breach of the Constitutional guarantees, and the enabling statutory provisions, the defendants have blatantly defied the law and refused to publish the said correction;

e) Unless this court grants the reliefs prayed for herein, the plaintiff will be denied the protection of law as guaranteed under Article 27 of the Constitution in relation to the protection and preservation of his reputation and inherent dignity;

f) It is in the interest of justice that the application be granted as prayed.

3. In the supporting affidavit, the Applicant has described his academic background and stated that he is a medical practitioner registered under the provisions of the Medical Practitioners and Dentists Board. Further that he is a Consultant Pediatrician and Consultant Child Neurologist being among the only eight Consultant Child Neurologists in the whole of East Africa.

4. It is deponed that on 8th of April 2021, the Defendants printed and published in the **Daily Nation** newspaper the following words concerning the Applicant:

“He was accused at the medical board of overdosing one-year-old epileptic patient. A doctor facing charges of negligence has lost his second attempt in court to block the medical board from punishing him for overdosing a one-year-old epileptic baby”

5. It is further stated that the Plaintiff as a medic knows that overdosing a patient is an extremely serious, unlawful and criminal action which equates to poisoning a patient and can cause serious medical complications including fatal outcomes; that he did not overdose or poison a patient as reported by the defendants; that the medical board did not find him liable nor punish him for overdosing a patient as reported and published by the defendants; that the publication was false and seriously defamed and damaged the Plaintiff's reputation, his professional standing or career and dignity.

6. The Plaintiff further deponed that it has taken him 34 years of his professional life to achieve his current standing and/or status as one of the eight consultant neurologists in East Africa. That for unknown reasons the Defendants chose to fabricate and publish defamatory content that has damaged and/or ruined his career and professional standing. It is stated that in order to cause maximum harm, the Defendants used his photo so as to attract attention of it's readers or viewers for the online publication.

7. Being aggrieved, by the publication in question, the Applicant made a request within 14 days pursuant to Section 7A of the Defamation Act to the defendants to publish a correction vide a letter dated 12th April 2021. That the said letter elicited no response and no action was taken by the defendants prompting the plaintiff to write a reminder vide a letter dated 16th April 2021, which suffered the same fate as the earlier one. That due to the defiance by the Defendants, the Plaintiff has now resorted to the intervention of this court to enforce Section 7A of the Defamation Act. It is further stated that an award of damages at the end of this case will not sufficiently restore the already damaged reputation.

8. In opposition to the application, the Defendants filed the 26 grounds of opposition dated 26th May, 2021. The application is opposed on grounds that it does not meet the test for grant of interlocutory injunctions, that the Plaintiff has not established a *prima facie* case with probability of success, that he has not demonstrated that he is likely to suffer irreparable harm if orders sought are not granted and that the balance of convenience lies in favour of the defendant as the subject matter of the article complained of is a matter of great public importance.

9. Further, it is stated that the court ought not issue temporary injunctions in defamation matters as it is akin to curtailing the freedom of expression enshrined under Article 33 and 34 of the Constitution especially on matters of public interest. It is further stated that the Applicant seeks a mandatory injunction which ought not to be granted at the interlocutory stage. Further, that no special circumstances have been shown to warrant the granting of the same. That in cases such as these, care ought to be taken due to the competing interests between private interest to reputation and public interest to free speech and the right to know, especially in matters touching on public interest. That the court ought not issue temporary injunctions without first having seen the defence by the defendants in defamation cases.

10. In a Replying Affidavit filed in opposition to the application, it is stated that the 1st Defendant in his duties as a correspondent employed by the 2nd Defendant covers cases reported in court which include cases touching on healthcare practice in Kenya and in particular, the cases that touch on public interest. It is further deposed that sometimes in March 2021, while doing his work of reporting of cases that have been decided by the Court of Appeal, he visited the electronic site of Kenya Law Reports platform and came across a ruling delivered on 19th March 2021 being **Civil Application NO. E308 of 2020: Donald Oyatsi Vs Disciplinary & Ethics Committee and 3 others in (2021) eKLR**. That the said ruling dismissed an application for stay of execution of the judgement and decree made by the High Courts on 18th September 2020 in **High Court Miscellaneous Civil Application NO. 42 of 2020 (JR) Vs Disciplinary and Ethics Committee and another: Donald Oyatsi (Ex-parte); AGK (interested party) (2020) eKLR**.

11. Further, that upon reading the two decisions above the 1st Defendant noted that the Disciplinary and Ethics Committee of the Kenya Medical Practitioners and Dentists Council had, among its other findings, found the Plaintiff liable for overdosing a patient without demonstrable benefits to the patient, and also directed the Plaintiff to enter into negotiations with the complainant, AGK, with a view to compensating them.

12. That following the decision of the Council, the Plaintiff moved to the **High Court via Judicial Review Miscellaneous Application NO. 42 of 2020 R Vs the Disciplinary and Ethics Committee and others Ex-parte Dr. Donald Oyatsi** seeking, among others, an order to quash the decision of the Council, which application was dismissed by the High Court on 18th of September, 2020. That the dismissal prompted the Plaintiff to file an application for stay **vide Civil Application NO. E308 of 2020 (Supra)**, which was also dismissed by the Court of Appeal on grounds that the High Court order could not be executed nor enforced.

13. The Defendants contend that the article was based on a ruling of the Court of Appeal delivered on 19th March 2021 and the Judgment of the High Court of 18th September 2020. That the article was a fair and accurate account of what transpired in the High Court and the Court of Appeal relating to the cases filed by the Plaintiff and that the publication in question was balanced as it highlighted the Plaintiff's plea to the Court of Appeal and was not meant to disparage the Plaintiff. Further, that medical negligence in medical practice is a matter of public interest and the article was highlighting a case that had been fully handled by the Council and the High Court.

14. This matter was canvassed by way of written submissions. I have read and considered the Application, the responses and the rival submissions filed by both parties.

15. On whether to issue the injunctive orders sought, the principles applicable were well settled in the case of **Giella v Cassman Brown & Co. (1973) EA**:

“To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience”

16. As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

“.....a *prima facie* case” I would say that in civil cases it is 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.”

17. Orders of Mandatory injunctions are granted sparingly by courts especially in defamation cases. In the case of **Micah Cheserem v Immediate Media Services (2000) 1EA 371** cited by the defendants, the threshold for grant of mandatory injunctions in defamation cases at interlocutory stage is set as follows:

“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest...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.”

18. The Court of Appeal in **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** held that:

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.”

19. The Court of Appeal in **Lucy Wangui (supra)** cited with approval the case of **Locabaill International Finance Ltd. v Agroexport [1986] 1 ALL E.R. 901**, where it was held that;

“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.”

20. The elements to be proved in a case of defamation are:

- (a) The words complained of were defamatory
- (b) The words referred to the applicant.
- (c) The words were published.
- (d) The publication was actuated by malice.

(See for example **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008**)

21. In the case at hand the article was published. The article concerns the Plaintiff. The question is whether the article was defamatory. In the ruling of the Council in PIC Case No. 3 of 2017 AGK on behalf of AGK against Dr. Donald P Oyatsi, the finding was that the Plaintiff has culpable of overmedicating the patient. The Plaintiff filed **H.C. Judicial Review Misc. Appl. No.42/2020 Republic v the Disciplinary & Ethics Committee and Others Ex parte Dr. Donald Oyatsi** seeking to quash the decision of the Council which application was dismissed. The Plaintiff applied for orders of stay of execution of the High Court decision by the Court of Appeal Civil Application No. E308 of 2020 which application was also dismissed.

22. The foregoing three decisions form part of the court record. The Plaintiff’s counsel has submitted that the facts were distorted in the article complained of. The court was specifically referred to the complaint before the Council and the finding thereof. It appears the Applicant is aggrieved by the use of the terminology **“overdosed”** as opposed to **“over medicated”**. At this stage of the case, the court is yet to have evidence adduced in respect of the two terminologies. The court is yet to have evidence before it to show whether the usage of the terminology complained of was in the circumstances of this case a distortion of facts and was driven by malice. In the premises, I find no *prima facie* case has been established at this stage of the case.

23. In cases of defamation, an award of damages may be a recompense but once a reputation is damaged, the same cannot be compensated in monetary terms (See for example **Philomena Mbete Mwilu v Standard Group Limited [2018] eKLR**.)

24. On the balance of convenience, we have a case which revolves on the use of terms **overdosed** as opposed to **overmedicated**. There is no evidence of any repeated publication. In the circumstances of this case, as per the affidavit evidence before the court at this stage of the case, this court's view is that the balance of convenience does not tilt in favour of the Plaintiff's side. This is not a clear case for a grant of orders sought.

25. In the upshot, I find no merits in the application and hereby dismiss the same with costs.

DATE, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021

B. THURANIRA JADEN

JUDGE