



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E046 OF 2020

AHMEDNASIR MAALIM ABDULLAHI.....APPLICANT

-VERSUS-

NJERI THORNE.....RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 7th August 2020 in which the plaintiff/applicant sought for:

i. Spent

ii. Spent

iii. Spent

iv. Pending the hearing and determination of the plaintiff's suit, an injunction be issued restraining the defendant, whether by herself, agents, servants of any persons acting on her instruction/under her direction, from further posting, publishing and circulating or causing to be posted published or circulated the said words or images serialized at paragraph 5 of this motion, on her twitter account styled as 'MamaBora' under the twitter handle '@NjeriThorne' or any other forum; be it oral, print or electronic;

v. Pending the hearing and determination of the plaintiff's suit, a mandatory injunction be issued compelling the defendant, whether by herself, agents, servants or any persons acting on her instruction/under her direction, to take down/retract/delete/purge the said words or images serialized at paragraph 5 of this motion, from her twitter account styled as 'Mamabora' under the twitter handle '@NjeriThorne' or any references thereto on any other forum in her control/power; and

vi. The costs of this application be provided for.

2) The plaintiff/applicant filed the supporting affidavit and a further supporting affidavit he swore in support of the aforesaid motion. The defendant/respondent filed the replying affidavit and a further replying affidavit she swore to oppose the application. When the motion came up for interpartes hearing, this court with the concurrence of the parties gave directions to have the application disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion together with the facts deponed in the affidavits filed in support and against the motion. I have also taken into account the rival written submissions plus the authorities cited by the parties.

4) The plaintiff/applicant averred that he operates a personal twitter account styled in his own name as "Ahmednassir Abdulahi SC" under the twitter handle "@ahmednassirlaw". The plaintiff averred that the defendant operates a twitter account styled as "Mama Bora" under the twitter handle "@Njeri Thorne".

5) The plaintiff also alluded that the defendant's twitter account at the time of filing this suit had a following of over 21,000 people. It is stated by the plaintiff that between 28th July 2020 and 31st July 2020, the defendant posted/published and circulated a series of defamatory libelous and scandalous tweets directed at the plaintiff as follows:

'Sasa, @ahmednasirlaw you can apologise for your slight a few months ago, and apologise for the threat to use me.... then I might consider restraining from quoting online accusations against you although my point really was, that you don't have locus standi (sic) to speak on matter KE. (posted at approximately 1952 hrs on 31st July 2020)

'And for the record, @ahmednasirlaw can be involved in all manner of criminal activities, none of y (sic) business. My issue is in allowing him to appear on national TV regularly and in turn letting him shape our narratives and cognitions. He has no interest in matters KE. (posted at approximately 2159 hrs on 31st July 2020)

'Folk like @ahmednasirlaw should not be commenting on matter KE. He is responsible for laundering pirate money bringing it in and distorting our economy. He also big caliphate dute (sic) and has worked against KE with terrorists. (posted at approximately 2217 hrs on 28th July 2020)

The glamorous building acts as the First Community bank Headquarters which ironically, was founded by Ahmednasir Abdullahi from suspected proceeds of piracy ransom paid off by desperate shipping companied whose vessels were seized by ruthless somali pirates off the Gulf of Aden, (posted at approximately 1703 hrs on 31st July 2020)

'Leteni Kesi. Nitawaletea QC. Wacha vile @ahmednasirlaw thinks he is SC. I will show you what silk and royalty look like. (posted at approximately 2354 hrs on 31st July 2020)

6) The plaintiff pointed out that the aforesaid tweets are singularly and collectively prima facie and ex facie, defamatory.

7) It is the applicant's assertion that the said words were calculated to disparage him in his profession as an advocate, senior counsel and in his business. The applicant further argued that the defendant published and caused to be circulated the offending tweets on her personal twitter account knowing the same to be false and with the sole object to discredit, embarrass and lower the plaintiff's dignity and to bring him to ridicule, contempt and disrepute in the eyes of right thinking members of society.

8) He pointed out that the offending publications were circulated to the defendant's 21,000 followers and that the same tweets were further circulated to other unquantifiable twitter users by virtue of being "retweeted" or "liked" onto other users twitter timelines.

9) The applicant avers that the offending publications are still exhibited on the defendant's twitter handle and being circulated thus bringing ridicule, scorn and disdain on the plaintiff. It is the further the submission of the plaintiff that in the natural and ordinary meaning, the offending words uttered by the defendant meant and were understood to mean:

a) The plaintiff is a criminal;

b) The plaintiff is complicit in criminal activities;

c) The plaintiff is a money launderer;

d) The plaintiff is complicit in piracy and terrorism;

e) The plaintiff is affiliated to the ISIS Caliphate;

f) The plaintiff is unworthy or the honour of Senior Counsel;

g) The plaintiff is unfit to practice law in Kenya;

h) The plaintiff founded First Community Bank from proceeds of crime;

i) The plaintiff had been guilty of dishonest and dishonourable conduct;

j) The plaintiff was of a dissolute and profligate character; and

k) The plaintiff was unfit to associate with respectable persons.

10) The plaintiff also argued that malice can be inferred from the defendant's defamatory conduct. It is further argued that since the publications are still in circulation the personal and professional reputation is suffering a continuing harm therefore there is need to restrain the defendant from exhibiting the offending publications.

11) The plaintiff also urged this court to find that this case is a Clear cut with special circumstances for the grant of the mandatory injunction to compel the defendant take steps to delete the said words and images.

12) The defendant on her part urged this court to dismiss the application and find that the tweets posted on her twitter handle between 28th July 2020 and 31st July 2020 constitute a series of fair comments and part of her engagement with her followers and an expression of her opinion on the applicant with regard to issues affecting Kenya as a nation. The defendant cited two English cases to buttress her arguments namely:

(i) **Stocker vs Stocker (2019) UKSC 17** in which the court observed that in facebook posts, the judge is tasked with deciding how a facebook post or a tweet on Tweeter would be interpreted by a social media user keeping in mind the way in which such postings and tweets are made and read.

13) The court further observed that it is wrong to engage in elaborate analysis of a tweet or facebook posting for its theoretically or logically deducible meaning but to ascertain how a typical reader would interpret the message. The court also stated that search should reflect the circumstances that is causal medium, it is in the nature of conversation rather than that it is pre-eminently one which the reader reads and passes on.

(ii) **In Monir vs Wood 2018 (EWHC (QB) 3525** where in paragraph 90, Nickin J. stated inter alia as follows:

“Twitter is a fast moving medium. People will tend to scroll through it quickly. They do not pause and reflect. They do not ponder on what meaning the statement might possibly bear. Their reaction to the post is impressionistic and fleeting.”

14) The defendant urged this court to consider the impact the said tweets had on the social media user considering the passive nature in which tweets are posted on various social media platforms stating that the plaintiff and the defendant have used their tweeter accounts positively by engaging their followers on issues affecting Kenyans thus leading to misunderstandings and as a result this suit was filed in order to settle old scores. The defendant denied the assertion that her tweets are defamatory of the plaintiff, but were expressions of opinion in good faith as to the merits of the publication. It is also the submission of the defendant that as a public figure the respondent ought to expect unflattering statements made about him since it comes with the territory.

15) This court is beseeched to apply the case of **Giella vs Cassman Brown Co. Ltd (1973) E.A 358** with restraint bearing in mind that the order of injunction in cases of defamation can only be issued in the clearest of cases.

16) It is pointed out that the case before this court is complex and concerns not only a series of posts on tweets on the defendant’s handle but the respondent’s entire page. It is suggested by the defendant that in order to unravel the issues herein this court ought to look at tweets posted by the defendant on her handle over time in relation to the issues raised herein in order to understand the context of the posting of the said tweets. This court was urged not to curtail the freedom of expression under Article 33 of the Constitution of Kenya, 2010.

17) Having considered the material placed before this court together with the rival submissions, it is not in dispute that the tweets complained of were published by the defendant using her twitter handle. The plaintiff has complained that the aforesaid publications are defamatory to him and that the same were maliciously published. The defendant on the other hand is of the submission that the tweets were not defamatory of the plaintiff but are fair comments in respect of a public figure.

18) In **Cheserem vs Intermediate Media Services (2000) 2EA 371** the court held inter alia that the principles of injunction stated in **Giella vs Casman Brown & Co. Ltd (1973) E.A 358** have to be considered with the greatest caution. The court went ahead to state that an interlocutory injunction in defamation cases is granted only in the clearest of cases.

19) The first principle to be considered is whether the plaintiff has demonstrated that he has a prima facie with a probability of success. The plaintiff has given the particulars of the tweets he avers are defamatory of him in paragraph 7 of the plaint. The defendant does not deny publishing the same save that she is of the opinion that the publications are not defamatory of the plaintiff.

20) It is also alluded that the tweets were maliciously published. The defendant denied the allegation of malice and averred that she published them in good faith and as fair comments. The issue that will go for determination in the trial of this suit is whether the tweets are defamatory of the plaintiff and whether those tweets were maliciously published.

21) In her submissions, the defendant stated that this court ought to consider the impact the tweets had on social media users considering the passive nature in which tweets, likes and comments are posted on the various social media platforms. The defendant averred that she and the plaintiff have used their tweeter accounts positively by engaging their followers on issues affecting Kenyans and that these impassioned discussions have led to misunderstandings and as a result this suit was filed in order to settle old scores.

22) Arising from the rival submissions it is clear that the defendant admits having published the information complained of by the plaintiff. It is also apparent that both parties are each attributing malice on the other. At the trial some of the issues which may arise for determination include inter alia first whether the publications were defamatory of the plaintiff. Secondly, whether there was malice in having the information published. Thirdly, whether the publication was a fair comment on the part of the defendant ex facie, the tweets appear to suggest to an ordinary right thinking person that the plaintiff is among other things a money launderer, a criminal and an active participant in terrorism.

23) On the basis of the material placed before this court, I am convinced that the plaintiff has demonstrated a rebuttable presumption at this stage that he has been defamed. Therefore, the plaintiff has shown a prima face case with a probability of success.

24) The second principle to be taken into account is that an applicant should show the irreparable loss he would suffer if the order of injunction is not granted. The plaintiff has expressly stated that he stands to suffer irreparable harm that cannot be compensated by damages. The defendant is of the submission that the plaintiff can be recompensed by an unqualified apology and or damages.

25) With respect, I am persuaded by the plaintiff’s assertion that a person’s good name and reputation is incapable of assessment and pecuniary quantification. I am therefore satisfied that unless the order sought is given the plaintiff will suffer irreparable loss.

26) The third and final principle is that where the court is in doubt, it would decide the application on a balance of convenience. It is the

plaintiff's submission that the balance of convenience tilts in his favour in that he stands to suffer irreparable loss to his reputation and business if the orders sought are not granted. The defendant merely stated that the balance of convenience tilts in favour of dismissing the motion without elaborating.

27) After a careful analysis of the material and submissions made before this court, I am satisfied that the balance of convenience tilts in favour of the plaintiff. The real time access to the offending publications and with the wide coverage on account of the open access nature of twitter website, the plaintiff's reputation will continue to suffer damage thus causing a lot of inconvenience and discomfort on the part of the plaintiff. I am convinced that the plaintiff is entitled to the orders.

28) The fact that the defendant does not deny making the publication save for the question as to whether the same is defamatory makes the suit a clear case. The defendant has not shown the prejudice she would suffer if the orders sought are granted.

29) The important prayer made by the plaintiff is that of mandatory injunction. It is the submission that the offending publications are still on the defendant's twitter page where they are accessible not only to the defendant's 20,000 plus followers with twitter accounts but to anybody with internet connection all over the world.

30) The plaintiff argued that the continued presence of those offending tweets poses a grave threat to the applicant's reputation since the applicant nor the respondent have control of who quotes or republished the same and that the applicant may face unquantifiable actionable libels and that damages may escalate to unmanageable levels. The defendant/ respondent appears not to have raised any argument against the prayer for mandatory injunction save that the defendant is of the opinion that the applicant does not have a strong case to be granted a mandatory order of injunction.

31) In Halsbury's Laws of England vol. 24th Edn at paragraph 948, the conditions necessary to be present before an order of mandatory injunction is issued were set out inter alia as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff.... A mandatory injunction will be granted on an interlocutory application.”

32) Having taken into account the submissions and the material placed before this court, I am satisfied that the plaintiff's case is clear and meets the criteria necessary to grant the order of mandatory injunction. It is clear that the continued presence of the tweets complained of will continue to damage the plaintiff's reputation and profession.

33) It is also apparent that the continued presence of the offensive tweets may make the court make awards which may be so high that the defendant may not be in a position to pay. In the circumstances, I think an order of mandatory injunction should be issued.

34) In the end, I find the plaintiff's motion dated 7th August 2020 to be meritorious. The same is allowed giving rise to issuance of the following orders:

i. Pending the hearing and determination of the plaintiff's suit, an injunction be issued restraining the defendant, whether by herself, agents, servants or any persons acting on her instruction/under her direction, from further posting, publishing and circulating or causing to be posted published or circulated the said words or images serialized in paragraph 5 of the motion, on her twitter account styled as 'MamaBora' under the twitter handle '@NjeriThorne' or any other forum; be it oral, print or electronic;

ii. Pending the hearing and determination of the plaintiff's suit, a mandatory injunction be issued compelling the defendant, whether by herself, agents, servants or any persons acting on her instruction/under her direction, to take down/retract/delete /purge the said words or images serialized at paragraph 5 of the motion, from her twitter account styled as 'Mamabora' under the twitter handle '@NjeriThorne' or any references thereto on any other forum in her control/power.

iii. Costs of the application is awarded to the plaintiff/ applicant.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant