



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E009 OF 2020

DR. HEZEKIAH K. CHEPKWONY.....PLAINTIFF

-VERSUS-

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT

SETH OLALE..... 2ND DEFENDANT

KEN MIJUNGU..... 3RD DEFENDANT

RULING

1) Dr. Pius Wanjala, the plaintiff/applicant herein took out the motion dated 7th July 2020 in which he sought for the following orders:

i. THAT this application be certified urgent.

ii. THAT the defendants by themselves or their respective servants and/or agents be restrained by an injunction from further broadcasting and publishing of defamatory statements and materials of and concerning the plaintiff until the hearing and determination of this application.

iii. THAT the defendants by themselves or their respective servants and/or agents be restrained by an injunction from further broadcasting and publishing of defamatory statements and materials of and concerning the plaintiff until the hearing and determination of this suit.

iv. THAT the costs of this application be provided for.

2) The plaintiff/applicant filed an affidavit and a supplementary affidavit he swore in support of the motion.

3) When served with the motion, Nation Media Group Ltd, Seth Olale, and Ken Mijungu, the 1st, 2nd and 3rd defendants/ respondents respectively filed the replying affidavit sworn by Sekou Owino to oppose the motion.

4) One Dr. Hezekiah K. Chepkwony too filed a suit and an application similar to the instant application against the same defendants/ respondents who too filed a near similar defence and response to the application. The court directed that the orders which may be issued in this suit should apply to the suit filed by Dr. Hezekiah K. Chepkwony i.e Nairobi H.C.C.C E009 of 2020.

5) This court gave directions to have the applications disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also taken into account the rival written submissions and the authorities cited by the parties.

6) It is the submission of the plaintiff that he has demonstrated that he has a prima facie case with a probability of success. He stated that the defendants admitted through the replying affidavit of Sekou Owino publishing and broadcasting the defamatory information against him as set out in paragraphs 2, 3, ,4, 8, 9, 10, 17, 18,

19, 21, 23 and 24.

7) The plaintiff pointed out that beside his photo portrait is published various titled vizly:

- **Episode of Mafya House**
- **Afya House is ill**
- **Exclusive Rot At Afya House**
- **Disease In Afya House**
- **Afya House Scandal**
- **Dissidents Want C.S Kagwe Jailed**

8) The plaintiff further stated in part that the defendant published of him and Dr. Hezekieh K. Chepkwony in part as follows:

“The genesis of the stand-off is the decision by C.S Mutahi Kagwe to transfer senior officers from various departments. It was part of his move to clean up the mess at the ministry dogged by multi-billion scandals. The four are:

- **Morekwa Moranga, under secretary MOH**
- **Hezekiah Chepkwony – Head Quality assurance Laboratory**
- **Pius Wanjala – Deuty Head quality Assurance Laboratory**
- **Freda Govedi – Director of Kenya national Transfusion Services**

9) The plaintiff also referred and quoted one of the publications as follows:

“Pius Wanjala who is a full time public officer employed by the ministry of health and deployed at the National Quality Control Laboratory as Deputy Director at the same time at advocate of the High Court of Kenya with Masika and Koross advocates and other surrogate firms is accused of conflict of interest and abuse of office by engaging in private practice during working hours.....”

The legal notice also copied to the Principal Secretary in the Ministry of health stated that “Both Dr. Pius Wanjala and Hezekiah Chepkwony were posted to the other statins severally but declined and instituted proceedings against the Ministry of health in various courts resisting their posting....”

10) The plaintiff argued that the aforesaid publications amongst others in their plain and ordinary meaning, meant or were understood to mean inter alia that he is part of the cartel which have turned Afya house into a mafya house having over the years been behind systematic siphoning of billions of shillings from the Ministry of Health and engages in scandals at Afya House running into billions of shillings. It is also said that the publications depicted him as a corrupt person.

11) In response to the plaintiff’s submission as to whether he has shown a prima facie case, the defendants submitted that the applicant’s case is improperly rooted on skewed, biased and selective viewing of the broadcasts and reading of the articles published by the respondents of which is intended to mislead the court to believe that the publications and broadcasts as being defamatory of the plaintiff when the same are in fact true when read in context and as a whole.

12) The defendants pointed out that some of the broadcasts and articles complained of that make reference to the applicant are true in substance. They made reference to the filing by the plaintiff of **Constitutional Petition no. 124 of 2019** to challenge the C.S Ministry of Health from transferring him hence the publication complained of that makes reference to the applicant were therefore absolute privilege within the meaning of Section 6 and 8 of the Defamation Act.

13) The defendants further argued that they published the publications for furtherance of the public’s interest to

disseminate in good faith any information touching redeployment of staff and corruption scandals that have hit the ministry to Health public. The defendants further averred that they had a right and were entitled to publish the said broadcast and articles and rely on the defences of fair comment, justification, absolute, privilege and qualified privilege.

14) The defendants further pointed out that the contents of the broadcasts and the articles complained of which may appear to be not true, do not qualify as being libelous therefore no cause of action can arise. The defendants urged this court to find that their defence raises bonafide triable issues which can only be adjudicated in a trial and not at an interlocutory stage.

15) Having considered the rival submission on the question as to whether or not the plaintiff has established a prima facie case with a probability of success, it is important to first set out the principles to be considered in determining an application for injunction in defamatory suit. In the case of **Micah Cheserem vs= Intermediate Media Services & 4others (2000) eKLR** in which Khamoni, J expressed himself inter alia as follows

“..... though the conditions applicable in granting an injunction as set out in the case of Giella vs. Cassman Brown & Co. Ltd (1973)EA 358 generally apply, in defamation cases those conditions operate in special circumstances. Those conditions have to be applied together with the special law relating to the grant of an injunction in defamation cases where the court’s jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in the clearest of cases. The court must be satisfied that the words or matter complained of are libelous it must be satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.

.....this is because generally and basically, actions or cases of defamation bring out a conflict between private interest and public interest, and this is more so in Kenya where we have the country’s constitution which has provisions to protect fundamental rights and freedoms of the individual including the protection of freedom of expression.”(underlining supplied)

16) The question which need to be answered is whether the application has met the criteria required as started hereinabove. The first principle is that an applicant must show he has a prima facie case with a probability of success. I have already outlined the arguments put forward by each side. The applicant has stated that the defendants falsely and maliciously broadcasted stories on NTV Tonight and published statements in the Daily Nation Newspaper on 30th May 2020, 4th June 2020, 6th and 7th June 2020 and 18th June 2020 that were false and defamatory of the plaintiff.

17) It was stated that the articles and broadcasts depicted the plaintiff as a member of the mafia at the Ministry of Health Headquarters where he participated in corrupt and criminal activities leading to the stealing of taxpayers billions of shillings.

18) The applicant further argued that the publications and broadcasts depicted him as guilt of insubordination.

19) The respondents on their part have accused the applicant of being selective and lacking in objectivity in that in the selected quoted publications he omitted the part which was not helpful to him and hence mislead the court.

20) After a careful perusal of the replying affidavit particularly in paragraphs 6(a) – (h) and paragraphs 6 (a) – (i) of the statement of defence, it appears the averments made therein appear to be true of the applicant in substance.

21) It is also apparent that portions of the broadcasts and the articles complained of that refer to the applicant relates to the **Constitutional Petition No. 124 of 2019, Hezekiah Chepkwony and 2 others vs= Ministry of Health and 2 others** whereof the applicant challenge the decision of the **C.S Ministry of Health** to transfer the applicant from National Quality Control Medical Training College.

22) With respect, I am persuaded by the defendants’ submission that the defence of absolute privilege comes into play in the circumstances and pursuant to the provisions of Sections 6 and 8 of the Defamation Act.

23) It is apparent that the articles and broadcasts complained of relate to reports of corruption and movements or redeployment of senior staff at the ministry of Health. The twin issues remain as of public interest

particularly during this period of Covid-19 pandemic in Kenya.

24) With respect, I am persuaded by the defendants that they in furtherance of the public interest to disseminate in good faith any information touching on corruption and redeployment of senior official serving at the Ministry of Health. The public is entitled to be informed as per Articles 34 and 35 of the Constitution of Kenya.

25) In my view, that right to information in the circumstances of this case supercedes the any private rights that may have been affected and particularly when it is in respect of persons serving in senior positions in government.

26) In this dispute, it is apparent that reports of corruption were made. What is not clear is that there is no evidence linking the plaintiff to the vice.

27) The publications and articles do not directly link the plaintiffs to the vice. It cannot therefore be conclusively stated that the broadcasts and articles complained of are not true. It is clear in my mind at this stage that the plaintiff has failed to demonstrate that he has overwhelming chances of establishing that the publications complained of are defamatory of him.

28) There is no doubt that the defendants have raised the defences of **justification, absolute privilege, qualified privilege and fair comment**. Such defences can only be defeated by if there is credible evidence of malice on the part of the defendants.

29) At the moment there is no evidence to show that the defendants had malice. It would appear, based on the affidavit evidence that the defendants were merely discharging their duty to inform the public in a genuine and bonafide belief that the contents of the broadcast and articles were true.

30) Having considered the averments made by the parties plus the material placed before this court, it is apparent that the defendants have no had a close relationship or association with the plaintiff hence it is not conceivable for the defendants to malign and defame the plaintiff using the broadcasts and the publications complained of.

31) It is also evident that when the plaintiff was transferred he was prompted to file **Constitutional Petition no. 124 of 2019** hence it is not true that he was only transferred on 12.06.2020.

32) The record also shows that the plaintiff received a letter dated 13.07.2020 from the Ministry of health implicating him of violating Public Officer Ethics Act.

33) It is not in dispute that the issue touching on transfer was a matter on active litigation hence the applicants report is a matter under absolute privilege since the issue is not disputed.

34) The main issue which the applicant raised is that he was defamed by the articles and the broadcasts the defendants published. Upon interrogating the material placed before this court it is clear that the plaintiff did not dispute the fact that there were moves to transfer him. He did not also deny the fact that corruption scandals were reported to have taken place during this period of Covid-19 pandemic.

35) It is also not in dispute that the plaintiff instituted a suit to challenge the decision to transfer him. In the circumstances, it is clear that the applicant has failed to establish a prima facie case with a probability of success to warrant a grant of an order of injunction.

36) The other principle which is related to this case is whether this is one of the clearest of cases. I am afraid to state that it is not.

37) The second principle to consider is whether the applicant has shown the irreparable loss he would suffer if the order for injunction is denied.

38) The applicant submitted that if the order for injunction is denied he will suffer irreparable damage with the potential of public lynching. He argued that his professional rating as a pharmacist and as a lawyer may be

damaged beyond repair.

39) The defendants are of the submission that the plaintiff having sought for **general, exemplary, punitive and aggravated damages**, it follows that the applicant’s damage is quantifiable in monetary terms.

40) The defendants further stated that even if the plaintiff conceive that any consequential loss or harm may arise, that damage can easily be quantified and compensated through damages hence there is no irreparable loss.

41) After considering the rival submissions on this principle, I am of the opinion that any damage to an individual reputation cannot be compensated in monetary terms.

42) It is apparent that if the publications and broadcasts are found to be defamatory to the plaintiff, the plaintiff will obviously suffer irreparable loss. However, this principle is dependent on whether the plaintiff has established a prima facie case with a probability of success. Having failed to satisfy the first principle, I decline to grant the order sought.

43) The final principle to be considered is the balance of convenience. The plaintiff did not address me over this principle. It is the submission of the defendants that they have a duty to inform the general public on issues touching on the Ministry of Health such as corruption and redeployment of staff.

44) It is said that in the circumstances public interest outweighs private interest of the applicant. With respect, I am persuaded by the defendants submission.

The right of the public to be informed in good faith of the on goings in the Ministry of Health regarding corruption and re deployment of senior officials tilts the balance of convenience in favour of not granting the order of injunction sought.

45) In the end, I find no merit in the motion dated 7th July 2020.

The same is dismissed with costs abiding the outcome of this suit. This order applies to the motion dated 7th July 2020 filed by Dr. Hezekiah Chepkwony in **H.C.C.C no. E009 of 2020 Dr. Hezekiah Chepkwony =vs= Nation Media Group & 2 others**. Consequently, the aforesaid motion is dismissed with costs abiding the outcome of the suit.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 11th day of December, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant