



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 97 OF 2020

INN.....PLAINTIFF/APPLICANT

VERSUS

NK.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant herein has brought the notice of motion dated 23rd June, 2020 supported by the grounds set out on the body thereof and the affidavit of the applicant. The applicant sought for the following orders:

i. Spent.

ii. THAT this Honourable Court be pleased to issue a temporary injunction compelling the defendant/ respondent to pull down the tweet posted on her tweeter handle dzaddy and all related threads on her tweeter handle on 4th September, 2019 and 15th June, 2020 and instead publish a formal apology on her twitter handle and with a daily newspaper with a nationwide circulation stipulating her malicious actions and quoting the defamatory tweet, pending the hearing and determination of the main suit.

iii. THAT this court be pleased to issue a permanent order compelling the defendant/respondent from broadcasting, publishing or being privy to the publication of any matter that is or might be libelous or slanderous to the plaintiff/applicant.

iv. Any other relief that this Honourable Court may deem fit to grant.

v. THAT the costs of the application be provided for.

2. The defendant/respondent swore a replying affidavit to oppose the Motion, to which the applicant rejoined with a further affidavit, followed by a supplementary affidavit sworn by the respondent.

3. The motion was canvassed by way of written submissions. On his part, the applicant argues *inter alia*, that the publication made by the respondent is defamatory and false, and that it portrays him as a man with little regard for women and a man lacking in morals.

4. The applicant further argues that having shown that the publication is defamatory in nature, he has demonstrated the existence of a prima facie case with a probability of success, which entitles him to the granting of an interlocutory injunction. The applicant cited the case of **John Ntoiti Mugambi Alias Kamukuru v Moses Kithinji Alias Hon. Musa [2016] eKLR** where the court determined that:

“The legal threshold for grant of injunctions in defamation cases is well captured in the case of MICAH CHESEREM V IMMEDIATE MEDIA SERVICES (2000) 1EA 371 where it was held that:-

“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 (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.”

5. The applicant submits that as a result of the impugned publication, his reputation has suffered injury and he is unable to comfortably visit public places or secure a proper job even after five (5) years of study, and that he has received and continues to receive threats from the public since it is believed that he is a ‘serial rapist.’

6. It is the submission of the applicant that the respondent's freedom of speech and expression under **Article 33** of the **Constitution, 2010** is limited under **Article 24(1)** which provides thus:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

7. In her reply submissions, the respondent contends that upon filing his case for defamation, the applicant did not disclose a material fact, which is that he indeed had sexual intercourse with the respondent, whether it was consensual or not. The respondent is of the view that the applicant has not established a prima facie case with high chances of success.

8. The respondent also contends that the order for a permanent injunction sought in the Motion cannot be granted without granting her an opportunity to be heard on her defence, citing the case of **Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR** in which the High Court sitting on appeal held that:

“It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

9. It is equally the submission of the respondent that the publication can only be taken down by deleting it permanently and if the interlocutory injunction sought in the Motion is granted, the same will be akin to silencing and condemning her unheard.

10. This court has considered the grounds set out on the face of the Motion and the facts deponed in the affidavits supporting and opposing the Motion and the contending written submissions and authorities relied upon therein.

11. A brief background of the matter is that the applicant instituted a suit against the respondent by way of the plaint dated 23rd June, 2020 and sought for *inter alia*, damages and an order for a permanent injunction, arising out of the tort of defamation.

12. It is clear that the Motion is seeking the twin prayers of a temporary injunction and a permanent injunction. Concerning the permanent injunction sought under order (iii), it is not in dispute that the suit is yet to be heard on merit and it is apparent that this is not clear cut case even without going into its merits.

13. For the foregoing reasons, I find that it would be premature for me to grant a permanent injunction at this stage. I am persuaded the holding of this court in the case of **Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR** where it was held *inter alia* as follows:

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

14. In respect to order (ii) for a temporary injunction, upon my consideration, I note that the same is essentially a prayer for a mandatory order of injunction.

15. When it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** when it rendered itself thus:

“...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.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In BHARAT PETROLEUM CORP LTD V. HARO CHAND SACHDEVA, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

16. In the motion, the applicant stated that the publications made by the respondent on her twitter handle on or about 4th September, 2019 and on 15th June, 2020 depicted him as a rapist and were tainted with falsehoods and that the published words would in their natural and ordinary meaning portray the applicant as a serial criminal and a misogynist, thereby exposing him to public contempt and ridicule which has negatively impacted on his job prospects.

17. In response, the respondent stated that the tweet was truthful since the applicant; with whom she was in a brief relationship; raped her on the date she visited him with the sole intention of ending the relationship. The respondent also stated that prior to that, the duo had never been sexually involved with each other.

18. The applicant asserted in rejoinder that any sexual encounters between him and the respondent were purely consensual and hence it is not true that he raped her as alleged.

19. From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a mandatory order of injunction at this stage. I also find that the applicant has not brought any credible evidence to show that the injury to his reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage.

20. In my humble view, the present case does not fall within the category of clear-cut cases that can form a basis to grant a mandatory injunction.

21. In the end, I find the motion to be without merit. The same is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 1st day of December, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

..... for the Defendant/Respondent