



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 105 OF 2017

(CORAM: F. GIKONYO J)

ANN WAIGURU.....APPELLANT

Versus

PAUL KINUTHIA GACHOKA.....RESPONDENT

JUDGMENT

1. The appellant herein was the defendant in the trial court. The Respondent was the Plaintiff. In the Plaintiff dated 28th September 2016 the Plaintiff prayed for; General Damages for libel, Exemplary and aggravated damages for injury to reputation and feelings, Costs of the suit and interest at court rates.
2. The plaintiff filed application dated 28th September 2016 seeking temporary orders to restrain the Defendant by herself, her servants or otherwise from uttering, publishing and broadcasting defamatory words to individuals, groups, TV stations and/or institutions whether locally or internationally concerning the plaintiff and generally touching on the money laundering Criminal Case at Milimani Court.
3. The application was opposed by the Defendant/Appellant through Replying Affidavit dated 27th October 2016 where she averred that the words purported to be complained of are not set out. That she is not familiar to the Plaintiff/Applicant and that the plaintiff/Applicant has not set out the prejudice his reputation will suffer as the purported utterances do not mention or identify him.
4. The application was canvassed through written submissions. The Court made its Ruling on 10th February 2017 and granted prayer 3 of the notice of motion which was to the effect;

“That pending hearing and determination of the suit, a temporary injunction is hereby granted restraining the Defendant by herself, servants, agents or otherwise from uttering, publishing and broadcasting defamatory words to individuals, groups, TV stations and/or institutions whether locally or internationally concerning the plaintiff and generally touching on the pending money laundering criminal case at Milimani Law Courts. “

5. Aggrieved by the aforesaid decision the Appellant lodged its Appeal on 10th March 2017 and sought the said trial Court’s Ruling to be set aside. He cited five (5) grounds of Appeal as follows;
 - a. **The learned magistrate erred in law in holding that the Respondents had established a prima facie case yet the alleged defamatory words complained of were not set out in the Plaintiff.**
 - b. **In the absence of the alleged defamatory words complained about set out in the Plaintiff:-**
 - (i) **The magistrate erred in law by holding that the words allegedly uttered by the Applicant were *sub judice*.**
 - (ii) **The learned magistrate erred in fact and in law by finding that the Respondent was easily identifiable as one of the accused persons in the widely publicized criminal case.**
 - c. **The learned Magistrate erred in law by granting a temporary injunction which was so vague as to be incapable of compliance, by failing to specifically state which money laundering case the Appellant was restrained from commenting on;**
 - d. **The learned magistrate erred in law by granting orders which have the effect of preventing the applicant from assisting relevant institutions with investigations into the loss of funds at the National Youth Service.**

e. Given that the Appellant was falsely linked with the loss of funds at the National Youth Service, the learned magistrate erred by granting Orders which have the effect of preventing the Appellant from making fair comment on a matter which has attracted great public interest.

6. On 2nd April 2019 this honourable Court directed the parties to canvass the appeal through written submissions. Both parties have filed their respective Submissions.

Submissions of the Parties

7. The appellant submitted that the jurisdiction to grant interlocutory injunction in libel is over and above the test set out in *Giella's* case. In defamation cases the court's jurisdiction to grant injunction is exercised with greatest caution so that an injunction is granted in the clearest cases. In this regard she cited **Cheseram Versus Immediate Media Services (2000) 1 Ea 372 (cck)**. The Appellant also cited **Coulson versus Coulson [1887] 3 TLR 846** which held that the court ought to grant interlocutory injunctions where;

- a. The statement is unarguably defamatory.
- b. There are no grounds for concluding the statements may be true.
- c. There is no other defence which might succeed.
- d. The evidence of an intention to repeat or publish the defamatory statement.

8. The appellant has also relied on the defence of justification and fair comment and opined that the Respondent is not even named in the words complained of. That the Respondent belongs to a class of people hence does not have an actionable claim against the appellant. On this cited cases on **Knupffer vs. London Express Newspaper Ltd [1944] 1 All ER** and a citation from **Gatley on libel and Slander**.

9. Lastly the Appellant submits that the alleged injurious material was made in the public interest and as fair comment and it is in the interest of the public that an individual should possess the right to freedom of speech, and it should be exercised without any impediment, more so if the alleged libel has not been proven to be untrue. In this she has relied on **Bonnard vs. Perryman [1891-4] ALL ER, Fraser vs, Evans & Anor [1969] 1 ALL ER 8**.

10. The Respondent submitted that the Appellants words were defamatory since in various broadcasts she addressed the whole country where she uttered with self-assurance that she knew that it had been proven that the individuals, who she referred to as "the cartel were guilty of stealing the Kshs. 791 million belonging to the NYS"

11. That in not mentioning the Respondent's name, the utterances by the Appellant did not become non-defamatory and justifiable as it was public knowledge that there was already an on-going matter including the NYS scandal in court which the appellant was well aware of. That this goes to show that the names of the accused persons were in the public domain owing to the fact that the case was already covered across the country. He relied on **Halsbury laws of England 4th Edition Vol 28 at pg. 7 & 23** and cited the **Cheserem case (supra)**

12. The respondent further submitted that the defence of fair comment makes it the duty of the appellant to produce sufficient evidence to provide the truth of such publications. According to him, the statements referred to the Respondents and were false and defamatory of the Respondent as all accused persons are by law presumed innocent until proven guilty.

13. That it was not within the public interest for the appellant to maliciously set out the offending description which referred to the Respondent as a member of a cartel. He cited **Standard Limited & Anor vs. Jonathan Abraham Chelule [2018] eKLR. Hon. Uhuru Muigai Kenyatta vs. Baraza Limited [2011] eKLR & Vickery vs. Mc Clean (2000) NZCA 338 (APAR 27)**

ANALYSIS AND DETERMINATION

14. This court will re-evaluate the evidence on record and reach its own conclusion in the matter. (See the case of **Selle &Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**).

15. Upon careful consideration of the appeal and arguments of the parties, I see the main issue for determination to be whether the Respondent deserves an injunction which was granted by the trial court. Arguments on (1) *Whether the Respondent falls within a class of persons as opposed to an individual*; and. (2) *Whether the temporary injunction granted was so vague as to be incapable of compliance* will also be tackled by the court.

Class of Persons

16. **Gatley, Libel and Slander pg. 6** defines Defamation as the collective term for libel and slander. It is committed when a person publishes words or matter to a third party that contain an untrue imputation that harms the reputation of the claimant.

17. At page 264 the author, states that the claimant need not be referred by name but there need to be a "peg or pointer" for his identification in the words complained of themselves. Thus if there is a statement that X is illegitimate that is a sufficient reference to X's mother; and where statements suggested that a man was married to or free to, marry Y, C his real wife can sue on the basis that the statements cast a slur upon her.

18. Cited is the decision of Isaac J. in **David Syme v Canavan (1918) 25 C.L.R 234 at 238** who held as follows;

“The test of whether words that do not specifically name the claimant refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the claimant to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the claimant is not named in words, he may never the less be described so as to be recognised; and whether that description takes the form of a word-picture of an individual or the form if a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the descriptions in such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.”

19. Closer home the Court of Appeal in **Musikari Kombo v Royal Media Services Limited [2018] eKLR** found that the mention of the Appellant as a husband was sufficient for the husband to file a claim independently from his wife.

20. More domestic jurisprudence. In **Jakoyo Midiwo v Nation Media Group Limited & another [2018] eKLR** the Court of Appeal defined a class of persons as follows;

A class of persons is considered defamed only if the publication refers to all its members—particularly if the class is very small—or if particular members are specially imputed. There is no dispute that the appellant was at all material times a Member of Parliament and thus a member of that class or group known as Members of Parliament. A member of a defamed group, however, lacks the means to vindicate his good name and redress his injury. Under current defamation law, a group member has no cause of action against the publisher of the defamation unless the group is very small or the defamatory statement applies specifically to the member. This rule follows from the requirement that, in order to establish a prima facie case of defamation, a person must demonstrate that a "reasonable person" could perceive the defendant's statement to be "of and concerning" the plaintiff. Unless the defamation designates the plaintiff so that those reading or hearing the publication understand that the plaintiff is implicated, the plaintiff's reputation cannot be tarnished. An exception to this general rule arises when the defamation, though made in group terms, is really a veiled reference to a specific group member. [Emphasis mine]

21. I will apply the above test to determine the question of reference to the Respondent as a member of a class of persons. In this case the statement referred to by the Respondent and allegedly made by the Appellant herein refers to individuals who stole Kshs 791 million from the NYS Scandal. It is the Respondent's averment that the Appellant referred to the perpetrators of the theft as being known and are in court; that at the time he was amongst persons arraigned in court on charges of money laundering in NBI MILIMANI CM COURT Criminal Case No. 301 of 2016.

22. There is no exact measure of what constitutes very small class of persons. But I should think where the yardstick is membership it should not be difficult to discern a small class if its members are few say 5 or 10. According to the Respondent, the words uttered by the Appellant were that the Respondent was a member of the class of persons affected by the words. Doubtless, the Respondent was not specifically mentioned by the Appellant. However, the words imputed referred to “cartels” and/or “individuals who stole Kshs. 791 million”. More pointed mark comes from reference to persons who are in court on the NYS Scandal. This is quite specific and a reasonable person may easily relate the statement to particular individuals especially given the fact that some individuals had been charged in court over the now popularly known as NYS Scandal. The group is very small and an action for an injunction would lie against the publisher of the defamatory words. However, is the defamatory statement, though made in group terms, really a veiled reference to a specific group member, in this case, the Respondent? This is relevant consideration in an application for temporary injunction particularly when determining presence or otherwise of prima facie case for issuance of an injunction.

Prima facie Case

23. The trial Court expressed itself when it relied on the citation made in **Gatley on Libel and Slander** where the author observed;

“a prima facie cause of action is established once the plaintiff proves that the defamatory words have been published about him; he does not have to prove that the defamatory words are false, for the law presumes this in his favour.”

24. Hitherto, the Appellant has not denied that she made the statements referred to herein. The statements were as a result of a television interview from two television stations. The Respondent provided a News clip analysis depicting minutes in the interviews that the Appellant used defamatory words. The question that this court may seek to ponder on and which was not considered in the trial court is whether the news clips suffice to prove that defamatory words were used if taken into context without the full wordings of the interview?

25. Without the full context of the news clips and interview, it may not be readily discernible at this stage that the full meaning and intent of the words complained of was defamation of the Respondent and the public would so perceive them. The Respondent has made reference to the terms used to be in reference to him and other members charged in *Criminal Case No. 301 of 2016- Nairobi*. He opined that them being referred to as “cartel” and/or those “responsible for the theft” being words impugning them to be crooks and/or fraudsters. In the particulars of the libel the Respondent uses the words “Corrupt cartel” as opposed to “cartel”. In the interview analysis there is no extract where the Appellant used the word “corrupt cartel”. I am saying these things to show that at this stage, the applicant has not established clear case for issuance of an injunction. It should be understood that with the expansion of freedom of expression and right to information in the Constitution, the rule on *sub judice* may not be enforced in the strict form formulated in common law. Fair comment and reporting will always be a defence. Nevertheless, parties should avoid making any utterances or publications that prejudice fair trial; such would be stopped with mighty force of the law. On this I am guided by the case of **Cheserem vs Immediate Media Services (200) 2 EA 371 (CCK)** where among others it stated that:

“An interlocutory injunction is temporary and only subsists until the determination of the main suit. In defamation, the

question of injunction is treated in a special way although the conditions applicable in granting an injunction as set out in the *Giella v Cassman Brown & Co Ltd* (1973) EA 358 generally apply...In defamation cases, those principles apply together with special law relating to the grant of injunctions 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 clearest possible cases. The court must be satisfied that the words complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.....The reason for so treating grant of injunction in defamation cases is that the action for defamation bring out conflict between private interests and public interest, more so in cases where the country's constitution has provisions to protect fundamental rights and freedoms of the individual, including the protection of the freedom of expression.”

26. In *Transcend Media Group v Standard Group Limited* [2017] eKLR the Court observed as follows;

Temporary injunction to prevent the publication of a defamatory statement can only be granted in the clearest cases. In fact courts have been hesitant to grant such orders where the defence of truth and fair comment has been pleaded. In *Ruth Ruguru Nyagah v Kariuki Chege & another* [2015] eKLR the court held that , “it was submitted by the defendants that it is not sufficient to merely establish that the words complained of are capable of being defamatory, rather the court must be satisfied that in the final determination of the suit it would inevitably come to the conclusion that the words were defamatory. It was further submitted on behalf of the defendants relying on the case of *Harakas & others v Baltic Mercantile & Shipping Exchange Ltd and Another* (1982) 2 All ER 701 where Lord Denning held;

“ where there was a defence of justification or qualified privilege in respect of a libel, an injunction restraining further publication would not be granted unless it would be shown that the defendant dishonestly and maliciously proposed to say or publish information which he knew to be untrue.”

What the Applicants were expected to prove at this initial stage, taking into account the principles and conditions for grant of interlocutory injunction in defamation cases is whether they have a prima facie case with probability of success and if the injunction is not granted, that they stand to suffer irreparable loss and if the court is in doubt the matter will be decided on a balance of convenience as espoused in the case of *Giella vs Cassman Brown & Co. Ltd* (1973) 358.

27. It bears repeating that in this case sufficient material in the full extract of the words complained of as opposed to the news clip analysis is necessary to establish prima facie case for purposes of an injunction to prevent further publication of the alleged defamatory material or words. I am aware the trial court relied on the decision made in *Masumbuko Yerry Kombe v Kibiwott Koross & another* [2014] eKLR that it is only enough the plaintiff to set out what he considers as defamatory words at the interlocutory stage. In that case, the court had the advantage of having the defamatory words which were made in a newspaper.

28. I therefore find that the trial magistrate erred in finding that the Respondent had raised a prima facie case in the absence of the defamatory words complained of. Such is an error in principle for which the court will interfere with the discretion of the trial court in issuing an injunction herein.

Allegation that Orders granted vague

29. Before I close, I will address the argument by the Appellant that the orders granted were vague as to be incapable of compliance. The Appellant posit that the order did not mention the case about which the appellant is restrained from making any publication. It is clear from the proceedings that the appellant was aware that the Respondent had been charged in Criminal Case No. 301 of 2016- Nairobi. In her Replying affidavit she made reference to the said case. Accordingly, this argument is pretentious and does not yield anything.

30. In the upshot the Appeal succeeds and Orders made on 17th February 2017 are hereby set aside. In light of the observation I have made above and the nature of this case which involves a novel and delicate balancing of rights, I order each party to bear own costs.

Dated and signed at Nairobi this 12th day of October 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 22nd day of October 2019

L. NJUGUNA

JUDGE