REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 226 OF 2018

PHILOMENA MBETE MWILU ……..…….. PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED ……..…...…… DEFENDANT

RULING

1. By a plaint dated 17th September 2018, the plaintiff who is the Deputy Chief Justice of the Republic of Kenya and a Judge of the Supreme Court of Kenya sued the defendant seeking general, exemplary and aggravated damages for defamation and an order for a permanent injunction restraining the defendant whether by itself, its servants, agents or otherwise from further publishing or causing to be published information alleged to be defamatory of and concerning the plaintiff which I will summarise shortly.

2. A day after instituting the suit, that is, on 18th September 2018, the plaintiff (hereinafter the applicant) presented a Notice of Motion under a certificate of urgency seeking three prayers two of which are now spent. The only prayer remaining for this court's determination is prayer 3 in which the applicant seeks orders of interlocutory prohibitory injunction on the following terms:

> *"THAT the defendant whether by itself, trustees, officers, members, agents, servants or otherwise howsoever be restrained from further writing, printing and publishing or causing to be written, printed or published any words and statements accusing, linking or associating the plaintiff with and/or imputing immorality, fraud, corruption, malfeasance and unethical judicial practices or writing, printing and publishing or causing to be written, printed or published false words and statements attacking her character and good repute in society pending the inter partes pending the hearing of this suit."*

The applicant also prays for costs of the application.

3. The application is supported by grounds stated on its face and the depositions made in the supporting affidavit sworn by the applicant on 18th September 2018 and the annextures thereto.

It is the applicant's contention both in the plaint and in the motion that the defendant sensationally and maliciously published or caused to be published falsehoods in three publications which greatly injured her reputation and character.

4. The first publication was carried in the Standard Newspaper of 19th September 2017 under the headline titled *"Damning petitions link Mwilu and Lenaola to NASA lawyers"*. The article had a sidebar proclaiming thus;

> *"documents claim phone numbers belonging to Raila's counsel and Supreme Court judge were at the same location during hearing of case"*. The whole text of the article is annexed to the supporting affidavit as exhibit marked **"PMM-1".**

5. The applicant avers that the article was precipitated by the Supreme Court's decision on 1st September 2017 in ***Raila Amolo Odinga & Another V IEBC & 2 Others, Presidential Election Petition No. 1 of 2017*** which nullified the 2017 presidential elections; that she was among the six judge bench that heard the petition and one of the four judges who rendered the majority decision; that a plain reading of the article insinuated *inter alia* that there was a petition which had been filed against the applicant prior to 18th September 2017 requesting the Judicial Service Commission (JSC) to investigate her conduct in a myriad of allegations; that her said petition successfully linked her to NASA lawyers; that it was an established fact that she engaged in covert and improper communications and meetings with the petitioners' lawyers during and after the hearing of the aforesaid presidential petition; and that she lacked credibility, integrity and honesty in the discharge of her mandate as the Deputy Chief Justice and Judge of the Supreme Court.

6. The second publication is contained in the 22nd September 2017 issue of the weekly edition of the Nairobian, the defendant's other newspaper. The applicant complains that in this publication, the defendant published or caused to be published a series of scandalizing and discourteous headline articles titled as follows:

a) "Love at first sight: when Amos Wako met justice Philomena Mwilu;

b) Amos Wako, Philomena Mwilu are a learned power couple; and

c) Wako, Mwilu fell in love at the bar.''

See annexture marked **"PMM-2"**

7. According to the applicant, a plain reading of the above articles meant and were understood to mean that she met and fell in love with Senator Amos Wako in a pub; that she's Senator Wako's second wife and that during her interview for the position of deputy chief justice, she confirmed the existence of the love affair by expressing support for polygamy which was all untrue.

8. The applicant deposed that following these publications, in a bid to stop the defendant from further tarnishing her reputation, she issued a demand letter to the defendant on 28th September 2017 seeking a retraction and an apology for both publications; that in response though claiming to have the highest regard for the applicant, the defendant's advocate in a letter dated 18th October 2017 refused to comply with her aforesaid demands and instead maintained that the publications were fair and accurate reports in a matter of public interest.

9. It is the applicant's further assertion that even after confirming that it held the applicant in high esteem, the defendant again maliciously published another damning article in its 31st August – 6th September 2018 edition of the Nairobian which bore the following headline:

''*Why I divorced Mwilu – ex husband. Case closed: she sheds tears at the sight of poor market women but has a side Kenyans don't know";* According to the applicant, the article taken as a whole portrayed her negatively as it implied that she was a two faced perverted individual.

10. It is the applicant's case that though the defendant has a duty to disseminate to the people of Kenya information on matters that are of public interest, it had no justification to publish false and inaccurate information concerning her insinuating that she was corrupt; that she lacked credibility, moral uprightness, integrity and honesty in the discharge of her mandate as the Deputy Chief Justice and Judge of the Supreme Court; that the publications were meant to disparage her character, integrity and professional standing in society and that unless restrained by an injunction, the defendant will either by itself or through its agents continue to print and publish similar defamatory material that will further damage her reputation.

11. In opposing the motion, the defendant filed a replying affidavit sworn on 8th October 2018 by *Millicent Ng'etich*, its Company Secretary. In the affidavit, the defendant through *Ms. Ngetich* admitted the publication of the impugned articles but denied that they are defamatory of the applicant as alleged or at all. It is the defendant's contention that the information contained in the publications was true in substance and amounted to fair comment on a matter of public interest and that some of the publications were privileged.

12. The defendant further denied the applicant's claim that the publications were actuated by malice and asserted that the application is a cleverly disguised attempt to interfere with its right to disseminate and the public's right to receive information concerning the applicant's past, present and future conduct in the discharge of her judicial functions which are matters that are currently topical and of great public interest; that allowing the application will contravene the provisions of *Articles 33 (1)* and *34 (1)* of the *Constitution*.

13. The application was argued orally before me on 9th October 2018. Learned counsel *Mr. Kemboy* appeared for the applicant while learned counsel *Mr. Ohaga* represented the respondent.

In their submissions, both learned counsel basically expounded on their respective clients' pleadings as summarized above and buttressed the position taken by each party with regard to the issues raised in the application.

14. Before setting out in brief the submissions made in support and in opposition to the motion, I wish to observe that though *Mr. Kemboy* in his submissions made reference to grounds of opposition allegedly filed by the respondent, I did not come across any grounds of opposition filed by the respondent in the court record and *Mr. Ohaga* in his submissions did not indicate that the defendant had filed grounds of opposition to the motion in addition to the replying affidavit. Since it is only the replying affidavit that is in the court record, I will proceed on the basis that it is the only pleading that was filed in opposition to the motion.

15. That said, I now wish to briefly turn to the submissions made by counsel on record for the parties. The gist of *Mr. Kemboy's* submissions is that there was a context to the three impugned publications. The first two were published when the Presidential Election Petition No. 1 of 2017 was pending determination before the Supreme Court while the last one was published immediately after the attempt to prosecute the applicant ; that taken as a whole and the contexts in which they were published, the publications were not meant to be an innocent dissemination of information to the public on a matter of public interest but was meant to question the integrity, credibility, honesty and suitability of the applicant as a Judge and Deputy Chief Justice of the Republic of Kenya.

16. Counsel further argued that if not stopped by an injunction, the defendant will continue to villify the applicant and totally damage her reputation which should be avoided because if this happens, damages will not be an adequate remedy; that in any event, if the application was allowed, the defendant will not suffer any prejudice.

17. In his riposte, *Mr. Ohaga* besides reiterating the depositions in the replying affidavit submitted that the application lacked merit as in his view, there was a disconnect between the prayer for permanent injunction in the plaint and the prayer for interim injunction sought in the application. He urged the court to find that the applicant had failed to satisfy the requirements for grant of temporary injunctions in defamation cases. Relying on the case of ***Micah Cheserem V Immediate Media Services & 4 Others, [2000] eKLR***, *Mr. Ohaga* submitted

that as the defendant has indicated in the replying affidavit that it will be relying on the defences of justification, fair comment, public interest, absolute privilege and lack of malice, the application ought to be dismissed.

18. Counsel further contended that as a state officer, the applicant was enjoined both by the *Constitution* and the *Leadership And Integrity Act* to conduct both her private and public life in a way that maintains public confidence in her office; that consequently, both her public and private life is subject to scrutiny and the defendant is therefore entitled to publish for public consumption information concerning her private life.

19. The court was invited to find that in this case, the grant of an injunction was inappropriate as the applicant can be adequately compensated by an award of damages should she succeed in the main suit; that in any case, there are numerous other publications in the public domain as shown in the annextures to the replying affidavit which did not emanate from the defendant which points to immorality, fraud, corruption and unethical judicial practices attributed to the applicant; that granting an injunction in the circumstances would not serve any useful purpose. *Mr. Ohaga* thus requested the court to dismiss the application with costs.

20. I have carefully considered the applicant's claim against the defendant as contained in the plaint dated 17th September 2018, the application, the affidavits on record, the oral submissions made on behalf of each of the parties and all the authorities cited by both parties. Having done so, I find that the only issue that arises for my determination is whether the applicant has demonstrated through the material placed before me that she has met the threshold for grant of a temporary injunction on terms sought in the application.

21. Before addressing my mind to the main issue itemized above, let me deal first with the preliminary point raised by learned counsel *Mr. Ohaga* regarding the alleged disconnect between the prayer for permanent injunction in the plaint and the prayer for temporary injunction in the application. If I properly understood counsel's submission on this point, he was of the view that the aforesaid disconnect rendered the application incompetent and that this was sufficient reason for the court to decline to grant the prayer sought in the application.

22. I have perused the two prayers in contention. I note that indeed prayer 3 in the application is slightly different from the prayer for permanent injunction in the plaint in terms of format since it specifies in broad terms the information it seeks to have the defendant restrained from publishing while as the prayer in the plaint though targeting the same information is crafted in general terms. In my view, the apparent discrepancy in the two prayers is not one which would render the application incompetent since if satisfied that the application is merited, the court in the exercise of its inherent power and in discharging its duty to administer substantive justice to parties before it can issue an order of injunction on terms that aligns it to the prayer for permanent injunction sought in the plaint. I am thus satisfied that nothing turns on the aforesaid preliminary issue raised by the defendant.

23. Having made the above finding, I now proceed to determine whether the applicant in this case has satisfied the requirements for grant of a temporary injunction as sought.

24. The parameters within which a temporary injunction should issue in defamation cases have been discussed in several authorities including those cited by the parties herein namely, ***Micah Cheserem V Immediate Media Services, (2002) 1 EA 371, Evans Kidero V John Kamau & Another, [2017] eKLR; Performance Products Limited & Another V Hassan Wario Arero & 7 Others, [2017] eKLR*** among others.

25. The golden thread that runs through all those authorities is that though the general principles governing the grant of injunctions in civil cases as enunciated in the celebrated case of ***Giella V Cassman Brown & Company Limited [1973] E.A. 358*** applies in actions for defamation, temporary injunctions in defamation cases should be granted in the clearest of cases. The need for utmost caution in the exercise of the court's discretion in such cases is grounded on the fact that defamation cases are not like other ordinary civil suits. They are different in the sense that they bring out a conflict between the right of citizens to exercise their freedom of expression, the right and duty of the media to disseminate information to the public especially on matters of public interest and the constitutional right of an individual to privacy and good reputation. The court must therefore examine the facts and the material placed before it with great care with the aim of balancing the above competing interests in order to attain the ends of justice in each case.

26. The above rationale and the principles that should guide the court in the exercise of its discretion in applications of this nature were well captured in ***Micah Cheserem V Immediate Media Services, (supra)*** where the court held as follows:

> ***"Applications for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in Giella V Cassman Brown & Company Limited (1973) EA. 358 generally applies in defamation cases, those conditions operate in special circumstances. Over and above the test set out in Giella's case in defamation, the court's jurisdiction to grant an injunction is exercised with 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. Normally, the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a human, responsible, truthful and trustworthy defendant."***

27. These principles are also reiterated in ***Gatley on Libel and Slander 12th Edition, Sweet and Maxwell*** at paragraph 25.2 where the learned authors state as follows:

> ***"The jurisdiction to grant interim injunctions to restrain publication of defamatory statements is of a delicate nature which ought only to be exercised in the clearest cases. … Thus the Court will only grant an interim injunction where:***
>
> ***a. the statement is unarguably defamatory;***

b. there are no grounds for concluding the statement may be true;

c. there is no other defence which might succeed;

d. there is evidence of an intention to repeat or publish the defamatory statement."

28. Guided by the above principles, I find that in order for the applicant to demonstrate that she has established a *prima facie* case to warrant the grant of an order of injunction as sought in the application, she must prove three things. Firstly, she must prove, *prima facie*, that the impugned publications contained words or statements that were defamatory that is, that they lowered her reputation in the estimation of right thinking members of the society and that in publishing the same, the defendant was motivated by malice. I say so because the fact of publication is not disputed as the defendant has already admitted having published the articles in question and it is not contested that the articles referred to the applicant.

29. I have examined the three publications very carefully. In my view, they make weighty and serious allegations against the applicant's professional conduct, her personal character and disposition.

30. Though at this interlocutory stage I am not required to make any definitive findings, on the material placed before me, it is my finding that the words or statements in the publications are *prima facie* defamatory of the plaintiff as the first publication depicts her as a judge who lacks integrity, honesty and creditability in the discharge of her judicial functions and one who has failed to live up to her judicial calling of dispensing justice without fear or favour. The other two publications in my view portray her as a lady with loose moral character and a mysterious double personality. In my opinion, the publications would no doubt tarnish or lower her reputation and standing in the eyes of right thinking members of the society.

31. The applicant has asserted that in publishing the said articles, the defendant was actuated by malice. Though the defendant has denied this allegation, it has not denied the applicant's claim that prior to the publication, it did not seek the applicant's input or comment to verify the truth of the information before publishing it.

It has been held that failure to enquire or verify the truth of facts before their publication is a fact from which an inference of malice may be drawn – See: ***Phineas Nyagah V Gitobu Imanyara [2013] eKLR; Stanbic Limited V Consumers Federation of Kenya, (supra)***.

32. The defendant contended that it is not liable in defamation and the order sought should not be granted since it published the offending articles in the public interest in the exercise of its constitutional right to freedom of expression and freedom of the media guaranteed under *Articles 33 and 34* of the *Constitution*.

33. I fully agree with the defendant that the three publications were on matters of public interest given the high and important office the applicant occupies in the Kenyan Judiciary as noted earlier in this ruling and the time in which the publications were made. I am also in agreement with *Mr. Ohaga's* submission that the defendant and indeed the media in general has a right to disseminate information to its readership in the exercise of its freedom of expression under *Article 33* and other freedoms guaranteed to the media under *Article 34* of the *Constitution* but these rights I must say are not absolute. They are limited under *Article 33 (3)* of the *Constitution* which provides in no uncertain terms that in the exercise of the right to freedom of expression, every person including juristic persons like the defendant must respect the rights and reputations of others.

34. The limitation under *Article33 (2)* and *Article 33(3)* means that in exercising its freedom of expression and the right to disseminate information to the public, the defendant was constitutionally enjoined to ensure that it published only the truth about the applicant and that it did not vilify her or violate her constitutional rights which includes the right to human dignity, privacy and reputation.

35. With tremendous respect, I wish to disagree with *Mr. Ohaga's* submission that since the applicant was by dint of *Article 260* of the *Constitution* a state officer, her private and professional life was subject to scrutiny and information regarding her private life was a matter of public interest which could be freely published.

36. Whereas I agree that depending on the status of a state officer there are some aspects of a state officer's private life that may be of public interest, there could be some other aspects of their private life that would be purely personal and cannot evoke any public interest. Even on matters that involve public interest, any publication regarding a state officer's professional or private life must be based on facts which are true or substantially true in order to enjoy the protection of the law. The Constitution does not give the media a right or a licence to publish false information even in matters of public interest or matters that concern a state officer.

37. It may also be important to point out that state officers, just like other Kenyan citizens are entitled to enjoy all the rights and freedoms guaranteed in the Constitution and the law.

38. Though the defendant had not filed a defence at the time the application was heard, it is clear from the replying affidavit that it intends to raise the defences of justification, fair comment and privilege in its defence to the applicant's claim. These defences if pleaded and proved are absolute defences to a claim of defamation.

> In most cases, these defences are proved or established by evidence tendered in the course of the main trial and for this reason, I wish to respectively disassociate myself with the holding of *Khamoni J* in the ***Micah Cheserem case, (supra)*** to the effect that where the defences of justification and fair comment are raised, the court should automatically refuse to grant an order of temporary injunction.

39. In my considered view, the mere pleading of the aforesaid defences does not by itself mean that they will eventually carry the day after

the suit is heard since as stated earlier, they must be established by way of evidence and the court may not know at an interlocutory stage whether that evidence will be available in the course of the trial or not.

40. My view is that where such defences are pleaded at the interlocutory stage by way of affidavits before a defence is filed, the defendant should avail to the court some material on the basis of which the court can make a *prima facie* finding that the defences are likely to succeed in the main trial.

41. In this case, the defendant has not at this stage availed any evidence to substantiate its claim that the information contained in the publications was true or substantially true. The defendant has not for example validated its claim that the applicant had improper communication and contact with lawyers who represented the petitioners in the presidential election petition in the form of call logs or records from any service provider. The defendant did not also annex any evidence in the replying affidavit to demonstrate that the information contained in the other two publications was substantially true or factually correct.

42. The annexture to the replying affidavit marked as **"Exhibit KT2"** showing the source of information published in the second article is a Wikipedia extract and though I am unable to make a firm finding at this stage whether Wikipedia is an authentic and reliable source of information, the defendant has not adduced any evidence to prove even on a prima facie basis, that the information in the Wikipedia extract is true. In this case, since there is no evidence to indicate whether the information was true or false, it is important to point out that the republishing of a rumour or libelous material is a new libel. As stated by the learned authors of ***Gatley on Libel and Slander 9th Edition Sweet and Maxwell 1998*** at pages 150-152:

> ***"At common law, every republication of a libel is a new libel and if committed by different persons, each one is liable as if the defamatory statement had originated with him. … When defamatory publication purports to repeat or report the defamatory statement of another, it is an essentially different libel from one where the same importation is conveyed directly. It may require to be changed or defended differently."***

In view of the above, the defendant cannot seek refuge in the source of the information it published if the information was not true in the first place and it was defamatory of the applicant.

43. The applicant has claimed that unless restrained by an injunction, the defendant is likely to continue publishing defamatory information which will damage her reputation beyond redemption. The applicant has demonstrated this by availing evidence that even after serving the defendant with a demand letter seeking an apology and retraction of the first two publications, the defendant proceeded to publish the 3rd article in the weekly edition of the Nairobian which was also defamatory. The defendant has not pledged in the replying affidavit or in submissions made on its behalf that it will not make further defamatory publications concerning the applicant. I am therefore persuaded to find that the reputation of the applicant is at stake.

44. The defendant has advanced the view that in this case, even if the applicant was to succeed in her action, an award of damages would be an adequate remedy. However, I am alive to the fact that in some cases such as the instant one, once a person's reputation is damaged or lost, no amount of damages can be sufficient to compensate the offended party for such a loss. I wholly concur with the view expressed by *Mbogholi J* in ***Ahmed Adan V Nation Media Group Limited & 2 Others, [2016] eKLR*** that reputation like a name, is priceless.

45. In view of all the foregoing reasons and findings, I have come to the conclusion that the applicant has established a *prima facie* case to the standard required in defamation cases to warrant the exercise of the court's discretion in her favour by granting an order of injunction aimed at ensuring that further damage to her reputation is prevented pending the hearing and determination of the main suit.

46. The claim by the defendant that issuing an order of temporary injunction will not be efficacious in this case since there are several other publications in the public domain published by other entities which are also defamatory of the plaintiff is in my opinion misplaced and irrelevant since this court can only deal with the material alleged to be defamatory of the plaintiff in the suit and the application currently before it.

47. In the end, I am satisfied that the Notice of Motion dated 18th September 2018 is merited and it is hereby allowed on terms that the defendant is hereby restrained from publishing any defamatory statements or words concerning the applicant's professional and personal life pending the hearing and determination of the main suit.

48. Costs of the application shall be in the cause.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 22nd day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Ogonji holding brief for Mr. Kemboy for the plaintiff

Mr. Limo for the defendant

Mr. Fidel: Court Assistant