



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 141 OF 2016

HON. MOSES WETANGULA.....PLAINTIFF/APPLICANT

VERSUS

HON. JOHN WALUKHE.....DEFENDANT/RESPONDENT

RULING

1. Before this court is the plaintiff's notice of motion dated 25th May, 2016. The plaintiff seeks:

1. Spent

2. That pending inter-partes hearing of this Application, this Honourable Court be pleased to issue an order restraining the Defendant from further uttering and publishing or causing to be published the same or similar misstatements or falsehoods or any further adverse statements complained of in the suit herein and specifically that the plaintiff's political or other activities are being financed by coalition of political parties known as Jubilee Coalition.

3. That upon inter-partes hearing of this application, this Honourable Court be pleased to issue an order restraining the Defendant from further uttering and publishing or causing to be published the same or similar misstatement or falsehoods or any further adverse statement complained of in the suit herein and specifically that the Plaintiff's political or other activities are being financed by governing coalition of political parties known as Jubilee Coalition pending the hearing and determination of this Suit.

4. That the costs of this Application be borne by the Defendant.

2. It was alleged that the defendant on or about 28th 29th and 30th April, 2016 made statements, uttered and published and/or caused to be published statements to the effect that the plaintiff's political activities were being financed by political parties coalition forming the ruling government known as Jubilee coalition. That the said words were stated whilst the defendant was hosted by Radio FM station known as Sulwe FM and while in public political rallies in Bungoma and/or elsewhere in the republic. That the said defamatory words were also published in the Star Newspaper under the title "**Wetangula bankrolled by Jubilee-MP**". The exact excerpt was said to be as follows:

"I was there and saw them. They met here in Parliament and discussed their weekend budget. Wetang'ula is being financed and we know it, Wetang'ula has never been in opposition. He is finding it hard to be teargased all the time that is why he is leaving for Jubilee, We know he is negotiating to be the majority leader or the speaker of the National Assembly next year".

3. The plaintiff lamented that the statements meant and or were understood to mean among others that he is untruthful about his membership and commitment to ideology, values and objectives of his political party the Forum for Restoration of Democracy in Kenya (FORD Kenya) and Coalition for Reforms and Democracy (CORD); that the plaintiff is untrustworthy and deceitful about his political persuasion standing and affiliation as is publicly known in the society and in his position as CORD co-principal credibility and integrity; that the plaintiff is a person of questionable political cause and persuasion and that he is a person lacking in financial means thus not capable of financing his political activities and engagements. He alleged that the said statements are false and they constitute not only malicious misstatements and or injurious falsehoods as against him but are also defamatory,

4. The defendant vide his replying affidavit filed on 4th July, 2016 contended as follows; that this suit has been brought with the purpose of frustrating him being the plaintiff's political rival, that he filed Election Petition No. 1 of 2008 against the plaintiff in which he alleged that the plaintiff frustrated him from being heard for about 5 years, that the plaintiff has since the filing of that petition had bad blood against the defendant and has been trying all ways to frustrate him. He stated that the said words if they were ever published, were not actuated by malice or spite and were not intended to injure the plaintiff's professional or personal capacity. He further stated that it is a discernible fact that the plaintiff has been seen together with Hon. Aden Duale, both in parliament buildings and in State house, that it is a fact that the plaintiff was seen with the leader of majority in the National Assembly at the National Assembly cafeteria and in State house. That it is also a fact that the plaintiff has been seen together severally with members of the Jubilee Party both in Parliament building and State house including Hon. Aden Duale. That as a matter of fact other media houses and publishers have been reporting the same alleged statements but there is no mention that the defendant uttered, published and/or caused the statements to be published. He contended that the plaintiff has failed to prove malice as alleged.

5. The application was dispensed with by way of oral submissions. The defendant's counsel, however, did not appear for the hearing of the motion. Ms. Nyambura counsel for the plaintiff submitted that the plaintiff had justified that the words complained of were defamatory. That the publication was to the effect that the plaintiff solicited funds for campaign from Jubilee and that he therefore owed Jubilee allegiance. It was further argued that it is clear that the plaintiff's name was referred to in the publication and that the defendant did not seek the comments or clarification from the plaintiff before the publication thereby malice is inferred.

6. I have considered the affidavits on record and the submissions by Counsel. This being an application for injunction, the principles that are set in **Giella v. Cassman Brown [1973] EA 358** apply. However, it must be noted that injunctions are granted only in the clearest of cases in defamation cases such as the one before this court.

7. The court had this to say in the case of **Micah Cheserem v. Immediate Media Services and 4 others (2000) 2 EA 371:-**

“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 injunction as set out in the case of Giella Vs Cassman Brown & co. Ltd (1973) EA 358 generally apply. In defamation cases, those principles apply together with the 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 the clearest possible cases. ...the reason for so treating grant of injunction in defamatory cases is that the action for defamation bring out conflict between private interest and public interest, and 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.”

(Emphasis mine)

8. From the foregoing, this court is under duty to determine whether or not the words complained of are prima facie defamatory. Whether or not the plaintiff shall suffer loss as a result of the publication. In the event there shall arise doubt as to efficacy of that evidence the court shall balance the convenience of the

parties.

9. There is no doubt that the words complained of referred to the plaintiff. The main issue left is whether or not they are prima facie true or not. The defendant relied on photos in which the plaintiff is seen to be in company of Jubilee members among them Hon. Duale, however, from the said photos, this court is unable to ascertain that the discussions/conversations therein are in regard to soliciting funds for campaign as stated in the publication. Prima facie therefore, the truth fullness of the statements are wanting and may be considered defamatory both for the reason that they are negative statements that are capable of negatively affecting the plaintiff's reputation. In the circumstances, this court finds and holds that the plaintiff has established a prima facie case to warrant a grant of the orders sought in the application herein. The application is granted interms of prayer 3.

Cost shall be in the cause.

Dated, Delivered and Signed at Nairobi this 2nd day of March, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... ***For the Plaintiff/Applicant***

.....***For the Defendant/Respondent .***