



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 115 OF 2016

HON. WILLIAM KABOGO GITAU.....PLAINTIFF

VERSUS

HON. FERDINAND NDUNG’U WAITITU.....DEFENDANT

RULING

1. The application dated 12th April, 2016 seeks orders that pending the hearing and determination of this suit, there be an order of temporary injunction, restraining Hon. Ferdinand Ndung’u Waititu from further making and/or causing to be made the defamatory statements that the Plaintiff complains of herein or any other defamatory statements, words, material, testimony or remarks against, of and concerning Hon. William Kabogo Gitau in relation to his alleged involvement in criminal activities, in any forum or medium whatsoever.
2. The application is premised on the grounds stated in the body of the application and is supported by the affidavit sworn by the Applicant, William Kabogo Gitau.
3. The Applicant has described himself as a politician and the current Governor of the County of Kiambu, a prominent businessman and a graduate with a degree in commerce. His complaint is that the Respondent who is described as the current member of parliament for Kabete Constituency and a prominent person who shapes and informs the greater populace through his opinions has made defamatory statements concerning the Applicant. That the defamatory words reflect the Applicant as corrupt, lacking in integrity, a criminal, a murderer, a drug peddler an international criminal and unfit to hold public office. It is further stated that the Respondent continues to engage in bad publicity, character assassination and incitement of the public against the Applicant. That the Applicant is therefore reasonably apprehensive that his reputation will be irretrievably tainted and his standing lowered in the estimation of the right thinking members of the society.
4. The Applicant has further averred that he is aware of a report submitted to the Minister for Internal security by the United States of America (USA hereafter) Ambassador which named him as one of the people involved in violent crime and drug trafficking . The Applicant exhibited the report by the USA Ambassador and stated that the Commissioner of Police made a report dated 1st February, 2011 in which the Applicant’s name was cleared. The report by the Commissioner of Police was also exhibited herein. The Respondent is further alleged to have circulated in social media in a whatsapp group called “Miriam spys – United States of Kiambu” further defamatory statements concerning the Applicant by posting a list of Kenyans allegedly banned from travelling to the USA with effect from 18th November, 2015. It is stated that the Applicant’s name is in the said list. The Applicant has stated that he is not involved in

crime or drug trafficking and has not been investigated, charged or convicted of any offence. The application was filed under a certificate of urgency. On 14th April, 2016 the application was certified urgent and ex parte interim orders allowed pending the hearing of the application inter-partes.

5. In opposition to the application, the Respondent filed the grounds of objection dated 26th April, 2016. The said grounds are as follows:-

“1.The Application and the entire suit are frivolous and have no merit.

2.There is no Jurisdiction conferred upon this Court to entertain the suit and the Motion as the pleas for relief are expressly time barred, having arisen in the year 2010 have been joined with broader reliefs.

3. There are no prayers available for adjudication as sought in a broad and nebulous manner by reason of which there is nothing to grant.

4. There are no Summons to enter Appearance taken out or served upon the Defendant in violation of Order 5 rule 1(1) of the Civil Procedure Rules, 2010, which is a mandatory requirement in the service of a Plaint such as purported to be served upon the defendant, in order to file a Defence.

5. The application is an abuse of the process of the Court as there is no lawful claim against Defendant as alleged or at all, the Plaintiff has mounted a political contest with the Defendant.

6. There is no evidence that the Applicant has any valid or lawful claim to the relief sought. Nothing on record subsists to warrant the grant of the orders sought, as the publications available of, and concerning the Plaintiff pre-date 2015.

7. The claim is frivolous.”

6. The Defendant also filed the notice of motion dated 15th April, 2016 seeking the following orders:

1. This motion be certified as urgent, and service thereof upon the Plaintiff/Respondent be dispensed with in the first instance.

2. Pending the hearing and determination of this Motion there be a stay of execution and any enforcement of the Order of injunction herein issued on the 14th April, 2016 in favour of the Plaintiff.

3. The Order of injunction herein issued on the 14th April 2016 be varied and/or entirely set aside.

4. The costs be in the cause.

7. The application is predicated on the grounds stated in the body of the application and is supported by the affidavit sworn by the Defendant, Ferdinand Ndungu Waititu. The Defendant complained about the ex parte interim orders made herein on 14th April, 2016. According to the Defendant, the Plaintiff deliberately misled the court. The Defendant’s contention is that the way the interim order is framed has the effect of locking out the Defendant from giving of evidence in the two other cases involving the Plaintiff and the Defendant which are in court wherein the Plaintiff is expected to answer to allegations of forgery. The Defendant also accuses the Plaintiff of failure to disclose Constitutional Petition No. 93 of 2016 wherein the Plaintiff allegedly relied on a forged Certificate of Primary Education certificate. It is further stated that the alleged cause of action herein arose in the year 2010 and 2011 and is therefore time barred.

8. The application dated 15th April, 2016 was certified urgent and heard *ex parte* in the first instance. *Ex parte* orders granted on 14th April 2016 were lifted and set aside. On 6th September, 2016 when the matter was listed before the court for hearing *inter partes* I gave directions that the two applications be heard simultaneously. The parties opted to canvass the two applications by way of written submissions. I have considered the said submissions.

9. The general principles for a grant of an interlocutory injunction in defamation cases were stated in the case of **Cheserem v Immediate Media Services (2000) 1EA 371 (CCK)** where it was held that:-

“Applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases because they bring out a conflict between private interest and public interest, though the conditions applicable in granting interlocutory injunctions set out in *Giella v Cassman Brown and Co. Ltd (1973) EA 258* generally apply, in defamatory cases those conditions operate in special circumstances. 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 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 the verdict to the contrary would be set aside as perverse.”

10. The wording of the prayers in the application dated 12th April, 2016 seek orders to forbid any **“...testimony or remarks against, of and concerning Hon. William Kabogo Gitau the relation to the involvement in criminal activities in any forum or medium whatsoever.”** This prayer is rather broad in nature and can be misconstrued to mean that the Defendant is barred from recording witness statements, swearing affidavits or even testifying in the two other cases alluded to above. I agree with the submission by the Defendant’s counsel that this could hinder the proper administration of justice or make it difficult for the Defendant to comply with the orders if granted by the court.

11. In the affidavit in support of the application dated 15th April, 2016, the Defendant has alluded to two cases between the Plaintiff and the Defendant which cases are said to be pending before different courts. Also mentioned is Petition No.93 of 2016. This affidavit evidence has not been rebutted. No papers were filed in opposition to the said application. These other pending cases were not disclosed by the Plaintiff to this court. This was material non-disclosure. That is what led to the lifting of the *Ex parte* interim orders. On the evidence before the court at this stage, the whatsapp group publication has not been exhibited herein. The alleged defamatory publications, pictures and images have also not been shown in this court.

12. On the service of summons, the Defendant has already participated in the case. The Defence and the witness statement have been filed. The purpose of summons is to notify the Defendants of the suit against them. There was therefore no prejudice occasioned to the Defendant. In this regard I am persuaded by the reasoning in the case of **Anglican Church of Kenya ACK Guest House v Alfred Imbwaga Musungu [2014] eKLR:**

I agree with the approach adopted by *Sergon, J.* in the *Hussein Mohamed Awadh Case (supra)*, that the purpose of summons is to inform the defendant of the case and to invite him to enter appearance. Once the Defendant enters unconditional appearance within the time stipulated in the summons, files defence and even participates in the proceedings, as was the case herein, the defendant is estopped from seeking to set aside such proceedings unless there is demonstrated that the defendant suffered some prejudice occasioned by the invalidity of the summons....the Summons to Enter Appearance issued for the 2nd Appellant was invalid but the proceedings, order, judgment and/or decree made subsequent thereto remain valid since the 2nd Appellant entered unconditional appearance, filed defence and participated in the proceedings leading to the judgment. In summary, the 2nd Appellant acquiesced in the process and has not demonstrated that it suffered any prejudice.”

13. On whether the suit is time barred, it is noted that some of the utterances complained about are said to have been made in the January, 2016. The suit also refers to November, 2015. The suit was filed on 12th

April, 2016 and is therefore not time barred as argued by the Defendant.

14. With the foregoing, I am of the view that the interests of justice will best be served in this case by proceeding to a full trial. *Prima facie*, the Plaintiff has not made out a case for the grant of the orders sought in the application dated 12th April, 2016. Consequently, the application dated 12th April, 2016 is dismissed with costs. The application dated 15th April, 2016 is spent. Costs to the Defendant.

Dated, signed and delivered at Nairobi this 9th day of March, 2017

B.THURANIRA JADEN

JUDGE