



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NUMBER 90 OF 2016

FRANCIS NDEGWA MUHORO.....PLAINTIFF/APPLICANT

VERSUS

PAYTON MATHAU. 1ST DEFENDANT/RESPONDENT

KELVIN MUTAROKI. 2ND DEFENDANT/RESPONDENT

AL-NUR MEDIA AFRICA LTD. 3RD DEFENDANT/RESPONDENT

RULING

This ruling determines the Plaintiff's application by way of Notice of Motion date 24th day of March, 2016 but only in terms of prayer (2) and limited to interim orders pending the hearing of the said motion inter partes.

Prayer 2 of the said application seeks from the court orders that: -

“Upon hearing ex parte an order be issued restraining the Defendants/Respondents themselves, their employees, servants, agents or any person acting for them or at their behest in any manner whatsoever from writing, publishing, discussing, uttering and/or conveying defamatory and/or disparaging information in any other manner whatsoever about the Applicant, his person, character and/or occupation pending the hearing and determination of this Application.”

The Application was brought to court under certificate of urgency on the 24th March, 2016 when Justice Mbogholi certified it as urgent and ordered that it be heard on the 31st day of March, 2016. On the 31st March, 2016 the matter came up before me and counsel for the Plaintiff sought time to study the grounds of objection as he was served late, in fact he was served in court after the matter had been mentioned.

The counsel for the Plaintiff sought interim orders pending the hearing of the Application inter partes but the same was opposed by the counsel for the Defendants. The court invited both counsels to submit orally in court on that limb of prayer 2 of the Application without going so much into the substance of the main application, but unfortunately the counsels went beyond the parameters of what would have been necessary for the subject matter of this ruling. I wish to take this early opportunity to state that I will briefly consider the submissions without delving into so much details because if I do so, I will be stepping into the shoes of the Judge who will hear the main application.

The Notice of Motion is brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Orders 40 and 51 of the Civil Procedure Rules Cap 21 Laws of Kenya. The same is premised on the grounds set out on the body of the same and its supported by the Affidavit of Francis Ndegwa Muhoro (the Plaintiff herein) sworn on the 24th March, 2016.

In paragraph 5 of the Supporting Affidavit, the Plaintiff avers that sometimes in the month of March, 2016, he got a copy of Nairobi Law Monthly Magazine, issue No. 3 dated March, 2016 and upon perusal of the same, he was shocked to read an article christened “**NDEGWA MUHORO – UNBLUSHING DIRECTOR OF CRIMINAL IMPUNITY**” authored by the 1st Defendant, edited by the 2nd Defendant and Published by the 3 Defendant.

In paragraph 6 of the affidavit, he further avers that the said article was false, misleading, demeaning and leveled all manner of malicious and mild allegations and/or accusations against him and his person.

He further deponed that the said article contained “**recommendations**” to the National Police Service and/or President of the Republic of Kenya to terminate his employment as the Director of Criminal Investigations and Deputy Inspector General of Police. The article further made reference to a defamatory letter authored by one Ahmednassir M. Abdullah addressed to the Director of Public Prosecution which is the subject of another suit pending before this honourable court.

The Plaintiff avers that there is a danger that the Defendant/Respondents if not restrained will continue with their mud slinging spree and image tarnishing agenda which will not only cause him psychological torture and emotional trauma but will also turn him and the entire Directorate of Criminal Investigation into tools of jest and laughing stocks in the eyes of the general public to whom his office and himself owe a duty of care.

The Defendants/Respondents filed grounds of objection on the 31st day of March, opposing the application on the grounds that the Plaintiff has not established a prima facie case and that the Plaintiff has failed to satisfy the requirements necessary for this Honourable court to issue an interlocutory injunction in such a matter.

The other grounds are that the Plaintiff has failed to demonstrate the contents of the publication to be untrue and/or the intention to further publish defamatory statements. That the Defendants have pleaded the defence of truth and justification, fair comment and qualified privilege, that the said words published were made in fair comment and without any malice towards the Plaintiff/Applicant and that the said words were made on a matter of public interest and the article is, therefore a statement privileged.

The other ground of objection was that the Defendants were within their lawful and civil duty as a media house and respected journalist respectively to report and inform the general public about matters of public interest and concern and in so doing they were discharging a public duty.

That the application herein is a blatant attempt to muzzle and intimidate the 1st, 2nd and 3rd Defendants freedom of speech and that the Defendant’s Constitutional right to freely express their view and opinions should not be curtailed by the whimsical and unreasonable demands of the Plaintiff/Applicant.

In his submissions, counsel for the Plaintiff submitted that the article makes scandalous allegations against the Plaintiff that he had been bribed and had been promised a 300 acres piece of land in Tatu City to influence the outcome of investigations. There is no evidence by the Defendants to that effect and this has been done without due regard to his dignity. He cited Article 33 of the Constitution and argued that though the press has freedom to publish, it should respect the rights of others. The Defendants are still publishing defamatory Articles and if interim orders are not granted, he will suffer more prejudice.

On his part, the counsel for the Defendants submitted that the Plaintiff has not denied the truthfulness of the materials published by the Defendants and that they are dealing with a matter of public interest and the Plaintiff is a public officer. He further submitted that the four tests of granting an injunction have not

been met and that the Plaintiff has not told the court what is defamatory.

In their defences, counsel submitted that the Defendants have pleaded the defence of truth and justification, fair comment, qualified privilege and urged the court not to grant the orders sought in the interim.

I have carefully considered the submissions of the counsels and the materials before me. I have also considered the article complained of. This is an injunction application. All the Applicant has to do is; firstly to establish that he has a prima facie case with a probability of success; show that if the injunction is not granted, he stands to suffer loss and damage that cannot be compensated by way of damages and finally, if this court is in doubt, it will decide the matter based on a balance of convenience.

I have also considered the defences raised by the Defendants but I have not seen any particulars of facts on which the defences are based on, they are mere statements that will have to be proved during the hearing. As Justice Mabeya rightly observed in the case of **Hon. Dr. Evans Kidero vs Standard Group Ltd & 4 others**, Civil Case No. 100/2015: -

“A man is his reputation, once the reputation is lost, it cannot be regained, it is even more worse when its destruction is repeated”

Accordingly, I am satisfied that the Plaintiff has established a prima facie case with a probability of success. I do grant interim orders in terms of prayer (2) pending inter partes hearing on the 14th April, 2016

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L NJUGUNA

JUDGE

Dated, Signed and Delivered at Nairobi this 4th day of April, 2016.

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JUDGE

In the presence of

..... ***for the Plaintiff/Applicant.***

..... ***for the Defendants.***