



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NUMBER 26 OF 2014**

**HON.SAMUEL NDUNGU GITAU .....PLAINTIFF**

**VERSUS**

**1. HON. KIMANI NGUNJIRI.....1<sup>ST</sup> DEFENDANT**

**2. THE STAR NEWSPAPER.....2<sup>ND</sup> DEFENDANT**

**3. STEVE WAMBUGU.....3<sup>RD</sup> DEFENDANT**

**RULING**

1.The plaintiff in his plaint dated 30<sup>th</sup> April 2014 and filed on even date sued the Defendants following a publication in the second Defendants. The Star Newspaper on the 19<sup>th</sup> February 2014 that he alleges to have been defamatory. It stated as follows:

***“All the academic papers Gitau presented during his vetting are not genuine. He needs to be in prison” said Mr. Ngunjiri, the first Defendant. He went onto state that Gitau was not also among the students who graduated in the honorary graduates of 2005 --- the executive never included his KCPE and KCSE certificates when he was submitting his curriculum vitae --- Nakuru County has continued to drag behind since the Country is being headed by officials who are not qualified---*”**

2. It is his statement that such publication and words in their ordinary meaning meant and were understood to refer to him as being dishonest, that his academic credentials are a forgery and fraudulently acquired, and therefore not suitable to hold public office.

He approached the court by his **Notice of Motion dated 5<sup>th</sup> May 2014** seeking orders that the defendants be restrained by an order of injunction, by themselves their agents and servants from publishing, uttering and or causing to be published and or uttered defamatory or slanderous information about the plaintiff/applicant pending the hearing and determination of the suit. The application was brought under **Order 40 Rules 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act.**

3. The grounds upon which the application is made is that the respondents have continuously published the said defamatory statements which are highly defamatory of the applicant to his character and reputation and he therefore stands to suffer irreparably should the orders sought not be granted.

In his supporting affidavit, the applicant deposes that the said publication is motivated by malice, and false and are as a result of the applicant denying the first and third respondents business favours in the

county in terms of tenders and that there is already criminal investigations being conducted by the directorate of criminal investigations into the said academic certificates. He therefore urges the court to restrain the defendants from further publications of the defamatory materials pending hearing and determination of the suit.

4. The application is opposed by a Replying Affidavit sworn on the 23<sup>rd</sup> June 2014 that justifies the publication as fair and accurate reporting and that the said words are true and were made in good faith without malice and therefore urged that the application be disallowed. It is urged by the second and third Respondents that they will demonstrate the truthfulness of the publication and that they have no intention of repeating publication of the said material.

5. There is no dispute as to the publication of the words complained of as they appear in bold on the Star Newspaper dated the 19<sup>th</sup> February 2014, 20<sup>th</sup> February 2014 and also in other Newspapers.

The court has considered the nature and purport of the offending publication. On the face of it, it appears to be defamatory and clearly malicious. The respondents submit that such publication may not be repeated anytime in the future and so an order of injunction is not appropriate. The respondents raised defences of justification and privilege. The court will ordinarily grant an interim injunction where a threatened publication would be on its face be privileged, with an exception where it is clear that the publication is malicious.

6. Where the defence asserts that it will prove the truth during trial, the court would be quick to issue an order of injunction to restrain repeat publication as opposed to a situation where an order of injunction is sought before the publication of an offending article or words that a complainant has knowledge that it would be published See **Francis P. Lotodo -vs- Star Publishers & Others (1998) e KLR**.

The respondents contend that the alleged irreparable loss and injury to the plaintiff if any, has already been suffered, and it is compensatable by an award of damages should the applicant succeed. Citing the decision in **Gilgil Hills Academy -vs- the Standard Ltd (2009) e KLR**, where even after repeated publication of defamatory material about the school no damage was suffered as no parents withdrew their children therefrom, and therefore it is urged that no order of injunction ought to be granted. The respondents further submit that the balance of convenience tilts in their favour as freedom of expression is a constitutional right.

7. To counter the respondents above submissions, the applicant sought to demonstrate a strong case in favour of granting the injunctive orders. He submitted he was never grilled by the Criminal Investigating officer (CID) on the material date or any other date over his academic qualifications and that the media owes a duty of care to the public to confirm authenticity of any material before publishing the same. It is urged that the truth would only be established upon hearing of the suit and therefore an order to restrain further publication would be in order at the interim, and to protect the individuals reputation or threatened with violation of his fundamental rights threatened by the publication.

8. It is submitted that damages are not adequate remedy as someones reputation is so personal that no award of damages can sufficiently compensate it. In **Joseph Sivo Mosumo -vs- HFCK(2008) e KLR** the where the court observed that damages cannot substitute for the loss occasioned by a breach of the law, and that the financial strength of a party is not always a factor to refuse an injunction, nor should a party be condemned to take costs in lieu of his crystallized right which can be protected by an order of injunction.

9. In the **American Cynamid Co -vs- Ethicon Ltd (1975) 2 WLR 316**, it was held that:

***“the object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages for the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial---”***

10. The respondent submits that the offending article was published only once and would not be published any other time. It however failed to apologise for the said publication and raised the defence of justification. There is no guarantee or an undertaking by the Respondents that the offending words would not be published before the suit is heard and determined. As stated in the **Merican Cyanamid case**, an interlocutory injunction serves to protect the plaintiff's further injury before the suit is heard and determined.

The circumstances and justice of this matter before me is that the court must weigh the applicants rights as against the respondents freedom of expression. The plaintiff is an employee of the County Government of Nakuru in the position of Executive Member in charge of Trade, Industrialization and Tourism, a public office.

The words published against him if not true would be extremely injurious not only to his reputation but also to his employment. There is no doubt that if proved to be true as the respondents have submitted, he will loose his employment and would be subject to criminal prosecution. But until then, there is a presumption of innocence under the law. The court therefore finds that the continued publication of the said defamatory articles would cause injury, loss and damage to the applicant and that the balance of convenience tilts in his favour.

11. For those reasons, pending the hearing and determination of the case, the respondents are restrained by an order of injunction from further publication of the defamatory words of and concerning the plaintiffs academic qualifications and certificates.

Consequently the applicants application dated 5<sup>th</sup> May 2014 is allowed in terms of prayer No. 3.

Each party shall bear its own costs of the application.

**Dated, signed and delivered in open court this 15<sup>th</sup> day of September 2016**

**JANET MULWA**

**JUDGE**