REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 60 OF 2015

FRANCIS ATWOLI & 5 OTHERS ....PLAINTIFF

VERSUS

HON. KAZUNGU KAMBI & 3 OTHERS .... DEFENDANTS

RULING

1. The Plaintiffs are Trustees of the giant Central Organization of Trade Unions (K) ("COTU"). On 16/2/15, they filed the suit against the Defendants alleging that on 13/2/15, the latter had jointly and severally uttered and/or caused to be published defamatory statements against them. That the reckless utterances of the Defendants were to the effect that the Plaintiffs were responsible for the death and or murder of the late Kabete Member of Parliament Hon George Muchai. The Plaintiffs gave what the alleged defamatory words meant, and alleged that the same were made in order to gain political mileage. They prayed for an order of injunction and for damages of Kshs.500,000,000/= as well as punitive and exemplary/or aggravated damages.
2. Together with the Plaint, the Plaintiffs lodged a Motion on Notice dated 16th February, 2015 under Order 40 Rule 2(2) of the Civil Procedure Rules and Article 35(2) of the Constitution of Kenya seeking injunctive orders against the Defendants. The prayers sought were as follows:-

> ***"2) That there be an order of injunction, restraining the Defendants/Respondents from using and or uttering defamatory words and statements against the Plaintiffs/applicants pending the hearing and determination of this application.***
>
> ***3) That there be an order of injunction, restraining the Defendants/Respondents from using and or uttering defamatory words and statements against the Plaintiff/applicant pending the hearing and determination of the suit herein."***

Prayer number 2 was granted at the exparte stage and what was argued before me inter partes and in respect of which this ruling relate is prayer No.3.

3. The grounds upon which the application was brought were set out in the body of the Motion and the Supporting Affidavit of Francs Atwoli sworn on 16/2/15. These were that the Defendants had alleged that ***"...............................COTU (K) six (6) top most officials who have a case with Muchai in court are responsible for his death."*** that the 1st Plaintiff was corrupt and had misappropriated COTU funds; that the Defendants had jointly and severally conspired falsely, wrongly and maliciously and with intent to injure the 1st Plaintiff's reputation and character conspired to publish print, broadcast and distribute defamatory words about him. The deponent

exhibited a DVD and copies of newspaper cuttings as "FA1" and FA2" in support of his depositions.

4. The deponent further deposed that the words complained of meant that he was a conman, a fraudster, a crook, a thief, a criminal and a man who leads a gang of murderers who killed the late Hon. Muchai. He contended that the Defendants made the statements complained of knowing that they were false and malicious. That as a result of the Defendant's statements, the Plaintiffs profession, integrity and status had been greatly injured. The Plaintiffs urged that in the interests of justice, the prayers sought should be granted.
5. In their submissions, Mr. Aduda, Mr. Odhiambo and Mr. Kingori Mwangi Learned Counsels appearing for the Plaintiffs reiterated the depositions of Mr. Atwoli and further submitted that the Defendants made the statements yet they had not recorded any statements with the police; that whilst the constitution guarantees free speech, there was limit to that freedom as far as reputation of others is concerned. That by granting the orders sought, the Defendants will suffer no prejudice. It was further submitted that, since the Defendants are public figures, their utterances are held seriously. That the statements were uttered at the funeral of the late Hon. Muchai and were sensational. Counsels sought to have electronic evidence admitted but for reasons on record, the same was rejected. They urged that the application be allowed.
6. All the Defendants opposed the application. The 1st Defendant swore a Replying Affidavit filed on 25/3/15 denying making any speech at the burial of Hon. Muchai linking the Plaintiffs to the killing of Hon. Muchai. He deposed that it had not been demonstrated how the words he uttered were defamatory of the Plaintiffs; that as Cabinet Secretary for labour the application sought to restrict him from performing his duties as such; that the allegations were vague, omnibus and general. In her Replying Affidavit sworn on 12/3/15, the 4th Defendant stated that the Plaintiff's allegations are vague and too general; that the deceased had made accusations against the COTU officials before his demise and what she had done was to repeat what the deceased had said; she denied linking the Plaintiffs to the killing of Hon. Muchai and reiterated that the Plaintiffs had not stated with certainty the words she had uttered that were defamatory. On his part the 3rd Defendant opposed the application vide his Notice of Preliminary Objection dated 25/3/15 and Replying Affidavit of 7/4/15 respectively. In it he contended that the application and the suit offended Order 1 Rule 13 and Order 2 Rule 7 of the Civil Procedure Rules; that the Plaint was defective as it prays for specific amounts as well as for damages and that the non-joinder of the publishers was fatal to the suit and application.
7. Mr. Nyachoti for the 1st Defendant submitted that the Plaint had not set out the alleged defamatory words and to that extent it was hopelessly defective; that by pleading that the words were uttered jointly, that was improbable as the Defendants were not in a choir. Counsel referred to the Case of **CA No. 117/2005 Kariunga Kirubua Vs LSK** in support of his submissions. He urged that before an injunction can be granted in a defamation case, the court must be careful in balancing the reputation of an individual vis a vis the freedom of expression of the others. Mr. Juma for the 4th Defendant associated himself with the submissions of Mr. Nyachoti and submitted that; it was not clear which words were published by which Defendant as pleased in the Plaint; that the 3rd and 4th Defendant had denied uttering the words complained of. Counsels urged that the application be dismissed.
8. In response, Mr. Aduda submitted that paragraphs 13, 14 and 15 of the Plaint had sufficient particulars capable of sustaining a case for defamation; that the words were uttered jointly and severally by the Defendants; that the application did not seek to prohibit the Defendants from exercising their freedom of expression. Counsel distinguished the cases relied on by the defence with the present case and submitted that they are not applicable.
9. I have considered the Affidavits on record, the submissions of Counsel and the authorities relied on. This is an injunction application. The principles applicable in such an application are well known. While the principles set out in the case of **Giella Vs Cassman Brown 1973 EA 358** are applicable, a fourth principle is applicable in defamation cases. This is that; the injunction will be granted only in the clearest of cases.
10. In Micah **Cheserem Vs Immediate Media Services and 4 others (2000) 2 EA 371,** the court held:-

"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."

11. In **Gilgil Hills Academy Ltd Vs The standard Ltd (2009) eKLR** Maraga J (as he then was) held that, whilst the three principles in **Giella Vs Cassman Brown (supra)** apply, other factors fall for consideration in the case of defamation cases. He stated: -

"This being a defamation case, however, an array of other factors fall for consideration only two are relevant to this case. They are public interest in the matter and whether on the material before the court at this stage, it is clear that the alleged defamatory publication is true or not.

On the factor of public interest, it is trite law that public interest demands that truth be out. For that reason, it is in public interest that individuals should possess the right to free speech and indeed that they should exercise it without impediment, <u>so that that right is not whittled down, the jurisdiction to grant an injunction at an interlocutory stage is a delicate and special one and ought to be exercised only in the clearest of cases</u>."(Underlining mine)

12. The foregoing then are the principles applicable in applications for a temporary injunction in defamation cases. What is the law as to prima facie? In libel or slander, it is the requirement of the law that the exact words complained of be set out verbatim in the statement of claim. **<u>In Gatley on Libel at para 2611</u>**. It is stated: -

"The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground for action."

13. In **<u>Collins Vs Jones (1955) QB 564 at 571</u>** the court held that: -

"A Plaintiff is not entitled to bring a libel action in a letter which he has never seen and of whose contents he is unaware. <u>He must in his pleading set out the words with reasonable certainty.</u> The court will require him to give particulars to ensure that he has a proper case to put before the court and is not merely a fishing one."

14. In **<u>Longheed Vs CBC (1978) 4 WWL 338 at Pg 349</u>** the court stated: -

"In my view, a Plaintiff in a defamation case involving audio visual presentation should not be bound by the same strict rules as to particulars which apply to a written statement. However, this privilege granted to such a Plaintiff should not be extended to permit the pleading merely of general conclusions that the Plaintiff has been defamed. The Plaintiff must through his pleadings clearly indicate to the Defendant which portions of the television (or news cast) gave rise to the allegations of defamation….."

15. One other cardinal principle of the law of defamation is that, the Plaintiff must show that the words complained of referred to him and no one else. That the persons to whom the words were published must have identified the Plaintiff as the person in respect of whom the impugned words referred to.

16. In their Plaint dated 16th February, 2015, the Plaintiffs alleged as follows: -

> ***"12. At all material time to this suit, the Plaintiffs were and still are the registered officials of the Central Organization of Trade Unions (COTU)***
>
> ***13. On or about the 13th of February, 2015 the Defendants jointly and severally did utter and/or cause to be published among other statements, the following defamatory words against the Plaintiff: -***
>
> > ***"… the six (6) top most COTU (K) officials are responsible for Honourable George Muchai's Death….."***
>
> ***14. Further, on same day the Defendants jointly and severally did utter and or caused to be published among other statements, the following defamatory words against the Plaintiffs: -***
>
> > ***"that is why the (read COTU officials) killed George……."***
>
> ***15. Further, on the same day specifically the 2nd Defendant did utter and or caused to be published among other statements, the following defamatory words against the 1st Plaintiffs: -***
>
> > ***"We want to see all the six (6) COTU officials led by Francis Atwoli in handcuffs for Muchai's murder…….."***

17. From the statement of claim, it would seem that the words complained of and set out in paragraphs 13, 14 and 15 of the Plaint were directed at the six (6) top most officials of COTU. Except the 1st Plaintiff Francis Atwoli who is named, none of the other Plaintiffs is personally named or identified in the words complained of. Nowhere in the Plaint or the Supporting Affidavit has the Plaintiffs pleaded that they are the top most COTU (K) officials. Pleading that they are one of the trustees and the registered officials of COTU (K) does not per se bring them in the re-alms of the complained words. In my view, save for Francis Atwoli who was personally named in the words set out in paragraph 15 of the Plaint. It was imperative, in my view, that the Plaint should have specified that the Plaintiffs are the only trustees and therefore the ***"Six (6) top most "COTU (K) officials."***
18. In pleading defamation, I have always known that in order for the Plaintiff to identify himself with the alleged defamatory words, he/she must state in the statement of claim that the words were uttered (in the case of slander) or published (in the case of libel) of and concerning the Plaintiff. He must plead that the words referred to the Plaintiff and no one else. As the matter stand as of now nobody knows how many trustees COTU (K) has or how many registered officials that organization has. In my view, the pleading in the Plaint is at large as far as identifying the Plaintiffs, safe for Mr. Atwoli, with the words complained of.
19. The Defendants complained that the words complained of were too general and vague. Mr. Aduda on his part submitted that the words as set out in paragraphs 13, 14 and 15 of the Plaint were sufficient. Looking at the Plaint, it is not clear where and how the publication was made. The words are alleged to have been uttered and published jointly and severally. The questions that linger in the mind of the court are; how were the words uttered jointly? Were they uttered by all the Plaintiffs as set out in paragraphs 13, 14 and 15 at the same time or separately? If jointly, was it in unison i.e. as a choir or how was it? Who among the Defendants uttered what words against which of the Plaintiff's? Where were the words published? As pleaded, is it possible for each of the Defendant separately to know in respect of which of the words alleged he is liable and for which he has to respond to in his defence? Is it not likely to embarrass oneself whilst trying to meet the Plaintiff's claim as pleaded? These questions remain unanswered.
20. At the hearing of the application, the court declined to watch a DVD that was produced at paragraph 3 of the Supporting Affidavit for falling short of the requirements of the law regarding admission of such evidence and for which reasons were given by the court. In paragraph 7 of the Supporting Affidavit, the Plaintiff's produced some four (4) newspaper cuttings out of which the court was able to identify only one as the Standard Newspaper of Saturday February 14, 2015. The

rest were unidentified newspaper cuttings. Nevertheless, the court scrutinized through all the said four pieces of newspaper cuttings, or reports but did not see any of the words set out in paragraphs 13, 14 or 15 of the Plaint either as paraphrased or at all. It is therefore, unclear from either the Plaint or the Affidavits on record, where and how the words complained off were published.

21. As earlier on noted, an interlocutory injunction in defamation cases issues only in the clearest cases. This is so considering that the court has to balance between the two competing interests, public interest of the freedom of speech and private interest to reputation. This is well captured in our Constitution in Article 33.
22. The foregoing being the case, I am not satisfied that the Plaintiffs have established any prima facie case in defamation with any probability of success. This cannot be said to be a clear case that warrants an injunction. That being the case, I do not think that I need to address the other two limbs of **Giella Vs Cassman Brown Case**. However, if my view on it is required, I am satisfied that damages will be an adequate remedy. In any event, the Plaintiffs have themselves quantified their damages at Ksh.500,000,000/-.
23. One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case, must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid, the order sought was too general to have any precise meaning.
24. In the circumstances, I find the application dated 16th February, 2015 to be without merit and the same is hereby dismissed with costs.

Dated and Delivered at Nairobi this 10th day of July, 2015

……………………………

A. MABEYA

JUDGE