



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 337 OF 2015

HON. MARTHA KARUA..... PLAINTIFF

VERSUS

HON. MOSES KURIA.....DEFENDANT

RULING

1. In the motion dated 24th September 2015, Martha Karua, the Plaintiff herein, sought for an order of injunction to restrain Moses Kuria, the Defendant herein, from issuing any statement on any media platform that pertains to the Plaintiff and her reputation or in any manner from mentioning the Applicant's name in any forum as would be defamatory, libellous and injurious to her reputation pending the interpartes hearing of the motion. The Plaintiff also asked for costs. She filed a supporting affidavit to buttress the motion. The Defendant resisted the motion by filing grounds of opposition plus a replying affidavit. Learned counsels appearing in this matter made oral submission when the application came up for interpartes hearing.
2. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavit filed in support and against the application. I also took into account the grounds of opposition. Mr. Imanyara, learned advocate for the Plaintiff, urged this court to confirm the interim orders until the suit is heard and determined so that the reputation and dignity of the Applicant is protected. The learned advocate argued that since the Defendant has indicated that he will continue uttering the defamatory statements, there is need to issue a gagging order.
3. Mr. Mungatana, learned advocate for the Defendant has beseeched this court to dismiss the motion on the basis that the same lacks merit and that it is fatally defective. The learned advocate pointed out two defects which he argues renders the motion incompetent. First, he submitted that the motion does not indicate the provision it is based. Secondly, that the motion seeks for temporary orders of injunction pending the interpartes hearing of the motion. Mr. Mungatana further pointed out that the Plaintiff has not sought for any order for permanent injunction in the plaint. Accordingly, he was of the view that the motion is irredeemable defective. Mr. Imanyara did not deem it fit to respond to the preliminary issues raised by Mr. Mungatana.
4. I have carefully considered the arguments put forward in support of the preliminary points. It is not in dispute that the motion does not specify the provisions of law it is premised. What is clear to me is that though the Plaintiff did not cite the provision her application is founded, it is apparent that she is seeking for orders of injunction to restrain the Defendant from further uttering the words and statements which are defamatory to her. The action before this court is a civil dispute, hence the applicable procedural law is the Civil Procedure Act and the rules therein. The overriding objective of the Civil Procedure Act is stated under Section 1A of the aforesaid Act, to be inteaalia, to facilitate the just, expeditious, proportionate and affordable resolution of civil

disputes. There is no doubt that though the Plaintiff did not specify the provisions of the law her application is based, nevertheless the Defendant understood that the Plaintiff was basically seeking for an order of injunction to restrain him from uttering the words complained of. It is also a matter of common notoriety that applications for injunction are brought under section 63 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules. In my humble view, the failure to cite the provision the motion is based is not fatal.

5. The second preliminary issue raised is in respect of the orders sought by the Plaintiff. Mr. Mungatana expressly stated in a notice of preliminary objection dated 8.10.2015 that the motion is spent. The learned advocate highlighted and pointed in his oral submissions the apparent defect. I have already stated that Mr. Imanyara did not address this court over this ground. I have examined prayer 2 of the motion and it is apparent that the Plaintiff is asking for an order of injunction to restrain the Defendant pending the hearing and determination of this application. A court of law can only grant orders which have been sought. The Plaintiff's prayer is to last until this motion is heard and determined. The court is not expected to read into the mind of the applicant to infer the sort of orders applied for. In the circumstances, the court cannot be gratuitous and grant orders not applied for. It is not in dispute that current motion will determine at the time of delivering the ruling.
6. Having determined the preliminary points, I now turn my attention to the substance of the motion. I have already restated the arguments put forward by the protagonists. It is the submission of Mr. Mungatana that the Plaintiff has not placed sufficient material to show that she has a prima facie case with a probability of success. The Defendant put forward the defence of justification and fair comment. It is also pointed out that since the plaintiff has asked for damages without pleading for a permanent injunction in the plaint, it is obvious that the order for injunction is not available. Mr. Mungatana pointed out that whatever the defendant has said was a reflection of the truth of past events which took place with his knowledge and that of the plaintiff. The defendant further argued that he is merely stating factual matters which the Plaintiff cannot dispute. In short, the Defendant argued that the order for injunction should not be issued to restrain the recalling and recollection of history merely because the plaintiff has changed sides in the political divide in this country. Mr. Imanyara urged this court to carefully look at the effect of the Defendant's utterance. He argued that those utterances linked the Plaintiff with the offence crimes against humanity which is a serious international offence thus damaging her reputation in the eyes of the public. Mr. Imanyara also pointed out that the Defendant's utterances touch on the cases pending before the international criminal court at the Hague.
7. The matter before this court is a claim based on the tort of defamation. Unlike in ordinary civil cases, it is a case where the court can actually grant both an award of damages and the order for injunction simultaneously.
8. However, the order for injunction is sparingly granted. It cannot be given when the defences of fair comment and justification are pleaded. **In Clerk & Lind sell onTorts 20th Edition PP 1449 – 1520** the defences of fair comment and justification are discussed in detail.

At Page 1449, justification is explained as follows:

***“it is a complete defence to an action for defamation for the defendant to plead justification, that is, that the statement is true. The burden of proof is on the defendant.....
..... However the court should not strike out a defence of justification except in cases where the defence clearly cannot be supported by the evidence.”***

In page 1520, the defence of fair comment is discussed as follows:

Fair comment – basic elements the modern authoritative statement of the law of fair comment is

to be found in Tse Wai Churu Paul v Albert Cheng where, in the Court of Final Appeal of Hong Kong Lord Nicholls outlined the history and principles of the defence. The defendant must overcome four hurdles in order to establish defence.

1. *The statement must be comment and not fact.*
 2. *The comment must have a sufficient factual basis (that is, the comment must be based on facts which are themselves sufficiently true)*
 3. *The comment must be objectively “fair” – i.e it must be an opinion which an honest person could hold. This is an objective test, but should not be confused with reasonableness.*
 4. *The subject matter of the comment must be of public interest.*
9. The defendant is of the strong view that he should not be restrained because what he has stated are fair comments which he can justify. The difficult in establishing these defences begins here. What is clear to me is that the facts on which the defence of fair comment is based must be true and honest. The question which has kept lingering in my mind for a long time is; at what point can a court conclude that the defence is fair comment and justified? In my considered view, the answer to this question is not difficult to obtain. The material and authorities I have gone through, seem to suggest that it is only after the suit has been heard, that the court can decide whether or not the defences of justification and fair comment have been established. It is therefore erroneous to hold that an order for interlocutory injunction cannot be granted in cases where a defendant has merely pleaded in his or her defence, the defence of fair comment and justification. To hold otherwise, will mean that no order for interlocutory injunction can be granted pending the hearing and determination of the suit. It therefore means that it is always desirable that a Plaintiff should plead for an order of injunction in the plaint.
10. Having outlined in detail, the aforesaid defences, I now consider the principles to be considered in an application for injunction. The principles are well settled. First, an applicant must show that he or she has a prima facie case with a probability of success.
11. The material placed before this court clearly show that the Plaintiff has shown that the defendant has linked her to planning meetings to fix her political opponents. She has clearly denied such an allegation. The Defendant has not denied linking her to such schemes. The veracity of such allegations are yet to be established.
12. I am convinced that the plaintiff has shown that she has a prima facie case with high probability of success.
13. Secondly, an applicant must show the irreparable damage he would suffer if the order is denied. The plaintiff has clearly stated that her reputation will seriously be damaged if the defendant continues with his utterances. The Plaintiff has argued that the defendant’s utterances will portray her as a corrupt public officer unworthy of trust. With respect, this argument cannot and has not been contested. The message which the defendant has stated in his defence is that the plaintiff in cahoot with others met and drafted letters which were dispatched to the International Criminal Court (I.C.C) and that she also procured witnesses to falsely fix her political opponents.
14. The damage which may arise cannot, in my view, be compensated in monetary terms. At this interlocutory stage, such utterances cannot be justified until the suit is heard and determined.
15. The third and final principle, is that, where the court is in doubt, the application should be decided on a balance of convenience. In the matter before this court, I am not in doubt, hence I do not intend to consider this principle.
16. In the end, I am satisfied that the motion dated 24th September 2015 is well founded. It is allowed as prayed in terms of prayer 2. However, in view of the fact that the order sought seeks for an order of temporary injunction to last until the aforesaid motion is heard and determined, the same lapses the moment this court pronounces its ruling. With respect, I agree with the submissions of

Mr. Mungatana, that the orders if granted will be regarded as spent at the conclusion of the motion which I hereby pronounce. Costs of the motion to abide the outcome of the suit.

Dated Signed and Delivered in open court this 6th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant