REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E047 OF 2021

HON. (RTD) CHIEF JUSTICE
DAVID K. MARAGA.....PLAINTIFF

VERSUS

AHMEDNASIR MAALIM ABDULLAHI.....DEFENDANT

RULING

1. For determination is **Hon. Rtd. Chief Justice David K. Maraga** *(hereafter the Plaintiff/Applicant)* **motion dated 03/03/2021** filed against **Ahmednasir Maalim Abdullahi SC** *(hereafter the Defendant/Respondent)* seeking *inter alia*

a) Spent

b) Spent

c) That pending the hearing and determination of the main suit, a temporary injunction be issued restraining the Defendant, whether by himself, agents, servants or any person acting on his instructions, under his instructions, from further posting or publishing any defamatory statements and or making any defamatory posts or publications in reference to the Plaintiff on his Twitter (now X) *Account Ahmednasir AbdullahiSC @ahmednasirlaw or in any other social, print, electronic or other media whatsoever.*

d) That a mandatory order do issue compelling the Defendant herein to pull down and or delete the defamatory post up on 12/01/2021 and 23/01/2021 in

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his Twitter (now X) *handle under the name Ahmednasir AbdullahiSC @ahmednasirlaw referring to the Plaintiff.*

e) That the costs be borne by the Defendant/Respondent.

2. The motion is brought pursuant to **Section 1A, 1B & 3A** of the **Civil Procedure Act (CPA), Orders 40 Rule 1 & Order 51 Rule 1** of the **Civil Procedure Rules (CPR)** and on grounds on the face of the motion amplified by the affidavit deposed by **Hon. Rtd. Chief Justice David K. Maraga** on an even date.

3. The gist of his deposition is that he is the immediate former Chief Justice of the Republic of Kenya having retired on 12/01/2021 meanwhile served in the Judiciary for eighteen (18) years having been admitted to the bar as an advocate of the High Court of Kenya in 1978. He goes on to depose that he equally serves as an elder of the Seventh-Day Adventist Church, a position that requires a person of high moral character and unquestionable integrity.

4. He states that the Defendant who is a Senior Counsel (SC) has a huge national and international following on his "X" account in the range of 1.1 million followers. And on 12/12/2020 posted, published and circulated a post on his "X" account handle @ahmednasirlaw as follows-; "*On that matter of Kshs. 220 million bribe and the senior judge of the Supreme Court who alleged that he didn't eat alone but shared with two other justices of the Court...who brokered this deal? watch this space.....@dkmaraga @kenyajudiciary @StateHouseKenya*", which post was reposted, quoted and attracted likes.

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5. That subsequently on 12/01/2021, the Defendant posted, published and circulated a defamatory, libelous and scandalous post on his "X" account directed at him as follows-; "*If CJ Maraga is a decent and honest Kenyan, he should come clean on the issue of the senior judge of the Supreme Court who took sh.220 million bribe. Me and CJ Maraga know the judge....intelligent Kenyans must read a lot on Maraga's astute silence on this matter*" which post was equally reposted, quoted and attracted likes from the Defendant's followers.

6. He goes on to depose that the words as published were false, reckless, tinged with malice and presented as absolute truth designed or intended to disparage, bring into disrepute, belittle, and injure his character and his reputation as a retired Chief Justice, former state officer, an advocate of the High Court of Kenya, a church elder, a husband, a father and statesman in the eyes of the public. That the Defendant's actions have subjected him to public hatred, ridicule, contempt, scandal and odium whereas he has received countless questions, calls from family, friends and church members regarding the publication, to wit, there now exists doubt to his standing and reputation as a man of high moral fortitude and integrity.

7. Despite demand for an apology and an unequivocal public retraction, the Defendant declined and or refused to pull down the posts or render an appropriate apology. He states that after institution and service of the instant proceedings, the Defendant on 23/02/2021 went on to further publish and

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circulate on his "X" handle two (2) libelous posts as follows-; *"The sickening pretensions by x CJ @dkmaraga that he doesn't know the senior Supreme Court Judge who received a bribe of Kshs. 220m & is struggling to sell a farm in Nyandarua for Kshs. 350m is breathtaking. Now he has filed a suit. I will unmask Kenya's biggest bribe in the Supreme Court."* ..... *"That senior judge of the Supreme Court falsified an evaluation report for some land which he registered in his daughter's name and got a huge fraudulent compensation from SGR. The police investigated the matter and recommended prosecution....but....but.....but @dkmaraga"* which post was equally reposted, quoted and attracted likes from the Defendant's followers.

8. He deposes that the latter post was made in spite of a demand by his advocates on record having been sent to the Defendant on 23/02/2021, warning the latter not to make any further defamatory or spiteful remarks as against him. That in utter disregard of the latter demand, the Defendant yet posted another post on his "X" handle on even date inviting members of the public to "*Don't miss this....an objective and dispassionate critique of for CJ@dkmaraga tenure*". That on the premise of the latter, on 24/02/2021, the Defendant went on to publish a spiteful article in the **Daily Nation Newspaper** at **Pg.8** titled *"Why Maraga was least qualified for the Chief Justice Job"* and on 25/02/2021 went on to publish a second spiteful article in the **Daily Nation Newspaper** at **Pg. 11** titled *"The CJ was more of a politician than head of Judiciary"*.

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9. That the Defendant's spirited and sustained attacks were not based on facts meanwhile put the integrity and standing of the Supreme Court of Kenya into disrepute owing to the false and sustained allegations. He maintains that he has been subjected to unwarranted personal drama by the Defendant who is still posting defamatory posts on his "X" handle and publishing newspaper articles in the Daily Nation to malign his name on a daily basis. He states that the defamatory publications have spread through social, print and electronic media whereas given the Defendant's conduct, he is greatly apprehensive that if the Court does not intervene, the Defendant will continue with the unwarranted attacks. In conclusion he states that it is in the interest of justice that the reliefs sought in the motion are granted.

10. **Ahmednasir Maalim Abdullahi SC** opposes the motion by way of **a grounds of opposition** dated **21/04/2021** and a **replying affidavit** dated **01/11/2021.** He begins by assailing the Plaintiff's suit as being frivolous both in form and substance, designed with utter bad faith and malice and with the intent to vex him. That the motion is equally intended to stop, prohibit and muzzle him from being a whistleblower to a monumental bribe to the tune of Kshs. 220 million that was received by a senior judge of the Supreme Court of Kenya to influence a decision of the Supreme Court. He deposes that in defence to the suit, he advances the defence of fair comment, truth, justification and qualified privilege therefore the Plaintiff is not deserving of any orders sought. That this Court can only grant interlocutory injunctions in the clearest of cases

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whereas if the public interest is at stake in the matter, the Court must first be satisfied that the words or matters complained of are libelous, so manifestly defamatory that the verdict to the contrary would be set aside as perverse. He goes on to depose that whether the words are defamatory can only be determined at the trial and not at this interlocutory stage, to wit, any such injunction if issued will be in utmost violation of a fundamental right and constitutional freedom accorded to him in the Constitution.

11. He states that the Plaintiff's contention that the words posted on his "X" account are defamatory, is outlandish, contrived, untenable, self-serving and utterly unbelievable. That the Plaintiff cannot maintain a cause of action that is premised on criticism of his office as Chief Justice, to wit, a private citizen cannot maintain a complaint relating to his previous public office. He iterates that an interim injunction as sought is plainly untenable, amounts to judicial overreach and will amount to gagging him from auditing, critiquing and unearthing one of the biggest grand corruption schemes as against a Judge of the Supreme Court. He further asserts that he has a long and illustrious history of fighting corruption in the Judiciary therefore his social media posts were not malicious at all and were in line with many other social media posts on the subject matter. That it is against public interest for a Chief Justice and President of the Supreme Court to sue for libel because of a single post that brought a corruption complaint to the public knowledge whereas through the instant suit, the Plaintiff seeks to inhibit public debate, audit

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and criticism of the judiciary meanwhile places an undesirable fetter on freedom of speech.

12. He maintains that the Plaintiff is scared stiff that he knows, as much, of the Supreme Court Judge that received the sum of Kshs. 220 million as a bribe, which facts are well within the Plaintiff's knowledge during his tenure as Chief Justice. Despite his posts highlighting corruption in the Supreme Court, the Plaintiff in his capacity as former Chief Justice was required to play a vital role in the fight against corruption especially under his administration and was required at all times to show aversion to allegations of corruption. In summation, he urges the Court to dismiss the motion with costs.

13. In rejoinder by way of a **supplementary affidavit dated 07/12/2021**, **Hon. Rtd. Chief Justice David K. Maraga,** states that the Defendant's response is full of falsehoods, untruthful statements and continues to defame both him and his counsel on record. That the Defendant makes lofty allegations as to his alleged participation in the fight against corruption but fails to provide an iota of evidence to substantiate his claims. He avows that the suit and motion have been filed in a bid to put a stop to the Defendant's relentless attacks, false, unsubstantiated and abhorrent allegations against his person which have put his integrity and standing into disrepute. He asserts not being unaware of any bribe received by a senior Judge of the Supreme Court during his tenure as Chief Justice nor at any other time as is alleged by the Defendant. That public interest and policy merely

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tolerates but does not hail the occasional impunity of a defamer and thus the Defendant cannot rely on the same to excuse his libelous remarks. He goes on to state that the freedom of expression encapsulated in **Article 33** of the **Constitution** is not an absolute right but is subject to the rights of others in society.

14. That the statements made by the Defendant concerned him in his personal capacity by attacking his integrity therefore the suit as filed has been brought in his capacity as a retired Chief Justice. He deposes that if the Defendant is truly serving public interest and fighting corruption, he ought to have reported the alleged bribery to the relevant investigative authorities rather than resorting to scathing incredulous posts while keeping the identities of the alleged offenders a secret. That the Defendant's response has no connection to the cause of action before this Court meanwhile has not been deposed to achieve the ends of litigation but is merely made to further defame him and other judicial officers in the guise of pleadings. In conclusion, he deposes that should the Court grant the orders sought, it will effectively stop the Defendant's unwarranted attacks and further serve the cause of justice.

15. Directions were issued on disposal of the Plaintiff's motion by way of written submissions. The parties duly complied. Having considered the lengthy rival affidavit material alongside the respective parties' submissions thereto, it is the Court's postulation that the issues for **determination concern: -**

a. *Whether the Plaintiff has met the threshold for grant of temporary and mandatory injunctions?*

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b. *Whether the reliefs sought for are tenable in the circumstance?*

c. *Who ought to bear the costs of the motion?*

16. The Court proposes to address the first two (2) issues contemporaneously. In presenting the instant motion, the Plaintiff has relied on among others provisions of the **CPA**, **Section 3A** which specifically reserves *"the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court"*, to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in **Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR** and requires no restatement.

17. Alongside the above, the Plaintiff has equally cited **Order 40 Rule 1** of the **CPR.** As concerns, the principles governing the grant of an interlocutory injunction, the same has since long been settled in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**.

18. Restating the settled position in the **Giella** Case, the Court of Appeal in **Cheserem v. Immediate Media services [2000] 2EA 371** while addressing itself on the principles for the grant of injunctions in defamation cases added that the applicant has to satisfy the triple requirement of -:

a) Establishing his case only at a prima facie level.

b) Demonstrating irreparable injury if a temporary injunction is not granted and;

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c) Assuage any doubts as to (b) by showing that the balance of convenience is in his favour.

19. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** restated the principles governing the grant of interlocutory injunctions as enunciated in **Giella's** case and observed that the role of the Judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles. In addition, the Court stated that the three (3) conditions apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. That is to say, that the applicant who establishes a *prima facie* case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And where the Court is in doubt as to the adequacy of damages in compensating such injury, the Court will consider the balance of convenience. Finally, where no *prima facie* case is established, the Court need not investigate the question of irreparable loss or balance of convenience.

20. Meanwhile, the Court in **Cheserem** (supra) particularly addressed itself as follows concerning granting of an interlocutory injunction in defamations cases -:

> *"……in defamation cases those conditions operate in special circumstances. Those conditions have to be applied together with the special law relating to the grant of injunction in defamation cases where the court's jurisdiction to grant an injunction is exercised with the*

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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. It must be satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.

.....

From the authorities and the law, I considered in the case of Francis P Lotodo, I found that defamation cases are special actions as far as the granting of injunctions is concerned. This is because generally and basically, actions or cases of defamation bring out a conflict between private interest and public interest, and this is more so in Kenya where we have the country's Constitution which has provisions to protect fundamental rights and freedoms of the individual including the protection of freedom of expression".

21. As to what constitutes a ***prima facie* case** with a probability of success, is one that a Court would conclude upon material presented before it, that there exists a right that has been violated or infringed by the opposite party that calls for explanation as held in the **Mrao v. First American Bank of Kenya Ltd & 2 others [2003] eKLR**. The aforestated decisions have been reaffirmed and applied by superior Courts in innumerable subsequent decisions.

22. With the above wisdom in reserve, at the outset, the Defendant appears to tacitly dispute publication by deposing in his response that "X" was the publisher of the impugned

publications whereas being an "X" account holder he merely posted on the said platform but did not publish. The Plaintiff vehemently challenged this proposition by deposing that following a landmark decision in **Fields v Twitter Inc**. it was since settled, that "X" formerly twitter, is not liable for posts by its users whereas its terms of service expressly abdicates the platform from any liability for any defamation stemming from its users posts.

23. Having considered the rival positions, this Court is not convinced by the Defendant's contestation on publication. As to what constitutes publication the same has since been settled within our jurisdiction, to wit, I do not intend to reinvent the wheel on the issue. The Court of Appeal in **Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR,** concerning publication, addressed itself as follows-;

> *"The word "publication" is repeatedly used without definition in the Defamation Act. Its permanent form has also not been explained. This is important in construing the provisions of section 8 of the Act on wireless broadcasting which provides that;*
>
> > *"8 (1) For the purposes of the law of libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form." (Our emphasis).*
>
> *Black's Law Dictionary 9th edition defines publication as "the act of declaring or announcing to the public".*

In Pullman v Walter Hill & Co (1891) 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:

> *"What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise……. If the writer of a letter shows it to his own clerk in order that the clerk may copy if for him, is that a publication of the letter? Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (per Lord Esher, MR). (Our emphasis).*

Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed."

24. Moving on to the crux of the motion, the Defendant rebuffs the Plaintiff's allegation on defamation by stating that impugned posts and or publication on "X" concerned a matter of utmost public interest, constituted truth, was justified and covered by

privilege therefore the Plaintiff is not deserving of any of the orders sought for in his motion. The Court has taken the liberty of reviewing the impugned publications appearing as **(Annexure DKM-1).** What I garner to be the purport of the said publications is that the Defendant appears to assert to having information that a senior Supreme Court Judge allegedly received a Kshs. 220 million bribe, to wit, he insinuates vide his posts that the Plaintiff is likewise alive to the said information meanwhile is complicit by failing to out the said senior Judge of the apex Court who allegedly received the bribe.

25. The Plaintiff, other than assailing the inaccuracy of the said publications, asserts that the latter intended to disparage, bring into disrepute, belittle, and injure his character and his reputation as a retired Chief Justice, former state officer, an advocate of the High Court of Kenya, a church elder, a husband, a father and statesman in the eyes of the public.

26. *Ex facie*, the publications tend to impute the Plaintiff's probable knowledge of corrupt dealings as pertains to the Kshs. 220 million bribe, purportedly received by a Judge of the apex Court. While, the publications do not directly link the Plaintiff as the party involved in taking of the bribe, it imputes complicity on the part of the Plaintiff for failing to out the Judge in question. The Defendant in his post of 12/01/2021, asserts as truth, that both he and the Plaintiff know the Judge in question whereas the Plaintiff vehemently disputes any such knowledge meanwhile puts the Defendant to task by way

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of justification to evince any material of the same in his possession to the relevant investigative authorities.

27. The Plaintiff equally maintains that the publications have been actuated by malice and that the same are not protected or covered by **Article 33** of the **Constitution**. To wit, the Defendant's repeated retort is that the publications were premised on a matter of public interest, were with the ambits of free speech. And that the suit and accompanying motion seeks to inhibit public debate, audit and criticism of the judiciary meanwhile places an undesirable fetter on freedom of speech.

28. Indubitably, on the backdrop of the Defendant's riposte, the Court is fully alive to the words of **Lord Coleridge C.J** in **Bonnard and another v Perryman (1891 -4) ALLER 968,** later quoted by **Denning MR** in **Fraser v Evans & Others,** to the effect that-:

> *"Until it is clear that an alleged libel is untrue, it is not clear that any rights at all have been infringed, and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions".*

29. While the evidence of the respective parties will be fully tested at the trial, the duty lay, even at this stage, with the Defendant to furnish a shard of tangible material tending to support his intended defence of fair comment, truth, justification and qualified privilege. In **Uhuru Muigai Kenyatta V Baraza Leonard [2011] eKLR** it was stated-:

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"While taking the defence of justification, or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification of qualified privilege does not inure the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication."

30. Whereas, the defence of justification and privilege may be displaced by evidence of malice. It was held in **Adam v Ward (1917) AC 309-**:

"A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or …. to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential."

31. Further in **Shah v Uganda Argus (1972) EA 80** it was held that a defendant is only entitled to protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose, but he will not avail himself of such protection if he uses the occasion for improper or indirect motive. Whereas, the circumstances in which publications are made could lead to a suggestion of malice. The Plaintiff has equally contended that despite demand for an apology and retraction the Defendant declined or refused to pull down the posts or render an appropriate apology meanwhile he later

went ahead to post further publications. In **Phineas Nyagah v Gilbert Imanyara [2013] eKLR** the Court held that;

> *"Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.*
>
> *….malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely."*

32. Further, as stated in **Dorcas Florence Kombo v Royal Media Services [2014] eKLR**-:

> *"--- qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or the use of the privileged information for an improper purpose."*

33. At this juncture, the Court is wary of saying more concerning this matter, for the obvious reason that it may prejudice the trial. While the Court is alive and is duty bound to champion the competing rights in **Article 33** that guarantees the freedom of the expression whereas **Articles 25** and **Articles 31** protect the inherent dignity of every person and the right to

privacy, suffice to say, it would appear that Plaintiff has demonstrated a ***prima facie*** case.

34. I am not particularly convinced by the Defendant's argument that his publication functioned with realms of free speech and discourse over questions that were of and in the public interest. Had his intention been to whistle blow concerning corruption within our apex Court, he must have receipts for the same whereas the law clearly provides for avenues within which such activity may be undertaken. By opting to use his handle on "X", within cover, confines and or comfort the device used to post the assailed publications, where the Plaintiff cannot be put to task by way of receipts of the allegations made, the same certainly cannot constitute free speech but rather oscillates within the realms of trolling with hint to defame.

35. In the end, the assertions made by each party will be determined through evidence at the trial, but clearly, no award of damages could possibly compensate the Plaintiff for such loss if it were eventually found that the allegations as published by the Defendant are false and defamatory. See the case of **Brigadier Arthur Ndoj Owuor v The Standard Limited (2011) eKLR**. Therefore, without addressing the issues further it would seem that the Plaintiff has also jointly established the potential of **suffering irreparable harm** with the **balance of convenience** tilting in his favour to warrant granting of temporary injunction.

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36. On the Plaintiff's quest for a mandatory injunction compelling the Defendant herein to pull down and or delete the defamatory post up on 12/01/2021 and 23/01/2021 in his Twitter (now X) handle, the Court is not persuaded that this it would be proper to grant the same at this point given that the respective parties evidence has not been tested by way of trial. As held by the Court of Appeal in **Kamau Mucuha v Ripples LTD (1993) eKLR** in reiterating the decision in **Kenya Breweries Ltd. v Washington Okeyo [2002] eKLR:**

> *"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then, only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple ... act which could be easily remedied, or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction."*

37. Whereas in **Nation Media Group & 2 Others v John Harun Mwau [2014] eKLR** the Court of Appeal held that a temporary mandatory injunction *"can only be granted in exceptional and in the clearest of cases"*. It behooves this Court to mention in conclusion, that it is acutely aware that a name is the only thing a person has and that once it is destroyed or lost it may

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never be redeemed as held in the case of **Amir Grinberg & 2 Others v. Andrew Baker [2021] eKLR.**

38. Ultimately, the Court is convinced that the Plaintiff has demonstrated that he is deserving of the reliefs sought while keeping in mind that it would be a grave injustice to interfere with freedom of the expression, which should be exercised in very extreme circumstances particularly at the interlocutory stage of proceedings.

39. *The upshot is that the Court finds merit in the Plaintiff's* ***motion dated 03/03/2021*** *and the commending order would entail-;*

a) *That pending the hearing and determination of the main suit, a temporary injunction be issued restraining the Defendant, whether by himself, agents, servants or any person acting on his instructions, under his instructions, from further posting or publishing any defamatory statements and or making any defamatory posts or publications in reference to the Plaintiff on his Twitter* (now X) *Account Ahmednasir AbdullahiSC @ahmednasirlaw or in any other social, print, electronic or other media whatsoever.*

b) *The Plaintiff is awarded costs of the motion.*

Orders accordingly.

Delivered Dated and Signed at Nairobi this 13th day of November, 2025.

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.....

JANET MULWA.

JUDGE

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