



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthami v Borona (Civil Case E011 of 2025)  
[2025] KEHC 16040 (KLR) (4 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16040 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE E011 OF 2025  
SM GITHINJI, J  
NOVEMBER 4, 2025**

**BETWEEN**

**MICHAEL MUTHAMI ..... PLAINTIFF**

**AND**

**ELIAS LAICHENA BORONA ..... DEFENDANT**

**RULING**

1. For determination is the Notice of Motion dated 14/5/2025 pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, seeking that:
  1. Spent
  2. Pending the hearing and determination of this Application, this Honorable Court be pleased to issue an interim order against the Defendant/Respondent, his servants, agents, employees and/or anyone whomsoever acting under his direction, control and/or howsoever directing the Defendant/Respondent to immediately pull down or cause to be pulled down and delete with immediate effect;
    - i. The defamatory statements posted on 19/07/2024 on his Facebook (now Meta) Account, Elias Laichena;
    - ii. The defamatory statements posted on 19/07/2024 in Maua Bar Association WhatsApp group using his registered mobile phone number 0725260410;
    - iii. The defamatory statements posted on 17/07/2024, 19/07/2024 and 08/08/2024 in Meru Bar Association WhatsApp group using his registered mobile phone number 0725260410; and any other platforms where he might have published the same statements; and



- iv. The defamatory statements posted on 16/2/2024 at Meru Bar Association using the defendant/Respondent's registered mobile phone No. 0725260410; and or any other platform where he might have published/posted and/or spread a similar statement.
    3. Pending the hearing and determination of this suit, this Honorable Court be pleased to issue an interim order against the Defendant/Respondent, his servants, agents, employees and/or anyone whomsoever acting under his direction, control and/or howsoever directing the Defendant/Respondent to immediately pull down or cause to be pulled down and delete with immediate effect;
      - i. The defamatory statements posted on 19/07/2024 on his Facebook (now Meta) Account, Elias Laichena;
      - ii. The defamatory statements posted on 19/07/2024 in Maua Bar Association WhatsApp group using his registered mobile phone number 0725260410;
      - iii. The defamatory statements posted on 17/07/2024, 19/07/2024 and 08/08/2024 in Meru Bar Association WhatsApp group using his registered mobile phone number 0725260410; and any other platforms where he might have published the same statements; and
      - iv. The defamatory statements posted on 16/2/2024 at Meru Bar Association using the defendant/Respondent's registered mobile phone No. 0725260410; and or any other platform where he might have published/posted and/or spread a similar statement.
    4. This Honorable Court be pleased to issue a temporary order of injunction restraining/barring the Defendant/Respondent by himself, servants, employees, agents, assigns and/or anyone whomsoever from disseminating or causing to be disseminated, making, posting, spreading and/or publishing similar and/or any defamatory statements against the Plaintiff/Applicant on any social media platforms operated, owned and/or associated with the Defendant/Respondent or in any manner whatsoever, pending the hearing and determination of this Application.
    5. This Honorable Court be pleased to issue a temporary order of injunction restraining/barring the Defendant/Respondent by himself, servants, employees, agents, assigns and/or anyone whomsoever from disseminating or causing to be disseminated, making, posting, spreading and/or publishing similar and/or any defamatory statements against the Plaintiff/Applicant on any social media platforms operated, owned and/or associated with the Defendant/Respondent or in any manner whatsoever, pending the hearing and determination of this suit.
    6. The costs of this Application be provided for.
  2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the Applicant, sworn on even date. He averred that he is an Advocate of the High Court of Kenya with over 10 years of experience, a devoted husband and a father with strong family values, the Treasurer of the Law Society of Kenya, Meru Branch, a Church leader at A.I.P.C.A and Full Gospel Churches, a member of the Board of Management, St. Theresa Mission Hospital and a former member of the Board of Management, Chugu Boys Secondary School. The Respondent, an Advocate of the High Court of Kenya, posted on diverse dates between 17/7/2024 and 8/8/2024 in the Meru Bar Association WhatsApp group, Maua Bar Association WhatsApp group and Facebook page, malicious and false statements intended to tarnish, dent, injure and bring his character and reputation into disrepute, consequently leading to loss of clients, profound emotional distress and social isolation



from members of the community. He will suffer irreparable harm unless an injunction is issued against any posts and/or publications being made by the Respondent targeted at him.

3. The Respondent responded to the application vide a Notice of Preliminary Objection dated 24/6/2025 on grounds that;
  1. The Application and the entire SUIT is incompetent, superfluous, do not lie, are fatally defective, misconceived, lacks merits and is tantamount to abuse of the court process.
  2. The Defendant avers that this suit is incompetent because the alleged statements by the Plaintiff relating to court proceedings are absolutely privileged under Section 7 of the [Defamation Act](#), Cap. 36, Laws of Kenya.
  3. As per Sections 6 and 7 of the [Defamation Act](#), the alleged comments were made in a private forum (the WhatsApp group), which can be construed as a forum with qualified privilege. The group consists of members with a common interest and the statements were shared in the spirit of open discussion within this context.
  4. The Plaintiff has raised matters that took place between Clients/Advocates and Advocates/Advocates communication, which is privileged information within the meaning of section 134 of the [Evidence Act](#).
  5. The Defendant avers that this suit is incompetent because the alleged statements by the Plaintiff are privileged under Section 7 of the [Defamation Act](#), Cap. 36 provides that Advocates communication in the cause of their duty is absolutely privileged.
  6. Jurisdiction is everything and the Court ought to down its tools herein. The Court has no jurisdiction to entertain an incompetent Suit because the Suit is incompetent and premature as was held in the case of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd [eKLR] in which the Court of appeal held, '...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence...'
  7. The Supreme Court of Kenya, now the highest court in the land has broadly confirmed and extended, the nature and scope of Preliminary Objections and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of [the Constitution](#). Recently, the Supreme Court reconsidered the position of parties resorting to the use of Preliminary Objections and pronounced itself as follows in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others (2015) eKLR.

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resource and secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword for winning a case otherwise destined to be resolve judicially and, on the merits.”



8. We persuade this Honourable Court to uphold the Preliminary Objection and dismiss the said Notice of Motion dated 14<sup>th</sup> May, 2025, and entire Suit with costs to the Defendant hereof.
4. The application and the Preliminary Objection were canvassed orally in court, and a ruling was reserved.

### **Determination**

5. Having considered the application, the Preliminary Objection, and the oral submissions by counsel, I find the issue for determination to be whether the threshold for the grant of the temporary injunction has been met.
6. The application is predicted on Order 40 Rule 1 of the Civil Procedure Rules, which provides as follows; “Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”
7. The conditions for grant of temporary injunction were set out in the locus classicus case of *Giella v Cassman Brown* [1973] EA 358 as follows; “An applicant must show a prima facie case with probability of success, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, when the court is in doubt, it will decide the application on the balance of convenience.”
8. The Respondent contends that the alleged statements are privileged information within the meaning of sections 6 and 7 of the *Defamation Act* as read with Section 134 of the *Evidence Act*. In rejoinder, the Applicant reiterates that those statements are defamatory and malicious in their ordinary meaning intended to tarnish and malign his reputation.
9. Section 6 of the *Defamation Act* provides that, “A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged: Provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter.”
10. Section 7 of the *Defamation Act* provides that, “(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice. (2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances. (3) Nothing in this section shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit. (4) Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of section 4 of the Law of



Libel Amendment Act, 1888, of the United Kingdom) (Act No. 51 and 52 Vict. c. 64.) immediately before the commencement of this Act or conferred by this Act.”

11. I find that the privilege envisioned under sections 6 and 7 of the Defamation Act is confined to newspaper publications and reports.
12. Section 134 of the Evidence Act provides that, “(1) No advocate shall at any time be permitted unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure - (a) any communication made in furtherance of any illegal purpose; (b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client. (2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.”
13. It is conceded that the Defendant/Respondent herein was one of the Defendants in the Maua case, and the Plaintiff in that case was represented by the Plaintiff/Applicant herein. That matter was subsequently heard and determined in favour of the Plaintiff, and the Respondent herein was ordered to vacate the land and refund the money to the Plaintiff. Evidently, the provisions of section 134 of the Evidence Act do not apply, because the only professional therein was the Applicant herein, who was properly discharging his professional mandate on behalf of his client, the Plaintiff therein.
14. An advocate cannot be vilified or otherwise subjected to degrading treatment merely for dutifully representing their clients. In the event of dissatisfaction with the manner in which an advocate has conducted a matter, the law provides appropriate avenues for redress, which ought to be pursued, instead of resorting to such unbecoming antics.
15. I find that the Applicant has, on the test of *Giella v Cassman Brown* (1973) EA 358, established a prima facie case with a probability of success. Invariably, the balance of convenience tilts in his favour as he demonstrated that he will suffer irreparable harm, incapable of being adequately compensated by an award of damages.
16. The inevitable conclusion is that the preliminary objection has not attained the threshold of pure preliminary points of law, capable of disposing of the entire matter. I find that the Preliminary Objection dated 24/6/2025 was improperly raised and it is hereby struck out.
17. The upshot from the foregoing analysis is that the application dated 14/5/2025 is merited and it is hereby allowed in terms of prayers 3 and 5 thereof.
18. Costs be in the cause.

**DATED AND DELIVERED AT MERU THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2025**

**S.M. GITHINJI**

**JUDGE**

Appearances:-

Defendant is present, Mr. Elias Laichena Borona.

Applicant Absent as well as his Advocate Mr. Ngunjiri.

