

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL DIVISION
CIVIL CASE NO. E264 OF 2025

ISAAC LENAOLA

.....**PLAINTIFF**

=VERSUS=

KUNG'U MUIGAI.....

.....**DEFENDANT**

RULING

1. This ruling is on the Plaintiff's Application dated 30th September 2025. The same which was by way of a Notice of Motion, is supported by the Supporting Affidavit of Hon Justice ISAAC LENAOLA who is the Plaintiff in this suit. Annexed to the said Affidavit as annexures, are: videos (on a flash disk), pictures, print-outs of screenshots, as well as of extracts from social media accounts (YouTube, Tik Tok, Facebook, WhatsApp, and X-formerly Twitter), other digital platforms and in the print media.
2. These contain statements and utterances that the Defendant KUNG'U MUIGAI, uttered against the Plaintiff in interviews on these media platforms; accusing him, *inter alia*, of being a corrupt Judge and accusing him of having received a bribe that influenced him to deliver an adverse judgment in a suit involving the Defendant and a company he is associated with.
3. The statements and utterances, which were made on diverse dates, were posted as well as reposted, shared as

well as reshared, widely across those social media and digital platforms. The flash disk which is containing the said defamatory matter, was accompanied with a Certificate of electronic evidence as required under Section 106B of the Evidence Act (Cap 80 Laws of Kenya).

4. The Plaintiff who is a Judge of the Supreme Court of Kenya, filed this suit against the Defendant for defamation. He has in this suit claimed that the said statements and utterances are not only false, but that they are defamatory as they are such as tend to lower his estimation in the eyes of right-thinking persons in society, and subject him to public ridicule.
5. He considers those statements and utterances, damaging not only to his reputation and social standing in society, but also to his professional standing and judicial career as a Judge of Kenya's apex Court and holder of various distinguished judicial positions internationally. For reason especially that the said statements and utterances, relate to the conduct of a suit that he presided over many years ago, when he was a High Court Judge; and in which the Defendant and his Company who were parties, lost.
6. The Defendant has in those statements and utterances alleged that the Plaintiff as Judge in that suit, received a bribe of Ksh One Million, to decide as he did in the judgment. The Plaintiff contends that the said statements and utterances, hold him out as a corrupt Judge who takes bribes to influence his decisions, and who is therefore unfit to continue holding judicial office.

7. In the Defence filed in this suit, the Defendant has admitted making those statements and utterances, and not only maintained that they are indeed true, but has repeated them in the said Defence; and pleaded the defence of truth (or justification) and fair comment (or honest opinion).
8. This Application which was principally brought under the provisions of Order 40 of the Civil Procedure Rules, has urged this Court to issue against the Defendant, interlocutory orders of prohibitive and mandatory nature; restraining the further uttering and/or publishing the said statements and utterances, and compelling the deletion, pulling down and removal from the social media and digital platforms, of the said statements and utterances. It has specifically made the following prayers:

(1) *(Spent).*

(2) *(Spent)*

(3) *(Spent)*

(4) *That pending the hearing and determination of this suit, an order of injunction be issued, compelling the Respondent whether by himself or agents to forthwith retract, pull down and/or delete, each and every post, video interview or statements defamatory of the Applicant, published/posted on social media platforms of Digeer (DG) Media and/or any other social media accounts wheresoever.*

(5) *That pending the hearing and determination of this suit, an order of injunction be issued, restraining the Respondent whether by himself,*

his servants, agents, anyone acting on his behalf and/or any of them, either individually or jointly or otherwise from making any defamatory statements against the Applicant in any way whatsoever.

(6) That the costs of this Application be provided for.

9. The Application has stated that it is based on the following grounds :

(1) That the Applicant has filed this suit, seeking damages for slanderous statements made by the Respondent against him in a video interview. Which statements are defamatory and made in bad faith.

(2) That on or about 8th September 2025 the Respondent recorded a video interview which was later posted on various social media accounts known as Digeer (DG) Media.

(3) That the video interview was posted on the Tik Tok and YouTube Accounts of Digeer Media which have a following of about 19,600 followers and 1,890 subscribers, respectively, who have the potential of interacting with and consuming the statements made by the Respondent.

(4) That the said video post attracted 6,309 likes, 582 comments, 796 saves and 1,724 reposts on Tik Tok, and 9 views on YouTube.

(5) That the said video interview has been in circulation in other media channels and the Respondent also caused the same to be disseminated on various social media platforms

including but not limited to Facebook, X (formerly Twitter), WhatsApp and Tik Tok.

- (6) That the statements by the Respondent are clearly false and scandalous and made only with the intent of ruining the Applicant's reputation both locally and internationally.*
- (7) That as evidenced by the interactions of the said video interview, it is clear that the same has influenced the public to arrive at a misconceived and misguided opinion of the Applicant, thereby lowering him in the estimation of right-thinking members of the society.*
- (8) That on 12th September 2025, the Respondent did another media interview, which was circulated in various media accounts in Kenya and claimed that the 'targeted people' in his previous interview of 8th September 2025 being the Applicant and other Judges of the Court of Appeal and Supreme Court of Kenya, were involved in the death of his previous Advocate on record, the late Mr. KYALO MBOBU.*
- (9) That the Respondent's actions, therefore, prompted the Applicant, through his Advocates, to write to the Respondent a demand letter on 16th September 2025 demanding for the video interview to be retracted by the Respondent and/or his agents. However, the Respondent, through his Advocates, did not and have not heeded to the demands by the Applicant.*

(10) That on or about 25th September 2025, the Respondent did another video interview reiterating the alleged involvement of the Applicant as well as other Justices of the Court of Appeal and Supreme Court of Kenya in corruption dealings, when handling the suits involving his properties. In the said video, the Applicant also confirmed that he does not intend to honour the demands made by the Applicant to retract the defamatory publications. Instead, he dared the Applicant to sue him.

(11) That the Respondent in his video interview of 25th September 2025 admitted that he had done an interview with the mainstream media channels in this country, including with the Nation Media Group, with the malicious intent of further spreading his defamatory and unsubstantiated statements.

(12) That the actions by the Respondent clearly demonstrates that he is not intent on stopping the making of further defamatory claims against the Applicant, despite the same being false, malicious and unsubstantiated.

(13) That the Applicant like every other Kenyan, is entitled to his good name and to the esteem in which he is held by others. Additionally, the Applicant holds a very distinguished seat as a Justice of the Supreme Court of Kenya and he, therefore, has a right to claim that his reputation

should not be disparage by defamatory statements made about him without lawful justification or excuse.

(14) That the Applicant being a senior member of the Judiciary which is an institution that relies heavily on public goodwill and trust, the Respondent is forthwith restrained from making further unsubstantiated claims against the Applicant.

(15) That the actions of the Respondent are ill-intended and orchestrated to besmirch the reputation of the Applicant, unless this Court otherwise intervenes.

10. The Application was opposed by the Defendant through a Replying Affidavit sworn by the Defendant. In which the Defendant has admitted uttering the said statements and utterances, and taken the same stance in his filed Statement of Defence- that of truth (or justification) and fair comment (or honest opinion).

Analysis & Determination

11. This Application was canvassed by way of written submissions. With each party filing its submissions. The Plaintiff's submissions are dated 22nd October 2025; and were filed alongside a List and Bundle of Legal Authorities. The Defendant's submissions which are dated 28th October 2025, were similarly accompanied with a List and Bundle of Legal Authorities. Each party's submissions were commendably short and precise.

12. The Plaintiff in his submissions submitted that the Application has satisfied the three conditions stated in **Giella v. Casman Brown Ltd [1973] EA 358**. For his part, the Defendant in his submissions submitted that the injunction cannot issue in a defamation suit where the Defendant has pleaded the defense of truth (or justification) and fair comment (or honest opinion).
13. He has in opposition to the Application cited several legal authorities including **Gartley on Libel & Slander (London: Sweet & Maxwell), Micah Cheserem v. Immediate Media Services & 4 Others [2010] eKLR, and Hon Sakaja Arthur Johnson v. Nation Media Group PLC & 2 Others [2025] KEHC 13737 (KLR)**.
14. In his address while highlighting the Defendant's submissions, defence counsel Mr NELSON HAVI now Senior Counsel, reiterated that the Plaintiff is a corrupt Judge who has no reputation to protect; and that who cannot therefore be defamed or who is "incapable of being defamed". Hence that the Defendant was justified in accusing him of corruption and uttering and publishing those statements and utterances as he did.
15. Mr Havi in concluding his address submitted that the Plaintiff is a corrupt Judge who has no protectable reputation; hence that this Court should not grant the interlocutory injunctive orders sought in this Application. In consequence of which he urged that the Application be dismissed accordingly.
16. Upon distilling the Application (together with its Supporting Affidavit), the Defendant's Replying Affidavit, as

well as the parties' rival written submissions, I have identified the following as the three issues for determination on this Application: (a) *Whether this Court should grant the prohibitive Interlocutory injunction sought in this Application*, (b) *Whether this Court should grant the mandatory injunction sought in this Application*, and (c) *Who should bear the costs of this Application?*

Interlocutory Injunctions in defamation suits

17. In **Micah Cheserem v. Immediate Media Services & 4 Others [2010] eKLR; (2002)1 EA 371 (CCK)**, the court (Khamoni, J) observed as follows:

“Though the conditions applicable in granting interlocutory injunctions set out in **Giella v. Casman Brown Co. Ltd [1973] EA 358** generally apply in defamation cases, these conditions operate in special circumstances. Over and above the test set out in Giella's case, in defamation, the court's jurisdiction to grant an injunction is exercised with greatest caution so that an injunction is granted only in the clearest possible cases....”

18. This was also the holding in the recent case of **Hon Sakaja Arthur Johnson v. Nation Media Group PLC & 2 Others [2025] KEHC 13737 (KLR)**, where I similarly observed that in defamation suits, the legal threshold for interlocutory injunctions, is essentially higher than the one set out in **Giella v. Casman Brown**. Therefore, the legal threshold for grant of a prohibitory interlocutory injunction in a defamation suit in Kenyan courts, has been settled in

judicial decisions (case law). In those decisions it is agreed that the threshold goes beyond the threshold restated in **Giella**.

19. In the **Sakaja v. Nation Media Group** case (*supra*), I also observed that defamation suits involve the balance of the constitutional imperative of freedom of the Press (or freedom of expression) on the one part, and the right to privacy and dignity on the other part. Hence that courts have to do a delicate balancing of these two equities.
20. The test in **Giella**, is three-fold, namely: (a) There has to be a prima facie case with high chances of success; (b) The harm, loss or damage the Applicant is likely to suffer should the injunction not be granted, should be one that cannot be adequately compensated by an award of damages; and (c) Should the court be in doubt as to these two conditions, then it may decide on the balance of convenience- the convenience being in favour of the grant of the injunction.
21. On whether reputational harm can be compensated by an award of damages, the answer is that yes courts have been quantifying and awarding damages for defamation. However, the contentious issue is whether an award of damages will be adequate in each case. The adequacy of damages to compensate reputational harm will be determined by a number of factors, as well as the circumstances of the case. That will therefore be determined on a case to case basis.
22. Some reputational harm can be of a magnitude that is of a global scale. For instance, social media defamation, where the defamatory material will in a matter of seconds have

travelled thousands of miles; will have been read by millions of people even concurrently; and will have been posted and reposted multiple times, as well as been shared and reshared multiple times.

23. The graveness of the harm will also depend on the subject's social status, his professional stature, or his career. Some reputational harm can destroy and even end one's career. The Plaintiff has in this Application stated this on his standing as a Judge of the Supreme Court which is Kenya's apex court; and of his other judicial positions internationally. He has in this Application stated that judicial office thrives on public trust.

24. In defamation suits, interlocutory pre-trial injunctions may be issued where the Application has satisfied the legal threshold in ***Giella***, as well as the requisite supplemental threshold of additionally also demonstrating that there exist exceptional factors or circumstances that make the grant of the injunction, most compelling, most deserving, most inviting, and most appropriate.

25. Recently, in ***Ejidio Kinyanjui v. National Media Group & 2 Others [2025] KEHC 17466 (KLR)***, I similarly held that in defamation suits, an interlocutory injunction will issue, where the Application has satisfied the legal threshold in ***Giella***, and additionally also demonstrated that there exist exceptional factors or circumstances that make the grant of the injunction, most compelling and most inviting. I then enumerated some of such exceptional circumstances as including and not limited to the following:

- (a) *Where the Defendant's utterance of the said statements or utterances against the Plaintiff, has been habitual or repetitive- hence giving rise to a reasonable fear of continuation. In such a case, unless the Defendant has offered to court a formal undertaking that he will not make any further such statements or utterances while the suit is pending, a court may issue the injunction;*
- (b) *Where the Defendant has continued making the same statements or utterances against the Plaintiff, unperturbed- even after the institution of the suit, and in spite of the suit;*
- (c) *Where there is a high likelihood that the Defendant will continue publishing or uttering the same statements or utterances against the Plaintiff, and is unlikely to stop, unless restrained by the court;*
- (d) *Where there is evidence of imminent or immediate threat of repeat publication.*
- (e) *The prejudice or loss the Defendant will suffer or is likely to suffer, if the injunction is granted;*
- (f) *Where the words or expression used in the impugned statements or utterances, are so oppressive, so harsh, so bullyish, so impunitous, or so insensitive; or*
- (g) *Where from their tone, the impugned statements or utterances are clearly laced with ill-will, malice, improper motive, vendetta, vengeance, bitterness, or they are clearly intended for*

retaliation or for the settling of scores or old grudges.

26. As pleaded by the Plaintiff and admitted by the Defendant, the said utterances against the Plaintiff have been repetitive, sustained and consistent. The Defendant has continued making those utterances despite the pendency of the suit, and he is unlikely to cease or desist, because he believes they are true and justified. He is unlikely to stop, unless restrained by a court order.

27. On this background, immediate future threat of further publication is not only imminent, but also evident as a result of the sustained onslaught by the Defendant. Due process requires this court to level the playing field, and to, pending determination of this suit, protect both parties from each other. It has a duty to protect the rights of the Defendant to express himself, and a corresponding duty to protect the Plaintiff from further attacks by the Defendant.

28. On whether the orders sought in this Application should be granted, the Defendant has in his response to the Application, and in his submissions, stated that interlocutory injunctions such as the ones sought in this Application, cannot be issued where the defences of truth (or justification) and fair comment (or honest opinion) have been raised.

29. Gatley on Libel and Slander 12th Edition, which the Defendant has heavily relied on to urge this position, at Paragraph 242 states that the jurisdiction to grant interim injunctions to restrain publication of defamatory statement, is of a delicate nature and ought to be exercised in the

clearest of cases. It further discourages courts from issuing interlocutory injunctions in defamation suits where the defences of truth (or justification) and fair comment (or honest opinion) have been pleaded.

30. While this treatise restates a practice of courts rarely [rather than not at all] issuing interlocutory injunction where such defence has been pleaded, it has added the rider that unless the claimant can show that the defence is highly likely to fail at trial. The use of the word rarely has the connotation of “not always or hardly,” rather than “never” or “not at all.” Besides, that principle is stated as a general rule; which like any other general rule, is subject to such exceptions as the circumstances of the case and the ends of justice, may dictate.

31. Besides, while this this treatise (Gatley on Libel & Slander) is a cornerstone textbook on the law of defamation in England, in our jurisdiction it is of persuasive authority only. Hence unlike a binding precedent which has the binding force, it is not binding on this Court. Courts in this jurisdiction may however draw some inspiration from it in deciding cases before them.

32. The Defendant has by his opposition to the Application and plea of truth (justification) and fair comment, urged this Court to find that the Plaintiff has no reputation to protect. This is rather pre-mature, as this Court cannot at this stage determine whether the Plaintiff has any reputation to protect or whether he has no good reputation. That is an invite I have to understandably decline at this preliminary pre-trial stage of this suit. Afterall, everyone is

presumed to have a good reputation, until proved otherwise. Which is a rebuttable presumption, to be rebutted by the adduction of evidence at trial.

33. In any case, the Plaintiff's reputation (whether bad or good), and whether it has been harmed by those statements and utterances, are among the key issues for determination in the suit itself. For such issues, parties should hold their breath and wait to out-do each other at the trial. They need not dance themselves lame at this pre-trial stage. This being a pre-trial stage, it is the Plaintiff's word against the Defendant's, and the Defendant's pleaded defences of truth (or justification) and fair comment (honest opinion) are yet to be actualized at trial through the calling of witnesses and the adduction of evidence.

34. It is therefore premature for the Court to, at this stage, make a determination, on the issue of whether or not Plaintiff has no reputation at all as claimed by the Defendant. When dealing with an Application for interlocutory relief, a court should not embark on an exhaustive determination of the contested issues such as this one, or embark on determining the merits of the suit itself, or make a final determination of the suit. Those are not issues for determining on an Application for interlocutory relief. On those, the court needs to tread cautiously, objectively and impartially and in a manner that does not tilt the playing field in favour of any party, ahead of the main duel.

35. I hold that this Application has satisfied the legal threshold in ***Giella***, and additionally also demonstrated

that there exist exceptional factors or circumstances that make the grant of the interlocutory prohibitive injunction sought, most compelling and most inviting. Such orders are usually binding on a party and his pleader.

Mandatory Injunction

36. The legal threshold for a mandatory injunction is a notch higher than for the interlocutory prohibitory injunction, and may issue, only in circumstances of exceptional hardship and in the most obvious cases. Such as where the Defendant has no defence, or where the Defendant has elected not to file a Defence. In this particular case the Defendant has raised the defence of truth (or justification) and fair comment (or honest opinion). Which are an absolute defence to a defamation suit. The stage is now set for the trial.

37. Where a defence of truth (justification) and fair comment, is raised, a court should at the interlocutory stage be hesitant to grant a mandatory injunction for the pulling down, deletion, removal, or destruction, of the offending matter from the media. Such a drastic action, may result in prejudice to the Defendant, for instance if the court later in its judgment, finds that there was no defamation, or if the said defence of truth (or justification) and fair comment (or honest opinion) finally succeeds at trial. For that reason, the Plaintiff's plea for a mandatory injunction (prayer 4), is hereby politely declined. In any case, the mandatory injunction, is one of the prayers in the suit itself.

Final Orders

38. This Application is hereby allowed only partially, and in terms of prayer (5), that pending the hearing and final determination of this suit, a temporary injunction is hereby issued, restraining the Respondent, whether by himself, his servants, his agents, anyone acting on his behalf, and/or any of them, either individually or jointly, from making the same or similar statements and utterances against the Plaintiff, in any media and in any manner whatsoever and howsoever.

DATED and DELIVERED at NAIROBI on this 18th day of December 2025.

**PROF (DR) NIXON SIFUNA
JUDGE**