

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E210 OF 2025

HON. (RTD) JUSTICE

PHILIP NYAMU WAKI.....PLAINTIFF/APPLICANT

VERSUS

NAIROBI INSIGHT MEDIA GROUP LTD.....1ST

DEFENDANT

MIKE KAHINDI.....2ND DEFENDANT

MAXWELL OCHIENG.....3RD DEFENDANT

RULING

1. For determination is the **motion dated 08/08/2025** brought by the **Hon. Rtd. Justice Philip Nyamu Waki** (*the Plaintiff hereafter*) against **Nairobi Insight Media Group Ltd, Mike Kahindi** and **Maxwell Ochieng** (*hereafter the 1st, 2nd & 3rd Defendants/Respondents*) seeking *inter alia*-;

a) *Spent*

b) *Spent*

c) *Spent*

d) *That Honorable Court be pleased issue a temporary injunction restraining the Respondents and or their servants or agents or any person acting under them or on their behalf from publishing, broadcasting, airing, sharing, distributing or in any way publishing the documentary video entitled "The rise and fall of the Akasha Cartel" which was aired on the 1st Defendant YouTube channel vide the link or URL <http://www.youtube.com/watch?>*

v=JsYfuzpuC3Y&t=683s pending hearing and determination of the suit.

e) That the Honorable Court be pleased to issue a temporary injunction restraining the Respondents and or their servant(s) or agent(s) or any person acting under them or on their behalf from uttering or publishing or broadcasting or sharing or airing or distributing or publicizing any further defamatory statements or publications against the Plaintiff or further disseminating or causing to be disseminated any such defamatory, disparaging or false material of or concerning the Plaintiff pending the inter partes hearing and determine of this suit.

f) The costs of this motion be provided for.

2. The motion is brought pursuant to **Section 1A, 1B & 3A** of the **Civil Procedure Act (CPA)**, **Orders 40 Rule 2 & 3** and **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. Justice Phillip Nyamu Waki** on an even date.

3. Despite being accorded ample opportunity the Defendant failed and or opted not to offer a response to the motion.

Directions were equally issued on disposal of the Plaintiff's motion by way of submissions. Only the latter complied. That said, despite non-compliance on the part of the Defendant, 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?*
- b. *Whether the reliefs sought for are tenable in the circumstance?*

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

4. The Court proposes to contemporaneously address issues (a) & (b) as coined above. However, before proceedings any further, as earlier stated, the Court notes that the Defendants opted and or failed to render a response to the motion and or file submissions.
5. As is, the motion stands unopposed. However, it can further be garnered from the proceedings herein, that the Plaintiff seeks interlocutory orders pending determination of the suit by way of temporary injunction, of which, the Plaintiff must establish and or demonstrate certain principles in order to benefit from the said relief.
6. Consequently, despite the Defendants failure to offer any opposition to the motion, the same does not accord the Plaintiff free reign, to wit, the Court will proceed to consider the merits of the motion on the basis of the affidavit material and applicable principles.

Whether the Plaintiff has met the threshold for grant of temporary and mandatory injunctions and whether the reliefs sought are tenable in the circumstances?

7. Having set out the above, 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 & Micugu Wagathara v Shaba Trustees Limited & City Council of Nairobi [2018] KECA 216 (KLR)** and requires no restatement.

8. Alongside the above, the Plaintiff has equally cited **Order 40** 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** are settled.
9. 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;*
 - c) *Assuage any doubts as to (b) by showing that the balance of convenience is in his favour.*
10. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)** 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.
11. 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.

12. 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 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”.

13. 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 aforesaid decisions have been reaffirmed and applied by superior Courts in innumerable subsequent decisions.

14. By his affidavit material, the Plaintiff contends that he is a retired Judge, having had a career in private practice for 20 years and at the judiciary for 24 years. That he has also served as Judge in International Courts among other senior positions locally, to wit, over the course of a long, illustrious and distinguished career, he has built a remarkable reputation based on integrity, excellence and professionalism.
15. He states that on 15/07/2025 the Respondents jointly and severally caused to be published a defamatory article titled "*The rise and fall of the Akasha Cartel*" which was aired on the 1st Defendant YouTube channel vide the link or URL <http://www.youtube.com/watch?v=JsYfuzpuC3Y&t=683s>, which video improperly associates him the Akasha Cartel, a notorious criminal gang which dealt in the trade and trafficking of illicit narcotics drugs in Kenya. That the publication by the Defendants was defamatory, malicious and calculated to injure, disparage and lower his estimation before right thinking members of society.
16. With above in mind, the Court has taken the liberty of reviewing the transcript of the impugned publications set out in part at Paragraph 9 of the Plaintiff's supporting affidavit. What I garner to be the gist of the said publications, it appears to address the Akasha's, to wit, it is purported therein that the latter bribed the Plaintiff who was later suspended over corruption claims. It

goes on to purport that the Akasha's and the Plaintiff participated in a criminal network and or conduit towards receiving bribes and transmitting the same to fellow judges to benefit the Akasha's to the detriment of parties litigating as against the latter. In a nutshell, as deposed in paragraph 11 of the Plaintiff's supporting affidavit, the publication created a negative imputation as to the Plaintiff character.

17. Ex facie, the publications tend to implicate the Plaintiff as being corrupt, complicit and serving at the bidding of the Akasha's. The Plaintiff equally maintains that the publication has been actuated by malice on the premise of the fact that the Defendants neither bothered to investigate the facts of the matter fully nor sought any comment on the allegation made as against the Plaintiff before publication.
18. 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 tangible material tending to support his intended defence of fair comment on a matter of interest. In **Mshindi & another v Ngenye [2024] KECA 1332 (KLR)**, the Court of Appeal referenced the decision emanating from the **Supreme Court of Canada in Wilradeolia v Simpson (2008) SCC 40** wherein the Court succinctly set out the requirements for a statement to be regarded as fair comment, as follows, that-;
"39.:"
 - a. *The comment must be on a matter of public interest.*
 - a. *The comment must be based on fact.*
 - b. *The comment though it can include inferences of fact must be recognizable as a comment.*

c. *The comment must satisfy the following objective test: could any person honestly express that the opinion on the proved facts.*

d. *Even though the comment satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was actuated by express malice”*

The defence of fair comment will therefore, avail where comments are made and not statements of fact. The comments so made must be on matters that are of public interest and the facts upon which the comments are based must be true, or substantially true.”

19. Subsequently, **Gatembu, JA in Munene v Gisesa & another [2025] KECA 2115 (KLR)** while equally addressing himself to the defence of fair comment, cited the Supreme Court of England decision of **Spiller vs. Joseph [2010] UKSC 53; [2011] 1 A.C.852** where he observed that-;

“6the elements that a person relying on the defence of fair comment needs to establish thus: the comment must be on a matter of public interest; the comment must be recognizable as comment, as distinct from an imputation of fact; the comment must be based on facts which are true or protected by privilege; the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based; and the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views.

20. Notably, the circumstances in which publications are made could lead to a suggestion of malice. That said, the Plaintiff has

equally deposed that despite demand to take down the publication of YouTube, issue a public apology and undertake not to publish similar content, the Defendant declined and or failed to act on the said invitation. 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.”

- 21.** 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 34** that guarantees the freedom of the media 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 the Plaintiff has demonstrated a *prima facie* case. As earlier noted, and at the risk of repetition, the Defendants offered no response on the matter.
- 22.** 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 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.

23. 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.

24. The upshot is that the Court finds merit in the Plaintiff's **motion dated 08/08/2025**. It is allowed in the following terms-;

c) A temporary injunction is granted restraining the Defendants/Respondents and or their servant(s) or agent(s) or any person acting under them or on their behalf from publishing, broadcasting, airing, sharing, distributing or in any way publishing the documentary video entitled "The rise and fall of the Akasha Cartel" which was aired on the 1st Defendant YouTube channel vide the link or URL <http://www.youtube.com/watch?v=JsYfuzpuC3Y&t=683s>

pending hearing and determination of the suit.

d) A temporary injunction is granted restraining the Defendants/Respondents and or their servant(s) or agent(s) or any person acting under them or on

their behalf from uttering or publishing or broadcasting or sharing or airing or distributing or publicizing any further defamatory statements or publications against the Plaintiff or further disseminating or causing to be disseminated any such defamatory, disparaging or false material of or concerning the Plaintiff pending hearing and determination of this suit.

a) The Plaintiff is awarded costs of the motion.

Orders accordingly.

Delivered Dated and Signed at Nairobi this 19th day of February, 2026.

JANET MULWA.

JUDGE