



**Nyagah v Maalim & 2 others (Civil Appeal 192 of 2017)
[2023] KECA 121 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 121 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 192 OF 2017
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

NAHASHON NGIGE NYAGAH APPELLANT

AND

ABDULLAHI AHMEDNASIR MAALIM 1ST RESPONDENT

CYPRIAN ADAMA NYAKUNDI 2ND RESPONDENT

AL-NUR MEDIA AFRICA LIMITED 3RD RESPONDENT

(Being an appeal against the ruling and order of the High Court of Kenya at Nairobi (B. Thurania Jaden, J.) delivered on 27th April 2017 in High Court Civil Case No. 96 of 2016)

JUDGMENT

1. The constitutional right to freedom of expression as enshrined in article 33 of the [Constitution](#) of Kenya 2010 is a necessary cog in the wheel of justice in any democratic state. On the other hand, the right to human dignity and the right to privacy is equally important in any democratic society. Ordinarily, there should be no clash between the two rights if there is respect for the boundaries as to what one can say or publish about another person.
2. Since the boundaries between the two rights cannot be marked rigidly and with certainty, cases are bound to emerge, such as the one before us, when a party moves to court to restrain another from publishing what is considered defamatory publications. What can constitutionally be published or said is so diverse that each case should be determined by its own facts. This is the scenario that the trial court found itself in when it was called upon by the appellant, Nahashon Ngige Nyagah to issue an injunction against the respondents to restrain them from publishing defamatory publications, which the appellant deemed to be a breach of advocate/client confidentiality.



3. By way of background, the appellant instituted High Court Civil Case No. 96 of 2016 against the respondents seeking a number of injunctive orders for what they claimed were defamatory publications. It is noteworthy that the dispute revolves around two companies: Tatu City Limited and Kofinaf Company Limited. Two sets of directors, one led by the appellant herein and another by one, Stephen Armstrong Jennings, are fighting over the shareholding and directorships of the said companies. As a result, High Court Civil Suit No. 46 of 2015 in which both camps are fighting over the control of the two companies, was filed in court.
4. The appellant states that, in the course of instituting the said Civil Suit No. 46 of 2015, he consulted and instructed the 1st respondent, Abdullahi Ahmednassir Maalim, to act for him at an agreed fee of Kshs.20 Million, but the 1st respondent allegedly jumped ship, took over the suit on behalf of the other camp and withdrew the suit.
5. The respondents, on their part, have their own version of facts as to the background to Civil Suit No. 46 of 2015. According to them, the National Police Service had recommended that the appellant be charged with the offence of conspiracy to defraud the owners of the property, Purple Saturn Properties Ltd. The 1st respondent denied being instructed to act for the appellant, but stated that the appellant had only approached him with a request to contact a judge, for the purposes of getting an interim injunction in the suit, which request he declined. The 1st respondent claimed that he was appointed to act for the directors of Tatu City Ltd, and that the previous advocates who were on record did not have instructions to act.
6. We have said enough about the background to the suit and the ongoing fights in relation to the directorship and legal representation. This suffices for the purpose of this appeal and we shall now fast-forward to what triggered the instant appeal.
7. On April 1, 2016, the appellant filed HCCC No. 96 of 2016 against the respondents. In a 115 - paragraph plaint, the appellant pleaded that he had given instructions to the 1st respondent and, in the process, released a number of confidential documents relating to his case. The appellant stated that the 1st respondent declined to act for him and switched sides to the party with whom they had a dispute. The appellant gave an exhaustive narration of what he considered to be serious defamatory publications by the respondents. In the plaint, the appellant sought several prayers for damages and injunctive orders.
8. Contemporaneously with the suit, the appellant also filed a notice of motion dated April 1, 2016 seeking injunctive orders to restrain the respondents from publishing or causing to be published any news items, statements, articles, words, images, pictures, cartoons and caricatures on internet, newspapers, facebook, twitter, youtube, WhatsApp or any media whatsoever. The notice of motion was supported by a 107- page affidavit sworn by the appellant where he narrated what he considered to be defamatory conduct of the respondents.
9. In response, the 1st and 3rd respondents filed grounds of opposition together with a replying affidavit by the 1st respondent. The 1st respondent denied ever meeting the appellant or receiving any instructions to act for him. In his 47 - paragraph replying affidavit, the 1st respondent denied all the allegations in the notice of motion. It is not necessary to recite the contents of the said affidavit, save to state that he deponed that any publication that he did was based on facts, was truthful, justified, and was a comment on matters of immense public interest.
10. The parties filed their respective written submissions and, in a ruling, dated April 27, 2017, the High Court judge (B. Thurania Jaden, J.) dismissed the notice of motion with costs. The relevant part of the ruling by the learned judge is as follows:



30. The freedom of expression of the media as guaranteed under article 33 of the Constitution of Kenya in the bill of rights is not absolute. There are limitations set out in article 34 of the Constitution. The Constitution balances the rights of freedom of expression with the rights and reputation of others. I am persuaded by the case of *Cheserem (supra)* where it was stated;
- “Before I conclude I will try to correct three things. First, the right of a journalist to freedom of speech and expression as guaranteed by the Constitution of Kenya is not absolute and it is not correct for the Respondents to say that, that right cannot be taken from the press. I have already discussed the limitation of the freedom of expression elsewhere. Secondly, it is not sufficient and I think it is dangerous and not good for a journalist to disseminate information based solely on good faith. He should base the information on factual truth if he expects the law to protect him. Thirdly, it is not correct to say as the Respondents say that; “Where public interest conflicts with private interest, the public interest shall prevail.” This is public interest (versus) private interest in defamation actions and the end result is not always the same. The result can be in favour of the public interest or in favour of the private interest. If there is a substantial risk of grave injustice and the private interest in preventing the publication the Applicant seeks to prevent outweighs the public interest, then the court will declare that private interest prevails over public interest.”
31. The considerations for the grant of an injunction in libel cases as set out in *Gatley on libel* 12th Edition are:
- a. The statement is unarguable defamatory.
 - b. There are no grounds for concluding that the statement is true.
 - c. There is no defence which might succeed.
 - d. There is evidence of an intention to repeat or publish the defamatory statement.
32. Turning to the case at hand, the publications complained of reflect the Applicant as having engaged in criminal conduct, fraud, bribery and having interfered with criminal investigations and court cases. These statements if they have no truth in them are clearly defamatory. The Respondents have pleaded fair comment and justification in the affidavit evidence before the court and the amended defence filed by the 2nd Respondent. The 1st Respondent in his replying affidavit has exhibited an investigation report by the National Police Service which report recommended that the Applicant be charged with the offence of conspiracy to defraud. Whether the publications in question are true statements or not it is difficult for the court to tell at this stage of the case. There is no reason for this court to prefer the affidavit evidence of any one side.
33. The Applicant’s affidavit evidence talks about the 1st Respondent having procured the writing of the letters complained of, having procured the publication of defamatory letters to The Standard Newspapers, Weekly Citizen, The Daily Nation, The People Daily, the Citizen etc and to various public offices, that the 1st Respondent procured the creation of tweets and retweets complained of and the creation of the hashtags complained of. While the term procured has been used several times in the Applicant’s affidavit in support of the application, there are no details of how the 1st Respondent procured the said publications.



34. On whether the 1st Respondent owes the Applicant any fiduciary duty not to disclose any confidential information to the detriment of the Applicant and to the benefit of other third parties, whether the 1st Respondent was instructed by the Applicant or not also boils down to the Applicant's word vis- a-viz the 1st Respondent's word. The confidential information and documents said to have been given to the 1st Respondent have not been disclosed. The pleadings and names of advocates in the ongoing cases are matters that are in the public domain.
 35. The application herein seeks injunctive orders in respect of "all pending civil and criminal matters relating to Tatu City and Kofinaf". The prayers are wide, nebulous and far ranging. Such orders ought to be sought within the said civil and criminal cases. It is within the said proceedings that an order can be made whether there ought to be any reporting or not.
 36. The freedom of expression as guaranteed under article 33 and article 34 of the Constitution is not absolute. The Constitution enjoins every person to respect the rights and reputation of others. Even the freedom of the media is not a ticket to vilify others through libelous publications. There is no public interest in false publications. Whether the Respondents are likely to repeat any of the publications the subject of the complaint herein will be at their own peril as to the consequences if the same are untrue.
 37. Prima facie, the application fails to meet the threshold for the grant of the orders sought. Consequently, I dismiss the application with costs."
11. Aggrieved by the said ruling, the appellant filed the instant appeal listing 13 grounds. In their written submissions dated June 27, 2019, the appellant collapsed the grounds and argued them under the following headings: the guiding principles for granting of injunctions in defamation cases; the statements are unarguably defamatory; that no basis was laid to conclude that the impugned publications were true; that there was no defence that was likely to succeed; the weight of the appellant's rights to reputation and the respondent's intention to repeat publication; and the scope of confidential information.
 12. We need not recite the appellant's submissions in full, but take the liberty to summarize them as follows:
 - a. Relying on *Gatley on Libel and Slander* 12th Edition, the appellant states that the applicable principles for the grant of interim injunctions in defamatory suits are:
 - i. the statement is unarguably defamatory;
 - ii. there are no grounds for concluding the that statements may be true;
 - iii. there is no defense; and
 - iv. there is evidence of an intention to repeat or publish the defamatory statement.
 - a. that the statements by the respondents were defamatory publications, that portrayed the appellant as a land thief, a fraudster, and a criminal;
 - b. that the respondents did not lay a basis, to sustain a conclusion that the impugned publications were true;
 - c. that the respondents did not demonstrate the existence of defences that were likely to succeed at the trial;



- d. that the appellant’s right to reputation far outweighed the public interest that was claimed by the respondents;
 - e. that the appellant had laid a basis to demonstrate that there was an intention to repeat the publication;
 - f. the appellant faulted the High Court for holding that it could seek the orders in different courts where the issues were live. To the applicant the High Court was the right forum to seek the injunctive orders as the decision of the court would have stopped further publications;
 - g. that the High Court erred in failing to restrain the 1st respondent from misusing confidential information that he had obtained from the appellant;
 - h. finally, the High Court did not properly apply the facts and the guiding principles in applications seeking injunctive reliefs and, if the court had properly applied the principles in *Gatley* (supra), the irresistible conclusion the court would have come to was that this was a proper case for granting of injunctive orders.
13. In opposition to the appeal, the 1st and 3rd respondents filed written submissions dated July 2, 2019. We need not recite the submissions in full, but the following can be gleaned from them:
- a. In reply to grounds 1, 3, 4, 5,8, 9, 10, 12, and 13 it was argued that the appellant’s case did not meet the threshold for granting injunctions. The 1st and 3rd respondents relied on the cases of *Cheserem vs. Immediate Media Services* (2000) 2 EA 371 and [Ahmed Adan vs. Nation Media Group Limited and 2 others](#) (2016) eKLR;
 - b. That the appellant did not establish a prima facie case, as a majority of articles complained of were authored or published by third parties;
 - c. That the learned judge exercised her discretion properly, and that she correctly applied the principles for granting injunctions in defamation claims;
 - d. Regarding grounds 2, 6, and 7, the 1st and 3rd respondents submit that the defences of fair comment, justification, and absolute privilege were available to them;
 - e. That the appeal has no merit and should not succeed.
14. On his part, the 2nd respondent, Cyprian Adama Nyakundi filed written submissions dated October 14, 2022 and stated as follows:
- a. The grounds of appeal number 2, 11, and 12 of the appeal did not touch on him;
 - b. Grounds of appeal number 1, 2, 3, 4, 5, 6, 7, 8, and 13 speak to only one issue, which is the applicable principle of granting an injunction in defamatory cases. He submitted that the prayers sought were not precise or comprehensive enough. Therefore, the trial court properly exercised its discretion in dismissing the prayers for an injunction.
15. We wish to state at the outset that though the parties have made extensive submissions on whether the publications the subject of the application for injunction were defamatory or not, this is an interlocutory appeal. Therefore, the main issue for determination is whether the learned judge exercised her discretion properly in refusing to grant the orders of injunction sought by the appellant. The determination as to whether the publications were defamatory or not will be dealt with by the trial court. A determination of the issue of whether the statements were defamatory or not in an



interlocutory appeal may embarrass the trial court. We will therefore make our determination on the grounds of appeal with the caution that we cannot deal with the merits or otherwise of issues that require a determination of facts.

16. We note that when the grounds of appeal are looked at in totality, they can be summed up as follows: that the appellant had a client-advocate relationship with the 1st respondent, and that the 1st respondent breached the fiduciary duty owed to the appellant; that the 1st respondent caused third parties to publish defamatory statements concerning the appellant; that the 1st and 3rd respondents published statements that were defamatory to the appellant; that the appellant had placed enough material before the learned judge to show that the statements by the respondents were defamatory; that if the court had properly addressed itself to the guiding principles, it would have granted the injunctive reliefs that were sought; and that this appeal has merit and should be allowed.
17. We also note that, on the other hand, the 1st and 2nd respondents strongly opposed the application for an injunction, and that their position can be abridged as follows: that grant of injunctions is an exercise of judicial discretion, and that the learned judge exercised her discretion properly; that the court should at this stage refrain from making conclusive views, that may embarrass the trial court; that the 1st and 2nd respondent did not cause any third party to publish defamatory statements against the appellant; that the statements they published amount to fair comment, and that they are thus entitled to defences of fair comment and justification; and that this appeal has no merit.
18. On his part, the 2nd respondent's submissions amount to a denial of all the allegations against him. He states that the appellant did not place any material before the trial court, that demonstrated any defamatory publication. As to the 2nd respondent, the orders sought against him were impractical, strange, nebulous, and illegal.
19. We have considered the record of appeal and the parties' submissions. In answer to all the grounds raised by the appellant, the broad question that we need to deal with in the instant appeal is whether this Court should interfere with the exercise of jurisdiction of the trial court. At this point, it really does not matter whether we would have made a different decision if we were in the shoes of the trial court. That is not the test, as we cannot substitute the trial court's discretion with ours.
20. The principles applicable when this court is dealing with an appeal that revolves around the exercise of discretion by a trial judge have been the subject of debate in many cases. It is a contest that has been fought in the legal ring for years and the applicable principles have been concretized. We will highlight some of the principles that have emerged over the years:
 - a. In *Mureithi v City Council of Nairobi*, [1979] eKLR it was held that an appeal lies to this court against an order granting or refusing an interim injunction which is a matter within the discretion of the court below, and that this court will interfere only if it is shown that the discretion has not been exercised judicially
 - b. In *KD Shah v Prakash Vrajlal Malkan & another* [1994] eKLR it was held that the Court of Appeal will not interfere with the exercise of a trial court's discretion unless it is satisfied that the decision is clearly wrong because the trial court has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and, in doing so, arrived at a wrong conclusion.
 - c. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court held as follows:



- i. The power of a court in an application for an interlocutory injunction is discretionary;
 - ii. The Court of Appeal may only interfere with the exercise of a court's judicial discretion if satisfied:
 1. The judge misdirected himself on the law; or
 2. That he misapprehended the facts; or
 3. That he took account of considerations of which he should not have taken account; or
 4. That he failed to take account of consideration of which he should have taken account; or
 5. That his decision, albeit a discretionary one, was plainly wrong.
 - iii. The principles for granting an interlocutory injunction are:
 1. The applicant must show a prima facie case with a probability of success;
 2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;
 3. If the court is in doubt, it will decide an application on the balance of convenience.
 - d. In *Mbogo & another v Shab* [1968] EA 93 the court held that the principles governing the exercise of judicial discretion are twin. Firstly, there are no limits or restrictions on the judge's discretion except that if the judge does so, it must be on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Secondly, this discretion is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
21. It is clear that the principles are now well settled and this Court can only interfere with the discretion of the trial judge if: the trial court misdirected itself in some matter and as a result, reached the wrong decision; the judge is clearly wrong in the exercise of his or her discretion; and as a result, there has been a miscarriage of justice.
 22. We have carefully read the ruling of the learned judge. The learned judge was confronted with highly contentious issues of facts as to whether there was an advocate-client relationship between the appellant and the 1st respondent; whether the 1st respondent obtained confidential information from the appellant; whether the 1st respondent conspired with third parties to publish defamatory statements concerning the appellant; whether the appellant was the subject of an investigation by the police; and whether the defence of fair comment and justification was available to the respondents.
 23. Upon considering all the issues, the learned judge, in exercise of her discretion, dismissed the application for injunction. Considering the material placed before us, there is nothing to demonstrate that the learned judge misdirected herself on some matters or that she was clearly wrong in her exercise of discretion in a manner that caused a miscarriage of justice. In the circumstances, it is our holding that the learned judge exercised her discretion properly, and that there are no proper grounds to justify the disturbing of her ruling. We wish to conclude by saying that we are alive to the fact that freedom of expression must always be exercised in a manner that respects the dignity and the rights of an



individual. We will leave it to the trial court to hear and determine whether the respondents are guilty of defamation. At this stage, we note that the factual position is highly contested and therefore one cannot fault the manner the learned judge exercised her discretion.

24. In view of the foregoing, it is our finding that the appellant has failed to demonstrate that the learned judge did not exercise her discretion properly. Accordingly, we hold that this appeal has no merit and it is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

K. M'INOTI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

