



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OKWENGU, MUSINGA & SICHALE, J.J.A.]

CIVIL APPEAL NO. 409 OF 2017

BETWEEN

KEVIN ISIKA MULE.....APPELLANT

AND

HFC LIMITED.....RESPONDENT

(Being an appeal from the ruling of the Employment & Labour Relations Court

at Nairobi (Monica Mbaru, J.) dated 28th September, 2017

IN

E&LRC CAUSE NO. 1445 OF 2016)

JUDGMENT OF THE COURT

The appellant, **Kevin Isika Mule**, filed a suit against **HFC Limited**, the respondent herein, in the Employment and Labour Relations Court (ELRC). The suit therein has since been determined in favour of the appellant.

However, during the pendency of the suit, the respondent filed an interlocutory application dated **27th January, 2017**. In the motion, the respondent sought the following orders:

“ (i) Spent

(ii) Pending the hearing and determination of this application inter-partes, an order by way of a super injunction be issued to restrain the publication of this application and/or any order granted pursuant to this application and further any article relating to the materials filed in these proceedings or the publication or otherwise disclosure or making public any confidential information regarding HFC Limited, its business, directors, shareholders, members of staff or its customers and their accounts,

(iii) Pending the hearing and determination of the suit herein, an order by way of a super injunction be issued to restrain the publication of this application and /or any order granted pursuant to this application and further the publication of any article relating to the materials filed in these proceedings or the publication of or otherwise disclosure of or making public any confidential information regarding HFC Limited, its business, directors, shareholders, members of staff or its customers and their accounts,

(iv) Any such orders as may be necessary to facilitate a fair and just trial of this action,

(v) The costs of this application be in the cause”.

The motion was supported by the affidavit of **Patrick Mokaya**, the Director, Business Development of the respondent Bank, sworn on **27th January, 2017**. The gist of the respondent’s complaint was that there was “... **A lot of false and malicious publication both on the**

mainstream (sic) alternative media” touching on the respondent and which publications were injurious to the business of the respondent.

The appellant did not file a replying affidavit but exercised his right to file grounds of objection raising points of law. In a ruling delivered on **28th September, 2017**, **Mbaru, J.** found as follows:

“Accordingly, pending the hearing and determination of the suit herein, an order by way of a super injunction is hereby issued restraining the publication of this application, the orders granted, the pleadings herein and stoppage of further publication of any article relating to the materials filed in these proceedings or the publication of or otherwise disclosure of or making public any confidential information regarding the respondent (HFC Limited), its business, directors, shareholders, members of staff or its customers and their accounts”.

The appellant was aggrieved with the said outcome and in a Memorandum of appeal dated **4th December, 2017** raised ten (10) grounds of appeal. In his written submissions, these grounds were summarized into five (5) issues of law.

Firstly, the appellant contended that the ELRC issued a blanket injunction in the absence of specificity on when matters are privileged so as to be protected from public scrutiny to the detriment of the respondent’s customers who needed to know of the mal-practices therein. Several authorities were relied upon. Secondly, the appellant postulated that the order of a super injunction was an affront to the appellant’s freedom of expression as guaranteed by **Article 33** of the Constitution which provides that **“every person has a right to freedom of expression, which includes –**

(a) freedom to seek, receive or impart information or ideas;” He termed the court’s action as ‘gagging’ him.

Thirdly, the respondent submitted that the orders of the ELRC was an affront to **Article 19** of the Universal Declaration of Human Rights and **Article 19** of the **International Covenant on Civil and Political Rights** which enshrined the fundamental right to freedom of expression and opinion.

Fourthly, that it is a tenet of justice that he who comes to equity must come with clean hands, that the respondent herein put out press statements to counter the alleged offending article, thus defending itself in the public domain whilst impugning the appellant’s case. It was his view that having done so, the respondent was undeserving of this court’s sympathy.

Finally, the appellant contended that no evidence was adduced on the respondent’s contention that the published article was going to damage the respondent’s reputation.

To counter the appellant’s submissions, the respondent filed its written submissions dated **30th September, 2019**. On the issue of whether the court should provide jurisprudential guidance on the concept of super injunctions, the respondent’s view was that this cannot be done in abstract or merely for academic purposes as there had to be a real dispute, which in the circumstances of this appeal was non-existent, the suit filed by the respondent having been determined by the ELRC.

On whether the grant of the order of a super injunction was proper, the respondent contended that the affidavit in support of the motion disclosed the manner in which the respondent was aggrieved; that there was no denial by way of a replying affidavit of the respondent’s averments therein and that there were special circumstances to warrant the issuance of an order of a super injunction.

On the breach of the appellant’s constitutional rights and rights under international law, the respondent contended that the injunctive order was not specific to the appellant but it was directed to third parties that were using documents filed by the appellant to write false and malicious articles in respect of the respondent’s business; that the appellant has no reason to complain unless he was using the third parties to cause the publication and that the super injunction was granted pending the hearing and determination of the appellant’s suit, which has since been heard and determined by the ELRC and hence the orders granted therein had since lapsed.

On **20th January, 2020**, the appeal came up before us for plenary hearing. **Mr. Mburu**, learned counsel for the appellant, whilst relying on the appellant’s written submissions dated **8th August, 2019** and a case digest of the same date, urged us to develop jurisprudence on ‘*super injunctions*’.

In his oral highlights, **Mr. Chacha Odera**, learned counsel for the respondent, relied on the respondent’s submissions dated **30th September, 2019** as well as a case digest dated the same date. He pointed out that the appellant did not file a replying affidavit in response to the affidavit in support of the motion and hence, the averments therein were not controverted. He also pointed out that the appeal before us was an academic exercise.

In a brief rejoinder, **Mr. Mburu** maintained that the appellant had not published any defamatory articles of the respondent but this notwithstanding, the ELRC issued orders gagging him.

We have considered the record, the rival written and oral submissions, the authorities cited and the law.

For a start, it is not controverted that this is an appeal arising from an interlocutory order. The purport of the order was that:

“Accordingly, pending the hearing and determination of the suit herein, an order by way of a super injunction is hereby issued restraining the publication of this application, the orders granted, the pleadings herein and stoppage of further publication of any article relating to the materials filed in these proceedings or the publication of or otherwise disclosure of or making public any confidential information regarding the respondent (HFC Limited), its business, directors, shareholders, members of staff or its customers and their accounts”.

It is also not controverted that the suit filed by the appellant against the respondent has since been determined. The life of the interlocutory order was of effect during the pendency of the substantive suit. To this extent, we find favour with the respondent’s submissions that courts exist for resolution of real disputes and real controversies as espoused in ***Legal Brains Trust (LBT) Limited vs. Attorney General of the Republic of Uganda [2012] eKLR*** wherein it was held:

“... in this regard, it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical questions – namely, those concerning which no real, live dispute exists. A court will not hear a case in the abstract, or one which is purely academic or speculative in nature about which there exist no underlying facts in contention. The reason for this doctrine is to avoid the hollow and futile scenario of a court engaging its efforts in applying a specific law to a set of mere speculative facts. There must be pre-existing facts arising from a real live situation that gives rise to, for instance, a breach of contract, a tortious wrong, or other such grievance on the part of one party against another. Absent such a dispute, the resulting exercise would be an abuse of the court’s process...”.

The gist of the applicant’s complaint having dissipated, we find that there is no live issue for our consideration.

As to whether the injunction order was merited, we find that the appellant himself denied having authored libelous articles against the respondent. We also note that he did not file a replying affidavit in response to the supporting affidavit of **Patrick Mokaya** sworn on **27th January, 2017** in support of the motion dated **27th January, 2017**. If this be the case, then why is he complaining about being gagged?

Again, if this be the case, he cannot be heard to say that his freedom of expression and opinion was flouted. He cannot blow hot and cold.

It is in view of the above that we find no merit in this appeal. It is hereby dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 8th Day of May, 2020.

D. K. MUSINGA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR