



**Maasai Mara Wildlife Conservancies Association (Suing through its registered officials Jackson Mpario -Chairman, John Sengeny- Secretary & Karl Von Heland -Treasurer) v Kariankei (Civil Suit E002 of 2023) [2024] KEHC 2629 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2629 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL SUIT E002 OF 2023  
F GIKONYO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**MAASAI MARA WILDLIFE CONSERVANCIES ASSOCIATION (SUING THROUGH ITS REGISTERED OFFICIALS JACKSON MPARIO - CHAIRMAN, JOHN SENGENY- SECRETARY & KARL VON HELAND - TREASURER) ..... PLAINTIFF**

**AND**

**FRED KARIANKEI ..... DEFENDANT**

**RULING**

1. In the application dated 26.05.2023, the plaintiff/applicant is seeking for: -
  - i. An injunction restraining the defendant whether, by himself, servants, or agents from further posting and publishing the defamatory words uttered on his Twitter account username @fskariankei as identified by uniform resource locator (URL) <https://twitter.com/fskariankei?lang=en>, on his Facebook account username Fred Kariankei as identified by uniform resource locator (URL) <https://www.facebook.com/fred.kariankei/>, on the article published in the star newspaper of 16<sup>th</sup> May 2023, on email dated 12<sup>th</sup> May 2023 or any other or further words and publications of like effect disparaging and injurious to the plaintiff pending the hearing and determination of this suit.
  - ii. Mandatory injunction compelling the defendant whether by himself, servants, or agents to take down, delete, retract, or purge the defamatory words uttered on his Twitter account username @fskariankei as identified by uniform resource locator (URL) <https://twitter.com/fskariankei?lang=en> and on his Facebook account username Fred Kariankei as identified by uniform resource locator(URL) <https://www.facebook.com/fred.kariankei/> and/or any other



places the said materials are published or stored pending the hearing, and determination of this suit.

- iii. That the costs of this application be provided for.
2. The application is based on the grounds set out in the application and the supporting affidavit sworn by Daniel Ole Sopia on 26.05.2023.

### **The Plaintiff/Applicant's Case.**

3. On diverse dates between 2022 and 2023 the defendant falsely and maliciously wrote, published, and/or caused to be published and disseminated online and in mainstream media outlets of and concerning the plaintiff various tweets, posts, articles, and materials in way of its business, conduct, and trade, the following:

- i. On 13<sup>th</sup> January 2022 on Twitter using the username @fskariankei:

“MMWCA @MConservacies is the systematically killing the voice of landowners in the mara. In august last year I asked @USAIDKenya oversight MMWCA against violation of its policies and right of land owners. of which they refused@m\_ogada @USAID @nature\_org @ntvkenya @citizentvkenya”

“On 17/1/2022 Lemek Conservancy land owners are having a general meeting to validate a management/investor of their choice on the hand MMWCA is sponsoring a group to force it's preferred management/investor of their choice. Should any chaos occur @USAIDKenya share the blame”

- ii. On 3<sup>rd</sup> March 2022 on Twitter using the username @fskariankei:

“#wordwildlifeday22 we celebrate our young Mara Isinya Conservancy. We purposed to benefit the community and protect endangered species like maasai giraffe. Shame @MConservacies has been a major saboteur just for the ego of its CEO .@nature\_org @kwskenya @USAIDKenya”

- iii. On 31<sup>st</sup> May 2022 on Twitter using the use.rname @fskariankei:

“Entities led by Maasai are entrenching neo-colonial conservation in Maasai mara 4the benefit of investors and a cartel revolving around the long-term chair of KWCA & MMWCA at the expense of equitable sharing, exclusion of others and mostly 2 weaken landowners voiceincOservati”

- iv. On 6<sup>th</sup> June 2022 on Twitter using the username @fskaiankei:

“This article underscores the conniving impunity of MMWCA and KWCA to entrench neo-colonial conservation in MAASAI MARA and puts names to faces of neo-colonial conservation ‘home guards’ @NationBreaking @nauraljustice @survival @VMatiru @nodealfornature”



- v. On 22<sup>nd</sup> June 2022 on Twitter using the username @fskariankei:
- “Ticking time bomb in Maasai Mara! As the regime in Tz uses bullets in Ngorongoro & Loliondo in the name of conservation @MConservancies and its financiers are using donor funds to hive off over 500k acres around Maasai Mara and displace 15k Maasai using power of attorney”
- vi. On 2<sup>nd</sup> July 2022 on Twitter using the username @fskariankei:
- “Ticking time bomb! In Masai Mara with funding from MMWCA, conservancies have robbed over 15000 indigenous Maasai rights to their land and conferred it to scrupulous individuals (LOC) using power of attorney for 25 years. 150000 acres are no longer in landowners’ hands unknowingly”
- vii. On 22<sup>nd</sup> September 2022 on Twitter using the username @fskariankei:
- “MMWCA @MConservancies political and narrow-minded conservation policies of exclusion in donor-funded development programs and in financial benefits is endangering wildlife @USAIDKenya @WWF @UNDP @nature\_org @USAmbKenya @noradno @norfund @tusk\_org @Save\_Giraffe @giraffe @kwsKenya”
- viii. On 9<sup>th</sup> October 2022 on Twitter the username @fskariankei:
- “This project has been used to discriminate, dominate, disempower communities by imposing a divisive policy of MMWCA that takes away their land rights and will bring conflict in future @USAID @USAIDKenya @USAmbKenya @washingtonpost @nytimes @K24Tv @Nation Africa @StandardKenya”
- ix. On 16<sup>th</sup> January 2023 on Twitter using the username @fskariankei:
- “After two years of denying Mara Isinya Conservancy rightful conservation money for taking land rights. MMWCA is back this time to promise donor funds if they support a clan relative of MMWCA official as leader. They have done this as a condition for supporting new conservancies.”
- “nepotism at MMWCA. While mmwca effort to control conservancies is largely to override interests of investors over landowners now a new trend is emerging where all new conservancies supported by MMWCA has a relative of senior official at MMWCA.”
- “Its also locally known that the first local girl to be employed by MMWCA was on condition she marries a senior MMWCA official. But MMWCA shamelessly has a well donor funder called gender project.”
- “failure by donors 2 hold MMWCA 2 account is and will course community disunity, disharmony and finally work against conservation. @USAID @UNDP @nature\_org @USAmbKenya @AJEnglish



@nordno @norfund @washingtonpost @WWF  
@tusk\_org @naturaljustice @Survival @LGT\_VP  
@WWFUS @maliasili\_org”

x. On 2<sup>nd</sup> February 2023 on Twitter using the username @fskariankei:

“When @MConservacies continue to force communities leaders they don't want these donors who support them become part of it @USAID @UNDP @nature\_org @USAmbKenya @noradno @norfund @tusk\_org LGT\_VP @WWFUS @maliasili\_org @WWF @StandardKenya @NationalBreaking @m\_ogada @VMatiru”

“Despite community resolve, MConservacies is forcing new conservancies to elect or employ relatives of MMWCA senior officials as a condition for donor funds support. It's corruption! @USAID @UNDP @naure\_org @USAmbKenya @norano @norfund @tusk\_org @LGT\_VP @WWFUS 2maliasili\_org”

xi. On 21<sup>st</sup> March 2023 on Twitter using the username @fskariankei:

“MMWCA continues 2pursue policies that enslave the Maasai in conservation. When illiterate Maasai are encouraged 2take long-term loans instead of savings, it's designed 2 make them slaves of conservation. @USAID @Survival @UNDP @LandRightsNow @nodealfornature @WWFUS @IPRightsIntl”

xii. On 18<sup>th</sup> April 2023 on Twitter using the username @fskariankei:

“I can relate with this/ @MConservacies has been advocating for conservation in the absence of justice and rights of indigenous maasai of maasai mara , Kenya, supported by @USAID @WWFUS @nature\_org @bandfoundation @CJRFund they exploit high poverty and illiteracy among landowners.”

xiii. On 24<sup>th</sup> April 2023 on Facebook using the username fred kariankei:

“of all success conservation songs in the Maasai Mara lies untold truth.” Followed by a photograph with the following words:

“The problem with neo-colonial conservation in Maasai Mara as currently led by MMWCAThe people who run and “own” MMWCA and use donor funds to dominate against communities that do not tow their political line rather than equitable sharing for prosperity of communities in conservation are same people.The people who arm-twisted communities in Mara North Conservancy, Olaremotorogi Conservancy Lemek and Naboisho Conservancy among others into 25 yr representation by land brokers without option others with power of attorney are the same people.The people who key facilities in the conservancies like airstrips are the same people.The people who own greater Mara management that is meant to control all development in the Mara conservancies are the same people.The people who allocated themselves community land title where a key guiding school in the Mara is are the same people.The people who play favouritism with well-wishers



scholarship to attend koyiaki guiding school rather than on merit are the same people. The people who are using donor funds as a condition to employ their relatives and clansmen are the same people. The people who are by design senior officers of MMWCA without any academic requirement are the same people. The people who used Covid 19 support for conservancies fund the advance interest of business in Maasai Mara are the same people. The people in the heart of the conflict in Mara north conservancy and Naboisho Conservancy that turned bloody are the same people. The people who have confined donor funded projects of benefit only 2 or 3 conservancies of over 20 conservancies are the same people. The people who tell other landowners to vacate their land to create conservancies but build permanent homes in the same area are the same people. The people who sponsor conflicts in other conservancies to prevent people they fear will challenge their dominance are the same people. In summary conservation in Maasai Mara through MMWCA has been captured by a cartel that must be freed to realize sustainable conservation.”

4. These false and malicious tweets, posts, articles, and materials were uttered, written, published, and disseminated by the defendant using his Twitter username @fskariankei as identified by uniform resource locator (URL)/ web address <https://twitter.com/fskariankei?lang=en> and on the defendant's Facebook page username Fred Kariankei identified by uniform resource locator (URL)/web address <https://www.facebook.com/fred.kariabkei/>.
5. On 8<sup>th</sup> May 2023 the plaintiff wrote to the defendant asking him to cease and desist from uttering, publishing, or disseminating further false and malicious materials against the plaintiff. The plaintiff also asked the defendant to take down the libelious and defamatory materials but the defendant has refused to comply with any of these demands and/or to make amends.
6. Instead of complying with the cease and desist, the defendant doubled down and continued to utter, publish, and disseminate further libelous and defamatory materials against the plaintiff as follows:
  - i. On 16<sup>th</sup> May 2023 in the Star newspaper, the defendant caused to be published an article in which he made, inter alia, the following false, malicious, and defamatory utterances:

“USAID drawn into Maasai Mara land lease dispute

Community says the arrangement between them and the Maasai Mara Wildlife Conservancies Association has violated their rights to land ownership.

Kariankei said he has been challenging the conservation model ‘that is edging out Maasai landowners out of their land to slums to give room for conservation investors.’

He said there is serious violation of USAID policy on the rights of the indigenous people for partnering with MMWCA

For instance, he said, on June 28, 2021 MMWCA facilitated a meeting with Lemek land owners with a view to forming Lemek Conservancy. Kariankei said the draft lease showed that the community was to lease their land to a company owned by a few local politicians and wealthy members of the community whose formation was facilitated by MMWCA.”



- ii. From the news of 16<sup>th</sup> May 2023 above, the plaintiff also learned that the defendant had written false and malicious emails to some of the plaintiff's donors such as USAID with the sole intention of getting them to cut funding to the plaintiff. The article states:

“Kariankei has since written a number of emails to USAID as they provide funds towards projects being rolled out by MMWCA.

On January 17, 2023, USAID Mission director's office for Kenya and East Africa replied to Kariankei acknowledging receipt of one his emails. ‘your message is well noted and we are looking into the concerns raised regarding the alleged violation of USAID policy. We apologize if you had difficulty reaching us and we will be in touch soon.’”

- iii. On 12<sup>th</sup> May 2023 the defendant sent an email to one of the plaintiff's donor partners, the Norwegian Agency for Development Cooperation (NORAD), making further libelious and defamatory statements against the plaintiff with the sole intention of getting the donor to cut funding from the plaintiff. He wrote as follows:

“From: Fred kariankeif=skariankei@gmail.com

Sent: fredag 12. mai 2023 13:19

To: minascurta, inaina.minascurta@norad.no

Cc: kirkvaag, ole Henrik greve ole.kirkvaag@norad.no; skjonsberg, svend thorleif <svend.thorleif

Subject: Re: Case No. 23007

Dear Ina and colleagues, I believe you are still considering my concerns on MMWCA. I wish to bring to your attention that in the past week using the police I was detained for 7 days without trial or being charged by MMWCA through its CEO Danial Sopia over a tweet on their accountability on gender issues. Though they cited the tweet, they have been looking for an avenue to shut me off not to raise any issues against MMWCA or their approaches to conservation. Indeed, when I was released on bond without being charged of any crime, MMWCA served me with a demand letter that I should delete all concerns I have raised with donors and apologize, failure to do so, they will open civil cases against me. They arrested me to harass and intimidate me and my family and tried to shut me off once and for all. MMWCA should answer these issues instead of punishing those of us who are raising them. Using the police, they have taken my phone with all my passwords for an alleged forensic investigation without a court order to do the same, obviously to snoop on what I have been sharing with their donors. I am raising this with you so that the truth cannot be buried and if anything happens to me and my family you are aware and that you don't stop holding them accountable.

Please find attached a newspaper reports on my arrest, demand letter from MMWCA and an online report through this link

<https://www.k24tv.co.ke/news/maasai-land-activist-released-on-bail-102771/>”

kind regards,

fred kariankei.



7. The defendant has continued to write these defamatory materials to organizations that the plaintiff partners with, with the sole intention of further injuring the plaintiff's reputation and standing and eventually incapacitating it.
8. The libelous and defamatory tweets, posts, articles, and/or materials have been shared and continue to be shared online by several Twitter users with the defendant's consent and /or approval.
9. Further, the defendant tagged and included several door organizations that the plaintiff partnered with, mainstream media/news organizations, and other organizations in the libelous and defamatory tweets, posts, articles, and materials thus ensuring maximum damage and harm to the plaintiff's reputation and standing among the tagged organizations and their audiences. Some of the organizations and identities tagged by the defendant in the libelous and defamatory materials include:
  - i. USAID Kenya
  - ii. ISAID Embassy Kenya
  - iii. The Nature Conservancy
  - iv. Kenya Wildlife Services
  - v. Norwegian agency for development cooperation (NORAD)
  - vi. Nor Fund
  - vii. United Nations Development Program (UNDP)
  - viii. World Wildlife Fund UD(WWF-US)
  - ix. Land rights now organization
  - x. Climate justice resilience fund
  - xi. Tusk trust
  - xii. Washington Post
  - xiii. New York time
  - xiv. Al Jazeera news
  - xv. Save the giraffe organization
  - xvi. Natural justice
  - xvii. Nation breaking news
  - xviii. Citizen tv Kenya
  - xix. NTVkenya
  - xx. Nation Africa
  - xxi. Standard Kenya
10. The defendant's tweets, posts, articles, and/or materials in their ordinary and/or natural meaning or by innuendo so far as they concern the plaintiff, meant and was understood to mean that the plaintiff is:



- i. Extremely corrupt, has no regard to the rule of law, has no moral or ethical qualms and is engaged in diabolical schemes in contravention of the law.
  - ii. Engaged in the misappropriation, embezzling, and stealing donor funds intended for the benefit of the Maasai Mara Wildlife Conservancies and the Maasai Mara communities.
  - iii. Engaged in acts of nepotism intended to subjugate members of the Maasai mara community and to cause them loss.
  - iv. Engaged in acts of sexual misconduct, sexual harassment, predatory sexual behaviours, and sexual abuse against its employees contrary to penal statutes.
  - v. Engaged in gross violation of human rights in the Maasai Mara communities promoting conflict, disunity, and distrust to the detriment of Maasai Mara Wildlife Conservancies and the Maasai Mara communities.
  - vi. Engaged in the wanton theft of land and therefore depriving members of the Maasai mara communities of their constitutional right to property.
  - vii. Engaged in the forced mass displacement of the civilian population, an offence under international criminal and humanitarian laws.
  - viii. Engaged in acts of discrimination by imposing divisive policies that take away community land rights from the Maasai mara community.
  - ix. Engaged in the formulation and promotion of narrow-minded policies of exclusion in donor-funded development programs to the detriment of wildlife, Maasai Mara wildlife conservancies, and the Maasai Mara communities.
  - x. Undeserving of receiving and managing donor funds for the benefit of Maasai Mara conservancies and members of the Maasai Mara communities.
  - xi. Engaged in neo-colonialism and is acting as a ‘home guard’ in the discharge of their mandate, a derogatory word intended to portray the plaintiff serving the interest of a colonial master to the detriment of the local community.
  - xii. Engaged to kill and/or weaken the voices of the Maasai Mara community landowners in the management or operation of the conservancies,
  - xiii. Engaged in enslaving and exploitation of high poverty and illiteracy among the Maasai Mara communities’ landowners.
  - xiv. Lacks integrity in the discharge of its functions mandate, is incorporated charlatan, morally depraved, unworthy of respect, and is therefore not fit to discharge its obligations, mandate, and/ or operate in the republic of Kenya.
11. The defendant published the libelious and defamatory materials in bad faith, out of malevolence, ill will, and spite towards the plaintiff. The plaintiff has set out the particulars thereof.
  12. The genesis of the defendant’s issues with the plaintiff and the source of his vitriols is the decision by the plaintiff to decline to channel donor funds to Mara Isinya Conservancy in which the government has no interest without proper governance structure being put in place. The defendant insisted on being a chairperson and his spouse a treasurer of the said Mara Isinya Conservancy a proposal which the plaintiff declined thus the beginning of the animosity and vitriols from the defendant.



13. The defendant therefore published the libellous and defamatory materials in a move to disparage the plaintiff and hurt its standing and work as a result of which the plaintiff has been injured in its reputation, credit, character and in its business. The plaintiff has been brought to public scandal, odium, hatred, ridicule, and contempt.
14. The defendant knew or ought to have known the extensive positive change and influence the plaintiff's work has had on members of the Maasai mara communities through its efforts in resource mobilization and deployment of the same to improve the livelihoods of the residents of the Masai mara communities. The plaintiff has cited some of the positive impact the plaintiff has had.
15. The publication of the libellous and defamatory materials by the defendant has caused some members of the Maasai mara community to refuse to have any dealings with the plaintiff or its member's conservancies, some have threatened to revolt and destabilize the member conservancies that the plaintiff has worked painstakingly to build and empower over the last decade.
16. The publication of libelious and defamatory materials has caused member wildlife conservancies, members of the Maasai Mara communities, donors, and partner organizations to question whether the plaintiff is fit to continue being the umbrella body for the Maasai Mara wildlife conservation movement and whether it is fit to continue receiving and handling donor funds.
17. The plaintiff has experienced a strained relationship with its donor partners who have questioned the suitability of the plaintiff to hand donor funds it entrusted with openly and transparently.
18. The defendant has failed to respect the plaintiff's rights and reputation in the exercise of his freedom of expression as provided for under article 33(3) of *the constitution*.
19. It is therefore in the interest of justice that the orders of injunction sought herein be granted to prevent further injury to the plaintiff's reputation, credit, character, and business pending the hearing of the main suit.
20. That from the foregoing factual and legal matters, the plaintiff has established a prima facie case with a high likelihood of success at the hearing of this suit and is therefore deserving of the orders sought in this application.
21. That the plaintiff stands to suffer irreparable harm and loss unless the order sought herein is granted. Once the plaintiff's reputation is lost, monetary compensation will never be adequate compensation. In the eyes of the public, once the reputation has been damaged it will remain in their memory for life.
22. That the balance of convenience lies in favor of the grant of the orders sought by the plaintiff. The defendant will not suffer any prejudice, inconvenience, or difficulties if the orders sought are granted as prayed. The plaintiff on the other hand stands to suffer grave difficulties, harm, and loss to its standing and reputation I the orders sought are not granted.

### **The defendant's take**

23. The defendant opposed the application by filing a replying affidavit sworn by Fred Kariankei on 11<sup>th</sup> June 2023.
24. The defendant averred that the suit herein is a defamatory claim for which any prospective damages if any are within the pecuniary jurisdiction of the chief magistrate's court. as such the suit is incurably defective having been instituted in the wrong court.



25. The defendant stated that the suit has been brought in an attempt to silence him after an unsuccessful complaint against him before the police and having been arraigned in court vide narok chief magistrate's court MCCRmisc/ E062 of 2023 hence tantamount to abuse of court process.
26. The defendant argued that the alleged defamatory publications made on 13<sup>th</sup> and 17 January 2022 are already statute-barred.
27. The defendant averred that in his tweet of 13<sup>th</sup> January 2022, he was simply raising concern over the interference of Lemek Conservancy by the plaintiff. The landowners were scheduled to hold the annual general meeting and MMWCA was imposing a 25-year lease on the landowners. Arising from the AGM held on 17<sup>th</sup> January 2023 some of the land owners as per his prediction disassociated themselves from MMWCA and their organization known as the Mara Lemek Land Owners Association to rival MMWCA. As a result of the negative energy in manipulating the choice of investors at Lemek Conservancy, the land owners consequently rebelled and formed their own association.
28. The defendant averred that his Twitter post of 3<sup>rd</sup> March 2022 was his view as the founder of Mara Isinya Conservancy. he sourced donor funding and resource mobilization from Basecamp Explorer Foundation through its founder Svein in the year 2021. The financial and technical support towards this dream was routed through MMWCA but the funds were withheld unreasonably by MMWCA to frustrate his initiative.
29. On the 31st May 2022 tweet, the defendant was expressing himself over how the plaintiff was encouraging land owners to cede management of their parcels of land to preferred private companies to act as cartels between the land owners and potential investors who only engage the middlemen who are exploitative to the detriment of the miserable land owners who are susceptible to exploitation.
30. The tweet of 6<sup>th</sup> June 2022 was a reaction to an article by a nation media online post titled" Mara land owners pull out over ' poor pay mismanagement'. The substance of article is that the plaintiff's staff and their close associates were involved in a scheme to establish an entity called GMM to the exclusion of the others. The defendant is not a shareholder of Nation Media Group nor a publisher of the story. Nation Media Group is not sued in these proceedings.
31. In The tweet posted on 22<sup>nd</sup> June 2023, the defendant was referring to the situation in the neighbouring county Tanzania, the leasing of land as conservancies in the Maasai mara is manipulative as the illiterate Maasai land owners do not freely consent to the leases that they sign for the reason that the cartels sponsored by the plaintiff take away the liberty of the land owners to engage candidly with the potential investors in the industry.
32. The tweet posted on 22 September 2022 was informed by the skewed distribution of programs and development projects in the conservancies at the sole discretion of the staff of MMWCA who would only concentrate such projects in their areas of preference and hence create an imbalance of distribution of resources by MMWCA. He is a member of Lemek Conservancy and is aware that the intention of MMWCA has ensured that the management entities who acquire land rights through leases are their cronies and this prompted the tweet on 19th October 2022.
33. In The tweets of 16<sup>th</sup> January 2023 and 2<sup>nd</sup> February 2023, the defendant grieved over interference with the leadership and management of Mara Isinya Conservancy. MMWCA withheld the funding for their new conservancy and instigated the removal of the defendant from its leadership as a condition for the release of the donor funding he had sourced from donors.
34. On the tweet of 21<sup>st</sup> March 2023 and 18th April 2023, the defendant expressed his discontent over the long-term leases of 25 years, and given that the lease agreement is drafted in the English language



- the illiterate Maasai are denied the opportunity to fully understand and comprehend the contents of the leases they are made to execute.
35. The tweet of 24<sup>th</sup> April 2023 was a fair comment to the extent that though there are successes registered by the plaintiff there are still areas for scrutiny and improvement for accountability and transparency.
  36. The defendant is a member of Lemek Conservancy under MMWCA and as such must take into account the plaintiff in its governance of public affairs and accountability to the stakeholders.
  37. That his tweets are in good faith, fair comment, and privileged information.
  38. The defendant is not an owner or publisher of the Star newspaper or liable for any publication by the Star. The Star newspaper is not a party to the suit.
  39. That the plaint dated 26<sup>th</sup> May 2023 upon which the plaintiff's application is anchored discloses no reasonable cause of action against the defendant. There is no proper suit from which injunctive orders can be issued.
  40. That the word complained of is incapable of a defamatory understanding for the reasons that the concerns are from the conduct of the plaintiff, MMWCA is a public body carrying out public duty using public funds. The members of the public have an interest in the proper management of the wildlife conservancies. The defendant has the right to seek information and question the conduct of the plaintiff. The condemnation does not give rise to a liability for defamation.
  41. The application is frivolous and vexatious.
  42. That none of the matters complained of in any way adversely affected the reputation of the plaintiff. That plaintiff has not provided any evidence of any such understanding by members of the public.
  43. That he has not been actuated by malice or ill will when raising matters of public interest. The plaintiff is a public entity and has a duty to respond to such concerns however mistaken or unfounded.
  44. The third parties can independently verify the veracity of the publications complained of and reach their conclusions.
  45. There is no evidence that the plaintiff's donors have taken adverse action against it or in any manner threatened to shun the plaintiff, withheld funding to MMWCA, or disassociated with MMWCA on account of the said publications. There is no evidence that the right-thinking members of the public have shunned or treated that plaintiff with odium or contempt on account of the said publications.
  46. That the plaintiff has failed to set out a prima facie case against him. The plaintiff has not demonstrated irreparable loss or damage that will suffer if the relief sought is not granted.

### **Supplementary affidavit**

47. The plaintiff/applicant filed a supplementary affidavit sworn by Daniel Ole Sophia on 3<sup>rd</sup> October 2023.
48. The plaintiff/applicant averred that the high court has unlimited original jurisdiction to hear and determine both civil and criminal matters. Defamation cases are civil in nature and therefore the high court has jurisdiction. The plaintiff deliberately filed the suit in the high court because the damages likely to be awarded would exceed KShs. 20,000,000 given the egregious nature of the defamatory materials and the subject matter of this suit.
49. The plaintiff/applicant averred the plaintiff has brought a bona fide case to protect and preserve its rights under the law, therefore, does not amount to an abuse of the court process.



50. The plaintiff/applicant averred that the defamatory materials were continuing and were published as part of a long-term campaign to defame the plaintiff with some being published as late as 16<sup>th</sup> May 2023 only 10 days before the filing of the suit and application herein. The issue of limitation of time therefore does not arise.
51. The plaintiff denies any interference with the management of the conservancies. These allegations are a figment of the defendant's imagination which he uses to justify the defamatory materials he published to the detriment of the plaintiff.
52. The plaintiff has poured vast resources to help all its conservancies set up and sustain proper governance structure and help the conservancies develop resilient and diversified revenue models. There is no single documented complaint about the allegations made by the defendant from any of the 23 private conservancies who are members of the plaintiff.
53. The plaintiff did not refuse to fund Mara Isinya Conservancy. The plaintiff merely set out preconditions for funding the conservancy key of which was that the conservancy put in place proper governance structures that are transparent and can be held accountable should there be any discrepancies. The defendant who has a personal interest in Mara Isinya Conservancy, however, did not accept preconditions and appointed himself as the chairperson and his spouse as the treasurer.
54. The plaintiff/applicant averred that the defamatory publications were made with the sole purpose of injuring the plaintiff's reputation and blackmailing it to submit to the personal and unreasonable demands of the defendant as opposed to the greater good of Mara Isinya Conservancy.
55. The plaintiff/applicant averred that all 23 member conservancies are voluntary members of the plaintiff. Not all land owners in the member conservancies lease land to the plaintiff. Neither the plaintiff nor member conservancies can force or coerce any individual to deal with their parcels of land in a manner that they do not wish.
56. The legitimate expectation and advocating for accountability and openness of management affairs of the plaintiff and its member's conservancies does not warrant the spiteful, malicious, and disparaging publications the defendant made to defame the plaintiff. Further, *the constitution* limits the freedom of expression. The plaintiff is a private entity and not a public body as alleged by the defendant.
57. The defendant's publications were not made in good faith. The publications do not constitute fair comment because the defendant expressed facts he knew or ought to have known to be false. The publications do not qualify as privileged communication as the publications are not part of parliamentary proceedings or reports, judicial proceedings, etc which qualify as privileged communication.
58. The plaintiff has a reasonable cause of action against the defendant in tort of defamation. The elements of defamation have been sufficiently expressed and demonstrated.
59. The plaintiff/applicant denied that any of its staff have engaged in any acts of sexual harassment or exploitation. The defendant continues to make the allegations even in these proceedings demonstrating the level of contempt to the plaintiff and the court.
60. The plaintiff/applicant intends to call witnesses to prove damage the publications have caused to its reputation at the hearing of this matter.
61. The plaintiff/applicant has demonstrated sufficiently a prima facie case against the defendant with a high chance of success. Unless the orders sought are granted it will likely suffer damage, harm, and loss which cannot be adequately compensated by an award of damages. The plaintiff has also demonstrated



the balance of convenience lies in its favour. The plaintiff/applicant therefore urges this court to grant the orders sought in the instant application.

### **The Plaintiff/applicant's submissions.**

62. The plaintiff/applicant submitted that in the exercise of this right to freedom of expression, the defendant has injured the plaintiff's reputation and standing among members of the public and/or society thus causing the plaintiff reputational harm loss and damage. The defendant has also abused and infringed upon the plaintiff's rights to dignity and freedom from degrading treatment. The plaintiff/applicant has relied on the black's Law Dictionary 8<sup>th</sup> edition, Winfield & Jolowicz 15<sup>th</sup> Edition, Genley On Libel and Slander 11<sup>th</sup> Edition Page 38, Julius Vana Muthangya V Katuuni Mbila Nzai [2019] eKLR and Article 33(3) of the Constitution.
63. The plaintiff/applicant submitted that an applicant must demonstrate a prima facie case, an irreparable injury that cannot be remedied by an award of damages if a temporary injunction is not granted and that the balance of convenience is in its favour. The plaintiff/applicant relied on Micah Cheserem V Immediate Media Services (2000) 1 EA 371, Renton Company Limited Vs Philip Kisia & 2 Others (2012] eKLR, Giella V Cassman Brown 7 Co. Ltd [1973] EA 258, and Nguruman Limited V Jan Bonde Nielsen & 2 Others [2014] eKLR.
64. The plaintiff/applicant submitted that the material presented before the court demonstrates a prima facie case. The defendant/respondent has not disputed publishing or uttering the libelious materials. The defendant's actions were at all times motivated by malice and ill will which precludes him from relying on the defences of fair comment, justification, and/or qualified privilege. The publications were aimed for the sole intention of personal benefits. the plaintiff is a private organization with no public roles. The plaintiff/applicant relied on the Mrao Limited V First American Bank of Kenya Limited [2003] eKLR.
65. The plaintiff/applicant submitted that the plaintiff's reputation and standing have suffered damage as a result of the published materials. Unless an order of injunction is granted by this court, the plaintiff will continue to suffer irreparable harm and injury. The plaintiff further stands to suffer huge economic losses due to the defamatory publications. The plaintiff/applicant has relied on Renton Company Limited V Philip Kisia & 2 Others [2012] eKLR, and West Kenya Sugar Company Limited V Moses Malulu Injendi & Another [2021] eKLR
66. The plaintiff/applicant submitted that the balance of convenience lies in favour of the plaintiff. The plaintiff stands to suffer great inconvenience and hardship trying to convince members of the public and its donor partners that the defamatory publications are not true and that they should continue to work with the plaintiff.
67. The plaintiff/applicant submitted that the materials published by the defendant are manifestly defamatory to the plaintiff. The publications are- hurtful to the plaintiff's reputation, standing, and the relationship between the plaintiff between the plaintiff and its donor and financial partners. Each day that the defamatory materials are allowed to stay published and/ or online, the worse the damage, harm, and injury occasioned to the plaintiff by the said materials. The plaintiff/applicant relied on West Kenya Sugar Company Limited V Moses Malulu Injendi & Another [2021] eKLR, Megascopce Healthcare Kenya Limited V Nation Media Group Limited & 4 Others [2021] eKLR.
68. The plaintiff/applicant submitted that it has met and /or satisfied the conditions and/ or grounds for the grant of a mandatory injunction in an interlocutory application.



## The Defendant/respondent's submissions

69. The defendant/respondent submitted that the application herein does not fall within the category of clearest of cases for the granted of orders of injunction. The defendant has given an explanation that justifies his posts and communication on matters within the realms of the plaintiff. The plaintiff has not refuted these facts and assertions. The plaintiff has confirmed the facts complained of truly exist, The defendant/respondent has relied on *Mrao Limited V First American Bank Of Kenya Limited & 2 Others* [2003] 1KLR 125, *Gilgil Hills Academy Ltd Vs Standard Ltd* [2009] eKLR, *Gatley On Libel And Slander 8<sup>th</sup> Edition By Philip Lewis M.A At paragraph 1574, Principles Of Injunctions At Page 102, Mumias Sugar Company Limited & 5 Others V Musa Ekaya* [2017] eKLR, *Cheserem Vs Immediate Media Services & 4 Others* [2000] Eklr., *Transcend Media Group V Standard Group Limited* [2017] eKLR, *Evans Kidero V John Kamau & Another* [2017] eKLR.
70. The defendant/respondent submitted that the publication fell within the defence of fair comment and justification. The publication in itself is incapable of tormenting any adverse perceptions by third parties against the plaintiff. The defendant /respondent relied on *Gulf Oil (G B) Ltd V Page & Others* [1987] 3 ALL ER 14, Article 33 and 34 of *the Constitution*, *Albert Cheng & Another V Tse Wai Chun Paul Paul* [2000] 3 HKCFAR 339, *Mcdonald Corp V Steel* [1995] 3 ALL ER 615, *Wilradeolia V Simpson* [2008] SCC 40, and *Peter Carter -Rucks Treatise On Libel and Slander*
71. The defendant submitted that the orders sought are too wide and oppressive to the respondent. The defendant/respondent relied on the case of *Francis Atwoli & 5 Others V Kazungu Kambi & 3 Others* [2015] eKLR, *John Ntoiti Mugambi Alias Kamukuru V Moses Kithinji Alias Hon. Musa* [2016] eKLR, and *Bestobell Paints Limited V Bigg* 9[1975] F.S.R 421
72. The defendant/respondent submitted that he will justify his alleged defamatory publications during trial hence reason enough not to grant interim injunctive reliefs sought. The defendant/respondent relied on the case of *Endmor Steel Millers Ltd V Royal Media Services Ltd & 2 Others* [2020] eKLR, and *Harakas V Baltic Merchantile and Shipping Exchange* [1982] W.L.R 958
73. The defendant/respondent submitted that the application has not met the threshold for the grant of interim injunctive orders sought.

## Directions of the court

74. On 31.05.2023 granted prayer 2 of the application THAT this honourable court be pleased to grant an order of injunction restraining the defendant whether, by himself, servants, or agents from further posting and publishing the defamatory words uttered on his Twitter account username @fskariankei as identified by uniform resource locator (URL) <https://twitter.com/fskariankei?lang=en>, on his Facebook account username *fred kariankei* as identified by uniform resource locator (URL) <https://www.facebook.com/fred.kariankei/>, on the article published in the star newspaper of 16<sup>th</sup> May 2023, on email dated 12<sup>th</sup> May 2023 or any other or further words and publications of like effect disparaging and injurious to the plaintiff pending the hearing and determination of this application.
75. The application was canvassed by way of written submissions. Both parties have filed.

## ANALYSIS AND DETERMINATION

### Issues

76. The main issues for determination revolve around;



- i. Jurisdiction of the court to hear and determine this suit.
- ii. Grant of injunction-temporary and mandatory- in a claim based on defamation.
- iii. Appropriate orders this court may make?

## **Jurisdiction**

77. As the canticle goes, ‘Jurisdiction is everything...’, a court of law must establish jurisdiction before adjudicating over the dispute before it (The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR 1).
78. And, jurisdiction is conferred by *the Constitution* or law (Samuel Kamau Macharia Vs KCB & 2 Others, Civil Application No.2 of 2011)
79. The defendant/applicant is understood to be saying that this suit ought to have been filed before the subordinate court which has pecuniary jurisdiction to try it. And, on that basis, they claim that this court has no jurisdiction to hear and determine the dispute.
80. The jurisdiction of this court is conferred by Article 165(3) in the following terms: -
  - “(3) Subject to clause (5), the High Court shall have:
    - (a) Unlimited original jurisdiction in criminal and civil matters;
    - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
    - (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
    - (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
      - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
      - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
      - (iii) any matter relating to Constitutional powers of State organs in respect of county governments .and any matter relating to the Constitutional relationship between the levels of government; and
      - (iv) a question relating to conflict of laws under Article 191; and



- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

81. The plaintiff/applicant in its supplementary affidavit has stated that it anticipates an award of damages of over Kshs. 20 million.
82. Therefore, given the nature of the claims which include claim of damages for defamation, this court has jurisdiction to hear and determine this matter.

### **Injunction**

83. The threshold for granting a temporary injunction in defamation cases was stated in the case of *Cheserem vs Immediate Media Services* (2000)2 EA 371 (CCK) thus;

‘An interlocutory injunction is temporary and only subsists until the determination of the main suit. In defamation, the question of injunction is treated in a special way although the conditions applicable in granting an injunction as set out in the *Giella v Cassman Brown & Co Ltd* (1973) EA 358 generally apply...In defamation cases, those principles apply together with special law relating to the grant of injunctions 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 complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.....The reason for so treating grant of injunction in defamation cases is that the action for defamation brings out conflict between private interests and public interest, more so in cases where the country’s Constitution has provisions to protect fundamental rights and freedoms of the individual, including the protection of the freedom of expression.’

84. A proper constitutional talk is that, an injunction in defamation cases should be issued only after careful balancing of the right to freedom of expression (article 33 of *the Constitution*), with the right to have a person’s dignity respected and protected (Art 28). And, more specifically, an injunction should speak to the limitation of the right to freedom of expression placed by *the Constitution* that; ‘In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others (see Art 33(3)). And, in granting an injunction, the court should also consider the general right to the correction or deletion of untrue or misleading or defamatory information that affects a person (Art 35(2)).
85. The novel balancing act by the court should produce an outcome that avoids issuance of orders which may be a complete gag of freedom of expression, but also providing remedy to a person whose dignity and reputation has been injured by the respondent.
86. In balancing the competing rights, the court should ask the traditional questions. Whether, within that context, the plaintiff, at this initial stage, has proved; i) a prima facie case with a probability of success; ii) that, if the injunction is not granted, it will suffer irreparable loss; and or iii) that, in case of doubt, the balance of convenience lie in favour of granting the injunction?
87. And, the wisdom on how these elements should be treated in the case of *Yellow Horse Inns Limited v Nduachi Company Limited & 2 others* [2017] eKLR, by the Court of Appeal is that;

“All the three conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. So that if the applicant



establishes a prima facie case, that alone will not avail him an injunction. The court must further be satisfied that the injury the applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no order of injunction should normally be granted, however strong the applicant's claim may appear at that stage."

### **Prima facies case**

89. Prima facies case in civil cases was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, thus:

"...in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter." (per Bosire. J)

90. The libelous words were alleged to have been- published by the defendant/respondent in his Twitter and Facebook accounts as well as the Star newspaper. The defendant/respondent has not disputed the publications in his Twitter and Facebook accounts.

91. The plaintiff/applicant has set out the publications by the defendant/respondent alleged to be defamatory in its supporting affidavit. The defendant/respondent has raised the defences of fair comment and justification. He has further submitted that a temporary injunction ought not to be granted.

92. On prima facie basis, it appears from the material before the court that the defendant also runs a conservancy and is in need of donor funding. But, he sees the plaintiff as the impediment to his receiving of donor funding. Resources ordinarily attracts fierce competition. Nevertheless, the defendant seems to have resorted to publishing disparaging material about the plaintiff to the world at large as well as to their respective donors. The plaintiff accused the defendant of doing so in order to create an impression upon the donors that the plaintiff is, inter alia, mismanaging the conservancy, misusing the funds and resources which are the core of the promoters and donors in the hope that they will stop funding the plaintiff. The defendant has refuted these claims and puts forth the defenses of justification and fair comment.

93. Some of the publications talk of possible community violence, threats to life. Corruption, mismanagement of resources which are very serious matters, and on prima facie basis, are capable of producing shunning of the plaintiff by the donors or mistrust in the handling of the donor funding. The publications also weigh very heavily on the integrity and stature of the plaintiff as an enterprise.

94. Other than justifying the publishing of and the materials in question, the defendant did not show any effort or attempt to report such serious matters to the relevant government and non-governmental agencies.

95. When these publications are looked within the material presented, they are capable of hurting the plaintiff in the manner feared by the plaintiff.

96. In light thereof, this court is persuaded that in the interim, the plaintiff/applicant has established a prima facie case with a probability of success.

### **Irreparable damage**

97. Given the nature of the business of the plaintiff, damages may not be adequate compensation for the hurt, and continued hurt of the plaintiff and its reputation.



### **Balance of convenience**

98. It bears repeating that, the defendant has right and freedom of expression. But, the right ends where other persons right begin. Article 33(3) of *the Constitution* is explicit that: -

In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others

99. In light of the finding above, the balance of convenience tilts in favour of stopping the the publishing of the libelous material pending determination of the suit. In the present case, the reputation of the applicant is on the line and once reputation is lost or damaged, no amount of damages can sufficiently compensate the offended party for such a loss.

### **Of mandatory injunction**

100. According to the case of Kenya Breweries Limited v Washington Okeyo [2002] eKLR, (Court of appeal);

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application”.

101. The plaintiff/applicant is also seeking the court to compel the defendant/respondents to take down/retract/delete/purge the defamatory words uttered in his Twitter and Facebook accounts and any other places the said materials are published or stored. The effect of this order is to stop any further hosting of the alleged defamatory words on the respondent’s platform. The defendant/ respondent cannot hide behind the constitutional provisions on freedom of speech which information is likely to injure the plaintiff/applicant’s reputation. In law, every person has the right to be corrected or deleted any information that affects the person or injures the person’s reputation.

102. In the circumstances, no harm or prejudice will the defendant/respondent suffer by pulling down the impugned material.

103. All that the plaintiff/applicant is seeking at this interim stage is for the material to be pulled down. Whether the information is true, justified, or defensible can await the hearing of the main suit.

104. In this court’s view, granting the orders being sought will not interfere with the right to freedom of expression. The defendant/respondent contended that he was acting in the public interest. The defendant/respondent being a member of Lemek Conservancy was within his powers to present his complaints to the plaintiff/applicant, or to the relevant responsible authorities for appropriate action. However, to convert his complaints which he has not indicated he presented formally or through acceptable mediums to or before the plaintiff/applicant, turns it a personal cause for personal gain. This he did by publication of the impugned material on private Twitter and Facebook accounts, which opens it up to litigation for defamation. The publication could be summarily taken down without prejudice to the right to freedom of expression. The court also smells an attempt to steal a match from the plaintiff.

105. In the end, this court is satisfied that the Notice of Motion dated 26<sup>th</sup> May 2023 is merited and it is hereby allowed, more specifically: -



- i. That an injunction is hereby issued restraining the defendant whether, by himself, servants, or agents from further posting and publishing the defamatory words uttered on his Twitter account username @fskariankei as identified by uniform resource locator (URL) <https://twitter.com/fskariankei?lang=en>, on his Facebook account username Fred Kariankei as identified by uniform resource locator (URL) <https://www.facebook.com/fred.kariankei/>, on the article published in the star newspaper of 16<sup>th</sup> May 2023, on email dated 12<sup>th</sup> May 2023 or any other or further words and publications of like effect disparaging and injurious to the plaintiff pending the hearing and determination of this suit.
- ii. Mandatory injunction is hereby issued compelling the defendant whether by himself, servants, or agents to take down and delete the defamatory words uttered on his Twitter account username @fskariankei as identified by uniform resource locator (URL) <https://twitter.com/fskariankei?lang=en> and on his Facebook account username Fred Kariankei as identified by uniform resource locator (URL) <https://www.facebook.com/fred.kariankei/> and/or any other places the said materials are published or stored pending the hearing, and determination of this suit.
- iii. Costs shall be in the cause.
- iv. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**F. GIKONYO M.**

**JUDGE**

**In the presence of:-**

Court Assistant – Otolu

Mr. Oyomba for Plaintiff/Applicant - Present

Kamwaro for the Defendant - Present

