



REPUBLIC OF KENYA



KENYA LAW
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**Morara v Mokaya alias 'Virusi' alias "Papa Vir" (Civil Case
E001 of 2023) [2024] KEHC 4454 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE E001 OF 2023
JM CHIGITI, J
MARCH 19, 2024**

BETWEEN

GEORGE MORARA PLAINTIFF

AND

GERALD MOKAYA ALIAS 'VIRUSI' ALIAS "PAPA VIR" DEFENDANT

RULING

1. The application that is before this court is dated 9th February 2023. The Applicant seeks the following Orders:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the main suit, a temporary order for injunction be issued restraining the Defendant herein, whether by himself, agents, servants, or any other persons acting on his instruction/ under his direction, from further posting or publishing any defamatory statements and/or making any defamatory posts or publications in relation to the Plaintiff on the WhatsApp Group named "Egetureri Kiomogusii" or in any other social, print, electronic or other media whatsoever;
 - d. That a mandatory Order do issue compelling the Defendant herein to pull down and/or delete the defamatory posts put up on or about the 23rd January 2023 on the WhatsApp Group named "Egetureri Kiomogusii".
 - e. That the costs of this Application be borne by the Defendant/Respondent,
2. The Application is supported by the Affidavit of George Morara sworn on 9th February 2023.



Applicants' Case:

3. On or about the 22nd January 2023, the Defendant falsely, recklessly and maliciously posted, published, and circulated various defamatory, libelous, and scandalous posts on the WhatsApp Group named "Egetureri Kiomogusii" directed at the Plaintiff as follows:

"There's an advocate called George Morara "George Mo" Tropex from Gesima, enemy of omogusii adviser to Simba Arati matters obogenki and a member of the Committee that is doing nonsense pending bills verification, he's harassing people a lot in that committee. Contractors and county officers Tiga oboriri Gusti neyaito twensi twanchane tosikane. Aye, Chochi Simba nekebaya" - at 14:03 hrs. Full English Translation: ("There's an advocate called George Morara "George Mo" Tropex from Gesima, enemy of the Kisii community adviser to Simba Arati matters gossip and a member of the Committee that is doing nonsense pending bills verification, he's harassing people a lot in that committee. Contractors and county officers stop being silly Kisii belongs to all of us let's love and respect each other. You, George, Simba is a small lamp")

"Arati is a Chinese citizen" - at 14:04 hrs.

"Civil what? The guy is being used by Arati to harass county employees"- at 14:13 hrs.

"Where do you get the energy of calling Arati goon governor" - 14:13 hrs.

4. The Plaintiff is an Advocate of the High Court of Kenya in good standing and reputation with the Law Society of Kenya and without any disciplinary or criminal record; a reputable businessman; a family man with two children; an elder in the New Life Faith Church and also a regular commentator on topical issues of national importance in a number of media outlets. He is also a member of the Kisii County Pending Bills Verification and Ineligible (pending bills) Resolution Committee.
5. The defamatory posts are still circulating on social media thereby continuously injuring the Plaintiff's reputation. The continued defamation has spread through social media like bushfire and the defamatory posts have been trending on various platforms with members of the public and other commentators continuing to make very disparaging remarks against the Plaintiff on account of the impugned posts.
6. The Defendants' publication of the libelous posts has exposed the Plaintiff to public hatred, ridicule, contempt, scandal and odium. He has been disgraced, humiliated, subject to untold embarrassment and ostracized in the eyes of members of the public for which he holds the Defendant fully, wholly, responsible, and liable.
7. The Defendant filed a Replying Affidavit well as Grounds of Opposition dated 8th March 2023.
8. The defendant does not deny publishing the same save that he is of the opinion that the publications are not defamatory of the plaintiff.
9. In *Abmednasir Maalim Abdullabi v Njeri Thorne* [2020] eKLR at paragraphs 18,19, 24, 25 & 26, the High Court (Sergon J) held thus:

"In *Cheserem v Intermediate Media Services* (2000) 2EA 371 the court held inter alia that the principles of injunction stated in *Giella v Casman Brown & Co. Ltd* (1973) EA 358 have to be considered with the greatest caution. The court went ahead to state that an interlocutory injunction in defamation cases is granted only in the clearest of cases."



10. The first principle to be considered is whether the plaintiff has demonstrated that he has a prima facie with a probability of success.
11. The plaintiff has given the particulars of the tweets he avers are defamatory of him in paragraph 7 of the plaint.
12. The second principle to be taken into account is that an applicant should show the irreparable loss he would suffer if the order of injunction is not granted. The plaintiff has expressly stated that he stands to suffer irreparable harm that cannot be compensated by damages.
13. With respect, I am persuaded by the plaintiff's assertion that a person's good name and reputation is incapable of assessment and pecuniary quantification.
14. The third and final principle is that where the court is in doubt, it would decide the application on a balance of convenience. It is the plaintiff's submission that the balance of convenience tilts in his favour in that he stands to suffer irreparable loss to his reputation and business if the orders sought are not granted.
15. The three-tier test of; a prima facie case, irreparable injury and balance of convenience are applicable to interlocutory injunction applications in defamation cases.
16. Mandatory Injunctions, the High Court in *Vimalkumar Bhimji Depar Shah v Stephen Jennings & 5 others* [2016] eKLR held that:-

“ 18. It is worth noting that interlocutory injunctions are granted prior to the trial of action or until further order is made in order to preserve the status quo until the court can hear the dispute fully. Further, in defamation claims, an injunction can properly issue to restrain an obstruction to justice and in particular, to certain publications or planned publications that are calculated to prejudice proceedings actually in progress or those about to be heard.

19. However, the test for an interlocutory injunction which is mandatory in nature is more onerous than is the case for an interlocutory injunction which is prohibitory in nature. This is as was established in the case of *O'Brien V Dromoland Castle Owners Association inc, (s)* [2012] IE HC 407 where the court, applying common Law principles stated that, referring to Kirwan's injunction, law and Practice Round Hall Press, Dublin; 2008 pp 210-214 that it is significantly harder to secure a mandatory injunction at an interlocutory stage than a prohibitory one.

17. In *Phinebas Nyagah v Gitobu Imanyara* 2013] eKLR, the High Court (Odunga J) held thus at paragraph 15:

“ 15. ... Under article 32(1) of the *Constitution* every person has the right to freedom of conscience, religion, thought, belief, and opinion and provides that the freedom to express one's opinion is a fundamental freedom. Article 33(1) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has



been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals. (Emphasis added).

18. The Defendant expressly admitted that he authored the words complained against. Libelous publications, like the instant one, affects not only a person's integrity but also his professional reputation and honour especially where such publication is circulated in a medium accessed by several followers which is still circulating to date.
19. The statements in the said publications are unfounded accusations made out of spite against the Plaintiff herein. The sensational manner in which the publication was written was clearly intended to cause irreparable damage to the Plaintiff by discrediting the character of the Plaintiff in the most damaging way possible and leaving no room in the minds of readers of the said publication as to the character of the Plaintiff and his suitability for the position he held.
20. The Defendant did not report or lodge any complaint with the relevant authorities regarding the alleged conduct of the Plaintiff as a member of the Kisii County Pending Bills Verification and Ineligible (pending bills)

Resolution Committee.

21. He also relies on *Jaswant Singh Rai v Moses Malulu Injendi & another* [2021] eKLR.

“...It is necessary to balance the interests of the parties herein. The fundamental rights and freedom under the *Constitution* including the freedom of expression and the private rights of an individual. The defendants have raised a defence of justification and have further submitted that temporary injunction ought not be given even when the words uttered and complained of are libelous.”

Respondent's Case;

22. The Respondent filed grounds of opposition raising the following grounds that the application herein is a non-starter, frivolous vexatious and an abuse of the process of the court and lacks merit in its entirety.
23. According to him, the extracted statement or words are not defamatory in their ordinary meaning or in any other prescribed meaning and that the purported words or statements only can only and at best be fair comment.
24. He also advances an argument that the words do not in any way refer to and are not attributable to the plaintiff and the plaintiff has no locus standi to institute the application herein.
25. The respondent also filed a replying affidavit wherein he argues that he does not hold any other names apart from my name Gerald Mokaya and that he is not the holder of the names Virusi and Papa Vir.
26. The Respondent argues that he never uttered, sponsored or caused to be published any defamatory words, insinuations and innuendos against the applicant and the applicant is put to strict proof thereof. He argues that he is a stranger to any purported allegations of defamation as fronted by the applicant.
27. According to him, the purported extracted statement or words are not defamatory in their ordinary meaning or in any other prescribed meaning.



28. The said purported words or statements if any only can only and at best be fair comment and that the words do not in any way refer to and are not attributable to the plaintiff.
29. According to him, there is no actual or imagined cause of action against him by the plaintiff/applicant as stranger to the purported defamatory words.

Analysis and Determination;

30. Lord Denning in *Fraser vs Evans*, [1969] 1 All ER.

“I find the circumstances of the case before Lord Denning and this one very different. I am persuaded that on the interim, the applicant has established a prima facie case with a probability of success, and that damages may not be adequate compensation in the event they establish their case against the defendants. The balance of convenience also tilts in favour of the applicant. At this stage, it is established that the words complained of can affect the Plaintiff’s business and their ordinary meaning can be interpreted to be having a negative view on the plaintiff.”

31. The defamatory posts are still circulating on social media thereby continuously injuring the Plaintiff’s reputation. The continued defamation has spread through social media like bushfire and the defamatory posts have been trending on various platforms with members of the public and other commentators continuing to make very disparaging remarks against the Plaintiff on account of the impugned posts.
32. According to the Respondent, the purported extracted statement or words are not defamatory in their ordinary meaning or in any other prescribed meaning.
33. The said purported words or statements if any can only and at best be fair comment and that the words do not in any way refer to and are not attributable to the plaintiff.
34. This court has looked at the words as pleaded by the plaintiff to the effect that on or about the 22nd January 2023, the Defendant falsely, recklessly and maliciously posted, published, and circulated various defamatory, libelous, and scandalous posts on the WhatsApp Group named "Egetureri Kiomogusii" directed at the Plaintiff as follows:

“There’s an advocate called George Morara “George Mo” Tropex from Gesima, enemy of omogusii adviser to Simba Arati matters obogenki and a member of the Committee that is doing nonsense pending bills verification, he’s harassing people a lot in that committee. Contractors and county officers Tiga oboriri Gusti neyaito twensi twanchane tosikane. Aye, Chochi Simba nekebaya” - at 14:03 hrs.

Full English Translation: (“There’s an advocate called George Morara “George Mo” Tropex from Gesima, enemy of the Kisii community adviser to Simba Arati matters gossip and a member of the Committee that is doing nonsense pending bills verification, he’s harassing people a lot in that committee. Contractors and county officers stop being silly Kisii belongs to all of us let’s love and respect each other. You, George, Simba is a small lamp”)

“Arati is a Chinese citizen” - at 14:04 hrs. “Civil what? The guy is being used by Arati to harass county employees” - at 14:13 hrs. “Where do you get the energy of calling Arati goon governor” - 14:13 hrs.



35. The court is of the view and I so hold that the aforesaid words are reckless to say the least. There is an element of malice in the words that have the effect of damaging the applicant's reputation.
36. The malice in the said publication is evident in the language used by the Defendant. The Defendant posted the publication on the subject WhatsApp group knowing or having reason to know that the words contained therein were false and untrue but nevertheless published them recklessly without ascertaining their veracity.
37. The Respondent did not challenge the fact that The Plaintiff is an Advocate of the High Court of Kenya in good standing and reputation with the Law Society of Kenya and without any disciplinary or criminal record; a reputable businessman; a family man with two children; an elder in the New Life Faith Church and also a regular commentator on topical issues of national importance in a number of media outlets. He is also a member of the Kisii County Pending Bills Verification and Ineligible (pending bills) Resolution Committee.
38. The applicant has demonstrated that he will suffer irreparable loss as a lawyer if the order of injunction is not granted.
39. In *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR, the High Court (Odunga J) held thus at paragraph 18:

“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice. (Emphasis added).”

The Court further found that personal reputation and integrity once lost cannot be compensated in monetary terms. Consequently, the Court will be inclined to grant the injunction sought where it is proved prima facie that the words were defamatory of the Plaintiff.

40. The applicant has made out a case that he is entitled to the orders sought in prayer c.
41. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the Court of Appeal in the case of *Kenya Breweries Ltd vs Washington Okeyo* (2002) EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in Vol 24 of *Halsbury's laws of England* 4th Edition paragraph 948 that: -

“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 simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”



The Applicant has not made out a case for the grant of an order of Mandatory and the same cannot issue at this point in the proceedings.

Order:

1. A temporary order for injunction is hereby issued restraining the Defendant herein, whether by himself, agents, servants, or any other persons acting on his instruction/ under his direction, from further posting or publishing any defamatory statements and/or making any defamatory posts or publications in relation to the Plaintiff on the WhatsApp Group named “Egetureri Kiomogusii” or in any other social, print, electronic or other media whatsoever pending the hearing and determination of the main suit.
2. The prayer ‘d’ is declined.
3. Costs to the applicant.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2024.

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CHIGITI. J (SC)

JUDGE

