



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL CASE NO. 3 OF 2018

PAUL KIPRONO CHEPKWONY.....PLAINTIFF

VERSUS

PAUL KIBIEGON CHIRCHIR.....DEFENDANT

RULING

1. The plaintiff/applicant is the duly elected Governor of Kericho County having been elected for a second term on 8th August 2017. He has lodged the present suit against the defendant, the duly elected Member of County Assembly of Kapsoit ward in Kericho County who was also elected to his position following the elections conducted on 8th August 2017.

2. In his plaint dated 12th June 2018, the plaintiff alleges that the defendant has been engaging in an intense social media campaign against him in a defamatory manner. He has even moved his campaign to radio and has instigated the publication of an extremely defamatory article published by the *Weekly Citizen* on 4th-10th June, 2018. The plaintiff seeks in his plaint inter alia, a permanent injunction restraining the defendant from writing, publishing and airing any defamatory statements about him.

3. Simultaneously with the plaint, the plaintiff filed an application brought by way of Notice of Motion under Order 40 rule 2 and 3 of the Civil Procedure Rules 2010 seeking the following orders:

a) *Spent*

b) *Spent*

c) ***THAT pending the hearing and determination of the suit, a temporary injunction be issued restraining the defendant by himself, agents, servants or otherwise howsoever from publishing or causing to be published in any way whatsoever, any news items, statements, articles, words, images, pictures and caricatures on Internet, Newspapers, Facebook, Twitter, Youtube and Whatsapp or any medium whatsoever -defamatory statements against the plaintiff.***

d) ***THAT the costs of this application be provided for.***

e) ***THAT this Honourable Court grants any other relief that it may deem fit.***

4. The application is supported by an affidavit sworn by the plaintiff on the same date. He avers in the affidavit that on 4th June 2018, he came across an article about him in the *Weekly Citizen* newspaper. The article described him in a manner he considered to be defamatory as it stated as follows:-

“Kericho Governor caught pants down

Kericho Governor Paul Chepkwony move to split the health docket into two has raised many questions.

According to sources, the creation of a docket of preventive medicine was to accommodate Winnie Rotich who is said to be a relative of the Governor. She recently graduated from Birmingham University with a Masters in Pharmacy.

Another position that has put Chepkwony at loggerheads with MCAs is the appointment of Lillian Kerio as the Chief Officer Agriculture. Her relationship with the Governor is not well known.

Talking to Weekly Citizen in Kericho, Kapsoit MCA Paul Chirchir revealed the two offices did not exist. To Chirchir, they were not approved by the Assembly.”

5. The applicant further avers that the newspaper also published that:

“The appointment of Nelius Njeri to head the media center during Chepkwony’s first term landed him in trouble. It was said Njeri was his long term girlfriend.

Chepkwony has recently rewarded his cousin and in-laws with plum slots at the county.”

6. The plaintiff avers that at the same time that the above newspaper article was published, the defendant, using his political name “Tarimbo,” published in two popular (WhatsApp) groups i.e Timbilwet Legacy and South Rift Leaders forum as follows:

“ Over Kshs. 100 m was lost to Lesebeth case, a case that has never been filed despite millions being paid outside the budget. Timbilwet should be the first to record statement.

“As an Assembly we will not preside over plundering of public resources and rogue decisions by the Executive who think they can serve with impunity because they are on their last term.”

“ Governor has created positions of Cos which is not only illegal as the positions were not approved by the Assembly but also immoral since we are grappling with a huge wage bill. To add salt to injury Governor has appointed some who are incompetent who are just but cronies to those positions.”

7. According to the plaintiff, the above printout was meant or understood by right thinking members of society to mean that:

i) *He unilaterally and without following procedure and in breach of the law created dockets/positions in total disregard of the Constitution and law;*

ii) *He had no regard to the law and bends the law to suit his alleged needs;*

iii) *He has created a docket for a relative and therefore he engaged in nepotism;*

iv) *He has misappropriated public funds;*

v) *He made appointments to public offices to people of no integrity and with inappropriate relationship with him or who have undisclosed relationships with him;*

vi) *He has committed abuse of office offences;*

vii) *He is a criminal and an economic saboteur;*

viii) *He is corrupt and of a corruptible nature;*

ix) *He has no leadership qualities and bulldozes appointments to Public office in Kericho County Government;*

x) *He makes appointments to people of no or unknown qualifications to public offices at Kericho County Government;*

8. It was his averment further that the defendant continues to defame him, has increased the intensity of the defamation on radio, and he therefore seeks appropriate remedies from this court as pleaded in his prayers.

9. The defendant opposed the application and filed a replying affidavit which he swore on 4th July 2018. He avers in the said affidavit that the publication by the *Citizen Weekly* was not sourced from him and he did not know the undisclosed reporter behind the story. He was also surprised that the plaintiff had not sued the owner of the paper. He contended, however, that it is in the public domain that the plaintiff, in his capacity as the Governor of Kericho County, attempted to split the health department under two chief officers and that he also attempted to split the department of agriculture to be manned by two officers. He avers that the County Assembly of Kericho rejected a proposal by the plaintiff to abolish the offices of the Chief Officers; Agriculture, Livestock and Fisheries as well as Health Services by splitting them.

10. The defendant averred therefore that the anonymous story in the *Citizen Weekly* is true to the extent that the plaintiff had been impeached by the County Assembly in his first term but was rescued by the Senate. He further contended that even without knowing the source of the story, the story was true to that extent and a story whose veracity can be verified cannot be libelous.

11. The defendant denied posting the story on the Kshs 100 million sank into the intended case against the British Government. It was his contention that the plaintiff’s attempt to link him to any other name is part of a wider scheme to gag him through hook and crook.

12. The defendant admitted that it was indeed true that the Kenyan taxpayer has paid a whopping Kshs. 100,000,000.00 for a case that has

never been filed against the British Government for injustices meted against Kenyan people from the Kipsigis and Talai communities. He further contended that the lawyer who was engaged to file the case was one Mr. J.K Bosek who admitted to having received Kshs. 100 million minus taxes. The lawyer had also informed the Assembly that the case had not been filed as their first option was to negotiate settlement out of court. It had also later emerged that there was no timelines on when to file or negotiate the case and it was thus a recipe for chaos and fraud. The defendant further averred that the County Assembly of Kericho had documented that a lot of money had been paid and that the case should proceed. He had made his statement in respect of the case in his oversight role as a member of the County Assembly, and he cannot be sued for playing his constitutional role.

13. The defendant further contended that the plaintiff has a contractual duty to account to Kenyans on how each and every shilling has been spent under his watch instead of dragging him to court as a cover up for abuse of office and engaging in 'white elephants'(sic). That the plaintiff had gone ahead and established offices without approval of the Assembly as required by law and would not budge in his characteristic acts of impunity.

14. The defendant averred that the County Assembly had rejected the nomination of Ms Lillian Chebet Kerio as her appointment did not take into account regional and equitable representation. The plaintiff had, however, still retained Lillian Chebet Kerio as an acting Chief Officer despite her rejection. He had also engaged one Winnie Rotich as Chief Officer for Pharmaceutical Services, a docket which does not exist. The County Assembly had already directed that persons holding office illegally do vacate within 7 days from 5th June 2018 but the plaintiff continues to retain these officers. He denied that he had defamed the plaintiff, asserting that he had been playing his role of representation, oversight and legislation.

15. The parties were directed to file their respective submissions on the application. For the plaintiff, submissions were made under several heads. First, on whether the defendant's actions were defamatory, it was submitted that the defendant has engaged in an intense social media campaign against the plaintiff in an extremely defamatory manner. He had also instigated a publication and was the source of an extremely defamatory article published by the *Weekly Citizen* on 4th- 10th June 2018. It was therefore submitted that the defendant wilfully and maliciously uttered and caused to be published an extremely defamatory article concerning the plaintiff which consequently has brought hatred, humiliation, ridicule and contempt to the plaintiff. The plaintiff relied on the case of **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** in support of the submission.

16. The cases of **CFC Bank Limited vs Consumer Federation of Kenya (COFEK) & 2 others 2014 eKLR** and **Civil Case No 126 & 135 Of 1990-Kudwoli vs Eureka Educational and Training Consultants & 2 others 1990** were further cited in support. It was submitted for the plaintiff that the words uttered and articles published in the *Weekly Citizen* instigated by the defendant were understood by right-thinking members of society to mean that the plaintiff is not accountable to the residents of Kericho County, that the plaintiff has absolutely no regard to the law or procedures for public appointments and that the plaintiff has no integrity and is dishonourable.

17. The plaintiff further relied on **Phineas Nyagah v Gitobu Imanyara (2013) eKLR** and **Evans Kidero v Standard Group Ltd & 4 others [2015] eKLR** with respect to what amounts to malice and the effect of defamatory statements on a person's character. The plaintiff also made various submissions with respect to his entitlement to damages, citing section 16A of the Defamation Act, Cap 36 Laws of Kenya. He also noted that an award of damages is discretionary, citing **CAM v Royal Media Services Limited Civil Appeal No. 283 of 2005[2013] eKLR** and **Hon. Henry Obwocha v. Headlink Publishing Ltd (2014) eKLR** in support. The court was urged to award the plaintiff general and aggravated damages to compensate him, considering his reputation and the behaviour of the defendant.

18. With regard to the question whether the court should grant the orders sought in the application, the plaintiff submitted that the principle applicable in defamation cases is that the injunction will be granted only in the clearest of cases. He relied on the case of **Micah Cheserem v Immediate Media Services and 4 others (2000) 2 EA 371** in support.

19. It was also his submission that the balance of convenience tilts in his favour as his reputation will be damaged and cannot be adequately compensated by damages in view of the fact that he is the Chief Executive of Kericho County Government. He relied for this submission on the case of **Gilgil Hills Academy Ltd Vs the Standard Ltd (2009) eKLR**.

20. In submissions filed on behalf of the defendant, it was contended that the plaintiff has not established a *prima facie* case to warrant the grant of the interlocutory orders sought. The defendant relied on **Nguruman Limited v Jan Bunde Nielson & 2 Others [2014] eKLR** to submit that the conditions for grant of an interlocutory injunction, a *prima facie* case, has not been met.

21. It was his submission that the plaintiff has not demonstrated a *prima facie* case with a probability of success as it was not the defendant who had published the words complained of. He relied on **Ruth Ruguru Nyagah v Kariuki Chege & Another 2015 eKLR** and **Phinehas Nyagah v Gitobu Imanyara [2013]eKLR** for this submission. The defendant's case therefore was that for any legal claims including an injunction, the defamation allegation must be made against the person who published the alleged defamatory words.

22. With regard to the alleged WhatsApp groups, the defendant denied being a member of any such group or having such an application on his phone.

23. It was also his contention that the words complained of are not defamatory to the extent that they constitute a public discussion on the management of public affairs in the County of Kericho. His contention was that the public offices occupied by both the defendant and the plaintiff require public debate and concern on the establishment and operation of executive and legislative affairs of a public matters. In his view, to the extent that the words complained of are in respect of official duties, they are not defamatory.

24. With regard to the question whether the plaintiff would suffer irreparable loss or damage, it was the defendant's submission that the plaintiff has not alleged that he will suffer any loss, leave alone irreparable loss, if the injunction is not granted. The defendant relied on the case of **Andrew Oloo Otieno v Benjamin Shamala Imbogo [2008] eKLR** in which the court dismissed a similar application on the sole ground that the plaintiff had not demonstrated he stood to suffer irreparable loss unless a temporary injunction was granted. He also relied on the case of **Renton Company Limited v Philip Kisia & 2 Others [2012]eKLR** in which the court had held that damages for injury to

reputation were capable of quantification.

25. To the question of where the balance of convenience lay, the defendant relied on the case of **Andrew Oloo Otieno** (supra) in which the court had stated that when it came to weighing the defendant's constitutional right of self-expression against the plaintiff's right to protection of his good reputation, the court would favour protection of the constitutional right of the defendant as appropriate damages would be available to the plaintiff.

26. The defendant further relied on Article 179(1) of the Constitution which states that the County authority is vested in the Governor; that under Article 185(3), a county assembly, of which the defendant is a member, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs; that under section 8(1)(a) of the County Governments Act, the function of the county assembly include the power to vet and approve nominees for appointment to county public offices.

27. It was his submission further that under section 62(2) of the same Act, the county assembly must approve establishment or abolition of a county public office. To the extent, therefore, that he was a member of the county assembly and had made comments about intended establishment and the failure to approve such establishment of county public offices, he was exercising his constitutional and legal duty of oversight.

28. The defendant further submitted that there were no special circumstances that warranted the grant of an interlocutory injunction. It was his case that such injunctions are only available in the clearest of cases possible, and he cited in support the case of **Brigadier Arthur Ndoni Owuor v The Standard Limited [2011]eKLR**. In his view, there was no evidence presented by the plaintiff to justify the grant of the injunctive orders that the plaintiff was seeking.

Analysis and Determination

29. I have considered the application, the affidavits in support and in opposition, and the submissions of the parties. This is an application for an injunction to restrain the defendant from publishing certain material that the plaintiff deems defamatory. That being the case, the plaintiff is under an obligation to satisfy the conditions laid down in **Giella –v- Cassman Brown & Company Ltd (1973) EA 358**. He must show that he has a *prima facie* case with a probability of success and that he stands to suffer irreparable damage if the injunction is not granted. If there is doubt that a *prima facie* case has been established, then the court will determine the matter on a balance of convenience.

30. I observe that the plaintiff has submitted at some length on what amounts to defamation and the circumstances in which damages for defamation may be awarded. However, since this is only the interlocutory stage of the matter, the substantive suit not having been heard, I will confine myself to considering the issues to be dealt with at this stage.

31. A *prima facie* case in civil cases was defined in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR** as follows:

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

32. In this case, the plaintiff is aggrieved by a certain article published in a publication called the *Weekly Citizen* that he alleges defamed him. However, the plaintiff has elected to file his suit against the defendant, and not the publication or its publishers. He has also alleged defamation as a result of certain matter published in *WhatsApp* groups, which the defendant has denied being a member of. In her decision in **Ruth Ruguru Nyagah v Kariuki Chege & Another [2015] eKLR**, Aburili J observed as follows:

“ Where the publication is done by a party other than the one sued, then no prima facie case with a probability of success is established.”

33. This was also the view expressed by Odunga J in **Phinehas Nyagah v Gitobu Imanyara [2013]eKLR** in which he stated:

“The defamatory material must be shown to have been published by the defendant.”

34. On this basis alone, I find that the applicant has not established a *prima facie* case with a probability of success. Not having joined the publication in which the alleged defamatory material was carried, he cannot claim to have established a *prima facie* case against the defendant.

35. I note that in the annexures to his replying affidavit, the defendant has produced documents which indicate that the allegations that the plaintiff terms defamatory may well be true. These allegations include accusations that the plaintiff has engaged in irregular appointments of persons close to him. The documents placed before the court by the defendant indicate that the county assembly of Kericho had already rejected the plaintiff's nominees. In **Brigadier Arthur Ndoni Owuor v The Standard Limited (supra)** the court observed as follows:

“...an interlocutory injunction in defamation cases is only granted in the clearest of casesunless it is clear that the alleged libel is untrue, freedom of speech should be left unfettered.”

36. In **Micah Cheserem v Immediate Media Services and 4 others (2000) 2 EA 371** relied on by the applicant, the court emphasised the

principle that an injunction will be granted in defamation cases only in the clearest of cases. It stated as follows:

“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 injunction as set out in the case of *Giella Vs Cassman Brown & co. Ltd (1973) EA 358* generally apply.... In defamation cases, those principles apply together with the 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 reason for so treating grant of injunction in defamatory cases is that the action for defamation bring out conflict between private interest and public interest, and 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.”

37. See also **Ahmed Adan v Nation Media Group Limited and 2 Others [2016] eKLR** and **Evans Kidero v John Kamau & another [2017] eKLR**.

38. The defendant in this case is a member of the county assembly of Kericho. He has a duty in that capacity under section 8(1)(a) of the County Governments Act to **“vet and approve nominees for appointment to county public offices as may be provided for in this Act or any other law.”** He is alleged to have made comments about the intended establishment by the plaintiff, and the failure to approve such establishment of county public offices by the county assembly. In my view, such comments were made in the exercise of his constitutional and legal duty of oversight, and on the material currently before the court, cannot be said to be defamatory.

39. In the circumstances, I am not satisfied that a *prima facie* case has been made out to warrant the grant of the interlocutory orders sought by the plaintiff/applicant. The application is accordingly dismissed. Costs shall be in the cause.

Dated and Signed at Nairobi this 19th day of June 2019

MUMBI NGUGI

JUDGE

Dated, Delivered and Signed at Kericho this 11th day of July, 2019

GEORGE DULU

JUDGE