IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: WAKI, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 244 OF 2017

BETWEEN

ALBERTUS LOTTER SADIE ..... APPELLANT

AND

ELSABE VILJOEN SADIE ..... RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi, (J. K. Sergon, J) dated 13th May, 2016

in

H. C. C. C. No. 285 of 2015)
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JUDGMENT OF THE COURT

This is a rather unusual case in which the husband seeks to use the coercive power of an injunction to stop his wife from defaming him. The High Court **(Sergon, J.)** refused to grant a temporary injunction on the basis that communication between spouses is privileged, hence this interlocutory appeal by the husband.

The two parties are South African citizens, but before June 2015, they lived together in Nairobi as man and wife. The husband worked as an Accountant for Ecobank Transnational Inc. (Ecobank) while the wife was unemployed. Their life together, however, went south due to irreconcilable differences and they separated. The wife went back to South Africa and in August 2015, the husband filed for divorce

in the Chief Magistrate's court in Nairobi **[CM Divorce Cause No. 272 of 2015]**. The divorce case has yet to be heard.

In July 2015, the wife addressed an email to two senior managers of the husband's employer portraying the husband as 'a thief, dishonest man, untrustworthy, violent and a mental case' who should be deported from Kenya, amongst other epithets. He considered those accusations as false and malicious, meant only to cause him to lose his reputation and employment. The wife was still threatening to unleash more vitriol through other media and that is why he filed the suit for defamation seeking the following orders:

> ***"a) General damages for libel.***
>
> ***b) Aggravated and/or exemplary damages.***
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> ***c) A permanent injunction restraining the Defendant, whether by herself, her servants, agents or howsoever from communicating or publishing or further publishing or causing to be published to the Plaintiff's employer, fellow employees or to any other person either by email or otherwise words or any publication defamatory of the Plaintiff.***
>
> ***d) A formal written retraction and apology for the false allegations published to Catherine Mogambi and Eric Coffie at Ecobank.***
>
> ***e) Costs of this suit and interest on (a) and (b) above."***

The husband also took out a motion for a temporary injunction in terms of prayer (c) which was the matter heard and determined by Sergon, J. on 13th May, 2016. The learned Judge was ready to accept that the words complained of were defamatory in nature, but, as stated earlier, declined to grant the injunction for the sole reason that

the communication was between persons who were still married in law and was therefore protected by privilege. He reasoned as follows:

> ***"There is no dispute that these parties to this suit are spouses. There is also no dispute that the parties have a pending Divorce Petition before the chief magistrate's court. In other words, the marriage between the parties herein still subsists pending the outcome of the Divorce proceedings. The question as to whether or not a communication between a husband and wife can be defamatory was partly considered in Wenhank vs. Morgan and wife (1888) QB 635 in which it was held inter alia, that***
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> > *"In an action for libel the fact that the defendant has disclosed the libel to his wife is not evidence of publication. ..... According to a well recognised principle, husband and wife are in the same position, and therefore that the uttering of a libel by a husband to his wife is no publication.."*
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> ***I have examined the words complained of and they would appear defamatory in nature but these are communications between spouses which are privileged in law. With respect, I agree with the submissions of Kivumbi, learned advocate for the Respondent that the communication between spouses cannot be regarded as defamatory since they are protected by law. On this ground alone, I find that the Applicant's has not established a prima facie case with a probability of success."***

That is the finding which aggrieved the husband who now challenges it on five grounds listed in his memorandum of appeal. They all amount to a complaint that the learned Judge misunderstood the *ratio decidendi* in the ***Wenhank case*** (supra). Learned counsel for the husband, **Mr. P. R. Amuga,** filed written submissions which he briefly highlighted orally at the hearing of the appeal. He submitted that the English authority relied on was irrelevant and distinguishable since the principle established there was that in an action for libel, the fact that the defendant disclosed the libel to his wife was no evidence of publication. The case was therefore misapplied in this case.

Counsel emphasized that the undisputed facts in this case are that the wife published defamatory words to third parties. It was not a case of disclosing the libel to a spouse. The husband did not authorize the wife to publish the words; there was no denial of the publication; there was no defence of privilege pleaded; and there was no denial that more defamatory words would be published. In those circumstances, submitted counsel, a clear *prima facie* case with a probability of success was established which no monetary compensation could atone for.

He cited **Halsbury's Laws of England, 4th Edition, Vol. 28** at page 127 para. 258, stating:

> ***"Injunction to restrain publication. The High Court has jurisdiction to grant an injunction at the trial of an action to restrain publication of defamatory words or matter in all cases in which the court thinks it just and convenient to do so. The court will accordingly grant an injunction if it is satisfied that the words complained of are defamatory of the plaintiff or, in the case of slander, calculated to disparage him in his office, profession, calling, trade or business held or carried on by him at the time of publication, and there is reason to apprehend a repetition of the wrong.***
>
> ***The jurisdiction is not confined to libels or slanders which affect the plaintiff's property, trade or business; there is no logical distinction between a case affecting property or trade or one affecting character. The jurisdiction extends to actions of slander as well as to actions of libel, although the courts naturally exhibit greater caution in granting an injunction in the case of spoken words than in the case of written or printed statements."*** *[Emphasis supplied]*

He also relied on the case of ***Brigadier Arthur Ndoj Owuor vs The Standard Limited [2011] eKLR*** where the High Court granted a temporary injunction in a defamation matter, stating thus:

> ***"In my view, with the facts placed before me, the applicant has demonstrated a prima facie case. The proof or otherwise of his case will be determined after the substantive hearing. His reputation is at stake in view of the content of the reports. Once a reputation is lost, in my view, monetary damages might not be an adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for a lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in memory possibly throughout his life."***

In conclusion, counsel referred to ***section 13 (b)*** of the **Marriage Act No. 4 of 2014** which provides that *'spouses have the same liability in tort towards each other as if they were not married'* and submitted that the legal position in Kenya is that a spouse can sue the other in tort, even during coverture.

In opposing the appeal, counsel appearing for the wife, **M/s W. G. Wambugu & Company Advocates**, filed written submissions but did not show up for oral hearing despite service of the hearing notice. They submitted that there was still an existing marriage between the parties and, in their view, a husband and wife cannot sue each other in tort, since they are in the same position as held in the ***Wenhank case.*** According to them, under common law, a wife cannot be held liable for libel against her husband during coverture, and their communication is privileged. Counsel relied on the High Court case of ***Micah Cheserem vs Immediate Media Services & 4 Others [2000] eKLR*** for the proposition that the question of an injunction in a defamation case is treated in a special way, and the court's jurisdiction must be exercised with the greatest caution and only in clear cases. In counsel's view, the husband was seeking a mandatory injunction which can only be granted in exceptional circumstances, but

which did not exist in this case. The trial court was right in dismissing the application, he concluded.

We have considered the interlocutory appeal which involves our determination as to whether the discretion of the trial court was exercised in a judicious manner. If it was, we have no business interfering with the decision, but will do so if we find that there was either an error in principle or that the trial Judge was plainly wrong. The Supreme Court recently (18th January, 2019) made the following pronouncement on interference with the discretion of the Court of Appeal:

> "***We would only interfere with the appellate court's discretion if we reach the conclusion that in exercise of the discretion, the court acted arbitrarily or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion from the Court of Appeal is not a reason to interfere with the exercise of discretion."***

See ***Musa Cherutich Sirma vs Independent Electoral and Boundaries Commission & Two Others SC Petition No. 13 of 2018, (UR).***

The same could be said about interference by this Court with the discretion of the trial court.

Both the defamation case and the divorce cases between the parties are still pending, and we cannot delve into the respective merits of the cases for obvious reasons. Suffice it to say, as correctly found by the trial court, that the parties were still married in law and that, on the face of it, the words complained about were defamatory in nature. Indeed the trial court was inclined to grant an injunction if the law, as the

learned Judge understood it, did not stand on his way. The fear, however, was unfounded.

The ***Wenhank case (supra)*** which was followed by the learned Judge is about 130 years old but the principle emanating from it still holds true in common law. The facts of the case revolved around a domestic servant who claimed he was defamed by one spouse who informed the other about his character. The legal issue was thus whether there was **publication** of the defamatory information, and it was correctly held that it was a common law principle that husband and wife were one person, and therefore, the uttering of a libel to the party libeled is no publication for the purpose of a civil action. Furthermore, if a libel was uttered on a privileged occasion to a husband when his wife was present, her presence did not take away the privilege. On those facts the case was correctly decided.

The case before us, as correctly submitted by the appellant's counsel, is totally different. It has nothing to do with publication of defamatory material between spouses. Here, it is one spouse, the wife, who took it upon herself to destroy the character of her husband in the eyes of the employer and his workmates, and still threatened to do more. Whether in fact the words were true or not will be a matter for trial, but it cannot be argued that there was no publication. With respect, the learned judge misconstrued the authority cited before him and made an error in principle. We are thus entitled to interfere with his discretion.

We do not interfere with the finding by the trial court that, on the face of it, the words were defamatory. They were also published as pleaded. There is only a general

denial in the defence that the wife intends to publish more information about the husband to his employer or his workmates, while the affidavit in reply simply accuses the husband of also maligning her to his friends in social media. As correctly stated in the ***Brigadier Owuor case (supra),*** in the nature of defamation, once a reputation is lost it is virtually irreversible and therefore damages may not be a suitable remedy. We think in this case, it is just that the wife be restrained from publishing further defamatory information against the appellant until the main suit is heard and determined.

It follows that this appeal is meritorious and succeeds. The order of the High Court made on 13th May, 2016 is hereby set aside and substituted with an order granting prayer (1) of the notice of motion dated 14th August, 2015. The costs of the appeal and of the motion in the court below shall be borne by the respondent.

Dated and delivered at Nairobi this 8th day of February, 2019.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR