



REPUBLIC OF KENYA



**Osano v Ekorent Africa Limited & 3 others; Infraco Africa Limited (Interested Party) (Civil Case E221 of 2021) [2023] KEHC 4038 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4038 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E221 OF 2021**

**A MSHILA, J**

**APRIL 28, 2023**

**BETWEEN**

**KENNETH OYWAYA OSANO ..... PLAINTIFF**

**AND**

**EKORENT AFRICA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EKORENT OF FINLAND ..... 2<sup>ND</sup> DEFENDANT**

**JUHA TAPIO SUOJANEN ..... 3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**INFRACO AFRICA LIMITED ..... INTERESTED PARTY**

**RULING**

**Background**

1. The notice of motion dated November 25, 2021 was brought under order 40 rules 2 and 4 of the [Civil Procedure Rules](#) for the following orders;
  - a. A temporary injunction do issue restraining the plaintiff whether by himself, his officers, employees, servants and/or agents from publishing, causing to be published, republishing, and/or disseminating, distributing or otherwise reproducing, whether partially or in its totality, letters, emails or any other written statement and or document with respect to the 1<sup>st</sup> and 3<sup>rd</sup> defendants business to either the 1<sup>st</sup> and 3<sup>rd</sup> defendants clients, business associates or investors and the members of the public pending the hearing and determination of the counterclaim.



- b. A temporary do issue restraining the plaintiff whether by himself, his officers, servants and/or agents from publishing and/or causing to be published, any material of and concerning the 1<sup>st</sup> and 3<sup>rd</sup> defendants, in relation to the directorship, shareholding and/or business of the 1<sup>st</sup> defendant pending the hearing and determination of the counterclaim.
  - c. A mandatory injunction do issue compelling the plaintiff to erase and/or recall all letters and emails sent to the 1<sup>st</sup> and 3<sup>rd</sup> defendants business associates, clients investors and third parties relating to the 1<sup>st</sup> and 3<sup>rd</sup> defendants, in relation to the directorship, shareholding and/or business of the 1<sup>st</sup> defendant pending the hearing and determination of the counterclaim.
  - d. The costs of this application be borne by the plaintiff.
2. The application was supported by the sworn affidavit of Juha Suojanen and by the grounds on the face of it.
  3. The plaintiff/respondent filed grounds of opposition dated March 4, 2022 on the following grounds;
    - a. The application by its nature seeks remedies that cannot be supplied within the cause herein.
    - b. The application is substantively premised on the tort of defamation which cannot be prosecuted within the cause herein which is based on breach of contractual relations and prayers for specific damages.
    - c. The application will essentially require the adduction of evidence of the nature to be supplied in a cause for defamation thus distorting the plaintiff's cause.
    - d. The application is an abuse of process, waste of judicial time, frivolous and vexatious.
    - e. The application dated November 25, 2021 can be best managed by filing a separate and distinct suit on defamation wherein the 1<sup>st</sup> and 3<sup>rd</sup> defendants can also file an application to seek the remedies herein.

### **Applicants' Case**

4. It was the applicants' case that the facts as set out in the counterclaim and the supporting affidavit demonstrate that they have a *prima facie* case with a probability of success. The sequence of events set out in the defence and counterclaim explains how the relationship between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants came to be.
5. The relationship started disintegrating on March 1, 2021 when the plaintiff published the first defamatory email against the 3<sup>rd</sup> defendant. Paragraph 6 of the supporting affidavit and pages 1 to 3 of the exhibit to the supporting affidavit. This led to the termination of the plaintiff's employment with the 1<sup>st</sup> defendant and eventual removal as a director of the 1<sup>st</sup> defendant.
6. The applicants invited the court to read the letters and emails whose content in their ordinary and natural meaning portray the applicants as dishonest for allegedly bringing in devices for use by the 1<sup>st</sup> defendant into Kenya without paying taxes. Allegedly misleading the 1<sup>st</sup> defendant's investors (the interested party and Atmosfair GmbH) by obtaining duplicate financing on the same invoices. Doctoring the 1<sup>st</sup> defendant's numbers to suit specific investor briefings. Exaggerating payments for rent, legal fees and other service providers with respect to the 1<sup>st</sup> defendant.



7. Further, that the applicants are corrupt for allegedly bribing police officers in Kenya to harass and arrest the plaintiff and to do away with the accusations lodged by the plaintiff against the 3<sup>rd</sup> defendant among other issues.
8. It was the applicants submission that the words as published by the plaintiff are defamatory. The plaintiff has not demonstrated that he has any grounds for arriving at the conclusions contained in the said letters and emails against the applicants. The failure by the plaintiff having to file any response to the current application or defence to the counterclaim is an indication the plaintiff has no defence to the same and was it not for the temporary injunction issued by the court on December 14, 2021 the plaintiff would have continued with his spree of defamatory letters and emails.
9. The applicants therefore urged the court to find that they have met the first principle by demonstrating that they have a *prima facie* case with a probability of success against the plaintiff.
10. The 1<sup>st</sup> defendant's grant of Eur 104,464 from the Ministry of Foreign Affairs of Finland to train new drivers in Kenya together with local electricians to install and maintain the charging stations was also put to risk. This also greatly affects the potential growth of the 1<sup>st</sup> defendant's business in Kenya together with the creation of employment for the drivers and technicians in Kenya. The applicants' thus submitted that the damage caused to the applicants' reputation is irreparable, no amount of damages could sufficiently compensate them for their loss.
11. The third principle requires the court to decide the matter on a balance of convenience, where it is in doubt. The applicants argued that there is no doubt in this case that would require the court to decide the matter on a balance of convenience. However, if there was any doubt the balance of convenience would tilt in favour of the applicants. They have demonstrated that the disadvantages that they have suffered and would continue to suffer due to the defamatory words. The balance of convenience tilts in favour of preserving the applicants' reputation and business.
12. The applicants submitted that they have demonstrated the special circumstances that would justify ordering the plaintiff to recall the letters and emails. The said letters were addressed to business associates and clients of the 1<sup>st</sup> defendant and also third parties who have no relationship with the applicants but who have a relationship with the interested party who is one of the 1<sup>st</sup> defendant's investors.

### **Respondent's Case**

13. It was the respondent's case that the plaintiff while writing the alleged defamatory material, did so within the mandate of his position as the Country Director, technically the CEO of the 1<sup>st</sup> defendant company.
14. Further, the letters complained of were not written and published for the public in any public forum of wide circulation. The letters were written to relevant personalities who had a stake in the business of the 1<sup>st</sup> respondent in which the plaintiff was a country director and the addressees of the letters or publication included directors, shareholders and business partners. These stakeholders of various descriptions naturally expected the plaintiff/respondent to give them information about the general state of the 1<sup>st</sup> respondent company and therefore the publication complained off constituted a natural mandate, consequence of and or expectation from the role of the plaintiff.
15. It was the respondent's argument that the contents of the letters might have been defamatory but very important and necessary. This is because the plaintiff would have abdicated duty if he had kept quiet in the face of all the wrongs that the 3<sup>rd</sup> defendant/applicant, Juha Tapio Suojanen did including



undermining and insubordination of his work, high handedness against him and other staff, fraud and financial mismanagement among others.

16. The orders prayed for in the application are of a permanent nature which cannot be granted through an application but only upon and after the hearing and final determination of the suit and therefore premature.
17. The respondent argued that the words complained of in the attachments which constitute email correspondence between the plaintiff, respondent and the stakeholders in the 1<sup>st</sup> respondent company, including shareholders, directors and business partners are neither libelous nor manifestly defamatory. They would have been libelous and manifestly defamatory if they were not true. However, a peek at the pleadings filed by the plaintiff illustrates that the plaintiff relies on the words complained of to prop up his case: the words complained of are true.
18. By virtue of the respondent's position as the country director was obligated to inform the stakeholders already described herein, of the conduct and behaviour of the 3<sup>rd</sup> defendant. He would have been failing in his duty if he did not do that, for which he would likely suffer prejudice since the buck stopped with him. That is the illustration that anchors the respondent's solid defence of justification.
19. On the other hand, the applicants have not submitted if the addressees in the alleged defamatory material shared it with anyone else or with the public and so the material has not exposed the defendants to any opprobrium at all, which in any event was clearly not the intention of the respondent. The materials are safe in the mail inboxes of the various addressees who are not more than five or six in number, assuming they have not destroyed the material and therefore the applicants have not suffered any damage. Not that it would matter anyway, in the face of the respondent's solid defence of justification.
20. The respondent has been removed albeit illegally as a director of the 1<sup>st</sup> respondent company. At the very least, he is not in the position he was in previously where he felt obligated to communicate to stakeholders on issues that affect the company. To that extent, he is remotely not publishing any communication to the stakeholders of the 1<sup>st</sup> respondent company about the business of the company because he has no business doing so anymore.

### **Issues for Determination**

21. The court has considered the application and the written submissions and frames the following issues for determination;
  - a. Whether a temporary injunction order should issue against the respondent?
  - b. Whether a mandatory injunction should issue compelling the plaintiff to erase and/or recall all letters and emails?

Analysis

Whether a temporary injunction order should issue against the respondent?

22. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of *Giella v Cassman Brown & Co Ltd* (1973) EA as follows:
  - “ a) The applicant must first establish a prima facie case with a probability of success.



- b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
- c) Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.”

23. The above principles were restated in the case of *Micah Cheserem v Immediate Media Services & 4 others* [2000] eKLR cited by the respondents and in respect to defamatory claims, thus:

“Firstly, the applicant must establish a prima facie case with a probability of success. Secondly, the applicant must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages. Thirdly, where the court is in doubt, then the balance of convenience should tilt in favor of the applicant.”

24. The court has perused the impugned emails sent by the respondent to the applicants and the same portrayed the applicants as dishonest, racist, corrupt and criminals and some of the accusations therein include bribery of the police, forgery among others; thus the court is satisfied that the applicants have made out a prima facie case with a probability of success;

25. On whether the applicants will suffer irreparable loss, the applicants argued that the letters and emails have been sent to the 1<sup>st</sup> defendants business associates and this puts at risk the 1<sup>st</sup> defendant’s grant of Eur 104, 464 as well as its potential business growth; on this principle the amounts are found to be quantifiable and therefore the applicants have not demonstrated that they stand to suffer irreparable loss that cannot be adequately compensated through damages.

26. On the third principle, it is this court’s considered opinion that on the face of it that the subject publication would cause any reasonable person to perceive the applicants unfavorably and that the applicants will as a result suffer a greater inconvenience if the order of injunction is not granted. It therefore follows that the balance of convenience tilts in favor of the applicants.

Whether a mandatory injunction should issue compelling the plaintiff to erase and/or recall all letters and emails?

27. On the issue of mandatory injunction, the considerations for granting mandatory injunctions were well stated in the case of *Kenya Breweries Ltd & another v Washington O Okeyo* [2002] eKLR where the Court of Appeal said;

“The test whether to grant a mandatory injunction or not is correctly stated in Vol 24 *Halsbury’s Laws of England* 4<sup>th</sup> Edition paragraph 948 which read: -

‘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 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 march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”



28. Further, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in *Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR when it rendered itself thus:

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva*, AIR 2003, Gupta, J of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

29. The respondent argued that the material is safe in the email boxes and therefore the applicants have not suffered any damage. In addition, he argued that the words are true even though they might be libelous on the face of it. The applicants on the other hand argued that the existence of the said emails continues to expose them to the damage of their reputations and might expose the interested party to unnecessary investigations by the UK serious fraud office.
30. Considering the above arguments, the applicants have not brought any credible evidence to show that the injury to their reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage.
31. In light of the above, the present case does not fall within the category of clear-cut cases that can form a basis to grant a mandatory injunction. Consequently, the prayer for a mandatory order of injunction is devoid of merit at this stage.

### **Findings and Determination**

32. From the forgoing this court makes the following findings and determinations;
- (i) This court finds the application to be partially successful.
  - (ii) A temporary injunction do hereby issue restraining the plaintiff whether by himself, his officers, employees, servants and/or agents from publishing, causing to be published, republishing, and/or disseminating, distributing or otherwise reproducing, whether partially or in its totality, letters, emails or any other written statement and or document with respect to the 1<sup>st</sup> and 3<sup>rd</sup> defendants business to either the 1<sup>st</sup> and 3<sup>rd</sup> defendants clients, business associates or investors and the members of the public pending the hearing and determination of the main suit.



- (iii) A temporary do issue restraining the plaintiff whether by himself, his officers, servants and/or agents from publishing and/or causing to be published, any material of and concerning the 1<sup>st</sup> and 3<sup>rd</sup> defendants, in relation to the directorship, shareholding and/or business of the 1<sup>st</sup> defendant pending the hearing and determination of the main suit.
- (iv) The application for a mandatory injunction to issue compelling the plaintiff to erase and/or recall all letters and emails is found to be devoid of merit and it is hereby disallowed;
- (v) The applicants shall bear the costs of the application;
- (vi) Mention on May 9, 2023 before the Deputy Register for case management.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2023.**

**HON. A. MSHILA**

**JUDGE**

**In the presence of;**

**Mrs. Mwangi for the 3<sup>rd</sup> Defendant and Interested party**

**No appearance for other parties**

**Sarah-----Court Assistant**

