



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E201 OF 2021

CYTONN INVESTMENTS MANAGEMENT PLC.....PLAINTIFF/APPLICANT

= VERSUS =

AM.....DEFENDANT/RESPONDENT

RULING

This ruling relates to the plaintiff/applicant's application dated 13th August, 2021 seeking the following orders:

1. Spent

2. Spent

3. THAT pending the hearing and determination of the suit filed herein, an order of injunction be and is hereby issued barring the Defendant/Respondent by himself, his agents, assigns and/or servants from making and/or publishing, airing, on social media and/or on any other platform, any statements, remarks, innuendo and defamatory statements about the plaintiff, its officials and its investment vehicles and/or any subsidiaries or officers of the plaintiff.

4. THAT costs be awarded to the Plaintiff/Applicant.

The application is supported by the affidavit of **FAITH CLAUDI**, the applicant's Legal Officer, sworn on 13th August, 2021 and the grounds on the face of the application. These grounds are that the applicant being an independent investment management company in real estate development relies on its good reputation, legality and legitimacy of its products to attract more clients. That the defamatory video by the defendant/respondent titled [Particulars Withheld] 3, Episode 10, "[Particulars Withheld]" uploaded on his YouTube channel, <https://youtu.be/cwAQ7Q2205w>, infused panic and falsehood meant to injure the applicant's reputation. That even after the issuance of a cease and desist notice, the respondent is yet to pull down the defamatory video, which continues to prejudice the interests of the applicant, its clients and affiliates. The applicant avers that the respondent having no personal or financial interests in the [Particulars Withheld] Fund lacks the authority to speak on the same. In its oral submissions before court, Ms. Aoko for the applicant pointed out that since it is the applicant's reputation at risk and they have a prima facie case, this court ought to allow the application for injunction.

In response, the respondent filed a replying affidavit sworn on September 15, 2021, in which he acknowledges owning a widely accessible and educational YouTube channel called AM. The respondent maintains that the statements referred to in paragraph 4 were indeed broadcast on his YouTube channel once, but that they were not meant to cause panic or falsehood. He further contends that since he is not an investor with the applicant's company, the information on his channel was narrated to him by the applicant's client, who is also his friend. Furthermore, he claims that the statements in the video were honest, truthful, and based on information that was trending in the mainstream and social media circles, and that as a result, the video did not harm the applicant's reputation.

Analysis and Determination:

The principles and conditions for grant of interlocutory injunction were stated in the case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358**. **The plaintiff needs to establish that there is a prima facie case with probability of success, that irreparable loss will be suffered if the injunction is not granted and lastly if the court is in doubt on the above two principles, the matter will be decided on a balance of convenience. The principles in Giella Case were modified to suit defamation cases in the case of Cheserem vs Immediate Media Services (2000)2 EA 371 (CCK) where the Court held that;**

"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 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."

In the case of *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR the Court of Appeal stated that a prima facie case is one which on the material presented in 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 respondent.

In the present application, the applicant's complaint is based on the alleged publication of defamatory statements by the respondent on his YouTube Channel against the applicant intended to tarnish and damage its reputation. The alleged defamatory statement was to the effect that the applicant and its officers were inauthentic, unscrupulous, corrupt, crooked, opportunistic investment partners, fraudulent money minting scheme with false promises and a dishonest business entity that does not abide by the rules and regulations governing investments. The respondent has confirmed that he aired the alleged video on his channel but he maintains that the statements were not defamatory and were used to educate the general public on smart investments. Further, the respondent argues that since the issues affecting the applicant were already in the public domain, the statements in his channel could not lower the respondent's reputation

Paragraph 6 of the plaint gives an English version of the alleged defamatory words. The effect of those words is that some people at the plaintiff company took away some money and went away and the company is now shaky. On the face of it that statement would likely cause any reasonable person to develop a negative perception of the applicant, its affiliates and their products, thereby causing its reputation to suffer. I find that the applicant has shown that it has a prima facie case with a probability of success. This court however takes note that its duty is not to delve into the merits of the case or to consider the evidence to be adduced at the trial, in order to determine whether a prima facie case exists. To this end, I rely on the Court of Appeal decision in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where it was held that:

"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."

In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal observed that the equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount of compensation can be measured with reasonable accuracy or the injury or harm is in such a nature that monetary compensation, of whatever amount, will never be an adequate remedy. The applicant has admitted that being an investment management company, its seven (7) year reputation is important and therefore the continued presence of the publication of the articles are lowering its reputation and business. I am in agreement with the pronouncement by Justice Mbogholi Msagha (as he then was) in *Amir Grinberg & 2 others v Andrew Baker* [2021] eKLR that "when it comes to defamation, a name is the only thing a person has. It is priceless. A reputation once destroyed or lost may never be redeemed."

The applicant's business is based on trust and a good reputation; however, the respondent's statement portrays the applicant as a dishonest business scheme with false promises. In my opinion, the statement may cause panic and concern among the applicant's existing and prospective clients who are interested in the projects undertaken by its affiliates. Because the respondent is not a client, the information received is hearsay, and the fact that it was in the public domain does not justify the statements. According to the balance of probabilities, the plaintiff is more likely to suffer than the defendant.

The respondent has also claimed that the applicant's demand violates his constitutionally protected right to free expression. Article 33 of the Constitution guarantees freedom of expression, but it is subject to the limitations set out in Article 33(2) and (3) to ensure that, as in this case, it does not result in defamation and, ultimately, the destruction of one's business. If the orders are granted, the respondent will suffer no prejudice.

In the end, I do find that the application dated 13th August, 2021 is merited and is hereby granted as prayed. Costs shall follow the outcome of the main suit.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022.

S. CHITEMBWE

JUDGE