



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL CASE NO. E004 OF 2021

UPENDO FOUNDATION.....1ST PLAINTIFF/APPLICANT

CHARLES PETER FISH.....2ND PLAINTIFF/APPLICANT

VERSUS

KENNEDY ODHIAMBO OBONGORESPONDENT

RULING

1. The plaintiffs/applicants moved the court by way of Notice of Motion dated 1st October, 2021. It was brought under sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, CAP. 21 Laws of Kenya, Order 40 Rules 1,2, 4, 9 & 10, Order 51 Rule 1 and under Articles 28, 31, 33 (3) 159 & 165 of the Constitution of Kenya. The applicants are seeking the following orders:

- a) The application herein be certified urgent and the same be heard ex-parte in the first instance, owing to the existing circumstances. [Spent]
- b) Pending the hearing and determination of the instant application, the honourable court be pleased to issue an interim order of injunction restraining the defendant/respondent either by himself, his agent, servant or anyone acting on his behalf from writing, publishing and/or republishing defamatory information in any manner whatsoever about the plaintiff's/applicants particularly to various sponsors including but not limited to Amani UK in regards to the charitable activities being conducted by the plaintiffs/applicants.
- c) Pending the hearing and determination of the instant application the honourable court be pleased to grant mandatory order of injunction compelling the defendant/respondent to forthwith remove, pull down, expunge and erase from all forms of media including print, broadcast, digital and social media any form or nature whatsoever of the program or similar words or statements or content of like effects relating to the plaintiffs/applicants.
- d) The honourable court be pleased to grant an order of temporary injunction restraining the defendant/respondent either by himself, his agents, servants or anyone acting on his behalf from writing, publishing and/or republishing defamatory information in any manner whatsoever about the plaintiffs/applicants particularly to various sponsors including but not limited to Amani UK in regards to the charitable activities being conducted by the plaintiffs/applicants, pending the hearing and determination of the instant suit.
- e) The honourable court be pleased to issue an order of mandatory Injunction compelling the defendant/respondent to forthwith remove, pull down, expunge and erase from all forms of media including print, broadcast, digital and social media any form or nature whatsoever of the program or similar words or statements or content of like effects relating to the plaintiffs/applicants, pending the hearing and determination of the instant suit.
- f) Costs of this application be borne by the defendant/respondent.
- g) Such further and/or other orders be made as the court may deem fit and expedient.

2. The application was premised on grounds that can be summarized as follows:

- a) The 1st plaintiff/applicant is a Non-Governmental Organization duly constituted and incorporated pursuant to the provisions of the Non-governmental organizations co-ordination Act, with her registered offices situated and/or located at Oyugis town, within the county of Homa Bay.
- b) For coherence, the 1st plaintiff/applicant was registered on the 21st June 2007 and a certificate of Registration was issued to that effect.

- c) Besides, the 1st plaintiff/applicant carries out various charitable activities in Homa-Bay county including but not limited to Food Security, Health, Education, Water and sanitation, Shelter, Economic empowerment and Special/humanitarian programs within eight(8) locations.
- d) Consequently, the 1st plaintiff/applicant has since gained an unmatched reputation in its philanthropic work and/or contribution to the members of the public and/or residents of Homa-Bay County and beyond.
- e) The 1st plaintiff/applicant additionally has Regional recognition in its field evidenced by the numerous assistance and/or contribution to the welfare of the society.
- f) On the other hand, the 2nd plaintiff/applicant is currently working as the international Coordinator of a charitable organization by the name Amani UK which organization is based at the United Kingdom.
- g) Besides, Amani UK, is the Sponsor of almost the charitable activities being undertaken by the 1st Plaintiff/applicant. To that end, the financial assistance being offered by the Amani UK to the 1st plaintiff/applicant is immense thus the 1st plaintiff depends on the said organization for its operations.
- h) The defendant/respondent herein was an employee of the 1st plaintiff/applicant whereby same was a project manager of Imani Project being a project under the management and/or supervision of the 1st plaintiff/applicant.
- i) On the other hand, the defendant's/respondent's employment was terminated by the 1st plaintiff/applicant on account of gross misconduct relating to the misappropriation of beehives which were part of a Hone Project funded by the 1st plaintiff/applicant.
- j) Be that as it may, the 1st plaintiff/respondent on account of the Honey project lodged a suit against Defendant/respondent on account of the honey Project lodged a suit against defendant/respondent vide OYUGIS PMCC NO.177 OF 2019 which matter was determined in favour of defendant/respondent herein.
- k) Nevertheless, on various dated between the 28th July 2021, 31st July 2021 and 1st august 2021, the defendant/respondent herein generated various email correspondences to Amani UK, who are the Sponsors of inter-alia the 1st plaintiff/applicant whereby various unfounded and malicious allegations were made touching on the board members and/or employees of the 1st plaintiff/applicant and the 2nd plaintiff/applicant herein.
- l) The application therein contained false, offensive, spiteful and malicious information about the plaintiff/applicants. For clarity, the email publications therein purported that the board members and/or employees of the 1st plaintiff/applicant were corrupt in the course of carrying out their mandate.
- m) Besides, the publications therein purported to depict the 2nd plaintiff/application as a fence sitter and/or indecisive in regards to his duties and/or responsibilities as the international Coordinator of Amani UK.
- n) In addition to that, the publications therein also purported that the 2nd plaintiff/applicant was diverting funds from Amani UK and lavishly using same on court cases instead of using same on vulnerable members of the society thus the 1st plaintiff/applicant was a corrupt individual.
- o) Consequently, the damaging allegations published and widely circulated by the defendant/respondent caused extreme condemnation and prejudice against the plaintiffs/applicants and culminated in the reduction of Donor support on behalf of eh 1st plaintiff/applicant.
- p) The malicious intent of the publications is evident with the fact that the defendant/respondent offered no evidence in support of his allegations to sponsors at Amani UK who various email publications were forwarded to.
- q) Besides, said email publications continue to be viewed locally and globally through the defendant's/respondent's social media platforms and therefore continues to lower the good reputation that the plaintiffs'/applicants once held.
- r) At any rate, the said action of causing to be published matters that the defendant/respondent knew or ought to have known before to be false, defamatory, malicious libelous were meant to be scandalous, humiliate, ridicule and vex the plaintiffs/applicants.
- s) In any event, the allegations contained in the said email publications had a clear intention to scandalize, defame and injure the reputation of the plaintiff/applicants and expose them to hatred, contempt, and ridicule with the sole aim of causing damage and injure to their reputation in general.
- t) Consequently, the defendant's/respondent's intention has been to defame and injure the reputation of the plaintiffs/applicants and expose them to hatred, contempt, ridicule and with the sole purpose of causing damage and injure to their reputation in general.
- u) Besides, that the defendant/respondent has no legal right to publish or propagate malicious publication against the plaintiffs/applicants.

v) Consequently, the defendants/respondents' email publication complained of were actuated by malice, extreme ill will and hatred. Same was deliberately and calculated and planned to injure the plaintiffs/applicants in their personal image, professional reputation with a view of affecting their general honest standing in the society.

w) Owing to the foregoing, the email publications have greatly injured the reputation of the plaintiff/applicants. Same have suffered great loss and damage as a respectable organization and honest philanthropist whose probity has been recklessly and cruelly impugned by the defendant/respondent.

x) Unless this application is forthwith heard and the orders sought granted, the plaintiffs/applicants will suffer loss and damage.

y) Consequently, the plaintiffs/applicants constitutional rights have been violated and/or infringed upon.

z) In view of the foregoing, the plaintiffs/applicants have a prima facie case against the defendant/respondent.

aa) In the circumstances, the actions and/or activities of the defendants shall occasion irreparable loss to the plaintiffs/applicants.

bb) Unless the orders sought are granted the plaintiffs/applicants shall be denied and/or deprived of their rights and/or interests in regards to their reputation being on the line.

cc) At any rate, the balance of convenience tilts in favour of the plaintiffs/applicants.

dd) On the other hand, the actions of the defendant/respondents complained of, amounts to and/or constitutes impunity.

ee) In any event, the actions by and/or at the instance of the defendant/respondent are in contravention of Article 28, 31 and 33(3) of the Constitution, 2010.

ff) Consequently, this is a fit and proper case to grant orders of temporary injunction.

gg) It is in the interest of justice that the application herein be granted *ex-debito Justitiae*.

3. The respondent opposed the petition giving various reasons which can be summarized as follows:

a) That the complained of email cannot be removed or pulled down.

b) That the applicants have not demonstrated that they have met the requirements for issuance of an injunction.

4. An interim injunction is provided for under order 40(1) (a) and (b) of the Civil Procedure Rules. It provides:

Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.

In the celebrated case of **Giella vs Cassman Brown & Company Limited (1973) E.A 358** the court said:

First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

5. After perusing the application and the submissions by both parties, I find that the application is so intertwined with issues in the suit and it is not in the interest of justice to grant the same. I accordingly dismiss it with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022

KIARIE WAWERU KIARIE

JUDGE.