



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL CASE NO. E008 OF 2021

SIPILI MATERNITY & NURSING HOMELTD.....PLAINTIFF/APPLICANT

-VERSUS-

NATION MEDIA GROUP.....1ST DEFENDANT/RESPONDENT

NGINA KIRORI.....2ND DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the Plaintiff’s notice of motion dated 11th November 2021, brought under Sections 1A, 1B and 3A of the Civil Procedure Act CAP 21 Laws of Kenya and Order 51 Rule 1 and Order of the Civil Procedure Rules 2010 any other enabling provisions of the law applicable. The application seeks the following orders:

i. Spent

ii. Spent

iii. Spent

iv. That pending the hearing and determination of this suit, the honorable court be pleased to grant an order of injunction restraining the Defendants by themselves, their agents, servants and/or any other person acting on their behalf from writing, printing, publishing, posting, airing, uttering and/or conveying defamatory and/or disparaging information in any manner whatsoever about the Plaintiff particularly the allegations published in a video posed on NTV Facebook and aired on NTV Kenya scheduled to be aired on NTV Investigate Program on 14/11/2021 at 7 and 9pm or words of similar nature.

v. That pending the hearing and determination of this suit, a mandatory injunction do issue compelling the Defendants by themselves, their agents, servants and/or employees to pull down, remove and erase the offensive post of a news story by Ngina Karori scheduled to be aired on NTV Investigate Program on 14/11/2021 at 7 and 9pm from the NTV Kenya Facebook page, all various posts, websites, blogs or other forms of electronic and social media of any affiliated websites, social media accounts and airing on NTV.

vi. That costs of this application be provided for by the Defendants.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of George Mbugua, a director of the Plaintiff. In a nutshell, the application was premised on the following grounds:

i. That on 10/11/2021, the Plaintiff’s directors received distress calls from relatives, friends and members of public at large informing them of a news story posted on NTV Official Facebook page on a news story to be aired on 14/1/2021 at 7 and 9pm on NTV Investigate Program concerning the Plaintiff prompting them to search the page

ii. That indeed the Plaintiff’s directors discovered the news story by the 2nd Defendant in 00.41 seconds video calling upon viewers and the public at large to watch the full story on NTV at 7-9pm on 14/11/2021 attacking the Plaintiff in all manner aspects. The news story was entitled “This hospital is inhospitable (sic)” a house of terror for the sick and vulnerable, a center of the unthinkable including sexual abuse.” Images of the Plaintiff’s facility are seen in the video and the 2nd Defendant and some interviewees are heard making comments.

iii. That the Plaintiff’s directors and members of staff have never been interviewed or asked to comment on the false, disparaging, malicious and defamatory contents in the video which has now been circulated nationally, regionally and

internationally through live broadcast on NTV and the internet and further the Defendants published the news story without verifying the truthfulness of its contents.

iv. That the full defamatory story is scheduled to be aired on the 14/11/2021 at 7 and 9pm and be watched by many causing further damage to the Plaintiff and it is only fair and just the orders sought be granted.

v. That the publication has caused damage to the Plaintiff's reputation built over the years and patients are demanding to be discharged.

vi. That none of the Plaintiff's directors and/or employees have ever been arrested, charged, summoned by the local administration nor the police on allegations of sexual abuse on either staff or patient and the Plaintiff has never been reported for mistreating staff and/or patients and no such complaint has ever been lodged with the medical practitioners and dentist board and the publication was biased, false, offensive, misleading and purely meant to defame the Plaintiff and tarnish its reputation.

vii. That the Defendants internet platform an live TV broadcast have a wider coverage and access than local print media and if the post is not deleted, continued injury shall be sustained thus the need to delete it and stop its airing on NTV.

3. The Defendants filed grounds of opposition dated 15th November 2021 opposing the instant application. The Defendant also filed an affidavit dated 19th November 2021 sworn by the 2nd Defendant who gave a detailed account of how the investigative story on the malpractices at the Plaintiff and particularly the conduct of its director, George Mbugua was undertaken.

4. Summarily, the 2nd Defendant deponed that a source from Sipili Town, Laikipia reached out to her supervisor, Dennis Okari who is the 1st Defendant's Special Projects- Investigations Editor via telephone and informed him that there were malpractices amounting to gross misconduct taking place at the Plaintiff. The source pointed out that the person involved in the cases of sexual assault was the proprietor of the hospital one George Mbugua (*hereinafter referred to as 'the director'*) who used his power and influence to take advantage of his patients and because of his influence many people had been scared to come forward and report these incidences.

5. The story was then assigned to the 2nd Defendant for the purpose of investigative journalism. She visited the hospital under the pseudonym Wanjiku Nancy Wanjiku to conceal her identity. The first person she interacted with was the director and told him she had a flare up of ulcers. She was then taken to a room and admitted without going through triage or patient registration and later on the director visited her and took advantage of her and began fondling her breasts to which she protested.

6. After about an hour, the 2nd Defendant heard a piercing scream from the second room from hers and upon running out she found the director fleeing from the room where a young girl was lying down on the bed. She gained access to the room and found the girl naked on her bed and crying uncontrollably. Upon inquiring the director said he was conducting a physiotherapy session and that the girl must have felt pain midway but the girl who she came to know as Helen told her that the director had asked her to remove her clothes saying he wanted to massage medicinal gel into her muscles but then he went onto her legs and finally told her to raise her legs at which point he tries to put his fingers into her private parts. That after she was discharged, together with Helen and her mother they made police reports about the incident but the police made no follow up.

7. The 2nd Defendant deponed that she was in Laikipia from 23rd August 2021 to 27th August 2021, at which time she managed to interview other sources who had other complaints about the hospital. After compiling all the information she had gathered she began piecing all the information together for the story to air on 14th November 2021 on NTV.

8. The 2nd Defendant deponed that the story was not to be aired to tarnish the name of the Plaintiff or to aid the Plaintiff's business rival but it was meant to highlight cases of malpractices by the health workers and to sensitize the public about these health workers.

9. The Defendants also filed a list and bundle of documents and a supplementary bundle of authorities dated 15th November 2021 and 5th December 2021 respectively.

10. The Plaintiff filed a supplementary affidavit sworn by George Mbugua dated 27th November 2021 denying the allegations contained aforesaid affidavit by the 2nd Defendant. He deponed that he was more involved in the administrative functions of the Plaintiff and that should he be called to attend to a specific case, there is always a chaperone around. That there was no records belonging to Wanjiku Nancy Wanjiku and he had never attended to such a patient. He clarified that Helen was in the hospital for physiotherapy as she suffers from severe arthritis and that once she was heard screaming, him and other staff left to find out what was happening. Helen was being attended to by a nurse and stated that she was in a lot of pain.

11. The director deponed that Helen was discharged the following day and he believes that she was working in cahoots with the Defendants herein. That the police reports made were false and fabricated. He also clarified to his knowledge on some of the other malpractices raised by the Defendants. It was reiterated that the intended broadcast is meant to tarnish the name of the Plaintiff and defense of qualified privilege is not available and that the Plaintiff's right to have its character and reputation protected and safeguarded from false, unwarranted and malicious attack should be upheld by granting the orders sought.

12. In addition, the Plaintiff filed a further supplementary affidavit dated 2nd December 2022.

PLAINTIFF'S/ APPLICANT'S WRITTEN SUBMISSIONS

13. The Plaintiff submitted that the videos marked as exhibit video 1,2 and 3 ought to be expunged from the record and they be disregarded

by the court while determining the application as the same are not admissible in evidence for failing to comply with the strict requirements of **Section 106b of the Evidence Act** particularly subsection 4. Reliance was also placed on **William Odhiambo Oduol v IEBC & 2 others Election Petition No. 2 of 2012 HCT Kisumu (2013) eKLR** as cited in the case of **Idris Abdi Abdullahi v Ahmed Bashane & 2 Others [2018] eKLR, MNN v ENK [2017] eKLR, Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 others [2017] eKLR.**

14. The Plaintiff asserted that they had satisfied the conditions set out in **Giella v Cassman Brown Ltd [1973] EA358** in so far as granting of a temporary injunction pending trial is concerned.

15. It was submitted that the Defendants sought refuge under **Article 33 of the Constitution** but the same is limited as held in **Renton Company Limited v Philip Kisia & 2 Others [2012] eKLR.**

16. The Plaintiff relied on the case of **Megascope Health Care Kenya Ltd v Nation Media Group Ltd & 4 Others [2021] eKLR** that set out the conditions to be satisfied in granting an injunction in defamation cases. They averred that the information set to be relayed by the Defendants was false and no evidence was tabled to prove that the 2nd Defendant visited the Plaintiff facility and that she was admitted therein. It was their submission that the 2nd Defendant should have at least reported to the local administration or police that she was working under cover and that she was to be admitted at the facility under the name Wanjiku Nancy Wanjiku for a report to be filed by the relevant authorities connecting her to the said name.

17. The Plaintiff stated that the 1st Defendant had aired a positive news article about the facility in October 2021 and one is left wondering why this was so if indeed the 2nd Defendant had been sexually assaulted at the facility on the 24/8/2021. They reiterated that the allegations made on behalf of Helen were false and that the said patient had not sworn an affidavit to confirm that she was sexually assaulted. The Plaintiff annexed an affidavit by Helen's mother confirming that they withdrew a complaint of professional negligence and that the Defendants had aired an erroneous report over the incident without their knowledge and consent.

18. It was asserted that the 2nd Defendant only attempted to lodge a complaint against the director when the suit herein was filed thus this was an afterthought. The Plaintiff reiterated that the claims that it charges mothers for delivery when it's supposed to free are false as well as the students covered under the SECO Afya Program. They contended that the evidence produced by the Defendants was false and fabricated. Similarly, the director attached a copy of his license which expires on the 30/11/2022 to counter the claims that he had no valid license.

19. Further reliance was placed on **Bob Collymore & Another v Cyprian Nyakundi [2017] eKLR, Phines Nyambura v Gitobu Imanyara [2013] eKLR & Micah Cheserem v Immediate Media Services & 4 Others [2000] eKLR.**

DEFENDANTS'/ RESPONDENTS' SUBMISSIONS

20. The Defendants began by contextualizing the matter at hand touching on the issue of medical malpractice in Kenya and the health and safety of patients being a matter of public interest. They stated that **Article 34 of the Constitution** recognizes the role of the media in our society and informs the freedoms and guarantees enjoyed by the media under the Constitution of Kenya, 2021.

21. On the issue of the protection journalistic sources, the Defendants relied on **Section 7(1) of the Code of Conduct or the Practice of Journalism set out in Schedule 2 of the Media Council Act, "Briefing Paper on Protection of Journalists Sources, page 26-47, European Court of Human Rights in Godwin v The United Kingdom [1996] ECHR.**

22. On whether the Applicant has meet the test for the grant of temporary injunction, the Defendants submitted that it is not in dispute that the investigative piece complained of referred to the Applicant, the issue in dispute is whether the words were defamatory in the first place to which they submitted that the investigative story was not defamatory to the Applicant.

23. It was asserted that it is not true that the video produced by the second Defendant showed that she was undergoing a breast cancer examination as purported by the Applicant but she was actually assaulted by the director who justified his actions by uttering the words "but you are beautiful." Further, the director has not denied that he is the man captured in the video and even if he was actually doing a breast examination, why would he justify his actions in the aforementioned manner and besides, the 2nd Defendant had also complained about the intrusion.

24. The Defendants averred that at paragraphs 13 to 16, the 2nd Defendant detailed how Helen was sexually assaulted and the same was captured in the snippet to the programme that was to be aired and also produced as video 2 in the exhibits annexed to the affidavit. In addition, it was their argument that the Applicant has but explained why parents were being forced to pay fir treatments that was covered by the school fees.

25. On the admissions of the electronic evidence produced by the Defendants, they submitted that the certificate of Robert Kanyi met the threshold of **Section 106B (4) of the Evidence Act** as the videos were received by email through the 2nd Defendant, they were downloaded and later saved to a flash disk. Further reliance was placed on **Section 78A of the Evidence Act** and **Republic v Barisa Wayu Mataguda [2011] eKLR.**

26. The Defendants stated that the Applicant has not established that the words publishes were defamatory and had therefore failed to stablish that its right to a good name has been infringed. Reliance was placed on **South Hetton Coal Company Limited v North Eastern News Association Limited [1894] QB 133 & BL v Independent Print Ltd & Another [2019] UKSC 27 Supreme Court of the United Kingdom.**

27. According to the Defendants the Applicant has not even on a prima facie basis shown what loss he stands to suffer from the investigative report or that there is an injury to his reputation. As for malice, the Defendants asserted that the investigative piece was not intended to tarnish anyone's reputation.

28. On whether the Plaintiff will suffer irreparable harm which cannot be compensated by damages, the Defendants relied on the case of Andrew Oloo Otieno v Benjamin Shamala Imbogo [2008] eKLR in stating that the Applicants acknowledges that damages will be an adequate remedy. Additionally, they stated that the balance of convenience does not lie in the Applicant's favor and therefore the Applicant has not made a case for temporary injunction or mandatory injunction.

29. Lastly, the Defendants submitted that the court should strike out paragraphs 8,10,12,13,14,15,23 and 24 of the affidavit of George Mbugua sworn on 27th September 2021 as they contained scandalous matters with no sources of information. Reliance was placed on Order 19 Rule (1) of the Civil Procedure Rules, Wamwere v Attorney General [2004] 1 KLR166 & Patni v Ali & Others [2005] EA 339.

ANALYSIS AND DETERMINATION

30. I have carefully considered the pleadings in this application, the evidence produced therein and the written submissions on record. The issue coming up for determination is whether the Plaintiff/Applicant has satisfied the threshold for grant of the injunction orders sought.

31. 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 favour of the Applicant.*

32. Similarly, in the case of Nquraman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal held that:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to; establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially.”

33. The Halsbury's Laws of England 4th Edition Vol. 28 in defines 'defamation' as follows: -

“A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule to convey any an imputation on him disparaging or injuries to him in his office, profession, calling, trade or business.

At page 23: -

In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under any circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in defamatory sense.”

34. In respect to granting injunction for defamatory claims, the case of Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR cited by the parties Justice Khamoni (as he then was) had this to say of such cases:

“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 favour of the Applicant.

Further,

“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in Giella vs Cassman Brown & Co. Ltd [1973] EA 258 generally apply. In defamation cases those conditions operate in special circumstances. Over and above the test set out in Giella's case, in defamation cases 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 (emphasis mine). The court must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Normally the court would not grant an interlocutory injunction when the Defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a humane, responsible, truthful and trustworthy Defendant.”

35. The dynamic nature of injunctive relief in relation to defamatory cases was further elaborated in the case of John Ntoiti Mugambi Alias Kamukuru v Moses Kithinji Alias Hon. Musa [2016] eKLR where the court stated as follows:

“Therefore, in defamation cases, while applying the traditional and the well-accepted principles set out by the Court of Appeal in Giella vs. Cassman Brown the court should also consider other special factors which will be largely founded on the circumstances of the case, freedom of expression and public interest that the truth should be out. In defamation cases, therefore, the court must establish whether it is a clear case in which an injunction should issue. Quite an act of balancing of freedom of speech and right not to be defamed is needed in defamation cases. That is why I say that in a case such as this, a fundamental principle here should be that the court should take a course appears to carry the lower risk of injustice if it should turn out to have been “wrong”. See Justice Hoffman in the English case of Films Rover International (1986) 3 All ER 772 at page 780-781. “

36. Consequently, the question which needs to be answered is whether the application herein has met the criteria required as stated hereinabove.

37. The first principle is that an Applicant must show he has a prima facie case with a probability of success. In *Mrao Ltd v Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125* which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR*, the Court of Appeal defined a prima facie case as:

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

38. It is not disputed that the Respondents aired a news clip posted on NTV Official Facebook page urging the public to watch the full news story to be aired on 14/1/2021 at 7 and 9pm on NTV Investigative Program about the medical malpractice at the Plaintiff. The news story was entitled *“This hospital is inhospitable (sic)” a house of terror for the sick and vulnerable, a center of the unthinkable including sexual abuse.* Images of the Plaintiff’s facility are seen in the video and the 2nd Defendant and some interviewees are heard making comments.

39. The Plaintiff averred that the publication has caused damage to the Plaintiff’s reputation built over the years and patients are demanding to be discharged. They argued that the allegations relied on to produce the news story are false and malicious as set forth in the Plaintiff’s pleadings.

40. The Defendants sought refuge under **Article 33 of the Constitution** but the Plaintiff contended that the same is limited as held in *Renton Company Limited v Philip Kisia & 2 Others [2012] eKLR*.

41. Additionally, the Defendants contextualized the matter at hand touching on the issue of medical malpractice in Kenya and the health and safety of patients being a matter of public interest. The Defendants therefore raised the defence of qualified privilege on the basis of public interest touching on medical malpractice by the Plaintiff. In addition, they stated that **Article 34 of the Constitution** recognizes the role of the media in our society and informs the freedoms and guarantees enjoyed by the media under the Constitution of Kenya, 2010.

42. The Defendants submitted that it is not in dispute that the investigative piece complained of referred to the Applicant, the issue in dispute is whether the words were defamatory in the first place to which they submitted that the investigative story was not defamatory to the Applicant.

43. They asserted that it is not true that the video produced by the second Defendant showed that she was undergoing a breast cancer examination as purported by the Applicant but she was actually assaulted by the director who justified his actions by uttering the words “but you are beautiful.” Further, the director has not denied that he is the man captured in the video and even if he was actually doing a breast examination, why would he justify his actions in the aforementioned manner and besides, the 2nd Defendant had also complained about the intrusion.

44. The freedom of expression of the media as guaranteed under **Article 33 of the Constitution of Kenya** in the bill of right is not absolute, there are limitations set out in **Article 34 of the Constitution**. The Constitution balances the rights of freedom of expression with the rights and reputation of others. The aforementioned constitutional provisions provide as follows:

“33. Freedom of expression

Every person has the right to freedom of expression, which includes—

freedom to seek, receive or impart information or ideas;

freedom of artistic creativity; and

academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to—

propaganda for war;

incitement to violence;

hate speech; or

advocacy of hatred that—constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

34. Freedom of the media

Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).

The State shall not—

exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

are necessary to regulate the airwaves and other forms of signal distribution; and

are independent of control by government, political interests or commercial interests.

All State-owned media shall—

be free to determine independently the editorial content of their broadcasts or other communications....”

45. I associate myself with the views of the court as held in the case of *Endmor Steel Millers Ltd v Royal Media Services Ltd & 2 others [2020] eKLR* that:

“The issue here, is clearly one of freedom of expression versus the protection of business reputation. The question arising for the determination of the court is whether an order of injunction can be issued to prevent publication of defamatory material of the Plaintiff, a corporation where the defences of justification or fair comment on a matter of public interest, are raised.

The law on injunctive relief in defamation cases is well established. The principle being that, generally, a court will not grant an interlocutory injunction to prevent defamation, where the defences of justification; fair comment on a matter of public interest; qualified privilege or such other recognized defence is raised; unless the Plaintiff can demonstrate that the matters complained of are false or if true in the case of fair comment and qualified privilege that they are actuated by malice.”

46. The court is called upon to balance between the two competing interests that is public speech and private interest to reputation as enshrined in the Constitution. By doing so, this court has to recognize the fundamental right of speech, media and expression guaranteed under **Articles 33 and 34 of the Constitution**; advancing the importance of public interest that any wrong-doings and malpractices must be exposed, all while recognizing that such right is not absolute and ought to be balanced against the rights of the public to receive fair and accurate information.

47. Notably, the Defendants have annexed copies of compact discs and a flash disk that amounts to electronic evidence. In reiteration, the Plaintiff submitted that the videos marked as exhibit video 1,2 and 3 ought to be expunged from the record and they be disregarded by the court while determining the application as the same are not admissible in evidence for failing to comply with the strict requirements of **Section 106B of the Evidence Act** particularly subsection 4. **Section 106B of the Evidence Act** provides for admissibility of electronic records. Further, the issue of the production of electronic and digital evidence is governed by **Section 78A at part VII of Evidence Act**. This court is however reluctant on determining on the admissibility of the electronic evidence at this premature stage and therefore I will not give much relevance to the evidence therein at this stage.

48. In the case of *Media Council of Kenya v Eric Orina [2013] eKLR*, Onyancha J applied the reasoning in *Bonnard & Another v Perryman* when he held that:

“The reasons for the court to deal with the issue of granting an injunction to restrain the publication of a defamatory material at this stage where the case has not been heard or evidence in the case known, can be picked from the above very old case they include:

a) That free speech should not without strict proof of its violating individual wrong, be fettered.

b) That the right to free speech is on which is for the public interest and therefore one which individuals should Have and should exercise without impediments, even if such impediment is by means of court injunction at the interim

stage.

c) That even where there is clear evidence that publication or repeated publication of a libel is likely to cause injury to an individual, protection of the right to free speech would force the court to deny restraint thereof even at the risk of such injury occurring in anticipation that the individual injury, will be compensated by ordinary damages or even aggravated damages.

d) That otherwise the publication of the injurious material will be justified because it may be true and should be published in public interest or as fair comment.”

49. The Applicant submitted that the Defendants acted out of malice. In *Phinehas Nyagah v Gitobu Imanyara (2013) eKLR* the court held as follows:

“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the Defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the Defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”

50. At this instance, I am not convinced that the Defendants acted out of malice. It would appear, that the Defendants were merely discharging their duty to inform the public in a genuine and bonafide belief that the contents of the broadcast and articles were true. However, having considered the rival arguments by the respective parties together with the annexed documents and pleadings filed, I am of the view that on the face of it, the impugned publication(s) would cause any reasonable person to perceive the Applicant unfavorably. Whether the said publication was defamatory to the Applicant and whether the defenses pleaded by the Respondents will stand can only be investigated at the trial stage. Accordingly, I am satisfied that the Applicant has therefore established a prima facie case with a probability of success.

51. Establishing a prima facie case with a probability of a success is not enough. The court must also consider the other principles in granting injunctive orders. In *Yellow Horse Inns Limited v Nduachi Company Limited & 2 others [2017] eKLR*, the Court of Appeal held that;

“All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. So that if the Applicant establishes a prima facie case, that alone will not avail him an injunction. The court must further be satisfied that the injury the Applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no order of injunction should normally be granted, however strong the Applicant’s claim may appear at that stage.”

52. On the second element in respect to irreparable damage/loss, the Plaintiff averred that the publication has caused damage to the Plaintiff’s reputation built over the years and patients are demanding to be discharged. On the other hand, the Defendants contended that the Applicant has not demonstrated the irreparable loss it has suffered and relied on the case of *Andrew Oloo Otieno v Benjamin Shamala Imbogo [2008] eKLR* in stating that the Applicants acknowledges that damages will be an adequate remedy.

53. On this limb, I concur with the Defendants’ position. In *Invesco Assurance Co. Limited v Nation Media Group [2004] eKLR* the court stated that;

“Would the Applicant suffer irreparable injury, if an injunction were not granted? It is not clear that this would be so. I take judicial notice that the Applicant is in the open business of insurance, and with diligent endeavors, should be able to get on with business in the normal manner. Any losses incurred are of an essentially pecuniary nature and would be redressed in damages if the suit was, in the event, successful.”

54. It is my considered view that the Plaintiff has not demonstrated injuries they will suffer and most importantly the extent to which the same is not capable of being compensated by an award of damages. Any injury, if any, arising from the alleged defamation can be adequately compensated by an award of damages.

55. Moreover, on the element of balance of convenience, the court must balance between public interest and freedom of speech as guaranteed under Article 33 of the Constitution vis a vis a private interest to reputation. I find that the balance of convenience tilts in favour of the Defendants as the Plaintiff has failed to demonstrate compelling factors to warrant grant of an injunction and that the issuance of the injunction would curtail the dissemination and discussion of an issue of public interest.

56. The Applicant also sought for mandatory injunction orders. In the case of *Kenya Breweries Limited v Washington Okeyo (2002) 1 EA 109; (2002) eKLR* cited in the case of *Paul Mwaniki Gachoka & another v Nation Media Group Limited & another [2019] eKLR*, the court reasoned that:

“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 it 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 match on the Plaintiff. A mandatory injunction will be granted on an interlocutory application.” ...

57. From my analysis of the respective positions presented together with the annexed documents and pleadings filed, I have not come across any compelling factors that would warrant the granting of a mandatory injunction at this stage. The Applicant has not brought any credible evidence to show that the injury to his reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage. I am also reluctant to grant the orders sought especially in the dispute herein where competent defences raising triable issues have been raised in court.

58. In conclusion therefore, I make the orders;

i. That the application lacks merit and is hereby dismissed.

ii. Costs in the main cause.

DATED AND SIGNED AT NYAHURURU THIS 17TH DAY OF FEBRUARY, 2022.

.....

CHARLES KARIUKI

JUDGE