



Cytonn Investments Management PLC v Kaikai & another (Civil Suit E247 of 2021) [2022] KEHC 14246 (KLR) (Civ) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E247 OF 2021**

**CW MEOLI, J
OCTOBER 21, 2022**

BETWEEN

CYTONN INVESTMENTS MANAGEMENT PLC APPLICANT

AND

LINUS KAIKAI 1ST RESPONDENT

ROYAL MEDIA SERVICES LIMITED 2ND RESPONDENT

RULING

1. Cytonn Investments Management PLC (hereafter the applicant) filed a suit founded on defamation against Linus Kaikai and Royal Media Services Limited (hereafter the 1st and 2nd respondent/respondents). Contemporaneously filed with the plaint was a motion dated October 6, 2021 seeking injunctive orders pending hearing and determination of the suit to restrain the 1st respondent by himself, his agents, assigns and or servants from making and or publishing defamatory statements against the applicant on Citizen TV, youtube channels or on any other platform; that the 2nd respondent be ordered to immediately pull down or cause to be pulled down and permanently deleted with immediate effect the defamatory statements available on their youtube channel and made by the 1st respondent from the segment “kaikai kicker” and to issue a public apology on the same platforms on which the defamatory statements were published.
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Faith N Claudi described as one of the legal officers of the applicant. She asserts that the applicant is an independent investments management company with a team of professionals driven by passion and commitment with the aim of offering superior returns to its investor clients through various investment vehicles and affiliates. Further that the applicant through its investments team has extensive and practical experience garnered for over seven (7) years from understanding of the various economic



environments, the investments needs of different types of investors and partnering with stakeholders to create personalized and structured investment solutions for wealth creation. She asserts that the applicant's good reputation has been painstakingly built and has attracted hundreds of thousands of investors and clients who rely on the legality and legitimacy of the applicant's business and strength of reputation for their innovative, experienced and highly skilled personnel.

3. The deponent contends that the 1st respondent on July 1, 2021 published statements of the applicant, in his segment "kaikai kicker" that aired on the Citizen TV youtube channel via the link <https://m.youtube.com/watch?v=HT9zwYClw> with intent to injure the reputation and the good standing of the applicant in the eyes of right thinking members of the public. She avers that the statements made therein were not only false, malicious but defamatory as the 1st respondent did not provide any particulars and or evidence of the allegations. That the statements are designed to damage the reputation of the applicant by the 2nd respondent publishing the said defamatory statements on their media platform, the same continues to be read and heard by a considerable following of the 2nd respondent's tv and youtube channels worldwide. She further deposes that the defamatory statements and utterances are indefensible as they were not verified hence applicant's case has an overwhelming chance of success. She concludes by asserting that it is expedient, fair and just that the orders sought be granted.
4. The respondent opposes the motion through grounds of opposition dated October 21, 2021. The grounds are to the effect that the applicant has not demonstrated a prima facie case with a probability of success; that the applicant cannot and has not established a case for the grant of mandatory injunction as set out in *Kamau Mucuha v Ripples Ltd* [1993] eKLR; that as held in *Media Council of Kenya v Eric Orina* [2013] eKLR in defamation cases injunctions are granted only in the clearest of cases; that damages will be adequate compensation for the applicant in the event the suit succeeds; that the balance of convenience is in favour of the 2nd respondent; that the applicant has not satisfied the conditions for a grant of the orders sought; and that the balance of convenience tilts in favour of the respondents as the orders sought if granted would amount to a curtailment of their press freedom guaranteed in article 33 and 34 of the *Constitution*.
5. In a rejoinder to the respondents' grounds of opposition the applicant filed a reply to the effect that contrary to the respondents assertion that a company cannot sue for defamation, the applicant is a body corporate and therefore a legal person under section 3 of the *Defamation Act*; that contrary to the respondents assertion the applicant does not need to demonstrate special damages as was established in *Philomena Mbete Mwilu v Standard Group Limited* [2018] eKLR; that contrary to the respondents assertion that the applicant has not set out in verbatim the defamatory words, the applicant has pleaded and set out the words complained of at paragraph 7 and 9 of the plaint; that contrary to the respondents grounds that the case is founded on libel, the case is a hybrid of both libel and slander; that it has been demonstrated that if the temporary order sought are not issued, the defamatory statements will continue to enjoy wide and repeated viewership on the respondents' youtube channel, hence the court ought to order that the defamatory statements be deleted pending hearing of the defamation suit.
6. The motions were canvassed by way of written submissions. Counsel for the applicant asserted that the issues for determination are whether a prima facie case has been established; whether the balance of convenience tilts in favour of the applicant; and whether applicant would continue to suffer irreparable harm if the orders sought are denied.
7. Addressing the first issue, counsel relied on the decisions in *Giella v Cassman Brown & Co Ltd* (1973) EA 358, *Nguruman Limited v Jan Bonde Neilsen & 2 others* [2014] eKLR, *Micah Cheserem v Immediate Media Services & 4 others* [2000] eKLR, *Mrao Ltd v First American Bank of Kenya Ltd*



- § 2 others [2003] eKLR, Canadian case of Hill v Scientology (1995) 2 SCR 11130, George Mukuru Muchai v The Standard Limited HCCC 2539/1997 and J.P Machira v Wangethi Mwangi § Nation Newspaper Ltd CA 179/77 to argue that at this interlocutory stage, the court is not required to conduct a mini trial or make any definitive findings. That the broad, blanket and non-factual statements of the respondent can only be interpreted by members of the public to mean that the applicant is operating outside the sanctioning of the law; that the 1st respondent was reckless and negligent as he never provided any evidence to support the defamatory allegations and that the statement has had a great effect on anyone who reads or hears them on the 2nd respondent's youtube channel.
8. Concerning the balance of convenience, it was asserted to tilt in the applicant's favour for several reasons including the fact that the 2nd respondent's continued publication of the defamatory matter on their youtube channel continues to enjoy massive viewership despite the applicant's protests and that damages cannot be adequate compensation for loss of business and reputation as held in Philomena Mbeti Mwilu v Standard Group Limited [2018] eKLR. Counsel contended that based on the principles enunciated in Kenya Breweries Limited § another v Washington O Okeyo [2002] eKLR and Paul Mwaniki Gachoka § another v Nation Media Group § another [2019] eKLR this is a proper case for issuance of a mandatory injunction and that the applicants stand to suffer irreparably if the orders sought are not granted.
 9. Counsel for the respondent on his part while placing reliance on the decision in Media Council of Kenya (supra) submitted that there is no special circumstance in this case to warrant the granting of the orders sought. That whether the effect of the words is defamatory to the applicant is a matter for trial and cannot be decided on affidavit evidence. Further citing the English decision of Fraser v Evans § another [1969] 1 ALL ER 8, Halsbury Laws of England, Volume 24, 4th Edition at Para 946 and article 33 of the Constitution of Kenya, counsel argued that the respondents having pleaded the defence of justification, good faith, and privilege, no interlocutory injunction is available to the applicant, more so as damages will be awarded to them in the event that their case succeeds.
 10. While calling to aid the decision in Giella (supra) and Kamau Muchuha v Ripples Ltd civil application No 126 of 1992 the respondents contended that as worded, the injunction sought by the applicants is a mandatory injunction disguised as an interlocutory injunction intended to irregularly obtain final orders at the interlocutory stage. And that such injunction could only be granted in the clearest of cases where special circumstances have been shown to exist. Moreover, an injunction ought not to be granted where damages as sought in the plaint can be an adequate remedy.
 11. It was further argued that the motion and suit aim to limit freedom of expression and of the media which is protected under article 33 and 34 of the Constitution of Kenya. In conclusion while placing reliance on John G. Fleming, The Law of Torts 5th Edition, Pg 695-700 and Halsbury Laws of England, 5th Edition, Pg 492-502 counsel submitted the applicant ought to have, but has not specifically pleaded the actual damage arising from the alleged oral injurious falsehood and therefore an injunction should not issue. The court was urged to dismiss the motion with costs.
 12. The court has considered the pleadings on record, the parties' rival affidavit material as well as their respective submissions. The applicant complains that the 1st respondent's statements and utterances in his segment "kaikai kicker" that was aired on July 1, 2021 by the 2nd respondent's Citizen TV and Citizen TV youtube channel was defamatory and calculated to injure the reputation and good standing of the applicant in the eyes of right-thinking member of the public. The respondents on their part opted not to file any affidavit material in response but relied on their statement of defence and the grounds of opposition dated October 21, 2021.



13. The court's duty is to determine whether the applicant has made a case for the grant of interlocutory injunctions against the respondents. The principles governing the grant of an interlocutory injunction as enunciated in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 are settled. Similarly, as to what constitutes a *prima facie* case, this was settled too since the decision in *Mrao v First American Bank of Kenya Ltd & 2 others* CANo 39 of 2002 [2003] eKLR. Both decisions have been reaffirmed and applied by superior courts in countless subsequent decisions including the recent decisions cited in this case by the parties.
14. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR restated the principles governing the grant of interlocutory injunctions enunciated in *Giella's case* and observed that the role of the judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles. However, it was cautioned that, such a court ought to exercise care not to determine with finality any issues arising. The court expressed itself as follows:
- “...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella's case*, they could neither be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:
- In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:
- a) establish his case only at a *prima facie* level
 - b) demonstrate irreparable injury if a temporary injunction is not granted.
 - c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”
15. In addition, the court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the applicant. That is to say, that the applicant who establishes a *prima facie* case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established, the court need not investigate the question of irreparable loss or balance of convenience.
16. As to what constitutes a *prima facie* case, the Court of Appeal delivered itself as follows: -
- “Recently, this court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “*prima facie* case” in civil cases in the following words:
- “In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”
- We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and



unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

17. This being a suit founded on alleged defamation, the dicta contained in *Micah Cheserem v Immediate Media Services & 4 others* [2000] eKLR is pertinent to the consideration of the instant motion. This is what Khamoni J (as he then was) stated in that case:

"Maybe counsel did not address me fully on the relevant law because it is not appreciated that the question of an injunction in defamation cases is treated in a special way. Here injunction is not treated in the way it is treated in other cases. I looked at the relevant authorities and considered the matter in the case of *Francis P Lotodo v Star Publishers & Magayu Magayu* in HCCC No 883 of 1998 and found that though the conditions applicable in granting an injunction as set out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 generally apply, in defamation cases those conditions operate in special circumstances. Those conditions have to be applied together with the special law relating to the grant of injunction 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 the clearest possible cases. The court must be satisfied that the words or matter complained of, are libelous. It must be satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.

But how will the court be so satisfied when the application for an injunction in a defamation action is, like in the instant case, filed at the initial stage? It is filed before pleadings are closed. How will the court be so satisfied?

Further, even when the court is satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse, can the court grant an injunction where the respondent has the defence of qualified privilege or where the respondent is pleading justification or fair comment" We will be at a stage where the court has not yet heard and seen witnesses testify. Their evidence has not therefore been tested, canvassed and evaluated. The respondent or defendant is pleading qualified privilege and therefore justification or fair comment, being a defence which defendants in actions which are not for defamation normally do not have. Does the court grant an interlocutory injunction?

From the authorities and the law, I considered in the case of *Francis P Lotodo*, I found that defamation cases are special actions as far as the granting of injunctions is concerned. This is because generally and basically, actions or cases of defamation bring out a conflict between private interest and public interest, and this is more so in Kenya where we have the



country's Constitution which has provisions to protect fundamental rights and freedoms of the individual including the protection of freedom of expression”.

18. The starting point therefore is the Constitution of Kenya 2010. Article 33(1) of the Constitution guarantees every person's right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-article (3) states that “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”. Article 34 guarantees the right to freedom and independence of the media. See also the provisions of the Defamation Act in that regard. Contemplating these competing rights Lord Denning MR stated in Fraser v Evans & others [1969]1 ALLER 8: -

“The right of speech is one which it is for the public interest that individuals possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed.”

19. In Halsbury's Laws of England 4th Edition Vol 28 paragraph 10 - A defamatory statement is defined as follows:

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

20. Additionally, Gatley on Libel and Slander 6th Edn states that:-

“A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another”

21. As stated in Selina Patani & another v Dhiranji V Patani [2019] eKLR, the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:-

“In rehashing, we note the ingredients of defamation were summarized in the case of John Ward v Standard Ltd HCC 1062 of 2005 as follows:

- i. The statement must be defamatory
- ii. The statement must refer to the plaintiff
- iii. The statement must be published by the defendant
- iv. The statement must be false.”

22. First, the respondent has raised the objection that a cause of action based on defamation/libel does not lie in the case of a company. It is settled law that a company is a legal person, with a legal personality and the various accruing rights of the natural person, can sue and be sued in its own name. And although logically it may not enjoy some of the more personal rights of an individual a company can suffer damage to or loss of reputation. See Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another [2015] eKLR.



23. Thus, the provisions of section 3 of the Defamation Act would be applicable to the applicant herein. The section provides: -

“In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.”

24. In the case of the Onama v Uganda Argus Ltd (1969) EA 92, the Court of Appeal for Eastern Africa stated as follows:

“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those “who have a greater or special knowledge of the subject matter”.

25. The court stated in Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the “probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published. -Clerks & Lindsell on Tort 17th Edition 1995-page 1018.”

26. The applicant has reproduced in the plaint and application what is said to be the defamatory statements aired by the 1st respondent on July 1, 2021 but the respondents assert that the applicant has not pleaded the full text of the alleged defamatory words published by them. Indeed, it appears that the portion included in the plaint and affidavit of the applicant appears to be part of a longer statement, and the court agrees that in order for the court to discern the full purport of the publication, it would be prudent that the entire statement be impleaded. The pleaded portion is to the effect that:

“It has become alarmingly common to see many innocent Kenyans shedding tears as they narrate how companies or individuals have vanished with their investment monies. The latest victim are some four thousand Kenyans that poured millions of shillings into what was sold to them as a high yield solution product by the Cytonn Company that is associated with real estate.

Cytonn promised its customers 18% return on their investment, a promise that enticed many enterprising Kenyans to pour in investment worth 10 Billion Kenya Shillings.

Before Cytonn there was Diamond Property Merchants.....” (sic)

27. Evidently, the 1st respondent’s utterances refer to the applicant, and if false, would be patently defamatory of the applicant in light of the imputation therein of acts of fraud on the part of the applicant. Namely, obtaining money from customers on the false pretext of giving high returns on their investment. Such acts if proved would amount to criminal conduct, hence attracting penal sanctions. The applicant’s contention is that the utterances are false and purely intended to damage its reputation. While the respondents did not file any affidavit material, they have filed a statement of defence in which they have pleaded justification, qualified privilege, and fair comment, and aver to have published the material good faith in the public interest.



28. In Eric Orina’s case, the learned judge cited a passage in *Fraser v Evans* (supra) in which Lord Denning stated *inter alia* that:

“It all comes back to this. There are some things which are of such public concern that the newspapers, the press and indeed everyone is entitled to make known the truth and make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away. The Sunday Times assert that, in this case, there is a matter of public concern. They agree they are going to injure the Plaintiff’s reputation, but they say they can justify it; that they are only making fair comment on a matter of public interest; and therefore, they ought not to be restrained. We cannot prejudge this defence by granting an injunction against them. I think that the injunction that has been granted should be removed. The Sunday Times should be allowed to publish the article at their risk. If they are guilty of libel...that can be determined by an action hereafter and damages awarded against them. But we should not grant an interim injunction in advance when we do not know in the least what it will contain...”

29. Khamoni J (as he then was) followed this line of reasoning in *Michah Cheserem’s case* (supra), and cited Lord Coleridge CJ (as he then was) in *Bonnard and another v Perryman* (1891 -4) ALLER 968, later quoted by Denning MR in *Fraser v Evans & others*, to the effect that:

“Until it is clear that an alleged libel is untrue, it is not clear that any rights at all have been infringed, and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions”.

30. Similarly in this case, once the respondents pleaded the defences outlined above, that was the end of the matter. A temporary injunction could not issue against them at this stage lest their freedom of speech is thereby peremptorily fettered and or curtailed. Looking at the framing of the 2nd prayer in the motion, the court agrees with the respondents that it is very expansive and granting it would be tantamount to throwing a blanket gag on the respondents’ exercise of the freedom of speech and media at a time when the alleged falsity of the statements complained of is yet to be determined.

31. The 3rd prayer seeks a temporary mandatory injunction that is only available in special circumstances. As stated by the Court of Appeal in *Kamau Mucuba v Ripples Ltd* (1993) eKLR and reiterated in *Kenya Breweries Ltd v Washington Okeyo* [2002] eKLR:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then, only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple ... act which could be easily remedied, or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

See also *Nation Media Group & 2 others v John Haron Mwau* [2014] eKLR where the Court of Appeal held that a temporary mandatory injunction “can only be granted in exceptional and in the clearest of cases”.

32. In my considered view, the circumstances of this case do not warrant the granting of a temporary prohibitory injunction and much less a temporary mandatory injunction against the respondents. The



court upon reviewing all the matters canvassed is not persuaded that the applicant has established a *prima facie* case, and no useful purpose would be served by considering the other hurdles relating to likelihood of irreparable damage and balance of convenience. Accordingly, the applicant's motion dated October 6, 2021 must fail and is dismissed with costs to the respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF OCTOBER 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Kinyanjui h/b for Mr. Gicheha

For the Respondents: Mr. Ndung'u

C/A: Carol

