



Cytonn Investments Management PLC v Hassan & another (Civil Suit E248 of 2021) [2022] KEHC 13932 (KLR) (Civ) (19 October 2022) (Ruling)

Neutral citation: [2022] KEHC 13932 (KLR)

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

**CIVIL
CIVIL SUIT E248 OF 2021**

**JK SERGON, J
OCTOBER 19, 2022**

BETWEEN

CYTONN INVESTMENTS MANAGEMENT PLC PLAINTIFF

AND

ABUBAKAR HASSAN 1ST DEFENDANT

RINA HICKS 2ND DEFENDANT

RULING

1. The plaintiff/applicant herein has brought the notice of motion dated October 6, 2021 supported by the grounds set out on the body thereof and the facts stated in the affidavit of applicant’s legal officer Ms Faith N Claudi. The applicant sought for the following orders:
 - a. Spent.
 - b. That pending the hearing and determination of the suit filed herein, a temporary order of injunction be and is hereby issued barring the 1st and 2nd defendants/respondents by themselves, their agents, assigns and/or servants from making and/or publishing defamatory statements against the plaintiff/applicant by making any statements on you tube channels or publishing on any other platform.
 - c. That the 2nd defendant is ordered to immediately pull down or cause to be pulled down and permanently delete with immediate effect the defamatory statements and utterances and related threads from her (Ms Rina Hicks You-tube channel) and other platforms where he might have published the same statements in their entirety due to its damaging effects and issuance of a public apology in the same platform that the defamatory statements and utterances were published.



- d. Spent
- e. That costs be awarded to the plaintiff/applicant.
2. The 1st and 2nd defendants/respondents swore their replying affidavit to oppose the motion dated October 22, 2021 and November 1, 2021 respectively.
3. I have considered the grounds stated on the face of the motion dated October 6, 2021 plus the facts deponed in the rival affidavits. I have also considered the written submissions and the authorities cited.
4. The applicant avers that it is an independent investments management company and financial investment business it engages on is built on good reputation in the market places. However, the 1st defendant/respondent did an interview with the 2nd defendant/respondent which can be accessed on the money-wise you tube channel that was meant to injure the reputation and good standing of the applicant in the eyes of right thinking members of the public.
5. The applicant further avers that the 1st defendant/respondent stated that the act of the applicant taking money from the public and investing it resembles fund management activities of a collective investment scheme and that a criminal complaint was launched with the director of public prosecution against the applicant for doing regulated work without license and obtaining by false pretences.
6. The applicant stated that 1st defendant/respondent took part of the interview and this was reiterated by Jackson Okoth of the Kenyan Wall street Journal in his publication dated August 7, 2021 and sensationally headlined 'CMA Stops Cytonn Asset Managers Limited from Recruiting New Clients'.
7. The applicant averred that the statements by the 1st respondent connotes that the applicant was unlicensed and was raising money from the public without any approvals hence the business was tainted with criminal activities, that to the contrary, it is within the sanction by law and has engaged the respondents through various correspondences including the letter dated February 17, 2016 requesting for a meeting with the respondents for clarification of what kind of offers by the applicant would be considered private offers.
8. The meeting was subsequently held and vide a letter dated April 14, 2016, the respondents advised on the concerns raised by the applicant. To ensure further compliance, in June 2018, the 2nd respondent requested the applicant to change the name from the then Cytonn Cash Management Solution to the current name Cytonn High Yield Solutions which was approved by the plaintiff's board of Investors on June 20, 2018. On July 5, 2018, the plaintiff advertised through the Daily Nation the announcement for change of its name as per the respondent's request.
9. In response, the 1st respondent stated that the Capital Market Authority has the mandate to protect investors and upon numerous enquiries by members of the public, the authority had to explain on the concerns of that arose on the regulations status of applicant's products and the 1st respondent, therefore took responsibility to explain the pertinent issues and in that context as the director of market operations had the interview with the 2nd respondent in her you tube channel.
10. The 1st respondent reiterated that in making the press statement, he was acting in good faith in his capacity as the director of market operations in authority are protected from personal liability under section 10 (1) of the Capital Markets Authority. He therefore thinks the application and entire suit are an affront to the said section 10 (1) of the *Capital Markets* Authority.
11. In brief summary, the respondents admit having uttered the statements and made the publications but plead justification in that, the publications depict the truth, they were made in the good faith to protect the general public and investors, they were made as fair comment and are within the statutory



- privileged. As such, the respondents opine that the applicant has not made a prima facie case and granting any injunction would amount to barring them from executing their statutory mandate.
12. 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.
 13. 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 favour of the applicant.
 14. In this instant the applicant's case is that the investment business it has entered solely depends on the portrayal of a good name, and the respondent's statements that it is unlicensed and unregulated are damaging to its excellent reputation and the investor trust it has established.
 15. On the other side, the respondents argued that they were required by law to warn the public about unregulated investors and to reveal the truth in order to safeguard the trusting population. According to the respondents, it is therefore in the interest of the general welfare that the truth be communicated, and they are therefore right in asserting that the plaintiff lacks a license.
 16. However, the respondents concur that Cytonn Assets Managers Ltd, the plaintiff's subsidiary, is properly licensed and regulated. Additionally, it cannot be disputed that the applicant makes two public offers that are under the scope as duly licensed and regulated. It is also not denied that the applicant offers both public offers which are within the ambit of the respondent and private offers which are not per se regulated by the respondent.
 17. To establish whether the applicant has established a prima-facie case. A prima facie case is one that, based on the evidence presented to the court, will lead to the judgment that there is a right that has allegedly been violated by the opposing party, necessitating an explanation or rebuttal from the latter. This court has expressed this definition numerous times. The tort of defamation is also founded on the understanding of the person's right to his good name.
 18. In the instance case, the applicant claims that the respondent's statements that it is conducting unlicensed and unregulated business have harmed its reputation by inducing the wrongdoer to believe that the applicant's enterprise is tainted with fraud, illegalities, and corruption and that investing in it would involve significant risk. Accordingly, I am satisfied that the statements and publications are per se defamatory, and in that respect, the court is satisfied that the plaintiff has established defamation.
 19. Regarding the question of whether damages would be an appropriate remedy, in my opinion, there is sufficient reason to believe that if the applicant's reputation in the business world is tarnished by illegalities that are not fully established, it may lead to a decline that may not be adequately remedied by an award of damages.



- 20. The respondents, however, have claimed that an interlocutory injunction should not be issued when justification is stated. However, as I mentioned in the sentence before, this would depend on the respondent demonstrating to the court's satisfaction that it is accountable, truthful, and trustworthy.
- 21. In this instance, it has not been disputed that Cytonn Assets Managers Ltd, a subsidiary of the applicant, is properly licensed and regulated in accordance with section 2 of the *Capital Markets Act*. Additionally, the respondents have not refuted that the applicant hired them to explain what a public/private offer would involve. The respondents have also not rebutted that it has no mandate or control over the applicant's private offers and all these issues have to be ascertained before a line is drawn or a conclusion is made to the effect that the applicant's business is unregularized and/or licensed. Therefore, for the aforesaid reasons and in this court's view, the balance of convenience tilts in favour of the applicant.
- 22. In conclusion therefore, I find merit in the motion dated October 6, 2021 and I allow it, thus giving rise to issuance of the following orders:
 - i. That pending the hearing and determination of this suit, an order for temporary injunction be and is hereby issued barring the 1st and 2nd defendants/respondents by themselves, their agents, assignees and/or servants from making and/or publishing defamatory statements against the plaintiff/applicant by making any statements on you tube channels or publishing on any other platform.
 - ii. The prayer seeking for the immediate pulling down and permanent deletion of the defamatory statements, utterances and related threats and for issuance of a public apology, is denied at this stage since it is an issue for determination upon full hearing.
 - iii. Costs shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF OCTOBER, 2022.

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J. K. SERGON
JUDGE

In the presence of:
 for the Plaintiff/Applicant
 for the 1st Defendant/Respondent
 for the 2nd Defendant/Respondent