REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E044 OF 2020

GEORGE KUBAI.....APPELLANT

VERSUS

ROBERT ALAI.....RESPONDENT

RULING

The notice of motion dated 10th July, 2020 seeks the following orders: -

b) **THAT** a temporary injunction be and is hereby granted restraining the Respondent either by themselves, his associates, servants, agents, employees or any other person whomsoever from posting on any form of electronic media, forums, publishing, republishing or causing further publication and uttering words, or any means whatsoever or making allegations that are defamatory and damaging against the plaintiff pending the hearing and determination of this Application.

c) **THAT** a temporary injunction be and is hereby granted restraining the Respondent/Defendant either by themselves, his associates, servants, agents, employees or any other person whomsoever from posting on any form of electronic media, forums, publishing, republishing or causing further publication and uttering words, or any means whatsoever or making allegations that are defamatory and damaging against the plaintiff pending the hearing and determination of this suit.

d) **THAT** a mandatory injunction be and is hereby granted compelling the Respondent/Defendant either by himself, their associates, servants, agents, employees or any other person whomsoever to withdraw, apologize, remove and or delete from his Facebook accounts, Twitter, Kahawa Tungu and or any other media, website, platform, forum or any other means defamatory and offending statement against the plaintiff, within Three (3) days of service of this Order.

e) **THAT** the costs of this application be paid personally by the Defendant.

The application is supported by the applicant's affidavit sworn on 10th July, 2020. The respondent filed a replying affidavit sworn on 18th August, 2020. Mr. Kurauka appeared for the applicant. Counsel urged the court to grant the orders being sought. Counsel contend that on 6th July, 2020 the respondent maliciously and wrongfully made false, misleading and highly libelous and defamatory allegations against the applicant. The respondent caused the defamatory words to be published, composed and written in the electronic media such as Twitter and print media. It is submitted that the contents of the said posts in their natural and ordinary meaning or by imputations are false, malicious and defamatory. The applicant does not own property at Runda Estate or has a daughter by the name **Joan Kubai**.

Mr. Kurauka maintains that the words complained of referred to the applicant and were maliciously intended to soil the applicant's reputation. The respondent has not denied that he is not the owner of the Facebook accounts, Twitter and Kahawa Tungu Media where the words were published. Counsel relies on the case **OF CFC STANBIC BANK LIMITED –V- CONSUMERS FEDERATION OF KENYA (COFEK)** where Justice Mabeya held: -

"….I am alive to the fact that some of the prayers sought by the Applicant are mandatory in nature. In Kenya Breweries Ltd Vs. Washington Okeyo, Civil Application No. 322 of 2000 (UR), it was held that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. Also in Halsbury's Laws of England Vol. 24, 4th Edn at paragraph 948, the learned authors observe: -

'A Mandatory injunction can be granted on an application interlocutory application as well as at the hearing …if the case is clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied….a mandatory injunction will be granted on an interlocutory application….'

Justice Mabeya further stated that;

> **'…..I have considered that the article complained of is not only defamatory but its continued publication of the world wide web may continue to damage the plaintiff…"**

Mr. Muriungi appeared for the respondent. It is submitted that the respondent categorically denied knowledge of the alleged publication as stated in the replying affidavit. The applicant has not fulfilled the requirements for granting orders of injunction as established in the case of **GIELA –V- CASSMAN BROWN & CO. LTD (1973) E.A, 358**. No prima facie case has been established. Counsel referred to the case of **MRAO LTD –V- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) eKLR** where the Court of Appeal held: -

> **"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 latter."**

Mr. Muriungi maintains that the applicant has failed to connect the respondent with the alleged defamatory words; The only document produced is a print out from a website known as Tuko.Co.Ke and a print out of a photograph of a man with the defendant's name below it giving some phone numbers. There is no proof that the photograph is that of the respondent, and if it is indeed his, no proof of who took it and where it was taken. Counsel also urge that the applicant has not complied with the provisions of Section 106B of the Evidence Act. No certificate under Section 106B (4) of Cap 80 has been annexed to explain how the information was obtained. Counsel relies on the case of **MUMIAS SUGAR COMPANY LIMITED & 5 OTHERS –V- MUSA EKAYA (2017) eKLR** where Justice L. Njuguna observed: -

> **"An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."**

It is also submitted for the respondent that the applicant has not established that he will suffer irreparable damage if the orders being sought are not granted. Further, since the applicant has not met the test of having a prima facie case with a probability of success and that of suffering an irreparable damage, the court should not consider the issue of balance of convenience.

The applicant herein is seeking two orders of injunctions intended to temporarily restrain the respondent from posting to any form of electronic media or uttering any words or allegations that are defamatory to the applicant as well as to remove, delete or withdraw any such defamatory words from social media platform. The basis of the application is that on 6th July, 2020 the respondent caused to be published in the social media the following words: -

> **"….Puzzle of National Oil General Manager George Kubai's Luxury Living …' Further you caused the said defamatory words to be published by the Defendant in Tuko.co.ke as follows;**
>
> **'...Joan Kubai is the daughter of city tycoons Isabella Kubai and Peter Kubai. Their Runda home has around six bedrooms and four of them are fitted with vast walk-in closets, a separate room for the shoe racks and huge bathrooms. There are four sitting rooms in the house and around here kitchens (one is in the master bedroom)..."**

The principles upon which an order of injunction can be granted were explained in the case of **GELLA –V- CASSMAN BROWN & CO. LTD (1973) E.A, 358** where Spry V. P. held at page 360: -

> **The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.**

In the case of **TRICOR ENTERPRISES LTD & 2 OTHERS –V- MWOK-HANDA (1990) KLR, 475** Mango J, (as he then was) held: -

> **The burden is on the applicant to show, on the preponderance of a probability, that he has a prima facie case with probability of success and that he might suffer irreparable injury if the injunction is not granted.**

The applicant avers in his supporting affidavit that he was working for the National Oil Corporation (NOCK) and that his position is very sensitive to any negative publicity like the words complained of. From the pleadings herein, it is established that the alleged defamatory words referred to the applicant. The applicant was working with the National Oil Company and there is no proof that another Peter Kubai was working at the Corporation. A simple analysis of the alleged defamatory words does establish that the intention was to portray the applicant as a rich man who was living a lavish lifestyle with his family at Runda Estate. It is argued by counsel for the applicant that the alleged words can be interpreted to mean that the applicant is greedy, a looter of public property, a thief, dishonest and a criminal.

According to the respondent, he did not author the alleged defamatory words. On his part, the applicant maintain that those words were available on the respondent's Twitter as well as Facebook. The applicant has annexed photographs of the alleged six bedroomed house and the said applicant's daughter at the residence. There is also a photograph of a man who the applicant contends that the photograph is that of the respondent.

It is not clear what relationship the photograph has with the other two photographs annexed to the supporting affidavit. Similarly, the annexed photographs did not show from which portal they were printed or extracted. The co-relation between the photographs together with the print-out from Tuko.Co.Ke and the respondent is not clear at this interim stage. That is why Section 106B of the Evidence Act came up with certain conditions to be complied with when there is a dispute involving electronic records.

The requirement of a certificate indicating how the information was obtained or produced is necessary. I am alive to the fact that the applicant may be able to produce such a certificate during the hearing as well as a proper extract of the respondent's Facebook page or Twitter showing the alleged defamatory words, but as it is now, the connection between the words complained of and the respondent falls far below the prima facie case principle. I cannot at this preliminary stage hold that indeed the respondent published the defamatory words which are the subject of this case. Issuing a mandatory order against the respondent directing him to delete, withdraw or remove the defamatory words from any portal or print media may be difficult to enforce in the event that the order is not complied with as it has not been established that the respondent is the author of those words.

In my view there is need to provide more information during the full hearing. I am satisfied that the available information falls short of the requirement for establishing a prima facie case with a probability of success and in my view cannot trigger the exercise of granting the orders being sought.

The upshot is that the application dated 10th July, 2020 herein lacks merit and is hereby disallowed. Costs shall follow the outcome of the main suit.

Dated and Signed at Nairobi this 25th day of January, 2021

……

S. CHITEMBWE

JUDGE