



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 89 OF 2020

HF GROUP PLC.....PLAINTIFF/APPLICANT

VERSUS

SAMUEL GIKURU WAWERU.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed the Notice of Motion dated 19th June 2020 seeking the following orders. Prayer 1 and 2 are spent.

3. Pending the hearing and determination of the suit herein, an injunction be issued to restrain the Defendant whether by himself, his employees, servants and/or agents associates, acquaintances or pseudonyms and aliases from:

(a) writing, printing and/or publishing or broadcasting in any media any statements that are defamatory of the plaintiff, its business, its shareholders, employees and/or directors; and its customers and their accounts; or

(b) Publishing or otherwise disclosing or making public any confidential information regarding the Plaintiff, its business, directors, shareholders and/or its customers and their accounts.

2. The application is supported by the grounds on its face plus the sworn affidavit of Regina Anyika. It's the Applicant's contention that it is a limited liability company incorporated in Kenya and listed in Nairobi Securities Exchange and regulated by the Central Bank of Kenya.

3. The Deponent has averred that it owns HFC Ltd which is the largest mortgage finance company in Kenya, offering various products and mortgage solutions to both the public and private sectors. Further that its ability to conduct its core business is firmly hinged on the confidence that the general public has in it.

4. She deponed that the defendant publishes his written work through various platforms and sites in Kenya and worldwide. That on diverse dates between 1st May 2020 and 12th June 2020 he published, posted or caused to be posted or published on his whatsapp group and/or facebook page, stories or articles concerning the plaintiff, in the following words:

"I Sam Waweru invite you to join me we petition winding up hfck for fraudulent accounting and abuse of Central Bank regulations towards lending principles.

They Abuse induplum rules and apply Shylock principles always disenfranchising their clients.

Nobody, almost nobody can borrow a mortgage from hfck and be able to pay back.

And right now it's the only NSE LISTED PUBLIC OWNED BANK REGISTERING MAJOR LOSSES.

We might end up loosing our hard earned properties.

My case is simple and a past banker, I borrowed 34.5m for 34 mths ..

I had paid 55 m

And today are demanding 10 m.

A property was worth 80 million is now valued at 49m.

We have evidence of them corrupting the justice systems and approaching lawyers representing debtors and compromising them.

Wake up.

Let's work and defeat these demons.

Don't keep quite.

Bring in others please.”

5. Further on 1st June 2020 he wrote the following concerning the plaintiff:

“Good evening members. It was great meeting you in person today. The ball is now in the hands of the technical team to a refine and update the letter drafted by Mr. Isika. This letter captures issues most of us face at HF. Its my hope that by the end of Tuesday, we will have a document that will inform the basis of our class suit. We will need to immediately decide on the legal team to represent us and also start negotiations on fees etc. I hope by the time the letter is made public, we will be able to take the next action quickly. Let us also for now make efforts to bring in more people. We need to stay focused on our goal. Let our next meeting be a powerful motivating experience for all. We are all stressed, worried and even tired from HFC harassment, we need to support each other not tear each other apart. Let us stick to the point. Time is not on our side. Have a great weekend and happy Jamhuri day.”

6. Yet again in another post the Respondent stated as follows concerning the plaintiff:

“My proposal

Reference should be detailed not just closure

HFCK has been run like the American Maddox finance.

The reference should indicate

Fraud

White collar crime

Investigation of it operations

Investigations towards directors

Threat that should this not be done we will file private prosecution towards winding up

Letter should be copied to

NSE

BRITAM

BOND HOLDERS”

7. She interpreted the said posts to portray the plaintiff/applicant as a rogue institution, not trustworthy, corrupt, a fraudster, a thief and could not be trusted with customers' money.

8. She contends that the defendant in publishing these posts was malicious, reckless and defamed the plaintiff with an intention of disparaging and discrediting its reputation and business. She adds that even as he discredited the plaintiff he did not state his own faults and failures when it came to his financial dealings with the plaintiff, and how he has been a perennial defaulter in mortgage repayments.

9. She has deponed that the defendant/respondent's intention in publishing the said articles was to demean the plaintiff/applicant in the eyes of its shareholders and customers. Further that there had been earlier articles by the defendant/respondent with the same effect. That the defendant/respondent did not seek to clarify the material before publishing it and that the sole intention was to tarnish and discredit the plaintiff's reputation and that of the senior management. It is therefore the plaintiff/applicant's desire to have him restrained by way of injunction in terms of prayer No. 3 of the Notice of Motion dated 19th June 2020.

10. The defendant/respondent filed a replying affidavit sworn on 20th July 2020. He has deponed that he is a customer of the

plaintiff/applicant from whom he took a facility in May 2012. He denies authoring and/or publishing any defamatory material/content against the plaintiff/applicant, as claimed in paragraphs 5 & 6 of the supporting affidavit.

11. He contends that this suit has been filed against him to counter the one he filed against the plaintiff/applicant on 2nd April 2020, which is **Mombasa ELC No. 45 of 2020 – Samuel Waweru Gikuri & Another vs HFC Ltd**. Its his claim that the ELC suit is in relation to the problems he has had in relation to the facility with the plaintiff/applicant. He denies having gone to the social media over this. He therefore opposes the application.

12. In a further affidavit sworn on 15th September 2020, Regina Anyika avers that the defendant/respondent's defamatory publications were through his number +254722510302 on whatsapp (*Annexure RAI*). She contends that the ELC case cannot be the subject of discussion in this matter as that is subjective.

13. This application was canvassed by way of written submissions which were briefly highlighted. The Plaintiff/Applicant's submissions are dated 1st September 2020. M/s Makori Purity for the plaintiff/applicant submits that the Applicant has established the three (3) requirements set out in the **Giella vs Cassman Brown Case [1973] E.A. 358** in respect to grant of an injunction.

14. It is Counsel's submission that a prima facie case has been demonstrated by the plaintiff/applicant. That it has been shown that it is an established company, and the defendant/respondent has been posting defamatory information about it. She referred to the case of **Mrao Ltd vs First American Bank of Kenya & 2 others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 others vs Jane W. Lesaloi & 5 others, [2014] eKLR** where the Court of Appeal defined a prima facie case as;

“A prima facie case is 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 that there exists a right which has apparently been infringed by the opposite party as to a call for an explanation or rebuttal from the latter.”

15. Counsel has further submitted that the plaintiff/applicant will suffer irreparable injury which cannot be compensated by an award of damages. She attaches this to the fact that the plaintiff/applicant is a limited liability company in Kenya and listed in the Nairobi Securities Exchange and regulated by the Central Bank of Kenya. It wholly owns HFC Ltd which is the largest mortgage finance company in Kenya, and deals in various mortgage solutions. Its her contention that the defamatory articles by the defendant/respondent against it have affected its customers, shareholders and the entire business, hence the need for an injunction.

16. On the balance of convenience counsel asks the court to find that more injury would be caused to the plaintiff/applicant than the defendant/respondent if the injunction is not granted. She referred to the case of **Paul Gitonga Wanjau v Gathathis Tea Factory Company Ltd & 2 others [2016] eKLR** where the court expressed itself as follows on the issue of balance of convenience:

“Where any doubt exists as to the Applicant's right, or if the right is not disputed, but its violation is denied, the Court, determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and should ultimately turn out to be right.”

17. Counsel therefore urged the Court to grant the injunctive orders sought.

18. The defendant/respondent's submissions are dated 12th October 2020. His Counsel Mr. Nyakeri has submitted based on paragraphs 9-13 of the replying affidavit that the plaintiff/applicant is on a revenge mission since the defendant/respondent sued him in the ELC Mombasa. He wonders how the defendant/respondent would publish such statements after filing a suit against the plaintiff/applicant. He contends that the suit has been filed out of bad faith and/or ill motive.

19. On whether the suit and/or application establishes a prima facie case with a high probability of success Counsel submits in the negative. He argues that the material placed before the court did not emanate from the defendant/respondent as alleged. Secondly the said material does not amount to defamation.

20. He has cited the case of **Philes Nyokabi Kamau vs Industrial & Commercial Development Corporation [2017] eKLR** to support his position that no prima facie case has been established, since the statement made is not defamatory. He further submits that the defendant/respondent is raising a defence of justification. He adds that there is no threat or reasonable threat raised in the circumstances of this case.

21. Referring to the legal threshold for grant of an injunction as set out in the **Giella vs Cassman Brown** case (supra) Counsel submits that no prima facie case has been established as required. In the case of **American Cyanamid vs Ethicon Limited [1975] AC 396**, Lord Diplock stated thus:

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.”

22. Finally he urged the court to dismiss the application with costs to the defendant/respondent.

23. In response M/s Makori submitted that the defendant/respondent in the replying affidavit denied publishing the statement yet Counsel in his submission admits that the statement was published. Its her submission that such admission cannot be made from the bar. She emphasized that the statement in issue is highly defamatory.

Analysis and determination

24. I have considered the application, affidavits, both submissions and authorities cited. The main issue for determination is whether the plaintiff/applicant has met the legal threshold for grant of an interlocutory injunction.

25. The law on granting an interlocutory injunction is set out under **Order 40(1)(a) &(b) of the Civil Procedure Rules 2010** which 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

(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 orders.”

26. The case of **Giella vs Cassman Brown Co. Ltd (supra)** set out the principles governing the grant of an interlocutory injunction. These are:

(a) The Applicant must establish a prima facie case with probability of success.

(b) The Applicant must show that he/she will suffer irreparable loss which cannot be compensated by an award of damages.

(c) If the above two have not been satisfied then the application should be determined on a balance of convenience.

27. Both counsel in this application have well captured the principles in the **Giella Cassman** case. Mr. Nyakeri for the defendant/respondent referred to the case of **American Cyanamid vs Ethicon Ltd (supra)** which captured three elements of importance which are:

(a) There must be a serious/fair issue to be tried.

(b) Damages are not an adequate remedy.

(c) The balance of convenience lies in favour of granting or refusing the application.

Whether the plaintiff/applicant has established a prima facie case with a probability of success

28. The claim before this court is based on defamation. The plaintiff/applicant has set out excerpts of what the defendant/respondent is alleged to have authored and/or published against it. The defendant/respondent in his replying affidavit has denied ever publishing the said excerpts. Infact he claims that the suit is a witch-hunt as a result of a suit he filed against the plaintiff/applicant.

29. Surprisingly Mr. Nyakeri for him in his submissions stated that indeed the excerpts were authored and published by the respondent and he was pleading justification. This is indeed contrary to the averments in the replying affidavit. The court will go by the averments in the replying affidavit but still ponder on the said submission which is on record.

30. The plaintiff/applicant is indeed a limited liability company and owns HFC Ltd which is a serious mortgage finance company. It obviously has several shareholders and customers, employees, directors. Publications in the social media through facebook, whatsapp, are meant for the public to read and digest.

31. Excerpts of the articles complained of are found in paragraphs 7, 8, & 11 of the supporting affidavit and the contents are self-explanatory. In them the HFCK is accused of so many evils and/or crimes. If the plaintiff in its rightful position was to be placed against the contents of the articles referred to (*which have yet to be proved*), what would be the reaction of its shareholders, customers, employees and/or directors?

32. The articles are three (3) and published on different dates. On the face of it they are defamatory. The words are inciteful to any right thinking members of the society. The plaintiff/applicant has cited its source as telephone No. +254722510302 which allegedly belongs to the defendant/respondent (Annexure RA1). As was held in the case of **Edward Shakala v Rosemary Halubwa Shikala & Anor [2020] eKLR** the plaintiff/applicant has not only extracted the articles and the words complained of, but has gone further to explain the impact of these words on it as a financial institution.

33. In **Mrao 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 vs Jane W. Lesaloi & 5 others [2014] eKLR** the Court of Appeal has defined a *prima facie* case as has been stated at paragraph 14 of this Ruling.

34. Counsel for the respondent has urged this court to find that he was justified in what he did and the applicant has in the circumstances not established a prima facie case. This admission was made from the bar and is not supported by the replying affidavit. From the material placed before this court I do find that the applicant has satisfied the court that the articles published if not justified are injurious to its functioning. A prima facie case has therefore been established.

Whether the damage can be compensated in the form of damages

35. Some of the consumers of the contents of these articles are the applicant's customers/shareholders/employees/directors etc. If the author of the articles is left to continue publishing them, the company will have wound up by the time the suit is finalized, since all the targeted persons will have left. In other words, the applicant will have suffered irreparable injury which no amount of damages would compensate it.

36. It is only fair and in the interest of justice, that pending the hearing of the suit the authoring and publishing of the defamatory articles be stopped. I find merit in the application which I allow in terms of prayer No. 3 of the said application.

37. I therefore make the following orders:

(a) THAT pending the hearing and determination of the suit, an order of injunction do issue restraining the respondent, whether by himself, his employees, servants and/or agents, associates, acquaintances or pseudonyms and aliases from:

(i) writing, printing and/or publishing or broadcasting in any media any statements that are defamatory of the plaintiff, its business, its shareholders, employees and/or directors; and its customers and their accounts; or

(ii) Publishing or otherwise disclosing or making public any confidential information regarding the plaintiff, its business, directors, shareholders and/or its customers and their accounts.

(b) Let parties fast track the hearing of this matter.

(c) Costs of the application to the plaintiff/applicant.

DELIVERED, SIGNED AND DATED THIS 25TH DAY OF MARCH 2021 IN OPEN COURT AT NAIROBI.

H. I. ONG'UDI

JUDGE