



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. E128 OF 2020**

**AMIR GRINBERG.....1<sup>ST</sup> PLAINTIFF**

**GAL ARBEL.....2<sup>ND</sup> PLAINTIFF**

**NIR SHER.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ANDREW BAKER.....DEFENDANT**

**RULING**

By dint of a plaint dated 24<sup>th</sup> September, 2020 the plaintiffs brought a suit against the named defendant for damages and other claims, based on what the plaintiffs claimed to be defamatory statements and or allegations made against them by the defendant.

In cited extracts of some publications attributed to the defendant, the plaintiffs allege that by that reason, their reputations have been tarnished and in their ordinary and natural meaning, imputations and innuendo, the publications were made with the sole intention to display them negatively as set out in paragraph 14 of the plaint. That is to say, they are cheats and crooks of sorts, malicious and conniving, unethical and unscrupulous, fraudulent and corrupt, dishonest and lacking in integrity and carried on their profession in utter disregard of the law.

Alongside the plaint, there was filed an application by way of Notice of Motion under Order 40 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, for an interim injunction order against the defendant to restrain him either by himself, associates, workmates, servants, employees and or agents from publishing and continuing to publish or causing to be published any statement relating to the applicants in respect of their businesses in Kenya and elsewhere, in particular their alleged association with companies named therein and on their social life generally, including their respective families and also on the allegations in a pending matter in **Milimani ELRC consolidated cause No. 1130 of 2018 Gael Arbele and 2 others vs. Balton CP Limited** as well as statements whose import by their ordinary and natural meaning or by imputations and innuendo, make reference to and are defamatory of the applicants. There are several grounds set out on the face of the application together with the supporting affidavit of the 1<sup>st</sup> plaintiff Amir Grinberg.

On 24<sup>th</sup> September, 2020 this court certified the Motion urgent and ordered service upon the defendant. Further, persuaded that interim orders were deserving, an interim injunction was allowed in terms of prayer 2 of the Motion to last for 14 days. A hearing date was then set before any judge in the Division. From the record, I note that when the matter came up for hearing on 8<sup>th</sup> October, 2020 there was an application by way of Chambers Summons dated 7<sup>th</sup> October, 2020 seeking to stay all proceedings in the suit and that the name of the defendant be struck out and that of Balton CP Limited be joined as the defendant.

From the notes made by Njuguna J on 8<sup>th</sup> October, 2020 the said application was certified urgent and an order made that it be heard on 5<sup>th</sup> November, 2020 alongside the Notice of Motion dated 24<sup>th</sup> September, 2021. The interim orders issued earlier by this court were then extended.

On 5<sup>th</sup> of November counsel for both parties appeared before me and agreed that the Notice of Motion may be determined by way of affidavit evidence and that prayer 2 of the Chamber Summons application dated 7<sup>th</sup> October be allowed. Counsel for the defendant asked for five days to file a replying affidavit to the plaintiffs Notice of Motion.

It would appear the file ended up in the hands of Sergon J on 11<sup>th</sup> November, 2020 as a Duty Judge who observed that there was an application dated 6<sup>th</sup> November, 2020 by the defendant and that the said application should be heard together with the Motion dated 24<sup>th</sup> September, 2020.

On 18<sup>th</sup> November, 2020 both counsel appeared before me and it was confirmed that the plaintiff's had been served with an affidavit in reply to the motion dated 24<sup>th</sup> September, 2020. A ruling date was set on notice and the interim order extended. Regrettably, I was unable to deliver the ruling earlier due to indisposition, and informed the Hon. Chief Justice by mail on 4<sup>th</sup> December, 2020 as required by Order 21 rule 1 of the Civil Procedure Rules.

I have confirmed from the record that although the plaintiffs filed an application for judgment against the defendant, no interlocutory judgment was ever entered and none can be entered because the defendant filed a defence, albeit in protest. The defendants filed a replying affidavit to the plaintiffs' Motion dated 24<sup>th</sup> September, 2020 denying all the allegations set out in the plaint submitting in the process that, the plaintiffs are not deserving the interim injunction sought in the Motion and that there are proceedings pending in **Milimani ELRC consolidated cause No. 1130 of 2018 Gael Arbele and 2 others vs. Balton CP Limited** and that the matters in issue in this application are subject to litigation in that cause.

Most importantly however, it is the defendant's position that the applicants must prove there is a prima facie case with the probability of success and that, they must demonstrate irreparable harm that they are likely to suffer if the order is not granted. It is the defendant's position that if the plaintiffs were to succeed in their suit they can easily be compensated by an award of damages. If the court is in doubt however, the court should consider the matter on a balance of convenience.

It is my duty to address the issues raised in the plaint, affidavit in support of the Motion the defendant's position as contained in the defence filed under protest, and the affidavit in reply. The defendant has correctly stated the principles upon which an interim injunction may be granted by the court. In applications of this nature however, caution must be exercised because the averments of the parties have not been tested under cross examination. Further, at interlocutory stage, courts must be guarded from entering into the arena of conflict before the parties are heard conclusively.

The foregoing notwithstanding, the court is in a position to determine the application before it. In the case of **Ann Waiguru vs. Paul Kinuthia (2019) e KLR** citing the case of **Cheserem vs Immediate Media Services (2000) 2 EA 371** stated as follows,

**“An interlocutory injunction is temporary and only subsists until the determination of the main suit. In defamation, the question of injunction is treated in a special way although the conditions applicable in granting an injunction as set out in the *Giella v Cassman Brown & Co Ltd (1973) EA 358* generally apply...In defamation cases, those principles apply together with special law relating to the grant of injunctions 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 clearest possible cases. The court must be satisfied that the words complained of are libellous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse”**

In **Transcend Media Group v Standard Group Limited [2017] eKLR** cited in the Waiguru case (Supra) the Court observed as follows;

**“Temporary injunction to prevent the publication of a defamatory statement can only be granted in the clearest cases. In fact courts have been hesitant to grant such orders where the defence of truth and fair comment has been pleaded. In *Ruth Ruguru Nyagah v Kariuki Chege & another [2015] eKLR* the court held that , “it was submitted by the defendants that it is not sufficient to merely establish that the words complained of are capable of being defamatory, rather the court must be satisfied that in the final determination of the suit it would inevitably come to the conclusion that the words were defamatory.”**

In the allegations contained in the extracts of both the plaint and the defence filed under protest, the applicants are cited both in their personal and corporate capacities or responsibilities. It is clear therefore that, character, reputation and integrity are at the centre of the dispute. I hasten to add that the cause of action in this matter is defamation. I say so because, a dispute still pending before the Employment and Labour Relation Court has been cited by both parties. Those are different causes of action which ultimately will lead to different determinations at the end of the hearings.

It is within my knowledge going by the record that, there is a pending application to replace the defendant in this matter with the company in which he is the CEO.

I have already observed that the application for interlocutory judgment has been overtaken by events. At the same time, the application by the defendant dated 7<sup>th</sup> October, 2020 in which Barton CP Limited wishes to replace the defendant has not been prejudiced because of the provisions of Order 1 Rule 10 (2) and Rule 14 empowers the court, at any stage to grant or refuse the order sought.

For now however, the court is concerned with the application for injunction orders. I observe from the contents of the documents filed herein that, business interests have been pleaded and taken the centre stage of the dispute. There must be a line drawn between the business conflict and character of the participants in the dispute. Having said so, I note there is always a thin line between justification and character assassination. I have some reservations to leaving this matter open in view of the acrimonious relationship between the parties that has been disclosed in the material placed before the court.

When it comes to defamation, a name is the only thing a person has. It is priceless. A reputation once destroyed or lost may never be redeemed. I have found the following statement in the book of **Shakespeare “Othello”, Act III ,155 – 161** which reads as follows,

**“ LAGO: Good name in a man or woman, dear my Lord, Is the immediate jewel of their souls; Who steals my purse steals trash; 'tis is something, nothing; Twas mine, tis his, and has been slave to thousands; But he that filches from me my good name , Robs me of that which not enriches him And makes me poor indeed”**

I can't agree more. To guard the names of the plaintiffs regardless of the end result of this case, I am persuaded that they have presented a prima facie case with a probability of success. In the event they were to succeed in their suit against the defendant an award of damages may never be sufficient to redeem themselves.

In view of the foregoing, the application succeeds in terms of prayer 3 of the Notice of Motion dated 24<sup>th</sup> September, 2020. The costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MARCH, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**