



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL MISC. APPL. NO. E097 OF 2021**

**CYTONN INVESTMENTS MANAGEMENT PLC.....APPLICANT**

**VERSUS**

**OKOTH OKONG'O..... RESPONDENT**

**RULING**

1) The plaintiff/applicant took out the motion dated 19<sup>th</sup> April 2021 in which it sought for:

***i. THAT this application be certified urgent and service be dispensed with in the first instance.***

***ii. THAT pending the hearing and determination of this suit filed herein, a temporary order of injunction be and is hereby issued barring the defendant/respondent by himself, his agents, assigns and/or servants from making and/or publishing, airing, on social media and/or on any other platform, any statements, remarks, innuendo and defamatory statements about the plaintiff, its investment vehicles and/or any subsidiaries or officers of the plaintiff.***

***iii. THAT cost be awarded to the plaintiff/applicant.***

2) The applicant filed the affidavit sworn by Jennifer Ndaisi Solovea in support of the application. The defendant/respondent filed a replying affidavit he swore to oppose the motion. Learned counsels appearing in this suit agreed to have the application disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion dated 19<sup>th</sup> April 2021 plus the facts deponed in the rival affidavits. I have also considered the written submissions and the authorities cited.

4) It is the submission of the plaintiff/applicant that it is an independent investment management company offering privately placed structured products and undertaking high value investment projects through its real estate development affiliate. The applicant further averred that the investors (clients) rely on the good reputation of the applicant and the legality and legitimacy in the applicant's products.

5) It is stated that the defendant/respondent published a defamatory article on the 254 news website that are meant to damage the plaintiff's reputation which it had built for over 7 years. The aforesaid website is said to be widely accessible at the time the article was published. The applicant argued that the article was infused with panic and falsehoods intended to ruin the plaintiff's reputation.

6) The plaintiff also aver that the defendant is responsible for the website which published the offending article against the plaintiff. It is also stated by the plaintiff that 254 website was shut down by the Communication's Authority owing to its unscrupulous articles as they shared unsubstantiated pieces of news with the public.

7) The plaintiff has stated that it is apprehensive that the defendant herein could publish similar defamatory pieces about it in other social media platforms or websites and that it has written a demand letter to the defendant to cease from publishing defamatory articles on it an apology. The respondent has not deemed fit to respond nor take steps to apologize over the offending article. It is said that an award of damages cannot compensate the applicant for the damage to its reputation.

8) In response to the plaintiff's arguments the defendant stated that the application is made in vain in that the applicant admits the offending article that is alleged to be published by the respondent has already ceased to exist. It is the respondent's submission that the plaintiff's application is incompetent and has been overtaken by events under the doctrine of laches as it has been brought six (6) months from the date of the impugned publication.

9) Having considered the rival arguments presented by the parties to this dispute, what provoked the plaintiff to file this suit and the instant application is the article allegedly published by the defendant titled:

**“Cytonn Collapse? Panic as clients move out ksh.250 million in two days”**

10) In paragraph 7 of the plaint and paragraph 7 of the supporting affidavit the plaintiff reproduced the contents of the article as follows:

***“In September 2020, the Capital Markets Authority (CMA) warned clients of Cytonn Investments Management PLC over the firm’s high yield fund. This, they said, exposes the investors to the risk of losing the hard-earned monies they have invested in the event of any adverse eventuality in Cytonn Investment Management PLC and its promoted Real Estate or other investments as the concentration risk is higher on account of the investment begins all under elated entities.”***

***This was after CMA received complaints from investors who were owed over kshs. 122.8 million in unpaid claims and they were unable to cash their investments that have matured.***

***“Cytonn had blocked investors from pulling out cash from real estate fund due to the uncertainties occasioned by the Covid pandemic***

***“Reduced construction activity, closure of lands offices and slowed purchase of real estate units are the reasons cited by Cytonn PLC for extending maturities....***

***“Many months after the firm started struggling and having a rough time in and out of court over myriad of issues, it emerged that in 2021, irate investors are working hard to leave the company”***

***“In the last week, investors shipped out almost kshs. 200 million in two days, an anonymous source told 254 news. This, the source said is according to data by the CMA”***

***“Since last year I have had panic attacks because of the money I invested in Cytonn, I don’t know if I will ever get my money.”***

11) The plaintiff has expressly stated that the aforesaid article is defamatory of it. The respondent has not denied having published the article. The respondent complained that the nature of orders sought if granted may unnecessarily limit the fundamental freedom of expression.

12) The defendant further stated that there is no law that prohibits any person from making fair comments on any matter that are in public domain. The plaintiff has specifically beseeched this court to issue an order of temporary injunction to restrain the defendant from publishing on social media or any other platform any statements, remarks, innuendo and defamatory statements about the plaintiff, its investment vehicles and or subsidiaries or officers.

13) The plaintiff also stated that the defendant’s website which had been used to publish the offending article was shut down by the Communications Authority of Kenya. The defendant conceded that his website was shut down. The plaintiff avers that it fears that the defendant may republish through other media platforms articles which are defamatory of it.

14) The defendant did not state whether or not he may publish articles similar to the one complained of.

15) In the case of **Micah Cheserem vs= Immediate Media Services (2000) I EA 371** this court held inter alia as follows:

***“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in Giella vs Cassman Brown & Co. Ltd (1973) EA 258 generally apply. In defamation case those conditions operate in special circumstances. Over and above the test set out in Giells’s case, in defamation cases 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 of matter complained of are libelous and also that the words as so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Normally the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a humane, responsible, truthful and trustworthy defendant.”***

16) I am satisfied that unless the order sought is granted, the defendant may republish in other media platforms articles of similar nature to that complained of in the instant application. There is no doubt that, prima facie, the article published by the defendant appears defamatory.

17) There is no doubt the loss envisaged to occur on the part of the plaintiff cannot be quantified in monetary terms. The fact that the defendant’s website has been shut nothing prevents the defendant from using other medial platforms to publish the offending statements or comments of the plaintiff.

18) In the end, I find the plaintiff’s motion to be meritorious. The same is allowed thus giving rise to issuance of the following orders:

i. Pending the hearing and determination of the suit filed herein, a temporary order of injunction is hereby issued barring the defendant/respondent by himself, his agents, assigns and/or servants from making and/or publishing, airing, on social media and/or on any other platform, any statements, remarks, innuendo and defamatory statements about the plaintiff, its investment vehicles and/or any subsidiaries or officers of the plaintiff.

ii. Costs to abide the outcome of the suit.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 26<sup>th</sup> day of August, 2021.

.....

J. K. SERGON

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent