REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. E208 OF 2020

ABNO SOFTWARES INTERNATIONAL LTD.....APPLICANT

-VERSUS-

SAMMY OCHIENG ONYANGO.....RESPONDENT

RULING

1. The live prayer in the motion dated 5th December, 2020 seeks: -

> **"(iii)That pending the hearing and determination of this suit there be an order of temporary injunction, restraining the Defendant/Respondent, his agents, employees, servants, representatives, or any person claiming through him from further publishing any article, words, materials, or remarks against, of and concerning the Plaintiffs/Applicants and their operations through social media platforms or by any other means of publication".**

2. The motion is expressed to be brought *inter alia* under Order 40 Rules (1), (2) & (3) of the Civil Procedure Rules and is premised on the grounds on the face of the motion which are amplified in the affidavit in support of the motion, sworn by **Alex Barasa**, who describes himself as the Chief Executive Officer of **ABNO Softwares International Limited** (hereafter the Applicant). He deposes that the Applicant is a leading and reputable ICT company engaged in the provision of software solutions to its large clientele which includes public institutions and parastatals in Kenya.

3. The deponent further states that on 9th October 2019, the Applicant engaged **Sammy Ochieng Onyango** (hereafter the Respondent) to the position of Finance Manager *vide* an employment contract executed on the same date; that on 25th June 2020, the parties entered into a Non-Disclosure Agreement (NDA) protecting confidential information accessed by the Respondent in the course of his duties ; and that the Applicant being dissatisfied with the Respondent's performance in the probationary period elected to terminate his employment, as communicated in a letter dated 2nd July 2020. It is deposed that the Applicant subsequently received a demand letter dated 8th July 2020 from the Respondent's advocate alleging unfair termination of employment and demanding damages amounting to Shs. 9,600,000/-. That in addition, the demand letter contained defamatory statements alleging that the Applicant was engaged in systemic corporate malfeasance, including tax evasion and that the Respondent's termination was prompted by his persistent proposals for change towards good and ethical corporate practices.

4. The deponent further swears that the Respondent subsequently filed a claim for compensation in the Employment and Labour Relations Court (ELRC) being **ELRC No. E374 of 2020 Sammy Ochieng Onyango Vs ABNO Softwares International Limited** which pleadings included allegations of corruption, tax evasion and corporate malfeasance on the part of the Applicant as well as confidential company information, in violation of the NDA. It is claimed by the deponent that the Respondent maliciously filed manipulated and /or forged documents in the case, with the sole aim of besmirching the reputation of the Applicant, and to force the Applicant to settle his claim. The deponent further asserted that the Respondent had on 14th October 2020 similarly published these and other defamatory documents to various public bodies including the Kenya Revenue Authority and the Ethics and Anti-Corruption Commission and to several of the Applicant's clients *via* an email dated 18th November 2020 entitled ***"Evidence of corruption activities at ABNO Softwares International".*** The deponent views the disclosures in the alleged defamatory publications as malicious and calculated to cause the Applicant reputational and financial damage and urges the court to grant a temporary injunction as prayed.

5. The motion is opposed by way of a lengthy replying affidavit sworn by the Respondent. The Respondent admits that his advocate did write the demand letter complained of but denies that any contents thereof were defamatory or published to a third party. Equally, he admitted filing the suit in the ELRC and claimed that the material filed therein is germane to the suit and claim that the Applicant in terminating his employment was victimizing him for his strident stand against corrupt activities, tax evasion and corporate malfeasance in the Applicant company. Defending the said material, he asserted his professional capacity as a certified public accountant, and stated that he did not

render/disclose any untrue statements and that none of the documents were forgeries as alleged by the Applicant.

6. The Respondent also admitted that after alleged harassment by a police officer in connection with the material in question, he had sent a complaint and the material to the Kenya Revenue Authority and other investigative bodies and swore that, other than the said investigative agencies who have no business relationship with the Applicant, he did not send out the materials to any of the Applicant's clients and the email address corruption.report@gmail.com from which the email dated 18th November was sent had not been linked to him, and was not his.

7. The Respondent further depones the Non-Disclosure Agreement is void *ab inito* and unenforceable, for among other reasons, want of consideration and in any event, it would run counter to public policy if evidence of acts of corporate corruption, tax evasion and other nonfeasance and malfeasance were to be accorded protection under the NDA. The Respondent takes the position that this cause was maliciously brought to dissuade him from pursuing his unfair termination claim against the Applicant and that the injunction if granted, would serve to automatically impede the prosecution thereof.

8. On 15th February, 2021 the Court gave directions that the motion be canvassed by way of written submissions. The parties duly complied.

9. On behalf of the Applicant, counsel submitted that the Applicant had demonstrated a proper case warranting the grant of a temporary order of injunction. He relied on the *locus classicus* on the applicable principles- **Giella v Cassman Brown & Co Ltd (1973) EA 358-** as cited in **Bob Collymore & Another v Cyprian Nyakundi [2017] eKLR.** Further, the Applicant argued that it had met the considerations precedent to granting of an interlocutory injunction as modified to suit the uniqueness of defamation cases, as stated in **Cheserem v Immediate Media Services & 4 Others [2000] EA 371; (2000) eKLR.** To the effect that, first, the jurisdiction to grant an interlocutory injunction in defamation cases must be exercised with the greatest caution so that injunctions are granted only in the clearest of cases and secondly, that the court must be satisfied that words complained of are libelous and so manifestly defamatory that a verdict to the contrary would be set aside as perverse.

10. Asserting that the Respondent's statements were actuated by malice, counsel emphasized the fact that the Respondent's employment with the Applicant had been terminated after an unsuccessful probation period and that, he published false and defamatory information in a bid to coerce the Applicant to pay the sums he was demanding from them. Concerning proof of intrinsic and extrinsic malice counsel relied on the decision of **Odunga J** in the case of **Phineas Nyagah v Gitobu Imanyara [2013] eKLR** as cited in **CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK) Sued through its officials, Stephen Mutoro & 2 Others [2014] eKLR**. Finally, counsel submitted that the Applicant's reputation has been tainted through the publications complained of and its business had been adversely affected; that the damage already suffered by the Applicant is grave; and that if the Respondent is not restrained from further publishing the defamatory statements, the Applicant will suffer irreparably.

11. Counsel for the Respondent submitted extensively, emphasizing the defences available to the Respondent and citing primarily English authorities in support of his submissions. He argued that the statements in the demand letter, filings in the ELRC, complaints to the Kenya Revenue Authority and other investigative bodies, which were the subject of the Applicant's complaints were variously covered by statutory immunity and the common law doctrine of absolute or qualified privilege. It was his submission that the alleged defamatory statements were made on occasions of privilege, relying on the provisions of Order 3(2)(d) of the Civil Procedure Rules, Section 65(1) of the Anti-Corruption and Economic Crimes Act, the Kenya Revenue Authority Act, Section 9(c) & (h) of the Public Procurement and Disposal Act, Section 11(d) & (h) of the Ethics and Anti-Corruption Commission Act.

12. It was also contended concerning that the demand letter by the Respondent's advocate was not defamatory as it was not published to any third party, having been addressed directly to the Applicant's senior employees. He relied on the Court of Appeal decision in **Selina Patani & Another v Dhiranji Patani (2019) eKLR** where the court cited with approval the English decision in **Pullman v Walter Hill & Co. (1891) 1QB 524.** Regarding the filings in the ELRC case**,** counsel argued privilege based on the decision in **Watson v McEwan (1905) AC 480** and others. It was counsel's submission that concerning disclosures made to investigative bodies, privilege arose from the reciprocity based on mutual interest or duty between the maker and receiver of the communication. For this proposition he relied on the English decisions in **Evans v London Hospital (1981) 1 WLR 184** and **Adam v Ward [1979] AC 309** the latter which was cited in **Ibrahim Mukhtar Abasheikh v Royal Media Services & Another (2020) eKLR.** As for the NDA counsel submitted that it was unenforceable for want of consideration, on grounds of absolute immunity and public policy.

13. It was therefore the Respondent's contention that the Applicant had not established a *prima facie* case as defined in **Mrao Ltd v First American Bank of Kenya Limited & 2 Others [2003] eKLR** having failed to produce evidence that the publications complained of were defamatory, to prove malice, to controvert the correctness of the Respondent's assertions contained in the said publications, to prove that the Respondent was the author of the email to the Applicant's clients, and in light of absolute immunity or privilege asserted by the Respondent, which is a complete defense. Further that the Applicant had not proved the actual loss suffered through the disclosures.

14. The court has considered the parties' rival affidavits and submissions. There is no dispute that the Applicant had by an employment contract dated 9th October 2019 engaged the Respondent in the position of Finance Manager. The probation period of 6 months provided for in the contract was apparently extended when it lapsed in April 2020, and a non-disclosure/non-solicitation agreement (NDA) was executed by the parties on 25th June, 2020. On 2nd July 2020 however the Applicants terminated the contract vide their letter of even date, which alluded to dissatisfaction with the Respondent's performance under probation.

15. Aggrieved by this turn of events, the Respondent consulted with his advocates who on 8th July, 2020 wrote a demand letter to the Chief Executive Officer of the Applicant, **Alex Baraza**. The letter was sent via an email copied to other senior officers of the Applicant company, namely **Esther Wahome, Faith Wanjiku** and **Jane Wangui**. The letter alleged among other things that the termination of employment was unlawful, in bad faith and actuated by malice as the Respondent having become aware of *"non- feasance and certain malfeasance in the corporate practices"* of the Applicant had unsuccessfully proposed and insisted on good practices to address alleged corporate vices. The Applicant, irked by the contents of the demand letter and especially the statements concerning the Applicant's alleged corporate malpractices which it deemed defamatory instructed their advocate to respond accordingly. Hence the Applicant's advocate's letter dated 20th July, 2020

sent to the Respondent's advocate.

16. Subsequently in August 2020 the Respondent filed a claim in the Employment and Labour Relations Court (ELRC) being **ELRC No. E374/2020,** by which he sought compensation for alleged unlawful and unfair termination. The claim contained among others, allegations of corporate improprieties on the part of the Applicant, including tax evasion and corruption. Filed with the claim were several documents containing alleged confidential information covered in the NDA and alleged forged documents (See annexures marked **AB5(a, b, c, d,** and **e)** and **AB6(a, b** and **c)**, respectively to the supporting affidavit of **Alex Baraza)**.

17. There are accusations and counteraccusations of blackmail and duress in relation to the proposal to settle the ELRC matter out of court, but it is not contested that in September, 2020 a report was made by the Applicant to police in connection with some of the documents filed in the ELRC claim and though the police pursued the Respondent in that regard, it is not clear how far these inquiries went. On 14 th October 2020 the Respondent dispatched *via* email a letter addressed to the Kenya Revenue Authority (KRA); the Public Procurement Regulatory Authority (PPRA); the Ethics and Anti- Corruption Commission (EACC); the Director of Public Prosecutions (DPP) and the Directorate of Criminal Investigations (DCI). The heading of the letter reads: "***Report on Corruption and Tax Evasion Practices at ABNO Softwares International Limited"***.

18. The letter makes several allegations of corruption and tax evasion on the part of the Applicant and states that the Respondent had in his possession what he termed as **"indictable evidence against ABNO and its chief officers, that may be useful to opening up investigations against ABNO: for corruption, tax evasion and other forms of corporate nonfeasance and malfeasance, and other public officers --- complicit in ABNO's corrupt practices".** Attached to the email were the documents described as hereunder:

> **"a) Evidence of Corruption Activities at ABNO Softwares International Limited.**
>
> **b) Evidence of Tax Evasion at ABNO Softwares International Limited**
>
> **c) Tax Evasion Appendix**
>
> **d) Call for Action against corruption against corruption and tax evasion practices at ABNO**." (sic).

19. The above communication was also copied to the Applicant. The Respondent admits at paragraph 26 and 27 of his replying affidavit that the information relayed *via* the email dated 14th October, 2020 together with the demand letter of 8th July, 2020 form part of the documents filed in the ELRC suit and would include annexures **AB5(a, b, c, d)** and **AB6 (a, b, c)** referred to in paragraph 12 of the Applicant's supporting affidavit. It would appear that thereafter, an email dated 18thNovember, 2020 was circulated from the email address corruption reports.ke@gmail.com to various recipients, including the National Drought and Management Authority (NDMA), one of the Applicant's clients. The email was forwarding what is stated to be a corruption report. This email was apparently brought to the attention of the deponent to the supporting affidavit *via* an email by NMDA dated 19th November, 2020. It is contended by the deponent that several of the Applicant's clients received the said email and contacted the deponent concerning the contents of the attachment thereto.

20. The court's duty is to determine whether the Applicant has made a case for the grant of an order of interlocutory injunction against the Respondent. As framed in the motion and the plaint, the Applicant's case rests on the alleged breach of the NDA and the tort of defamation, as allegedly disclosed in four asserted instances: through the demand letter dated 8/07/2020; the court filings in **ELRC No. E 374 OF 2020** in August 2020; the email to the KRA and other allied bodies dated 14th October 2020; and the email to clients of the Applicant dated 18th November, 2020. Save for the latter, all the other instances are admitted by the Respondent who however denies that the contents thereof were covered by the NDA or were defamatory of the Plaintiff. He raises several issues in defence.

21. The principles governing the grant of an interlocutory injunction as enunciated in **Giella v Cassman Brown & Co. Ltd [1973] EA 358** are settled. Similarly, as to what constitutes a prima facie case, this is settled too since the decision in **Mrao v First American Bank of Kenya Ltd & 2 Others C. A. No. 39 of 2002; (2003) eKLR**. Both decisions have been reaffirmed and applied by superior courts in countless subsequent decisions including the recent decisions cited in this case by the parties.

22. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** restated the principles governing the grant of interlocutory injunctions enunciated in **Giella's** case and observed that the role of the Judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles. The Court cautioned that such a court ought to exercise care not to determine with finality any issues arising. The Court expressed itself as follows:

> **"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:**
>
> **In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:**
>
> **a) establish his case only at a *prima facie* level**
>
> **b) demonstrated irreparable injury if a temporary injunction is not granted.**
>
> **c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."**

23. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established, the court need not investigate the question of irreparable loss or balance of convenience.

24. As to what constitutes a *prima facie* case, the Court of Appeal delivered itself as follows: -

> **"Recently, this Court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for** *"prima facie case"* **in civil cases in the following words**:
>
> > **"In civil cases, a** *prima facie* ***case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."***
>
> **We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The Applicant need not establish title, it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed." (**Emphasis added)

25. In addition, this suit being not any ordinary suit, but one brought for defamation in addition to breach of contract, the counsel contained in **Micah Cheserem's** case is pertinent to the consideration of the instant motion. This is what **Khamoni J** (as he then was) stated in that case:

> **"Maybe counsel did not address me fully on the relevant law because it is not appreciated that the question of an injunction in defamation cases is treated in a special way. Here injunction is not treated in the way it is treated in other cases. I looked at the relevant authorities and considered the matter in the case of *Francis P Lotodo vs Star Publishers & Magayu Magayu* in HCCC No 883 of 1998 and found that though the conditions applicable in granting an injunction as set out in the case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 generally apply, in defamation cases those conditions operate in special circumstances. Those conditions have to be applied together with the special law relating to the grant of injunction 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 the clearest possible cases. The Court must be satisfied that the words or matter complained of are libelous. It must be satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.**
>
> **But how will the Court be so satisfied when the application for an injunction in a defamation action is, like in the instant case, filed at the initial stage? It is filed before pleadings are closed. How will the Court be so satisfied?**
>
> **Further, even when the Court is satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse, can the Court grant an injunction where the respondent has the defence of qualified privilege or where the respondent is pleading justification or fair comment? We will be at a stage where the Court has not yet heard and seen witnesses testify. Their evidence has not therefore been tested, canvassed and evaluated. The respondent or defendant is pleading qualified privilege and therefore justification or fair comment, being a defence which defendants in actions which are not for defamation normally do not have. Does the Court grant an interlocutory injunction?**
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> **From the authorities and the law, I considered in the case of *Francis P Lotodo*, I found that defamation cases are special actions as far as the granting of injunctions is concerned. This is because generally and basically, actions or cases of defamation bring out a conflict between private interest and public interest, and this is more so in Kenya where we have the country's Constitution which has provisions to protect fundamental rights and freedoms of the individual including the protection of freedom of expression".**

26. The starting point therefore is the Constitution. Article 33(1) of the Constitution guarantees every person's right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that *"In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others"*. Article 32(1) guarantees the right to freedom of conscience, belief and opinion, inter alia. Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. See also the provisions of the Defamation Act. Contemplating these competing rights **Lord Denning MR** stated in **Fraser v Evans & Others [1969]1 ALLER 8**

> **"The right of speech is one which it is for the public interest that individuals possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed."**

27. In **Halsbury's Laws of England 4th Edition Vol. 28** paragraph 10- a defamatory statement is defined as follows:

"….a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business".

Additionally**, Gatley on Libel and Slander 6th Edn.** states that**:**

"A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another"

28. As stated in **Selina Patani's** case, the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:

"In rehashing, we note the ingredients of defamation were summarized in the case of John Ward v Standard Ltd. HCC 1062 of 2005 as follows:

i. The statement must be defamatory

ii. The statement must refer to the plaintiff

iii. The statement must be published by the defendant

iv. The statement must be false."

29. The Respondent has disputed publication in respect of the demand letter dated 8.07.2020 as it was solely addressed to the Applicant's officials. The Applicant did not controvert this assertion. Therefore, the alleged offensive letter may seem to meet the publication test in so far as it was sent to the Applicant in the first instance, but it was evidently filed in the ELRC suit alongside other documents. Equally there is no evidence to connect the Respondent to the email sent out to the Applicant's clients on 18th November 2020.However, with regard to the court filings in the ELRC and communication to the KRA and allied institutions the question is whether prima facie, these were defamatory and false and or whether the Respondent made the statements on an occasion of privilege as he claims.

30. In the case of the **Onama v Uganda Argus Ltd (1969) EA** the East African Court of Appeal stated as follows:

"In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those "who have a greater or special knowledge of the subject matter". In deciding the question of identity, the proper test is whether reasonable people who knew the appellant would be led to the conclusion that the report referred to him. The fact that an individual believed the report to relate to the appellant could not, of itself, be decisive. The test is whether, in the opinion of the court "a substantial number of persons who knew the plaintiff, reading the article" would believe it relate to him. Evidence of such persons is admissible and the judge will give it such weight as he thinks fit, but it is for the court to decide whether the words complained of would lead reasonable people to conclude that they point to the appellant…. Such witnesses may be people with a knowledge of the surrounding circumstances, but that must mean a knowledge of the facts. In the court's view previous public talk cannot be used to identify an unnamed person in a possibly defamatory statement, unless, of course, the statement itself refers to such talk. If, however, the second report is not, in law, "having regard to its language" capable of referring to the appellant, it is immaterial whether in fact the appellant's friends and acquaintances would have read it as referring to him and for the reasons given the appeal would be dismissed".

31. The Court stated in **Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR** that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the **"probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published."-Clerks & Lindsell on Tort 17th Edition 1995-page 1018."**

32. Looking at the contents of the admitted publications, namely, the demand letter dated 8/07/2020; the court documents filed in **ELRC NO. 374 of 2020** and the email dated 14/10/2020, there can be no doubt that the publications contain material which clearly refers to the Applicant and, if false, are libelous of the Applicant. The allegations therein directly impute acts of corruption and tax evasion by the Applicant and are therefore manifestly defamatory, referring as they do, to alleged criminal activities attracting penal sanctions. For instance, in the letter sent *via* the email dated 14th October 2020, to KRA and other public bodies the Respondent states inter alia that:

"ABNO Softwares International Ltd ("ABNO") is a limited liability company …. selling software products. ABNO's customers are mostly drawn from public sector, education institutions with ABNO colluding with organizational and/or institutional heads to secure supply tenders through bribery and corruption in breach of public procurement laws and regulations.

ABNO is involved in financial statement manipulations…. ABNO has consistently misled tax authorities on its financial position through collusion with institutional auditors….

ABNO has consistently underdeclared its profits to avoid incurring its due tax liability …. ABNO has also declared dividends to its shareholders but in its disclosure obligations, it failed to disclose this, and failed to meet its obligations as

pertains withholding and remitting income tax on dividends."

33. These allegations are to be found in one form or other in the four admitted publications. Copies of the Applicant's bank statements in respect of the Applicant's account at Nxxxx Bank and which form part of the publications carry the following heading: "***Extract of Bank statement showing cash withdrawals to pay kickbacks (Highlighted transactions)"***. (See the Applicant's annexures marked **AB5c**.) The Applicant's contention is that these allegations of corruption and tax evasion are false. By his lengthy replying affidavit and submissions, the Respondent appears to raise two defenses, namely justification and privilege (both absolute and qualified). See for example paragraphs 15, 16, 17,18, 27, 29 of the replying affidavit. However, in submissions, the Respondent emphasizes the defence of privilege.

34. In **Michah Cheserem's** case**,** the learned cited **Lord Coleridge CJ** (as he then was) in **Bonnard and another V. Perryman (1891 -4) ALLER 968,** later quoted by Denning MR in **Fraser v Evans & Others,** to the effect that:

> **"Until it is clear that an alleged libel is untrue, it is not clear that any rights at all have been infringed, and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions".**

35. This court is wary for obvious reasons to delve into the question whether the demand letter and other filings in the ELRC suit were made on a privileged occasion, as defined in **Adam v Ward (1917) AC 309**:

> **"A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or …. to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential."**

36. However, any possible defence of privilege that may attach to the court filings may not be automatically extended, as the Respondent has suggested in his submissions, to other subsequent publications. It is to be noted firstly, that although the letter to the KRA and other bodies may have contained some of the documents filed in the ELRC, the complaint letter whose contents I have earlier quoted, was written by the Respondent two months after the filing of the ELRC case, as the Respondent has explained in his affidavit. The Court stated in **Onama's** case that:

> **"The fact that the earlier publication was privileged on the occasion of its publication would not protect a subsequent repetition or adoption of the defamatory statement. The privileged publication would only be used as evidence, as part of the proof of the subsequent publication and not as a basis of the action for libel…"**

37. In defending the publication made to the KRA and allied bodies, the Respondent appeared to raise a defence of absolute or qualified privilege and justification. He called to his aid common law principles and section 65(1) of the Anti-Corruption and Economic Crimes Act which provides:

> **"No action or proceedings, including disciplinary action, may be instituted or maintained against a person in respect of---**
>
> **a. ...**
>
> **b. A disclosure of information made by the person to the commission or an investigator"**

This protection is qualified by subsection 2 which states that:

> **"Subsection 1 does not apply with respect to a statement made by a person who did not believe it to be true".**

38. The publication to KRA and other bodies may not therefore be covered under absolute privilege but may fall in the category envisaged in **Adam v Ward.** Ditto for publication to other bodies such as the PPRB, DPP and DCI.

While the Respondent appeared in his replying affidavit to asset the truth of the publications admitted he did not expressly state that he will be entering a plea of justification in his defence, yet to be filed, nor has he made any attempt to demonstrate to this court the truthfulness of his patently injurious statements.

39. Beyond the loaded headings inserted on the annexure documents marked **AB 5c-e**, there is no supporting material tendered by the Respondent for instance, to show that highlighted cash withdrawals therein were actually paid as kickbacks to certain individuals in the institutions listed in annexures **AB 6b,** and which list together with accompanying statements prepared by the Respondent (annexure **AB6a and c)** the Applicant dismisses as forgeries. Majority of the documents marked annexures **AB 5a-c** are extracts which would require examination alongside other primary records to gain the full purport. It is incorrect to state that the onus lay with the Applicant to controvert the Respondent's statements on tax evasion and corruption. The duty lay with the Respondent to rebut the Applicant's assertions by showing that his statements to KRA and others had some factual foundation and were privileged.

40. In my view, the Respondent did not furnish any material tending to support the alleged truthfulness of these records and therefore his statements alleging corruption in the Applicant company. In the circumstances, it was not enough for the Respondent to as it were, to throw back at the head of the court the same documents complained of by the Applicants as the basis of their complaint, and merely assert that these are true reflections of the activities of corruption and tax evasion in the Applicant company.

41. In **Uhuru Muigai Kenyatta V Baraza Leonard [2011] eKLR** the Supreme Court stated:

> **"While taking the defence of justification, or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification of qualified privilege does not inure the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication."**

42. Considering the sequence of events in this case, it seems that the Respondent was disgruntled by the sudden and seemingly unexpected termination of his contract of employment with the Applicant. By the time of writing his complaint to KRA and allied bodies, relations between the two parties were strained, and the Respondent was unhappy that the Applicant had made a report to the police in connection with admitted use of confidential and or false documents in his possession. The sequence of events leading to this disclosure, the timing and broad-stroke language employed in the letter to the KRA in the portions earlier referred to suggest an element of malice on the part of the Respondent: sweeping statements were made without any particularization. See **Phineas Nyagah v Gitobu Imanyara [2013] eKLR**. As stated in **Dorcas Florence Kombo V. Royal Media Services [2014] eKLR**:

> **"--- qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or the use of the privileged information for an improper purpose. "**

43. Thus, while there may be some merit in the Respondent's assertion that an NDA cannot be construed to cover evidence of criminal activities, in this case the asserted basis for the alleged criminal or corrupt activities appears tenuous, at this stage. Applying the principles earlier outlined, it appears that the Applicant has made out a prima facie case with a probability of success. The Applicant complains that it has already been defamed and information covered in the NDA disclosed without justification. That their reputation has already been tarnished by the publications made by the Respondent; and that they will suffer irreparable damage if the Respondent is not restrained. The Applicant prides itself as a leading ICT company with a large clientele portfolio. Loss of reputation would evidently dent the Applicant's business standing and it appears likely that damages may not be adequate compensation in that event. It was not necessary at this stage for the Applicant to prove actual loss as suggested by the Respondent.

44. In as much as the Respondent enjoys the right to free expression, such expression must be exercised in a manner that respects the Applicant's equal right to reputation. In the circumstances, the court feels assured that this is a proper case for the granting of an injunction to stem the further dissemination of injurious material, including material acquired by the Respondent in the cause of his employment, that is defamatory of the Applicant and/or protected under the NDA.

45. The court is alive to the existence of the suit filed by the Respondent in the ELRC, and clarifies, for the avoidance of doubt that the orders to be made herein do not apply to the proceedings to be taken in that suit. Having made that qualification, the court hereby grants prayer (iii) of the motion dated 5th December 2020, with costs to the Applicant.

46. In addition, this court has considered that the Respondent's suit before ELRC is based on unfair termination and therein Respondent claims inter alia that his dismissal was provoked by the strident stance he adopted against corrupt activities by the Applicant. These and other claims were considered by the Applicant to be defamatory and in breach of the NDA hence the present suit. These matters all flow from the Respondent's dismissal and for good order, ought to be determined by the same court to avoid a situation where different findings are made by different courts in relation to the same issues presented by the parties. The issues appear inextricably intertwined and it seems to me a prudent use of the court's time if the suit before this court and that in the ELRC are heard together.

47. I draw parallels between the pertinent facts of this case and the facts in the case of **Paramount Bank Limited v. Vaqvi Syed Qamara & Another [2017] eKLR** cited by the Court of Appeal in **Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others [2017].** The Court of Appeal stated:

> **"In Paramount Bank Ltd vs. Vaqvi Syed Qamara…. this court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus:**
>
> **"The origin of the dispute between the 1st Respondent and the Appellant was presented as a dispute arising from an employee/employer relationship where the 1st appellant accused the 1st Respondent of theft followed by a criminal charge of stealing. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages, for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Act the court could entertain the dispute in all its aspects and award damages appropriately."**

48. In this matter, the Respondent has expressed a similar view and asserted that rather than file a claim before this court, the Applicant ought to have filed a counter claim in the ELRC suit. This court is unaware of the status of pleadings in that case. Whatever the case, it appears to me eminently prudent that this suit and the ELRC suit ought to be consolidated and heard together.

49. In the circumstances, the court will order that the instant suit be transferred to the ELRC in Nairobi for consolidation with the claim in **ELRC No. E374 of 2020 Sammy Ochieng Onyango v ABNO Softwares International Ltd**. for purposes of hearing and determination.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF AUGUST 2021

C.MEOLI

JUDGE

<u>In the presence of:</u>

For the Applicant: N/A

For the Respondent: Mr Mugodo

C/A: Carol