



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL NO. E132 OF 2021

DR.NJAGE MAKANGA.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT

STANDARD GROUP PLC.....2ND DEFENDANT

RADIO AFRICA LIMITED.....3RD DEFENDANT

MEDIAMAX NETWORKS LIMITED.....4TH DEFENDANT

RULING

1. The plaintiff/applicant herein has brought the notice of motion dated 9th June, 2021 supported by the grounds set out on the body thereof and the facts stated in the affidavit of **Dr.Njage Makanga**. The applicant sought for the following orders inter alia:

i. Spent

ii. Spent

iii. Pending the hearing and determination of this suit an order of injunction do issue restraining the Defendants whether by themselves, their employees, servants, nominees and/or agents or otherwise howsoever from broadcasting, writing, printing, publishing, posting and/or uploading unto their online platform, television or radio stations, newspapers or other media or on the internet or online version of the said false/malicious, any article or stories or comments concerning the plaintiff or any matter directly affecting or relating to the plaintiff in connection with the subject matter of the suit herein.

iv. Spent

v. The costs of this application be provided for.

2. The 1st and 2nd defendants/respondents filed Grounds of Opposition dated 14th July, 2021 and 19th July 2021 respectively to oppose the motion. The 1st, 3rd and 4th defendants each filed replying affidavits dated 13th July 2021, 19th August 2021 and 27th September 2021 respectively to oppose the Motion

3. When the motion came up for interparties hearing before this court, the parties respective advocates chose to rely on the averments made in their respective affidavits.

4. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed supporting and challenging it, the Grounds of Opposition and the authorities cited.

5. A brief background of the matter is that the applicant instituted a suit against the respondents by way of the plaint dated 30th September, 2020 and sought for *inter alia*, an order for permanent injunction against the respondents, arising out of the tort of defamation. The plaint was filed together with the instant Motion.

6. The crux of the matter is that it came to the applicant's attention that the defendants were preparing to publish or broadcast a story concerning alleged embezzlement of public funds from the Kenya Rural Roads Authority based on information depicted in the internal memo that is the basis of the story.

7. That the internal memo alleged that the applicant had been linked to the corruption scandal at Afya Centre, that he is a mastermind in a network focused of embezzling public funds, that he is beneficiary of unlawful payments made by KERRA to the tune of 60 million and that he used influence at the Ministry of Transport to corruptly receive public funds through an array of companies.

8. In the Motion, it is clear that the applicant is seeking one key order of grant of an interlocutory injunction.

9. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA** as follows:

i. The applicant must first establish a prima facie case with a probability of success.

ii. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.

iii. Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.

10. The above principles were restated in the case of **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** inter alia as follows:

Firstly, the applicant must establish a prima facie case with a probability of success. Secondly, the applicant must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages. Thirdly, where the court is in doubt, then the balance of convenience should tilt in favour of the applicant.

11. Under the first principle, it is the position of the applicant that the false information is published by the defendants on their various platforms it shall be freely and publicly accessed from all corners of the world and that would occasion him irreparable reputational injury.

12. The applicant states that despite having the opportunity to verify or ascertain the facts from him, neither of the defendants have contacted him with the view to obtain the applicant's side of the story but instead have unilaterally seek to recklessly and irresponsibly publish false information to the detriment of him reputation.

13. The applicant contends that in the circumstances, he is apprehensive that unless restrained by an order of this court the defendants are poised to disseminate or otherwise spread or make available freely and to the general global audience the defamatory information.

14. He further contends that the defendants shall not suffer any prejudice as the core of their business is not dependent on specifically making any publication concerning him.

15. In response, the 1st respondent in their replying affidavit stated that the said internal memo did not emanate from the 1st defendant it is therefore a total stranger to the contents of the said unsigned and undated internal memo and in the circumstances the orders sought will prejudice the 1st defendant/respondent.

16. In their Grounds, the 1st defendant/respondent argues that the orders being sought are in effect gagging of the media and that are in effect determining the entire suit without evidence being adduced at an interlocutory stage.

17. The 2nd defendant/respondent in their Grounds of Opposition argued that the applicant had not satisfied the grounds to warrant the granting of a temporary injunction at this stage hence the application is premature in the circumstances as the veracity of the plaintiff allegations can only be tested in a full trial.

18. They further argued that the applicant has not demonstrated that he stands to suffer irreparable injury if the orders sought are not granted.

19. The 3rd respondent in their replying affidavit stated that the said internal memo did not emanate from them and is a total stranger to the contents. They further stated that the applicant has not demonstrated a case against the 3rd respondent therefore if the orders are granted they would be greatly prejudicial to the 3rd respondent.

20. The 4th respondent stated that all their official communication emanating from them is usually dated, signed and clearly shows the sender and the recipients of such communication therefore the said internal memo in this suit does not originate from the 4th defendant/respondent and consequently it a stranger to the said memo.

21. The 4th respondent further stated that the applicant cannot seek protection under the Media Act or the Law of Defamation as their claim does not meet the required threshold to institute a defamation claim against the 4th defendant.

22. Having considered the arguments put forward by the respective parties together with the annexed documents and pleadings filed, I am of the view that on the face of it, the aforementioned impugned internal memo would cause any reasonable person to perceive the applicant unfavourably.

23. It is also noteworthy that whether the said internal memo was defamatory of the applicant and whether the defences pleaded by the respondents will stand can only be investigated at the trial stage.

24. For now, I am satisfied that the applicant has established a prima facie case with a probability of success.

25. In respect to the second principle on irreparable damage/loss, the applicant states that as a result of the impugned internal memo, it has caused and occasioned gross and untold harm, anxiety, loss and injury in his reputation and by way of his occupation considering the strict requirements of integrity in the country and the job he holds.

26. It is the averment of the applicant that unless the injunctive orders sought are granted and the respondents are restrained from making any further publications of a similar nature, its reputation will be damaged.

27. On their part, the respondents state that they are strangers to the contents of the unsigned and undated memo. That in my opinion it is clear that if the orders sought are given then the respondent being strangers to the said memo will not prejudice them in any way.

28. In the case of **American Cyanamid v Ethicon [1975]AC 135** it was stated inter alia as follows:

“A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages not injury that cannot be repaired.

.... The object of interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial.”

29. The orders sought in this suit are not in effect determining the suit but they are only temporary orders pending the hearing and determination of the main suit.

30. Upon considering the rival positions above and upon studying the material which was placed on the record, I am of the view that one’s reputation is invaluable and once tarnished, cannot adequately be compensated by way of damages. In this regard, I am satisfied that the applicant is more likely to suffer irreparable loss unless he is granted an interlocutory order of injunction.

31. Having come to the view that the applicant has satisfied the first

two (2) principles warranting an interlocutory injunction, it is only fair to state that the applicant stands to suffer a greater inconvenience if the order of injunction is not granted in comparison to the inconvenience that would befall the respondents were the same to be allowed. It therefore follows that the balance of convenience tilts in favour of the applicant.

32. In conclusion therefore, I find merit in the Motion, it is allowed giving rise to issuance of the following orders:

i. Pending the hearing and determination of this application suit an order of injunction do issue restraining the Defendants whether by themselves, their employees, servants, nominees and/or agents or otherwise howsoever from broadcasting, writing, printing, publishing, posting and/or uploading unto their online platform, television or radio stations, newspapers or other media or on the internet or online version of the said false/malicious, any article or stories or comments concerning the plaintiff or any matter directly affecting or relating to the plaintiff in connection with the subject matter of this suit.

ii. Costs of the Motion shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant

..... for the 4th Defendant