REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 96 OF 2020

HON. GJB.....PLAINTIFF/APPLICANT

-VERSUS-

THE STANDARD GROUP LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant in this instance took out the Notice of Motion dated 1st July, 2020 and sought for the following orders:

> ***(i) Spent.***
>
> ***(ii) Spent.***
>
> ***(iii) THAT this Honourable Court be pleased to issue a temporary injunction directing the defendant by itself, servants, legal representatives, agents or howsoever to retract the article published on 17th January, 2020 which is defamatory of the plaintiff and render/publish an apology to the plaintiff pending the hearing and determination of the suit.***
>
> ***(iv) THAT this Honourable Court be pleased to issue a temporary injunction directing the defendant by itself, servants, legal representatives, agents or howsoever from further publishing or causing to be published the said or similar defamatory words of or concerning the plaintiff either in print or electronic media pending the hearing and determination of the suit.***
>
> ***(v) THAT costs of the application be in the cause.***

2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of the applicant, who stated that she was the respondent in Milimani Divorce Cause No. 797 of 2019 filed by her ex-husband and where the court upon hearing the parties issued a decree absolute and that the marriage ended on an amicable note.

3. The applicant stated that in its issue of the Nairobian of 17th January, 2020 the defendant/respondent printed and published on the front page a defamatory article about her, and which defamatory article was widely circulated.

4. It was the averment of the applicant that the defamatory words could in their ordinary and natural meaning, be taken or otherwise insinuated to mean that the applicant is *inter alia*, incompetent, unethical and violent.

5. The applicant went on to aver that the impugned publication was also false and actuated by malice, and that before making it, the respondent did not take the time to verify the truthfulness of the facts. The applicant added that the respondent has since refused and/or neglected to offer any apology for the publication despite demand to do so.

6. It was the assertion of the applicant that as a result of the impugned publication, she was exposed to ridicule, contempt in the eyes of family, friends, colleagues and the society at large; and that she suffered serious injury to her reputation.

7. The respondent opposed the Motion by putting in Grounds of Opposition and the replying affidavit of *David Odongo*. In the Grounds of Opposition, the respondent raised the grounds set out hereunder:

> ***a) There is no subsisting prayer for consideration inter parties as against the defendant; prayer (i) of the application being spent at the ex parte stage as the same was only sought for consideration 'pending the hearing and determination of the application.'***

b) No evidence has been presented demonstrating any future intention attributable to the defendant to publish any article either electronically or in print referred to as;

(i) "Why I Divorced Politician GS; who is the B?"

(ii) "How alcohol, infidelity tore S and G apart."

c) The application seeks orders to abridge the guaranteed freedom and independence of the media guaranteed under Article 34 of the Constitution of Kenya, 2010.

d) The plaintiff has not satisfied the threshold conditions for the grant of a temporary injunction as:-

(i) No prima facie case with a probability of success has been shown in that:-

-The impugned article was published on 17th January, 2020 which was over six (6) months ago;

-the plaintiff has not shown that there is an imminent risk that the article, the subject of the main suit, shall be republished;

-the publication seeks a generalized, vague and indeterminate order for an injunction restraining "further publishing or causing to be published defamatory words of and concerning the plaintiff" yet there is no specification of the nature of remarks that may be characterized as "defamatory";

(ii) It has not been shown that the plaintiff would sustain irreparable harm which would not be adequately compensated for by damages should the claim succeed.

(iii) The plaintiff has specifically prayed for general, exemplary damages together with costs and interest which the court will assess once an affirmative finding on liability is made against the defendant thus clearly evincing the belief that monetary compensation shall be adequate solatium.

(iv) The balance of convenience in totality tilts in favour of upholding the guaranteed freedom of the media in the circumstances.

8. In his replying affidavit, David Odongo, a journalist of the respondent, stated *inter alia*, that the version of the publication made by the respondent was correct and that there was no malice or falsehood behind the publication.

9. The deponent also stated that the story relating to the marital woes between the applicant and her ex-husband was in the public domain and was published not only by the respondent but by other media houses as well.

10. It was therefore the assertion of the deponent that the impugned publication was true and is a fair comment on a matter of public interest; and that an injunction in libel cases ought only to be granted in the clearest of cases.

11. The applicant rejoined with a supplementary affidavit sworn on 21st September, 2020 in which she contended *inter alia*, that the Motion seeks substantive prayers contrary to the averments made in the Grounds of Opposition, and that the respondent has not given any undertaking that it does not intend to make any such publications concerning her in the future.

12. The applicant further contended that the rights of the respondent under Article 34 of the Constitution cannot be used to curtail her individual constitutional rights.

13. The applicant restated that the publication in question is false and maliciously made.

14. When the parties appeared before this court for hearing of the Motion, the parties were directed to file written submissions. On the part of the applicant, she restated the averments made in her affidavits to the effect that the impugned publication is false and defamatory of her, and that the respondent cannot be heard to hide under the guise of Article 34 of the Constitution which provides for freedom of the media.

15. The applicant submitted that given her position as a senior advocate of the High Court of Kenya among others, it is clear that the publication had the impact of negatively affecting her reputation in the eyes of her colleagues and in the society as a whole. The applicant cited before this court the case of **James Wainaina Macharia v Nation Media Group Limited & another [2017] eKLR** in which the court held thus:

"I am satisfied the applicant has shown that he has a prima facie case with a probability of success. The applicant is a senior Cabinet Secretary in the Ministry of Transport, Infrastructure, Housing and Urban Development therefore the publication disparaged him also by way of his occupation."

16. The applicant urged this court to grant the prayers sought in her Motion and relied on the following reasoning taken by the court in the case of **Ahmed Adan v Nation Media Group Limited & 2 others [2016] eKLR:**

"It must be borne in mind however, that in some instances damages may not be enough to restore reputation. I hold the view that reputation like a name is priceless. No amount of damages therefore may be adequate compensation were the defendants to be found liable.

The 1st Defendant's websites, the Plaintiff alleges, are awash with information injurious of him and unless they are brought down his reputation will continue to be at stake."

17. For all the foregoing reasons, the applicant urged that her application be allowed.

18. The respondent replied with the submission that according to the law, the applicant is required to satisfy all the three (3) principles on the granting of an interlocutory injunction, as set out in the renowned case of **Giella v Cassman Brown & Co. Ltd (1973) EA** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

19. The respondent is of the view that despite arguing that she has a prima facie case with probability of success, the applicant has not brought any evidence to support this position. Reference was made *inter alia*, to the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** where the Court of Appeal in addressing the subject of a prima facie case reasoned as follows:

"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."

20. According to the respondent, the applicant has not established a prima facie case since she has not shown that the publication made was false, malicious and defamatory of her.

21. The respondent further submitted that the applicant has equally not shown the irreparable loss she is likely to suffer should the injunctive orders sought be denied, given that she has not shown that since the publication of the allegedly defamatory publication, her reputation has suffered irreparable injury. It was also the submission of the respondent that the applicant has not tendered any evidence to prove that the respondent is likely to republish the impugned article or to make further publications of a similar nature in respect to her.

22. The respondent is of the view that consequently, the balance of convenience tilts in its favour, and cited *inter alia*, the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** in which the court analyzed this principle in the following manner:

"The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

23. Finally, the respondent contended that in any event, the orders sought in the application are too wide and are non-specific, since she has not particularized the words classified as being defamatory. For those reasons, the respondent takes the view that the applicant is undeserving of the orders sought in her application.

24. I have taken into consideration the grounds set out on the face of the Motion and the facts deponed in the affidavits in support of and in opposition thereto and the Grounds of Opposition. I have also considered the contending submissions and authorities relied upon.

25. Before I consider the merits of the Motion, however, I wish to address a preliminary issue which was raised in the Grounds of Opposition, that there is no subsisting prayer/order for consideration inter parties. Upon perusing the Motion, I note that save for orders (i) and (ii) which are now spent, the applicant is seeking the substantive orders for a temporary injunction pending the hearing and determination of the suit, under orders (iii) and (iv) laid out hereinabove. It is therefore not correct that no substantive orders are being sought in the Motion.

26. Now to the merits, it is clear that the application concerns itself with the granting of an interlocutory injunction until such time as the suit is heard and concluded. The germane principles on interlocutory injunctions originated from the Court of Appeal in East Africa in **Giella v Cassman Brown & Co. Ltd (1973) EA** cited by the parties herein, and are as follows:

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

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

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

27. The above principles were reaffirmed by the court in the case of **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** relied upon by the respondent, in this manner:

> ***"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."***

28. In respect to the first principle, the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya and 2 others [2003] eKLR** which the respondent cited in its submissions, sought to define a prima facie case in the following manner:

> ***"A prima facie case in a civil application includes but is 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 call for an explanation or rebuttal from the latter."***

29. The Court further opined that:

> ***"…a prima facie case is more than an arguable case. It is not sufficient to raise issues. 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."***

30. I considered the averment by the applicant both in her affidavit and pleadings regarding the manner in which the defamatory words could be taken to mean that she was, among others, dishonest; incompetent and unethical. It is noted that those averments were vehemently denied by the respondent.

31. In my view and upon studying an excerpt of the impugned publication, on the face of it the same would likely cause any reasonable person to develop a negative perception of the applicant, thereby causing her reputation to suffer gravely. I therefore find that the applicant has shown that she has a prima facie case with a probability of success.

32. It is important for me to point out at this time that it is not my duty to delve into the merits of the case or to consider the evidence to be adduced at the trial, in order to determine whether a prima facie case exists. In fact, I note that though the respondent argued that the applicant ought to have adduced evidence, it made reference to a decision which contradicted its position: that is, the holding by the Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** that:

> ***"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."***

33. Under the second principle, the applicant argued in a nutshell that unless the interlocutory injunction sought is granted, she stands to continue suffering humiliation and ridicule caused by the same, and especially given her status in society. The respondent on its part is of the view that the applicant has not demonstrated the irreparable harm suffered and that the publication was based on true facts.

34. On the one hand and without investigating the merits of the instant case, I am alive to the freedom and independence of the media encapsulated under Article 34 of the Constitution. I am also alive to the fact that the reputation of a person is priceless and once tarnished, is difficult to redeem.

35. Further to the foregoing, I am convinced that the applicant has reasonably shown that unless the impugned publication is taken down, her reputation is likely to continue being at stake.

36. I say this in due consideration of the societal position of the applicant as a Member of Parliament and an advocate of the High Court and I am supported by the reasoning of the court in the case of **James Wainaina Macharia v Nation Media Group Limited & another [2017] eKLR** when it considered the position of the plaintiff in that instance and noted that the publication in question disparaged him in a professional way too.

37. In that sense, I am of the opinion that the applicant has reasonably demonstrated the likelihood of irreparable damage she stands to suffer for which an award of costs may not constitute adequate compensation.

38. Having found in favour of the applicant on the first two (2) principles for the granting of an interlocutory injunction, I am persuaded that the balance of convenience tilts in favour of the applicant.

39. The upshot is that the Motion is allowed as prayed in terms of orders (iii) and (iv) and the following orders are made:

> **a) A temporary injunction be and is hereby issued directing the defendant/respondent by itself, servants, legal representatives, agents or howsoever from further publishing or causing to be published the article published on the 17th January, 2020 or similar article of or concerning the plaintiff either in print or electronic media pending the hearing and determination of the suit.**
>
> **b) Costs of the application to abide the outcome of the suit.**

Dated, signed and delivered at NAIROBI this 29th day of October, 2020.

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L.NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent