REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 41 OF 2019

MICHAEL JOSEPH..... PLAINTIFF/APPLICANT

-VERSUS-

KENYA AVIATION WORKERS UNION.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant herein took out the Notice of Motion dated 8th March, 2019 and sought for the orders hereunder:

i. Spent.

ii. Spent.

iii. THAT the defendant/respondent whether by itself, officers, members, agents, servants and/or employees or otherwise howsoever be restrained from further writing, printing and publishing, circulating, disseminating or causing to be written, printed, published, circulated, disseminated in any manner whatsoever words and statements concerning and in respect to the plaintiff in the publication dubbed 'KAWU'S PRESS STATEMENT ON CHALLENGES FACING AVIATION SECTOR' or causing to be written, printed, published, circulated or disseminated any words in any manner defamatory of the plaintiff whatsoever pending the hearing and determination of the suit.

iv. THAT costs of the application be borne by the defendant/respondent.

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 he was at all material times the Non-Executive Chairman of the Board of Directors of Kenya Airways PLC ("the company") and that together with the plaintiff in Civil Suit No. 42 of 2019 being at all material times the Chief Executive Officer (CEO) of the company, the applicant led a great number of employees in the company.

3. The applicant stated that on or about the 28th day of February, 2019 the respondent published defamatory words against the applicant under the title: ***"KAWU'S PRESS STATEMENT ON CHALLENGES FACING AVIATION SECTOR"*** and which defamatory words were further published in an online site traced at www.kahawatungu.com under the headline: ***"How CEO Sebastian Mikosz and Chairman Michael Joseph have led the looting of Kshs.1.8 billion from KQ"***

4. The applicant further stated that on 5th March, 2019 under the headline: ***"Kenya Aviation Workers Union accuse KQ bosses of wastage"*** and thus reproduced the defamatory words contained in the impugned press release by the respondent.

5. It was the averment of the applicant that the defamatory words could be taken or otherwise insinuated to mean that the applicant is *inter alia*, incompetent, corrupt and unprofessional.

6. The applicant went on to aver that the impugned publications were also false and actuated by malice, and that unless the respondent is restrained from making further publications of a similar nature, it will continue to publish defamatory material of a similar nature concerning the applicant.

7. To oppose the Motion, the respondent put in the replying affidavit of its Secretary General, **Moss K. Ndiema**. The deponent stated in his affidavit that no defamatory words were ever published against the applicant by himself or by the respondent and that he has never received any demand for an apology or a retraction from the applicant.

8. When the application came up for hearing, the parties agreed to dispense with the same by filing written submissions. On his part, the applicant submitted that he has established a prima facie case with probability of success since he has shown that the impugned publications made by the respondent are defamatory of him and have the impact of lowering his reputation in the minds of right thinking members of society. The applicant made reference to the case of **John Ntoiti Mugambi Alias Kamukuru v Moses Kithinji Alias Hon. Musa [2016] eKLR** where the court held that:

> **"Prima facie case in the context of the law was set out in the case of MRAO LIMITED V FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) IKLR 125at page 137, to be:-**
>
> **"..... 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 as to call for an explanation or rebuttal from the latter.""**

9. The applicant also submitted that the respondent has not pleaded in its statement of defence any of the defences available under the law on defamation, and has further failed to demonstrate whether the defamatory words are true or are fair comment on a matter of public interest.

10. It was the argument of the applicant that he has shown that the defamatory words published by the respondent has lowered his reputation and is likely to continue to cause him injury for which damages would not be an adequate compensation. To support his said argument, the applicant quoted the court's decision in the case of Brigadier **Arthur Ndong Owuor v The Standard Limited [2011] eKLR** thus:

> **"His reputation is at stake in view of the content of the reports. Once a reputation is lost, in my view, monetary damages might not be an adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for a lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in memory possibly throughout his life."**

11. In conclusion, the applicant contended that the balance of convenience tilts in his favour and hence he is entitled to the interlocutory injunctive order sought in the Motion.

12. In its reply submissions, the respondent argued that the allegations of defamation have not been proved against it and hence has not established a prima facie case as set out in the case of **Giella v Cassman Brown (1973) EA 358.**

13. The respondent further argued that in any event, the injunctive orders sought are far too wide and are intended to cripple the operations of the respondent, thereby making them incapable of being reinforced. To back its position, the respondent referred this court to the case of **Francis Atwoli & 5 others v Kazungu Kambi & 3 others [2015] eKLR** where the court rendered itself thus:

> **"One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering."**

14. It was further the contention of the respondent that the applicant's Motion and plaint do not disclose a reasonable cause of action against it and hence should be dismissed on that basis.

15. I have duly considered the grounds in the Motion and the facts deponed to in the supporting affidavit, the facts deponed in the replying affidavit and the rival submissions and authorities cited.

16. Before I consider the merits of the Motion, I deem it necessary to address the issue raised by the respondent concerning whether application and suit disclose a reasonable cause of action. Upon my perusal of the record and proceedings, I note that this issue was previously raised by the respondent vide a notice of preliminary objection and this court aptly analyzed and made a determination on the issue. Resultantly, the respondent cannot be heard to raise this issue afresh.

17. On the merits of the Motion, it is clear that this is a matter concerning the granting of an interlocutory injunction. In that case, the relevant principles as encapsulated in the prominent case of **Giella v Cassman Brown (1973) EA 358** cited by both parties herein are:

> **a. Whether there is a prima facie case.**
>
> **b. Whether damages would be an adequate remedy in the event that an injunction is not granted and if not, whether the applicant would be able to give an undertaking in damages to the defendant(s).**
>
> **c. Where the balance of convenience tilts.**

18. The above principles were reaffirmed by the court in the case of **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** 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."

19. As concerns the first principle, the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya and 2 others [2003] eKLR** 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."**

20. 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."***

21. Having studied the facts presented before me by the parties, it is apparent that the applicant is of the view that the impugned publications are not only false and malicious but are defamatory of him in the sense that they can be taken in their ordinary sense to mean that he is *inter alia*, dishonest and corrupt. These averments were vehemently denied by the respondent.

22. From my perusal of the applicant's pleadings and affidavit, I am of the view that on the face of it, the aforementioned publications would very well cause any reasonable person to develop a negative perception of the applicant. In any event, it is not the duty of this court to investigate the merits of the suit at this stage. I am therefore convinced that the applicant has established a prima facie case with a probability of success.

23. In regard to the second principle touching on irreparable loss through the infringement of a right, I make reference to the following analysis portrayed in **Nguruman Limited v Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012** as cited by the Court of Appeal in the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** as hereunder:

> **"…If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage."**

24. I have considered the applicant's arguments regarding the manner and extent to which his reputation has been injured and stands to be injured in the event that the respondent is permitted to continue publishing defamatory articles of a similar nature to the impugned ones and concerning the applicant and weighed them against the averments made on behalf of the respondent.

25. Upon taking the above into account, I appreciate the fact that the reputation of a person is invaluable and once tainted, is very difficult to redeem; and any injury suffered cannot adequately be compensated by way of damages. In this respect, I am of the view that the applicant has reasonably demonstrated the likelihood of irreparable damage for which an award of costs may not constitute adequate compensation.

26. The applicant cited the case of **Brigadier Arthur Ndonj Owuor v The Standard Limited [2011] eKLR** which reaffirms my finding above and where the court determined that:

> **"His reputation is at stake in view of the content of the reports. Once a reputation is lost, in my view, monetary damages might not be an adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for a lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in memory possibly throughout his life."**

27. Having arrived at the above findings in respect to the first two (2) principles, I am persuaded that the balance of convenience tilts in favour of the applicant.

28. In the end, the Motion dated 8th March, 2019 succeeds in terms of order (iii) and consequently:

> **a. The defendant/respondent whether by itself, officers, members, agents, servants and/or employees or otherwise howsoever is hereby restrained from further writing, printing and publishing, circulating, disseminating or causing to be written, printed, published, circulated, disseminated in any manner whatsoever words and statements concerning and in respect to the plaintiff in the publication dubbed 'KAWU'S PRESS STATEMENT ON CHALLENGES FACING AVIATION SECTOR' or causing to be written, printed, published, circulated or disseminated any words in any manner defamatory of the plaintiff whatsoever pending the hearing and determination of the suit.**
>
> **b. Costs of the application shall abide the outcome of the suit.**

Dated, signed and delivered at **NAIROBI** this 22nd day of October, 2020

…….

L. NJUGUNA

JUDGE

In the presence of:

……. for the Plaintiff/Applicant

……. for the Defendant/Respondent