



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 168 OF 2018**

**THE BOARD OF TRUSTEES OF KIAMBU INSTITUTE OF SCIENCE**

**& TECHNOLOGY..... 1<sup>ST</sup> PLAINTIFF**

**ALLAN NGUGI .....2<sup>ND</sup> PLAINTIFF**

**JAMES RAYMOND NJENGA .....3<sup>RD</sup> PLAINTIFF**

**GEORGE K. WARUHIU..... 4<sup>TH</sup> PLAINTIFF**

**JOSEPH NJUGUNA THAIRU.....5<sup>TH</sup> PLAINTIFF**

**KIMANI MATHU.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....1<sup>ST</sup> DEFENDANT**

**TOM MSHINDI .....2<sup>ND</sup> DEFENDANT**

**MUTUMA MATHIU.....3<sup>RD</sup> DEFENDANT**

**JOHN KAMAU .....4<sup>TH</sup> DEFENDANT**

**RULING**

1. By way of a plaint filed on 20<sup>th</sup> July 2018, the plaintiffs, namely, *The Board of Trustees of Kiambu Institute of Science & Technology, Mr. Allan Ngugi, Mr. James Raymond Njenga, Mr. George K. Waruhiu, Mr. Joseph Njuguna Thairu and Mr. Kimani Mathu* instituted suit against the defendants namely, the Nation Media Group Limited, (1<sup>st</sup> defendant), Mr. Tom Mshindi (2<sup>nd</sup> defendant), Mr. Mutuma Mathiu (3<sup>rd</sup> defendant), and *Mr. John Kamau* (4<sup>th</sup> defendant) seeking several reliefs including an award of general, special and punitive damages as well as orders of both prohibitory and mandatory injunctions on terms specified in the plaint.

2. The plaintiffs' cause of action is founded on claims that the 2<sup>nd</sup> to 3<sup>rd</sup> defendants caused the 1<sup>st</sup> defendant to publish defamatory material in reference to them in the Daily Nation Editions of 24<sup>th</sup> and 26<sup>th</sup> July 2017 titled "**Scandal>board created to briefly hold land in trust turns back, strips college of everything**" and "**Get this public land back**". The publications which were also allegedly published twice on 23<sup>rd</sup> July 2017 and 30<sup>th</sup> July 2017 in the Daily Nation online platforms were to the effect that the plaintiffs had grabbed 200 acres of prime land and buildings belonging to a public institution, *Kiambu Institute of Science & Technology (KIST)* valued at KShs.32 billion forcing the institution to pay rent for what it initially owned.

3. It is the plaintiffs' case that the publications were false and malicious and have not only exposed them to contempt, ridicule and humiliation but have also caused damage to their personal, business as well as professional reputations and have lowered their image in the eyes of the general public, decision makers and other professionals within and outside Kenya.

4. Contemporaneous to the filing of the plaint, the plaintiffs presented a Notice of Motion dated 20<sup>th</sup> July 2018 which is the subject of this ruling. In the motion, the plaintiffs (applicants) sought several prayers two of which are now spent. The prayers pending my determination

are prayers 3, 4, and 5 which sought the following orders:

- a. That pending the hearing and determination of the suit, this Honourable Court be pleased to issue an order restraining the defendants and any other agent or employee of the 1<sup>st</sup> defendant from further publications of the defamatory articles that the plaintiffs/applicants complain of herein or any other defamatory article, words, material, testimony or remarks against, of and concerning the plaintiffs, in any form or medium whatsoever.
- b. That this Honourable Court do give any other or further orders as is just and expedient in the circumstances.
- c. That costs of the application be provided for.

5. The application is premised on grounds set out on its face and the depositions made in the supporting affidavit sworn by the 2<sup>nd</sup> applicant on 20<sup>th</sup> July 2018 on his own behalf and on behalf of all the other applicants. In his supporting affidavit, the 2<sup>nd</sup> applicant re-iterated the averments in the plaint regarding the alleged defamatory publications and the negative impact they had on the applicants' personal, business and professional standing in society.

6. Further, the 2<sup>nd</sup> applicant averred that the impugned publications in their ordinary and natural meaning meant and were understood to mean by those who read them that the applicants in their individual capacities and as a corporate body had, *inter alia*, committed criminal acts by engaging in land grabbing, had no respect for the rule of law and lacked integrity.

7. The 2<sup>nd</sup> applicant in addition deponed that the applicants had reasonable apprehension that upon service of the suit, the defendants would republish the defamatory articles causing further irreparable damage to their already tarnished reputations given that despite demand made on 24<sup>th</sup> August 2017, the defendants had refused, ignored and failed to publish a retraction and an apology for the defamatory stories; that unless the orders sought are granted, the defendants will continue to publish the offending publications and that it was in the interest of justice that the application be allowed.

8. The application is contested by the defendants. *Mr. Sekou Owino*, the 1<sup>st</sup> defendant's Head of Legal and Training swore a replying affidavit on 2<sup>nd</sup> October 2018 on behalf of all the defendants (hereinafter the respondents). The respondents through the deponent admitted having published the impugned publications but denied that their content was false and defamatory of the applicants. He contended that the publications were true in substance and that the respondents were justified in publishing the facts therein and making comments thereon for the benefit of members of the public.

9. The deponent further averred that the publications were published in good faith in the belief that the facts set out therein were true; that the application was solely aimed at curtailing the exercise of the 1<sup>st</sup> respondent's right under *Article 34* of the *Constitution* which guarantees freedom of the media and to deny the public their right to information enshrined in *Article 35* of the *Constitution*.

The respondents advanced the position that the application lacked merit and implored me to dismiss it with costs.

10. By consent of the parties, the application was canvassed by way of written submissions which both parties duly filed.

In their submissions, the applicants besides re-iterating the facts pleaded in the plaint on which their claim for defamation was premised urged me to find that they had met the threshold for grant of orders of a temporary injunction in defamation cases as set out in the case of *Micah Cheserem V Immediate Media Services, (2002) 1 EA 371*. They submitted that they had established a *prima facie* case with a probability of success since they had demonstrated that the impugned publications were defamatory and were actuated by malice given that the respondents had not tendered any evidence to illustrate that the publications were based on true facts or were a fair comment on a matter of public interest.

11. The applicants further submitted that they enjoy high esteem and regard amongst members of the public and that if the orders sought were not granted, damage to their reputation would not be adequately compensated by an award of damages.

12. The respondents on their part besides denying that the publications were defamatory of the applicants in the manner described in the plaint submitted that this is not a clear case in which orders of interlocutory injunction can issue given that in their statement of defence, they had pleaded the defences of justification, qualified privilege and fair comment which can only be defeated if there was evidence of malice. For this proposition, the respondents relied on the persuasive authority of *Francis P Lotodo V Star Publishers & Magayu, [1998] eKLR* where *Khamoni J* (as he then was) made reference to *Gatley on Libel and Slander 8th Edition* page 639 where the authors stated thus:

**"Where the words are prima facie privileged, the court should not grant an interlocutory injunction. ... When once a defendant says that he is going to justify (the words complained of), there is an end of the case so far as an interim injunction is concerned."**

They urged the court to find that the applicants have not established a *prima facie* case with a probability of success.

13. The respondents further submitted that the applicants have not established that they will suffer irreparable loss if the court declined to allow the application; that by seeking compensation in the form of damages in the plaint, the applicants have admitted that any consequential loss or harm occasioned by the impugned publications can be quantified in monetary terms and can be compensated by an award of damages and they have not claimed that the respondents would be incapable of paying damages that may be awarded if they succeed in the suit. That therefore the applicants are not entitled to the orders of injunction on terms sought in the motion.

14. Relying on the authority of *Gilgil Hills Academy Ltd V The Standard Limited, [2009] eKLR*, the respondents argued that since the publications revolved around corruption and land grabbing of a public institution, the public interest in the matter far outweighed the private interests of the applicants.

15. Lastly, the respondents submitted that the application ought to be dismissed as the issuance of any injunctive orders will curtail their freedom of expression and freedom of the media which entails seeking, receiving and imparting information or ideas to the public.

16. I have carefully considered the pleadings in this case, the application, the affidavits sworn in support and in opposition to the application and the rival written submissions filed by the parties and the authorities cited.

17. Having done so, I find that the key issue which crystallizes for my determination is whether the applicants have demonstrated through the material placed before me sufficient basis to justify grant of orders of an interlocutory injunction on terms sought in the motion.

18. The parameters within which a temporary injunction should issue in defamation cases have been outlined in several authorities. They include the authority of *Micah Cheserem V Immediate Media Services, (2002) 1 EA 371* which has been referenced by both parties herein and the authorities of *Evans Kidero V John Kamau & Another, [2017] eKLR; Performance Products Limited & Another V Hassan Wario Arero & 7 Others, [2017] eKLR* among others.

19. The golden thread that runs through all these authorities is that though the general principles governing the grant of injunctions in ordinary civil cases enunciated in the celebrated case of *Giella V Cassman Brown & Co Ltd, [1973] EA 358* applies to grant of interlocutory injunctions in actions for defamation, injunctions in defamation cases should be granted only in the clearest of cases where the words complained of are on their face value defamatory.

20. The principle that clearly emerges from these authorities is that the court should exercise its discretion in such cases with utmost caution because unlike other civil cases, defamation cases are unique in that they bring out a conflict between the rights of an individual to reputation and privacy on the one hand and the rights of citizens to exercise their freedom of expression as well as the right and duty of the media to disseminate information to the public on the other hand. Courts thus have an obligation of carrying out a delicate balancing act between all the above competing rights and interests in deciding whether or not to grant an injunction in any particular case.

21. The court in *Micah Cheserem V Immediate Media Services, [supra]* when outlining the principles that guide the courts in deciding applications for interlocutory injunctions in defamation cases stated as follows:

**“... Though the conditions applicable in granting interlocutory injunctions set out in *Giella V Cassman Brown & Company Limited (1973) EA. 358* generally applies in defamation cases, those conditions operate in special circumstances. Over and above the test set out in *Giella’s* case in defamation, the court’s jurisdiction to grant an injunction is exercised with greatest caution so that an injunction is granted only in the clearest possible cases...”**

The court proceeded to define what constituted a clear case to warrant grant of orders of temporary injunction in such cases thus:

**“...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. 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 human, responsible, truthful and trustworthy defendant.”**

22. Further, *Gatley on Libel and Slander 12<sup>th</sup> Edition, Sweet and Maxwell* at paragraph 25.2 gives guidance on what the court should consider in weighing whether or not to grant an interlocutory prohibitory injunction in defamation cases. The court must be satisfied of the following:

- i. That the statement is unarguably defamatory;**
- ii. That there are no grounds for concluding the statement to be true;**
- iii. That there is no other defence which might succeed;**
- iv. That there is evidence of an intention to repeat or publish the defamatory statement.**

23. On the issue of whether an interlocutory injunction should issue where the defendant had pleaded the defences of justification and privilege, Lord Denning in *Harakas & Others V Baltic Mercantile & Shipping Exchange Limited & Another, [1982] 2 All ER 701* held that where such defences are raised, an injunction restraining further publication should not issue unless the applicant had demonstrated that the defendant dishonestly and maliciously purposed to publish information which he knew to be false.

24. Guided by the above principles, I will now address the issue isolated above for my determination.

I will start by considering whether the applicants have demonstrated that they have a *prima facie* case with high chances of success at the trial. The Court of Appeal in *Mrao Ltd V First American Bank of Kenya Ltd & 2 Others, [2003] eKLR* defined a *prima facie* case as follows:

**“...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.”**

25. From the averments in the plaint and in the supporting affidavit, there cannot be any doubt that the statements or words contained in the articles complained of if proved to be false and maliciously published would be highly defamatory of the plaintiffs since they portray them as persons who lack integrity; individuals who have no qualms about grabbing a public college and its land worth billions of shillings which as trustees of the institution they were enjoined to protect.

26. However, the applicants’ claim that the statements in the articles were false and malicious have been strongly denied by the respondents in their joint statement of defence dated 14<sup>th</sup> August 2019. The respondents have maintained that the publications were true in substance and were based on facts specifically pleaded in paragraph 10 of their joint statement of defence.

27. In their defence, the respondents have further pleaded that the statements in the articles amounted to fair comment on a matter of public interest. They have given particulars of the facts constituting the factual basis of the alleged fair comment in paragraph 13 of their statement of defence. They have also denied the applicants’ claim that the publications were actuated by malice.

28. Given the foregoing, I find that though there is no dispute regarding publication of the articles by the 1<sup>st</sup> respondent and that they referred to the applicants, the claim that they contained falsehoods and were maliciously published is vehemently contested by the respondents. In my view, whether or not the articles contained falsehoods or were true statements concerning transactions involving land belonging to KIST and the applicants are matters of fact which cannot be effectively canvassed by way of affidavit evidence. They are substantive matters which go to the core of the suit and ought to be resolved by evidence in a trial.

29. That said, am alive to the fact that at this interlocutory stage, I am not required to make any definitive findings lest I prejudice hearing of the suit. As noted earlier, the respondents have pleaded justification, qualified privilege and fair comment on a matter of public interest and have specifically pleaded facts on which these defences are mounted. These defences if proved, are absolute to an action for defamation. On the material placed before me, I am unable to make a clear finding that the defences are unlikely to succeed at the hearing. It is however clear from the pleadings that the publications involved matters of public interest touching on land owned by a public institution.

30. In view of the foregoing and having taken all relevant factors into account, it is my finding that this is not a plain and clear case which would justify the grant of an interlocutory injunction on terms sought by the applicants. I am thus not satisfied that the applicants have met the threshold of establishing a *prima facie* case to the standard required in defamation cases as set out in the *Micah Cheserem case, [supra]*.

31. Having found as I have above, I do not find it necessary to consider the other two requirements regarding whether the applicants have proved that if the orders are not granted, they will suffer irreparable damage or loss that cannot be compensated by an award of damages and where the balance of convenience falls in this matter.

32. Suffice it to say that the applicants’ prayer for interlocutory prohibitory injunction is based on their contention that if not restrained, the respondents will republish the alleged defamatory articles and cause further damage to their reputation which cannot be redeemed by an award of damages.

33. Though I entirely agree with the applicants that damage to reputation when it occurs is priceless and cannot be adequately compensated by an award of damages, I find that the applicants have not availed any evidence to show that the respondents have at any time republished or threatened to publish any defamatory publication in reference to them on the matters in issue since 2017, about three years ago when the articles complained of were published. In the premises, I find that the applicants have failed to demonstrate that the respondents are likely or have any intention of publishing further defamatory material in reference to them in the foreseeable future and that the court’s intervention is thus necessary to protect their reputation from further damage pending hearing and determination of the suit.

34. Consequently, I have come to the conclusion that the applicants have failed to lay any good basis upon which this court can exercise its discretion in their favour by granting the orders sought. It is thus my finding that the Notice of Motion dated 20<sup>th</sup> July 2018 lacks merit and it is hereby dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of November 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Chege for the plaintiffs/applicants

Mr. Githua holding brief for Ms. Ogula for the defendants/respondents

Carol: Court Assistant