



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 60 OF 2020**

**DETILAND COMPANY LIMITED..... PLAINTIFF**

**VERSUS**

**RADIO AFRICA LIMITED..... 1<sup>ST</sup> DEFENDANT**

**STAR PUBLICATION LIMITED..... 2<sup>ND</sup> DEFENDANT**

**JULIUS OTIENO.....3<sup>RD</sup> DEFENDANT**

**HENRY MAKORI.....4<sup>TH</sup> DEFENDANT**

**ALEX SANDIKA OLE MAGELO.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff, *Detiland Company Limited* instituted suit against the five defendants, namely, *Radio Africa Limited*, *Star Publication Limited*, *Julius Otieno*, *Henry Makori* and *Alex Sandika Ole Magelo* seeking several reliefs including general and punitive damages for defamation and an order for permanent injunction to restrain the defendants whether by themselves, their employees, assignees, servants or agents from publishing any defamatory material whether by print or electronic means in reference to the plaintiff.

2. The plaintiffs' cause of action is premised on claims that the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are employees of the 1<sup>st</sup> and 2<sup>nd</sup> defendants caused to be published in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' online media platform on 23<sup>rd</sup> March 2020 and in the *Star Newspaper* of 24<sup>th</sup> March 2020 defamatory statements alleging that the plaintiff had irregularly acquired development approvals for construction of a 14 storey apartment block in Kileleshwa area of the City of Nairobi in total violation of zoning regulations; that the 5<sup>th</sup> defendant was quoted in the aforesaid publications as the source of the defamatory information contained in the articles; and, that the 5<sup>th</sup> defendant had in addition caused malicious falsehoods relating to the plaintiff's aforesaid construction project to be published in the Nation Media Group's digital media platform under the title "*Magelo: Rot at City Hall to Blame for Collapsing Building*".

3. Together with the plaint, the plaintiff filed a Notice of Motion dated 24<sup>th</sup> April 2020 in which it sought several prayers of temporary prohibitory and mandatory injunction. Prayers 1, 2, 3 and 4 sought several orders pending hearing and determination of the motion which are now spent. The only prayers pending my determination in this ruling are prayers 5, 6, 7, 8 and 9 which are reproduced hereunder:

*(v) That a temporary injunction to restrain the defendants/respondents, their servants, agents, employees, associates or otherwise from further authorizing, uttering, writing, distributing and/or otherwise publishing any interviews, articles, comments and/or words that are libelous or injurious falsehood or any similar words defamatory of the plaintiff and its project pending the hearing and determination of the suit.*

*(vi) That a temporary injunction to restrain the 5<sup>th</sup> defendant/respondent, its servants, agents, employees, associates or otherwise from further authorizing, uttering, writing, distributing and/or otherwise calling for and/or attending any interviews, giving false information to media houses, writing articles, making comments and/or words that are libelous or injurious falsehood or any similar words defamatory of the plaintiff and its project pending the hearing and determination of the suit.*

*(vii) That pending the hearing and determination of the suit, an order do issue restraining the defendants/respondents by themselves, their servants, agents, employees, associates or anyone acting on their behalf from writing, printing, publishing, distributing/circulating, uttering and/or conveying defamatory and/or disparaging information in any manner whatsoever about the plaintiff, particularly the allegations published in the *Star Newspaper Edition* of Tuesday 24<sup>th</sup> March, 2020 in an article titled "*Magelo fights city over building in Kileleshwa*" or words of a similar nature.*

***(viii) That pending the hearing and determination of the suit, an injunction order do issue compelling the defendants/respondents to remove and erase from all various posts, websites, blogs or other forms of electronic and social media or any form or nature whatsoever the article or similar words or statements or content, of like effect relating to the plaintiff/applicant and its project.***

***(ix) That costs of the application be provided for.***

4. The application is premised on grounds stated on its face and the depositions made in the supporting affidavit sworn by *Hui Wen*, a Director of the plaintiff (applicant).

5. In the supporting affidavit, besides replicating the pleadings in the plaint and the grounds anchoring the motion, the deponent emphasized that the publication made on 23<sup>rd</sup> March 2020 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their digital platform namely: <https://www.thestar.co.ke/news/2020-03023-ex-speaker-magelo-fights-city-over-kileleshwa-buidling> which was published in the Star Newspaper of 24<sup>th</sup> March 2020 was false and malicious since prior to the construction of the Apartment Block, it had obtained all requisite approvals and licenses from all relevant agencies and Government Departments, a fact which was within the knowledge of the 5<sup>th</sup> respondent; that before causing the aforesaid publications (the subject publications), the 3<sup>rd</sup> and 4<sup>th</sup> respondents did not seek any input from the applicant with a view to establishing the veracity or truth of the information provided by the 5<sup>th</sup> respondent.

6. According to the applicant, the defamatory publications were designed to scandalize and disparage its reputation as an honest construction company and they actually achieved their objective since thereafter, its business suffered massive losses with twelve purchasers rescinding their letters of offer. The financial loss allegedly suffered thereby forms the basis of the applicant's claim for special damages in the sum of KShs.97,500,000.

7. The application is contested by all the respondents. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the application through a replying affidavit sworn by the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent admitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents published the articles of 23<sup>rd</sup> and 24<sup>th</sup> March 2020 but denied that the same were defamatory of the applicant and that they were actuated by malice. He averred that the contents of the two publications were true in substance and that they were made in good faith in the public interest.

8. The 3<sup>rd</sup> respondent also deponed that it was clear from the publications that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had attempted to reach the applicant for its comment before publishing the impugned articles without success; that after receiving a demand letter from the applicant's advocates, the 1<sup>st</sup> to 4<sup>th</sup> respondents published follow up stories in their digital platform and in the Star Newspaper of 29<sup>th</sup> and 30<sup>th</sup> March 2020 indicating the applicant's side of the story regarding the issues raised in the subject publications.

9. *Mr. Hui Wen* swore a further affidavit on 23<sup>rd</sup> July 2020 to counter the averments made in the 3<sup>rd</sup> respondent's replying affidavit. He denied the 3<sup>rd</sup> respondent's claim that the subject publications were true in substance and that they were not malicious or defamatory. He maintained that the publications were actuated by malice and that they injured the applicant's business reputation and standing in the eyes of the public as an honest developer of high rise residential apartments.

10. On his part, the 5<sup>th</sup> respondent swore a replying affidavit on 2<sup>nd</sup> June 2020 and filed grounds of objection of even date in his opposition to the motion. In his grounds of objection and lengthy replying affidavit, the 5<sup>th</sup> respondent in a nutshell attacked the competence of the applicant's suit claiming that it did not disclose any cause of action against him and that it was frivolous, vexatious and a classic abuse of the court process. He averred that the suit was aimed at suppressing and or curtailing his constitutional right to freely express his views and opinion regarding the applicant's construction project. He asserted that he was not privy and had no knowledge of the subject publications and that he was a stranger to the allegations made in the plaint.

11. Further, the 5<sup>th</sup> respondent asserted on a without prejudice basis that if the words attributed to him were published as alleged, the same were true and amounted to fair comment on a matter of public interest which forms the basis of his defence of truth and justification, fair comment and qualified privilege as pleaded in his defence.

12. In response to the 5<sup>th</sup> respondent's grounds of objection and replying affidavit, the applicant's director swore another affidavit dated 22<sup>nd</sup> July 2020. He denied the 5<sup>th</sup> respondent's claim that the plaint did not disclose any cause of action against him and that the suit was frivolous and vexatious. He also disputed the claim that the suit was designed to suppress the 5<sup>th</sup> respondent's right to freedom of expression. The bulk of the rest of the averments in the affidavit went towards establishing that the subject publications were actuated by malice and that the 5<sup>th</sup> respondent participated in the false publications including the publications made by Nation Media Group; that the defences of justification, fair comment and qualified privilege were not applicable in this case and should be disregarded in determining the application.

13. When the application came up for hearing, all the parties consented to having it canvassed by way of written submissions which all parties duly filed.

14. After considering the application, the pleadings, the affidavits sworn in support and in opposition to the motion, the rival written submissions made on behalf of the parties and all the authorities cited, I find that the main issue which arises for my determination is whether the applicant has demonstrated through the material placed before me sufficient basis to warrant grant of the orders of temporary prohibitory and mandatory injunction on terms sought in the motion. But before addressing my mind to this issue, it is important to first deal with the preliminary issues raised by the applicant regarding the competence of the replying affidavit sworn by the 3<sup>rd</sup> respondent and the claim made by the 5<sup>th</sup> respondent that the plaint did not disclose a reasonable cause of action against him.

15. On the first preliminary issue, the applicant in its submissions claimed that the 1<sup>st</sup> – 4<sup>th</sup> respondents’ replying affidavit sworn by the 3<sup>rd</sup> respondent dated 15<sup>th</sup> May 2020 was defective and was bad in law as it was not commissioned by a commissioner for oaths. The basis for this claim is the allegation that a copy of the said affidavit served electronically on the applicant’s counsel was signed by the deponent but was not commissioned. Reliance was made on Sections 5 and 8 of the *Oaths and Statutory Declarations Act* which provides that an affidavit must clearly state the place and date where it was sworn and it must be sworn before a magistrate or a commissioner for oaths. Relying *inter alia* on the Supreme Court’s decision in **Gideon Sitelu Konchellah V Julius Lekakeny ole Sunkuli & 2 Others, [2018] eKLR**, the applicant urged me to find that as the replying affidavit was not commissioned, it was fatally defective and should be struck out; that once struck out, the application will be unopposed by the 1<sup>st</sup> – 4<sup>th</sup> respondents.

16. The 1<sup>st</sup> – 4<sup>th</sup> respondents in their submissions refuted the applicant’s aforesaid claims and asserted that the replying affidavit filed in court and served on the 5<sup>th</sup> respondent on 8<sup>th</sup> June 2020 was properly executed and commissioned as required by the law; that the inadvertent error of electronically serving the applicant’s counsel with an uncommissioned copy of the affidavit was corrected on 17<sup>th</sup> June 2020 when the correct copy was served on the applicant’s counsel.

17. Upon perusal of the replying affidavit sworn by *Julius Otieno*, the 3<sup>rd</sup> respondent on 15<sup>th</sup> May 2020 which was filed in court on 25<sup>th</sup> May 2020, I have confirmed that the same was executed and commissioned by *Mr. Michael Osundwa Sakwa*, an advocate and a commissioner for oaths. As I can only rely on what is on the court record and not what was allegedly served on the parties, I find no substance in the applicant’s claim that the replying affidavit filed by the 1<sup>st</sup> – 4<sup>th</sup> respondents is fatally defective and ought to be struck out. My finding is that the replying affidavit conforms to all the requirements of the law and is properly on record.

18. Regarding the 5<sup>th</sup> respondent’s claim that he is non suited as the plaintiff does not disclose a reasonable cause of action against him, I will start by defining what constitutes a reasonable cause of action. The Court of Appeal in **D. T. Dobie & Company (Kenya) Limited V Joseph Mbaria Muchina & Another, [1980] eKLR** defined a reasonable cause of action as any action with some chance of success when allegations in the plaintiff only are considered; one that cannot be said to be utterly hopeless.

19. As stated earlier, the applicant’s suit is based on the tort of defamation. In the plaintiff, the applicant has pleaded that the 5<sup>th</sup> respondent provided the malicious falsehoods that were published by the 1<sup>st</sup> – 4<sup>th</sup> respondents in reference to its construction project which were defamatory; that the publication greatly injured its reputation as an honest business entity and has caused it enormous financial loss. Looking at the allegations made in the plaintiff against the 5<sup>th</sup> respondent holistically, I am satisfied that the plaintiff discloses a reasonable cause of action against him. I do not therefore find any merit in the 5<sup>th</sup> respondent’s objection to the validity of the suit against him.

20. Turning now to the merits of the application, the principles that guide courts in the exercise of their discretion in deciding whether or not to grant a temporary injunction in defamation cases are similar to those applicable to all other civil cases. Those principles were enunciated in the celebrated case of **Giella V Cassman Brown & Co Ltd, [1973] EA 358** and has been adopted in many other subsequent authorities. See, for instance, **Nguruman Limited V Jan Bonde Nielsen & 2 Others, [2014] eKLR**. To be deserving of orders of interlocutory injunction, the applicant must establish a *prima facie* case with a probability of success; that he or she stands to suffer irreparable loss that cannot be adequately compensated through an award of damages if the application was not allowed and if the court is in doubt, it will consider whether the balance of convenience tilts in favour of the applicant.

21. Though as stated above, the general principles enumerated in **Giella V Cassman Brown & Co Ltd, [supra]** applies to defamation cases, it is trite that in defamation cases, the court must exercise its discretion with utmost care and caution considering that defamation cases are not ordinary cases. They are unique by their very nature. They bring out a conflict between private and public interest, that is, the right of private persons to a good reputation on the one hand and the right of citizens and the media to exercise their right of freedom of speech and expression and to disseminate information to members of the public especially on matters of public interest on the other hand. The court must therefore balance all the above competing rights before deciding whether or not to grant an injunction in any particular case.

22. In **Micah Cheserem V Immediate Media Services & 4 Others [2000] eKLR** when outlining the principles that should guide courts in deciding applications for interlocutory injunctions in defamation cases, the court 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...”***

23. 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.”***

***[Emphasis added].***

24. Further, the learned authors of *Gatley on Libel and Slander 12<sup>th</sup> Edition, Sweet and Maxwell at paragraph 25.2* give 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.

25. Guided by the above principles, I will now address the main issue I have isolated earlier for my determination. A perusal of the application shows that the prayers sought by the applicant are twofold: These are, orders of interlocutory prohibitory injunction and interlocutory mandatory injunction. For good order, I will deal first with the prayer for temporary prohibitory injunction.

26. As noted earlier, to be deserving of orders of interlocutory injunction, one of the conditions an applicant must satisfy is proof that he has 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.”**

27. My reading of the plaint reveals that the content of the article published by the 1<sup>st</sup> – 4<sup>th</sup> respondent on 24<sup>th</sup> March 2020 was disclosed in paragraph 55 of the plaint. The information contained in the article as pleaded by the applicant appears to be a reproduction of a letter allegedly written by the 5<sup>th</sup> respondent to the immediate former Nairobi County Secretary, Mr. *Leboo Morintat* questioning why county officials had approved construction of a 15 floor building by the applicant in violation of the area zoning plans. In the same publication, it is stated that the county technical committee had approved construction of the building after the applicant had met all necessary conditions.

28. Though at this interlocutory stage I am not required to conduct a mini trial or make any definitive findings as doing so might embarrass the trial court or prejudice trial of the suit, reading the article as a whole, I am unable to find *prima facie* how the words used in their ordinary meaning or innuendo were defamatory of the applicant. The accusations in the article were apparently targeted at County Government Officials and not the plaintiff. In the premises, I am not persuaded to find that the statements made in the publication were unarguably and obviously defamatory of the applicant. Having so found, I am satisfied that the applicant has failed to establish a *prima facie* case against the 1<sup>st</sup> – 4<sup>th</sup> respondents that would justify grant of a temporary prohibitory injunction as prayed.

29. Although am in agreement with the applicants’ submissions that loss of reputation may not be sufficiently compensated by an award of damages, I think that in the context of a prayer for interlocutory prohibitory injunction, whether or not damages would be an adequate remedy if the application was dismissed would mainly become relevant if there’s evidence that the respondents have at some time republished the offending publication or has threatened or manifested an intention to publish the same or other defamatory material in reference to the applicant. In this case, the applicant has not demonstrated that any of the respondents has threatened or has expressed an intention to republish the subject publications.

30. Regarding the 5<sup>th</sup> respondent, he is alleged to have given malicious falsehoods pertaining to the applicant’s construction project to the Nation Media Group which were published on its digital media platform namely, <https://www.nation.co.ke/counties/Nairobi/City-Hall-rot-blame-collapsing-buildings-/1954174-5284560-format-xhtml-6li4hsz/index.html>. The 5<sup>th</sup> respondent has denied being privy or having any knowledge of the said publication or having taken part in its alleged publication.

31. It is instructive to note that the Nation Media Group is not a party to these proceedings. Having denied publishing the information published digitally by the Nation Media Group, it was incumbent on the applicant to prove *prima facie*, that the 5<sup>th</sup> respondent was in fact involved in the said publication which it has failed to do. In addition, it is my finding that since the allegation that the 5<sup>th</sup> respondent was the source of the information published by the 1<sup>st</sup> – 4<sup>th</sup> respondents is denied, whether the allegation is true or false is a matter of evidence which can only be established in the trial. In the circumstances, I am not convinced that the applicant has established a *prima facie* case against the 5<sup>th</sup> respondent to the threshold required in defamation cases.

32. Turning now to a consideration of whether a mandatory interlocutory injunction should issue against the respondents on terms sought in prayer 8, I will start by point out at the outset that though courts have power to grant such an injunction, case law abounds that interlocutory mandatory injunctions should be granted only in very clear and exceptional cases where there are compelling circumstances and where the injury complained of is immediate and is likely to cause extreme hardship if it is not sorted out by grant of the injunction at the interlocutory stage.

33. In *Kenya Breweries Limited & Another V Washington O. Okeyo, [2002] eKLR*, the Court of Appeal enumerated the circumstances in which a mandatory injunction should be issued. The court stated as follows:

**“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 which reads:**

**A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff .... a mandatory injunction will be granted on an interlocutory application”.**

34. From the above holding by the Court of Appeal which is binding on this court, it is apparent that the burden of proving sufficient cause to

justify grant of an interlocutory mandatory injunction is higher than in the case for grant of a prohibitory interlocutory injunction.

35. Having analysed the parties' pleadings and all the material placed before me, I agree with the position taken by the respondents that this is not a clear and straight forward case that would merit the grant of a mandatory injunction at this interlocutory stage. I am not persuaded that there are any compelling or exceptional circumstances that would justify the grant of the order on terms sought in prayer 8 of the motion.

36. For all the foregoing reasons, I have come to the conclusion that the applicant's Notice of Motion dated 24<sup>th</sup> April 2020 is devoid of merit in its entirety. The application is accordingly dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> day of December 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Otieno Michael holding brief for Mr. Brian Otieno for the Applicant.

Mr. Odhiambo for the 5<sup>th</sup> Respondent.

No appearance for the 1<sup>st</sup> to 4<sup>th</sup> Respondents

Ms Mwinzi: Court Assistant