



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 24 OF 2016

ANIKET MANDEVIA.....PLAINTIFF/APPLICANT

-VERSUS-

THE NATION MEDIA GROUP LIMITED.....1ST DEFENDANT/RESPONDENT

BRIAN WASUNA.....2ND DEFENDANT/RESPONDENT

RULING

1. The brief background of the dispute is that the defendants herein caused to be published in the local Business Daily newspaper certain articles on 14th December, 2015 and 12th February, 2016. It is claimed that the subject of the article is a feud involving the plaintiff herein and which feud arose out of a family business in respect to a prime property within Nairobi. The articles stated inter alia that the plaintiff (who is a lawyer by profession) had assaulted his sister and threatened her life, in addition to allegedly fraudulently transferring her shares in the family business to himself with the assistance of their father. The plaintiff has sued the defendants on the basis of the said articles, arguing that the same contain defamatory words. However, at this point, I am dealing with an application filed by the plaintiff.

2. Aniket Mandevia, the plaintiff/applicant, took out a Notice of Motion dated 3rd July, 2018 in which the applicant sought for inter alia:

(i) Spent.

(ii) Spent.

(iii) THAT pending the hearing and determination of the suit, the defendants/respondents be ordered to expunge from their website, namely www.businessdailyafrica.com the articles published on the web pages with the links set out under paragraph (ii).

(iv) THAT pending the hearing and determination of the suit, the defendants/respondents be restrained from publishing by way of print media, the internet or any other means, any defamatory articles related to the articles complained of or otherwise, concerning the plaintiff/applicant.

(v) THAT the costs of the application be awarded to the plaintiff/applicant.

3. The aforesaid Motion is supported by the affidavit sworn by the plaintiff/applicant.

4. In response, the defendants/respondents filed both Grounds of Opposition and a Replying Affidavit sworn by Sekou Owino to oppose the Motion. The plaintiff/applicant filed a further affidavit in response to the replying affidavit.

5. When the application came up for inter parties hearing, learned counsels appearing in the matter recorded a consent order to have the Motion disposed of by written submissions. I have considered the same together with the grounds set out on the face of the Motion and its supporting affidavit, the facts deponed in the replying affidavit and the Grounds of Opposition.

6. Having considered the material placed before this court, I have formed the view that there are two (2) issues which commend themselves for determination: first is whether or not to grant the prayer to expunge the impugned articles and secondly, whether or not to grant an interlocutory injunction against the defendants/respondents.

7. I think it is appropriate to begin by determining the second issue. The principles to be considered in determining an application for injunction in defamation cases were restated in the case of *Micah Cheserem v Immediate Media Services & 4 others* [2000] eKLR. In the aforesaid case, the court stated inter alia that:

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

b) The applicant must also show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages.

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

8. In respect to the first principle as to whether or not the plaintiff/applicant has a prima facie case, it was submitted on his behalf that the words included in the impugned articles have caused the plaintiff/applicant to be shunned and viewed in a negative light; that the words can be interpreted by any right thinking member of society to mean that the plaintiff/applicant is inter alia a criminal, a thief or crook, a person with no regard for the rule of law.

9. It is also argued that the said articles are not a true and accurate replication of the contents of the pleadings filed in Milimani Civil Suit No. 589 of 2015; and that the articles were not written in the public interest.

10. The defendants/respondents on their part contended that the articles were published as a matter of public interest and as fair comment, thus the court ought not to grant an interlocutory injunction.

11. It is the further submission of the defendants/respondents that the publications are drawn from pleadings relating to a dispute already before the court and in view of this, the same cannot be said to be defamatory and consequently, the plaintiff/applicant has not demonstrated a prima facie case.

12. In my view, whereas the defendants/respondents have argued that the articles were made in the public interest and sourced out of pleadings in the aforementioned case, it is apparent that the public interest arising therefrom has not been demonstrated. Similarly, the publications are based on pleadings filed in a case still pending in court and I doubt whether the same can be said to be justified.

13. In the circumstances, while it is apparent that the relevant defences have been pleaded, I am satisfied that the plaintiff/applicant has demonstrated an apparent infringement of his rights, dignity and reputation, thereby leading me to conclude that he has a prima facie and arguable case.

14. The second principle to be considered is on the question of irreparable loss. The plaintiff/applicant asserted that the controversial articles is accessible to all and sundry online, and that have negatively impacted his reputation and standing before prospective clients, business partners and employers. As such, the plaintiff/applicant is apprehensive that the continued publications of a similar nature will result in further damage to his reputation in a manner that cannot be adequately compensated by an award of damages.

15. The defendants/respondents in reply submitted inter alia that the plaintiff/applicant had prayed for exemplary and special damages in his plaint, which goes to show that the injury alleged to have resulted can easily be compensated through damages.

16. Having taken the above into account, my analysis is that the plaintiff/applicant did adduce evidence to further his argument that the published articles had cast doubt on his suitability for the relevant employment positions and it matters not whether he sought for damages in his plaint as he is entitled to do so in any case. What is of concern is whether or not he can adequately be compensated for the loss resulting from the publications. In my view, it is clear that the plaintiff's/applicant's reputation has been tainted and it is highly unlikely that any amount of damages will constitute adequate compensation. Therefore, his argument on this ground is well founded.

17. The third principle touches on the balance of convenience. In relation thereto, the plaintiff/applicant stood his ground that the balance of convenience tilts in his favour while the defendants/ respondents were of a contrary view. Having found in favour of the plaintiff/applicant on the first two (2) grounds hereinabove, I am satisfied that the balance of convenience is favourable to him.

18. The defendants have stated in their submissions that prayer (iv) of the Motion for the grant of an interlocutory injunction is unenforceable. It is their contention that the said prayer is wide and non-specific. That if granted, the restraining order will have the impact of impeding the defendants'/respondents' constitutional rights and freedom of expression as the media.

19. The plaintiff/applicant is of the submission that the words complained of in the articles are prima facie defamatory in their natural and ordinary meaning and by way of innuendo hence do not need to be given any particulars.

20. Having carefully considered the rival submissions, I am of the view that the plaintiff/applicant was not bound to specifically list each and every defamatory word.

21. The plaintiff/applicant submitted and specifically for the offensive articles to be expunged, otherwise he stands to be continually prejudiced.

22. The defendants/respondents countered this submission by arguing that an order for withdrawal of the aforesaid articles would negatively affect the 1st defendant's/respondent's business and that the same would require the consent of third parties.

23. In the circumstances, it would appear this court has to balance the interests of the respective parties. On the one hand, if the articles continue to be accessible, the plaintiff's/applicant's reputation is likely to diminish further. On the other hand, freedom of the media is a constitutional entitlement of the defendants/respondents.

24. In my opinion, it is the reputation of the plaintiff/applicant which is in danger of being further damaged if the articles are not pulled down immediately.

25. Consequently, the Motion succeeds in terms of prayers (iii) and (iv). Costs shall abide the outcome of the suit.

Dated, Signed and Delivered at Nairobi this 28th day of February, 2019.

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J.K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the Defendants/Respondents