REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 214 OF 2018

PEWIN CABS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DAVID MWERE.....1ST DEFENDANT/RESPONDENT

AYUMBA AYODI.....2ND DEFENDANT/RESPONDENT

NATION MEDIA GROUP....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant has brought a Notice of Motion dated 26th August, 2018. The same is supported by the grounds set out on the body thereof and facts deponed to in the affidavit sworn by *Justus Muriithi Kirigua*. The applicant is seeking the orders hereunder:

> ***(i) Spent.***
>
> ***(ii) Spent.***
>
> ***(iii) THAT pending the hearing and determination of the suit, this Honourable Court be pleased to grant a temporary injunction against the defendants/respondents, restraining them and the agents and/or employees of the 3rd defendant/respondent from further publication of the defamatory articles and any other related defamatory articles.***
>
> ***(iv) THAT the costs of the application be provided for.***

2. *Sekou Owino* swore a replying affidavit on behalf of the respondents to oppose the motion.

3. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions. The dispute to which the Motion relates arose from an article published by the respondents on 22nd August, 2018 in relation to the **International Amateur Athletic Federation (IAAF) World Under-18 Championship games hosted in Nairobi sometime in 2017**.

4. The article in general read that an audit report prepared by the Auditor General revealed a scam within the sports ministry involving Kshs. 1.7 billion and that the applicant was paid the sum of Kshs.28.3 million over and above the normal market rate. The publication promoted, the applicant to institute this defamatory suit against the respondents.

5. The principles to be considered in determining applications for interlocutory injunctions were restated by the Court of Appeal of East Africa in ***Giella v Cassman Brown & Co. Ltd (1973) EA***. In taking cognizance of the fact that this is a claim of a defamatory nature, the relevant guiding principles for granting an interlocutory injunction are captured in the Court of Appeal case of ***Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR*** *inter alia* 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 or she 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.***

6. It is important to note that the granting of an interlocutory injunction can only be done in the clearest of cases.

7. The first principle is whether or not a prima facie case has been established. The applicant submitted that the publication made by the respondents was defamatory in the sense that it not only tended to lower the applicant's reputation in the eyes of right thinking members of the society but was made falsely, maliciously and in total breach of professional duty of care and responsibility.

8. It is also the applicant's submission that the respondents have not shown remorse for the said publication and are intent on continuing to publish further defamatory statements.

9. On their part, the respondents maintained that their publication was a reflection and replication of the Auditor General's report dated 10th July, 2018, adding that the statement is true, qualified privilege and a matter of public interest.

10. The respondents also argued that they are entitled to exercise their constitutional right of expression and freedom of the media as provided for under Articles 33 and 34 of the Constitution. The respondents' submission in brief is that they have not made any additional publications of such nature and have no intention of republishing the statement in addition to the fact that there is nothing to indicate the threat of future related publications.

11. The respondents therefore took the view that the applicant has failed to establish a prima facie case with chances of success.

12. Having considered the rival arguments, a prima facie case is taken to mean a case that is both arguable and has a likelihood of success. This should be established without necessarily delving into the merits of the suit.

13. I have perused the report by the Auditor General and established that the statement concerning the applicant is similar to that made in the newspaper article though not borrowed word-for-word. It is thus true that the allegedly defamatory statement was drawn from the said report and in fact, reference was made to the report in the publication.

14. Furthermore, I have perused the plaint filed on 30th August, 2018 by the applicant and observed that the applicant admittedly stated that it received the sum of Kshs.66,000,000/=.

15. That notwithstanding, at this point it cannot be determined with certainty whether or not the statement claiming the services rendered by the applicant cost Kshs.23.8 million over and above the market rate are true facts since the report was by and large a creature of the Auditor General's opinion.

16. While I am alive to the respective constitutional freedoms of the media and expression, however those rights cannot exist as absolute rights. It would appear that the respondents did not undertake any further investigations prior to making their publication. They did not dig further to verify the accounts given in the report as true and factual yet they are duty to do so. In the premises, I am convinced that the applicant has established a prima facie case against the respondents.

17. As concerns the second element of irreparable loss, it is the applicant's submission that as a result of the publication, it has lost out on a number of government tenders and the quality of its business has diminished.

18. The applicant is therefore apprehensive that continued publications of such nature will further negatively impact its reputation and business. The respondents replied by contending that no further publications have been made and there is no intention of doing so on their part.

19. In my humble opinion, it is impossible for this court to predict or read into parties' future intentions. To add on, as soon as the reputation of a party has suffered injury, no amount of recompense can form adequate compensation though it might offer some comfort in some instances. In the case of ***Brigadier Arthur Ndonj Owuor*** =vs= The Sandard Ltd (2011) eKLR this court stated inter alias follows:

> ***"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."***

20. Given that this is a claim relating to public funds hence the public has a stake therein, continued publications would inevitably lower the applicant's reputation in the eyes of right-thinking members of the society, hence the need for its safeguarding. I say this having taken into account the respondents' rights and freedoms as captured under ***Articles 33 and 34*** of the Constitution.

21. Having determined so, I am also persuaded that the balance of convenience weighs in favour of the applicant as against the respondents.

22. In the end, I find that the Motion has merit. Consequently the motion is allowed in terms of prayer (iii). Costs shall abide the outcome of the suit.

Dated, Signed and Delivered at Nairobi this 27th day of March, 2019.

J.K. SERGON

JUDGE

In the presence of:

……. for the Plaintiff/Applicant

……. for the Defendants/Respondents