



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL CASE NO 189 OF 2018**

**OCHIENG RAPURO.....PLAINTIFF**

**VERSUS**

**TATU CITY LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 3<sup>rd</sup> August 2018 and filed on 6<sup>th</sup> August 2018 was brought pursuant to the provisions of Sections 1A, 1B & 3 and 3B, 63(e) of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 40 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provision of the law. Prayers Nos (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. That an order of injunction be issued restraining the Defendant whether by themselves, servants, agents or otherwise howsoever from publishing, circulating or disseminating in any manner whatsoever the libelous words concerning and in respect of the Plaintiff/Applicant in the statement Tatu City's response to Nation Media Group's farcical statement of 9 June delivered via Twitter published in the Twitterhandle <http://twitter.com/TatuCity/status/1005771615703273472/photo/1> on 9th June 2018 or any words in any manner defamatory of the plaintiff in any manner whatsoever until the hearing and final determination of this suit.**

**4. That the costs of this application to be provided for.**

2. The Plaintiff's undated Written Submissions were filed on 2<sup>nd</sup> November 2018 while those of the Respondent were dated 19<sup>th</sup> March 2019 and filed on 22<sup>nd</sup> March 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**PLAINTIFF'S CASE**

4. The Plaintiff swore the affidavit in support of his application on 3<sup>rd</sup> August 2018. He stated that he worked as a journalist and Managing Editor of the Business Daily. He added that he had worked for Nation Media Group (NMG) in that capacity for nine (9) years. He further gave a history of his career eventually leading to his current position.

5. He averred that the Defendant caused to be published words in the social media to the extent that he was the mastermind behind "**corrupt journalism**" at Nation media Group and particularly unfair coverage of the Defendant. This, he stated, was recklessly created to paint a picture that he was corrupt and incompetent yet the individuals who were mentioned to have colluded with him neither worked with him nor were they engaged in any common enterprise.

6. He pointed out that the Defendant had not retracted the defamatory statement but had infact released another defamatory statement urging Nation Media Group to suspend him from work while investigations were being conducted that the same had referred to him as the "**Evil Gatekeeper**" of Nation Media Group in its in-house online publication known as Tatu City News.

7. His case was that he was an innocent, upright hardworking profession family man who was entitled to his good name and reputation.

8. He therefore urged this court to allow his application as prayed.

### **THE DEFENDANT'S CASE**

9. In opposition to the said application, on 21<sup>st</sup> September 2018, the Defendant filed Grounds of Opposition dated 21<sup>st</sup> September 2018. On 7<sup>th</sup> November 2018, the Defendant's Chief Operating Officer, Christopher Barron, swore a Replying Affidavit on behalf of the Defendant herein. It was filed on 8<sup>th</sup> November 2018.

10. The Defendant's case was that the words complained of were not defamatory but were made in fair comment and without malice to the Plaintiff and that having been made on a matter of public interest, the statement was privileged averred that the present application was an attempt to silence it and threaten its freedom of expression contrary to the Constitution of Kenya.

11. It was emphatic that the Plaintiff orchestrated publications under the caption of "**Land officials entangled in Tatu City fraud claims**" and "**Tatu City embroiled in fresh land row**" on 23<sup>rd</sup> May 2018 and 7<sup>th</sup> June 2018 respectively at the behest of one Stephen Mwangi who was sow local and racial discord with a view to stealing land from it and associate companies.

12. It added that the Plaintiff was an irresponsible journalist who had not promoted media freedoms and who had failed to support the protection and promotion of human rights and civil liberties in his biased and corrupt coverage.

13. It therefore urged this court to dismiss the present application with costs.

### **LEGAL ANALYSIS**

14. The court carefully considered the very detailed Written Submissions that were filed by the parties herein and the case law they each relied upon and noted that at this interlocutory stage, the only thing that it was being called upon to determine was whether or not the Plaintiff had met the test that had been set out in the case of **Giella v Cassman Brown & Co [1973] EA 358** so as to be granted an interlocutory injunction pending the hearing and determination of the case herein. There was danger in the court going into the merits of the case if it analysed the cases relating to the question of whether or not the statements the Defendant was said to have been made were defamatory in nature.

15. The principles that were set out in the case of **Giella v Cassman Brown & Co [1973] EA 358** (Supra) by Spry VP were as follows:-

**"The conditions for the grant of an interlocutory injunction are now. I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E A Industries v Trufoods, [1972] E A 420.)"**

16. In Ground No (7) of the Defendant's Grounds of Opposition, it was stated as follows:-

**"The purpose of the application and suit was not to prove the averments of defamation, but rather to satisfy the egotistical nature of the Plaintiff/Applicant. He is using this suit as a means to present himself as a model citizen with high standing, which is not the case herein"**

17. In Paragraph 30 of the Defendant's Statement of Defence that was dated 7<sup>th</sup> November 2018 and filed on 8<sup>th</sup> November 2018, it was stipulated as follows:-

**"The Defendant is a stranger to the averments contained in paragraph 21(sic) of the Plaintiff. Nonetheless, the Defendant puts the Plaintiff to strict proof thereof. The Defendant avers that the Plaintiff is not entitled to any of the orders sought as the statements made by the Defendant are truthful as it surrounds the actions on the part of the Plaintiff in respect of the publications made about the Plaintiff and its associate companies."**

18. In Paragraph 9(2) (q) and (s) of the Defendant's Replying Affidavit, Christopher Barron stated that:-

**1. The Plaintiff has failed to support, protect and promote human rights and civil liberties in its biased and corrupt coverage of the Defendant company.**

**2. The Plaintiff herein has gone against the code of conduct for journalism.**

19. On the other hand, the Plaintiff denied the aforesaid allegations and contended that he was above reproach and that he had published the Articles the Defendant had complained of in good faith and without malice in accordance with the standards that are required in journalism.

20. Clearly, both the Plaintiff and the Defendant were in diametrically opposite ends of the case. The Defendant had made strong statements regarding the Plaintiff's conduct whose veracity had to be tested during trial. It was thus not possible to determine at this stage if the

Plaintiff's rights had been infringed upon by the Defendant as this called for rebuttal as was held in the case of **Mrao vs First American Bank Ltd & 2 Others [2013] eKLR** that was relied upon by the Plaintiff herein. The truth of the matter could only be unraveled or established if they both tendered their evidence during trial.

21. This court therefore found that it could not for a fact conclude that the Plaintiff had established a *prima facie* case with probability of success.

22. However, if after trial it was found that the said statements the Defendant had made had been untrue, the Plaintiff would have suffered irreparable damage more so if the similar statements were repeated. Although the compensation in defamatory cases is damages, such damages would never be commensurate to the damage of reputation that a person would have suffered.

23. Once reputation is damaged, it is a near impossible task to repair it. Statements go viral by moving like wildfire especially in social media. They move like water in a stream because they are irreversible. Indeed, no amount of damages can be adequate to compensate a party who has been defamed. The damages that are awarded are merely to offer consolation to him that the offender has been punished to pay him damages but are not remedial.

24. It was therefore the considered view of this court that the Plaintiff has satisfied the irreparable injury test as was held in the case of **Paul Gitonga Wanjau vs Gathuthi Tea Factory Co Ltd & 2 Others [2016] eKLR** that was relied upon by the Plaintiff herein particularly because the Defendant felt that it was justified in making the statements and that it was its fundamental right to do so as was enshrined in the Constitution of Kenya, 2010 as was alluded to in the case of **Cheserem vs Immediate Media Services & 4 Others [2002] 2 EA 371** that it relied upon. It had been held that:-

**“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in Giella Vs. Cassman Brown & Co. Ltd (1973) EA. 258 generally apply 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 must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.”**

25. Notably, in the case of **Cheserem vs Immediate Media Services & 4 Others (Supra), Brigadier Arthur Ndonj vs The Standard Ltd [2011] eKLR** and **Gilgil Hills Academy Ltd vs The Standard Ltd [2009] eKLR** that were all relied upon by the Defendant, the common thread was that in defamatory cases, an injunction will only be granted in the clearest of the cases.

26. Accordingly, having considered the Written Submissions and the case law that the parties relied upon in respect of the question of whether or not the Plaintiff was entitled to the equitable remedy of injunction, this court was satisfied that this was a clear case why an interlocutory injunction should be granted as the Plaintiff had satisfied the irreparable damage test. The balance of convenience thus tilted in favour of the court granting the Plaintiff an interlocutory injunction pending the hearing and determination of the case herein.

## **DISPOSITION**

27. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion, application dated and filed on 6<sup>th</sup> August 2018 was merited and the same is hereby granted in terms of Prayer No (3) therein. Costs of this application will be in the cause.

28. The Plaintiff is hereby directed to file an undertaking as to damages within the next fourteen (14) days from today. He is also hereby directed to take all necessary steps for the prosecution of his case within the next twelve (12) months from today failing which the provisions of Order 40 Rule 6 of the Civil Procedure Rules, 2010 will take effect.

29. It is so ordered.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of September 2019.**

**J. KAMAU**

**JUDGE**