



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 380 OF 2015

VIMALKUMAR BHIMJI DEPAR SHAH.....PLAINTIFF/APPLICANT

-VERSUS-

AL-NUR MEDIA AFRICA LIMITED T/A

NAIROBI LAW MONTHLY.....1ST DEFENDANT/RESPONDENT

DAVID WANJALA.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant herein filed the Notice of Motion dated 9th November, 2015 in which he sought for the following orders:

(i) Spent.

(ii) Spent.

(iii) Spent.

(iv) THAT pending the hearing and determination of the suit, an interim injunction be directed at each of the defendants/respondents restraining them by themselves, their agents, servants or otherwise howsoever from posting on any electronic media, or publishing, or disseminating in any manner whatsoever the defamatory words, statements or content or any similar words or statements or content, of like effect against the plaintiff herein.

(v) THAT the costs of the application be provided.

2. The Motion is supported by the grounds set out on its face together with the facts stated in the affidavit of the applicant.

3. The defendants/respondents put in Grounds of Objection dated 16th February, 2016 to oppose the Motion.

4. The parties were directed to put in written submissions on the application, which they did.

5. I have considered the grounds set out on the face of the Motion, the facts deponed in the affidavit supporting it, the Grounds of Objection and the rival submissions together with the various authorities cited therein.

6. It is evident that the present application concerns the granting of an interlocutory injunction. Being that the claim arises out of the tort of defamation, the relevant guiding principles were restated in the case of **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** and are as follows:

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

b) The applicant must 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.

7. On the first principle, the applicant averred that the publication in question made by the respondents is not only false, but was driven by

malice and was made without any attempts by the respondents to verify the true facts from the applicant.

8. In echoing the above, the applicant submitted that the respondents did not adduce any evidence to show that the publication bore truth to it, adding that the respondents ought to have given the applicant a chance to respond to the allegations portrayed in the publication before releasing it to the public, but they did not do so.

9. On their part, the respondents took the view that for the applicant's Motion to succeed, he would be required to establish the following principles as laid out in the case of **William Coulson and Sons v James Coulson (1887) TLR 846**:

a) That the statement is unarguably defamatory;

b) That there are no grounds for concluding the statement may be true;

c) That there is no defence that might succeed; and

d) That there is no evidence of an intention to repeat or publish the defamatory statement.

10. The respondents maintained their ground that the applicant has failed to prove a prima facie case against them, further maintaining that their case rides on the defences of truth and justification, fair comment and qualified privilege.

11. It was also the respondents' contention that the applicant has not demonstrated the falsehood behind the publication or shown that their defence is one that cannot succeed.

12. In respect to the first principle, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya and 2 others [2003] eKLR** sought to define a prima facie case in the following manner:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Court further opined that the standard for proving a prima facie case is higher than that associated with an arguable case and that an applicant must show an infringement of a right and the probability of success of his or her case upon trial.

13. Without examining the merits of the case, I have noted that the publication in question touches on speculations of a fraud scheme linked to the Tatu City Project and the applicant's likely involvement in the same.

14. It is also noted the applicant's position is that the words in the publication are not only untrue but are malicious in themselves, and that no apology has been offered by the respondents.

15. Whereas it is apparent that the respondents have raised a variety of defences to the claim, it is too early to consider the evidence attached to the defences. As it stands, I am satisfied that the applicant has shown that he has a prima facie case within the meaning given in **Mrao Ltd (supra)**.

16. In respect to the second principle, it was the applicant's submission that given his reputation as a renowned and respected businessman both locally and internationally, it would be a matter of necessity for the respondents to be restrained from making any further publications of a nature similar to the defamatory publication in question.

17. In so submitting, the applicant drew this court's attention to **Micah Cheserem (supra)** where the High Court held that the status of an applicant and the nature of the allegations already made against him or her are key in determining whether irreparable damage will be suffered.

18. The respondents on their part contended that members of the public are entitled to the information published as a matter of public interest and that the interlocutory injunction being sought by the applicant stands to threaten their constitutional freedoms of speech and the media.

19. On the one hand, this court is alive to the provisions of **Article 33 and 34** of the **Constitution, 2010** on freedom of expression and freedom of the media, respectively. On the other hand, this court is also alive to the fact that a person's reputation is also as significant and as soon as the reputation of a party has suffered injury, no amount of recompense can be said to constitute adequate compensation. The High Court in **Brigadier Arthur Ndonj Owuor v The Standard Limited [2011] eKLR** held *inter alia*:

“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. In the instant application, it is averred the publication touches on allegations of fraud in respect to a huge investment project. I am satisfied that the continued publications of a similar kind are likely to further injure the applicant's reputation, thereby causing him irreparable damage.

21. Further, it is worth mentioning that the respondents' rights and freedoms under **Articles 33 and 34** (*supra*) do not constitute absolute rights.

22. Having determined so, I am persuaded that the balance of convenience tilts in favour of the applicant.

23. In the end, the Motion is allowed in terms of order (iv). Costs shall abide the outcome of the suit.

Dated, Signed and Delivered at Nairobi this 20th day of December, 2019.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1st Defendants/Respondents

..... for the 2nd Defendants/Respondents