REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 49 OF 2018

LONDON DISTILLERS (K) LIMITED.....APPLICANT

VERSUS

EDERMANN PROPERTY LIMITED.....1ST DEFENDANT

ZEYUN YANG.....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 9th March 2018, the plaintiff/applicant sought a total of six prayers but three of them are already spent. The prayers pending this court's determination are prayers 3, 4 and 6 in which the applicant seeks orders of temporary injunction to restrain the respondents either by themselves, their servants, agents, employees or any other person from publishing, republishing or causing publication of defamatory material against the applicant's distillery by way of letters, print and social media accounts or in any other manner whatsoever and to compel the respondents to give a full, unreserved and unconditional apology as approved by the applicant which should be published in the same prominent manner as the alleged defamatory letters and social media accounts were published. The applicant also prays for costs of the application.

2. The application is supported by the grounds stated on its face and the depositions in the affidavits sworn by *Mohan Galot* on 9th March 2018 and 5th April 2018 and the annextures thereto.

3. The application is opposed through the replying and further affidavits sworn by *Thomas Isaya Miya* on 19th March and 4th May 2018 respectively and the replying affidavit sworn by *Charles Wambugu* on 20th March 2018.

4. The application was prosecuted by way of written submissions which were highlighted before me on 25th June 2018. Learned counsel *Mr. Thangei* appeared for the applicant while *Mr. Gitonga* represented the respondents.

5. In the plaint dated 9th March 2018, the affidavits sworn in support of the motion and the submissions made on its behalf, the applicant in the main contends that it is a manufacturer and distributor of a wide range of alcoholic beverages; that it has since 1982 established household brands in Kenya, the East African Region and beyond and has earned great respect among its consumers, business partners and competitors locally and globally; that on 22nd January 2018 and 5th February 2018, the respondents maliciously and recklessly published false and defamatory information concerning the applicant through letters copied to twenty two persons and entities among them three media houses alleging that the applicant's distillery is and has been polluting the environment; that the respondents have continued to republish the alleged defamatory material through an unknown blogger on twitter social media captioned

#London Distillers Pollution; that the applicant's business and products are very sensitive to bad publicity and unless restrained by orders of injunction, the respondent will actualize its threat of publishing further defamatory articles that will tarnish the name and reputation of the applicant irreparably.

6. Relying on the guiding principles for the grant of interlocutory injunctions as set out in the celebrated case of ***Giella V Cassman Brown & Company Limited [1973] E.A. 358*** as applied in the case of ***Mrao Limited V First American Bank of Kenya Limited & 2 Others, (2003) KLR***, *Mr. Thangei* urged this court to find that the applicant was deserving of the orders sought as in his view, it had established a *prima facie* case against the respondents having demonstrated that the offending letters were authored and published by the respondents; that the contents of the letters were false, reckless and defamatory of the applicant and that the defence of justification was not available to the respondents. Counsel implored the court to find merit in the application and allow it as prayed.

7. *Mr. Gitonga* in his submissions on behalf of the respondents reiterated the averments in the replying affidavits and denied the applicant's allegations that the letters in question were false, malicious and defamatory of the applicant. He maintained the respondents position that the two letters amounted to a genuine complaint against the applicant to the National Environment and Management Authority (NEMA) regarding pollution of the environment; that NEMA was the statutory body established to investigate such complaints; that the complaint was *bonafide* and was a true representation of facts on matters of public interest and that the defences of justification, fair comment and privilege were available to the respondents in the circumstances of this case. Counsel also submitted that publication to the twenty two persons and entities to which the letters were copied was denied and no evidence had been tendered to demonstrate that the letters were actually delivered to the said persons. It was the respondent's case that the application lacked merit and amounted to an abuse of the court process and ought to be dismissed with costs.

8. Having carefully considered the application, the affidavits on record, the rival written and oral submissions made on behalf of the parties and all the authorities cited, I find that the only issue which arises for my determination is whether the applicant has demonstrated through the material placed before the court sufficient basis to justify the grant of the orders sought.

9. The parameters within which a temporary injunction should issue in defamation cases have been discussed in several authorities. The golden thread that runs through all those authorities including those cited by the parties in this case is that though the general principles for grant of temporary injunctions as enunciated in the celebrated case of ***Giella V Cassman Brown*** ***(supra)*** applies, in cases for defamation, such orders should only be granted in the clearest of cases.

10. The main principles which should guide the court in exercising its discretion in such cases were articulated in the case of ***Micah Cheserem V Immediate Media Services (2002) 1EA 371*** where the court held as follows:

> ***"Applications 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 V Cassman Brown & Company Limited (1973) EA. 258 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. 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. 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."***

11. In ***Gilgil Hills Academy Limited V The Standard Limited [2009] eKLR*** *Maraga J (as he then was)* while discussing the circumstances that would warrant the granting of an interlocutory injunction in

defamation cases also addressed the question of the effect the raising of the defences of justification and fair comment would have on applications such as the present one. He held as follows:

> ***"To justify the granting of an injunction in defamation cases at interlocutory stage therefore, the court must have prima facie evidence to come to a decision that the words complained of are untrue. See the case of Bonnard V Perryman, [1891-4] All ER 970. If, on the material placed before the court at the interlocutory stage, it entertains any doubt on the efficacy of that defence, then that should be one of the factors to be considered whether or not an injunction should be granted. The other factors are, as I have pointed out, whether or not the plaintiff will adequately be compensated by an award of damages and whether the defendant will be able to pay the damages likely to be awarded if the plaintiff succeeds."***

12. The aforesaid principles are reiterated in ***Gatley on Libel and Slander 12th Edition, Sweet and Maxwell*** at paragraph 25.2 where the learned authors state as follows:

> ***"The jurisdiction to grant interim injunctions to restrain publication of defamatory statements is of a delicate nature which ought only to be exercised in the clearest cases. … Thus the Court will only grant an interim injunction where:***
>
> ***a. the statement is unarguably defamatory;***
>
> ***b. there are no grounds for concluding the statement may be true;***
>
> ***c. there is no other defence which might succeed;***
>
> ***d. there is evidence of an intention to repeat or publish the defamatory statement."***

See also the case of ***Performance Products Limited & another v Hassan Wario Arero & 7 others [2017] eKLR.***

13. Lastly in ***Harakas & others V Baltic Mercantile & Shipping Exchange Limited and Another, (1982) 2 All ER 701*** *Lord Denning* held that where there was a defence of justification or qualified privilege in a libel case, an injunction restraining further publication should not issue unless the applicant demonstrated that the defendant dishonestly and maliciously proposed to publish information which he knew to be false.

14. Guided by the above principles, I will now proceed to consider whether the applicant has met the threshold for grant of a temporary injunction on the terms sought in the application.

15. The applicant has maintained that it has established a *prima facie* case to warrant the grant of an order of temporary injunction as the respondents had admitted publication of the offending letters to NEMA and twenty two other persons and entities and that what was contained in the publication was false and malicious; that the published information was defamatory of the applicant and if not stopped by injunction, the respondents were likely to republish similar information.

16. Though the respondents have admitted having published the two letters to NEMA, they have asserted that though the letters were copied to other persons and entities, the letters were actually not delivered to those persons. The respondents have therefore denied publication of the said letters to any other person or entity apart from NEMA. Publication is a question of fact and can only be proved by evidence in the trial of the main suit. I cannot therefore make any finding on the contested aspects on the issue of publication at this interlocutory stage.

17. I have carefully examined the contents of the two letters which form the basis of the applicant's complaints. In my view, on the face of it, the two letters constitute a complaint to NEMA about environmental pollution by the applicant. The letters implore NEMA to investigate the matter and direct the applicant to adhere to measures regarding air quality and the safe management of effluent from its

distillery.

18. It is instructive to note that the two letters do not make any reference to the quality and safety of the applicant's products. Given that the material placed before the court only bears evidence of publication of the letters to NEMA and given that NEMA is a statutory body established for the purpose of receiving and investigating complaints of alleged environmental pollution, it is difficult to see at this stage how such publication would injure the applicant's reputation in the eyes of its consumers, business partners and competitors.

19. The applicant's claim that the respondents have caused subsequent publication of the alleged defamatory letters in the local dailies and in the social media has not been substantiated by any evidence to that effect since the applicant has not availed any evidence to prove that the writers of the newspaper articles and the bloggers in the annextures exhibited on pages 189-194 of the supporting affidavit were under the control or direction of the respondents. In other words, the applicant has not proved that the writers of those articles were as a matter of fact the respondents' agents.

The applicant has also not proved its allegation that the respondents had threatened to republish the alleged defamatory information. In fact, *Mr. Gitonga* in his submissions denied that the respondents had any intention of publishing any defamatory material concerning the applicant in future.

20. Though the respondents have not filed a defence in this matter which is understandable considering that the application was filed under a certificate of urgency contemporaneously with the plaint, it is clear from the replying affidavit and submissions filed on their behalf that the respondents intend to raise the defences of justification, qualified privilege or fair comment.

These defences if proved, are absolute defences to actions for defamation. From the letters addressed to the applicant by NEMA dated 6th February 2017 and 8th February 2018 which are annexed to the respondents' replying affidavit sworn on 19th March 2018 it can safely be inferred that the respondents' claim that the complaints in the two letters were based on true facts and were made in good faith may be true.

21. In view of all the foregoing and on the material placed before me, I am not satisfied that the applicant has met the threshold of proof required to establish a *prima facie* case to the standard required in defamation cases to justify the grant of an order of interim injunction as prayed in the application.

22. With regard to prayer 4, the applicant sought an order requiring the respondents to publish a full and unconditional apology in the same way it allegedly published the defamatory information pending the hearing and determination of the suit. My take is that it would be inappropriate and unjust to issue such an interim order as doing so would be tantamount to determining the issues raised in the main suit at an interlocutory stage.

23. In the result, I find that the application dated 9th March 2018 lacks merit and it is hereby dismissed with costs to the respondents.

It is so ordered.

DATED, DELIVERED and **SIGNED** at **NAIROBI** this 27th day of September, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Chacha holding brief for Mr. Thangei for the applicant

Mr. Litoro for the defendants

Mr. Kibet: Court Assistant