REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.112 OF 2018

WHISPERING PALMS ESTATE.....1ST PLAINTIFF

AFRISON EXPORT IMPORT LIMITED.....2ND PLAINTIFF

HUELANDS LIMITED.....3RD PLAINTIFF

VERSUS

STANDARD GROUP LTD. & ANOTHER.....1ST DEFENDANT

MOSES NYAMORI.....2ND DEFENDANT

RULING

What is before the court for determination is the Notice of Motion dated the 28th day of May, 2018, seeking a number of prayers but the main ones being that;

> (3) pending the hearing and determination of the suit herein this Honourable Court be pleased to issue a permanent injunction restraining the Defendants jointly and/or severally and/or their sister companies/media outlets namely **KENYA TELEVISION NETWORK (KTN), RADIO MAISHA, THE NAIROBIAN (A WEEKLY TABLOID), STANDARD DIGITAL** (which is the on line platform of the Standard Newspaper), their agents and/or servants and/or employees and/or business associates from publishing and broadcasting the defamatory words/matters/posts/publications/ utterances and statements published in the Standard Newspapers of **4TH APRIL 2018, 11TH APRIL, 2018** and **13TH APRIL 2018**
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> (5) pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue a Permanent mandatory injunction and/or order compelling the Defendants jointly and/or severally and/or their sister companies/media outlets namely **KENYA TELEVISION NETWORK (KTN), RADIO MAISHA, THE NAIROBIAN (A WEEKLY TABLOID), STANDARD DIGITAL** (which is the on line platform of Standard Newspaper), their agents and/or servants and/or employees and/or business associates to pull down/remove from the internet (which, *interalia*, includes Google, You-Rube, Twitter, Whatsapp, Facebook etc) the defamatory words/matters/posts/publications/utterances and statements which were published in the Standard Newspaper of **4TH APRIL 2018, 11TH APRIL 2018 and 13TH APRIL, 2018.**
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> (6) the costs of this Application be provided for.

The application which is brought under Order 40 Rules 1,2,3 and 9 of the Civil Procedure Rules and Sections 1, 1A, 1B and 3A of the Civil Procedure Act is premised on the grounds set out on the body of the same and is supported by the affidavit of Francis Mburu Mwangi sworn on the 28th day of May, 2018.

The grounds in support of the application are that, the defendants jointly and severally, in the standard newspapers of 4th April 2018, 11th April, 2018 and 13th April 2018 wrote and/or printed statements and utterances which were false and which defamed the plaintiffs; that they have failed to apologize and withdraw the said libelous/defamatory words and utterances and the plaintiffs suffer and continue to suffer loss, damages and prejudice, that the plaintiffs who are renowned local and international business entities their businesses are suffering immense and irreparable damages and loss as a result of the publication of the said words/statements and utterances, it is pointless and not in the interest of justice and fair play to retain the publication of the said defamatory words/broadcasts pending the hearing and determination of the suit.

In the supporting affidavit, it is deponed that the 1st and 2nd plaintiffs own the property in issue i.e. land reference number 7879/4. That the defendants jointly and severally in the standard newspaper of the 4th day of April, 2018 posted, published, wrote, printed and/or caused to be

published the following articles with some matters that were defamatory of the plaintiffs

"Mps summon interior CS on Sh.3.3b land deal.

"Sh.1.5 billion since has been wired to whispering palms estate limited.

NLC paid dealer billions for state land mps told

"managers of two schools tell the house team the land was public property when it was given out.

"schools say they were kept out of negotiations.

HOW LAND AGENCY "DUPED" KENYANS IN SHS.3 BILLION DEAL"

"Swazuri's team has already paid Kshs.1.5billion to reclaim Land whose title has not been produced.

The plaintiffs aver that the said words in their natural and ordinary meaning or by Innuendo were intended and understood by right thinking members of the public or readers to mean that the plaintiffs did not own the land mentioned in the article, that they are crooks, that they obtained the Kshs.1.5 billion fraudulently among others.

The plaintiffs contend that the said Articles were published falsely, maliciously, recklessly and without due regard to the character, reputation, business and social image. That, the defendants have been grossly misreporting the proceedings in parliament to create spicy/juicy articles/stories so to increase the volume of their sales at the expense of the plaintiff's director's reputation.

The plaintiffs further avers that any dealing the plaintiffs had with the Government of Kenya/National Land Commission in relation to L.R. 7879/4 (part) have been very transparent and above board but the defendants did not bother to get the correct facts from them before publishing the defamatory Articles which was clear indication that they were driven by malice and that it is not in the interest of justice and fair play to retain the publications and the same should be pulled down/removed pending the hearing and determination of the suit.

The defendants opposed the application by way of a replying affidavit sworn by the 2nd defendant on the 25th July 2018. The 2nd defendant who is a journalist depones that he is the author of the impugned articles as published on 4th, 11th and 13th April, 2018 in the first defendant's newspaper.

The 2nd defendant avers that the publications are creative of matters of extreme public importance as they covered an ongoing land matter where cabinet secretaries, National Land Commission were summoned by members of parliament to explain the allegations that Kshs.1.5 billion was paid to the first plaintiff. He contended that Articles as published were neither malicious nor false as alleged as concerning the plaintiffs and that the publications were done relying on information he gathered regarding the plaintiffs' herein.

That the publications were made in good faith, fair comment and published without malice upon matters of considerable public interest as the same concerned the National Land Commission, a statutory body tasked with the mandate to administer issues regarding public land and therefore, the defendants are under a legal, social and moral duty to publish information to the public who have a right to receive it as the articles concerned public and amounts running into billions of tax payers money. That the Articles contained words consisting of facts obtained from proceedings in parliament which was headed by the Hon. Dr. Rachael Nyamai and 18 other members of parliament.

He further deponed that the proceedings were later consolidated and a parliamentary report was published on 5th June 2018 which currently mirrors the contents of the publication that he made on the aforesaid dates. That the publication was priviledged since it was an accurate reporting of the parliamentary proceedings and that it would be a breach of duty if the 1st defendant failed to inform the members of the public about the progress of the matter.

The application was disposed off by way of written submissions which this court has duly considered together with the material filed herein.

The plaintiffs have sought interlocutory and mandatory injunctions in a defamation matter. The principles of granting such inunctions have been discussed extensively by various courts but one thing that the courts are in agreement on is that injunctions in defamation cases are granted only in the clearest of cases. In the leading case of **Micah Cheserem Vs. Immediate Media Services (2002) 1 EA 371** the court held thus:

"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. 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 defendants".

The same principles were restated in the case of **Brigadier Arthur Owour Vs. The Standard Limited Nairobi, HCCC No. 511/2010** where the court restated the principles as stated in the case of **Cheserem Vs. Intermediate Services** as follows;

> ***"This is an application for an interlocutory injunction pending the hearing and determination of the suit in a defamation case. The parameters for consideration by the court in an ordinary application for interlocutory injunction orders were considered by the Court of Appeal for East Africa in the now famous case of Giella Vs. Cassman Brown & Co. Ltd (1973) E.A 358. The requirements are that an applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience. In defamation cases, such as the present one, the court of Appeal in the case of Cheserem Vs. intermediate media services (2000) 2EA 371 applied the principles in Giella Vs. Cassman Brown (Supra). The court went further to state that the requirements in the Giella Vs. Cassman Brown (Supra) have to be considered with the greatest caution. An interlocutory injunction in defamation cases is granted only in the clearest of cases".***

In applying those principles in our case, one needs to ask whether the applicants have established a prima facie case with a probability of success. I have looked at the Articles complained of, as I am obliged to do. I have also perused the parliamentary committee report annexed to the 2nd Defendant's replying affidavit titled:

> ***"Report on inquiry into alleged irregularities in the compensation for part of L.R. Number 7879/4 to M/s Afrison Import Export Limited and HueLands Ltd by the National Land Commission on behalf of the Ministry of Education for Acquisition of land for Ruaraka High School and Drive Inn Primary School for June 2018.***

As per the said report and the committee's findings, the following are some of the highlights;

> 1. That the committee recommended that the director of criminal investigation should investigate possible collusion by Afrison Import Export Limited and Huelands with National Land Commission, National Treasury and the Ministry of Education including failure to sub-divide the land and protect government interests in the acquisition of various portions of L.R. No. 7879/4 with an intention to fleece and swindle public funds.
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> 2. The National Treasury, the Ethics and Anti-Corruption Commission should take responsibility for the loss of public funds amounting to Kshs.1,500,000,000/-.
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> 3. The schools were never involved or informed of the inquiry proceedings.

The defendants in their replying affidavit have pleaded the defence of fair comment on a matter of public interest and that of justification. The court appreciates that the defendants have not yet filed their defence but to the extent that they have deponed the above fact in their replying affidavit, the court can rightly rely on the contents of the same. In **Carter-RVCK on libel and slander 5th Edition at page 94**, the writer had this to say about the defence of justification;

> ***"In order to succeed upon a plea of justification, the onus lies upon the defendant to prove that the whole of the defamatory matter complained of that is to say, the words themselves and any reasonable inference to be drawn from them are substantially true. On the other hand, for the defence to be successful, it is not necessary that every "t" should be crossed and every "I" dotted, it is sufficient if the substance of the libelous statement is justified"***

> **The same position is advanced in Gatley on Libel & Slander 10th edition**

> ***"….some leeway for exaggeration and error is given by the defence of fair comment and qualified priviledge, however, for the purposes of justification, it is the defendant to prove that; The main charge or the gist of the libel is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable……."***

In view of the aforegoing, I concur with the defendants that the published words were substantially true and in the circumstances they are not prima facie defamatory. The issue of whether there was malice or not can only be determined after taking evidence during the full hearing of the matter. As I observed in the case of **Hon. Dr. Evans Kidero Vs. John Kamau & Another (Civil Case No.3/2017)** the defendants having pleaded the defence of justification and fair comment, the court should be careful in deciding whether to grant an interlocutory injunction or not but in view of the contents of the parliamentary committee report exhibited by the defendants, I find that the plaintiffs have not established a *prima facie* case with a probability of success.

In the end, the application dated 28th May 2018 is hereby dismissed with costs to the defendants.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 25th day of October, 2018

……

L. NJUGUNA

JUDGE

In the presence of:-

.....For the Plaintiff

.....For the Defendant