



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 113 OF 2018

WHISPERING PALMS ESTATE LTD.....1ST PLAINTIFF

AFRISON EXPORT IMPORT LTD.....2ND PLAINTIFF

HUELANDS LIMITED.....3RD PLAINTIFF

FRANCIS MBURU MUNGAI.....4TH PLAINTIFF

VERSUS

CYPRIAN NYAKUNDI.....1ST RESPONDENT

TWITTER.....2ND RESPONDENT

GOOGLE.....3RD RESPONDENT

YOUTUBE.....4TH RESPONDENT

FACEBOOK.....5TH RESPONDENT

RULING

1. The Notice of Motion dated 28th May, 2018 was taken out by the Plaintiffs/Applicants in which they sought the following orders inter alia:

i. That this Honourable Court be pleased to certify this Application as urgent and that the same be heard ex-parte in the first instance due to its nature and urgency and thereafter the same be heard inter-partes as the court deems fit – spent

ii. That pending the inter-partes hearing and determination of this Application this Honourable Court be pleased to issue a Temporary Injunction restraining the Defendant/Respondents jointly and/or severally, their agents and/or servants and/or employees and/or their business Associates and/or their followers in Twitter and other online social platforms from tweeting/posting/publishing/ broadcasting and uttering the defamatory tweets/posts/ words/matters/publications/utterances/statements/the personal statement of MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO DIHAY which were published on the 1st Defendant's/Respondent's twitter handle account on 30TH APRIL, 2018; 2ND MAY, 2018; 4TH MAY, 2018; 7TH MAY, 2018; 8TH MAY, 2018 and 10TH MAY, 2018.

iii. That pending the hearing and determination of the suit herein this Honourable Court be pleased to issue a Permanent Injunction restraining the Defendants/Respondents jointly and/or severally, their agents and/or servants and/or employees and/or their business associates and/or their followers in Twitter and other online social platforms from tweeting/posting/publishing and broadcasting the defamatory tweets/posts/words/matters/publications/utterances and statements/the personal statement of MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO DIHAY which were published on the 1st Defendant's/Respondent's Twitter handle account on 30TH APRIL, 2018; 2ND MAY, 2018; 4TH MAY, 2018; 7TH MAY, 2018; 8TH MAY, 2018 and 10TH MAY, 2018.

iv. That pending the inter-partes hearing and determination of the Application herein this Honourable Court be pleased to issue a Temporary Mandatory Injunction and/or Order compelling the Defendants/Respondents jointly and severally, their agents and/or servants and/or employees and/or their business associates and/or their followers on Twitter and other online social platforms to pull down/remove from the internet (which, inter alia, included Google, YouTube, Twitter, WhatsApp, Facebook

etc.) the defamatory tweets/words/matters/posts/publications/utterances and statements/the personal statement of MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO which were published/posted on the 1st Defendant's/Respondent's Twitter handle account on 30TH APRIL, 2018; 2ND MAY, 2018; 4TH MAY, 2018; 7TH MAY, 2018; 8TH MAY, 2018 and 10TH MAY, 2018.

v. That pending the hearing and determination of the suit herein this Honourable Court be pleased to issue a Permanent Mandatory Injunction and/or compelling the Defendants/Respondents jointly and/or severally, their agents and/or servants and/or employees and/or business associates and/or their followers in Twitter and other online social platforms to pull down/remove from the internet (which, inter alia, include Google, YouTube, Twitter, WhatsApp, Facebook etc.) the defamatory words/matters/posts/publications/utterances and statements which were published/posted in his Twitter handle account on 30TH APRIL, 2018; 2ND MAY, 2018; 4TH MAY, 2018; 7TH MAY, 2018; 8TH MAY, 2018 and 10TH MAY, 2018.

vi. That pending the inter-partes hearing and determination of the Application and the suit herein this Honourable Court be pleased to order that the 1st Defendant/respondent be served with the Application herein/any court documents/pleadings/any Mention and Hearing dates and Court Orders through his Twitter Handle/Account and/or his email (CypriinNyakundi@gmail.com) and/or his WhatsApp (0710 280 973/ and/or through any Newspaper that has a wide circulation in Kenya – spent.

vii. That pending the inter-partes hearing and determination of the Application and the suit herein this Honourable Court be pleased to order that the 2nd, 3rd, 4th and 5th Defendant/Respondent be served with the Application herein/any court documents/any Mention and Hearing dates/pleadings and Court Orders through their website and/or through internet and/or through their Twitter accounts/Handles and/or Facebook account and/or through Youtube and/or through any Newspaper that has a wide circulation in Kenya.

viii. That this Honourable Court be pleased to order the 1st Defendant/Respondent (CYPRIAN NYAKUNDI) to personally appear in court during the inter-partes hearing of this Application for cross examination in respect of the defamatory tweets/words/matters/posts/publications/utterances and statements/ the personal statement of MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO which were published/posted on the 1st Defendant's/Respondent's Twitter handle account on 30TH APRIL, 2018; 2ND MAY, 2018; 4TH MAY, 2018; 7TH MAY, 2018; 8TH MAY, 2018 and 10TH MAY, 2018.

ix. That the Communications Commission of Kenya and/or the Communications Authority of Kenya and/or the Cyber Crime Unit of the Kenya Police and/or the Inspector General of Police be ordered to enforce any court orders issued during the prosecution of the Application herein and/or any other court orders issued during the prosecution of the suit herein.

x. That the costs of this Application be provided for.

2. The Motion is supported by the Affidavit of Francis Mburu Mungai dated 28th May, 2018 who swore the affidavit on behalf of his co-Plaintiffs/Applicants and the written submissions dated 22nd August, 2018. He stated that the 2nd and 3rd Plaintiffs owned property LR Number 7879/4. That on 30TH APRIL, 2018; 2ND MAY, 2018; 4TH MAY, 2018; 7TH MAY, 2018; 8TH MAY, 2018 and 10TH MAY, 2018, the 1st, 2nd, 3rd, 4th and 5th Defendants jointly and/or severally tweeted/posted/published/wrote/printed/broadcasted and /or caused to be posted/written/printed/ published and broadcasted tweets on the 1st Defendant's Twitter handle /account/tweets/posts/words containing words/posts/ matters /utterances/statements/the personal statement of MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO DIHAY on Twitter, Google, YouTube and Facebook which were libellous and defamatory to the Plaintiffs.

3. The defamatory tweets/posts/materials/utterances/ statements have been trending widely in social media and international media outlets exposing the Plaintiffs to immense losses, damages and prejudice. That the defamatory tweets/ posts/ materials/ utterances/ statements were intended and understood by right thinking members of the public and/or readers that the Plaintiffs had conspired with the National Land Commission officials to defraud the government of Kshs. 4.8 billion. That the said words were published falsely, maliciously, recklessly and without regard to the Plaintiffs 'character, reputation, business and social image. That the dealings with regard to LR Number 7879/4 were conducted with transparency but the 1st Defendant did not verify the correct facts before publishing the said defamatory tweets/words/statements/utterances. The Plaintiffs allege that MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO DIHAY is an extortionist and reproduced a WhatsApp message sent to Geoffrey Mutisya Mbili, an employee of the Plaintiffs, in which he gave the Plaintiffs one day to pay him Kshs. 82.1 million failure to which he would sabotage the acquisition process of LR Number 7879/4. The extortion attempt was reported to the police and that MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO DIHAY is being looked for by the police.

4. The Motion is opposed by the 1st Defendant vide his grounds of opposition dated 4th June, 2018. He stated that the acquisition of LR Number 7879/4 Ruaraka Land was under investigations by two Parliamentary Committees of the National Assembly and Senate therefore in the public domain. He averred that he was not the author of the personal statement of Meshack Onyango Dihay on the acquisition of LR Number 7879/4 which had been circulated and serialised vide electronic media and print worldwide and as such an injunction would fail. He stated that the Cabinet Secretary in Charge of the Ministry of Lands had stated on record before the Parliamentary Committee that the acquisition of LR Number 7879/4 Ruaraka Lands had been irregular.

5. It was agreed by consent that the Motion would be dispensed with by written submissions. The Plaintiffs/Applicants in their submissions argued that the ownership of the said land had been thoroughly investigated by Parliament, the Police, Government security agencies and the Attorney General. They sought for general and exemplary damages. They also sought for temporary, permanent and mandatory injunctions to restrain the Defendants' jointly and/or severally, their agents and/or servants and/or employees and/or their business associates and/or their followers on Twitter and other online social platforms from tweeting/posting/ publishing/broadcasting and uttering the defamatory tweets/posts/words/matters/publications/utterances/ and statements the personal statements of MESHACK ONYANGO DEHAY ALIAS

MESHACK ONYANGO DIHAY and they also sought for the said words to be pulled down/removed from inter alia, Google, YouTube, Twitter, WhatsApp and Facebook.

6. The Plaintiffs urged the court to grant them Prayers 3, 5, 9 and 10. In his submissions, the 1st Defendant argued that the Application had failed to establish the three principles for granting interlocutory injunction namely, establishing a prima facie case, irreparable injury and a balance of convenience. He urged court to dismiss the Application with costs to the Plaintiffs/Applicants. The 1st Defendant makes reference to various reports for instance, the National Assembly Departmental Committee on Lands which recommended investigation of the 2nd and 3rd Plaintiffs/Applicants by the Director of Criminal Investigation. He pleaded the defence of justification and/or fair comment on grounds of public interest.

7. I have considered the grounds stated on the face of the Motion and the facts deponed in the affidavits filed in support and against the Motion. The ingredients of defamation were restated down in the case of **JOHN EDWARD VS STANDARD LTD (UNCITED)** inter alia as follows:

"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:-

i. The statement must be defamatory.

ii. The statement must refer to the plaintiff.

iii. The statement must be published by the defendant.

iv. The statement must be false."

8. Having perused the documents attached to the Plaintiffs/Applicants affidavit, I find that the tweets/posts/words/matters/publications/utterances/and statements portrayed the plaintiffs in bad light in the eyes of the public. This is owing to the fact that the same were made in reference to the Plaintiffs/Applicants and they were tweeted/posted/published and broadcasted by the 1st Defendant using the platforms of the 2nd, 3rd, 4th and 5th Defendants/Respondents.

9. As to whether the tweets/posts/words/matters/ publications/utterances/and statements are false, is an issue yet to be determined at the trial. The matter pertaining LR 7879/4 Ruaraka Lands is still under investigations by various State agencies which are yet to conclude their findings and have the same published. The publications therefore cannot be justified at this stage. The tweets/posts/words/matters/publications/utterances/ pertaining the personal statements of MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO DIHAY cannot be authenticated as of now. The tweets/posts/words/matters/ publications/utterances/and statements seem to have been made with the intention of bringing disrepute to the Plaintiffs/Applicants before the veracity of the issues raised are fully determined.

10. Court has to now consider whether the relief sought for is merited in light of the aforesaid defamatory tweets/posts /words/matters/publications/utterances/and statements. The threshold for granting orders of injunctions in defamation cases was well articulated in the case of **CHESEREM VERSUS INTERMEDIATE MEDIA SERVICES (2000) 2EA 371**

11. From the foregoing, it has been established that the tweets/posts/words/matters/publications/utterances/and statements cannot be justified at this stage. Therefore the plaintiffs have a prima facie case.

12. This court has to now address the issues over the 2nd, 3rd, 4th and 5th Defendants given that they have been enjoined to this case by virtue of the fact that the 1st Defendant used their online platforms to publish/tweet/post and broadcast the personal statements of MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO DIHAY. It has to be appreciated that it is difficult to control over what happens on the social platforms and as such, there are no mechanisms to restrain the Defendants/Respondents, their agents and/or servants and/or employees and/or their business associates and/or their followers in Twitter and other online social platforms from tweeting/posting/publishing and from broadcasting the defamatory tweets/posts/words/matters/publications/ utterances and the personal statement of MESHACK ONYANGO DEHAY ALIAS MESHACK ONYANGO DIHAY which were published on the 1st Defendant's/Respondent's Twitter handle account on 30TH APRIL, 2018; 2ND MAY, 2018; 4TH MAY, 2018; 7TH MAY, 2018; 8TH MAY, 2018 and 10TH MAY, 2018. It is unfortunate as of now the social media platform lacks the requisite checks and balances to ensure that what is published/tweeted/posted and broadcasted on their online platforms is authenticated information.

13) In the end this court allows the motion and the appropriate orders to issue are as follows:

i. An order of temporary injunction pending the hearing of this suit is issued to restrain the 1st respondent from tweeting/posting, publishing and broadcasting the offensive tweets, posts, words, publications and utterances and the statements attributed to ne Meshack Onyango Dehay alias Meshack Onyango Dihay which were published on the 1st defendant's twitter handle on 30.4.2018 2.5.2018, 4.5.2018, 7.5.2018, 8.5.2018 and 10.5.2018.

ii. In the circumstances of this case a fair order on costs is direct which I hereby do that each party meets it s own cost.

Dated, Signed and Delivered in open court this 19th day of October, 2018.

J.K. SERGON

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendant