



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO.96 OF 2016

NAHASHON NGIGE NYAGAHPLAINTIFF

VERSUS

ABDULLAHI AHMEDNASIR MAALIM.....1ST DEFENDANT

CYPRIAN ADAMA NYAKUNDI.....2ND DEFENDANT

AL-NUR MEDIA AFRICA LIMITED.....3RD DEFENDANT

RULING

1. The application dated 1st April, 2016 seeks the following orders:

1. Spent

2. Spent

3. Pending the hearing of this suit, the 1st2nd and 3rd Defendants whether by themselves, agents, servants or otherwise howsoever be and are hereby restrained from further publishing or causing to be published in any way whatsoever, any news items, statements, articles, words, images, pictures, cartoons and caricatures on Internet, Newspapers, Facebook, TM TwitterTM, YouTubeTM and WhatsappTM or any medium whatsoever, linking or associating the Plaintiff with and/or imputing impropriety, corruption, bribery and gross misconduct or any similar or related words defamatory of the Plaintiff in respect to all pending civil and criminal matters relating to Tatu and Kofinaf.

4. Pending the hearing of this suit, the 1st2nd and 3rd Defendants whether by themselves, agents, servants or otherwise howsoever be and are hereby directed by an order of permanent mandatory injunction to remove from the 3rd Defendant's websites <http://nairobiawmonthly.com> and <http://nairobi.businessmonthly.com>, 1st 2nd and 3rd Defendant Facebook, TM TwitterTM, YouTubeTM and WhatsappTM, any publications of defamatory information concerning the Plaintiff, linking or associating the Plaintiff with and/or imputing impropriety, corruption, bribery and gross misconduct or any similar or related words defamatory of the Plaintiff in respect to all pending civil and criminal matters relating to Tatu and Kofinaf.

5. Pending the hearing of this suit, the 1st Defendant by himself, his associates, agents, employees, servants and or otherwise howsoever, be and is hereby restrained from using any confidential information imparted to him during his retention by the Plaintiff against the Plaintiff, in all pending civil and criminal matters relating to Tatu and Kofinaf.

6. The costs of this application be provided for.

2. The application is predicated on the grounds stated in the body of the application and is supported by the affidavit sworn by the Applicant, Nahashon Ngige Nyagah. The Applicant has described himself as a senior Kenyan National, an accomplished long serving public servant and businessman of high moral, ethical standing and reputation.

3. The 1st Respondent, Abdullahi Ahmednassir Maalim is described as an advocate of the High Court of Kenya, practicing in the name and style of Ahmednassir Abdukadir & Company Advocates.

4. The 3rd Respondent is described as a private limited liability company duly incorporated in the Republic of Kenya under the provisions of the Companies Act, Cap 486 of the Laws of Kenya and carrying on business as a newspaper publisher in Nairobi and elsewhere in the Republic aforesaid and the entire East Africa region.

5. It is stated that the 1st Respondent is the majority shareholder and a director of the 3rd Respondent. That the 1st Respondent is a senior counsel and commands a large audience in matters legal, administrative, political and social. That the 1st Respondent is an active participant in the social media through his Twitter handle, **@ahmednasirlaw**, with 150,500 followers as at the 30th day of March, 2016 and through his Facebook page, **Senior Counsel Ahmednassir** with 20,257 likes as at the said date.

6. The 2nd Respondent is described as a person who also operates an online newspaper **Kenyanlivefeed.com** operated under the parody name Robert Syundu. The 2nd Respondent is also stated to be the owner of parody handles **c-Nyakundih**, **c_nyakundih**, **C_NYAKUNDIH**, **armuanA**, **chiefmike_**, **nyakunditalks**, **Trendsetterske** and **Kenyathinker**. That the 2nd Respondent further commands a large audience on his Facebook account, **Cyprian Nyakundi** with 5,000 friends and a public page, **Cyprian Nyakundi** with 21,975 likes as at the 30th day of March, 2016. That the 1st Respondent's key follower on Twitter is the 2nd Respondent whilst the 2nd Respondent's key follower is the 1st Respondent. That the 2nd Respondent has in his associate of bloggers, **@muneneofficial**, **@kinyanBoy**, **@boldleaks**, **@LeonLidigu**, **@Ericc_Mwiti**, **@MuneneOfficial** and **@FredieMwangi**.

7. That the 1st Respondent was the publisher and lead writer in the Nairobi Law Monthly on its relaunch until recently, when the 3rd Respondent took over the publication of the Nairobi Law monthly and the Nairobi Business Monthly. That the Nairobi Law Monthly and the Nairobi Business Monthly have wide circulation in the print and electronic media through **http://nairobi lawmonthly.com**, twitter handle **@NLM_Magazine**, and a public page on Facebook, as **The Nairobi law Monthly** for the former, and **http://Nairobi businessmonthly.com**, twitter handle **@NBM_Magazine** and a public page in Face book, **Nairobi Business Monthly Magazine** for the latter.

8. It is stated by the Applicant that he is involved in several litigation pitting him and Vimal Kumar Bhinji Debar Shah (hereinafter Mr. Shah) as the Kenyan directors of Tatu City Limited (herein after Tatu City) and Kofinaf & Company Ltd (hereinafter Kofinaf) on one hand and Mr. Stephen Armstrong Jennings (hereinafter Mr. Jennings) amongst others as the directors of Tatu City and Kofinaf on the other hand. That in one of the suits, HCCC No. 46 of 2015, the Applicant consulted the 1st Respondent and instructed him to appear in the matter to lead one Mr. Nelson Havi Advocates (hereinafter Mr. Havi). That the 1st Respondent accepted the brief and requested for all the pleadings and documents in respect of the dispute. That the said pleadings and documents were provided to the 1st Respondent. That the Applicant also disclosed to the 1st Respondent substantial confidential information and material relating

to the suit and the entire dispute between the directors of Tatu City and Kofinaf including the details of the Applicant's advocates and potential future Advocates.

9. It is further averred that despite the 1st Respondent having accepted the brief at a fee of Ksh.20,000,000/= , the 1st Respondent became evasive and elusive and failed to collect the Ksh.20,000,000/= and failed to pick calls or meet with Mr. Havi but retained the confidential documents availed to him in respect of HCCC 46 of 2015. Mr. Havi was then instructed to proceed with HCCC No. 46 of 2015 on his own. That several orders were made in HCCC No. 46 of 2015 in respect of an application for injunction on 23rd February, 2015. The application for injunction was amended on 23rd February, 2015 and fixed for hearing interparties on 3rd March, 2015. That upon receiving the notice of the making of the orders of the 23rd February, 2015 the 1st Respondent contacted Mr. Havi and indicated that he was available to lead him but the Applicant and Mr. Shah instructed Mr. Havi to proceed without him as he had abandoned the earlier brief.

10. The Applicant's complaint is that the 1st Respondent has breached the fiduciary duty owned to him by taking instructions to act for the Applicant's adversaries in HCCC No. 46 of 2015 and all matters pitying the Applicant and his adversaries and continued to use the confidential information disclosed to him by the Applicant who he consulted and instructed him in the same suit. That the 1st Respondent continues to use the 3rd Respondent's magazines, Nairobi law monthly and Nairobi Business Monthly, several newspapers and television station as well as his and the 3rd Respondent's accounts on facebook and twitter to defame the Applicant and to advance the Applicant's adversaries causes in the press contrary to professional ethics and the law.

11. It is further stated that the 1st Respondent set up an elaborate smear campaign to intimidate Mr. Shah and the Applicant as well as the courts handling the matters of Tatu City and Kofinaf in a scheme to pressurize the judges to rule in Mr. Jennings favour or to abandon the matters in order for them to forum shop. That one of such schemes included the writing of a letter in the name of one Wilfred Gitonga accusing Mr. Shah and the Applicant of bribing and compromising the judge handling their case and having the said letter sent to the Chief Justice, Ethics and Anti-Corruption Commission, Director of Public Prosecutions, Law Society Commission on Administration of Justice and also procured the letter's fabrication in the Standard Newspaper and other print media and also on the 1st Respondent's twitter handle.

12. Further defamatory publications are said to be contained in an affidavit sworn by one Alex Kamuhia Kahu in HCCC 46 of 2015, a letter dated 17th September, 2015 addressed to the Director of Public Prosecutions and copied to the Cabinet Secretary Ministry of Interior and Co-ordination of National Government, the Inspector General of Police, The Independent Policing Oversight Authority and the Director of Criminal Investigations. That on 23rd September, 2015 the 1st Respondent procured the fabrication of a defamatory letter in the People Daily titled "**Lawyer accuses Director of Criminal Investigation of mishandling Tatu probe.**" and another defamatory letter in the Saturday Nation titled "**Muhoro accused of protecting Nyagah in Tatu City scandal**". That on 1st October, 2015 the 3rd Respondent published a cover story in the Nairobi law monthly titled "**The Elite effect, the Crimes case of the three and Tatu City Symbolizes Woes of the Foreign Direct Investment**" and another article of the same date in Nairobi Business monthly titled "**The Tatu City Melodrama.**" That between October 2015 and March, 2016 the 1st Respondent repeated these defamatory statements and procured the creation of a hashtag "**Arrest Nyagah**" which hashtag was widely used by the 1st and 2nd Respondents on twitter to call for the arrest of the Applicant on false allegations of being a criminal.

13. Other smear campaigns are said to have been undertaken by the 1st and 2nd Respondents on the **blog Boldleaks**; a special report in the Nairobi Law Monthly and its website titled "**Ndegwa Muhoro: Unblushing Director of Criminal impunity**"; a letter dated 7th March, 2016 addressed to the Director of Public Prosecutions amongst other Public Offices; republication of the letter dated 7th March, 2016 to the general public on K 24 news bulletin, in The People Daily and the Daily Nation. That on 21st March,

2016 the 3rd Respondent wrote and published on its website an article in the Nairobi law Monthly titled **Muhoro: DPP negligent, to blame for slow pace of investigations.**”

14. According to the Applicant, the aforesaid publications are false, malicious and injuries and defamatory to his character and reputation. The Applicant is apprehensive that unless the Respondents are restrained by the court they will continue to publish and cause to be published the said defamatory statements or similar words concerning the Applicant.

15. The application is opposed. The 1st and 3rd Respondent filed the grounds of oppositions dated 6th May, 2016 which state as follows:

1. That the grant of an interlocutory injunction in the terms sought by the Plaintiff would amount to an egregious violation/restriction of the 1st and 3rd Defendant freedom of expression as guaranteed by Article 33 of the Constitution.

2. That, the public interest in the matter concerning *iteralia* the Plaintiff as a public figure, Corruption and fraudulent dealings in land as issues of huge public interest which outweigh the private interest of the Plaintiff in this case.

3. That 1st and 3rd Defendants have substantive complete defences to the Plaintiff’s claim in the suit of truth, justification and fair comment and therefore no injunctive relief should be granted.

4. That the application and suit does not disclose a substantive cause of action against the 1st and 3rd Defendants and is obviously a malicious and ill-conceived campaign by the Plaintiff and his advocates against the 1st Defendant for his representation of the plaintiffs in HCCC No.46 of 2015.

5. That the application goes against the well-established rule against prior restraint as it invites the Court to become involved at the interlocutory stage in the analysis and the consideration of the merits of the claim and the likely results of the substantive trial and/or full hearing.

6. That the entire application does not demonstrate any reasonable apprehension or legitimate threat, to warrant the grant of mandatory or restraining injunctive orders.

7. That the application does not meet the threshold for grant of mandatory or restraining orders, is an abuse of the court process and should be dismissed with costs.

16. A replying affidavit has also been sworn by the 1st Respondent, Abdullahi Ahmednassir Maalim in opposition to the application. It is stated that the suit herein is an abuse of the process of the court and an attempt to restrain him from representing Tatu City and its associate companies in the suits pending before several courts. The descriptions of the Respondents as stated in the affidavit in support are denied. It is deponed that an investigation report by the National Police Service recommended that the Applicant be charged with the offence of conspiracy to defraud the owners of Purple Satan Properties Ltd of property valued at Ksh.4,800,000,000. The covering report of the investigation has been exhibited herein.

17. The 1st Respondent denied knowing the 2nd Respondent or having had any interactions with him to discuss the Applicant and stated that the fact that the 2nd Respondent follows him on twitter and facebook is irrelevant and cannot form a basis for any claims in law. That freedom of association is guaranteed under the constitution and that 2nd Respondent is free to exercise his constitutional rights.

18. It is denied that the Applicant instructed the 1st Respondent to represent him in HCCC 46/15; that the Applicant consulted him and instructed him to lead Mr. Havi in HCCC 46/15 or that he accepted any such

brief; that there exists a fiduciary duty between him and the Applicant not to disclose any information to third parties without his consent or use any information to the benefit of third parties and not to act against the Applicant or to the detriment of the Applicant in any pending or future cases pitying the Applicants against Mr. Jennings or in matters relating to Tatu City and Kofinaf. The 1st Respondent denied the breach of any fiduciary duty to the 1st Applicant by disclosing any confidential information to the benefit of Mr. Jennings.

19. According to the 1st Respondent, the truth of the matter is that the Applicant and Mr. Shah who are nominal shareholders in Tatu City and Kofinaf initiated HCCC 46 of 2015 seeking interim orders to restrain the Defendants therein from acting on a resolution by Mr. Jennings and other directors of Tatu City to appoint one P. M. Ngugi and F. Mosier as directors of Tatu City and revoking the appointment of the Applicant as the Chairman of the Board of directors of Tatu City. That the said suit was filed by Mr. Havi purportedly on the instructions of Mr. Shah and the Applicant herein without the knowledge of other directors. That in a meeting held on 16th September, 2016 by the directors of Tatu City it was confirmed that Mr. Havi had no instructions to represent the Plaintiffs in the said case and the firm of Ahmednasir Abdikadir & Co. Advocates was subsequently appointed. The said firm subsequently filed a Notice of charge of Advocates. That the Applicant and his advocates did not take the withdrawal of the instructions kindly and Mr. Havi started an all out war against the 1st Respondent on social media painting him as unprofessional, conniving power wielding advocate with far reaching tentacles in the judiciary, Law Society of Kenya and office of the Director of Public Prosecution and interferes with the independence of judges. According to the 1st Respondent it is the Applicant's advocates who approached him to talk to the judge handling HCCC 46/2015 with a view to persuading her to grant temporary relief and he informed them that he does not see judges with a view to influence their decision making.

20. The 1st Respondent denied having come up with a smear campaign against the Applicant and Mr. Shah or convincing Mr. Jennings that he would use his influence in the Judicial Service Commission and in the Government to secure Mr. Jennings cause. The 1st Respondent denied having met or knowing one Mr. Wilfred Gitonga who is alleged to have written a letter to the Chief Justice accusing a judge of having been compromised in the handling of HCCC 46 of 2015 or having a hand in the a application made therein for the judge to disqualify herself.

21. The 1st Respondent denied any link with the Standard Newspaper, The Weekly Citizen and the People Daily and wondered why the Applicant had not sued the said papers for defamation. It is further stated that the tweets by the 1st Respondent are comments on matters of public interest. That the letters written by the 1st Respondent were written on the instructions of that client and the contents therein are true and that the 1st Respondent will rely on the defence of justification.

22. The 1st Respondent denied that together with the 2nd and 3rd Respondents they tweeted and retweeted the alleged malicious and defamatory publications and stated that his attendance of an advertised public address by Mr. Jennings on 17th September, 2015 at Louis Leakey Auditorium which was published on youtube as # **Tatu True Talk – part 1** was not defamatory of the Applicant as that was a public forum.

23. The 1st Respondent further deponed that the letters complained of were not defamatory but highlighted the disregard of the law in the manner into the complaints raised by his client were being investigated. It is stated that the contents of the letter dated 15th March, 2016 confirms the contents of the letter dated 17th September 2015 and are based on true facts and therefore justified. According to the 1st Respondent, it was the Applicant's advocates who sought to intimidate the Director of Public Prosecutions by filing a petition with the Public Service Commission seeking the removal of the Director of Public Prosecutions. The 1st Respondent further asserted that the publications highlighting the woes of foreign investors and Tatu City reiterated the Director Criminal investigation's report dated 24th August, 2015 in which the Applicant and his associates were found criminally liable for the offence of conspiracy to defraud. That the said publications were truthful, justified and fair comments. That the affidavit by Alex Kahu is a pleading in a suit and is also privileged.

24. The 1st Respondent further stated that it was his duty to advance his client's case within the parameters of the law and that he was free to exercise his right of expression as guaranteed under Article 33 of the Constitution.

25. The 2nd Respondent, Cyprian Adama Nyakundi in his replying affidavit denied the claims by the Applicant. He denied operating any online Newspaper operated under a parody account. He denied having tweeted and retweeted the alleged defamatory publications or having procured the creation of a hashtag “# Arrest Nyagah” which called for the arrest of the Applicant on false allegations that he was a criminal.

26. The 2nd Respondent further deponed that the court handling any pending civil and criminal matters relating to Tatu City and Kofinaf are seized of jurisdiction to determine whether there should be reporting of the proceedings therein or not. That the reports of judicial proceedings are privileged. It is further averred that the exact words communicated by the 2nd Respondent that are the subject of the Applicant's complaints have not been set out. The 2nd Respondent further stated that his freedom of expression is guaranteed under Article 33 of the Constitution and that any person engaged in media and broadcasting is protected by article 34 of the Constitution.

27. During the hearing of the application, the parties opted to file written submissions. The highlights of the said submissions were subsequently made before me. I have considered the said submissions, the highlights and the authorities cited.

28. The general principles that govern the grant of interlocutory injunction in defamation cases were stated in the case of **Cheserem v Immediate Media Services (2000) 1EA 371 (CCK)** where it was held that:-

“Applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases because they bring out a conflict between private interest and public interest, though the conditions applicable in granting interlocutory injunctions set out in *Giella v Cassman Brown and Co. Ltd (1973) EA 258* generally apply, in defamatory cases those conditions operate in special circumstances. Over and above the test set out in *Giella's case*, in defamation cases 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 the verdict to the contrary would be set aside as perverse.”

29. In the case of **HCCC No. 544 of 2009 Uhuru Muigai Kenyatta v The Standard Limited**, the court stated, *inter alia*,

“The court has jurisdiction to grant interlocutory injunction in defamation cases but only in the clearest of the cases. The jurisdiction has been said to be of a delicate nature and will only be exercised with great caution. See *Gatley on the Law of Libel and Slander 8th Edition* paragraph 1571.”

30. The freedom of expression of the media as guaranteed under Article 33 of the Constitution of Kenya in the bill of rights is not absolute. There are limitations set out in Article 34 of the Constitution. The Constitution balances the rights of freedom of expression with the rights and reputation of others. I am persuaded by the case of **Cheserem (Supra)** where it was stated;

“Before I conclude I will try to correct three things. First, the right of a journalist to freedom of speech and expression as guaranteed by the Constitution of Kenya is not absolute and it is not correct for the Respondents to say that, that right cannot be taken from the press. I have already discussed the limitation of the freedom of expression elsewhere. Secondly, it is not sufficient and I think it is dangerous and not good for a journalist to disseminate information based solely on good faith. He should base the information on factual truth if he expects the

law to protect him. Thirdly, it is not correct to say as the Respondents say that; “Where public interest conflicts with private interest, the public interest shall prevail.” This is public interest (versus) private interest in defamation actions and the end result is not always the same. The result can be in favour of the public interest or in favour of the private interest. If there is a substantial risk of grave injustice and the private interest in preventing the publication the Applicant seeks to prevent outweighs the public interest, then the court will declare that private interest prevails over public interest.”

31. The considerations for the grant of an injunction in libel cases as set out in *Gatley on libel* 12th Edition are:

- (a) The statement is unarguable defamatory.
- (b) There are no grounds for concluding that the statement is true.
- (c) There is no defence which might succeed.
- (d) There is evidence of an intention to repeat or publish the defamatory statement.

32. Turning to the case at hand, the publications complained of reflect the Applicant as having engaged in criminal conduct, fraud, bribery and having interfered with criminal investigations and court cases. These statements if they have no truth in them are clearly defamatory. The Respondents have pleaded fair comment and justification in the affidavit evidence before the court and the amended defence filed by the 2nd Respondent. The 1st Respondent in his replying affidavit has exhibited an investigation report by the National Police Service which report recommended that the Applicant be charged with the offence of conspiracy to defraud. Whether the publications in question are true statements or not it is difficult for the court to tell at this stage of the case. There is no reason for this court to prefer the affidavit evidence of any one side.

33. The Applicant’s affidavit evidence talks about the 1st Respondent having procured the writing of the letters complained of, having procured the publication of defamatory letters to *The Standard Newspapers*, *Weekly Citizen*, *The Daily Nation*, *The People Daily*, the *Citizen* etc and to various public offices, that the 1st Respondent procured the creation of tweets and retweets complained of and the creation of the hashtags complained of. While the term procured has been used several times in the Applicant’s affidavit in support of the application, there are no details of how the 1st Respondent procured the said publications.

34. On whether the 1st Respondent owes the Applicant any fiduciary duty not to disclose any confidential information to the detriment of the Applicant and to the benefit of other third parties, whether the 1st Respondent was instructed by the Applicant or not also boils down to the Applicant’s word vis-a-viz the 1st Respondent’s word. The confidential information and documents said to have been given to the 1st Respondent have not been disclosed. The pleadings and names of advocates in the ongoing cases are matters that are in the public domain.

35. The application herein seeks injunctive orders in respect of “all pending civil and criminal matters relating to Tatu City and Kofinaf”. The prayers are wide, nebulous and far ranging. Such orders ought to be sought within the said civil and criminal cases. It is within the said proceedings that an order can be made whether there ought to be any reporting or not.

36. The freedom of expression as guaranteed under Article 33 and Article 34 of the Constitution is not absolute. The Constitution enjoins every person to respect the rights and reputation of others. Even the freedom of the media is not a ticket to vilify others through libelous publications. There is no public interest in false publications. Whether the Respondents are likely to repeat any of the publications the subject of the complaint herein will be at their own peril as to consequences if the same are untrue.

37. *Prima facie*, the application fails to meet the threshold for the grant the orders sought. Consequently, I dismiss the application with costs.

Date, signed and delivered at Nairobi this 27th day of April, 2017

B. THURANIRA JADEN

JUDGE