



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 184 OF 2016

KENYA FLUORSPAR COMPANY LTD.....PLAINTIFF/APPLICANT

- V E R S U S -

MICAH KIGEN.....1ST DEFENDANT/RESPONDENT

RADIO AFRICA GROUP.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant namely, Kenya Fluorspar Co. Ltd, took out the motion dated 15.7.2016 in which it sought for *inter alia*:

1. *spent*

2. *spent*

3. *spent*

4. *A temporary injunction restraining the defendants/ respondents whether by themselves, their employees, servants and/or agents or any such related persons from publishing, causing to be published, republishing, and/or disseminating, distributing or otherwise reproducing or in any way circulating, whether partially or in its totality, the article titled, “Kenya Fluorspar Company Announced Closure is a Blackmail: Micah Kigen” or any other scandalous, libellous or defamatory statement/article regarding the applicant or its business operations on the North Rift News website, on their Facebook page or on any other website and/or on any media platform including print media and/or social media, in any interviews, forum or any other platform pending the hearing and determination of this suit.*

5. *The plaintiff/applicant be at liberty to apply such further or other orders and/or directions as this honourable court may deem fit and just to grant.*

6. *The costs of this application be provided for.*

2. The motion is supported by two affidavits of Nico Spangenberg.

When served with the motion Micah Kigen and Radio Africa Group the 1st and 2nd respondents respectively filed replying affidavits to oppose the motion. When the motion came up for interpartes

hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the rival written submissions and the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. While the motion was pending hearing, the plaintiff filed a notice dated 7.12.2016 to withdraw the suit against Radio Africa Group, the 2nd defendant herein. This ruling therefore relates to the application solely directed at the 1st respondent. Basically the plaintiff is seeking for a temporary order of injunction to restrain the 1st defendant from circulating the article titled “**Kenya Flourspar Company Announced Closeup is a blackmail**” or any other scandalous, libellous or defamatory statement of the plaintiff in various modes of communication. The principles to be considered before granting an order of injunction were well stated in the celebrated case of **Giella =vs= Cassman Brown & Co. Ltd (1973) E.A 53**

First, an applicant must show a prima facie case with a probability of success.

Secondly, an applicant must also show that unless the order is given he would suffer irreparable loss.

Thirdly, where the court is in doubt the application will be decided on the balance of convenience.

4. It is the submission of the plaintiff that it has established a prima facie case with a probability of success. It is pointed out that the 1st respondent had intentionally made allegations attacking the plaintiff’s integrity on 18.02.2016 and 12.3.2016 through the publication in the Star Newspaper and through wireless broadcasting on the Star Newspaper’s Website. The 1st defendant on the other hand is saying that the subject of the aforesaid publications are of public interest. The plaintiff aver that it made a demand to the 1st defendant to counter-check the allegations made against it or in the alternative get the plaintiff’s response but the 1st defendant deliberately refused to meet the plaintiff’s demand to retract the false allegations made against the plaintiff. In the aforesaid publications the plaintiff averred that information were false accusations directed against the plaintiff.

First, that the plaintiff irregularly acquired EPZ status .

Secondly, that the plaintiff has refused to compensate the community for the compulsory acquisition of their land for mining purposes.

Thirdly, that the plaintiff has been exploiting the local community, by tax evasion and discharged harmful effluent into rivers thus causing environmental degradation, livestock and human deaths.

Fourthly, that the suspension of the mining operations by the plaintiff was not genuine and was a ploy to exploit workers and avoid its obligations under the mining lease.

5. The plaintiff argued that when the publication is looked at as a Whole, it would lead to the conclusion that the plaintiff conducts its business in a dishonest, improper and harmful way. The plaintiff explained in detail how it lawfully acquired EPZ status. It also gave in detail the way it conducts its mining business and the process of compensation. The plaintiff further explained the law it used to suspend mining operations within the law.

6. The 1st defendant/ respondent argued that in cases of defamation the applicant must show over and above the principles set out in **Giella =vs= Cassman Brown** (supra) prima facie, that the case is very clear. It also argued that the order cannot be granted if the defendant plead the defence of justification.

7. Having considered the rival submissions, it is clear in my mind that the words published ,if it turns out to be false, the plaintiff’s reputation will suffer a great deal. The question as to whether or not the defence of justification can be sustained will depend on the outcome of the substantive hearing of this suit. On the basis of the above arguments, I am convinced that the plaintiff has shown a prima facie case.

8. I have carefully avoided making conclusive opinion on the merits of the case to avoid delving too much

into the trial judge's territory. The rival submissions filed by the parties have gone deeply into the kind of evidence expected to be presented at the trial. In determining the application, this court had to do a delicate balancing between the 1st defendant's right to freedom of expression and the plaintiff's right of protection from being defamed. What is clear in my mind is that it is a highly contentious matter which can only be resolved in a substantive trial but in the meantime the court must keep the ring even.

9. The second principle to be considered is whether or not the plaintiff stands to suffer irreparable harm that cannot be compensated in monetary terms. The plaintiff has specifically stated that its business reputation and goodwill it enjoys in Kenya and internationally will be damaged irreparably unless the order is granted. The 1st defendant/respondent has pointed out that in the plaint the plaintiff has specifically pleaded for damages hence whatever damage the plaintiff suffers can be compensated by an award of damages. The 1st defendant has stated that he is ready to pay damages if awarded to the plaintiff. The order being sought here is to prevent future publications, which may further injure the plaintiff's business reputation. In my view, even if the 1st defendant is in a position to pay for damages, the kind of awards cannot at this stage be ascertained, therefore it is not true to say that the envisaged damage can be paid in monetary terms. The plaintiff has stated that its reputation as a mining company may be destroyed locally and internationally. That may call for the services of an actuarial scientist to ascertain the actual damage which may run into millions or if not billions. In such a case, it cannot be said that the plaintiff will not suffer irreparable damage.

10. Since I am not in doubt, I do not see the need to consider the third principle of convenience.

11. In the end, I allow the motion dated 15.07.2016 in terms of prayer 4 with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 23rd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

..... for the Defendant