



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 159 OF 2016

BOB COLLYMORE.....1ST PLAINTIFF/APPLICANT

MICHAEL JOSEPH.....2ND PLAINTIF/APPLICANT

VERSUS

CYPRIAN NYAKUNDIDEFENDANT/RESPONDENT

RULING

The Applicants filed a Notice of Motion application dated 17th June, 2016 under sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 40 Rules 1,2 & 4, Order 5 rule 17 (1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. The application seeks the following Orders: -

(a) *...spent*

(b) THAT pending the inter partes hearing and determination of this Application, a temporary injunction do issue restraining the Defendant, by himself, servants or agents from further publishing or causing to be published in any of

(c) his blogs www.cnyakundi.com and <http://www.kenyalivefeed.com> or in any other blog or media platform any statements or otherwise of or concerning the Plaintiffs. .

(d) THAT pending the hearing and determination of this Suit, a temporary injunction do issue restraining the Defendant, by himself, servants or agents from further publishing or causing to be published in any of his blogs www.cnyakundi.com and <http://www.kenyalivefeed.com> or in any other blog or media platform any statements or otherwise of or concerning the Plaintiffs.

(e) *...spent*

(f) THAT costs of this application be borne by the Defendant

The application is supported by the Affidavits of **BOB COLLYMORE** and **MICHAEL JOSEPH** both dated 17th June, 2016. The basis of the application is that the Defendant, has in a series of articles published on the said blogs several articles/allegations of or concerning the Plaintiffs, which are false, unsubstantiated, baseless and unsupported and therefore defamatory of the Plaintiffs. The Plaintiffs also state that the Defendant has failed to apologise and withdraw the defamatory statements and articles and

that there is a high likelihood that the Defendant will continue publishing defamatory articles with a view of besmirching, disparaging and ruining the Plaintiffs' reputation.

The alleged defamatory statements against the 1st Defendant, Bob Collymore are that;

(g) In a purported "petition" of 4th March, 2016, styled as hash tag **DeportBobColymore**, the Defendant published, or caused to be published on his blog page <http://www.cnyakundi.cpm>, allegations against the 1st Defendant as follows:

"That Bob Collymore has used his dominant position to bribe his way into contracts regarding transmission of election results and CCTV monitoring..."

"...that Bob Collymore oversaw the variation of costs from 14B to over 50B of the CCTV contracts, fast tracked after staged terror attacks, meant to fear monger and influence ICC proceedings..."

That Bob Collymore has overseen patronage in the awarding of tenders at Safaricom to engage only providers who will guarantee his senior managers commissions despite their comfortable pay-packages..."

(h) THAT on 7th May, 2016 the Defendant published an article titled, "**Do we have the attention of Kenyan corporates now? Safaricom responds directly to Cyprian Nyakundi**" alleging against him as follows: -

"don't be a thief and then come to lecture Kenyans from a moral high-ground..."

(i) THAT on or about 12th May, 2016, the Defendant also published and/or caused to be published an article titled "**protestors call on Vodafone to investigate Bob Collymore in London,**" as follows:

"It is now becoming evident that when Bob Collymore announced that he was going to blacklist suppliers allegedly linked to corruption, he wanted to intentionally block those who did not toe his line and offer either handsome kickbacks or stakes in their companies..."

"... he has also been under the radar after a suspect deal where Safaricom was tasked with Nairobi integrated security CCTV system, which turned out to be a fraud that doesn't work..."

"He has been accused of using his position to reward cronies and sycophants largely single-sourcing and not basing his Suppliers on merit. He has been said to meddle in nearly every facet of the company, planting his loyalists and only working with vendors who promise him and his lieutenants kickbacks..."

"...Bob Collymore has now gone ahead and demanded stakes in Companies that are Supplying Safaricom through a network of proxies. The reason why companies like Huawei were single-sourced for large contracts, despite competition offering an even more superiors product..."

(j) That on 12th June, 2016, the Defendant also published an article titled "**why is Bob Collymore planning the Assassination of Cyprian Nyakundi?**" alleging as follows;

"Mr. Bob we have been consistent in pointing out the contradictions between your loud talk and the reality on the ground. We are also perhaps the only outlet that isn't impressed by your money. Because Mr. Collymore, what you eat don't make me shit!"

"If you want to be a crook, by all means be a thief like Jimnah Mbaru , who steals and lays

low like envelope . But don't be a thief and then come to lecture Kenyan from a moral high-ground. That shall not take lying down."

"Your silly cartels involving advertising agencies, contractors, vendors and service providers which lockout meritorious Kenyans from getting involved in the publicly-listed firm, should be warned, Mr. Collymore."

"...we request Bob Collymore not to attempt anything stupid on Nyakundi. If he disappears or is assassinated, you will be the first suspect, we are aware you have spoken to the killer flying squad to help you deal with him."

The alleged defamatory statements against the 2nd Plaintiff Michael Joseph is that on or about the 12th May, 2016, the Defendant published or caused to be published on his blog page an article titled, "Protestors call on Vodafone to investigate Bob Collymore in London" as follows:

"...the culture of demanding bribes by senior Safaricom staffers begun during the tenure of Michael Joseph who was popularly referred to as Mr. 10% in Nairobi Circles. Every Vendor (sic) had to part with 10% of the value of the contract, many being forced to adjust the costs of goods and services upwards, to meet his deficit..."

The Plaintiffs filed a Certificate of Electronic Records dated 18th April, 2017 and submitted on the same via written submissions dated 9th May, 2017

The application has been opposed by the Defendant who filed Grounds of Opposition dated 15th July, 2016 and a Replying Affidavit of the same date where he raised the defence of fair comment. In the Replying Affidavit, the Defendant/Respondent avers that upon independent investigations, he established that there were controversies surrounding the procurement procedures at Safaricom Limited where the applicants served at some point as Chief Executive Officers. He avers that the said comments were fair and fair information given to the public with a view of informing the public on the issues of alleged corruption on the procurement process at Safaricom Limited, a Public Company listed at the Nairobi stock exchange and a state corporation by virtue of the 65% shareholding held by the Government of Kenya

The application was canvassed by way of written submissions. In the submissions dated 25th July, 2016, the Plaintiffs submitted that a fair comment can only arise if the facts are admitted or shown to be true and that the defendant has not shown that there is any truth in any of the serious allegations he has made against the Plaintiffs. That failure to verify the correctness of the words is a pointer to malice. On this point, the Plaintiffs relied on the case of **Phineas Nyagah V. Gitobu Imanyara (2013) eKLR** as cited with authority in the case of **Linda Okello V. Standard Group Media & 3 Others (2015) eKLR** where the court stated that,

"evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice...Malice may also be inferred from relations between parties. The failure to inquire in the facts is a fact from which inference of malice may properly be drawn."

The Plaintiffs further submitted that it is not in dispute that the words complained of were published and that those words were defamatory. They further submitted that their reputation is at stake and an award of damages cannot compensate the irreparable damage which will be occasioned. That the Defendant's ability to pay damages which the court may ultimately award is doubtful. The Plaintiffs submitted that they had met the requirements for a temporary injunction as outlined in the case of **Giella V. Cassman Brown**.

On 12th August, 2016, the Defendant filed his submissions dated 10th July, 2016 and relied on the case of **Renton Company Limited Versus Philip Kisia and 2 Others (2012) eKLR** to illustrate that in

defamation cases, the Court must be satisfied that the words complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. The Defendant further contended that the statements made by him are in no way inarguably defamatory and relied on the case of **Coulson V Coulson**. He averred that he will rely on the defence of fair comment and that he did not have intention of repeating publication of statements complained about by the Plaintiffs.

I have considered the application and the grounds raised therein, the Affidavits, the submissions and the authorities cited.

The parameters for consideration by the court in an ordinary application for interlocutory injunctive orders were considered by the then Court of Appeal for East Africa in the famous case of **Giella Versus Cassman Brown & Co. Ltd [1973] EA 358**. The requirements are that an applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, that he will suffer irreparable loss or damage if the interlocutory injunction is not granted and 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.

However, the general principles and conditions precedent to the grant of interlocutory injunctions have been modified to suit the uniqueness of defamation claims. Those principles were settled in the case of **Cheserem versus Intermediate Media Services [2000] 2EA 371** among others that:

“An interlocutory injunction is temporary and only subsists until the determination of the main suit. In defamation, the question of injunction is treated in a special way although the conditions applicable in granting an injunction as set out in the Giella v Cassman Brown & Co Ltd (1973) EA 358 generally apply... In defamation cases, those principles apply together with special law relating to the grant of injunctions in defamation cases where the court’s jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in clearest possible cases. The court must be satisfied that the words complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.....The reason for so treating grant of injunction in defamation cases is that the action for defamation bring out conflict between private interests and public interest, more so in cases where the country’s constitution has provisions to protect fundamental rights and freedoms of the individual, including the protection of the freedom of expression.”

I have meticulously analysed the statements complained of by the Plaintiffs. The Defendant’s statements are to the effect that the Plaintiffs are corrupt, they demand for 10% of the contracts amount awarded in order to cut deals and that the 1st plaintiff is planning the assassination of the Defendant. The Defendant has not denied the publication, however, he seeks to justify the words and claims that the statements were fair comments. A fair comment can only be based on facts which have been proven to be true.

In the instant application, the Defendant has failed to illustrate the true facts from which he based his comments. What constitutes a fair comment was properly addressed in **Gatley on Libel and Slander 6th Edition Page 706** where the learned authors stated that:

“if the words complained of contain allegations of facts, the defendant must prove such allegations of facts to be true. It is not sufficient to plead that he bona fide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however bona fide. Bonafide belief in the truth of what is written may mitigate the amount, but it cannot disentitle the plaintiff to damages.”

The Defendant herein has not tabled any evidence in support of his allegations that the Plaintiffs are corrupt and have been cutting deals as he alleges. Further, no evidence has been tabled to show that the 1st plaintiff is liaising with the said killer flying squad to assassinate him. These allegations are serious and criminal in nature which warrants to be investigated by the police upon making of a formal complaint

by the defendant. The Defendant has not reported the said threats at any police station and it appears that these are mere allegations. From the Defendant's Replying Affidavit, it is not clearly ascertainable on what facts the Defendant is claiming to be making a fair comment on.

For a defence of fair comment to succeed, the facts and the comments must be properly distinguishable. In **Adams v. Guardian Newspapers [2003] Scot CS 131** Lord Reed stated that:

"In London Artists Ltd v Littler, Edmund Davies L.J. (as he then was) said (at page 395): 'It behoves a writer to indicate clearly what portions of his work are fact and what are comments for, in the words of Fletcher-Moulton L.J. in Hunt v Star Newspaper Co Ltd [1908] 2 K.B.309, 319: '... comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see Andrews v Chapman (1853) 3 C & K 286.' Failure to exhibit clarity in this respect carries its own risks, for, as Fletcher-Moulton L.J went on to say, at page 320: 'Any matter,...which does not indicate with a reasonable clarity that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment.'

'The same point was made more recently by Lord Nicholls of Birkenhead in Reynolds v Times Newspapers Ltd [2001] 2 A.C.127 at page 193: To be within this defence the comment must be recognizable as comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made.'

In a nutshell, I find that the Defendant has failed to establish the factual matters on which he made his fair comments. Further, the Defendant has also failed to table any evidence to show that there exist true facts on which he is making his comments. I disagree with the Defendant's submissions that the Plaintiffs have failed to prove that the statement made by the Defendant are untrue. The burden of proving allegations should be carried by the one who alleges and the duty is on the Defendant to prove the truthfulness of his statement as he is the publisher of the same and to support his defence of fair comment.

The Defendant contends that the orders sought are contrary to his Constitutional right of freedom of expression regarding matter of great public interest. Indeed the Defendant has a Constitutional right of freedom of reporting under Article 33 and 34 of the Constitution. Those rights of the defendant are, however limited under Article 34. They are subject to the rights and freedoms of others. The Constitution specifically states that freedom of expression should respect the rights and reputation of others.

The reputation of the Plaintiffs is at stake in view of the contents of the publications. Once a reputation is lost, monetary damages might not be an adequate compensation. The Plaintiffs are/were the CEO of the leading telecommunication mobile company in the country, Safaricom limited. They are people held in high esteem and regard amongst the members of the public and once their reputation is lost, it would be difficult for the same to be regained. Monetary damages might be a consolation but not adequate compensation in this case.

With the facts placed before this court, it is my considered opinion that the Plaintiffs have established a prima facie case. The proof or otherwise of the case will be determined during the substantive hearing as at this stage I am not supposed to consider merits of the same.

In view of the foregoing, the Defendant should be restrained by way of an interlocutory injunction as prayed pending the hearing and determination of the suit. The application is allowed in terms of prayers 3. Costs to the plaintiffs.

Dated, Signed and Delivered at Nairobi this 29th Day of **September, 2017.**

.....

L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant

.....For the Respondent