



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 304 OF 2016

JAMES WAINAINA MACHARIA..... PLAINTIFF/APPLICANT

V E R S U S –

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT/RESPONDENT

BRIAN NGUGI1ST DEFENDANT/RESPONDENT

RULING

1) James Wainaina Macharia, the plaintiff/applicant herein, filed an action against Nation Media Group Limited and Brian Ngugi, being the 1st and 2nd defendants/respondents respectively for defamation. The plaintiff/applicant has now taken out the motion dated 18th November 2016, in which he sought for the following orders inter alia:

1. THAT this application be certified urgent and heard ex parte in the first instance.

2. THAT pending the hearing of the suit filed herein, an order do issue restraining the defendants/respondents, by themselves, their agents, servants or anyone acting on their behalf from writing, printing, publishing, distributing/circulating, discussing, uttering and/or conveying defamatory and/or disparaging information in any manner whatsoever about the plaintiff/applicant particularly, the allegations published at pages 1 and 4 of issue No. 2484 of the Business Daily Newspaper of 17th November, 2016 in an article titled “CS Macharia linked to firm in Afya House Kshs. 5 billion contracts” or words of similar nature.

3. THAT pending the hearing of this application, an order do issue restraining the defendants/respondents by themselves their agents, servants or anyone acting on their behalf from writing, printing, publishing, distributing/circulating, discussing, uttering and/or conveying defamatory and/or disparaging information in any manner whatsoever about the plaintiff, particularly, the allegations published at pages 1 and 4 of Issue No. 2484 of the Business Daily Newspaper of 17th November, 2016 in an article titles “CS Macharia linked to firm in Afya House Kshs. 5 billion contracts” or words of similar nature.

4. THAT pending the hearing and determination of this suit, an injunction order do issue compelling the defendants/respondents to remove and erase from all various posts, websites, blogs or other forms of electronic and social media of any form or nature whatsoever the article or similar words or statements or content, of like effects relating to the plaintiff/applicants.

5. THAT pending the hearing and determination of this application, an injunction order do issue compelling the defendants/respondents to remove and erase from all various posts, websites,

blogs or other forms of electronic and social media or any form or nature whatsoever the article or similar words or statements or content, of like effects relating to the plaintiff/applicants.

6. THAT costs of this application be provided for.

2) The motion is supported by the affidavit of James Wainaina Macharia. When served, Nation Media Group Ltd and Brian Ngugi the 1st and 2nd the defendants/respondents herein respectively filed their grounds of opposition to resist the application. When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavit filed in support of the motion and the grounds of opposition and the rival written submissions.

4) Let me first consider the background of this dispute before going into the substance of this application. On Thursday, 17th November 2016, the defendants/respondents wrote and published or caused to be written and published on pages 1 & 4 of the Business Daily hereinafter referred to as 'the Newspaper' under the newspapers main headline, "**CS Macharia linked to a firm in Afya House sh. 5 billion contract:** (the article), various statements of and concerning the plaintiff/applicant which were reported by the 2nd defendant/ respondent. The article was further repeatedly published on the newspaper's website, www.businessdailyafrica.com, social media pages on the internet, specifically, twitter and is still in circulation. Along with the article appeared a photograph and name of the plaintiff/ applicant on the front page of the said newspaper.

5) The applicant avers that the article was widely distributed in Kenya and elsewhere. At the material time, the newspaper had millions of readers. The applicant further submitted that the 1st defendant knew or ought to have known that once the article was written and published in the newspaper on the 1st defendant's website and social media pages the same would be available for unhindered access and must have in fact been accessed, by a large number of readers in Kenya, the region and worldwide. The applicant further avers that the defendant's various allegations concerning him are entirely false and misleading and must have been calculated to cause extreme opprobrium and prejudice against him. That the article was malicious and calculated to injure, disparage and lower the esteem with which right thinking members of the society generally regarded and held him. For this reason, the applicant has suffered and continue to suffer, monumental loss and damages both in his personal capacity and by way of the various public duties, occupations and vocations that he engages in.

6) The applicant also avers that unless the defendants are restrained by an order of the court, they will continue to republish, reproduce share and or disseminate the article and falsehood against him.

7) The defendants/respondents on the other hand are of the view that the applicant's application has not established any sufficient cause for the grant of the prayer sought. It is also argued that the application has not met the test for the grant of an interlocutory injunction. More so, that no special circumstances have been established to warrant the grant of mandatory injunction at the interlocutory stage. Further, the defendants aver courts ought to be cautious in granting orders of temporary injunctions in defamation case due to competing interests between private interest to reputation and public interest to free speech and the right to information. Finally, the defendants have submitted that they are entitled to enjoy the constitutional right of freedom of expression and speech as enshrined under Article 33 and 34 of the Constitution of Kenya, 2010.

8) The Principles to be considered in determining an application for an injunction were laid down in the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** as follows:

- i. *The applicant must make out a prima facie case with a probability of success; and*
- ii. *The applicant must show that if he is denied the order for injunction he would suffer irreparable*

loss which cannot be adequately compensated by an award of damages; and

iii.If there is doubt as to either of the above, the court would decide the application on a balance of convenience.

9) The threshold for the grant of interlocutory injunction in defamation cases, was further reiterated in the case of **Cheserem vs Immediate Media Services (2000) 1 EA 371 CCK** in which this court held *inter alia* that:

*“Applications 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 case, those conditions operate in special circumstances. Over and above the test set out in Giella’s case, the court’s jurisdiction to grant an injunction is exercised with the 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 libellous and so manifesting defamatory that any verdict to the contrary would be set aside as perverse.”

10) After considering the material placed before this court and the rival submissions, I am convinced that the plaintiff has shown that he has a prima facie case with a high probability of success. Considering the statements and the utterances labelled against the plaintiff by the defendants, one of the issues which may arise is whether or not those statements and utterances are defamatory or are they fair comment. It is an issue which can only be conclusively be determined at the trial. The defendants/ respondents however submits that this test has not been met by the plaintiff/applicant and they further state that the said publication are true in fact and in substance as per their knowledge. The plaintiff/applicant is apprehensive that unless an order is issued to restrain the defendants/respondents from further making those statements and utterances, they will repeat the offending defamatory matter to the utter detriment of the plaintiff.

11) Secondly, an applicant must show the irreparable damage he/she would suffer if the order for injunction is denied. The applicant submits that his office is delicate by the nature of its role in the country. For the respondent to undertake such an act against him he not only attacks the applicant but also the integrity of the country and the people of Kenya by defaming the institution they trust.

Further, the applicant beseeched this court to find that the Business daily is a newspaper with nationwide circulation. It also boasts on online presence beyond the jurisdiction of this honourable court and it will be impossible to quantify how far wide it has been made available. This makes the applicant to stand no chance of making a good impression before the right thinking members of society and foreign nationals.

The article has left the applicants reputation and dignity in tatters and largely irredeemable in the eyes of the numerous persons who read the article.

12) The respondents on the other hand submit that the applicant has asked for damages under the heads of exemplary, aggravated and punitive damages therefore this is an indication that the applicant acknowledges that damages will be an adequate remedy.

13) In my considered view the aforesaid publication cannot be justified at this interlocutory until the suit is heard and determined. It cannot be said that the injury caused can be compensated in monetary terms. In the case of **Ahmed Adari –vs- Nation Media Group and 2 others Nairobi HCC No. 172 of 2015 (unreported)** this court held *inter alia*:

“that reputation like a name is priceless. No amount of damages therefore may be adequate compensation where the defendants were to be found liable.”

14) The third and final principle is that, where the court is in doubt, the application should be decided on a balance of convenience. In the matter before this court, I am not in doubt, hence I do not intend to belabour in considering this principle..

15) The applicant has also beseeched this court to grant an interlocutory order of mandatory injunctions to compel the defendants to remove and erase from various posts, websites, blogs or other forms of electronic and social media of any form or nature whatsoever the article or similar words or statements or contents, of like effects relating to the plaintiff. In the case of **Showind Industries Limited –vs- Guardian Bank Limited and another, Nairobi High Court Civil suit No. 273 of 2002** it was held *inter alia*:

“ Interlocutory mandatory injunction would be granted sparingly and only in exceptional circumstance where the applicant’s case is strong and straight forward. “

16) I am satisfied the applicant has shown that he has a prima facie case with a probability of success. The applicant is a senior Cabinet Secretary in the Ministry of Transport, Infrastructure, Housing and Urban Development therefore the publication disparaged him also by way of his occupation.

17) In the end, the motion dated 18th November 2016 is allowed in terms of prayer 2 and 4. Costs of the motion to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 19th day of October, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant