



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 316 OF 2016**

**MUMIAS SUGAR COMPANY LIMITED....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ERROL DAVID JOHNSTON.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**RONALD JOSEPH LUBYA.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**EDDIE BERNARD ODHIAMBO.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**CHARLES KIMITI KYALO.....5<sup>TH</sup> PLAINTIFF/APPLICANT**

**IRENE MUASYA.....6<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**MUSA EKAYA.....DEFENDANT/RESPONDENT**

**RULING**

The Plaintiffs/Applicants (the “**Applicants**”) filed a Notice of Motion dated 29<sup>th</sup> November, 2016 seeking orders;

*(a) ...spent*

**(b) THAT** a temporary injunction be granted pending the interpartes hearing of this application, restraining the defendant, by himself, or through any of his servants, from uttering any defamatory words , publishing any defamatory information , verbally or in writing on his Facebook page or on social media platforms or anywhere else to individuals, groups, body or bodies, companies or to any other institutions , of or concerning the Plaintiffs.

**(c) THAT** a temporary injunction be granted pending the hearing and determination of this suit restraining the defendant , by himself, or through any of his servants, and agents from uttering any defamatory words , publishing any defamatory information , verbally or in writing on his face book page or on social media platforms or anywhere else to individuals, groups, body or bodies, companies or to any other institutions , of or concerning the Plaintiffs;

**(d)** An order by way of mandatory injunction requiring the Defendant/Respondent to expunge from his Facebook page, all the defamatory contents posted thereon concerning the Plaintiffs/Applicants and failing which the Plaintiffs to be at liberty to serve the provider of the Facebook platform with the courts order and for them to enforce the court order;

(e) **THAT** costs of this application be provided for.

The application is premised on the grounds on the face of the application and the Supporting Affidavit of **RONALD JOSEPH LUBYA**. The deponent has deponed that the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs are senior managers in the 1<sup>st</sup> Plaintiff which is a public company listed on the Nairobi stock exchange and engaged in the business of sugar cane milling, power generation and selling of sugar, ethanol and water. That since February, 2016, the Defendant has been maliciously publishing defamatory words of and concerning the Plaintiffs on Facebook which statements have injured the reputation of the Plaintiffs as a consequence of which the 2<sup>nd</sup>- 6<sup>th</sup> Plaintiff's careers have been brought into public scandal, odium and contempt among right thinking members of society.

The alleged defamatory statements are contained in paragraph 9 of the Supporting Affidavit wherein it is deponed that on diverse dates since February, 2016, the Defendant, has brazenly and maliciously caused to be disseminated and published, posted on his Facebook Page and concerning the Plaintiffs the publication set out therein titled **“massive corruption rocks Mumias Sugar Company as Human resource and legal staff, tops up the list”**.

It is deponed that the defendant's conduct in posting the defamatory statements was actuated by extreme malice, and calculated to gain cheap publicity, followership and notoriety and that the statements are in breach of the Plaintiffs' rights provided for in Article 28 of the Constitution of Kenya as well as in article 27 (4) of the constitution.

The application was opposed by the Defendant/Respondent (the **“Respondent”**) who filed a Replying Affidavit sworn on 24<sup>th</sup> February, 2017. He depones that he is a farmer in Mumias, a social activist, commentator on political, social and economic issues in Mumias and in the country. He admits ownership of the Facebook account going by the name Musa Ekaya and having made the publications on the diverse dates and goes on to state that he stands by the comments as the publications are true, fair comment and of great public interest on the ongoing at the Mumias Sugar Company. The respondent goes on to give the misdeeds of each of the 2<sup>nd</sup> - 6<sup>th</sup> Applicants.

He depones that the 2<sup>nd</sup> applicant is incompetent and corrupt having been recruited irregularly without attending an interview and that he is therefore incompetent to hold the position of a CEO. That he does not have the requisite academic papers and draws a huge salary which is not justified. Regarding the 3<sup>rd</sup> Applicant, he depones that he is part of a group engaged in irregular employment practices, practicing unfair treatment, nepotism and favoritism. As for the 4<sup>th</sup> Applicant, he states that he harasses staff, intimidates them, engages in irregular procurements and has no integrity. That the 5<sup>th</sup> Applicant engages in unaccounted for trips and there is no clear legal process through which he was recruited and that the 6<sup>th</sup> Applicant is unethical in her dealings, she intimidates the staff and her colleagues. Attached to the Affidavit is a bundle of documents that the Respondent relies on. The Respondent depones that the Plaintiffs have damaged their own reputation and he only exposed what they have been doing.

In response to the Respondent's Affidavit, the Applicants filed a Supplementary Affidavit wherein it was deponed that the bundle of document annexed to the Respondents' Replying affidavit, the source is not disclosed and the same should be expunged from the record. It is also deponed that the defence of truth and fair comment is not applicable and that no defence was filed by the Respondent. In response to the Supplementary affidavit, the Respondent filed a reply and averred that there is nothing to be apologetic about. In reference to his annexures, he depones that the 1<sup>st</sup> plaintiff is a public company and therefore bound by the provisions of article 35 of the constitution on access to information and the corresponding Act.

The application was canvassed by way of written submissions. The Applicants filed their submissions dated 20<sup>th</sup> June, 2017 and submitted that they have met the Giella versus Cassman Brown requirements for grant of interlocutory injunction. The Applicants relied on the case of **CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK) Being sued through its officials namely Stephen Mutoro**

**& 2 others [2014] eKLR** and averred that they had established a prima facie case.

It is further submitted that the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs are public servants and their reputation may be lost and that members of public will lose confidence in them. The plaintiffs relied on the case of **Brigadier Arthur Ndong Owuor Vs The Standard Limited [2011] eKLR** that,

*“In defamation cases, such as the present case, the Court of Appeal in the case of **Cheserem versus Intermediate Media Services [2000] 2EA 371** applied the principles in the case of **Giella Versus Cassman Brown (supra)**. The court went further to state that the requirements in the **Giella versus Cassman Brown (supra)** have to be considered with greatest caution.”*

The Respondent filed his written submissions dated 10<sup>th</sup> July, 2017 and submitted that the Applicants have not proved the requirements for granting of a temporary injunction and have also not provided the authenticity of the respondent as the holder of that Facebook account. The Respondent further submitted that the Applicants have not demonstrated the requirement that they stand to suffer loss as no evidence has been adduced to show their reputation has been damaged. On this, he relied on the case of **George Mukuru Muchai Vs The Standard Limited [2001] eKLR** where it was held that,

*“In my view, the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complainant and not how he/she himself/herself feels the words portray about him/her.”*

The Applicants filed Supplementary written submissions on 28<sup>th</sup> July, 2017 distinguishing the Respondents' authorities. They also submitted that the documentary evidence annexed to the respondents' submissions should be expunged as in law, fresh evidence cannot be introduced through submissions.

I have read and considered the application as well as the Affidavits on record. The documents annexed to the Respondents' submissions will not be considered as the same amounts to introduction of new evidence by way of submissions. It was also submitted by the Applicant that the Defence of the Respondent is not known as the Respondent has not yet filed his Defence. I wish to note that at this stage we are dealing with an interlocutory application where the Respondent has filed a Reply.

The general principles to be considered in interlocutory injunctions as established in the **Giella vs Cassman Brown** have been modified to suit the uniqueness of defamation cases. Those principles, were settled in the case of **Cheserem vs Immediate Media Services** 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 brings 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.”*

An interim injunction to prevent the publication of defamatory statement can only be granted in the clearest possible cases. In **Ruth Ruguru Nyagah v Kariuki Chege & another [2015] eKLR** the court held that;

*“it was submitted by the defendants that it is not sufficient to merely establish that the words complained of are capable of being defamatory, rather the court must be satisfied that in the*

*final determination of the suit it would inevitably come to the conclusion that the words were defamatory. It was further submitted, on behalf of the defendants that, relying on the case of **Harakas & others v Baltic Mercantile & shipping Exchange Ltd and Another (1982) 2 All ER 701** where Lord Denning held;*

***“ where there was a defence of justification or qualified privilege in respect of a libel, an injunction restraining further publication would not be granted unless it would be shown that the defendant dishonestly and maliciously proposed to say or publish information which he knew to be untrue.”***

In this application, the Applicants are seeking a temporary injunction against the defendant, to restrain him from publishing or uttering any libelous matter of and concerning the plaintiffs which in their view will be injurious to their profession and reputation. The Applicants also seeks a mandatory injunction to have the statement deleted from the Respondents Facebook page.

The impugned publications which the plaintiffs allege are defamatory are contained in the Respondent's Facebook page. The relevant extracts were downloaded and/or printed by the Applicants and submitted to Court as evidence. The respondent has challenged the authenticity of the extracts in that the Applicants did not provide the basic requirements to prove that the account belongs to him. The law is very clear on the production of electronic evidence. **Section 106A of the Evidence Act (Cap 80)** provides that the contents of electronic records may be proved in accordance with the provisions of section 106B.

Section 106B (4) provides that;

**where a party seeks to give evidence by virtue of section 106B, he has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:**

- a)** identify the electronic record containing the statement and describing the manner in which it was produced; and
- b)** give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer.

The above condition was not met in this case. The Applicants have not annexed any certificate to show how the impugned statement was obtained. Given the advancement in technology, it is easy to have the original information stored in an electronic device distorted in the process of obtaining the evidence, hence, the requirement for the conditions provided in this section have to be met. In the case of **Republic .V. Barisa Wayu Matuguda [2011] eKLR** the court held that,

***“This provision makes it abundantly clear that for electronic evidence to be deemed admissible, it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4)(d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence.”***

Further, it is my finding that the applicants have not established a prima facie case to warrant the orders sought. It has been alleged that the Applicants' reputation has been ridiculed amongst the right thinking members of the society and as well as to the employees. The Applicants being managers of a public company are subject to criticism and it is only in clear cases where this Court can grant an interim injunction.

I am not satisfied that the Applicants have demonstrated a clear case to the standards required in a defamation case, to warrant the interim orders sought and for this reason I see no merits in the application . The upshot of this is that the application dated 26<sup>th</sup> November, 2016 is hereby dismissed with costs.

It is so ordered

**Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> Day of November, 2017.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....for the 1<sup>st</sup> Plaintiff/Applicant

.....or the 2<sup>nd</sup> Plaintiff/Applicant

.....for the 3<sup>rd</sup> Plaintiff/Applicant

.....for the 4<sup>th</sup> Plaintiff/Applicant

.....for the 5<sup>th</sup> Plaintiff/Applicant

.....for the 6<sup>th</sup> Plaintiff/Applicant

.....for the Defendant/Respondent