



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 64 OF 2016

TRANSCEND MEDIA GROUP.....PLAINTIFF/APPLICANT

VERSUS

THE STANDARD GROUP LIMITED.....DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant filed a Notice of Motion dated 7th March, 2016 under the provisions of Order 40 Rule 1 & 4 and Order 51 of the Civil Procedure Rules seeking orders that :-

(a) ...spent

(b) ...spent

(c) **THAT** this Court do issue an injunction restraining the Defendant whether by themselves, their servants and/or agents or otherwise from further publishing or causing to be published, words defamatory of the Plaintiff pending the hearing and determination of this suit.

(d) **THAT** the Defendant retracts the statement published about the Plaintiff in a defamatory article of 19th February, 2016 and render and publish an apology to the Plaintiff.

(e) **THAT** costs of this Application be in the cause.

The application is premised on the grounds on the face of the application and the Supporting Affidavit of **PETER LAI MUTHOKA**, a director of the Plaintiff who depones that on 19th February, 2016 an article was published in the Standard Newspaper that associated and linked the Plaintiff to the recent National Youth Services (NYS) scandal. It stated that the Plaintiff was one of the companies that benefited from questionable deals with the NYS scandal and the headline stated that the Plaintiff had been awarded Kshs. 326 Million for the rebranding of the NYS. The plaintiff states that he is aware of the scandals that have recently engulfed NYS with allegations of questionable contracts having been awarded to brief case companies. He avers that the allegations are defamatory and malicious and were never intended to reveal the correct position.

As a result of the publication, the Plaintiff claims that they received so many phone calls from friends and Clients and it was a particularly difficult time as they were then tendering new jobs with Safaricom, KRA and KWAL among others.

The claim was denied by the Respondent who filed a Replying Affidavit dated 10th May, 2017 and sworn by MILICENT NG'ETICH, the Head, Legal department of the Respondent. She avers that the orders

sought are not necessary as the Defendant has not made any further publication since the suit was filed. She pleaded the defence of fair comment on a matter in the public interest and averred that the Defendant has the responsibility as a national media to publish information to the general public. She further depones that the words as published were true in substance and in fact and were made in good faith.

The application was canvassed by way of written submissions. The Applicants filed their submissions dated 1st August, 2017 and submitted that they have met the *Giella versus Cassman Brown* requirement for grant of the interlocutory injunction. The Applicants relied on the case of **Gitao & Another V. Kenya National Chamber of Commerce & Industry Civil Case No. 1859 of 1990** amongst other authorities which I have considered. It is the Plaintiff's submission that the words published by the defendant were not only a total false, unsubstantiated and malicious but the same were published to the public and the resultant effect was that it impacted negatively on the Plaintiff.

The Respondent filed its written submissions dated 4th September, 2017. On prima facie case, the Respondent submitted that the Appellant has admitted that there was a scandal in the award of tender by NYS and it appeared that several companies were incorporated to supply commodities at inflated prices, that the plaintiff admitted that it had been awarded the said tender to rebrand NYS and therefore there is no prima facie case established to warrant the injunctive orders sought. That there is no irreparable injury to be suffered by the Plaintiff and that the inconvenience that would be caused to the public and possibly to the nation outweighs the inconvenience alluded to by the Plaintiff as the matter concerns expenditure of public funds.

I have read and considered the application as well as the Affidavits on record. The general principles and conditions precedent to the granting of interlocutory injunctions as established in the **Giella v Cassman Brown** have been modified to suit the uniqueness of defamation of claims. Those principles, were settled in the case of **Cheserem vs Immediate Media Services (200) 2 EA 371 (CCK)** 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.”*

Temporary injunction to prevent the publication of a defamatory statement can only be granted in the clearest cases. In fact courts have been hesitant to grant such orders where the defence of truth and fair comment has been pleaded. 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 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.”

What the Applicants were expected to prove at this initial stage, taking into account the principles and conditions for grant of interlocutory injunction in defamation cases is whether they have a prima facie case with probability of success and if the injunction is not granted, that they stand to suffer irreparable loss and if the court is in doubt the matter will be decided on a balance of convenience as espoused in the case of *Giella vs Cassman Brown & Co. Ltd* (1973) 358.

I have read the Newspaper article complained of. The article largely talks about the happenings at the NYS and mentioned the Plaintiff as one of the companies that benefited from the multimillion tenders without stating that the Plaintiff was awarded the tender improperly. It is a matter of fact that there is investigation going on at the NYS on a scam involving the tendering process which fact the Plaintiff acknowledges. Therefore the Plaintiff allegation can only be substantiated and argued in a main suit. At this point the Plaintiff cannot be said to have established a prima facie case to the standards required in a defamation suit.

In the case of **George Mukuru Muchai Vs The Standard Limited [2001] eKLR** 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 complaint and not how he/she himself/herself feels the words portray about him/her.”

It matters not what the Plaintiff perceives the publication to be but what the members of the public perceive it to be. In other words the threshold for determining whether a publication is defamatory is in the reasonable members of the public to whom the estimation of the plaintiff must be lowered. The fourth order sought that the Defendant retracts the statement published about the Plaintiff in a defamatory article of 19th February, 2016 and render and publish an apology to the Plaintiff cannot be granted in the interlocutory stage as it would be tantamount to determining the main suit at interim stage.

The publication complained of was a matter of public interest and concern. The Appellant was mentioned among other entities which had been awarded tenders by the NYS without a specific publication that the Plaintiff company was a sham and corrupt. I am not satisfied that the Applicant has 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 merit in the application . The upshot of this is that the application dated 7th March, 2016 is hereby dismissed with costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 20th Day of December, 2017.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent