



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 172 OF 2015**

AHMED ADAN.....PLAINTIFF

V E R S U S

NATION MEDIA GROUP LIMITED

JAINDI KISERO

KIPSANG SAMBAL.....DEFENDANTS

**RULING**

The Plaintiff herein has applied by **notice of motion dated 7<sup>th</sup> May, 2015** for a temporary injunction to restrain the Defendants, pending disposal of the suit, from -

**“repeating, republishing or otherwise disseminating, in any manner or form, whatsoever, any statements of or concerning the Plaintiff with regard to Integrity Centre, whether directly or indirectly, or publishing or making any further comments or referencing to him on the basis of the investigation report of the 3<sup>rd</sup> Defendant on Integrity Centre, whether through the internet or via print media**

**Repeating, republishing or otherwise disseminating, in any manner or form, whatsoever, any statements and reports based on his investigation report/s of or concerning the Plaintiff with regard to Integrity Centre, whether directly or indirectly, on his preliminary investigations, with regard to Integrity Centre until the same are authorized for release by the Commission in accordance with the law and after conclusion of investigations.**

**..... to immediately, and not more than 24 Hours from service of the order, remove and for takedown the online publication titled “INTRIGUES OVER SUSPECT SALE OF EACC OFFICES and disable all links they have provided to the said publication from their online accounts and / or affiliated websites and social media accounts”**

The Plaintiff also prays for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be required to remove the online publication titled “INTRIGUES OVER SUSPECT SALE OF EACC OFFICES” and disable all links they have provided to the said publication from all their online accounts.

The main grounds for the application are that the Plaintiff has a prima facie cause of action in libel/slander against the Defendants with a high likelihood of success on the merits; since publication of

the offending words extends to the internet, the harm is still ongoing as they have a continuing global presence; the defamatory statements have already been picked up and disseminated globally; The Plaintiff's business has thereby suffered "irreparable" harm which is likely to continue as long as the materials are accessible via the internet; damages would not be an adequate remedy should the Plaintiff eventually succeed in trial and in the absence of the protective orders sought, success at the trial will be rendered largely academic; no harm will be suffered by the Defendants if the orders sought are granted. There is a supporting affidavit sworn by the Plaintiff.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have opposed the application by **grounds of objection dated 4<sup>th</sup> June 2015**. Those grounds are:-

1. That the Plaintiff has failed to show a prima facie case with a probability of success.
2. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have a good defence to the claim.
3. Damages (if any are awardable) are an adequate remedy as opposed to injunction.
4. No undertaking as to damages has been made by the Plaintiff as required by law.
5. The balance of convenience lies against granting an injunction.
6. The granting of injunction is contrary to public policy and in effect is the muzzling of the freedom of media as enshrined in the Constitution.

A replying affidavit sworn by Sekou Owino a legal officer with the 1<sup>st</sup> Defendant on 4<sup>th</sup> June 2015 is to the effect that –

- i. The Defendants featured a publication through the internet on a story involving the intrigues over suspect sale of EACC offices which was not done in malice to discredit and/or cast aspersions to the Plaintiff's credibility and reputation as alleged.
- ii. The 2<sup>nd</sup> Defendant through his own independent investigations established that there were controversies surrounding the sale of the EACC offices which were dubious in nature.
- iii. The feature story was published in public interest and at no point did the Defendants broadcast it to bear any defamatory meaning.
- iv. The publication was fair comment and fair information published with a view of informing the public on issues of alleged un-procedural sale of the EACC offices.
- v. The publication was published under a sense of public duty and without malice towards the Plaintiff and in the honest belief that the information contained therein was true and accurate.
- vi. The plaintiff's application is aimed at barring the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from enjoying their freedom of the media as enshrined in the Constitution regarding matters of great public interest and importance.
- vii. At no point prior to filing of the suit did the Plaintiff request a right of reply as the publications were published on 19<sup>th</sup> and 20<sup>th</sup> April 2015 and the suit was filed on 8<sup>th</sup> May 2015.

The 3<sup>rd</sup> Defendant's Replying Affidavit in opposition to the Plaintiff's application was sworn by himself raises the following grounds of opposition –

- a. That the Plaintiff has not in any way adduced any evidence to demonstrate that he published or participated in publishing the defamatory story or that he acted in concert with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to maliciously defame, harm, injure or unlawfully interfere with the professional and business reputation of the Plaintiff.
- b. That in so far as the publication relied on a report prepared by him, the said report was prepared in carrying out his statutory duties in his official capacity accorded to him by section 23 of the Anti-Corruption and Economic Crimes Act.
- c. That he has not occasioned the Plaintiff any harm in his social, economic or political standing.
- d. That nonetheless, the Plaintiff has engaged in a scheme to scandalize and intimidate him by publishing a false narrative in various newspapers and magazines to the effect that he has attempted to acquire the EACC the property subject of this suit.
- e. That the publication is denied save to authorized persons in the normal course of business as an investigator and whereas he is no longer seized with investigations into the subject matter of the

suit, he did make findings which pointed to a conspiracy involving the Plaintiff and other players to commit corruption or economic crime in relation to the discharge of charge over the 'Integrity Centre'.

- f. That these findings and preliminary conclusions might have formed the basis of the feature story complained of.
- g. That since the Plaintiff is seeking an equitable and discretionary order, he ought to have made full and frank disclosure of material facts forming the basis of the investigations and preliminary conclusions.

The Plaintiff swore further affidavits denying the contents of the replying affidavits and reiterating the facts in his supporting affidavit on 3<sup>rd</sup> September 2015 and in reply to all the Defendants which can be summarized thus -

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' replying affidavit is only sworn on behalf of the 1<sup>st</sup> Defendant and there is no authority to make depositions on behalf of the 2<sup>nd</sup> Defendant, neither is the information he gives based on the deponent's knowledge or facts therefore those parts should be struck out.
- b. That the affidavit contains admissions as at no point does the deponent show how the 1<sup>ST</sup> and 2<sup>nd</sup> Defendants complied with provisions of the Statutory Code of Conduct for the Practice of Journalism particularly the steps taken to investigate the feature story complained of before publication as the conclusions made by the 3<sup>rd</sup> Defendant were only preliminary.
- c. A later article published by the 1<sup>st</sup> Defendant reporting on this matter dated 19<sup>th</sup> August 2015 does not give full information about this matter, is contrary to the sub-judice doctrine and this Court needs to issue a ban on what should be published about these pending proceedings.
- d. The 3<sup>rd</sup> Defendant by his affidavit has only admitted that he leaked a confidential and privileged preliminary report to the media without authorization by the Commission thus he is not protected statutorily from personal liability resulting from the disclosure.
- e. The assertions by the 3<sup>rd</sup> Defendant are of no probative value to the defamatory proceedings as the documents sought to be relied upon have not been produced as evidence as no documents have been filed in compliance with Order 7 Rule 5 of the Rules.

The 3<sup>rd</sup> Defendant filed a further replying affidavit demonstrating 'the arbitrary manner in which the account was dealt with and the property discharged which justified the preliminary conclusions reached.'

All the Defendants entered appearance and filed statements of defence. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants admitted publishing the words complained of but denied liability. They denied that the words were defamatory of the Plaintiff, either in their natural and ordinary meaning or by *innuendo*. In addition to other defences, they pleaded **justification** and **fair comment without malice on a matter of public interest and public policy**. The 3<sup>rd</sup> Defendant denied publishing the words complained of but admitted having been involved in investigations into the sale of *Integrity Centre* which pointed to conspiracy involving the Plaintiff and other players to commit corruption or economic crimes.

I have considered the written submissions made on behalf of the parties, including the various authorities cited.

The court has jurisdiction to grant interlocutory injunction in defamation cases, but only in the **clearest of cases**. The jurisdiction has been said to be **of a delicate nature** and '**ought only be exercised in the clearest of cases**'. See *Gatley on the law of Libel and Slander*, 11<sup>th</sup> Edn, Para. 27.2.

The jurisdiction will in general not be exercised unless there is strong *prima facie* evidence that the statement complained of is untrue. Unless it is plainly clear that an alleged libel is untrue, it will not be clear that any right has been infringed.

Whether or not there is libel is primarily a question of fact. In order to grant an interlocutory injunction the court would have to come to a decision upon that question of fact before trial and upon untested

affidavit evidence. It must therefore be manifest that the matter complained of is libelous and that that fact is unlikely to change at trial. The defamation complained of must be **obvious, atrocious and wholly unjustified**. It must be a kind inflicting the **most serious injury** to a plaintiff's character and reputation. Should the court entertain a doubt that the words complained of are defamatory, interlocutory injunction will not be granted, for it is important, in the public interest, that the truth be known.

The **test in defamation cases should therefore go beyond that obtaining in ordinary cases**. It will not be sufficient merely for the plaintiff to establish a *prima facie* case with a probability of success and irreparable loss.

There are also instances when interlocutory injunction will be very difficult to obtain no matter how strong the plaintiff's case. These instances include where **justification** is pleaded. Where the defendant pleads that he will be able to prove that the words complained of are true, unless the court is clearly satisfied that he will not be able to do so, it will not grant interlocutory injunction. See *Gatley para. 27.5, 27.6* In **Bonnard vs Perryman [1891] 2 Ch. 269**, it was explained –

**“the right of free speech is one which it is for the public interest that individuals should possess and indeed that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed...”**

I must decide in this application if the Plaintiff has placed before the court strong *prima facie* evidence that the words complained of are untrue. Is it manifest that the words complained of are libelous and that that fact is unlikely to change at trial? Is the defamation complained of obvious, atrocious and wholly unjustified? Has it inflicted the most serious injury to the Plaintiff's character and reputation?

The above questions are of course asked over and above the usual test for the grant of interlocutory injunction in ordinary cases. First and foremost, a plaintiff must establish a *prima facie* case with a probability of success. Then he must establish that unless the injunction sought is granted he stands to suffer irreparable loss. If he passes these preliminary hurdles, the court can then interrogate the higher standard required in defamation cases as set out above.

The circumstances surrounding the publication of the words complained of in this suit are in the public domain and are as follows. The Plaintiff is a lawyer at Wetangula, Adan and Makokha Advocates. During the sale of *Integrity Centre* which houses Ethics and Anti-Corruption Commission the 3<sup>rd</sup> Defendant was assigned to investigate how the transfer was carried out. During his investigations, he stumbled upon information linking the plaintiff to companies that were involved in the transaction. While the Integrity Centre was sold for Kshs. 400 million, private property valuers estimated that it was worth in excess of Kshs. 1 Billion. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants therefore quoted a report that had been prepared by the 3<sup>rd</sup> Defendant who was assigned to write it as part of his day to day assignments given to him by his employer.

When he attempted to make queries at the Deposit Protection Fund (DPF) from which the initial request for investigation emanated, (to recover a share certificate for 2500 shares held in trust for Trust Finance Limited- in liquidation), the then Director Ms. Rose Detho sought termination of investigations arguing that the DPF had secured the desired share certificate.

That even then, the 3<sup>rd</sup> Defendant continued with investigations and that is when he stumbled upon information linking the Plaintiff to the companies which were involved in the transactions he prepared his report.

That the imputations contained in the words complained of, if untrue, are highly defamatory of the Plaintiff cannot be in doubt. Those imputations are that the Plaintiff, was involved in a transfer of the

*Integrity Centre* that was not *bonafide*; it was also doubtful that any consideration passed; that he got involved in underhand deals to acquire public property placed under the receivership of the DPF by virtue of the provisions of section 45(3) of the Anti-Corruption and Economic Crimes Act; that he thereby obtained for himself an unworthy benefit; and that he was thus corrupt. If these allegations were true the Plaintiff would be liable to criminal prosecution under the **Anti-Corruption and Economic Crimes Act**. So far however, no such proceedings have been initiated or instituted against the Plaintiff.

The Defendants especially the 3<sup>rd</sup> Defendant whose report was relied on to publish the defamatory statements has laid before the court evidence he intends to use at the trial of the action to prove that the words complained of are true or are substantially true.

Any statement by a publisher or its agents that leads to unequivocal pointer as to the culpability of a plaintiff or offended party is prejudicial to the entire process.

The reply by the defendants contains issues for determination which have to be addressed by evidence and tested by way of cross-examination. If not restrained prejudice may be occasioned to the offended party. Some conclusions have been arrived at by the defendants without the benefit of any evidence placed before the court. I have asked myself whether or not the Plaintiff has attained the threshold to entitle him to the orders sought.

I have already observed that the Defendants have relied on material that is yet to be presented at the trial. For as long as the trial is yet to commence and determination made based on the evidence to be adduced, no party to the proceedings may claim to be right.

It may be argued that it is in the public interest or policy to uphold the position advanced by the Defendants. It must be borne in mind however, that in some instances damages may not be enough to restore reputation. I hold the view that reputation like a name is priceless. No amount of damages therefore may be adequate compensation were the defendants to be found liable.

The 1<sup>st</sup> Defendant's websites, the Plaintiff alleges, are awash with information injurious of him and unless they are brought down his reputation will continue to be at stake.

In addition, the internet platforms have a wider coverage and access than the local print media. In the event the postings are maintained, continued injury shall be sustained.

The foregoing being the case, the orders that commend themselves are as sought by the Plaintiff.

I am persuaded the Plaintiff is entitled to Orders 3. 3.1, 3.2 and 3.3 of the Notice of Motion dated 7<sup>th</sup> May, 2015. The costs shall be in the cause.

Orders accordingly

**Dated and delivered at Nairobi this 22nd Day of March, 2016.**

**A.MBOGHOLI MSAGHA**

**JUDGE**