



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 300 OF 2015

VIMALKUMAR BHIMJI DEPAR SHAH.....1ST PLAINTIFF

BIDCO AFRICA LIMITED.....2ND PLAINTIFF

VERSUS

STEPHEN JENNINGS.....1ST DEFENDANT

RG AFRICA LAND LTD T/A

RENDEAVOUR GROUP.....2ND DEFENDANT

PRESTON MENDENHALL.....3RD DEFENDANT

ARTEM GUREVICH.....4TH DEFENDANT

ALY KHAN SATCHU.....5TH DEFENDANT

CYPRIAN NYAKUNDI.....6TH DEFENDANT

RULING ON INTERLOCUTORY INJUNCTION

1. This ruling determines the Notice of Motion dated 31st August 2015 filed by the plaintiff Vimal Kumar Bhimji Depar Shah and Bidco Africa Limited who are the applicants, against the defendants Stephen Jennings RG African Land Ltd t/a Rendeavour Group, Preston Mendenhall, Artem Gurevich, Aly Khan Satchu and Cyprian Nyakundi. The application which was filed under certificate of urgency under the provisions of section 3, 3A, 63(e) of the Civil Procedure Act, Order 40 rule 2 of the Civil Procedure Rules, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law and inherent powers of the court. The application seeks for injunctive orders as follows:

i. Spent

ii. That leave be granted to the plaintiffs herein to effect service on the second defendant RG Africa Land Limited, Preston Mendenhall and Artem Gurevich by way of substituted service in Daily Newspaper of wide circulation.

iii. Pending the hearing and determination of the application interpartes, an interim injunction

directed at each of the defendants restraining them by themselves, their agents, servants or otherwise howsoever from posting on any electronic media, or publishing, or disseminating in any manner whatsoever the defamatory words, statements or content or any similar word or statements or content, of like effect relating to the plaintiffs herein.

iv. Pending the hearing and determination of the application interpartes, a mandatory injunction be issued directed at each of the defendants compelling them, by themselves, their agents, servants or otherwise howsoever to erase and remove from their various posts, websites, blogs or their forms of electronic and social media of any form or nature whatsoever the said defamatory words, statements, or content or any similar words or statements or content of like effect relating to the plaintiffs herein.

v. Google and twitter be directed to assist in affecting the aforesaid orders.

vi. Spent.

vii. Pending the hearing and determination of this suit, an interim injunction be issued directed at each of the defendants, restraining them by themselves, their agents, servants, proxies or otherwise howsoever from posting and forwarding on any electronic media, or publishing, or disseminating in any manner whatsoever the defamatory words, statements or content or any similar words or statements or content, of like effect against the plaintiffs herein.

viii. Pending the hearing and determination of this suit, a mandatory injunction be issued directed at each of the defendants compelling them, by themselves, their agents, servants or otherwise howsoever to erase from their various posts, websites, blogs or their other forms of electronic and social media of any form or nature whatsoever the said defamatory words, statements, or content or any similar words or statements or content, of like effect.

ix. The costs of this application be provided.

2. The Notice of Motion is grounded on 9 grounds on the face of the application and supporting affidavit of Mr Vimal Kumar Bhimji Debar Shah sworn on 31st August 2015.

3. The grounds and supporting affidavit lay the foundation for this suit and the application for injunctive orders. It is averred and deposed that on 20th May 2015 the 3rd defendant Presten Mendanhall on behalf of the second defendant RG African Land Limited wrote a letter to the plaintiffs' various business associates including IBM East Africa which words are set out in paragraph 12 of the plaint, and which words are said to be injurious to the plaintiffs' reputation; That on 9th June 2015 at Sankara Hotel in Westlands, Nairobi at a Mind speak forum hosted by the 2nd defendant, the first defendant Stephen Jennings delivered a speech to a large audience of influential investors, in which he uttered the words particularized in paragraph 17 and 18 of the plaint, which were defamatory to the first plaintiff; That the 5th defendant Aly Khan Satchu fielded questions to the 1st defendant which questions were meant and did encourage the first defendant to utter further defamatory statements regarding the first plaintiff: That the 1st defendant proceeded to post and publish the said defamatory statements on their website to wit <http://www.rendevour.com> on the world wide web of the internet, in particular, by way of a video link to YouTube with the link appearing on the first defendant's website: That the said website has remained open to general access by any user of the world wide web hence, it is to be inferred from the open access of the site and the wide interest by Kenyans and international investors in Kenya's economic climate and or business opportunities on account of Kenya being the gateway to East and Central Africa, that the words complained of in paragraph 5 and 6 of the plaint were published to a substantial and unquantifiable number of readers who as at 28th August 2015 stood at 55,019 and 117 respectively: That the fifth defendant has proceeded to post and publish the said defamatory statements in a video hosted on Youtube with the link appearing on the second defendant's website to wit www.Rich.co.ke and his personal twitter handle to wit @alykhansatchu with the following of 189,000 followers: That on 1st July 2015 the first defendant

has after publication of the aforementioned defamatory articles proceeded to undertake a very vile smear campaign against the first plaintiff and the second plaintiff by distributing leaflets and posting messages on line as particularized in paragraphs 29,30 and 31 of the plaint; That the sixth defendant Cyprian Nyakundi has also been enlisted by the 1st defendants and he has undertaken a very vile smear campaign against the plaintiffs and he had during the months of July 2015 to August 2015 published various defamatory statements on his blog site <http://cnyakundi.com> as well as on the various online twitter platforms vide @c-nyakundi it with 611,900 or more followers; that despite the gravity of the allegation being made against the plaintiff by the defendants they have despite repeated demands failed to pull down from their websites the defamatory article despite their knowledge of the said articles causing distress and exposing the plaintiffs to odium, ridicule and contempt. The said defamatory articles continue to expose and cause the plaintiffs untold distress as they are being viewed by hundreds of thousands and /or millions of Kenyans and other nationalities spread across the world on the world wide web system of the internet; That by reason of the words complained of at paragraphs 12,17,18,29,33 and 37 of the plaint have gravely injured the reputation of the plaintiffs, and have exposed the plaintiffs to odium and or public scandal and contempt and caused hem deep embarrassment and distress and continues to do so; that the third defendant has after a failed bid to extort shs 40 million from the plaintiffs threatened and has continued publishing further false and defamatory statements about the plaintiffs and BIDCO and he has posted over 30 defamatory posts on his blog and on twitter under various “hash tags” as particularized in paragraphs 37 of the plaint; and that unless restrained, and expeditiously so, the defendants will continue to further publish or cause to be published the same or similar defamatory words of the plaintiffs thereby causing them irreparable harm.

4. The supporting affidavit annexes the alleged reproduced defamatory publications/matters.

5. In opposition to the application for injunction the 1st, 3rd, 4th and 5th defendants filed grounds of objection on 9th September, 2015 contending that the application was devoid of merit as the main suit was legally untenable and fatally defective, the applicants have no prima facie case with a probability of success as required in the *Giella v Cassman Brown* case; the defendants plead the defence of justification, fair comment and qualified privilege and therefore no interlocutory injunction can issue; that the words complained of are truthful and not defamatory that the plaintiffs’ complaints are informed by Indian cultural values and norms on honour and integrity; that the suit is propelled by the plaintiffs’ inflated ego and sense of self- importance and is not about whether or not he was defamed by the defendants and that the court is not the proper institution to help him solve such personal issues and problems; and that the defendants constitutional right to express their opinions should not be curtailed by unreasonable and whimsical demands by the plaintiffs. The 6th defendant respondent did not file any response to the application.

6. The application was argued orally before me on 10th September 2015 with Mr Mmaiti submitting for the plaintiff’s applicants that the plaintiff holds various positions and directorship in large manufacturing companies including Bidco Africa Limited; is a respected member of the business community both locally, regionally and internationally as listed in paragraph 2 of his supporting affidavit: that he is an advisor to various presidents of the world; That the plaintiff is of good character which the defendants are unlawfully attacking, among other tributes.

7. Further, that some of the defendants documents confirm that position and the respect that the plaintiff enjoys worldwide. The plaintiff’s counsel submitted that the words used in the publications were meant and have indeed disparaged the plaintiff’s good reputation in that they have painted the plaintiff as a person who does not respect any legal process; manipulates the judiciary; is willing to engage in corrupt practices including demanding for bribes which allegations impute criminal activities on the part of the plaintiff, punishable by jail terms. Counsel also referred to the several annextures including annexure 1 and 3. Annexure 3 is a public lecture by the 1st defendant at a forum hosted by the 5th defendant and repeated in the 3rd defendant’s letter to IBM EA. It was submitted that the video from the lecture was posted to various websites of the defendants accessed by various people which is alleged to be injurious to the plaintiff’s character and reputation.

8. It was also submitted that the 5th defendant fielded questions after hosting the speech and did not control or stop his guest from giving answers that were defamatory of the plaintiffs. It was further submitted that the defendants formed a website known as Badcoafrika.com which is used to spread malicious falsehoods and have distributed leaflets making false allegations against the plaintiffs in supermarket chains alleging that the plaintiffs had grabbed land among other false allegations. It was submitted that the publications are not mere criticism of the plaintiffs but that they all bear negative connotations which are harmful to the plaintiff's character and reputation. That when the plaintiff attended the GES summit, and in the presence of World leaders and Heads of States and Entrepreneurs, the defendants circulated false and malicious leaflets to the participants. That the 6th defendant who is a blogger picked up those defamatory matters and reproduced them in his blogs, equating the plaintiff's actions to terrorism; describing the plaintiff as a land grabber; violator of human rights and one who had corrupted the Ugandan Government. That malice is evident and presumed from the alleged publications for example, that there is no reason for writing to IBM where the defendants are not shareholders. That the publications were published to the whole world without calling on the plaintiffs to defend himself or themselves. That the malicious campaign is fuelled by a dispute over Tatu City Enterprises. Counsel for the plaintiffs urged the court to protect the personal dignity of the plaintiffs as that right is guaranteed under Articles 28 and 33 of the Constitution. He relied on several authorities to fortify his clients positions including **CFC Stanbic Bank Ltd V Consumer Federation of Kenya HCC 315/2014; Safaricom Ltd V Porting Access (K) Ltd & Another HCC 167/2011; Kenya Breweries Ltd & Another Vs Washington Okeyo CA 332/2000; Gatley on Libel & Slander 11th Edition Sweet & Maxwell**); **Law and the internet 3rd Edition Lilian Edwards and Charlotte Waelde; and Black's Law Dictionary 8th Edition, Bryan A. Garner.**

9. Counsel for the plaintiffs submitted that when parties disagree over business ventures, they should not misuse freedom of speech and that where such misuse is apparent, mandatory injunctions are granted in clear and special circumstances. He maintained that the plaintiffs had established a prima facie case on the meanings of the words published and the damage those words have caused and or likely to cause in libel are assumed, which harm is irreparable. Further, that allowing the continuation of such defamatory statements to be published against the plaintiffs will leave the plaintiffs with no recourse in the business world since they are regarded as thieves hence both prohibitive and mandatory injunctions should be granted in their favour.

10. In opposition to the plaintiffs application, the 1st- 5th defendants represented by Senior Counsel Mr Ahmednasir Abdullahi submitted, relying on the grounds of opposition filed on 9th September, 2015 and the statements of defence filed on behalf of his clients. Senior Counsel contended that all the prayers in the Notice of Motion were spent save for prayers 7, 8 and 9. He contended that the application dated 31st August 2015 is frivolous, undeserving and an abuse of the court process. That there was no genuine complaint by the plaintiffs who only want the court to protect his ego. That there is no evidence that he is an advisor to presidents of the world. That the allegations that the 3rd defendant's letter is defamatory are not true. That the 3rd defendant pleads the defence of justification and that they shall demonstrate it at the trial. Senior Counsel urged the court not to grant interlocutory injunction once the defence of justification is pleaded, as espoused in Section 14 of the Defamation Act 36 of Laws of Kenya. He also relied on principles of injunctions by **Richard Kuloba [1987] Oxford University** press of freedom of speech which should not be limited than is necessary and that the law of defamation is there not to protect private rights of parties to litigation or prosecution but founded entirely on public policy.

11. That the plaintiff can be awarded damages if the defendants fail to justify their defence of justification. Senior counsel maintained that none of the extracts annexed are defamatory but are prima facie general comments by businessman in Uganda and Kenya. He relied on the **Star Publication Ltd & Another V Ahmednasir Abdullahi & 5 Others HCC 317 of 2013** where Onyancha J declined to grant injunction where there was a plea of justification because the plaintiff could plead for damages.

12. According to Senior Counsel, the defendants were at liberty to publish defamatory words at their own risk without their right of free speech being curtailed or at all. He also relied on the **Media**

Council of Kenya Vs Eric Orina HCC 540/2012 cited by Onyancha J in the above case of **The Star Publication Ltd Vs Ahmednasir Abdullahi**, citing **Cheseren Vs Immediate Media Services [2000] 2 EA 371** counsel submitted that an interlocutory injunction at this state was redundant. Further, that there must be substantial risk of grave injustice for a court to grant an interlocutory stage in defamation claims. Further reliance was placed on the English case of **Frazer V Evans & Others[1969] 1 ALL ER** where the court held that the court would not restrain the publication of an article even though it was defamatory, when the defendant said that they intended to plead justification or fair comment. He further submitted that the words complained of are not defamatory but only construed to be so and that even if they were defamatory, the defendants plead justification and are willing to be held liable to pay to the plaintiff any damages that may be awarded. He also submitted that the annexed discs and videos are inadmissible at this stage and that all the averments of the plaintiffs are worthless. He urged the court to dismiss the application for injunction as it has no prima facie case with a probability of success since the alleged particular defamatory words are not set out.

13. Miss Mutua counsel for the 6th defendant submitted that her client writes on issues of public interest, pollution, deforestation, land grabbing and human rights violations which are issues of public interest generally and which issues outweigh issues of private nature. She relied on **Ruth Ruguru Nyagah Vs Kariuki Chege & Another [2015] e KLR** where the court held that the court had to weigh the defendant's right of self expression against the plaintiff's right of protection and that it has to favour the constitutional right to the protection of the public interest. That the 6th defendant was exercising his constitutionally guaranteed right under Article 33 of the Constitution which overrides the plaintiff's private right. She also concurred with the decisions relied on by Senior Counsel Ahmednassir Abdullahi in his submissions which she submitted, are clear that where the rights of free speech are involved, the court has to weigh out whether they should override the rights of private citizens. She submitted that a mandatory injunction will fetter the 6th defendant's freedom of expression hence it should not be granted. Counsel urged the court to dismiss the application against her client with costs.

14. In a brief rejoinder, Mr Mmaiti submitted that the reference to Kuloba's book is misplaced as the issues that he was dealing with are different from the issues at hand in that he was dealing with whether the law of contempt can be used to impede free speech.

15. Concerning the case of **Kenya Breweries Ltd V Okeyo,(2002) 1 EA 109** Mr Mmaiti submitted that the court was clear that no exceptional circumstances existed unlike in this case where there were exceptional circumstances. Further, that in **Bonnard V Perryman (1891-4 ALL E.R)** case, the court found that an injunction could not be granted where the defence of justification is pleaded unless the court can be sure that the defence cannot be sustained at the trial. Counsel submitted that in the instant case, the defendants had not assured the court by way of affidavit that what they plead is the truth and that there has been no retraction of the facts deposed in the applicant/plaintiff's affidavit. He also submitted that the defendants are not truthful, trustworthy and humane deserving of protection of their constitutional rights. That in **Cage cot Cotton Company Ltd V Tanzania Marketing Board** (supra) case, the court granted an interlocutory injunction because the private interests outweighed the public interest. He argued that the plaintiff deserved his dignity protected even if there was no evidence of his involvement in the management of Bidco Group of Companies.

16. Before the ruling here could be written and delivered as scheduled for 8th October 2015 the applicants/plaintiffs herein filed another application dated 29th September 2015 seeking to have the defendants cited for contempt of court. The court therefore recalled the ruling in the application for injunction and heard the application for contempt, with the agreement of both parties' advocates on record that the rulings in both applications be delivered on the same day. I have just rendered the decision on contempt of court. I must therefore pronounce myself on whether or not the application for interlocutory injunction is merited.

17. I have carefully considered the pleadings, affidavit evidence on record, grounds of opposition, oral submissions of learned counsel for the respective parties and the law both Constitutional, statutory

and case law relied on. This being an application for both a mandatory and prohibitory injunctions, all the applicants are required to do is, firstly, to establish that they have a prima facie case with a probability of success; secondly, that if the injunction is not granted, they stand to suffer loss and damage that cannot be compensated by way of damages and finally, that if this court is in doubt, it will decide the matter based on a balance of convenience. The above principles were set out clearly in the celebrated case of **Giella V Cassman Brown & Company Ltd [1973] EA 358 at page 360** where it was stated:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (EA industries V Trufoods [1972] EA 420)”

18. It is worth noting that interlocutory injunctions are granted prior to the trial of action or until further order is made in order to preserve the status quo until the court can hear the dispute fully. Further, in defamation claims, an injunction can properly issue to restrain an obstruction to justice and in particular, to certain publications or planned publications that are calculated to prejudice proceedings actually in progress or those about to be heard.

19. However, the test for an interlocutory injunction which is mandatory in nature is more onerous than is the case for an interlocutory injunction which is prohibitory in nature. This is as was established in the case of **O’Brien V Dromoland Castle Owners Association inc, (s) [2012] IE HC 407** where the court, applying common law principles stated that, referring to **Kirwan’s injunction, law and Practice Round Hall Press, Dublin; 2008 pp 210-214** that it is significantly harder to secure a mandatory injunction at an interlocutory stage than a prohibitory one.

20. In **Lingani V Health Service Executive [2005] IE SC 89** Fennelly J stated that in such a case, It is necessary for the applicant to show at least he has a strong case that he is likely to succeed at the hearing of the action.” In **AIB V Diamond [2011] IE HC** Clarke J noted that cases involving mandatory interlocutory injunctions require a higher level of likelihood of the applicant succeeding at trial.

21. In **Mrao Ltd V First American Bank of Kenya Ltd & 2 Others [2003] 1 KLR 125** the court defined a prima facie case in civil cases as:

“A case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

22. In the case of mandatory injunctions as was held in **Kenya Breweries Ltd Vs Washington Okeyo CA App 332/2000**, an applicant must demonstrate the existence of special circumstances. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the Court of Appeal in the case of **Kenya Breweries Ltd vs Washington Okeyo (2002) EA 109** had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of Halsbury’s Laws of England 4th Edition paragraph 948 that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

In the English case of Locabail International Finance Ltd vs Agro Export & Another (1986),

ALI ER 901 which the Court of Appeal in Kenya has followed with approval in many decisions, the court held that:-

“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

23. The above decision was cited with approval by the Court of Appeal in the case of **Sharriff Abdi Hassan vs Nadhif Jama Adan CA 121/2005(2006) e KLR** by further observing that:-

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property.”

24. The same Court of Appeal in the case of **Jaj Super Power Cash and Carry Ltd vs Nairobi City Council & 20 others CA 111/2002** stated:

“ This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

25. As stated in the ruling on the application for contempt, the court notes that although there are serious allegations by the plaintiffs against all the defendants to the effect that the defendants have published highly libelous material of and concerning the plaintiffs, nonetheless, the alleged publications were allegedly made in the internet through websites, twitter handles or speeches saved on CDS and other digital/electronic forms. It was not a publication in the newspapers. The defendants deny the alleged publications but nonetheless contend that even if they so published the alleged defamatory words of and concerning the plaintiffs, they plead the defences of fair comment on matters of public interest and justification. They also content that the application for injunction is meant to curtail their freedom of expression guaranteed under the Constitution.

26. I have examined the impugned publications both in the plaint and in the supporting affidavit. The plaintiffs have averred that the impugned publications are meant or were understood to mean inter alia that the plaintiffs are land grabbers; ruthless imperialists; are involved in corrupt dealings with the Ugandan government and or the justice system; are inhuman and heartless; and involved in terrorism and corporate terrorism; are involved in the degradation, pollution and destruction of the environment; have no regard for human rights; have no regard for animal rights; earn them income unjustly; take advantage of the down trodden; are corrupt and engage in criminal and or fraudulent activities are unprofessional in the conduct of their affairs; extortionists; manipulative; sabotages Tatu City project; corrupts the Kenyan Government for own selfish ulterior purposes; corrupts and manipulates the Kenyan judicial system; are vexatious litigants; conspirators with Nahashon Nyagah to steal millions of dollars from Tatu City.

27. Nonetheless, the alleged impugned articles having been published in the electronic or digital form, it was necessary that the extract publications are accompanied by certificates of transcription and appropriate leave sought and granted to play in the view of the court the CDs containing the alleged defamatory material. This was not done.

28. Although this court is not hearing the main suit at this juncture, in tort of defamation, the claimant must establish that the words complained of were published by the defendants; that they are defamatory, that is, that they tend to lower the reputation of the claimant in the estimation of the right thinking members of the society generally; that the words refer to the claimant and finally, that the words are malicious. What this court was shown to be publications are transcribed material from websites, twitter handles and other electronic or digital formats. For such material to be said to have been published, and for the court to grant a mandatory injunction, it must be satisfied that the case is a clear one, as the standard of proof required is higher than that required in prohibitory injunction. It is not sufficient for the plaintiff/claimant to “publish” the alleged defamatory words in his pleadings or affidavit and claim for a mandatory injunction. The court should have been enabled to access and view those electronic/digital/internet sources as contemplated in Sections 106A-106I of the Evidence Act. Electronic evidence is subject to manipulation that is why the Evidence Act stringently provides for standards on how such evidence is to be adduced. In this case, the plaintiffs have not demonstrated to court what instruments were used to produce the CDs annexed. They have also not shown that there was publication of the alleged defamatory words in the internet and or twitter handles as the court cannot presume the authenticity of what is in the internet, and which can easily be manipulated. In other words, the case for a mandatory injunction has not been shown on a balance of probabilities to be unusually strong

29. In my humble view, it is not just the issue of admissibility of such evidence at this stage but its probative value even at this interlocutory stage especially in the prayer for a mandatory injunction. The essence of justice is fairness to both parties. In **Film Rover International Ltd Vs Cannon Film Sales Ltd [196] 3 ALL ER 722** the court held that:

“.....In which case the court was required to feel a high degree of assurance that the plaintiff would succeed at the trial before an injunction could be granted or exceptional in that because withholding an injunction with is a greater risk of injustice than granting it.”

30. In **Kamau Mucuha Vs Ripples Ltd CA No. 186/1992** the Court of Appeal held that a mandatory injunction can only be issued in the clearest of cases as granting it at an interlocutory stage amounts to granting a major relief claimed in the action and its effect is to determine the suit absolutely.” That a mandatory injunction ought not to be granted on the basis of affidavit evidence that it is also established in Case law that courts cannot issue a permanent injunction without evidence being taken at full trial(See **Wachira Muriithi Kibuchi V Jadson Maranga Nyangau HCC 280/2006**).

31. In the instant case, If I were to consider in detail the dispute between the parties by referring to the websites/twitter/electronic/digital publications which have not been produced in a manner acceptable in law, there is the danger of determining the merits of this suit on affidavit evidence without hearing both parties which determination will prejudice the findings to be made at the full hearing.

32. Nonetheless I find that on a balance of probabilities there are serious allegations made against the defendants, those of allegedly publishing and or disseminating highly inflammatory statements and or words of and concerning the plaintiffs in their business and reputation and which, should it be proved that they are false, even if the defendants have proved justification and fair comment in the public interest, since the plaintiffs have not lost the opportunity to adduce their evidence in support of the serious allegations leveled against the defendants, the plaintiffs’ reputation will be greatly affected and they stand to suffer irreparable injury which cannot be adequately be compensated by an award of damages. From the allegations that the defendants’ alleged publications refer to the plaintiffs as being engaged in criminal activities, manipulate the courts and corrupt them; are extortionists, on the face of it, such words imputing criminal activities on the plaintiffs as pleaded in the plaint and reproduced in the supporting affidavit to this application appear defamatory, subject to proof of truth or fair comment on matters of public interest. However, the old English case of **E. Hulton & Co. v. Jones [1908 – 1910] All E.R. (Rep.) 29 Lord Loreburn, LC** (at p.47) stated that:

“Libel is a tortious act. What does the tort consist in? It consists in using language which

others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame the plaintiff. He has none-the-less imputed something disgraceful, and has none-the-less injured the plaintiff. A man may publish a libel in good faith believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action.”(emphasis added).

33. From the above decision which was cited with approval by Ojwang J. (as he then was) in **HCC Civil Case 1333 of 2003 Mwangi Kiunjuri vs Wangethi Mwangi & 2 others**, it is clear that pleading justification or truth is not a guarantee to continually print defamatory words concerning a person.

34. In addition, the balance of convenience tilts in favour of the applicant as the defendants stand to suffer no prejudice if they are prohibited from publishing any statements that are defamatory of and concerning the plaintiffs.

35. I must also add that in defamation cases, the court must weigh between the freedom to express oneself and impart information to others against the respect for others' right to reputation and inherent dignity, all enshrined in the Constitution. Having taken into account all the submissions and considered the **Star publications Ltd v Ahmednasir Abdullahi case and Media Council of Kenya v Eric Orina** decisions relied on by the defendants are persuasive and not binding on me. Similarly, the foreign decisions are also persuasive and are not necessarily in line with our 2010 Constitution, which, though granting the freedom of speech and expression, nonetheless limits that freedom and subjects it to other person's right to inherent dignity and also the right to their reputation being protected and not to be vilified by others. Article 33 of the Constitution which provides for freedom of expression and information also limits the same freedom. To refuse to grant an interlocutory injunction in this case would in my view, be granting a license to the defendants to engage in highly inflammatory defamatory publications that is likely to injure the plaintiff's reputation and trade in the eyes of right thinking members of the society generally, noting that the 1-5th defendants are business moguls just as the plaintiffs and a possibility of business rivalry playing out cannot be ruled out. Article 33 of the Constitution provides:-

“Freedom of Expression.

1. Every person has the right to freedom of expression which, includes;-

- a). Freedom to seek, receive or impart information or ideas.***
- b). Freedom, of artistic creativity; and***
- c). Academic freedom and freedom of scientific research.***

2. The right to freedom of expression does not extend to:

-

- a). Propaganda for war***
- b) Incitement to violence***
- c). Hate speech; or***
- d). Advocacy of hatred that –***

(i) Constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) Is based on any ground of discrimination specified or contemplated in Article 27(4).

3. In exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

36. Further, it is not in every case where the defence of justification or fair comment on matters of public interest or absolute or qualified privilege is pleaded that the court will deny an injunction in defamation cases. Each case has to be weighed on its own circumstances, especially in the new constitutional dispensation, considering the fact that the Defamation Act, Cap 36 Laws of Kenya has never been amended to align it to the 2010 Constitution. The court, therefore, in examining other decided cases must be careful not to be unduly influenced by other decisions which may not

37. In addition, I have examined the defences filed in court by the defendants and I have not seen any facts or particulars that the defendants have set out in their defences of justification, fair comment on matters of public interest and or privilege. Order 2 Rule 7(2) of the Civil Procedure Rules provides that:

“Where in action for libel or slander the defendant alleges that in so far as the words complained of consists of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies in support of the allegation that the words are true.”

38. Thus, it is clear from rule 7(2) that the rule applies to a plea of justification and a plea of fair comment on a matter of public interest and requires a defendant to give particulars of facts constituting a plea of justification. Section 15 of the Defamation Act is also relevant. It provides:

“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”

39. Further, the 6th defendant did not file any affidavit to controvert the allegations leveled against him by the plaintiffs. In the premises, considering that granting of an injunction at the interlocutory stage is in the discretion of the court, I am satisfied that on affidavit evidence available, the plaintiffs have established a prima facie case with a probability of success that the defendants should be restrained by way of a prohibitory injunction from publishing any defamatory statements or words, of and concerning the plaintiffs.

40. However, I find that this is not a clear case and there are no exceptional circumstances to warrant grant of mandatory injunction at this stage as those who are enlisted to assist in the enforcement by way of removal or deletion of the alleged defamatory publications from the various websites and or twitter handles are neither parties to this suit nor government law enforcement agencies. As was stated in **Locabail International Finance Ltd v Agro Export and another [1986] 1 ALL ER 901** where the court stated that:

“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendants had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction.”

41. In the instant case, where the alleged publications are either in the internet, websites, twitter or other electronic or digital formats, I find that granting the mandatory orders sought by the plaintiffs would be tantamount to issuing final orders. Accordingly, the prayer for a mandatory injunction fails.

42. For the foregoing reasons, only the prayer for an interlocutory prohibitory injunction succeeds as prayed in prayer vii of the Notice of Motion dated 31st August, 2015. The prayer for a mandatory injunction and for Google and Twitter to assist in enforcement is declined. Costs of the application shall be in the main suit.

43. The interlocutory prohibitory injunction herein granted shall remain in force for a period of twelve months only from the date hereof, unless extended with leave of court. The parties are hereby directed to expeditiously prepare the suit for trial within the said 12 months from the date of this ruling.

Dated, signed and delivered in open court at Nairobi this 10th day of August 2016.

R.E. ABURILI

JUDGE

In the presence of:

Miss Kamau h/b for Mr Wandabwa for the plaintiffs

Mr Issa and Mr Busaidy h/b for SC Ahmednasir for the 1st, 2nd, 3rd, 4th and 5th defendants/Respondents

Miss Mutua for the 6th defendant/Respondent

Court Assistant: Adline