



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

**CIVIL DIVISION**

**CIVIL CASE NO. 320 OF 2015**

**NAHASHON NGIGE NYAGAH.....PLAINTIFF**

**VERSUS**

**STEPHEN ARMSTRONG JENNINGS**

**PRESTON MENDENHALL**

**THE STAR PUBLICATIONS LIMITED**

**WILFRED GITONGA.....DEFENDANTS**

**RULING**

The Plaintiff seeks by Notice of Motion dated 14<sup>th</sup> September 2015 the main order that pending hearing and disposal of the suit herein, the Defendants be restrained

**“...from further broadcasting, publishing or causing to be broadcasted or published in any way whatsoever, any news items, statements, articles, words and pictures on Television, Raido, Internet, Newspapers, Magazines, Facebook, Twitter, YouTube and Whatsapp or any medium whatsoever, linking or associating the Plaintiff with and/or imputing impropriety, fraud, criminality and corruption on the Plaintiff in the affairs of Tatu City Limited, Kofinaf Company Limited, Purple Saturn Properties Limited, Gunga Properties Limited, Jojoja Properties Limited, Nara Company Limited and properties Land Reference Numbers 11288 (Original No. 6772/3), 11285 (Original No. 6772/1) and 11289 (Original No. 6772/4).”**

The application was brought under Section 1, 1A, 1B, 3, 3A, 63(c) & (e) of the **Civil Procedure Act** (the **Act**) Order 40, rules 1,2,4 & 8 and Order 51 rule 1 of the **Civil Procedure Rules** (the **Rules**). The grounds for the application can be summarized as a smear and defamatory campaign set up by the Defendants falsely and maliciously accusing the Plaintiff of fraud, forgery and corruption in relation to the properties of Tatu and Kofinaf, Companies whose ownership and capital investment is disputed between the Plaintiff, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants. It is pleaded the Defendants have expressly stated that they will continue to repeat the defamatory statements against the Plaintiff and unless restrained they will continue to publish similar articles, words and images defamatory of the Plaintiff.

There is a supporting affidavit sworn by the Plaintiff. He depones to the factual basis for the application.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposed the application by Grounds of Objection filed on 18<sup>th</sup> September

2015 and replying affidavit sworn by the 1<sup>st</sup> Defendant on 7<sup>th</sup> April 2016. The grounds emerging therefrom include -

(i) That the application herein is a flagrant attempt to muzzle and intimidate the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by killing the freedom of expression enjoyed by them.

(ii) That they plead defence of justification as all the statements made about the Plaintiff are true.

9iii) True statements cannot be defamatory and can only be a civic duty on their part to the society.

(iv) The orders sought cannot be granted at an interlocutory stage as the truth cannot be established at this stage.

(v) That the Plaintiff has no reasonable cause of action and the entire suit is frivolous, vexatious and an abuse of the court process.

(vi) That they plead fair comment on a matter of great public interest.

The 3<sup>rd</sup> Defendant has also raised grounds of opposition filed on 7<sup>th</sup> October 2015 to the effect that the publications complained of are fair comment on matters of public interest; the prayers sought are too broad and are only meant to curtail the 3<sup>rd</sup> Defendant's right to freedom of the media and expression. That the application is devoid of merit and should be dismissed.

There are many documents annexed to both supporting affidavits. I have perused them.

The application was canvassed by way of written submissions. I have duly considered them, together with the cases cited. I have also perused the plaint and the Defendants' statements of defence and the replying affidavit.

The Plaintiff's suit is essentially in defamation. But all the material placed before the court in the supporting and replying affidavits disclose a deeper dispute on who among the parties save for the 3<sup>rd</sup> Defendant owns what share in the companies (Tatu and Kofinaf) which the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim. It is a property dispute which cannot be properly adjudicated upon the present interlocutory application. The Defendants have pleaded justification and as correctly pointed out, the court cannot issue an interlocutory injunction upon the untested affidavit evidence. Moreover, the freedoms of opinion, expression and the media in **Articles 32, 33 and 34** of the **Constitution** are fundamental rights, and although they are not absolute, they will not be lightly curtailed. At this preliminary stage I do not find any justification for issuing the interim injunction sought, and I decline to do so. The Plaintiff has not demonstrated a *prima facie* case with a probability of success. The Notice of Motion dated 14<sup>th</sup> September 2015 is hereby dismissed with costs. It is so ordered.

***Dated, signed and delivered at Nairobi this 27th Day of October, 2016.***

**A. MBOGHOLI MSAGHA**

**JUDGE**