



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

**CIVIL CASE NO. 304 OF 2016**

**JAMES WAINAINA MACHARIA.....PLAINTIFF/APPLICANT**

**V E R S U S –**

**NATION MEDIA GROUP LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**BRIAN NGUGI .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1) James Wainaina Macharia, the plaintiff/applicant herein, took out the motion dated 18.11.2016 in which he applied for the following orders *inter alia*:

**1. THAT this application be certified urgent and heard ex parte in the first instance.**

**2. THAT pending the hearing of the suit filed herein, an order do issue restraining the defendants/respondents, by themselves, their agents, servants or anyone acting on their behalf from writing, printing, publishing, distributing/circulating, discussing, uttering and/or conveying defamatory and/or disparaging information in any manner whatsoever about the plaintiff/applicant particularly, the allegations published at pages 1 and 4 of issue No. 2484 of the Business Daily Newspaper of 17<sup>th</sup> November, 2016 in an article titled “CS Macharia linked to firm in Afya House shs. 5 billion contracts” or words of similar nature.**

**3. THAT pending the hearing of this application, an order do issue restraining the defendants/respondents by themselves their agents, servants or anyone acting on their behalf from writing, printing, publishing, distributing/circulating, discussing, uttering and/or conveying defamatory and/or disparaging information in any manner whatsoever about the plaintiff, particularly, the allegations published at pages 1 and 4 of Issue No. 2484 of the Business Daily Newspaper of 17<sup>th</sup> November, 2016 in an article titles “CS Macharia linked to firm in Afya House shs. 5 billion contracts” or words of similar nature.**

**4. THAT pending the hearing and determination of this suit, an injunction order do issue compelling the defendants/respondents to remove and erase from all various posts, websites, blogs or other forms of electronic and social media of any form or nature whatsoever the article or similar words or statements or content, of like effects relating to the plaintiff/applicants.**

**5. THAT pending the hearing and determination of this application, an injunction order do issue compelling the defendants/respondents to remove and erase from all various posts, websites,**

***blogs or other forms of electronic and social media or any form or nature whatsoever the article or similar words or statements or content, of like effects relating to the plaintiff/applicants.***

***6. THAT costs of this application be provided for.***

2) Upon reading the notice of motion exparte, on 18.11.2016, Lady Justice Njuguna certified the same urgent and fixed it for interpartes hearing on 24.11.2016. On the aforesaid date, Mr. Regeru, learned advocate for the plaintiff and Mr. Ochieng learned advocate for the defendant appeared before the honourable judge to argue the motion.

3) Mr. Ochieng learned advocate for the defendants requested for time to file and serve his clients' response to the motion. Mr. Regeru on his part did not oppose the application for adjournment but instead beseeched the court to grant his client prayers 3 and 5 of the motion. The honourable Judge allowed prayer 3 of the motion and proceeded to give the defendant 7 days from the date of service to file a response and a corresponding leave of 7 days to the plaintiff to file a supplementary affidavit in reply. The motion was then adjourned to 14.12.2016 for interpartes hearing. Unfortunately, the matter was not put on the cause list of that date. The plaintiff's counsel prompted the Deputy Registrar to place the file before the duty judge for extension of the interim orders and to fix an interpartes hearing date. This court acceded to the plaintiff's request and proceeded to fix the motion for interpartes hearing on 20.12.2016 and further issued orders extending the interim order.

4) When the motion came up for interpartes hearing, Mr. Ochieng applied for an adjournment on the basis that the defendant was unable to file a response to the motion because the person who was to sign the replying affidavit was indisposed. Mr. Regeru was ready to indulge Mr. Ochieng.

5) Mr. Regeru beseeched this court to extend the interim order and to expand it cover the defendant's website. The learned advocate also asked this court to now grant prayer 5 limited to the defendant's website.

6) Mr. Ochieng opposed the application for the grant of prayer 5 of the motion claiming that the plaintiff had not shown any special circumstances for the issuance of a mandatory order of injunction. He was of the view that if the order is granted there will be nothing to go for trial. Mr. Regeru pointed out that the plaint contains eight separate prayers meaning that when the suit goes for trial there are several issues which can be canvassed at the trial. He pointed out that the continued existence of the offensive material in the defendants' /respondents' website is prejudicial to the plaintiff in that he will continually be defamed while the suit is pending considering the fact that the defendant is a respected media house.

7) After considering the rival submissions, there is no serious objection to the prayer for the extension of the interim order issued on 24.11.2016. There is a request that the same should be expanded to cover the 1<sup>st</sup> defendant's website. With respect, I find the request reasonable and justified. I consequently grant prayer 3 to cover the defendants website to subsist until 21/2/2017 when the motion is fixed for interpartes hearing.

8) The question as to whether or not I should grant prayer 5 of the motion at this exparte stage is hotly contested. The plaintiff has basically asked this to issue an order of mandatory injunction directing the defendants to remove from its website the offending article. It is argued that it's continue existence will perpetuate the plaintiff's continued defamation. The main ground raised by the defendant is that there will be nothing to remain for hearing if the order is made. It is also argued that there are no special circumstances to warrant issuance of mandatory orders of injunction. I have perused the plaint and I am convinced that there are six main prayers which are sought namely prayers (a), (b), (c ), (d), (e) and (f).

9) It is therefore not true that if prayer 5 of the motion is granted, the entire suit will have been decided at an interlocutory stage. It has been argued that there are no special circumstances to warrant issuance of a mandatory order of injunction. In my humble view, I am persuaded by the argument that the continued existence of the offending article in the defendants' website will continue to defame the plaintiff, is a special circumstance which merits the issuance of the orders sought. This finding is also buttressed by

the fact that the 1<sup>st</sup> defendant is a reputable media house which is widely read and accessed nationally and internationally.

10) In the end, I find the request by the plaintiff's counsel to be meritorious. Consequently I grant prayer 5 of the motion dated 18.11.2016 but only limited to the defendant's website.

11) Costs shall abide the outcome of the motion.

**Dated, Signed and Delivered in open court this 20<sup>th</sup> day of December, 2016.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant