



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 132 OF 2015

HON. DR EVANS KIDERO.....APPLICANT

VERSUS

1. **ERIC AHOLI**
2. **CHARLES APPLETON**
3. **BRIAN DESOUZA**
4. **ANIS PRINGLE**
5. **JOSEPHAT MWAURA**
6. **JACOB GATHECA**
7. **JOSEPH KARIUKI**
8. **BENSON NDUNG'U**
9. **JOHN NDUNYU TRADING AS KPMG KENYA.....RESPONDENT**

RULING

1. By a notice of motion application dated 31st March, 2015, the Applicant, Hon **Dr. Evans Kidero** seeks for the following orders inter alia under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, 2010, and under sections 1 A, 1B, 3A and 63(e) of the Civil Procedure Act and the enabling provisions- ***They include:- the application be certified urgent, an order of temporary injunction issue restraining the respondents from further publication of the defamatory articles that the applicant complains of in relation to the management of Mumias sugar company limited in any forum or medium. The costs of the application be provided for.***

The motion is supported by an affidavit and a supplementary affidavit sworn by Dr. Evans Kidero.

2. The application is also premised on the grounds that the respondents published defamatory words concerning the applicant stating that he was corrupt, lacking in integrity, a scheming conspirator, a white collar criminal; a scofflaw; and anarchist, a delinquent, a racketeer, practicing cronyism, a profligate, improvident, a swindler, a fraudster, a cozenor, obstinate, pertinacious, obdurate, mulish and undeserving of holding public office. The defamatory words were malicious and false injuring the applicants standing among the right thinking members of society given the fact that he serves as the governor of Nairobi. Unless the respondents are restrained, the applicant's reputation will be further tainted.
3. The applicant alleges that the respondents in their draft report on alleged forensic audit of Mumias Sugar Company Limited dated 8th July 2014, maliciously published defamatory articles concerning him in relation to the management of Mumias sugar company limited.
4. The Respondents namely Eric Aholi, Charles Appleton, Brian Desouza, Anis Pringle, Josephat Mwaura, Jacob Gatheca, Joseph Kariuki, Benson Ndung'u, John Ndunyu, Trading as Kpmg Kenya

filed the replying and a further replying affidavit of Brian Desouza together with grounds of opposition to resist the aforesaid motion.

5. In their response the respondents deponed that; they were requested by Mumias Sugar Company Limited to conduct a forensic investigation into transactions relating to importation of sugar; commercial transactions and procurement. After completion of the investigation, a draft of factual findings report was compiled and forwarded to the Board of directors of Mumias before the publication of the final report. The publication of the draft report to mumias was on an occasion of qualified privilege. The Government of Kenya owns 20% shares in Mumias. The acting managing director of Mumias Sugar Co. Ltd was required to produce to the National Assembly a copy of the draft report and he instructed the respondent to forward a copy to the clerk the National Assembly.
6. There is no doubt that the Defendants were instructed by their client, Mumias Sugar Company Limited to carry out an audit for the company which they did. They proceeded to investigate transactions that included importation of sugar, commercial transactions and procurement. Their findings were compiled into a report which report they forwarded to their client. It is under these instructions of their client through a letter dated 9th December 2014, that the respondents were directed by the acting Managing Director of Mumias Sugar Company Limited, **Mr. Coutts Otolo**, to forward the draft report to the Clerk of the National Assembly. It is on this ground that the respondent forwarded the draft report to the National Assembly.
7. The respondents argue that the approach to grant of orders of an injunction in defamation cases is different from the normal conditions for an interlocutory injunction in other cases. They relied on the case of **Cheserem v Immediate Media Services [2000]2 E 371** where Justice Khamoni held that though the conditions laid in **Giella v Cassman Brown** do apply in injunction cases, they have to be applied together with the special law relating to the grant of injunctions in defamation cases where the injunction is only granted in the clearest of possible cases. The learned judge further stated that the words published must be libelous and that an order of injunction will not be granted in defamation cases where the respondent is pleading justification or qualified privilege. The same reasoning was applied in the case of **Ruth Ruguru Nyagah v Kariuki Chege & another [2015] eKLR** in which the court held that;

*"In other words, the general principles and conditions precedent to the grant of interlocutory injunctions as established in the **Giella v Cassman Brown** have been modified to suit the uniqueness of defamation of claims. Those principles, as correctly submitted by counsel for the defendants were settled in the case of **Cheserem vs Intermediate Media Services (supra)** among others."*

8. The applicant is expected to prove at this initial stage, that he has a prima facie case with probability of success and that if the injunction is not granted, he stands 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**.
9. The alleged publications which the applicant avers are defamatory of him are contained in a draft report for the company the Applicant was the Managing Director. The respondents are auditors who were engaged to carry out a forensic audit. They forwarded their draft findings to their client. Their client further directed them to forward a copy of the draft report to the Clerk to the National assembly which they did.
10. The question which must be answered at this juncture is whether or not the Applicant has satisfied the principles necessary to grant an order for injunction. The main ground relied upon by the Respondents against the grant of the order is that they have pleaded the defence of justification or qualified privilege. The Respondents do not deny that they forwarded a draft audit report to the clerk to the National Assembly on the instructions of their client Mumias Sugar Co. Ltd.

11. It was expected that since the audit report was requested by Mumias Sugar Company Ltd, the aforesaid company would by itself handover the report to the clerk, National Assembly rather than the Respondents. The other issue which still lingers in my mind is the fact that the audit report is a draft report. In other words the same is not conclusive. The draft report has put the Plaintiff's integrity into question.
12. The Plaintiff has complained that the draft report has been widely publicized and yet his side of the story has not been sought. The Plaintiff avers that if given an opportunity to interrogate the draft audit report he will be in a position to show that at no time did he make any decision that was not in the best interest of Mumias Sugar Company Limited in his entire tenure as the Managing Director of the company. I hold the view that in defamation cases, the order for injunction should sparingly be granted if the Defendant pleads the defence of justification and or qualified privilege. However what we are dealing with here, is an a draft audit report forwarded to an oversight committee of parliament which may conduct its investigation in public based on an inconclusive report yet the final report is not yet out.
13. The defence of justification and qualified privilege can only be invoked When the final report has been made and submitted to the client.
14. In the circumstances, I am convinced that the Plaintiff/Applicant has shown he has a prima facie case with high probability of success. I am also satisfied that unless the order sought is granted, the Plaintiff/Applicant is likely to suffer irreparable loss.
15. This court has been cautious not to make conclusive findings in appreciation of the fact that the main suit is yet to be heard and finalized.
16. In the end, the motion dated 31st march 2015 is allowed in terms of prayer (iii). Costs of the motion to await the outcome of the suit.

Dated, Signed and Delivered in open court this 30th day of September, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent