



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 100 OF 2015

HON. DR. EVANS KIDERO PLAINTIFF/APPLICANT

-VERSUS-

STANDARD GROUP LTD..... 1ST DEFENDANT/RESPONDENT

PAUL WAFULA..... 2ND DEFENDANT/RESPONDENT

DANIEL WESANGULA..... 3RD DEFENDANT/RESPONDENT

NATION MEDIA GROUP LTD..... 4TH DEFENDANT/RESPONDENT

REMENYA GIBENDI..... 5TH DEFENDANT/RESPONDENT

R U L I N G

1. Dr. Evans Kidero, the Plaintiff herein is the first Governor of Nairobi City County and a former managing director of the Mumias Sugar Company Ltd. In his Plaint dated 9th and amended on 30th March, 2015, the Plaintiff set out his career achievements and reputation and pleaded that he is a man of high standing in society. He alleged that, between the 9th and 18th February, 2015, the Defendants maliciously, recklessly and without justification published or caused to be published articles concerning him in relation to the management of Mumias Sugar Company that were defamatory of him. He prayed for various reliefs.
2. Together with the Plaint, the Plaintiff filed a Notice of Motion date the same date seeking to restrain the Defendants from further publishing any article or material concerning him in relation to a report dated 8th July, 2014 by KPMG Kenya on Forensic Investigations of Mumias Sugar Company or any other report by the said KPMG Kenya regarding the affairs of Mumias Sugar Company (hereinafter "MSC").
3. The grounds for the application were set out both in the body of the motion and in the Plaintiff's Supporting and Supplementary Affidavits sworn on 9th March and 22nd May, 2015, respectively. The Plaintiff contended that he was the Managing Director of MSC between October 2003 and 2012; that at the time of joining MSC, the company had made a loss of Kshs.244 Million the previous year; that during his stay at MSC the financial statements of the company were duly audited by Deloitte and Touché Auditors and were approved by the Board of Directors of MSC who substantially remains the same. That MSC continued to make huge profits during his watch culminating in a profit of Kshs. 1.7 Billion and the net Equity of the company had grown from a mere Kshs.9 billion to Kshs.27 Billion. That under his watch, the financial statements of MSC

- were religiously published and approved at the shareholders' Annual General Meetings. That on leaving MSC, the company reverted back to its old ways of loss making.
4. The Plaintiff lamented that despite his successful stewardship of MSC, on various dates between 9th and 18th February, 2015, the Defendants published articles that were defamatory of him. He specifically set out portions of the said articles in his lengthy Affidavit and alluded to what innuendos they carried. He also produced in his Supporting Affidavit as an exhibit, the Financial Reports of MSC and the articles complained of. According to the Plaintiff, the articles published of him were understood to mean, inter alia, that he was an anarchist, a delinquent, fraudster, that he lacked integrity, a fraudster, a swindler, a scofflaw, that he is corrupt and is a white collar criminal undeserving of holding public office.
 5. The Plaintiff contended that the words complained of were published maliciously in that, the Defendants failed to ascertain from him the truth of the allegations made against him. That the Defendants failed to disclose to the public that their articles were premised on an uncompleted draft report unilaterally prepared by KPMG Kenya and not meant for public use. The Plaintiff sought to explain in his Affidavits why the information contained in the said report was inaccurate and therefore unreliable.
 6. In his submissions, Prof. Ojienda, Learned Counsel for the Plaintiff submitted that; the words complained of were clearly defamatory of the Plaintiff; that there has to be proportionality in the exercise of the freedom of expression vis a vis peoples reputation. Counsel took the court through the documents produced by the Plaintiff to demonstrate that the articles complained of contained factual untruths. He concluded that there was no defence to the Plaintiff's claim for defamation and therefore urged the court to allow the application.
 7. In opposition to the application, the 1st to 3rd Defendants filed Grounds of Opposition dated 17th March, 2015 and Replying Affidavits of Paul Wafula and Daniel Wesangula sworn on the same date. They contended that the Plaintiff was guilty of delay; that the orders sought would infringe on their constitutional rights and public duty; that the information complained of is factual extracts of documents in the public domain and that the Plaintiff's private interests do not outweigh the public interest of the right to know. It was sworn that the reports published by the said Defendants on 8th and 10th February, 2015 were accurate extracts from the KPMG report dated 8th July, 2014 and that they sought to get the Plaintiffs response to the report without any response. That the said Defendant's actions were borne out of a public and professional duty to inform the public. That the Plaintiff had failed to respond to issues raised by KPMG.
 8. It was further contended by the said Defendants that they accorded the Plaintiff an opportunity to comment on the KPMG Report vide an interview carried on 17th February, 2015. In his submissions, Mr. Lutta Learned Counsel for the said Defendants submitted that the Plaintiff had not established a prima facie case with any probability of success; that the articles did not make any express reference to the Plaintiff but the management of MSC; that the Defendants had not breached their duty under Article 33 of the Constitution as the Plaintiff had been given a right of reply; that the Plaintiff had not demonstrated that he will suffer irreparable injury and that there was no evidence that the Defendants intended to publish further articles on the Plaintiff. Counsel urged that the application be dismissed.
 9. On their part, the 4th and 5th Defendant filed Grounds of Opposition dated 22nd May, 2015 in opposition to the application. They contended that there was no prima facie case with a probability of success disclosed; that damages were an adequate remedy; that the balance of convenience lies against granting the injunction sought. It was further contended that the application was tantamount to gagging the press and that the Plaintiff had been accorded the right to reply which he had duly exercised.
 10. In her submissions, Ms Jan Mohammed, learned Counsel for the 4th and 5th Defendant faulted the Plaintiff for producing, in the voluminous Affidavits, the material meant for trial which was unnecessary in her view; that the Defendants had raised the defence of qualified privilege; that the issues in the KPMG report are of public interest; that the Plaintiff being a public figure, he is subject to public scrutiny. Counsel further submitted that MSC being a public company, the issues touching on it are of public interest. Jan Mohammed further submitted that the issue of malice alluded to by the Plaintiff was a question of fact and not law which can only be dealt with at the trial and not at the interlocutory stage. That the reports carried by her client contained the

- Plaintiff's response on the same page. She therefore urged the court to dismiss the application.
11. In rejoinder, counsel for the Plaintiff submitted that what the Plaintiff was seeking was to restrain further publication of the impugned articles and that the Plaintiff had brought to court the bulky evidence in an attempt to prove the falsity of the reports. That the repetition of publication was evidence of malice.
 12. I have carefully considered the Affidavits on record, the written submissions of the parties, the oral highlights thereon and the authorities relied on by learned Counsel. This is an application for injunction. The principles applicable are well settled. Apart from the usual principles in the well known case of **Giella Vs Cassman Brown 1973 EA 358**, that a prima facie case be established, that damages be shown not to be an adequate remedy and the balance of convenience, there is an additional principle in defamation cases. This is that injunction will issue with greatest caution and only in the clearest of cases. See **Cheserem Vs Immediate Media Services & 4 others (2000) 2 EA 371**. The court must be satisfied that the words are libelous and manifestly defamatory.
 13. The reason why caution should be exercised in granting injunctions in defamation cases is because of the need to balance between the constitutional right to freedom of expression with the individual right to reputation. This is enshrined in Article 33(1) (a) of our Constitution which provides that every person has the right to freedom of expression, including the freedom to seek, receive or impart information or ideas. This is what the Defendants in this case, quite rightly, contended that they are entitled to. However, that freedom is limited by sub article (3) thereof which provides that in the exercise of the right to freedom of expression, there shall be respect to the rights and reputation of others. It is for this reason therefore that in defamation cases, courts have to carefully weigh between the freedom of expression and respect for the rights and reputation of others. It is a delicate balance between the larger public interest to the right of expression vis a vis the narrow private interest of one's reputation. See **Renton Company Ltd Vs Phillip Kisia and 2 others (2012) eKLR** and **Gilgil Hills Academy Ltd Vs The Standard Ltd (2009) eKLR**.
 14. In **Gatley on Libel and Slander 9th Edition**, the learned authors observe on injunctions at paragraph 25.1 thus:-

“Generally, such an injunction can only be granted where a party to an action has invaded or threatens to invade a legal or equitable right of the other party which can be enforced by the court, and when one party has behaved or threatens to behave in an unconscionable manner. The latter does not include the publication of false or defamatory statements. Accordingly, the jurisdiction to grant interlocutory injunctions in the field of defamation and malicious falsehood arises whether there has been, or there is threatened, a publication of a defamatory statement or a false statement which would give rise to a claim for malicious falsehood.”

15. In the said text, the learned authors have specified grounds for the grant of an interlocutory injunction in defamation matters to include cases where the impugned statement or words is unarguably defamatory; where there are no grounds for concluding that the statement may be true; that there is no defence which might succeed and where there is evidence of an intention to repeat or publish the defamatory statement.
16. The foregoing then are the parameters within which this court is called upon to determine the application under consideration. Has the Plaintiff established a prima facie case with any probability of success? Put differently, can a tribunal properly directing itself on the material presented before this court conclude that there exists a right of the Plaintiff which has apparently been infringed by the Defendants so as to call for an explanation or their rebuttal?
17. It was the Plaintiff's contention that the publication complained of was false and malicious. On their part the Defendants contended that there was no express reference to the Plaintiff in the articles complained of; that what was being referred to was the financial dealings of MSC; that what was published were factual extracts from the KPMG Report; that they took reasonable measures to verify the same from the Plaintiff but the latter failed to give his comment. The

Defendants also raised the defences of qualified privilege and fair comment. There was also a contention that the application was belated.

18. I have looked at the entire record. Some of the statements complained of read as follows:-

“How Mumias was looted dry”

***“.....over three-year period starting July 2011, Mumias top distributors had been granted over 2.4 billion worth of discounts. Former managing directors Peter Kebati and Evans Kidero – the current Nairobi Governor, approved the highest value of credit notes*”**

Then:-

“Sugar gate: How 1,497 trucks of Mumias Sugar disappeared in transit.

A total of 1,497 trucks left Mumias Sugar Company’s warehouse between 2011 and 2014, but were diverted on the way to the millers other storage centres across the country, The KOMG audit found that in 2011, the year Nairobi Governor Evans Kidero was at the helm, a total of 343 shipments were diverted out of the 1,495 that were shipped.”

Another one read:-

“How Mumias bosses brought firm to its knees”

‘.....Managing Director Evans Kidero and his successor at Mumias Sugar, Mr. Peter Kebati, ignored repeated calls by auditors and the company’s board of directors to seal gaping corruption loopholes..... current Nairobi Governor Kidero is listed among the individuals with the greatest responsibility for the losses at the country’s largest miller during his decade long reign as managing director.....’

19. In Exhibits “EK1” “EK2”, “EK3” “EK4” “EK5” “EK6” “EK7” “EK8” “EK9” and “EK11” produced to the Supporting Affidavit, are the audited and published financial statements of MSC for the years 2001/2002 to 2012/2013. There is nothing to show that they were qualified by the MSC auditors. They are deemed to have been approved by the Board of Directors of MSC before being presented to the shareholders and subsequent publications. The question that arises is, where is the alleged repeated calls by auditors and board of directors on the Plaintiff in the face of such financial statements.

20. In his Supplementary Affidavit sworn on 22nd May, 2015, the Plaintiff produced exhibits “EK19” and “EK20”. These were a schedule of inter warehouse transfers for each of the 1,497 trucks that the impugned articles alleged disappeared as well as a copy of monthly stock reconciliations from the year 2011 to 2014. Although the Defendants objected to the production of these exhibits on the basis that the Plaintiff was not competent to produce them, this court accepts them on a prima facie basis as they are being produced in an interlocutory application and the Affidavit in my view was sworn in tandem with Order 19 of the Civil Procedure Rules, 2010.

21. I know that I am not trying the suit on the Affidavit evidence; I am alive to the criticism counsel for the 4th and 5th Defendant leveled against the production of the voluminous exhibits that run to thousands of pages. However, from the examples given above several issues arise. Firstly, it is clear that the articles complained of expressly referred to the Plaintiff not only by his former position at MSC but also his current position as Governor of the Nairobi City County. Secondly, the said exhibits tend to disapprove the allegations contained in the articles and therefore prove the falsity of the report which the Defendant relied on to publish the articles complained of. Thirdly, the statements complained of are but prima facie defamatory of the Plaintiff.

22. In **Gatley on Libel and Slander**, paragraph 25.5. the learned authors observe that:-

“..... a prima facie cause of action is established once the plaintiff proves that defamatory words have been published about him; he does not have to prove that the defamatory words are false, for the law presumes this in his favour. In practice it is customary, if not invariable, for there to be some evidence even if limited to assertions by the Plaintiff of the falsity of the allegations, for in the absence of such evidence, the court may in the exercise of its discretion and having regard to the ‘delicate nature’ of the jurisdiction refuse an injunction. It is not usual for Plaintiff to be able to prove on an application for an interlocutory injunction that the words are false.

I fully associate myself with the said conclusions and apply the same here.

23. In the case of **CFC Bank Limited Vs Consumer Federation of Kenya (COFEK) & 2 others 2014 eKLR** it was held that for an action for defamation to succeed, a party must establish three things; that the words complained of are defamatory, that they tend to lower the claimants reputation in the estimation of the right thinking members of society; that the words complained of refer to the claimant and that they are malicious. On an interlocutory stage such as the case before court, the applicant need only establish these on a prima facie basis.
24. I have already found that the words complained of referred to the Plaintiff. The words alleged serious lack of integrity on the part of the Plaintiff as to be unfit to be entrusted with public office. As to malice, that is a question of fact. However, it may be inferred from the language used in the publication itself: the conduct of the defendant such as the effort made to inquire in the facts or the Defendants’ conduct generally. I propose to consider this issue vis a vis the Defendants’ defence of qualified privilege and fair comment.
25. It was the Defendants’ contention that the articles were factual extracts from the KPMG Report and that they gave the Plaintiff an opportunity to comment. I have seen the exhibit marked Annexure “A” “B” and “C” to the Replying Affidavit of Paul Wafula. They detail the effort made by the 1st to 3rd Defendants to obtain the Plaintiff’s comment. The effort is shown to have been made immediately before and during the period of publication of the complained articles. As regards the 4th and 5th Defendant, they published both the impugned article together with the Plaintiff’s response at the same time. In the circumstances can malice be inferred?
26. Annexure “EK16” to the Supporting Affidavit of Evans Kidero is, inter alia, the KPMG Report. It is headed

“Mumias Sugar Company Ltd

Draft Factual Findings Report

Private and confidential

8 July 2014”

27. In the letter dated 18th December, 2014 by KPMG delivering the said report to the Parliamentary Committee on Agriculture, it was indicated that the report was only a draft and a final report will be released upon receipt of certain comments from MSC by KPMG. The report itself indicate KPMG was unable to interview the Plaintiff and two (2) other officers who had retired from MSC. In the report, KPMG does not state why the said three former officers of MSC were not interviewed. KPMG however attempted to explain this fact in a press statement dated 10th March, 2015 and produced by the 1st and 3rd Defendant as Annexure “DW1”. It alleged that efforts to secure an interview with the Plaintiff were turned down by the Plaintiff. In my view, such explanation, if genuine should have been contained in the report itself. The draft report is wanting in some respect on this issue. It does not indicate when KPMG were appointed to carry out the investigations; it does not show when the investigations commenced and undertaken before KPMG allegedly wrote to the Plaintiff on 11th June, 2014 for his comments. It should be remembered that by that time, the draft report was almost ready as it is dated 8th July, 2014 which is less than a month later.

28. At page 13 of the draft report KPMG noted as follows:-

“This report was prepared solely for the purposes of reporting our findings to you. This report should therefore not be utilized for any other purpose. No part may be quoted, referred to or disclosed in whole or in part, by any party, without our prior consent.

.....
.....
In preparing this report, KPMG has relied upon and assumed, without independent verification, the accuracy and completeness of any information provided to, and/or gathered by KPMG whether from public sources or otherwise and accordingly KPMG express no opinion and makes no representation concerning the accuracy and completeness of any such information contained in this report,

Our report contains elements that have been identified as part of our investigation, but these elements are not exhaustive. Any documents or information brought to our attention subsequent to the date of this report which would affect the findings listed below, will require our findings to be adjusted and qualified accordingly.”

29. Exhibit “EK13” is a copy of page 7 of the Standard Newspaper of 9th February, 2015. The 1st and 2nd Defendant wrote therein as follows:-

“Over three-year period starting July 2011, Mumias 28 top distributors had been granted over Sh. 2.4 billion worth of discounts. Former managing directors Peter Kebati and Evans Kidero – the current Nairobi Governor approved the highest value of credit notes.”

30. The issue of discounts and credit notes are dealt with at Clause 7.3 at pages 327 to 334 of the said draft report. At pages 329 to 334 thereof, the report details the persons responsible for the discounts and the amounts involved. A simple calculation shows that the following people gave discounts or credit notes worth the amounts shown:-

a. Peter Hongo –	Kshs.475,307,511/=
b. Peter Kebati –	Kshs.374,136,518/=
c. Evans Kidero –	Kshs.238,667,141/=
d. Chris Chepkoi –	Kshs.104,067,223/60
e. Paul Murgor –	Kshs.82,535,653/60
f. Christine Cherotich –	Kshs.62,904,256/60
g. Everline Katsatsa –	<u>Kshs.34,871,925/77</u>
Total	- <u>Kshs.1,372,490,229/77</u>

31. From the foregoing, it is clear that the amount of discounts enumerated in the report is Kshs.1,37 billion and the highest credit notes were by two others before the Plaintiff. One will therefore wonder where the amount of discounts or credit notes of over Kshs.2.4 billion reported by the said Defendants came from in respect of which the Plaintiff is alleged to be one of the two who gave the highest. Obviously that report was sensational and factually incorrect. In **Phineas Nyagah Vs Gitobu Imanyara (2013) eKLR** Odunga J held that:-

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice.....”

32. I have delved into information contained in the draft report to gauge the bona fides of the Defendants in their reporting and to consider their constitutional right to freedom of expression which includes, the right and duty to disseminate information. It is an attempt to interrogate the

- bigger picture of public interest vis a vis the Plaintiff's private interest to reputation. I do not intend to make any firm findings here but only to test the Plaintiff's case on a prima facie basis on the basis of the evidence on record as weighed against the Defendant's proposed defences.
33. From the foregoing, the questions that arise are; were the articles factually truthful as contended? In view of fact that KPMG themselves qualified the draft and stated that they were not prepared to vouch for it due to the limitations and disclaimer set out therein, was the draft capable of being relied on by the Defendants to publish the impugned articles? KPMG itself indicated that the report was only a draft and not conclusive. That they had not interviewed the Plaintiff although they gave no reason therefor. They also stated that they had not received comments of the board of Directors of MSC and that if it received it may change the findings in the draft report. This being the case, were the Defendants' right to publish such articles in a manner so conclusive as they did?
 34. In my view, the constitutional right to freedom of expression has a limitation. That limitation is the respect for the reputation of others. Nowhere in the articles produced before court did any of the Defendant indicate therein that the information disseminated by the Defendants was based on a draft report; or that the authors of the report, KPMG, had made a disclaimer that the information therein had not been verified; or that the authors had categorically indicated in that report that the Plaintiff had not been interviewed; or that the board of MSC had not given its comments which when received might change the conclusions in the draft report. In any event there was no evidence that the permission of KPMG had been obtained to publish the information in the draft report.
 35. Once reputation is lost the same cannot be regained. What a man has, in my view, is his reputation and that is why the framers of the constitution were very alive to that fact that they put it as a proviso to the freedom of expression in Article 33. I have taken into consideration that whilst the Plaintiff is a public figure and that his actions both past and present must be put to scrutiny. The same should, however be scrutinized and published fairly. As a public figure, any falsehood as to his standing and integrity, considering Chapter six (60 of our constitution, might have devastating effect on him as a person as well as his career.
 36. On this regard, I am of the prima facie view that the articles were not wholly truthful; there was no bona fides in their publication and their publication may have been actuated by malice in view of the failure to disclose the qualifications made by the authors. I am satisfied that in the circumstances of this case, the exercise of the right to freedom of expression by the Defendants does not outweigh the private right to the reputation of the Plaintiff.
 37. As regards the contention that the application was belated and that the articles have already been published, the plaintiff is seeking to restrain re-publication. I am aware of the holding in **Dr. James Obondi Otieno Vs Nation Media Group Ltd Ksm HCCC NO. 7 of 2005 (UR)** wherein it was held that unless the nature of the defamation is a continuing one, acts of defamation if singular an injunction will not issue. In the present case, apart from the fact that the Defendants severally repeated the publication of the impugned articles, the issue of "Sugagate" is a hot subject in Kenya at the moment. There is no indication and assurance that the publication will not be repeated.
 38. Accordingly, I am satisfied that the Plaintiff has established a prima facie case with a probability of success.
 39. As regards damages, as I have already stated, a man is his reputation. Once reputation is lost, it cannot be regained. It is even more worse when its destruction is repeated. No amount of damages in my view, unless the Plaintiff expressly so indicates in his pleadings, is capable of restoring lost reputation. See **Brigadier Arthur Ndonj Owuor Vs The Standard Ltd (2011) eKLR**. Accordingly, I am satisfied that no award of damages can or will be able to compensate the Plaintiff if the libel is allowed to be repeated.
 40. As regards the balance of convenience, the same tilts in favour of granting the injunction. The Defendants stand to lose nothing if they are restrained from perpetrating the publication of the said reports whilst the Plaintiff stands to lose everything if his reputation is completely destroyed. The Defendants may re-publish the articles once and if, the suit is determined in their favour.
 41. For the reasons set out above regarding the nature of the draft report upon which the impugned articles were based and the manner in which the articles were presented, I take the view that this may be a clear case where an injunction ought to issue.

42. Accordingly, I find the application meritorious and I allow the same as prayed in paragraph (iii) of the motion with costs. It is so ordered.

.....

A. MABEYA

JUDGE

Dated and delivered at Nairobi this 21st day of September, 2015.

.....

JUDGE