



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 505 OF 2013

MASUMBUKO YERRY KOMBE.....PLAINTIFF

VERSUS

KIBIWOTT KOROSS.....1ST DEFENDANT

STANDARD GROUP LIMITED ... 2ND DEFENDANT

RULING

1. The application before this Court is a Notice of motion dated 2nd December 2013 brought Under Order 51 rule 1 and Order 40 rules 1,2 and 3 and section 1A & 2B(3) of the Civil Procedure Rules section 3A & 63(e) of the Civil Procedure Act.

The applicant seeks the following orders;

- i. Spent
- ii. That the Honorable Court be pleased to issue injunctive orders restraining the Defendants/respondents and/or their agents and/or servants and/or their relatives and or whoever acting on their behalf from publishing and/or discussing matters touching on parcels of land within Chembe/Kiabambeshe settlement scheme and in particular Settlement and in particular Plot No.399 and plot No. 409, pending the hearing and determination of this application.
- iii. That the Honorable Court be pleased to issue injunctive orders restraining the Defendants/respondents and/or their agents and/or servants and/or their relatives and or whoever acting on their behalf from publishing and/or discussing matters touching on parcels of land within Chembe/Kiabambeshe settlement scheme and in particular Settlement and in particular Plot No.399 and plot No. 409, pending the hearing and determination of this suit.
- iv. That cost of this application be provided for.

2. The application is based on the following grounds;

- i. That on or around 9th November, 2013 and 16th November, 2013 the Defendant/respondents published an article in the Standard Newspaper touching on issues of land within Chembe/Kiabambeshe Settlement Scheme and in particular plot no. 399 and plot no. 409 which are subject matters in the law Courts at Malindi, being HCCC No. 98 of 2006 (O.S), Chego Kivumbi Mitsingila -vs- Robert Gacheshe & Another, Criminal case no. 635 of 2011, Republic – vs- Sofia Abidillahi Chacha, petition No. 17 of 2011, Sofia Abdillahi Chacha –vs- The Director of Public Prosecution & Another No. 11 of 2012, Denman Properties Ltd & 4 Others –vs- the

Honorable Attorney General & Others High Court Miscellaneous Civil Application No. 14 of 2011, Antocha Ltd –vs- The Commissioner of Lands and others

- ii. That the said proceedings which are ongoing and as such they are not supposed to be subject of discussions outside the Court. In short they are subjudice.
 - iii. That the article in the said newspaper was also defamatory as against the plaintiff/applicant and thus any further publication would cause great prejudice and irreparable loss and damage to the plaintiff/applicant and therefore ought to be stopped pending the determination of the suit filed herein.
 - iv. That due to the defendant's/respondent's unlawful actions herein, the plaintiff/applicant stands to suffer irreparable loss and damage and/or great injustice if the Orders sought for herein are not granted.
 - v. That no prejudice shall be suffered by the defendant /respondents if the orders sought are granted.
3. The application is supported by the sworn affidavit of Masumbuko Yerry Kombe dated 2nd December, 2013. He reiterated the grounds on the face of the application. In his supplementary affidavit dated 31st January 2014 he replies to the defendants relying affidavit and points out the defamatory publication and how it has affected him. He states that he has been referred to as shady, but powerful business man un scrupulous trader and fraudster.
 4. The application was opposed. The defendants/respondents filed a replying affidavit sworn by Ronald Lubywa sworn on the 6th December, 2013. He deponed that the defendants are a national newspaper with widespread coverage around the Country and bear a social responsibility to the nation to comment on core issues affecting the society and that land matters being extreme importance to the society should be discussed freely and openly in a democratic society; that the said articles of 9th November 2013 and 16th November respectively were an expression of opinion and to that extent the same should be treated as fair comment on matters of public interest; that if an injunction is ordered it will deprive the society the right to be informed and deny the defendants the right to express themselves freely; that the said publications were made in good faith without malice and the same were true in substance and in their ordinary meaning were understood to mean that there were numerous land matters from Malindi ranging from double registration and illegal land allocation associated with powerful politicians and land officers in the said region; that since the same were made in good faith; that the Court should protect the rights and freedoms of the defendants as they were performing their duty to inform the public; that the application is an abuse of the court process being that the plaintiff has not shown how the defendant's publications have injured his character or defamed him.
 5. The respondents admit that there are cases pending in Court involving land Parcel Chembe / Kibabamshe Settlement particularly plot no. 399 and 409 and that the plaintiff has not placed before this Court any evidence or threat that the defendants intend to publish any material geared towards defaming his image and that the case mentioned do not touch or mention the plaintiff who is neither a party nor a litigant in the said cases and has neither exhibited any kind of special interest in the same and finds the applicant's action vague, ambiguous and the same does not disclose any particular words of expression from which the respondent's ought to be restrained; that the applicant has failed to show that the defendant's actions were actuated by malice and neither prove that the publications were calculated to taint his image nor demonstrated that the publications will cause him irreparable loss which cannot be adequately compensated and is therefore the plaintiff is not entitle to the temporary injunction orders as the same would only bar the defendants from expressing his fair comment and that the plaintiff's application should be dismissed with costs.
 6. Parties filed written submission. Mr. Kenga for the plaintiff submitted that the two publications dated 9th November 2013 and 31 January 2014 portrayed his client as a fraudster who attempted to defraud a local bank while in real sense he should be treated as a suspect of alleged element of no criminality on his part. He refuted that the articles were made in good faith and were fair comments on a matter of public interest and argued that it was not possible for the defendant to

call the plaintiff a fraudster and then claim it was done in good faith; that the 2nd defendant has admitted to failing to seek clarification as regards the 1st defendant and any person would know that such a comment was not a fair comment. He argued that although Article 33(2)(d)(1) gives the defendant right of opinion the same is limited in sub section 2 of the same article which provides that;

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

He submitted further that the applicant was aggrieved by the defendants reference to him as a shady but powerful business man unscrupulous trader and more seriously, being referred to as a fraudster who attempted to defraud the bank, with the word fraud being associated with the plaintiff without proof or evidence and the same was defamatory in every sense; that these allegations were not only untrue but also made in bad faith (malice) and the defendant did not even bother to verify his allegations from the purported bank, the police or Land Ministry before reporting or publishing the issue of fraud against the plaintiff; that a week after the said publication another was made on emphasizing the earlier publication and even slotted on the same page 8 & 9 of the defendant's newspaper. He referred the Court to section 1(1) of the Defamation Act Cap 26) which defines a defamatory statement as;

“A statement if published can be defamatory if it has caused or is likely to cause serious harm the reputation of the claimant.”

He submitted that the defamatory remarks complained of falls under the classification of libel which does not require any proof of damage or harm as the same is automatic and obvious that making an imputation and or reference that the plaintiff was a fraudster could cause serious harm on the plaintiff's reputation and that it was upon the defendant to invoke section 2, 3, 4 and 7 of the Defamation Act Cap 26 and their applicability in this case; that Article 33(1) (a) of the Constitution used by the defendants to back their defence also has a limitation in (2) (d) (1) which provides that (a) (b) (c) (d) Advocacy of hatred that Constitutes ethnic incitement, vilification of others or incitement to cause harm; that nobody is allowed to make an expression that vilify others; that the defendants in their defence involved section 2, 3 and 4 of the Defamation Act Cap 26 while they should have been guided by section 35(1 & 2) of the Media Act Cap 441B which in part pass information in a far accurate manner and the rules made in pursuant to section 35(2) of said Act forming part of the laws; that the reference amount to libel as the reporter knowing the same to be untrue passed them to the public and that the defendants should have complied with rules 2, 3, 4, 5, 6 and 9 on the 2nd schedule of the Media Act; that Section 2 does not aid the defendant since the imputation conveyed as regards to the criminality of the plaintiff/ applicant is not true and no single imputation was made against the plaintiff. The fact that the applicant applied for a loan did not make him a fraudster; that section 2(4) of Cap 26 abolished the Common Law defence of justification therefore the respondents replying affidavit lacks merit as it purports to justify the publication of defamatory remarks under the law; that

section 3 of Defamation Act provides a defence based on Honest opinion. The 1st respondent referring the plaintiff as a fraudster / criminal is an expression of opinion of the 1st defendant and should be treated as fair comment. he further submitted that the common law defence of fair comment was abolished under section 3(8) of Cap 26 and as such the same should fail; that the common law defence of honest opinion to succeed 3 conditions must be met namely;

- i. That the statement complained of was a statement of opinion as per section 3(2) of the Defamation Act;
- ii. That the statement complained of indicated, whether in general or specific terms, the basis of the opinion;
- iii. That an honest person could have held the opinion on the basis of:-
 - a. A fact asserted to be a fact in a privilege statement published before the statement complained of;
 - b. Anything to be a fact in a privilege before the statement complained of;

He agreed that land issues are matters of public interest reporting him as a fraudster without evidence is not a matter of public interest. He referred the Court to the case of **Stephen Thuo Muchina –vs- Wainaina & 2 Others HCCC No. 184 of 2005** where the media was exonerated because it merely published a report from the police officers and thus earned qualified privilege and the facts were true however in the current case facts are not true and the defendant does not have evidence of proof he also referred the Court to the case of **Patrick Nyoike –vs- the People HCCC 474 of 2009** the publication done recklessly and without any justification causing the plaintiff to be treated as a suspect of a criminal offence exposes him to humiliation, ridicule, odium and contempt by right thinking members of society and injure his recognition and reputation. He submitted that the facts in this case are similar to this case and the Court should consider it in rendering its judgment. The plaintiff is seeking a temporary injunction to prevent further publication which may cause amendments and attract more damages against the defendants; that although damages cannot repair reputation, the plaintiff praying for a temporary injunction pending determination of the suit is justified. He also referred to the case of **Kuacha Group of Companies & Anor –vs- tom Mshindi & 2 Others** where the plaintiff portrayed as criminals by defendants yet no evidence existed of such a fact, thus the suit was allowed.

7. Mr. Gichamba for the defendants relied on his replying affidavit and submitted that properties are matters of public interest and the that the articles were based on the declaration of the announcement by the Director of Public Prosecution when the matter was forwarded to him for consideration of prosecution and the same were made public for the general public consumption and as such no malice can be founded from such a situation and that there is no mention of the applicant considered as one of those considered for prosecution and that the waiver of prosecution does not in any way indicate the demeanor of the applicant as a fraudster; that in matters of granting an injunction 3 conditions must be satisfied and that the matter complained about is libelous and malicious and that nothing in the said article could taint the image of the plaintiff and the same was not done with any malice but with the sole benefit of the applicant and since the same falls within public interest the same would be qualified publication. He sought to draw the attention of the Court to applicant’s counsel submissions wherein he had referred to the United Kingdom defamation Act Cap 36 of Laws of Kenya and referred the Court to section 3 of the Judicature Act Cap 8 which provides for sources of law in Kenya as the Constitution, Kenyan written law, Acts of parliament of the United Kingdom which are subject to the Kenyan statutes, common law and doctrines of equity and statutes of general application in force in England as at 1897. It was his submission that the law referred to by the applicant’s counsel was foreign and did not have force of Kenyan Law. He further submitted that the Media Act Cap 411B that the plaintiff referred to has since been repealed and replaced by the Media Act no. 46 of 2013 and urged the Court to disregard and expunge the submissions made in regards to the repealed law. He submitted that it is settled that the principle of law applicable in seeking a temporary injunction is laid down in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** these are to the effect that three conditions must be met.

- i. *The applicant/plaintiff must make out a prima facie case with a probability of success; and*
- ii. *The denial of an order of injunction will cause the applicant irreparable loss which cannot be adequately compensated by an award of damages; and*
- iii. *If there is a doubt as to either of the above, the Court would Choose where there is a balance of convenience.*

He submitted that the applicant was seeking a temporary injunction on the ground that the publications by the defendants are defamatory to him and likely to injure his reputation and therefore the publication should stop. He referred the Court to the case of **Media Council of Kenya vs Eric Orina [2013] eKLR** where it was held that; *“it is to be noted however that in defamation the above principles or conditions are applied in a special way. That is to say that the principle or conditions are applied with the greatest of caution so that the injunction sought is granted only in the clearest of cases. The Court has to be satisfied that the words or matters complained of are clearly libelous and they are manifestly so defamatory that any verdict to the contrary would likely be set aside as perverse.”*

That from the reading of the said articles the same were referring to the dubious land transactions that have been happening in Malindi are propagated by shady and powerful businessman who are fraudsters and engaging in criminal conducts and that the said publications fall under section 7(1) of the Defamation Act, Cap 36 which states;

“Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice. ”

He submitted that the person complaining of a defamatory article is to seek clarification from the publisher, failing of which he will seek clarification from Court; that the plaintiff has not proved any malice on the part of the defendants and indicated that the publication was a right espoused under the Article 33 of the Constitution which is a freedom of expression or free speech. He relied on the case of **Bonnard and Another –vs- Perryman (1891-4) All ER 965-968** , where it was held that;

*“the plaintiff never sought an explanation from the defendant. That the defendant tried to contact the plaintiff but their calls and texts went unanswered and that the defendant were simply dispensing their duties of informing the public on matters of public interest. He also referred to the case of **Gil Gil Hills Academy –vs- The Standard Limited [2009] eEKL**, where it was held that;*

“this being a defamation case, however, an array of other factors fall for consideration. Only two are relevant to this case. They are public interest in the matter and whether, on the material before Court at this stage, it is clear that the alleged defamatory publication is true or not. On a factor of interest it is trite law that public interest demands that the truth be out, for that reason, it is in the public interest that individuals should possess the right to free speech, and in deed, that they should exercise it without impediment so that that right is not whittled down, the jurisdiction to grant an injunction is a delicate and special one and ought to be exercised only in the clearest of cases.”

The defendant does not deny publication of the said articles but contend that the same were matters of public interest and the same fall in the purview of qualified privilege. He submitted that the plaintiff has not convinced the Court that the statements made are not true. He referred the Court to the case of **Cheserem –vs- Immediate Media Services [2002] 2 EA** where it was held that;

“because of the public interest that the interest that the truth should be out, injunctions should be cautiously granted in defamation. To justify the granting of an injunction in defamation cases at an interlocutory stage therefore, the court must have prima facie evidence to come to a decision that the words complained of are untrue.” The Court further held that, *“if, on material placed before the Court at an interlocutory stage, it entertains any doubt on efficacy of that defence. Then that should be one of the factors to be considered whether or not an injunction should be granted. The other factors are, as I have considered whether or not an injunction should be granted. The other factors*

are, as I have pointed out, whether or not an injunction should be granted, the other factors are, as I have pointed out whether or not the plaintiff will adequately be compensated by an award in damages and whether the defendant will be able to pay the damages.”

On the issue of subjudice Counsel submitted that the plaintiff/applicant is not mentioned in any of the cases which the applicant has relied and has also not placed any evidence or threats by the defendants to publish any material geared towards him or likely to defame his image and urged the Court to dismiss the plaintiff’s application.

8. Mr. Kenga in reply to the DPP indicated that he will be investigating the issue but went further and indicated that among those targeted was his client. He denied that that was a matter of public interest and indicated that the malice was that there was nothing of public opinion.
9. Counsels in their affidavits and submissions sought to argue the entire case. At this interlocutory stage I will not make any definite findings. The plaintiff seeks an injunction against the respondent. What the plaintiff needs to prove at this stage is that he has a prima facie case with probability of success and if an injunction is denied he stands to suffer irreparable loss if the injunction is not granted and if the Court is in doubt the matter will be decided on a balance of convenience, see **(Giella vs Cassman Brown & Co. Ltd [1973] 358)**.
10. In this case a publication has been done which the applicant claims is defamatory as it portrays him as shady and a fraudster. The defendant does not deny the publication but justifies it as fair comment. Being a defamation libel case two issues are relevant being the public interest in the matter and the material before the Court. Issues touching on land are issues of public interest, though the newspapers have a right of freedom of publication this right must be weighed against private rights. The allegations made have not been proved at this interlocutory stage and the plaintiff has set out what he considers as defamatory at paragraph 6 of the plaint. In my view he has set out a prima facie case with a probability of success. He has also drawn the Court’s attention to matters pending before the Malindi Law Courts. With the alleged defamatory publication in mind and the matters pending before the said Court in my view an order of injunction is warranted. Though the applicant can be compensated by way of damages it is only in order that the respondent be restrained from further publication or discussing matters touching on the said land parcels of land within Chembe/Kibabemshe Settlement scheme and in particular plot No. 399 and plot No. 409. This order shall be enforced for 12 months from the date of this ruling. The plaintiff applicant shall endeavor to fix the suit for hearing. Costs shall be in the cause. Orders accordingly

Dated, signed and delivered this 19th Day of September 2014

R.E. OUGO

JUDGE

In the Presence of:-

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent

.....Court Clerk