REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 540 OF 2012

MEDIA COUNCIL OF KENYA ..... APPLICANT PLAINTIFF

VERSUS

ERIC ORINA ..... RESPONDENT/ DEFENDANT

R U L I N G

The application before the court is the Notice of Motion dated 2nd November, 2012 and filed by the Plaintiff, herein referred to as the **"Applicant"**. It seeks an injunctive order to restrain the Defendant, who is the respondent herein from writing, printing and publishing, further defamatory statements against the applicant and its Council members, pending the hearing and determination of this suit. The application is properly supported by an affidavit and a supplementary affidavit.

The Application is, on the other hand, opposed by a Replying Affidavit sworn by the Respondent Both parties filed written submissions with the leave of court.

The Applicant's case is that the Respondent sent disparaging emails to the Chairman of the Applicant, persistently over a period of three weeks in August 2012. That the said emails were also published on-line portal known as **JACKAL NEWS**, which portal is accessed by many subscribers. That the nature of the published statements, in their ordinary and natural meaning, were construed and understood to be and to mean that the Chairman and Council members of the Plaintiff/applicant are: -

1. ***unfit to hold such offices;***
2. ***corrupt and engage in corrupt practices; and***
3. ***ignorant and oblivious to the interests of the applicant.***

The Applicant further stated and argued that the Respondent's allegations in the emails aforestated, are not only wrong and erroneous, but are also damaging to the Media Council's reputation. That they are also damaging to the Council in its function that caters for the best interest of the members of and general public at large. That the right thinking members of the public who read the **"JACKAL NEWS"** would start thinking negatively of the Applicant. The Applicant stated that the Respondent had published six (6) emails in five (5) publications in the portal which are as follows: -

1. **8th August, 2012: "MCK Chairman Levi Obonyo "Blocked" Colleague(s) from attending Key Media Conference in Rwanda As 'Resign' Call Grow Louder."**

2. **15th August, 2012: "State-Funded Media Council of Kenya in the Sewer Because of 'A**

Bunch of Ludlum Dogs"

3. **23rd August, 2013: "Fire-breathing Eric Orina Tells MCK Boss Levi Obonyo 'Come Baby Come and Sack Me' As Bloody Stand-off Escalates"**

4. **23rd August, 2012: "There will be Blood'; A Warning Letter to Media Council of Kenya Board Members."**

5. **25th August, 2012: "A Massive Sex Scandal is Brewing at The Media Council of Kenya And We Will Expose it."**

The Applicant accordingly further argued that the Respondent is clearly presumptuous and likely to continue to publish more derogatory material likely to be published by the **"JACKAL NEWS".** Such will hamper not only the cohesiveness of the Applicant Council members, but also the core aims and objectives of the Applicant, and dampen the same beyond control. That he should, therefore, be restrained. That the repeated emails and publication of the same show that the Respondent has the tendency to voice personal thoughts rather brusquely in repeated ways and he is likely to strike again and again.

The Applicant also argued that the Respondent's above conduct does not ensure that when exercising the right to freedom of expression, the rights and reputations of others should as well respected and embraced. He instead, has breached and threatens to continue breaching the applicant's constitutional right to have its reputation respected, and not demystified in the minds of right thinking members of society.

Finally the Applicant urgued the court to get satisfied ftom the material presented by it, that it has a good case with a likelihood of success at the trial and accordingly one in which an order of restraint of the respondent at the interim stage, would be justified. It refereed the court to the Principles laid down in **Giella Vs Cassman Brown & Co. Ltd case (1973) EA 258** and urged that the principles have been demonstrated in this case.

In response, the Respondent admitted publishing the cited emails but stated that he was a member of the Applicant council. He had taken an oath to commit himself to fairness, freedom of expression, openness and accountability. That he has served the Applicant with creativity, energy, diligence, commitment and devotion at all material times. That he has, in the cited emails, correctly challenged and questioned the Applicant in respect to the state of affairs in the Applicant Council as well as the unlawful manner in which the members were conducting the Council's mandate. That he was not throwing mud at the council but was as an insider, "**blowing the whistle**" in a **justified** and fair manner in the realm of **"fair comment**."

The Respondent also argued that while some of the matters he was in the process of revealing may have been unsavoury, they were nevertheless accusations which concerned some members of the Plaintiff/Applicant Council and related to Council's integrity, transparency and accountability to the public. The matters were therefore in fair comment and were justified. That any injunction issued by this court to restrain the Respondent from continuing to publish and expose acts of misconduct committed by the Applicant would be against public interest and in restraint of his personal rights, as well as a public right of fair comment.

The Respondent, faced with the issue that he has not filed any defence through which he would demonstrate his likely defence in this case, stated that he has never been served with any summons in respect of which he would file his expected defence. However, he asserted, he will definitely raise the defences of truth, justification and fair comment. He argued also and further, that the Applicant in this application, has failed to show that by the publication of the cited emails, it has suffered or will suffer any loss or damage which cannot be sufficiently compensated in damages. The Respondent further argued that the publisher, the **"JACKAL NEWS",** has deliberately not been joined as a party in this case which demonstrates that the Plaintiff is not seriously aggrieved, but rather filed the suit and this application to

merely stifle the Respondent from divulging in public interest, the wrong things being committed by the Plaintiff council.

Accordingly, the Respondent concluded that the Applicant has in this kind of defamation cases, failed to demonstrate that it is entitled to an interim or temporary injunction. The Respondent then went ahead and sought, not only for the striking out for the supplementary affidavit sworn by Applicant's Advocate, but also the dismissal of the application with costs.

I have perused all the materials raised in support of and against issuance of an interim injunction or temporary against the defendant/Respondent herein, and I have also carefully considered the same in the face of the principles of law applicable in such cases.

It is settled that the principle of law applicable in a case seeking interim injunction are those laid down in the case of **Giella Vs Cassman Brown and Co. Ltd (1973) EA 358.** These are to the effect that the following three conditions must be met.

That is to say that:

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.**

It is to be noted however, that in defamation cases, the above principles are applied in a special way. That is to say that the principles 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 libellous and that they are so manifestly defamatory that any verdict to the contrary would likely be set aside as perverse.

This position was set out in the old English case of **Bonnard and Another – Vs – Perryman (1891-4) All ER 965 – 968:-**

> **"It is obvious that the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by an injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which is for the public interest that individuals should possess, and, indeed that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any rights of all have been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."**

The reasons for the court to deal with the issue of granting an injunction to restrain the publication of a defamatory material at the stage where the case has not been heard or evidence in the case known, can be picked from the above very old case.

They include:-

a. **That free speech should not without strict proof of its violating individual wrong, be fettered.**

b. **That the right of free speech is one which is for the public interest and therefore one which individuals should have and should exercise without impediments, even if such impediment**

is by means of court injunction, at the interim stage.

c. **That even where there is clear evidence that publication or repeated publication of a libel is likely to cause injury to an individual, protection of the right to free speech, would force the court to deny restraint thereof even at the risk of such injury occurring in anticipation that the individual injury, will be compensated by ordinary damages or even aggravated damages.**
d. **that otherwise the publication of the injurious material will be justified because it may be true and should be published in public interest or as fair comment.**

Lord Denning had later in the case of **Fraser – Vs – Evans & Another [1969] 1All ER 8 at 10,** the following to say:-

> **"It all comes back to this. There are some things which are of such public concern that the newspapers, the press, and indeed, everyone is entitled to make known the truth and make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away. *The Sunday Times* assert that, in this case, there is a matter of public concern. They admit that they are going to injure the Plaintiff's reputation, but they say that they can justify it; that they are only making fair comment on a matter of public interest; and therefore, that they ought not to be restrained. We cannot prejudge this defence by granting an injunction against them. I think that the injunction which has been granted, should be removed. *The Sunday Times* should be allowed to publish the article at their risk. If they are guilty of libel ... that can be determined by an action hereafter and damages awarded against them. But we should not grant an interim injunction in advance of an article when we do not know in the least what it will contain..."**

The above English Law position has been applicable in our legal systems in East Africa from colonial times and our law is basically English Law. To that end, the High Court of Tanzania in **Cogecot Cotton Co. Ltd – Vs – Tanzania Marketing Board [2000]2 EA 372 at 378** stated thus in respect to the position expressed above –

> **"The law with regard to the granting of a temporary or interlocutory injunction in defamation cases comes to the protection of the defendant where he has filed a defence so that it can be seen whether or not he has pleaded the defence of *'justification'* or *'fair comment.'* Otherwise the defendant should show by affidavit that he is going to plead the defence of '*justification*' or '*fair comment*'."**

In this case before me the applicant which is the Media Council of Kenya point out to the material already published by the Respondent, who is or was also a member of the Council, and asserts that the publications are malicious, filthy and libelous. The Applicant further argues that the several publications in the ***Jackal News*** have caused immense injury on the members of the Council as well as the Council itself; and that further publications will do even more damage. It accordingly argues that the court should grant temporary injunction to stop the Respondent from causing more or greater damage.

The Respondent, on the other hand has not filed any defence and the court cannot guess what it will be or will include. However, the Respondent does not really deny publishing the material complained of. All he says is that he does not know who released the material to the blog known as ***Jackal News***. He goes further to swear in an affidavit which is part of his defence to this application, that he will in his defence to be filed hereafter when he will be served with the summons to enter appearance and defence, rely on the defences or partial defences of '**justication'** and '**fair comment'**. He insists that what he published is the simple truth and that he will draw his defence on that basis. The court understands the Respondent to be saying that if he eventually fails to prove the said defences,he takes the risk of paying the damages or aggravated damages that may be granted to the Applicant.

It is the view of the court, after perusing the plaint and listening to what the defendant will raise as defences, that the Plaintiff has a prima facie case with a probability of success. I also have considered

whether the damage that will arise if temporary injunction is not granted at this stage, will be so monumental so as not to be capable of being compensated by damages. I have further, considered the fact that the plaintiff was established for the purpose of protecting the right to freedom of speech and free expression, a right the Respondent is trying to assert in his publications that are in question in this suit. The Council is accordingly expected to be more tolerant on the issue, than private individuals. In the court's view therefore, and because the plaintiff is not a private person but a public body, any damage done to it in respect to its reputation, can sufficiently be compensated with damages.

For that reason, this condition, as set out in Giella case, has not been demonstrated.

In the circumstances the court sees no need to examine the third condition concerning the best balance of convenience. Accordingly I find that this application has no sufficient merit. It is hereby dismissed with costs.

It is so ordered.

Dated and Delivered at Nairobi this 22nd day of August 2013

D.A. ONYANCHA

JUDGE

Delivered in the presence of:

..... for the Applicant/Plaintiff

..... for the Respondent/Defendant