



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Suit 323 of 2010**

**RENTON COMPANY LIMITED..... PLAINTIFF**

**VERSUS**

**PHILIP KISIA.....1<sup>ST</sup> DEFENDANT**

**TOM ODONGO.....2<sup>ND</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....3<sup>RD</sup> DEFENDANT**

**RULING**

By Chamber Summons dated 22<sup>nd</sup> June 2010 expressed to be brought under Order 39 rules 1, 2 & 3 of the Civil Procedure Rules, the plaintiff prays for the following orders:

- 1. That this Honourable court do issue an order restraining the defendants by themselves, their agents, servants, employees and/or attorneys from further causing to be published, publishing and/or printing further defamatory words and/or similar words of and concerning the Plaintiff proprietorship of L.R. No. 12979/4 pending the hearing and determining of the suit herein.**
- 2. That the cost of this application be provided for.**

The application is supported by an affidavit sworn on 22<sup>nd</sup> June 2010 by **James M. Gatundu**, who describes himself as a director of the plaintiff. In the said affidavit, the deponent states that the plaintiff is the registered proprietor of LR No. 12979/4 which it acquired by virtue of a transfer from the Nairobi City Council, the 3<sup>rd</sup> respondent herein at a consideration of Kshs. 18,200,000/-. According to the deponent the 3<sup>rd</sup> respondent has been collecting rates from the plaintiff. However, on diverse dates in the year 2010, the 1<sup>st</sup> and 2<sup>nd</sup> defendants maliciously published statements concerning the plaintiff with the intention of damaging the reputation and the business of the plaintiff. It is averred that on 27<sup>th</sup> May 2010, the 2<sup>nd</sup> defendant on instructions of the 1<sup>st</sup> respondent wrote two letters to the Managing Directors of Kenya Power and Lighting and Kenya Commercial Bank respectively accusing the plaintiff of grabbing the said land. Prior to that the said defendants are alleged to have given interviews to a reporter of the

Standard Newspaper in which similar allegations were made. All this time, the deponent states, the defendants knew the said land had been sold by the 3<sup>rd</sup> defendant to the plaintiff for value and the title thereof has never been challenged. At the instigation of the defendants, it is alleged, the Ministry of Lands purported to revoke the said title but that action was stayed by the Court on grounds of illegality and unconstitutionality. It is the plaintiff's view that the said publication was intended to ruin the plaintiff's business and cause financial harm and loss to the plaintiff by scarring investors intending to do business with the plaintiff to develop the said property. Consequently the deponent contends, the said bank has cancelled the loan to the plaintiff while Kenya Power and Lighting has stopped installation of power to the said property. It is contended that the plaintiff had entered into joint venture agreements with third parties in respect of the said property and has also sold various subdivisions thereof to several hundreds of members of the public who have acquired interest therein. Unless therefore the defendants are restrained from publishing false and defamatory statements regarding the plaintiff's business and operations, it is the plaintiff's case that the plaintiff will suffer irreparable loss which cannot be compensated in damages.

In opposition to the application, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed the following grounds of opposition:

- 1. The application does not meet the criteria for the grant of the orders sought therein.**
- 2. The application is premature, defective, incompetent and misconceived.**
- 3. The words on a plain reading of the 2 caveats registered against the title on 24.2.2009 under 5.65 of the Registrar of Titles Act and Kenya Gazette Vol. CXII No. 56, Notice No. 6220 of 4.6.2010 which ultimately revoked the said title, are just and fair comments and privileged for being matters of public interest**
- 4. The application otherwise lacks merit**

The application was argued by way of written submissions. In its submissions, the plaintiff citing **Giella vs. Cassman Brown Company Ltd [1973] EA 358 at 360**, states that it is the registered owner of the suit land, a fact which the defendants are well aware of and despite that fact the defendants have gone ahead to publish the aforesaid defamatory material. The said publications, it is contended, meant and were meant to be understood that the plaintiff is engaged in illegal activities and that the land in question is reserved for the public utility and that the plaintiff fraudulently acquired the same. The said imputation, it is contended, *inter alia*, amounts to an inference of a criminal offence. It is further submitted that the fair comment alluded to in the grounds of opposition cannot in the circumstances be sustained and therefore the plaintiff has established a *prima facie* case against the respondents. Not only has the plaintiff's contracts with the financial institution aforementioned been cancelled but other third parties' interested in entering into joint venture with the plaintiff have similarly cancelled their respective agreements including the stoppage of installation of power to the property. Accordingly, the loss suffered by the plaintiff which include loss of reputation, it is submitted, cannot be compensated by an award of damages. Since the defendants have not shown any prejudice they stand to suffer unlike the plaintiff it is submitted that the balance of convenience tilts in favour of the applicant.

On their part the 1<sup>st</sup> and 2<sup>nd</sup> defendant submit, on the authority of **GBM Kariuki vs. Fred Kwasi Apaloo Nbi HCCC No. 1376 of 1994**, that no *prima facie* case has been established since the pleadings do not show reference to the plaintiff. Since the plaintiff has admitted having sold the said parcel to many other persons, it is contended that if the words complained of are defamatory at all, then they may as well refer to those other persons and not necessarily the plaintiff. It is further contended that there is no evidence of the existence of the alleged contracts with Kenya Power and Lighting and Kenya Commercial Bank. The said defendants further submit that they were covered by the defences of privilege, fair comment and truth and that any fair minded person reading the two documents may have reached the same reference to the matter in question. It is further submitted that the land registry being the final authority on land ownership, there can be no other or further inference but that which emanates from the registrar of titles. Since the plaintiff has admitted that the lands in question have been subdivided and sold out, its claim on the said land has been extinguished hence its suit has no pillar to stand on since the third parties to whom the land has been sold are non-parties to the suit. Relying on the case of **John Kabere Mungai vs.**

Charles Karuga Koinange Nairobi HCCC No. 1183 of 1983, it is submitted that there is no prima facie case disclosed. As the plaintiff admits that the title has been revoked, without the said revocation being set aside, it is submitted on the strength of Kenya Commercial Finance Company Ltd vs. Afraha Education Society & Others Civil Appeal No. 142 of 1992 [2001] 1 EA 86 and Greystone Construction Co. Limited vs. Microtech Accessories Ltd & 4 Others Nairobi HCCC 215 of 2010 that the plaintiff cannot make any claims to the title and since it cannot claim the same, it has no interest in the suit parcel of land. Since the conditions for granting interlocutory injunction are sequential, it is submitted that without establishing a *prima facie* case, there is no need to address the second condition. Since the plaintiff has admitted having disposed of the land the nature of the loss, it is submitted, cannot be said to be irreparable. In any case there has been no demand for retraction of the statement and an apology. It is further submitted that the delay in fixing the present application for hearing, can only lead to the inference that there is none and there has never been any pending loss impending to warrant a grant of the orders sought. Further it is submitted that it is not claimed that damages would not make the plaintiff's loss if any. On the balance of convenience, it is submitted that as long as the title remains revoked it is important that information be disseminated to the public rather than allow them to invest and continue with their activities on the said parcel of land.

Having considered the application, the affidavit in support thereof, the grounds of opposition as well as the submissions and authorities, this is the view I form of the matter.

The freedom of expression is enshrined in Article 33(1)(a) of the Constitution which provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However that freedom is limited by clause (3) thereof which provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

It, therefore, follows that in suits for defamation the Courts must weigh between the freedom to express oneself and impart information against the respect for others' rights and reputation. Where a person alleges that what was said is true, for example, to gag the dissemination of the information may be as detrimental as to allow false information to be published to the detriment of one's reputation. Reputation once lost, it must be recognized may not be regained. The grant of interlocutory injunctions in defamatory cases, though follow the general principles in applications for interlocutory injunctions, have been modified to suit the unique subject of defamation. This principle cannot be expressed better than **Khamoni, J** in Micah Cheserem vs. Immediate Media Services & 4 Others Nairobi HCCC No. 398 of 2000 [2000] 2 EA 371 in which the learned Judge expressed himself as follows:

**“An interlocutory injunction is temporary and only subsists until the determination of the main suit...In defamation, the question of injunction is treated in a special way although the conditions applicable in granting injunction as set out in the case of Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358 generally apply...In defamation cases, those principles apply together with the special law relating to the grant of injunctions in defamation cases where the Court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in the clearest possible cases: the Court must be satisfied that the words complained of are libellous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse...The reason for so treating grant of injunction in defamatory cases is that the action for defamation bring out conflict between private interest and public interest, and more so in cases where the country's constitution has provisions to protect fundamental rights and freedoms of the individual including the protection of the freedom of expression”.**

The same Judge in Francis P. Lotodo vs. Star Publishers & Another Nairobi HCCC No. 883 of 1998 had this to say:

**“An injunction will not be granted where the defendant pleads justification unless the Court can be sure that his defence cannot be sustained at the trial and that the plaintiff will receive more than nominal damages, even if the publication, if true, would clearly be libellous...To justify the Court in granting an interim injunction, it must come to a decision upon the question of libel or not and**

therefore the jurisdiction is of a delicate nature and ought only to be exercised in the clearest cases...The court would not restrain the publication of an article, even though it was defamatory, when the defendants said that they intended to plead justification or fair comment...The discretion will not in general be exercised unless there is “a strong *prima facie* evidence that the statement complained of is untrue” for “until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed.”Where the words are *prima facie* privileged, the Court should not grant an interlocutory injunction unless the Court is clearly satisfied that the defendant was actuated by malice.When the defendant says that he is going to justify the words complained of, there is an end of the case so far as an interim injunction is concerned...The decision in Giella vs. Cassman Brown & Company Ltd. [1973] EA 358 at 260 unlike the English cases, is binding on the Courts in all cases of injunction including defamation... The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the Defendant will suffer if it is granted lies on the plaintiff... Under Section 79(1) of the Constitution, the rights, principles and conditions enshrined therein free from the drastic interference that may be lost by the granting of an interlocutory injunction, unless there is a substantial risk of grave injustice and the private interest in preventing the publication the applicant seeks to prevent outweighs the public interest”.

In Gilgil Hills Academy Ltd vs. The Standard Ltd Nakuru HCCC No. 88 of 2009 Maraga, J (as he then was) expressed himself as follows:

“At the stage of an application for injunction the court is not able, nay, supposed to make any definitive findings. If it is an ordinary suit, what would be required of the court at that stage is to determine whether, from the pleadings as well as counsel’s submissions, the plaintiff has made out a *prima facie* case with a probability of success and if so whether a denial of an injunction will cause the plaintiff irreparable loss which cannot be adequately compensated by an award of damages. If the answer to these questions would be in the affirmative, then the plaintiff would be entitled to the injunction and *vice versa*...This being a defamation case, however, an array of other factors fall for consideration and only two are relevant to this case. They are the public interest in the matter and whether, on the material before the court at this stage, it is clear that the alleged defamatory publication is true or not...On the factor of public interest it is trite law that public interest demands that truth should be out. For that reason, it is in the public interest that individuals should possess the right of free speech, and, indeed, that they should exercise it without impediment. So that that right is not whittled down, the jurisdiction to grant an injunction at an interlocutory stage is a delicate and special one and ought to be exercised only in the clearest of cases...Needless to say that that individual right of free speech or of freedom of expression is enshrined in section 79 of the Constitution. That section, however, provides riders and the one relevant to this case is the protection of the reputation and right of others...In deciding whether or not to grant an injunction, each case should be considered on its own peculiar facts bearing in mind the fact that whether or not the defence of justification and or fair comment will hold is for the court to decide after hearing the case. To justify the granting of an injunction in defamatory cases at interlocutory stage, therefore, the court must have *prima facie* evidence to come to a decision that the words complained of are untrue...If, on the material placed before the court at the interlocutory stage, it entertains any doubt on the efficacy of that defence, then that should be one of the factors to be considered whether or not an injunction should be granted”

In Dr James Obondi Otieno vs. Nation Media Group Limited Kisumu HCCS No. 7 of 2005 (Mwera, J) was the view that unless the nature of the defamation is the continuing one, acts of defamation, being ordinarily singular, nothing is to be served by issuing an injunction.

In the present case the plaintiff’s claim is that it was defamed by way of 2 letters published in May 2010, more than 2 years ago. It has not been contended that the said defamation is on-going. The plaintiff’s case is that it is the lawful proprietor of the suit land. Yet at the same time it contends that it has subdivided and sold the same to hundreds of members of the public. He does not state the portion, if any, that it retained. I have also perused the documents upon which this cause of action is based. It is clear that there is no express reference to the plaintiff in this suit. Further, I agree with the submissions of counsel for the

defendants that in light of the contention by the plaintiff that it has subdivided and sold portions of the suit property, one cannot tell by a mere reading of the said documents whether reference was made to the plaintiff or to the purchasers. To make that conclusion one would have to await the adduction of oral evidence at the hearing of the main suit.

Further it is contended that the plaintiff's title to the suit property has been revoked though there is a stay granted. Whether the grant of the stay in the circumstances of the case amounts to the restoration of title before the matter is finalised is arguable. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in their defences have pleaded, albeit in the alternative, that the publications complained about were true in substance and in fact. The defendants have further pleaded privilege. The plaintiff in its plaint has not pleaded any particulars of malice in absence of which I am unable to find that the plea of qualified privilege may not avail the defendants. Order 2 rule 7(3) of the Civil Procedure Rules provides as follows:

***“Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred”.***

In the instant case there is no reply to the defences on record although the defences mentioned in the foregoing provision are alluded to in the defences.

Taking into account the foregoing, I do not have sufficient *prima facie* evidence to satisfy me that the words complained of are untrue taking into account the plaintiff's conduct of subdividing and selling the suit land to third parties when the same was allegedly obtained from the third defendant which is a Local Government Authority. Exercising the necessary caution, I am not satisfied that the words complained of are libellous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Without making definitive findings at this stage, it is my considered view that since public interest demands that truth should be out, it is only proper that in the light of the uncertainty surrounding the title to the suit property, members of the public should be cautioned against investing and transacting in the said land. The plaintiff has not satisfied me that it stands to suffer greater prejudice than the public if the injunction is not granted. The failure to satisfy me on this point disentitles the plaintiff to the reliefs sought under the overriding objective in section 1A of the Civil Procedure Act whose aim *inter alia* is the attainment of the principle of proportionality. In any case it is my view that any damages that may be sustained by the plaintiff is capable of being quantified and compensated. To state that damage to reputation is incapable of being compensated goes against the plaintiff's own suit in which it is claiming *inter alia*, general damages.

I have also taken into account the fact that this application though filed more than 2 years ago was for some unknown reason not expedited with the result that it is doubtful whether any meaningful purpose will be served by granting the orders sought. I also note that the plaintiff has not given any undertaking in damages as is customarily required in such matters.

In the result I find no merit in the application dated 22<sup>nd</sup> June 2010 which I hereby dismiss with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

**Ruling read, signed and delivered in Court this 25<sup>th</sup> day of July 2012.**

**G.V. ODUNGA**  
**JUDGE**

In the presence of Mr. Muthui for Ms. Oluoch for the Plaintiff