



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL NO. 545 OF 2010

FRM (E.A) PACKERS LTD.....PLAINTIFF

VERSUS

THE NATION MEDIA GROUP PATRICK NZIOKA.....DEFENDANT

Coram: Mwera J

Wambugu for plaintiff

Ms Janmohammed for defendant

Njoroge court clerk

RULING

The plaintiff company brought a chamber summons dated 15.11.10 to court invoking the powers donated by sections 1A, 1B, 3A of the Civil Procedure Act and the now repealed Order XXXIX 2, of the Civil Procedure Rules:

i) that the two defendants be restrained from publishing on the internet, radio and TV, libelous words of the plaintiff's product called TRIGGER.

It was contended in the 13 grounds that on 4.11.10 the 1st defendant without investigating the truth, showed on its NTV station that a man died in Nyeri after drinking an "illicit brew called Trigger Gin", by displaying empty bottles of that brew on the screen. The TV news was repeated the following day as well as carrying an article in the Friday Nation of 5/11/10. The same was repeated on 8/11/10. The news caused panic and raised public outcry, causing financial loss and damage to the plaintiff.

Francis Mathenge Kigo , a director of the plaintiff company swore an affidavit that it had obtained a due certificate of analysis according to the law and also a standardization mark from Kenya Bureau of Standards (KEBS) to manufacture and market the alcoholic drink – **Trigger**. So when the defendants published the words complained of that a man died in Nyeri after drinking **Trigger**, that prompted KEBS officials to visit the plaintiff's premises to collect samples for random testing (Ann.GRM 1), with the

result that the samples complied with the requirements of the respective standard in all parameters tested. In the circumstances, the published words were false and defamatory of the plaintiff's product.

In the replying affidavit by one Sekou Owino, the legal officer with the 1st defendant and also deponing on behalf of the 2nd defendant employee of the 1st defendant, it was contended that the plaintiff had not made out a prima facie case to warrant an injunction. No certificate as specified under the Food, Drugs and Chemical Substances (General) Regulations had been availed. A man had died in Nyeri following consumption of alcohol. The publications complained of were not defamatory and they did not elicit mendacities concerning the plaintiff at all. Most of the averments in the supporting affidavit were said to be unsubstantiated, scandalous and not worth the ex parte orders sought. Only a trial can determine by proof what potential loss or otherwise suffered. The orders sought were only meant to seriously curtail the defendant's rights and freedoms as per the Constitution. Indeed the publication complained of constituted fair comment in the public interest. The 2nd defendant had verified the information given to him by the neighbours and the widow of the dead man in Nyeri and thus adhered to the tenets of responsible journalism. No malice was intended at all. The plaintiff filed a supplementary affidavit reiterating what was contained in the supporting affidavit and both sides were directed to file submissions.

At this stage all that the court requires to grant the temporary orders of injunction awaiting the final outcome of the trial of the suit, is for the applicant to make out only a prima facie case. In the event that bar is not crossed, the court will refuse to grant the injunction. It all depends on the material placed before the court at this stage. The rest in the manner of the law, the facts, the circumstances, the principles is for the trial court. In these proceedings both sides submitted as if a trial had been conducted – referring to the law, the depositions, the annexures, exhibits, authorities both by treatises and case law and the applicable principles. Even the constitution was not left out! That is not what was required in these proceedings. Regardless, after going over all those, the court was minded to confirm the injunction orders on the basis that the plaintiff had demonstrated that the publication, in the view of the plaintiff was defamatory of its product and it was repeated and likely to be repeated. The plaintiff had obtained evidence after the publication that the brew was not harmful – a thing the defendants are inclined to hold a different view to. But then that should be evidence before the trial court. Even regarding damage and loss, that too falls on the trial court to determine. So all in all, the orders are granted. The parties to move to process the suit for trial as per the Civil Procedure Rules 2010.

Costs to the plaintiff.

Delivered on 12/5/11

J. W. MWERA

JUDGE