REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 511 OF 2010

BRIGADIER ARTHUR NDONJ OWUOR. …….....……. PLAINTIFF

VERSUS

THE STANDARD LIMITED. …….....…….. DEFENDANT

R U L I N G

This is a Chamber Summons filed on 2nd November, 2010 on behalf of the plaintiff in file No. 511 of 2010. However, several related cases were filed in the High Court in respect of the same subject mater by officers serving in the Defence Forces. The other cases are HCCC No. 512 to 519 of 2010 and will be effect by this ruling.

The application was brought under Order 39 rule 1 & 2 of the Civil Procedure Rules (now replaced). The prayers in the application are as follows: -

1. ***This application be certified as urgent.***

2. ***That service of this application upon the defendant in the first instance be dispensed with and the application be initially heard ex-parte.***

3. ***That a temporary injunction be granted, pending the inter partes hearing of this application, restraining the defendant by itself, its respective servants or agents or howsoever from publishing, printing, circulating or distributing allegations that the plaintiff is corrupt or has abused his office as a public servant to confer a benefit to himself or other parties or has flouted the Procurement Law and Rules in the Award of a tender or tenders by the Department of Defence or has been involved in Ksh.1.6 billion tender scandal at the Department of Defence in the Republic of Kenya.***

4. ***That alternatively, the application be fixed for hearing inter partes on priority basis.***

5. ***That a temporary injunction be granted, pending the hearing and determination of this suit, restraining the defendant by itself, its respective servants or agents or howsoever from publishing, printing, circulating or distributing allegations that the plaintiff is corrupt or has abused his office as a public servant to confer a benefit to himself or other parties or has flouted the Procurement Law and Rules in the award of a tender or tenders by the Department of Defence or has been involved in Ksh. 1.6 billion tender scandal at the Department of Defence in the Republic of Kenya.***

6. ***That costs of this application be provided for.***

It is appropriate to observe here that, after filing this application, interim injunctions orders were granted pending the hearing and determination of the application inter partes. Therefore, at this juncture prayer 1, 2, 3, and 4 have been spent. They are, therefore, not currently for decision. The prayers for decision are prayers 5 and 6.

The application has grounds on the face of the Chamber Summons. It is contended in the grounds, inter alia, that the defendant had published atrocious falsehoods against the plaintiff accusing him of committing economic crimes. The publications were done on 25th, 26th, and 27th October, 2010. That unless restrained by this court, the defendant would repeat or republish similar allegations concerning the plaintiff.

The application was filed with two affidavits. The first was described as a supporting affidavit. It was sworn by the plaintiff on 2nd November, 2010.

In this affidavit, the deponent annexed copies of the documents complained of and deponed, inter alia, that the plaintiff was a public officer deployed in the Defence Headquarters as the Chief of Logistics. That he was subject to the provisions of the Government Financial Management Act 2004 and the Anti Corruption and the Economic Crimes Act 2004. That his employment was regulated by the Armed Forces Act. That in the publications printed by the defendant, there were falsehoods to the effect that the Plaintiff together with others as a Contract Negotiations Committee breached the law and contravened the requirements under the Public Procurement Act and Regulations and that the Ministry of State for Defence had issued a letter of credit for Ksh.800 million in part payment. That such alleged contraventions amounted to criminal offences. That it was alleged falsely that the Chief of General Staff had called the plaintiff and the other members of the committee to record statements on the alleged contravention of the Law and Regulations. That the publications were grave, damaging, injurious and would ruin the plaintiff and that such further publications should be prohibited as requested. That unless restrained by the court, the defendant was likely to continue publishing falsehoods concerning the plaintiff.

The other affidavit is headed "***second supporting affidavit***". In this affidavit, the Chief of General Staff of the Kenya Armed Forces General Jeremiah Kianga was the deponent of the affidavit. The affidavit was also sworn on 2nd November, 2010. It was deponed in the said affidavit that the deponent had seen the alleged publications. That it was not true that the deponent had cancelled a letter of credit. That it was also not true that Procurement Procedures were not followed. That he did not request the plaintiff or any other member of the Contract Negotiating Committee to provide him with a written statement as alleged by the defendant.

The plaintiff through their counsel Mr. Shaplery Barret & Co. filed written submissions on 10th December, 2010. It was contended that the application was for temporary injunction pending the hearing and determination of the suit. There were undisputed facts. The defendant did not dispute that they published all the articles complained of. No dispute that the plaintiff was one of the officers who was named as having been involved in opening of a letter of credit in the sum of Ksh.800 million to pay a South African Company. No dispute that the plaintiff was one of the officers who was alleged to have been requested by the Chief of General Staff to provide a written statement on the scandal.

It was not disputed that the Chief of General Staff did not cancel a Letter of Credit of Ksh.800 million. It was not disputed that the Chief of General Staff stated that all actions attributed to him by the defendant in the articles did not occur and were completely false and fabricated. It was contended that the defendant did not file any replying affidavit to challenge the contents of the supporting affidavits.

It was contended also that the contents of the articles were falsehoods which gave the impression that the plaintiff was involved in corruption and various other criminal activities contrary to the Anti-Corruption and Economic Crimes Act, the Government Financial Management Act, and the Penal Code. It was contended that the effects of the publications amounted to violations of the plaintiff's human dignity contrary to Article 28 of the Constitution. Reliance was placed on **Civil Appeal No. 284 of 2005, Nation Media Group and 2 Others Versus John Joseph Kamotho & 3 others,** wherein the Court of

Appeal stated that once somebody's reputation was tainted by an unfounded allegations the reputation may be damaged forever. That reputation was part of the dignity of an individual.

It was contended that the articles bismirched the plaintiff by portraying him as being corrupt and a criminal relating to colossal amounts of money. The articles were fabricated stories by the defendant for financial benefit or profit. There was no guarantee that the plaintiff will ever be able to fully restore his lost reputation or integrity. It was contended that the defendant completely ignored the correction given by the Department of Defence on 25th October, 2010. The defendant was still not remorseful for their conduct.

Counsel emphasized that there was no alternative remedy to protect the plaintiff's reputation and integrity pending the hearing and determination of this case, except through injunctive orders of this court.

Reliance was placed on **HCCC NO. 544 of 2009 Uhuru Muigai Kenyatta versus The Standard Limited,** where the court stated, inter alia, "

"The court has jurisdiction to grant interlocutory injunction in defamation cases but only in the clearest of the cases. The jurisdiction has been said to be of a delicate nature and will only be exercised with great caution. See Gatley on the Law of Libel and Slander 8th Edition paragraph 1571."

It was contended that the present is a situation where an interlocutory injunction should be granted. The private rights of a good reputation, character and integrity of the plaintiff out weigh, the public interest of dissemination of information by media houses. Media houses did not have the right to fabricate atrocious falsehoods and make profit out of such falsehoods at the expense of an individual's private right to a good reputation and integrity.

The plaintiff's counsel also filed supplementary submissions on 17th December, 2010. In the submissions it was contended that Parliament enacted the Media Act in 2007 which regulates the conduct and discipline of journalists and the media. Emphasis was placed on Section 5 (2) of the Act which provides

"The media shall keep and maintain high professional and ethical standards and shall, at all times, have due regard to the code of conduct set out in the 2nd schedule to this Act".

It was submitted that media practitioners were required to maintain accuracy and fairness. Part of the requirement of accuracy and fairness includes news coverage which has to respect the dignity of individuals. It was contended that in the articles complained of, the defendant breached the Media Act and Code of Conduct. The defendant's conduct was plainly unethical. This was because, inter alia, the publications were not fair or accurate, were biased, were impartial and did not respect the dignity of the plaintiff.

The plaintiff's counsel also on 11th February, 2011 filed a response to the defendant's submissions. It was contended that the request for interlocutory injunction was not seeking to protect the Department of Defence (DOD). It only happened that the plaintiff worked for the Department of Defence and was portrayed as being corrupt as a public servant. It was also contended that the publications were not accurate or fair.

On whether the order applied for contravened the Constitutional rights and freedoms of the defendant under Article 33, it was contended that in fact Article 33 (3) of the Constitution required that the respect and reputation of others should be safeguarded. Therefore, there was no issue of the violation of the rights of the defendant arising herein.

On whether the plaintiff meets the threshold or conditions for grant of interlocutory or temporary injunction, it was contended that in the case of **Cheserem versus Intermediate Media Services (2000)**

2EA 371, the court considered the factors that were necessary for the grant of interlocutory injunctions. In the present case, the defendant has failed even to file a replying affidavit to challenge the facts presented by the plaintiff in the application for injunction. In the absence of a replying affidavit, all the facts contained in the plaintiff's affidavit were not challenged and have to be relied upon as the facts for the purposes of determining the application. The said facts disclosed and proved that the defendant published the article without justification. Therefore, the present application met the threshold required for the grant of temporary injunctions.

It was contended that the defendant admitted that it is a Media House. Therefore, the Media Act 2007 was applicable to the defendant and was for the protection of both the defendant and members of the public who might be harmed by the defendant's publication. The defendant could not validly claim that the Media Act did not apply to them.

The application was opposed. The defendants through their counsel Ochieng, Onyango, Kibet and Ohaga Advocates filed grounds of opposition on 24th November, 2010. The grounds are as follows: -

1. The wide reaching interlocutory injunction sought as per the prayer seeks to have the court proscribe any reporting on department of Defence matters which the plaintiff cannot seek to do in his individual capacity as he is not the personification of the Department of Defence neither would he have the locus standi to apply for such an order on behalf of the entire department of defence;

2. The grant of an interlocutory injunction in the terms sought by the plaintiff would amount to an egregious violation/restriction of the defendant's freedom of the media and freedom of expression entrenched in the Constitution and a concurrent stifling of the public interest in that freedom of expression;

3. The public interest in the matter concerning public procurement by a public entity in this case the Department of Defence out weighs the private interest of the applicant as in the case;

4. The defendant has substantive arguable defences to the publication i.e. fair comment as well qualified privilege as in the filed statement of defence on record;

5. The publication goes against the trite rule against prior restraint as it invites the court to become involved at the interlocutory stage in the analysis and the consideration of the merits of the claim and the likely results of the substantive trial/full hearing;

6. The entire application does not demonstrate any reasonable apprehension or legitimate threat, intent to further publish any articles relating to the subject matter.

The defendant through their counsel filed written submissions on 2nd February, 2011. It was contended that the court should scrutinize verbatim the wording of prayer 5. It was contended that the said prayer seeks an overreaching order restraining the defendant from publishing any matters relating to procurement touching on the Department of Defence. It was not related or restricted to the plaintiff in his personal capacity. The prayer seeks to restrain the defendants from disseminating or publishing news relating to the controversial tender. The plaintiff has no locus standi or the capacity to act for or seek to prohibit any segment of the press from reporting on any matter affecting the Department of Defence. The prayer was untenable and issuing the same would be tantamount to a blanket order that went beyond the scope of the cause of action alleged in the plaint. It should, therefore, not be granted.

It was contended that the Constitution of Kenya 2010 had express provisions for the protection of the rights and fundamental freedoms to each and every individual. Reliance was placed on Article 33, the relevant part of which provides: -

"Every person has the right to freedom of expression which includes: ……..

- ***Freedom to seek, receive or impart information or ideas."***

Reliance was also placed on Article 34 which granted freedom to the media in disseminating news on matters of public interest. The freedom of the media was guaranteed and protected. Therefore, it could not be restricted by way of injunction.

It was contended that the relief sought by the plaintiff was in a form of equitable remedy. The parameters for granting an interlocutory injunction had been settled by the Court of Appeal for East Africa in the case of **Geilla Versus Cassman Brown & Co. Ltd [1973] EA 358.**

In defamation cases, the correct parameters for grant of an interlocutory injunction were stated in the case of **Cheserem Versus Intermediate Media Services [2000]2EA 371.** It was contended that interlocutory injunctions in defamation cases were treated differently from ordinary cases because they brought out the conflict between private and public interest. It was the contention that in defamation cases, the court's jurisdiction to grant an injunction is exercised with greatest caution and an injunction may be granted only in the clearest of cases. Reliance was also placed on the English case of **Bonnard Versus Perryman [1891] 2 CH 269.** It was contended that the English Court stated that generally, the right to free speech was one which was for the public interest and which individual should possess and exercise so long as no wrongful act is done, unless an alleged libel is untrue.

Further, reliance was placed on the English Case of **Fraser Versus Evans [1969] IQB 349** where Lord Denning MR applied the principles in the case of **Bonnard Versus Perryman**. Counsel emphasized that the two English cases were cited with approval in the case of **Cheserem** (supra).

On the requirement for prima facie case with probability of success, counsel contended that no prima facie case had been made out for grant of an interlocutory injunction. It was contended, that in line with English case of **Bonnard Versus Perryman** the requirements for grant of an interim injunction in defamation cases were: -

(a) The claimant must show that the allegation were clearly defamatory.

(b) The claimant must demonstrate that the defendant threatens to publish or further publish the defamatory words or similar words.

(c) Where the defendant states that he intends to rely on any substantive defence the court will not grant an injunction even where (a) and (b) are satisfied unless the defendant is acting in bad faith or the defence will inevitably fail;

(d) The claimant must show that the publication will result in irreparable injury that cannot be fully compensated in damages;

(e) The claimant will generally be required to offer a cross undertaking as to damages as a preriquisite to the grant of an interim injunction.

Reference was made to the text **Defamation Law Procedure and Practice Sweet and Maxwell 2nd Ed. at page 198**. It was contended that a quick reading of the statement of defence filed herein would show that the publication herein was a fair comment on a matter of public interest. It was contended that if the court made a conclusive finding on the validity of the defence of fair comment at this interlocutory stage, that finding would severely limit the trial court in its determination of the substantive suit. Because the defendant has filed a defence and pleaded fair comment on a matter of public interest, the application should be dismissed.

On the case of **Uhuru Kenyatta Versus Standard Limited – HCCC No. 544 of 2009** relied upon by the plaintiff, it was contended that that case was distinguishable from the present one. In that case, the defendant had not given particulars as required under Order 6 rule 6A of the Civil Procedure Rules. The court, therefore, held that there was no basis laid before it to show that the defendant could be able to establish the defence of justification. In the present case however, the defendant had supplied particulars as required by the rules and no response thereto had been filed disputing the particulars provided.

On the test of irreparable injury, it was contended that the plaintiff was not going to suffer irreparably. The plaintiff herein was seeking to bar the defendant from reporting on any matters relating to the Department of Defence, which should not be allowed.

On the balance of convenience, it was submitted that there was no practicability and enforceability of the order sought. Therefore, the court should not consider this last test for grant of interlocutory injunctions. Reliance was placed on the book on **Principles of Injunctions** where Kuloba J, at page 102, stated that once a defendant said that he was going to justify the words complained of, there was an end of the case so far as a temporary injunction was concerned.

Counsel also responded to the plaintiff's supplementary submissions. It was contended that the supplementary submissions were incompetent as they did not address the issues arising herein. It was further submitted that the Media Act was not contravened by the defendant. If there were any complaints under section 26 of the Media Act, then there should have been a complaint forwarded to the Complaints Commission established under section 23 of the Act. This court could not take over the role of the Complaints Commission. There was no unethical conduct in the publication complained of herein. The High Court was not the appropriate forum to address the alleged violation of the Code of Conduct under the Act. Counsel urged that the application be dismissed.

At the hearing Mr. Oyatsi for the plaintiff made submissions to highlight the written submissions. Counsel referred to several documents including the plaint, the application, affidavits filed as well as the grounds of opposition and submissions on both sides. Counsel submitted that the applicant had established a case for the grant of an interlocutory injunction pending the hearing and determination of the suit as requested. Counsel urged the court to allow the application and grant the prayers sought.

Counsel for the defendant Mr. Werimo also made submissions to highlight documents filed as well as the written submissions. Counsel contended that the threshold for the grant of interlocutory injunctions in defamation cases had not been met by the plaintiff. Therefore, the application should be dismissed.

I have considered the application, documents filed, the submissions both written and oral, and the authorities cited.

This is an application for an interlocutory injunction pending the hearing and determination of the suit, in a defamation case. The parameters for consideration by the court in an ordinary application for interlocutory injunctive orders were considered by the then Court of Appeal for East Africa in the now famous case of **Geilla Versus Cassman Brown & Co. Ltd [1973] EA 358**. The requirements are that an applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.

In defamation cases, such as the present case, the Court of Appeal in the case of **Cheserem versus Intermediate Media Services [2000] 2EA 371** applied the principles in the case of **Geilla Versus Cassman Brown (supra).** The court went further to state that the requirements in the **Geilla versus Cassman Brown (supra)** have to be considered with greatest caution. An interlocutory injunction in defamation cases is granted only in the clearest of cases.

In my view, what the court stated in the case of **Cheserem Versus Intermediate Media** was based on the fact that interlocutory injunctions in defamation cases would possibly be an impediment of freedom of expression. A number of English Cases have been cited herein. I will only refer to the case of **Bonnard Versus Perryman [1891] 2CH 269** where the English Court stated that the right of free speech is one which is for the public interest which individuals should possess and should exercise without impediment. Therefore, unless it is clear that the alleged libel is untrue, freedom of speech should be left unfettered. I fully agree with this position.

The defendant has argued that the application goes against the requirements of the Media Act No. 3 of

2007. That if there is any complaint, it should have reported to the Media Complaints Commission in accordance with the rules of conduct for the Practice of Journalism. It is my humble view, that there is no law that prevents a person from coming to this court to allege defamation of his reputation, with or without reporting to the Media Complaints Commission.

The respondent has argued that the plaintiff has come to this court in order to gag it from reporting matters of irregularities in the Department of Defence. I observe that in the Newspaper articles complained of, the plaintiff was actually mentioned in person. It is not possible at this stage to separate the plaintiff from the Department of Defence because he was mentioned as a person in a context which included the Department of Defence. Therefore, it cannot be said that he is covering the Department of Defence from press reports on irregularities. That can only come out after evidence is tendered in court and a decision is made therefrom.

The defendant contends that the orders sought are contrary to their Constitutional right of freedom of the press. Indeed the defendant has a Constitutional right of freedom of reporting under Article 33 and 34 of the Constitution. Those rights of the defendant are, however limited under Article 34. They are subject to the rights and freedoms of others. The Constitution specifically states that freedom of expression should respect the rights and reputation of others.

The reports in the press herein about irregularities in the Department of Defence are of public interest. However, truth and fairness have to be observed at all times. The defendant has filed a defence following the filing of the plaint herein. The issues raised in both the plaint and the defence will be for consideration by the court and determination after a full hearing. They cannot be determined at this preliminary stage.

Obviously, the reputation of the plaintiff is at stake. The reports complained of have already been published and they are in the public domain. The plaintiff now merely seeks a temporary injunction against further publications on the same subject matter. This does not cover publications on matters not related to the subject tender/procurement.

In my view, with the facts placed before me, the applicant has demonstrated a prima facie case. The proof or otherwise of his case will be determined after the substantive hearing.

His reputation is at stake in view of the content of the reports. Once a reputation is lost, in my view, monetary damages might not be an adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for a lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in memory possibly throughout his life.

The above observations and findings satisfy the two first requirements under the **Geilla Versus Cassman Brown Ltd** case.

Having considered with caution the circumstances of this case, and balancing the public and private interest, I am of the view that the defendant has to be restrained by way of an interlocutory injunction as prayed pending the hearing and determination of the suit. Therefore, I will grant prayer 5. As for costs, they will be in the cause.

For the above reasons, I allow the application and grant a temporary injunction as requested in prayer 5 of the application. Costs in the cause.

Dated and delivered at Nairobi this 9th day of June 2011

……..
GEORGE DULU
JUDGE

In the presence of
Mr. Oyatsi for plaintiff

N/A for defendant
C Muendo – court clerk