



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 74 OF 2011

WILLIAM KABOGO GITAU.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED1ST DEFENDANT

STANDARD LIMITED.....2ND DEFENDANT

ANNE KIGUTA.....3RD DEFENDANT

DENNIS ONSARIGO.....4TH DEFENDANT

MOHAMMED ALI.....5TH DEFENDANT

PAUL KELEMBA.....6TH DEFENDANT

ISABELA KITURI.....7TH DEFENDANT

KTN-BARAZA LIMITED.....8TH DEFENDANT

RULING

The Plaintiff herein was filed on 7th March, 2011 which was then Amended on 8th March, 2011.

Along with the Original Plaintiff, the Plaintiff also filed a Notice of Motion dated 7th March, 2011 seeking interim injunction restraining each of the Defendants from further publishing any libelous materials of the Plaintiff linking or associating him with violent crimes and drugs trafficking.

It is averred in the Plaintiff that on 5th March, 2011 the 1st and 6th Defendants published a cartoon titled “Madd Madd World– Drugs How it Works” contents whereof were highly defamatory and libelous of the Plaintiff. It is further averred that on 6th March, 2011, 1st, 2nd, 3rd, 4th, 7th, and 8th Defendants published by television broadcast at 7.00 p.m. in Kiswahili language and at 9.00 p.m. in English language which were defamatory and libelous publication of and concerning the Plaintiff.

The publications have been reproduced verbatim in the Amended Plaintiff.

In their joint Defence, the Defendants admit having published the impugned publications but denies that they were falsely or maliciously published. The defence of privilege and justification have also been

pleaded.

In response to the interlocutory application, grounds of opposition have been filed on 15th March, 2011.

The Plaintiff filed written submissions in support of the application which has set forth the grounds and filed an affidavit in support sworn by the Plaintiff on 7th March, 2011.

It is by now trite that in the matters of defamation, the issue whether an interim injunction should be granted is a delicate one simply because the court has to weigh and balance the right of the Plaintiff against the right of freedom of speech and delicate balancing of the public interest and private interest.

The Constitution has, under Article 33, recognized that every person has the right of freedom of expression and has gone further to grant the freedom and independence of media under Article 34 (1). Under Article 33 (3) the general freedom of expression is constricted by enjoining that every person's rights and reputation shall be respected.

The freedom of speech also has limits expressed in Article 33 (2) of the Constitution.

It shall also be pertinent to note that freedom of media includes the freedom of electronic media, the latter having wider and swifter capacity to publish the news not limited to local readers only.

I have advisedly noted as aforesaid so as to observe that hitherto accepted principle for interim injunction enunciated in the case of ***Bonnard –vs- Perryman***, that the freedom of expression is paramount, could need some modification.

In the dissenting judgment from ***Lord Heydon J.*** in the case of ***Australian Broadcasting Corp. –v-s O'Neil (2006) HCA 46***, it was observed, namely:

“...Those who had decided Bonnard –vs- Perryman had lived through a time when there was no electronic media and no problem of cross-media ownership; the print organs were much more fragmented than now, were directed to a population with much lower literacy than now, were much less able to reach most of the adult population, and were much less able speedily to disseminate defamatory material. In short, attention would have to be directed to whether in modern conditions the mass media are more able to inflict harm which is not also grave but irreparable, and if so, whether it ought to be less difficult for plaintiffs to obtain urgent interlocutory relief to prevent such harm.”

With the above mentioned brief elucidation, I shall now dwell on the factors to be looked at before an interlocutory injunction can be granted as stated in the book titled ***“Gatley on Libel and Slander”***.

(1) The statement is unarguably defamatory.

(2) There are no grounds for concluding that the statement may be true.

(3) No issue in defence which might succeed.

(4) Whether there is evidence of an intention to repeat or publish defamatory statement.

I must note that the above factors have been culled out from the Judgment of ***Lord Esher*** in the case of ***Coulson –vs- Coulson (1887) 3 TLR 846***.

From the date of the case, one cannot but notice that it is very old case, and this court shall have to consider whether blind application thereof is required.

As far as the first factor is concerned, it can be considered as an eternally justified principle. The court must come to the conclusion that prima facie the publication is defamatory i.e. it has derogatory

imputation to the reputation or character of the Plaintiff.

I may state that at this stage, the Plaintiff only has to show that prima facie the publication is defamatory of him and having done so, he does not have to prove that the defamatory words are false, and that some evidence, even if limited to the averments made by the Plaintiff, is before the court that the publication is false.

In this case, the Plaintiff has shown that the publications have stated *inter alia* that the Defendants have claimed to have conducted investigations and uncovered those behind the business of drug trafficking and that his name is mentioned as one of those suspects. This has been done in the background of unfolding of events since December, 2010 and the Report from security authorities that no evidence had so far been unearthed against the Plaintiff having been prepared and laid on table of the National Assembly.

The Defendants have not denied the publications, but have raised Defence of justification and privilege, but has fallen short of any particulars or evidence to suggest that they are true or factual in substance. The particulars as per Order 2 Rule 7 (2) of Civil Procedure Rules are required to be given so as to support the averment of fair comment.

Moreover, the Defence is irregular to the extent that it is not accompanied by the written statement of witnesses, copies of documents to be relied at the trial (see Order 7 Rule 5 Civil Procedure Rules, 2010).

In short, it was submitted that it is doubtful that the Defence raised shall succeed looking at the Defence as well as circumstances of this case.

It is further to be noted that considering the sequel of publication by the Defendants it is likely that the same shall be repeated unless restrained.

As regards the irreparable injury, it was stressed that the statement as regards his marriage with another woman has resulted in damage to his relationship with his wife and two children. He is a politician and businessman. The allegations as regards his association with these serious crimes have adversely affected him and shall have more derogation to his reputation if further publication is made as suggested in publication of 6th March, 2011 both in Kiswahili and English language.

The case of *Cheserem –vs- Immediate Media Services (2000) 2 EA 371 (CCK)* was relied upon, wherein *Hon. Khamoni J.* has very succinctly analyzed and elucidated the principles of Interim Injunction in the defamation cases.

It has been held that:-

“Normally the court would not grant an interlocutory injunction when the Defendant pleads justification or fair comment because of public interest that the truth should be out and the court aims to protect a humane, responsible, truthful and trust worthy Defendant.”

The Defendant in its grounds of opposition, has raised the issue of justification on the grounds of great public importance and freedom of expression granted under the Constitution.

The Defendant has relied on three authorities, namely:-

(1) Hon. Martha Karua –vs- The Standard Limited and Kwendo Oponga (HCCS (NRB) 294/04) Unreported.

(2) Northern Ireland and HCQB NO. 135 Ref: GIL7996, between Bridget O’rawe AND William Trimble Ltd.

(3) Jameel and Another –vs- Wall Street Jound (Home Land) (2006) UKHL 44

I have carefully perused the said authorities and specially the 2nd authority of Bridge (supra) wherein the principles enunciated by Lord. Nicholls in Reymond –vs- Time Newspaper Ltd (2001 2 AC 127 (at 205) are observed, namely:-

- “1. The seriousness of allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.***
- 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.***
- 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.***
- 4. The steps taken to verify the information.***
- 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.***
- 6. The urgency of the matter. News is often perishable commodity.***
- 7. Whether comment was sought from the Plaintiff. He may have information others do not possess or have not disclosed. An approach to the Plaintiff will not always be necessary.***
- 8. Whether the article contained the gist of the Plaintiff’s side of the story.***
- 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statement of fact.***
- 10. The circumstances of the publication, including the timing.”***

I also observe with approval Lord Hoffman’s in Jameel’s case (supra) that:-

“The Standard of conduct required of newspaper must be applied in a practical and flexible matter”.

However, I may add that the prime duty of a Judge is to balance between Private and Public interest, between the Freedom of Speech and Right of Reputation so that interest of justice and fair play is expounded.

I have noted hereinbefore that the Defence has raised defence of privilege and particularized “*Interim Report on Drug Trafficking dated 1st February, 2011*” and “*Hansard Report*”. They are not produced by the Defendants at this stage and I note that the Defendants have also not filed any affidavit. Those two documents are included in the Bundle of Documents filed by the Plaintiff on 7th March, 2011. The Report mentioned is on page 73. On page 80 of the bundle, it is shown that Hon. Mwau has stated that the Plaintiff had not been employed by him as a driver or that he had not married his daughter. On page 85 of the Report, it was found that no evidence so far had been adduced connecting him to drug trafficking. The Hansard of Parliamentary Proceedings of 17th February, 2011 is from page 199 to 252. During those proceedings, the said Interim Report was tabled noting that the Report is interim and that further information was sought from relevant authorities like KACC and KRA.

Annexure WKG 10 shows an advertisement of broadcast of three part series of “*Jicho Pevu*”, “*Dawa za Karaba*” and “*KTN’s undercover*” ‘peddlers of lives’” and as per the Defence the publication thereof have not been denied so is the publication of the impugned cartoon.

Prima facie, as per the facts before the court, the said publications are defamatory of the Plaintiff

considering the circumstances of this case and facts before the court. Moreover, the Defence of justification raised in the Defence, as at this time, is not properly put forth. But whether it will carry its day is difficult to be determined at this stage, specifically from perusing the two documents relied by the Defendant. The two documents do not show any connection of the Plaintiff with Drug Trafficking. Despite that fact, the reiteration of suspicion after a lapse of about one month of the events in question should be considered to be not in good faith.

The publications do indicate that there is part II of the series which it intended to publish and which has been enjoined by an ex-parte interim order extended till hearing and determination of this application.

Considering very carefully the facts before me, in my humble view, the Plaintiff has proved the criteria to be considered by the court.

In the premises aforesaid, I allow the application and order that each of the Defendants be and are hereby restrained from publishing any derogatory words and cartoon in respect of involvement of the Plaintiff in drug trafficking ***based on the facts existing as of this present.***

The costs of the application in cause.

Dated, signed and delivered at Nairobi this 8th day of **September, 2011**

K. H. RAWAL

JUDGE

8.9.2011