REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 88 of 2009

GILGIL HILLS ACADEMY LTD……....…...……PLAINTIFF

VERSUS

THE STANDARD LTD……..DEFENDANT

RULING

This is a claim for damages for defamation. The plaintiff claims in its plaint that during divers dates in March 2009, the defendant published and caused to be published in its daily newspaper, The Standard, articles and/or stories of highly defamatory and libellous character. It has set out verbatim the alleged publications and what it thinks those words mean or were understood to mean.

Contemporaneous with the filing of the plaint, the plaintiff filed an application under Order 39 Rule 2(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for a temporary injunction to restrain the defendant from further publication of the libellous material until this suit is heard and determined. In the affidavit in support of the application, it is alleged that further publications may lead to withdrawal of pupils from the school thus causing its complete closure.

In its defence the defendant admits having published the words complained of but denies that they are defamatory as alleged or at all and states that the words are true in substance and in fact and in so far as they consist of expressions of opinion, they are comments made in good faith on a matter of public interest. In opposition to the application the defendant has filed grounds of opposition in which it has repeated its defence and added that an injunction will unduly restrict the discussion of affairs relating to the care and custody of pupils at the plaintiff's school.

At the hearing of the application counsel for both the parties basically expounded on their respective clients' pleadings as summarized above.

Having not heard the case, I am at this stage not able, nay, supposed to make any definitive findings. If this were an ordinary suit, what would be required of me at this stage is to determine whether, from its pleadings as well as its 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 sought and vice versa.

This being a defamation cases, however, an array of other factors fall for consideration. 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. The one relevant to this case is the protection of the reputation and rights of others.

I consent with Justice Khamoni's decision in Cheserem Vs Immediate Media Services [2002] 2 EA 371 cited by counsel for the defendant that because of the public interest that truth should out, injunctions should be cautiously granted in defamation cases. I, however, do not subscribe to the contention in that case and the statement on page 102 of the Principles of Injunctions by Richard Kuloba that once a defence of justification and or fair comment is pleaded in these cases, then that axiomatically is an end to the case for a temporary injunction and that it will be refused even if the words complained of are prima facie libellous and untrue. That holding appears to have been borrowed from Lord Denning's statement in Fraser Vs Evans, [1969] 1 All ER 8. I do not think that Lord Denning's decision in that case was meant for general application to all such defences.

In that case nothing had been published, and the court had no idea of what the same was going to be. The injunction was sought to restrain an intended publication. In my respective view, 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 an injunction in defamation cases at interlocutory stage therefore, the court must have prima facie evidence to come to a decision that the words complained of are untrue. See the case of Bonnard Vs Perryman, [1891-4] All ER 970. 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. The other factors are, as I have pointed out, whether or not the plaintiff will adequately be compensated by an award of damages and whether the defendant will be able to pay the damages likely to be awarded if the plaintiff succeeds.

Bearing in mind these guiding principles, I have carefully considered both the parties' pleadings and the annextures to the affidavit in support of the application. As I have said the defendant admits having published the material complained of but asserts that the same is factually true and the expression of opinion on those facts is fair comment on a matter of public interest. As I have also said, the determination of whether or not that defence will hold is a matter for the trial judge. If that defence holds, then the suit will obviously dismissed. If it does not, then the defendant will be liable for damages.

Admittedly the basis of the publication in this case is the death of a pupil in the plaintiff's school about eight months previous to the publication of the words complained of. That fact is not disputed as a pupil, Linda Chepkorir, actually died in the plaintiff's school. What is in dispute is whether or not her death was as a result of the plaintiff's negligence.

To cover up the alleged negligence, it is alleged that a director of the plaintiff attempted to bribe one of the defendant's journalists not to publish the story. It is also a fact that that director has been charged with a criminal offence but the case has not been heard. It is of course important for the public to be informed of the progress of the case pending in court against a director of the plaintiff. An injunction will muzzle the defendant's right to keep the public abreast of the case.

There is no evidence on record at this stage to disprove the defendants allegations that Linda's death was as a result of the plaintiff's negligence and that to cover that negligence, a director of the plaintiff attempted to bribe one of the defendant's journalists. I must quickly add that neither is there evidence to prove that these allegations are true.

On irreparable damage it is further alleged in the publications that upon reading the news of Linda's death in the defendant's said newspaper, many parents stormed the school and some sought to withdraw their children. The plaintiff fears that any such further publications may cause the school to collapse.

Is this fear founded? I think not. It is clear from the annextures to the affidavit in support of the application that the defendant repeated the story on three different days. But there is nothing in those affidavits or in counsel's submissions that children were actually withdrawn from the school as a result of that publication. So I cannot see the loss that the plaintiff will suffer that will not be adequately compensated by an award of damages bearing in mind the fact that there is no allegation that the defendant will not be able to pay the damages the plaintiff will be awarded if it succeeds.

In the upshot, and on the principles set out herein above for the grant of interlocutory injunctions in defamation cases, this is not one of the clearest of the cases for grant of an injunction. I therefore find no merit in this application and I accordingly dismiss it with costs.

DATED and delivered this 18th day of June, 2009.

D. K. MARAGA

JUDGE.