



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 383 of 2008**

**HON. AMBASSADOR CHIRAU ALI MAKWERE..... PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....DEFENDANT**

**RULING**

1. The plaintiff herein commenced suit by way of a plaint dated 20.08.2008 in which he says that he is a Member of Parliament representing Matuga Constituency and serves as a Cabinet Minister in the Government of Kenya in charge of transport. He complains against certain publications by the defendant appearing in the TAIFA LEO issue of 2.08.2008 at page 10 thereof in which the plaintiff alleges the defendant falsely and maliciously published words that were defamatory of him. The full text of the alleged defamatory words is set out at paragraph 4 of the plaint in both Kiswahili and English. The implied meaning of the publication is also set out at paragraph 6 of the plaint. The plaintiff says the defendant has refused to apologise to the plaintiff despite demand to do so and accordingly prays for judgment against the defendant for:-

- (a) general damages
- (b) exemplary damages
- (c) An injunction to restrain the defendant from publishing or continuing to publish material defamatory of the plaintiff especially in his capacity as Minister for Transport.
- (d) Costs and interest on (a) and (b)

2. The plaintiff also filed an application dated 20/05/2008 under certificate of urgency by way of chamber summons contemporaneously with the plaint. The certificate of urgency was filed under Rule 3(2) of the Judicature Act, Cap. 8 Laws of Kenya and the High Court Vacation Practice and Procedure Rules. Though the application was certified urgent for hearing during vacation, it was not heard until after the vacation. The main application was brought under Order 39 Rule 2(1) of the Civil Procedure Rules seeking in the main an order of injunction to bar the defendant, its servants or agents from publishing or continuing to publish material which is defamatory of the plaintiff until the suit is heard and determined.

3. The application is premised on two grounds on the face thereof which allege that (a) the defendant has formed the habit of publishing material that is defamatory of the plaintiff especially with regard to the plaintiff's post as Minister for Transport and that such publication has caused the plaintiff severe loss of reputation and (b) if the defendant is not restrained by way of the injunction sought, it will continue to publish such defamatory material with the sole aim of tarnishing the plaintiff's reputation and that the plaintiff will suffer and continue to suffer irreparable damage.

4. The application is also supported by the sworn affidavit of the plaintiff dated 20.08.2008. The plaintiff complains that the defendant has formed a habit of publishing material that is defamatory of him; which material the plaintiff says has portrayed him as an incompetent Minister and insinuated that the plaintiff is the sole cause of accidents and general anarchy on the Kenyan roads. The plaintiff in particular complains against the two articles published on 2/08/2008 and an earlier article published on 10/02/2006 in the defendant's FRIDAY NATION. The plaintiff says that despite his efforts to explain to the defendant that he is not personally responsible for drunken driving on the roads, or the over speeding, or the unroadworthy vehicles, the state of the roads in the country and the prevalence of unqualified drivers

who hold fake driving licences, the defendant has refused to heed the explanations given by the plaintiff and continues to relentlessly publish material that is defamatory of the plaintiff. The plaintiff says that his ministry is not responsible for the day to day enforcement of these various aspects of the transport sector and that various other government departments such as the police, Ministry of Roads and Public Works are involved. He says that the Ministry of Roads and Public Works is, for example, responsible for the condition of the roads, road signs, the construction, installation, maintenance and management of the roads infrastructure, including weighbridges and that therefore he should not be held accountable for the same in his capacity as Minister for Transport.

5. The plaintiff further says that as a result of the various publications by the defendant the plaintiff has filed several suits before the High Court against the defendant for libel that is to say HCCC No. 212 of 2006 and 176 of 2007. Both of these cases are, admittedly still pending for hearing and determination. The plaintiff refers to an address he made to the press on 28.07.2008 in which he was at pains to explain to the press the matters that he has averred to in his affidavit and the extent to which he takes responsibility for the same. The plaintiff explains therein the efforts that the Government is making to address those issues in addition to other areas such as the aviation industry and services offered thereunder. As concerns the matters complained of by the plaintiff he said that the Ministry's responsibility ends with issuance of relevant gazette notices. He also said that his Ministry had embarked on a reform agenda whose aim is to improve service delivery by instituting amendments to the Traffic Act, including gazettment of Notice No. 161 of 2003 on road safety.

6. The proposed amendments to the Traffic Act, according to the plaintiff's press statement would include an amendment to allow the Transport Licensing Board to issue TLB licenses at any date in the year upon expiry, and, among other matters, the issuance of Second Generation Driving Licenses.

7. The application is opposed by the Replying Affidavit sworn by Sekou Owino the Legal Officer at the defendant company. Mr. Owino denies that the words complained of are defamatory of the plaintiff or at all as the words complained of constitute expression of opinion and that the same are to that extent fair comment on matters of public interest, to wit

(a) it is a matter of opinion that the plaintiff's performance in the Ministry of Foreign Affairs as well as the Ministry of Transport has not been effective.

(b) It is a matter of opinion that the plaintiff as Minister for Transport has failed to take responsibility for problems falling within his remit;

(c) It is a matter of opinion that the plaintiff's explanation for problems in the transport system have not been satisfactory.

8. The deponent says that because of the defendant's defence of fair comment, an injunction ought not to issue; that the defendant as a national newspaper bears a social responsibility to comment on contemporary issues affecting society at large and that if orders of injunction are issued as prayed, they would gag the defendant in such a way that it would deprive the society of such comment as well as deny the defendant its right to express itself freely in a manner not justifiable in a democratic society. The deponent also says that matters of transport are extremely important in this country and that the same should be discussed freely, openly and as reasonably as possible. The deponent has annexed to his affidavit a copy of the Annual Accidents Statistics from the police department showing the number of people killed in road traffic accidents over the last four years. From the said report, the number of persons killed per year starting from 2003 through to 2008 both years inclusive are as follows:

Victims : 3004; 2251; 2531; 2714; 2693 and 1020 between January and May

Drivers : 278; 244; 251; 291 and 110

Motor Cyclists: 33, 54, 44, 34, 35 and 23.

Pedal cyclists: 333, 306, 310, 310 and 116

Passengers : 997, 586, 590, 715, 740, 343

Pillion Passengers: 87, 108, 96, 112, 127 and 103

Pedestrians : 1276, 966, 1242, 1253, 1242 and 422

The report also shows that those killed are of all ages, though it would appear that those who are under 16 years old are

the majority victims.

9. The deponent also says that on the advice of the defendant's counsel Mr. Geoffrey Imende, the instant suit is an abuse of the due process of the court because the matters complained of herein are the subject of other pending suits; and further that by raising the same issues in this suit the plaintiff is thereby prejudicing the fair determination of those suits already pending in court. It is to be noted here that the plaintiff admits that there are two other cases pending before the High Court involving himself and the defendant herein and that one of the suits touches on the same complaints that is the basis of the cause of action herein. In any event, the deponent says that the cause of action herein is time barred because the articles complained of were published more than a year before the filing of this suit. Finally the deponent says that according to advice received from the defendant's counsel, the plaintiff has not placed before this court evidence of any threat by the defendant to publish defamatory words of the plaintiff and that in the circumstances, the plaintiff's application remains vague, ambiguous and does not disclose any particular form of words or expression from which the defendant ought to be restrained.

10. Both parties, through their advocates canvassed the application before me on 16.09.2008. Mr. J. M Mburu of J. M. Mburu & Company Advocates appeared for the plaintiff while Mr. Guto Mogere of Mohammed Muigai Advocates appeared for the defendant. Mr. Mburu reiterated the averments of the supporting affidavit and also attempted to submit from the bar that the defendant had since the filing of the suit published other articles which are defamatory of the plaintiff and that it was now clear that a habit had indeed been established. Since there was no supplementary affidavit to that effect, those submissions from the bar remained mere allegations unsupported by evidence. Mr. Mburu also relied on a number of decided cases to support the plaintiff's case, and in particular he relied on the cases of E. HULTON & CO. – vs – JONES (1908 – 10) ALL ER 29 and GEORGE ORARO – vs – NATION MEDIA GROUP LTD & ANOTHER – being Nairobi HCCC No. 1205 of 1993. Mr. Mburu submitted that the defendant was engaged in a game of misinforming the public about the plaintiff, and that it should be stopped in its tracks.

11. Mr. Mburu sought to rely on a portion of the judgment appearing at page 286 of the Oraro case on the duty of the media regarding media reports to the public on the contents of pleadings filed in court, but in my view that particular passage is not relevant to the instant suit. The court therein was dealing with the issue of privileged publication concerning a report to the public on the contents of pleadings filed but which had not become part of open court proceedings.

12. In response to the Replying Affidavit Mr. Mburu submitted that there was no truth absolutely in the articles published of the plaintiff and that the court must act now and protect the plaintiff from further harm by restraining the defendants from any further publications.

13. Mr. Mogere for the defendant opposed the application and argued that what the plaintiff produced as evidence of habit by the defendant are two articles one dated 10.02.2006 and the second one dated 17.12.2007. As for the first article Mr. Mogere submitted that the same is time barred since the complaint has been raised more than one year since the article was published and further that the second article complained of is the subject matter in the pending HCCC No. 176 of 2007. The first article, Mr. Mogere said is the subject matter in the pending HCCC No. 212 of 2006. On this point Mr. Mogere urged the court to find that the instant suit falls squarely under Section 6 of the Civil Procedure Act which provides that –

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

14. In response to Mr. Mogere's submission on the two articles, Mr. Mburu submitted that what the plaintiff wants the court to do is to find that the defendant has decided to systematically defame the plaintiff and to find further that section 6 of the Civil Procedure Act does not apply. Mr. Mburu further submitted that even if the court were to find that the said two articles complained of in this suit are subjudice, the court should still consider the other articles, and in particular annexure ACAM 4 entitled MWAKWERE AMENOA' ACAM 4 and decide whether from the said annexure ACAM 4 there is a possibility that the defendant is in the habit of defaming the plaintiff, and to make the inference that the defendant's conduct proves beyond doubt that it intends to publish further articles that are defamatory of the plaintiff. Mr. Mburu relied on an excerpt from WINFIELD AND JOLOWICZ ON TORT – 17<sup>th</sup> Edn, 2006 at page 559 lines 12 – 35 where it says –

“If the statement is comment in this objective sense the defence will succeed unless the claimant is able to show that it was actuated by malice on the part of the defendant”.

Mr. Mburu urged the court to find that all the articles published by the defendant concerning the plaintiff are actuated by

malice and to find it necessary to injunct the defendant.

15. It is not disputed that the articles complained of herein are the Subject of HCCC No. 212 of 2006 and 176 of 2007. In my view, I am persuaded that the said articles are subjudice and cannot form the basis of another cause of action in the instant suit. I would, with respect to counsel for the plaintiff, agree with counsel for the defendant that by bringing this suit to the court the plaintiff is abusing the due process of the court. Mr. Mburu's arguments on this issue are not convincing and I would thus find that annexure "ACAM 1" not only time barred as far as this suit is concerned, but that it is also subjudice. I cannot proceed to establish that a habit on the part of the defendant has been formed unless in the first place I accept that there is a valid cause of action on both of these articles, and secondly unless I find that the articles complained of are defamatory of the plaintiff. I cannot do that here because those complaints are already before a competent court awaiting adjudication.

16. On the second issue of continuing defamation Mr. Mogere submitted that no evidence has been adduced by the defendant to prove the existence of such a habit, and that if the court were to grant the injunction sought the defendant would be gagged in its right to freedom of speech and especially if such freedom is to inform the public about matters of serious public interest. Referring to Gatley on Libel and Slander, 9<sup>th</sup> Edn at paragraph 25.10, Mr. Mogere submitted that the plaintiff must show evidence of an intention on the part of the defendant to repeat or publish. The relevant paragraph reads –

"25.10 Evidence of an intention to repeat or publish. The court will not grant an interlocutory injunction unless there is some evidence, or there are grounds to infer, that the defendant threatens or intends to continue the publication of the words. However, where there has not as yet been any publication of defamatory words, but there is a threat of publication, the plaintiff need not wait for publication to take place; he may seek to restrain publication, by means of a *quia timet* order, before it has taken place. But no one can obtain a *quia timet* order by merely saying "*Timeo*", he must aver and prove that what is going on is calculated to infringe his rights. Thus there must be evidence that a defamatory statement concerning the plaintiff is about to be published".

17. Mr. Mogere submitted that the plaintiff's evidence as per the supporting affidavit does not say that the defendant is about to publish some other reports that are defamatory of the plaintiff. In the persuasive case of LIVERPOOL HOUSEHOLD STORES ASSOCIATION – vs – SMITH [1887] L. 2938, the court held that the court can only issue an interlocutory injunction only in the clearest cases. The question to pose at this point is whether the plaintiff's case is such a clear case for the granting of an interlocutory injunction. In the case of MARTHA GREENE – vs – ASSOCIATED NEWSPAPERS LIMITED [2004] EWCA CIV 1462, the court referred to the case of Fraser – vs – Evans [1969] IQB 349 in which Lord Denning MR said the following at pages 360 – 1:-

"The court will not restrain the publication of an article even though it is defamatory, when the defendant says he intends to justify it or make fair comment on a matter of public interest. That has been established for many years since *Bonnard vs Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out. There is no wrong done if it is true, or if (the alleged libel) is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication".

18. In Mr. Mburu's view the defence of fair comment does not apply in this case since, what was published of the plaintiff by the defendant was actuated by malice. I have considered the submissions by both counsel on this issue and I am persuaded that even if the court were to find that the two articles complained of were properly before court and were in fact defamatory of the plaintiff, I would still not grant the injunction sought for the reason that the articles deal with a matter of grave public concern – the security of the Kenyan people as they travel about doing their business. It is a matter of public interest and it is my considered view that that interest overrides, the individual interest of the plaintiff herein. In any event, the plaintiff has not adduced evidence to show that the defendant is about to publish another or other articles that are defamatory of the plaintiff.

19. In the result and for the two reasons I have given above, I do find and hold that the plaintiff's application lacks merit. The same cannot stand. I accordingly dismiss it in its entirety with costs to the defendant. I also direct that this suit shall be stayed pending the hearing and determination of HCCC Nos. 212 of 2006 and 176 of 2007.

It is so ordered.

Dated and delivered at Nairobi this 8<sup>th</sup> day of October 2008.

**R. N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Ngugi holding brief for Mburu (present) for the Plaintiff

Mr. Achach holding brief for Mogere (present) for the Defendant