



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 4 of 2005**

**JOHN HARUN MWAU** .....  
**PLAINTIFF**

**VERSUS**

**THE STANDARD LIMITED** .....**1<sup>ST</sup>**  
**DEFENDANT**

**TOM MSHINDI** .....**2<sup>ND</sup>**  
**DEFENDANT**

**MUTUMA MATHIU** .....**3<sup>RD</sup>**  
**DEFENDANT**

**RULING**

(1) By his Amended Complaint dated the 28<sup>th</sup> January 2005, John Harun Mwau (“**the Plaintiff**”) sued the Standard Ltd., Tom Mshindi and Mutuma Mathiu (“**the Defendants**”) to recover damages arising out of two articles which the Defendants published in *The Standard* on the 17<sup>th</sup> and 31<sup>st</sup> December 2004, and which the Plaintiff says were defamatory of him.

(2) In the first article published on the 17<sup>th</sup> December 2004, it was alleged that the police raided a warehouse belonging to the Plaintiff as investigations continued into the K.Sh.5.3 billion cocaine haul. In the second article which appeared on the 31<sup>st</sup> December 2004, the Defendants published a large photograph of the Plaintiff on the front page of the newspaper aforesaid beside or juxtaposed to the words – “**cocaine: Minister’s house searched**” and **exposed: Drug suspect in Dutch jail called MPs, other big names.**”

(3) The Plaintiff says these words complained of were false and defamatory and implied or gave the impression that the Plaintiff is a drug peddler, a drug trafficker and a criminal, among several other connotations. The words also gave the impression that the Plaintiff was in some way connected to the cocaine haul. The Plaintiff contends that the words were published with malice and have caused serious damage to his reputation.

Apart from damages, the Plaintiff also seeks a permanent injunction to restrain the Defendants, their servants and agents from printing or publishing defamatory or libelous statements against him. The Plaintiff also seeks a further relief namely that the Defendants be ordered to publish retractions and

apology that meet the approval of the Plaintiff before publication.

(4) The Defendants filed a joint Statement of Defence on the 24<sup>th</sup> March 2005 and denied the Plaintiff's claim in its entirety. They admitted publishing the words complained of but deny the meanings attributed or attached to them by the Plaintiff. The Defendants also say that the words complained of were fair comment on a matter of public interest namely that the public has a right to know of any transactions involving criminal activities and in particular drug trafficking.

(5) Pending the hearing of the suit, the Plaintiff has applied, by way of the Amended Chamber Summons dated and filed on the 7<sup>th</sup> February 2005, (the Plaintiff filed on the 3<sup>rd</sup> January 2005 having been amended on the 28<sup>th</sup> January 2005 to remove a company called Pepe Ltd. as a plaintiff), for a temporary injunction under Order 39 rules 2 and 3 of the Civil Procedure Rules in the terms I have set out above. The Application is supported by the affidavits of the Plaintiff sworn on the 31<sup>st</sup> December 2004 and the 7<sup>th</sup> February 2005 in addition to the grounds set forth in the said Amended Chamber Summons.

(6) The Defendants in opposition to the Application filed the Replying Affidavit of Moses Kurgat made on the 21<sup>st</sup> January 2005 together with the Grounds of Opposition dated the 24<sup>th</sup> January 2005 contending that the Plaintiff is not entitled to the reliefs sought on the said Amended Chamber Summons, namely a temporary injunction, retractions and an apology.

(7) Mr. Odera, the learned counsel who appeared for the Plaintiff on this Application, made a number of submissions. He said that Pepe Ltd., in whose premises the drugs were alleged to have been found by the Police, is not owned of the Plaintiff. He also pointed out that the Plaintiff could not have been the person whose house was searched by the Police because he is neither a Minister nor an employee of the Government of Kenya. Learned counsel also submitted that it is a most serious matter to link anyone with a psychotropic substance because it is a criminal offence to deal with such substances with grave implications for one's reputation and business. Mr. Odera further submitted that the Defendants acted in bad faith and whatever defences they may raise are bound to fail. Finally, he said that the Defendants have not indicated that they will refrain from publishing defamatory statements against the Plaintiff. In his view, the Plaintiff is entitled to the reliefs sought on the Amended Chamber Summons.

(8) In the course of his reply to the submissions of Mr. Imende, learned counsel for the Defendants, Mr. Odera raised an important legal point, which I allowed him to argue subject to Mr. Imende's right to reply. Mr. Odera submitted that under the provisions of Order 50 rule 16 of the Civil Procedure Rules, the Defendants cannot rely on both the said Replying Affidavit of Moses Kurgat and the Statement of Grounds of Opposition aforesaid. He contended that under the rule, a respondent has a choice either to file a replying affidavit or a statement of grounds of opposition, and where, as in this Application, the respondent files both a replying affidavit and a statement of grounds of opposition, he must elect on which one of the two he wishes to rely because he cannot rely on both documents.

(9) Order 50 rule 16(1) states —

“16 (1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.”

One can see that the rule gives a respondent a choice. He may decide to file a replying affidavit or a statement of grounds of opposition or both. Previously, the rule required a respondent to file only a replying affidavit which meant a respondent could not, even if he wished to do so, file a statement of grounds of opposition.

The Rules Committee of the Judiciary must have realized that an affidavit can deal only with facts and that a respondent who wishes to raise points of law cannot properly do so by affidavit but can do so by way of a statement of grounds of opposition. So the rule as it stands now gives a respondent the right to file one or the other of such documents or both. It is my view, therefore, that both the Replying Affidavit

and Statement of Grounds of Opposition filed by the Defendants are properly before the court and have to be considered.

(10) Mr. Imende, for the Defendants, opposed the Application. The first point he raised was that I should disregard Mr. Mwau's affidavit sworn on the 31<sup>st</sup> December 2004 in support of the original Chamber Summons of even date therewith which was subsequently amended on the 7<sup>th</sup> February 2005 to strike out the name of Pepe Ltd as earlier observed. In learned counsel's view, that affidavit ceased to exist following the amendment of the Chamber Summons to which it was annexed. Ideally, the Amended Chamber Summons should have been supported with a fresh affidavit or there should have been an averment in the Plaintiff's affidavit sworn in support of the Amended Chamber Summons that reliance will be placed on the original affidavit. I do not regard this omission as fatal because as a court of equity and justice, I should look at all the evidence placed before me in reaching my decision. Mr. Imende's submission which is really a technical objection should not, therefore, stand in the path of justice.

(11) Mr. Imende's second point was that the injunction should not be granted because there has never been any threat by the Defendants to repeat the publication of the statements which the Plaintiff has complained about. He also says that the court cannot be called upon to grant a very general and speculative order of injunction. With respect, I think there is considerable merit in this submission. Reading prayer 3 in the Amended Chamber Summons, the Plaintiff is asking for an order to restrain the Defendants from —

“printing, broadcasting, televising publishing or authorizing publication of any matter that is or might be libelous and defamatory to the Plaintiff and/or any other matter relating to the Plaintiff whatsoever ....”

(12) The Plaintiff's claim is based on the premise that the Defendants have published words that are defamatory of him on two separate occasions. There is an averment in paragraph 30 of the Amended Plaintiff dated and filed on the 28<sup>th</sup> January 2005 that the Defendants shall continue to publish defamatory materials against the Plaintiff. That allegation has been specifically denied in paragraph 17 of the Statement of Defence dated and filed on the 24<sup>th</sup> March 2005. In view of that denial, the Plaintiff's fear of repetition is unfounded.

(13) The Plaintiff also seeks an apology in a particular form at this stage. In view of the Defence lodged by the Defendants, I have no power on the present Application to order the Defendants to publish an apology. The whole basis of an apology is an unequivocal acknowledgment by the Defendants that they now realize and accept that the material they published was untrue. That stage has not been reached yet in this case.

(14) The manner in which Mr. Odera has presented his case appeared strongly to suggest that the Defendants have no defence at all to the Plaintiff's claim. As I am not trying the action, I cannot form a judgment now on that particular point. If that was the view Mr. Odera had formed on the pleadings, there was nothing to stop him making an application to strike out the Defence. In that event, and with respect, the submissions he has made in this Application would have been quite helpful.

(15) For the reasons I have given, the Amended Chamber Summons application dated and filed on the 7<sup>th</sup> February 2005 must fail and it is ordered that the same be and is hereby dismissed with costs to the Defendants.

Dated and delivered at Nairobi this Twenty Fourth day of May, 2006.

P. Kihara Kariuki

Judge