REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1197 OF 2003

INVESCO ASSURANCE CO. LTD. ……..….PLAINTIFF/APPLICANT

VERSUS

THE NATION MEDIA GROUP…..……..DEFENDANT/RESPONDENT

RULING

1. The Application, the Depositions, and Preliminary Matters

The Plaintiff's application by Chamber Summons of 19th November, 2003 was brought under Order XXXIX rule 2 of the Civil Procedure Rules, and Sections 63(c) and 3A of the Civil Procedure Act (Cap. 21), and was filed on the same day. The Applicant was seeking Orders as follows:

> (a) that, a temporary injunction do issue restraining the Defendant by itself, its employees and agents from broadcasting, printing, publishing or continuing to publish and/or distribute any words, articles, editorials, commentaries, caricatures and pictures howsoever of and concerning the Plaintiff's insurance services offered to the City Council of Nairobi and/or any payments made to it by the City Council of Nairobi directly, or through its agents, in their newspapers known as The East African, The Daily Nation, Taifa Leo, Taifa Jumapili, its website www.Nationaudio.com/East African, the Nation Radio 96.4 FM or any other newspaper or magazine in which the Defendant has a controlling interest within the East African region and abroad, pending the hearing and determination of this application;
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> (b) that, a temporary injunction do issue restraining the Defendant by itself, its employees or agents from broadcasting, printing, publishing or continuing to publish and/or distribute any words, articles, editorials, commentaries, caricatures and pictures howsoever of and concerning the Plaintiff's insurance services offered to the City Council of Nairobi and/or any payments made to it by the City Council of Nairobi directly, or through its agents, in their newspapers known as ***The East African, The Daily Nation***, the ***Sunday Nation, Taifa Leo, Taifa Jumapili***, its website or any other newspaper or magazine which the Defendant has controlling interest in within the East African region and the Nation Television pending the hearing and determination of this suit;
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> (c) that, the costs of this application be provided for .

The grounds stated on the face of the Chamber Summons are as follows:

> (i) that the Defendant printed, broadcast, published and distributed a false and malicious lead story in its November 10 – 16 issue of The ***East African*** newspaper entitled "Kenya Minister in Kshs.117 [million] City Hall Scam", which was injurious to the Plaintiff;

(ii) that, in the said story the Defendant had claimed that the Plaintiff obtained Kshs.117,000,000/= from the City Council of Nairobi without offering any insurance services to that Council;

(iii) that, the Defendant, after being requested to make offers of amends, refused to make any offer and instead went ahead to publish more defamatory material about the Plaintiff, in the ***Sunday Nation*** of 16th November, 2003 on page 15;

(iv) that, the Defendant has also used and continued to use its other print and/or electronic media and website to advertise and/or repeat the said defamatory story especially in its ***Daily Nation*** issue of 11th November, 2003 and its advertisements just before prime-time news on ***Nation T.V***.;

(v) that, the said defamatory story has already started affecting the Plaintiff's business and the Plaintiff apprehends that any further publication of the said offending story would cripple the Plaintiff's business especially through non-renewal of the existing insurance covers offered by the Plaintiff to its various clients, and the cancellation of the Plaintiff's licence by the Commissioner of Insurance;

(vi) that, the loss and damage occasioned by the said defamatory story cannot be compensated by way of damages;

(vii) that, the Plaintiff has a prima facie case with a high probability of success, and the balance of convenience tilts in the Plaintiff's favour.

The evidence to support the Plaintiff's application is set out in the supporting affidavit of Joseph K. Kariuki, the Managing Director of the Plaintiff, sworn and filed with the application on 19th November, 2003. This lengthy affidavit may be summarised as follows:

(a) that, the Defendant published a headline story defamatory of the Plaintiff in its 10th – 16th November issue of ***The East African***;

(b) that in the said issue of ***The East African,*** the following words did appear:

· Para. 3:

"Officials at the Council told the ***East African*** that the case involving Bespoke Insurance Brokers was not the only one in which the Minister had attempted to force City Hall into making a questionable payment."

· Para. 4:

"The Minister had, again in complete contravention of the Council's tendering and payment procedures, forced it into a financial arrangement in which an insurance premium financier, Triple A Capital Ltd, paid Kshs.117 million to Invesco Assurance Company on behalf of the City Hall, for the period 2000 to 2002. The Council had been repaying the insurance cover at the rate of Kshs.6 million per month."

Para. 7:

"According to records of the Council's finance committee, however, the company is said to have offered no insurance cover for the period in question."

(c) that, the said publication in The ***East African*** described the payment to the Plaintiff as questionable, on the basis that the City Council was forced to take a financial loan to pay for non-

existent insurance services, thus depicting the Applicant as a thief, a corrupt institution, and an embezzler of public funds;

(d) that in its 12th and 13th paragraphs in ***The East African*** the Defendant juxtaposed the said Kshs.117 million payment paid to the Applicant against alleged "problematic Kshs.45 million" tender involving Invesco Assurance Company Ltd., at a time when the matter was pending in Court, Nairobi High Court Miscellaneous Civil Application No. 996 of 2003;

(e) that the Respondent maliciously published the said story when it knew the story was untrue;

(f) that, the same story had earlier been published in the ***Sunday Nation*** issue of 9th November, 2003 and through ***Nation T.V***. and Nation F.M. Radio;

(g) that, further commentaries to the same effect were run in the ***Daily Nation*** of 11th November, 2003 and the ***Sunday Nation*** of 16th November, 2003;

(h) that, the Applicant did indeed provide insurance services to the City Council for the period running from the year 2000 to 2002;

(i) that, the Applicant's business involves sale of insurance policies to the Government, the private sector and the general public, and the negative publicity caused by the Respondent would result in considerable losses to the Plaintiff;

(j) that, the Insurance Act (Cap. 487) under which the Applicant's licence was granted forbids it from engaging in criminal practices and the allegations by the Respondent may result in investigations being commenced by the Commissioner of Insurance, which would result in irreparable damage to the Applicant.

To the Plaintiff's application and the supporting depositions, the Defendant filed grounds of objection, dated 2nd February, 2004 on 24th February, 2004. The points raised in the objections document are as follows:

(a) that, the Plaintiffs have not shown a *prima facie* case with a probability of success;

(b) that, damages, if any are awardable, is adequate remedy and there is no need for injunctions to apply;

(c) that, the balance of convenience is against the granting of an injunction;

(d) that, no undertaking as to damages has been given by the Plaintiff as required by law;

(e) that, the injunction being sought is too wide and not capable of being granted;

(f) that, the orders sought, if granted, would be tantamount to gagging the Press;

(g) that, the application lacks merit and is an abuse of the process of the Court, and should be dismissed with costs.

2. Submissions for the Plaintiff/Applicant

The hearing of the application first took place on 9th June, 2004 when the Applicant was represented by Ms. Mwangi while Ms. Mululu, holding brief for Ms. Janmohamed, appeared for the Defendant.

Ms. Mwangi restated the prayers: the Applicant was seeking temporary injunctions restraining the Defendants, and costs as well. She submitted that if the impugned publication by the Plaintiff was not

stopped, then the Plaintiff's business was likely to be crippled. She contended that the Applicant did have a prima facie case with a probability of success. Counsel contended that the impugned publication was malicious and untrue, and had been actuated by the sole purpose of tarnishing the Applicant's reputation, so as to threaten its economic life. Counsel stated that as a result of the Defendant's objectionable publication, the Applicant started receiving cancellations of existing policy, and this together with non-renewals, brought about a loss to the Plaintiff of some Kshs.69,687,914/=.

Counsel for the Applicant prayed for a temporary injunction against the Respondent until the issues in dispute were determined. Ms. Mwangi submitted that the Applicant was a custodian of funds from members of the public, in the form of premiums, and if the cancellations of policy continued, then the Applicant might be forced to close down; and at that stage a payment of damages would serve no purpose. In counsel's words, "Damages to a dead person cannot be termed adequate compensation." Counsel submitted that the mere fact that compensation could take the form of damages did not dictate that an injunction be not awarded. For this proposition she cited the Court of Appeal decision in ***Aikman v. Muchoki*** [1984] KLR 353. Madan J.A. in that case remarked as follows (pp.358 – 359):

> *"The conditions for the grant of an interlocutory injunction were correctly considered by the learned judge by reference to the decisions of the Court of Appeal in* ***E.A. Industries Ltd v. Trufoods Ltd*** *[1972] EA 420,* ***Giella v. Cassman Brown & Co. Ltd*** *[1973] E.A. 358, and* ***Nsubuga and Another v. Mutawe*** *[1974] E.A. 487. The conditions are: (1) the probability of success; (2) irreparable harm which would not be adequately compensated for by damages, and (3) if in doubt, then on a balance of convenience.*
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> *"The conditions spelled out above for the grant of an interlocutory injunction were rightly understood but wrongly applied as follows: first, the appellants being lawfully in possession of the estates under the authority of the debentures…, and the defendants having unlawfully seized and unlawfully continuing in possession of the estates, the appellants had shown a clear and overwhelming prima facie probability of success; the court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful title of others, and brazenly admit it, ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so. Equity will not assist law-breakers… It was, therefore, a limited approach by the learned judge to say that the injury which the Plaintiffs may have suffered as a result of the defendant's trespass or acts were capable of compensation by an award of damages. I will not subscribe to the theory that a wrongdoer can keep what he has taken* ***because he can pay for it****. The real injury arose from the unlawful seizure of the estates by the defendants in defiance of the law…*
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> *"…The learned judge considered that as liability was in dispute, it would be unfair and most unjustifiable to issue an* ***injunction based on a contingent liability yet to be ascertained****. This is [a proposition] with which I cannot agree. Quite frequently when an interlocutory injunction is granted the liability has not yet been ascertained."*

On the principles enunciated by Madan, J.A. in the ***Aikman*** case, Ms. Mwangi submitted that the prayer for an injunction should not, in the instant matter, be refused. She submitted that interlocutory injunctions can quite properly be granted where liability has not yet been ascertained.

Counsel in any case maintained that damages, in the instant matter, would not be adequate, because continued publication of the impugned reports by the Defendant would interfere with the daily running of the Applicant's business. Counsel considered that the balance of convenience lay in favour of granting injunction as prayed.

Counsel also disputed the claim in the Respondent's grounds of opposition, that the Applicant had given no undertaking as to damages, in the prayer for grant of an injunction. She riposted that the Respondent itself had not shown what kind of damage it stands to suffer, such as would call for the making of an

undertaking by the Applicant. In the words of counsel, "An undertaking cannot be made in a vacuum. The only possible damage the Respondent could suffer is costs of the suit, and this is not damage."

Counsel also disputed the Respondent's ground of objection that the injunction sought was "too wide to be granted." Ms. Mwangi submitted that the injunction sought was quite specific; it touches on the publication on the Plaintiff's insurance services offered to the Nairobi City Council, while the Respondent's business is to report on the entire scope of public matters and not just on Nairobi City Council's insurance business.

On the point raised by the Respondent that the Press ought not to be gagged, counsel submitted that this issue would only arise if there was ***truth*** in the matter being published by the Respondent; but the Respondent had not shown what it had relied on, as a basis for its impugned story. Ms. Mwangi submitted that the Respondent had not, even in its Statement of Defence filed on 6th January, 2004 controverted the content of the Plaintiff's application. Counsel submitted that the Statement of Defence consisted of bare denials that do not indicate any situations that justified the publishing of the impugned story; and that the conclusion should be drawn that the said story was based on falsehoods. Counsel stated that the Court is a Court of justice, and submitted that the Court is empowered by Section 63e of the Civil Procedure Act (Cap. 21) to make such interlocutory Orders as may be just and convenient, to ensure ends of justice are met.

Counsel drew my attention to ***Winfield and Jolowicz on Tort,*** 13th ed. (1989) (W.V.H. Rogers), which defines the nature of liability in defamation (p. 296):

> *"Liability for defamation is divided into two categories of libel and slander, and this division has important consequences. A libel consists of a defamatory statement or representation in permanent form; if a defamatory meaning is conveyed by spoken words or gestures it is slander."*

Counsel submitted that the Applicant's case fell within the category of libel, and that a temporary injunction was justified.

3. Submissions for the Defendant/Respondent

Ms. Mululu for the Defendant made her submissions on the basis of the grounds of opposition filed on 24th February, 2004.

Counsel submitted that the principles set out in ***Giella v. Cassman Brown & Co. Ltd***. [1973] E.A. 358 were the basis upon which temporary injunctions could be granted, but their application in ***defamation*** cases was subject to special conditions. In defamation cases, counsel submitted, the jurisdiction to grant injunctions is exercised ***with the greatest caution***. Only in the clearest possible case would a temporary injunction be granted in defamation proceedings, and, counsel submitted, the Plaintiff had not shown a ***prima facie*** case with a probability of success. She submitted that the Court would have to be satisfied that the words complained of are so ***manifestly defamatory that a decision not to grant an injunction would be perverse***. In determining the propriety of an injunction in those circumstances, counsel submitted, the Court must consider the individual's ***right to freedom of expression*** as provided for in Section 79 of the Constitution. Besides, she further submitted, an injunction might only be granted where there was a ***substantial risk of grave injustice, and the private interest in stopping publication outweighs the public interest.*** Counsel, for these propositions, relied on ***Gatley on Libel and Slander***, 9th edition. The authors of this authoritative work state the law on interlocutory injunctions, in relation to defamation, as follows:

> (i) at para. 25.1:
>
> "*Generally, such an injunction can only be granted where a party to an action has invaded or threatens to invade a legal or equitable right of the other party, which can be enforced by the Court, and when one party has behaved or threatens to behave in an unconscionable manner. **The***

latter does not include the publication of false or defamatory statements. *Accordingly the jurisdiction to* grant interlocutory injunctions in the field of defamation and malicious falsehood arises ***where there has been, or there is threatened, a publication of a defamatory statement or a false statement which would give rise to a claim for malicious falsehood***."

(ii) at para. 25.2:

"The jurisdiction to grant interlocutory injunctions to restrain publication of defamatory statements is 'of a delicate nature', which 'ought only to be exercised in the clearest cases.' That was stated by Lord Esher, M.R. in ***Coulson v. Coulson*** *[1887] 3 T.L.R. 846, and it encapsulates the general approach of the Court*. ***The reluctance to grant peremptory injunctions is rooted in the importance attached to the right of free speech***."

The authors have gone further and specified the proper grounds for the grant of an interlocutory injunction in defamation cases:

(a) the impugned statement is unarguably defamatory;

(b)there are no grounds for concluding that the statement may be true;

(c) there is no other defence which might succeed;

(d) there is evidence of an intention to repeat or publish the defamatory statement.

Counsel also relied on the decision of this Court, rendered by the Honourable Mr. Justice Khamoni, in ***Cheserem v. Immediate Media Services*** [2000] E.A. 371, in which it was held that applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases because ***they bring out a conflict between private interest and public interest***: "Over and above the test set out in ***Giella's*** case, in defamation cases the Court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in the clearest possible cases" (p.371).

Ms. Mwangi submitted that where the defences of justification, fair comment or qualified privilege are pleaded, as they are in paragraphs 7 and 8 of the Statement of Defence, the Court would not grant an interlocutory injunction. Counsel disputed the submission made for the Applicant, that the Statement of Defence only consists of mere denials; she stated that the said defences are ones of substance and are founded on the provisions of the Defamation Act (Cap. 36), Sections 7(1), 14 and 15. Ms. Mululu submitted that the defences pleaded by the Respondent could stand the test, and thus there was no need to stop the Respondent's exercise of its publication rights, which it was in any case ready and willing, and was set to defend vigorously and probably, successfully. In these circumstances, counsel submitted, the Applicant had failed to show a ***prima facie*** case with a probability of success. Counsel submitted and, in my view, with justification, that the Applicant's depositions, in the very detailed manner in which they were formulated, came close to placing before the Court the totality of the evidence. Ms. Mululu urged, and quite persuasively, I think, that such detailed evidence was more appropriate for the stage of full trial. The essential point made here, I believe, is that the right material for the later stage of full trial cannot rightly be brought forward to the stage of interlocutory proceedings, and applied to pre-empt the Respondent's later case which has yet to fall due, by restraining the Respondent prematurely in the exercise of the Respondent's right to publish. Counsel submitted, and rightly, I think, that although the depositions for the Applicant had been made on oath, the Respondent had yet to test the veracity of those averments, through examination; and thus all such affidavits, at this stage, should be considered to present no more than a ***prima facie*** case, and consequently should not be the justification for taking away the Respondent's publishing rights. Ms. Mululu submitted that the Respondent's defences could only be defeated if there was evidence of malice, but ***evidence*** of malice could only be adduced at the main trial.

Counsel for the Respondent relied on Order VI rule 6A(3) which thus provides:

"*Where in an action for libel or slander the plaintiff alleges that the defendant maliciously*

published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, ***he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred."***

Counsel stated that since the filing of the Statement of Defence on 6th January, 2004 the Defendant has not been served with a Reply to Defence regarding the claim of malice. In these circumstances, Ms. Mululu submitted, the Respondent's defences stand unchallenged, and thus ought not to be derogated from through grant of the Applicant's prayer for an interim injunction.

Counsel submitted that the City Council of Nairobi is a public institution, thus being the subject of a major public interest in the manner in which it expended funds under its charge. The Courts should not stop the publication of reports which enabled the public to realize their interest in the workings of a body such as the Nairobi City Council. On this point counsel relied on the ***Cheserem*** case, and invoked the passage quoted therein (pp.375 – 376), from Lord Denning, M.R. in ***Fraser v. Evans and Another*** [1969] 1 ALL E.R. 8 at p.10:

"There are some things which are of such public concern that the newspapers, the press, and indeed, everyone ***is entitled to make known the truth and to make fair comment on it****. This is an integral part of the* ***right of free speech and expression****. It must not be whittled away. The* ***Sunday Times*** *assert that, in this case, there is a matter of public concern. They* ***admit that they are going to injure the Plaintiff's reputation****, but they say that they can justify it; that they are only making fair comment on a matter of public interest; and therefore, that they ought not to be restrained.* ***We cannot pre-judge this defence by granting an injunction against them****. I think that the injunction which has been granted should be removed. The* ***Sunday Times*** *should be* ***allowed to publish the article at their risk.*** *If they are guilty of libel … that can be determined by an action hereafter and damages awarded against them. But* ***we should not grant an interim injunction in advance of an article when we do not know in the least what it will contain****. I would allow the appeal accordingly and discharge the injunction."*

Ms. Mululu submitted, on the question of damages, that they would be an adequate remedy if it were to be found during the hearing of the main suit that the Respondent was liable. Counsel remarked, quite rightly, I think, that the fact that Mr. Kariuki's affidavit in support of the application contained (para.18) a quantification of loss, was proof that such loss was quantifiable and could be compensated by damages. To buttress this point, Ms. Mululu submitted that, nowhere had the Applicant claimed that the Respondent was incapable of making good any award of damages such as might be made against the Respondent. Counsel avowed that the Nation Media Group, the Respondent, was one of the largest and most established media groups in the country, and its ability to pay an award of damages could not be doubted.

Counsel submitted that the balance of convenience rested against the granting of an injunction, particularly in these times of great public concern in the country about ***corruption in public institutions.*** The public has a right to know how the City Council has conducted its financial affairs; and besides, counsel submitted, no evidence had been given of loss to the Applicant, apart from allegations of cancellations of policy, some of which predate the publication of the impugned article. Ms. Mululu contended that it was, indeed, the Respondent who would suffer greater inconvenience if an injunction was granted – because the Respondent would then be unable to report on matters of public interest.

On the issue of an undertaking by the Applicant as to damages, counsel submitted that it was the Applicant's responsibility, when applying for an injunction, to give the undertaking. She cited as authority for this proposition***, Gatley on Libel and Slander,*** 9th edition, at para.25.20:

*"An undertaking by the plaintiff as to damages must be given on every interlocutory injunction [****Fenner v. Wilson*** *[1893] 2 Ch. 656]. The plaintiff's evidence should include evidence of his*

ability to meet any liability for damages as might arise by virtue of the undertaking."

Counsel restated the point in the grounds of opposition, that the injunction as sought was too wide, and granting the same would have the effect of gagging the press.

Ms. Mululu disputed the claim by the Applicant that the impugned publication would imperil the Applicant by being investigated by the Commissioner of Insurance. She remarked that since the publication of the story in November, 2003 there has been no evidence that such investigation was indeed taking place. Counsel argued that the Court should not take the position that there is necessarily a loss to the Applicant if the Applicant is subjected to the apprehended investigation, as such investigation would indeed give opportunity to the Applicant to show its blamelessness, and besides, the Commissioner should not be denied his right to carry out his prescribed work.

Counsel prayed that the application be dismissed with costs to the Respondent.

4. The Applicant's Response

While acknowledging that interim injunctions in defamation cases can only be issued in special cases, counsel for the Applicant contended that the instant case is a clear one calling for the issuance of an injunction Order. Counsel relied on the following passage from ***Gatley on Libel and Slander*** (para. 25.5):

> *"…a prima facie cause of action is established once the plaintiff proves that defamatory words have been published about him; he does not have to prove that the defamatory words are false, for the law presumes this in his favour. In practice, it is customary, if not invariable, for there to be some evidence, even if limited to assertions by the plaintiff, of the falsity of the allegations, for in the absence of such evidence the Court may, in the exercise of its discretion, and having regard to the 'delicate nature' of the jurisdiction, refuse an injunction. It is not usual for the plaintiff to be able to prove on an application for an interlocutory injunction that the words are false."*

She submitted that the Applicant had a duty to show lack of truth, and she had adduced evidence in this regard. Counsel submitted that Order XVIII empowered the parties to prove facts in interlocutory proceedings, and that the affidavit in support of the application was supported by facts.

Ms. Mwangi submitted that the line of defence taken by the Respondent could not negate the case for issuing an injunction. She relied on ***Gatley on Libel and Slander*** (para. 25.6):

> "*Where the defendant contends that the words complained of are true, and swears that he will plead and seek at trial to prove the defence of justification, the Court will not grant an interlocutory injunction, unless, exceptionally, the Court is satisfied that such a defence is one that cannot succeed. This was the decision in* ***Bonnard v. Perryman*** *[1891] 2Ch. 269. Lord Coleridge explained (p. 284), 'The right of free speech is one which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment,* ***so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed****; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel* ***is untrue****, it is not clear that any right at all has been infringed…"*

Counsel contented that a defence of justification does not lie in the present proceedings, and that the Respondent had not established that its defence of justification will succeed.

Is it, however, possible that the Defendant could establish that the defence of justification would succeed? On this point I would not agree with counsel, as, establishing whether or not that defence succeeds is, firstly, a matter reserved to the hearing of the suit, to be done by examination and cross-examination of witnesses; and secondly, a matter for authoritative pronouncement only be the Court itself. I do not think it is possible at all at this interlocutory stage to establish the veracity of the claim that the allegedly defamatory statement is ***the truth***.

Ms. Mwangi submitted that the grant of an injunction was justified by the fact that, even after Advocates sent a demand notice to the Respondent, the Respondent still continued to make further publication of the allegedly defamatory material. Counsel cited in support a passage in ***Gatley on Libel and Slander*** (para.25.10):

> *"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…"*

Counsel submitted that the Respondent had shown clear intentions to repeat publication of the words complained of, and that in this way the Respondent has shown that it cannot defend itself against the suit.

On the quantifiability of damage, it was submitted for the Applicant that, the fact that as much as Kshs.69 million had been lost following publication of the allegedly defamatory statement, demonstrated that further losses would ensue even though such remained unquantified and were indeed unquantifiable.

Counsel said of the possibility of investigations on the Applicant by the Commissioner of Insurance, that these would interfere with the day-to-day management of business.

On issues of public interest, counsel contended that the public interest was not at stake, and such payments as were made by the City Council were made in fulfilment of purely contractual obligations.

On whether the Applicant should have replied to the Statement of Defence, on the issue of malice, counsel submitted that there was no need to file a Reply to Defence, as the relevant issues had already been covered in the Plaint, which deals with the issue of malice in paragraph 11(a) – (i).

Counsel submitted that the Respondent has not pleaded that it will suffer damage if an injunction is granted, and that no authority had been given to show the position of the Kenyan Courts, in a situation such as this. Ms. Mwangi submitted that the Defendant could only seek costs and interest; and that, therefore, there was no need for the Applicant to make any undertaking as to damages.

5. Final Analysis and Orders

It is the case, as must be known to both parties, that the merits of this matter must await determination at full trial. This shows that the Court's primary instrument of justice is the full trial, which gives the parties a chance to apply the best methods in brining out the truth, thus enabling the Court to make the correct decision in the determination of rights and liabilities.

The Court's discretion to make interlocutory Orders, granted by Section 63 of the Civil Procedure Act (Cap. 21), must thus be viewed as guided by the overall goal of disposing of the litigious issues through the full trial. The Courts have already defined the conditions under which interlocutory injunctions may be granted, particularly in ***Giella v. Cassman Brown & Co. Ltd***. [1973] E.A. 358. While these conditions are of general application, it is now well recognised that they only apply with considerable qualification in ***defamation cases,*** such as the present one.

Is the Applicant entitled to an interim injunction, restraining the Defendant, its employees or agents "from broadcasting, printing, publishing or continuing to publish and/or distribute any words, articles, editorials, commentaries, caricatures and pictures howsoever of and concerning the Plaintiff's insurance services offered to the City Council of Nairobi and/or any payments made to it by the City Council of Nairobi directly or through its agents?"

The Respondent claims the rights of a free press, and invokes its public responsibility to publish all material bearing upon the discharge of public stewardship by organizations such as the City Council of Nairobi. The Respondent takes the position that, while such a general duty of publication has always

existed, it has become particularly urgent in recent times in Kenya, with the various ***exposes*** of corruption that have caused singular anxiety to members of the public. The Respondent considers itself to be discharging an important public duty, and that it is while it was so engaged, that it did publish the material forming the gravamen of the Applicant's suit. The Respondent has already filed a Defence and is fully prepared to defend its rights to continue with its media publications, as well as to keep following up on the statements and reports which the Applicant is complaining about. The Respondent is clear about its public duty, and is pleading ***fair comment on matters of public interest***, as well as ***justification,*** in its defence.

It is now well established that, with the defences such as those pleaded by the Respondent, it would not be restrained in its publishing, and any claims in defamation made against the Respondent, must be resolved through the full trial when rights and liabilities will be determined on the basis of evidence and the examination of witnesses. It is recognised that the Defendant, while performing its public duty and in respect of which task it must be protected, ***may*** publish defamatory material. The Court will not stop such a course of publication through injunction, except in a gross case of libel maliciously perpetrated and guided by falsehood, in respect of which a failure to grant injunction would be perverse. Short of this condition, this Court is inclined to uphold the Defendant's right to continue with publication, on a matter of public interest such as the instant one, while bearing the risk of paying damages if so determined at the trial. This is the principle which will guide me in determining the outcome of the present application.

Counsel for the Applicant submitted that the impugned publication was malicious and untrue. Was it malicious? Malice is defined in ***Longman Modern English Dictionary*** (1976 ed) as "the will to do harm to another." It was not, however, shown that the Respondent was actuated by such a will; and, I think, proof of such a will requires the examination of witnesses at the main trial. Was the publication false? The Applicant endeavoured to prove so; but the Respondent claims to have the means to establish the truth of the content of the impugned story. This matter can only be established at the full hearing.

Ms. Mwangi for the Applicant contended that the effect of the impugned report has been to cause business losses, which could drive the Applicant out of business unless the Respondent was restrained. Now business interests are, I think, essentially pecuniary interests which can be easily redressed by Court Orders for the payment of damages. I do not think a very strong case is made by the Applicant on this particular score.

Has the Respondent committed, or is committing such an odious violation of accrued legal rights of the Respondent that, notwithstanding the conditions of grant of injunction in cases of defamation, injunctive relief should be granted pending the hearing and determination of the suit? This is not obvious. The Respondent has a *prima facie* justification for its publication activities; and at this interlocutory stage, such *prima facie* entitlements must be upheld. This is particularly so, as the Applicant has not shown, in my view, any perverse conduct on the part of the Respondent. This, I think, nowhere comes near the scenario depicted by Madan, J.A. in ***Aikman v. Muchoki*** [1984] KLR 353 at pp. 358 – 359: "that a wrongdoer [may not be allowed to] keep what he has taken because he can pay for it."

Many pertinent issues have been canvassed in this, with respect, competently conducted matter, and there is no need for me to return to all of them, especially as I believe my lines of assessment on merits leading me to my final Orders have opened out reasonably clearly. I will briefly reconsider the matter in the light of the principles set out in ***Giella v. Cassman Brown.***

Has the Plaintiff/Applicant shown a *prima facie* case with a probability of success? I think not, given in particular the more stringent conditions for granting an injunction now well recognised in defamation cases. The claims in the main suit appear to be evenly balanced, and only a full trial will determine the pertinent rights and liabilities; and at that stage the winner will be adequately compensated in damages.

Would the Applicant suffer irreparable injury, if an injunction were not granted? It is not clear that this would be so. I take judicial notice that the Applicant is in the open business of insurance, and with diligent endeavours, should be able to get on with business in the normal manner. Any losses incurred are of an essentially pecuniary nature and would be redressed in damages if the suit was, in the event,

successful.

On whose side is the balance of convenience? In this country today, and in an issue such as the one represented in the gravamen of the suit, the vital reference point in determining the balance of convenience should be the members of the public and the ***public interest***. Only the Defendant/Respondent can claim to relate directly to the public interest – interest in probity and good stewardship in relation to public authorities and public financial management. The Respondent would only relate indirectly to the public interest – through the need to maintain a buoyant and productive private business sector. In my view, the balance of convenience lies in favour of the Respondent, rather than of the Applicant .

I will make the following Orders:

1. The Plaintiff/Applicant's Chamber Summons application dated 19th November, 2003 and seeking an interim injunction against the Defendant, is refused.

2. The costs of this application shall be borne by the Plaintiff in any event.

Finally, I should like to record my appreciation of the professionalism, industry and courtesy with which both counsel argued this application.

DATED and DELIVERED at Nairobi this 24th day of September, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Ms. M. Mwangi, instructed by M/s Mwangi Keng'ara & Co. Advocates

For the Defendant/Respondent, Ms. Mululu, instructed by M/s Archer & Wilcock Advocates.