REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

Civil Suit 57 of 2004

HON. AMB. CHIRAU ALI MAKWERE…….PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LIMITED……...DEFENDANT

RULING

The applicant applies for a stay of proceedings under Order 41 r 4 of the Civil Procedure Rules and Section 77 and 79 of the Constitution. So far as procedure is concerned, O44 Rule 4 gives the court powers to stay execution of proceedings. The Sections of the Constitution referred to gives no jurisdiction to the court to stay proceedings. These sections deal with provisions to secure protection of law and protection of freedom of expression.

In order to succeed, the Applicant must show substantial loss. Dr. Gibson Kamua Kuria submits that the loss is that if a stay is not granted, the court will award substantial damages against the Defendant. Dr. Kamau Kuria submitted that the Defence filed entitled the defendant to call evidence to justify the contents of the words complained of in the Plaint.

He submitted that the Defamation Act was in conflict with Section 3 of the Constitution and that under Section 79 the Defendant was entitled to rely on the judgment in the case referred to in paragraph 3 of the Defence.

He referred to the case of **Derbyshire County Council VS Times Newspaper (1993) AC p 534 in which at page 117 and 118 Lord Keith stated**:

There are, however features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably effect on freedom of speech. In City of Chicago Vs Tribune Co (1923) 139 NE 86 the Supreme Court of Illinois held that the city could not maintain an action for damages for libel. Thompson CJ said, at p 90:

> The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against as a newspaper it can be maintained against every private citizen who ventures to criticize the ministers who are temporarily conducting the affairs of his government, he may be punished… but all other utterances or publications against the government must be considered absolutely privileged. While in the early history of the struggle for freedom of speech restrictions were enforced by criminal prosecutions, it is clear that a civil

action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticize the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions… After giving a number of reasons for this, he said, at p 90:

> It follows, that every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.

These propositions were endorsed by the Supreme Court of the United States in the **New York Co. Vs Sullivan (1964) 376 US 254, 277**. While these decisions were related most directly to the provisions of the American Constitution considered with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country.

What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public. In **Hector Vs Attorney General of Antigua and Barbuda [1990] 2 AC 312** the Judicial Committee of the Privy Council held that a statutory provision which made the printing or distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal offence contravened the provisions of the constitution protecting freedom of speech. Lord Bridge of Harwich said, at p 318:

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism leveled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot hold viewing statutory provision which criminalizes statements likely to undermine public confidence in the conduct of affairs with the utmost suspicion.

Also the case of **Lange Vs Australian Broadcasting Corporation (1999) Human Rights Law Report p231** in which it was held in holding number 11 that:

As a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. The Defendant's conduct, moreover, will not be reasonable unless the Defendant has sought and published a response (if any) from the person defamed except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the Plaintiff an opportunity to respond. He also relied on a passage from **Developing Human Rights Jurisprudence** in which the learned author at page 43 states:

The European Court did not go so far as the U.S Supreme Court in New York Times Vs Sullivan and hold that a public official or figure must establish that the allegation was false and that the publisher knew it was. However, the court's judgment was sympathetic to the principles which explain Sullivan that:

> "Freedom of the press… affords the public one of the best means of discovering and forming an opinion of the ideas and attitude of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such as regards a

private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance".

The Defence referred to in the 3rd Paragraph of the Defence is a matter for argument in due course.

The question now, however, is will substantial loss be suffered by the defendant if the case is allowed to proceed?

In my view it will not. I say so for the following reasons, Firstly, the Defendant is still at liberty to submit on the Defence contained in paragraph 3 of the Defence and Secondly if l am wrong in my ruling and the Court of Appeal upholds that on the defence relied on in paragraph 3 evidence can be given to justify the truth of the allegations made, if judgment is given in favor of the Plaintiff, the same can be stayed or set aside pending the hearing of evidence in support of the said defence.

I would add that in this case the words complained of were not spoken of the Plaintiff nor do they relate to him in his capacity as a politician or public figure. The words relate to him as a person in his private capacity although he may well be a well known public figure.

Further for the sake of clarification l did not state that the Defendant cannot rely on his defence disclosed in paragraph 3. My ruling was based partly on the point that unless justification is pleaded, evidence cannot be led in respect thereof, which means to justify the truth of the allegations.

Fourthly, references to the passage quoted from Developing Human Rights Jurisprudence above, in which the learned author states that the European Court did not so far as the U.S Supreme Court in the New York Times Case in holding that the onus of proving the allegation is false and the publisher knew of it, is upon the person defamed. This has not been the law in Kenya to date.

In order to succeed, it would be necessary for the Applicant to persuade the court that such was the case in which event it would be open to him to argue that the Plaintiff had failed in such onus of proof.

This would not, however, allow the Defendant to produce evidence by way of justification in the absence of an averment to that effect.

For these reasons l dismiss the application with costs to the Respondent.

Dated and Delivered in Nairobi on 6th December 2004

P. J RANSLEY

JUDGE