



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. E136 OF 2020**

**CROWN SOLUTIONS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**DENNIS OKARI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GORDWINS O. AGUTU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**EMMANUEL JUMA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**NATION MEDIA GROUP.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff/applicant herein has brought the notice of motion dated 30<sup>th</sup> September, 2020 supported by the grounds set out on the body thereof and the facts stated in the affidavit of **Brian Sitima**. The applicant sought for the following orders:

*i. Spent.*

*ii. Spent.*

*iii. Spent.*

*iv. THAT pending the hearing and determination of the suit, an injunction be issued restraining the respondents, whether by themselves, agents, servants or any persons acting on their instructions/under their direction, from further posting, publishing, circulating or causing to be reposted, republished or circulated of any defamatory story, words or images with reference to the applicant, specifically the allegations broadcasted and published on 16<sup>th</sup> August, 2020 in a purported investigative expose cited in the 4<sup>th</sup> defendant’s NTV Prime Time News Bulletin titled: “Covid-19 Millionaires Corruption and Covid-19 moving at the same pace” (“The Publication”) or any other such linking the plaintiff/applicant to the contacts by allegations of the publication in whatever form and manner published; verbal, oral, print or electronically.*

*v. Spent.*

*vi. THAT pending the hearing and determination of the suit, an order of INJUNCTION do issue restraining the respondents, whether by themselves, agents, servants or any persons acting on their behalf, from writing, producing, broadcasting and publishing and republishing defamatory information in any manner whatsoever about the applicant, specifically the allegations broadcasted and published on 16<sup>th</sup> August, 2020 in a purported investigative expose cited in the 4<sup>th</sup> defendant’s NTV Prime Time News Bulletin titled: “Covid-19 Millionaires Corruption and Covid-19 moving at the same pace” (“The Publication”) or any other such linking the plaintiff/applicant to the contacts by allegations of the publication in whatever form and manner published; verbal, oral, print or electronically.*

*vii. THAT pending the hearing and determination of the suit, an order do issue COMPELLING the defendants/ respondents to remove, pull down, expunge and erase all forms of media including print, broadcast, digital and social media form or nature of publication relating to the applicant.*

*viii. THAT the costs of the application be provided for.*

2. The 1<sup>st</sup> defendant/respondent swore a replying affidavit while the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed Grounds of Opposition dated 27<sup>th</sup> November, 2020 to resist the motion.

3. There is nothing to indicate that the 2<sup>nd</sup> defendant/respondent filed any documents in response to the Motion or participated at the hearing thereof.

4. The Motion was canvassed by way of written submissions.

5. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits supporting and challenging it, the Grounds of Opposition and the contending written submissions and authorities cited.

6. A brief background of the matter is that the applicant instituted a suit against the respondents by way of the plaint dated 30<sup>th</sup> September, 2020 and sought for *inter alia*, various forms of damages and an order for permanent and mandatory injunctions against the respondents, arising out of the tort of defamation. The plaint was filed together with the instant Motion.

7. The crux of the matter is that the impugned publication alleges that public funds which were allocated to the Kenyan Government by international governments and institutions in a bid to combat the Covid-19 pandemic crisis were misused or not accounted for.

8. It is clear from the motion that the applicant is seeking for two orders: an interlocutory injunction and the grant of a mandatory injunction. I will first deal with the interlocutory injunctive order sought.

9. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA** as follows:

*a) The applicant must first establish a prima facie case with a probability of success.*

*b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.*

*c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.*

10. The above principles were restated in the case of **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** cited by the respondents and in respect to defamatory claims, thus:

*Firstly, the applicant must establish a prima facie case with a probability of success. Secondly, the applicant must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages. Thirdly, where the court is in doubt, then the balance of convenience should tilt in favour of the applicant.*

11. Under the first principle, it is the position of the applicant that the defamatory publication made by the respondents is false, malicious and misleading to say the least.

12. The applicant states that prior to making the defamatory publication on 16<sup>th</sup> August, 2020 the respondents did not contact the applicant to verify the accuracy and authenticity of the said publication, or give the applicant an opportunity to respond to the allegations contained therein.

13. In its submissions, the applicant contends that the defamatory publications paints it *inter alia*, as a criminal, money launderer and a participant in defrauding the public; and that any reasonable person would upon studying the publication, look down upon the reputation of the applicant.

14. The applicant further contends that whereas the respondents enjoy the constitutional right to freedom of the media, such right is not absolute and ought to be balanced against the rights of the public to receive fair and accurate information.

15. To buttress its point above, the applicant cites the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** in which the Supreme Court rendered itself as follows:

*“We should not however put the media upon a pedestal. The media does not exist in a vacuum. The power of the media is a double-edged sword which can save or destroy democracy...”*

16. In response, the 1<sup>st</sup> respondent in his replying affidavit and on behalf of his counterparts, states that he put together a special report to show that the public funds which were intended to deal with the Covid-19 global pandemic were misappropriated and which report was released in the public interest.

17. According to the 1<sup>st</sup> respondent, the impugned publication was never intended to malign anyone and was purely for public accountability purposes, therefore made in good faith.

18. In their Grounds, the respondents argue that the applicant had not satisfied the grounds to warrant the granting of an interlocutory

injunction at this stage.

19. Furthermore, in their submissions the respondents argue that the applicant has not proved the elements associated with the tort of defamation; namely, malice and injury to its reputation; and hence the applicant has not shown that it has a prima facie case with high chances of success.

20. Having considered the arguments by the respective parties together with the annexed documents and pleadings filed, I am of the view that on the face of it, the aforementioned impugned publication(s) would cause any reasonable person to perceive the applicant unfavourably.

21. Moreover, it is not in dispute that the impugned publication was made by the respondents and/or their representatives. It is also noteworthy that whether the said publication was defamatory of the applicant and whether the defences pleaded by the respondents will stand can only be investigated at the trial stage.

22. For now, I am satisfied that the applicant has established a prima facie case with a probability of success.

23. In respect to the second principle on irreparable damage/loss, the applicant through its Head of Legal **Brian Situma**, states that as a result of the impugned publication, the business credit and standing of the applicant has been injured and that it has lost invaluable business opportunities that cannot be made up for through monetary means.

24. More specifically, the applicant states that following the publication, it was summoned by the National Assembly's Departmental Committee on Health to answer to the allegations arising therefrom.

25. It is the averment of the applicant that unless the injunctive orders sought are granted and the respondents are restrained from making any further publications of a similar nature, its reputation will continue to plunge

26. On their part, the respondents are of the view that the applicant has not demonstrated the irreparable loss it has suffered and that since it is seeking an award of damages in the suit, this goes to show that damages would constitute an adequate remedy.

27. Upon considering the rival positions above and upon studying the material which was placed on the record, I am of the view that one's reputation is invaluable and once tarnished, cannot adequately be compensated by way of damages. In this regard, I opine that the applicant is more likely than not to continue suffering irreparable loss unless granted an interlocutory injunction restraining the respondents from making further publications of a similar nature.

28. Having come to the view that the applicant has satisfied the first two (2) principles warranting an interlocutory injunction, it would be fair to state that the applicant stands to suffer a greater inconvenience if the injunction is not granted in comparison to the inconvenience that would befall the respondents. It therefore follows that the balance of convenience tilts in favour of the applicant.

29. The second facet of the Motion concerns the subject of a mandatory injunction. In this respect, the applicant states that it has a clear-cut case and that unless this particular injunction is granted, then its reputation will continue to suffer.

30. In its submissions, the applicant has made reference *inter alia*, to the case of **Paul Mwaniki Gachoka & another v Nation Media Group Limited & another [2019] eKLR** in which the court determined thus:

***“The order sought by the plaintiff under this prayer is targeted at the 1st defendant website. The posts were done before the truth of the allegation was tested by evidence and rejoinder thereof. If it continues to exist then the plaintiffs shall be exposed before they are heard.***

***It is for that reason that I must also order a mandatory injunction as sought by the plaintiffs for the defendants to pull down the post on their website as sought.”***

31. In response, the 1<sup>st</sup> respondent states that a similar injunction was sought and granted in HCCC NO. E94 OF 2020 (Megascop Healthcare Kenya Limited v Nation Media Group Limited & 4 others) arising out of the same cause of action, and hence there is no need for a mandatory injunction to be granted against the respondents.

32. In their Grounds of Opposition however, the respondents contend that the applicant has not presented any special circumstances to warrant the granting of such an injunction.

33. The respondents further submit that an award of mandatory injunction ought to be made sparingly and in special circumstances.

34. In the case of **Kenya Breweries Limited v Washington Okeyo (2002) 1 EA 109; (2002)eKLR** cited in the case of **Paul Mwaniki Gachoka & another v Nation Media Group Limited & another [2019] eKLR** referenced above, the court reasoned that:

***“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances it will not normally be granted. However, if the case is clear, and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the plaintiff. A mandatory injunction will be granted on an interlocutory application.” ...From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a***

**mandatory injunction at this stage. I also find that the applicant has not brought any credible evidence to show that the injury to his reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage.**

35. In the present instance, it appears not to be in dispute that the applicant was for whatever reason not consulted or granted an opportunity to respond to the contents of the impugned publication beforehand. It is also apparent that the said publication has wide coverage, both locally and internationally.

36. I therefore find that the applicant will continue to be exposed to ridicule and contempt if the publications continue to be accessible on the various platforms.

37. Furthermore and in respect to the other case which was referred to by the respondents, though they did not annex a copy of the relevant order, I came across it on the record and note that the mandatory injunction was only granted in the interim, until a particular date, which has since lapsed. There is nothing to indicate that such injunction is still in force in that suit.

38. Consequently, I am convinced that the present circumstances would entitle the mandatory injunction sought.

39. In conclusion therefore, I find merit in the Motion and I will allow it, giving rise to the following orders:

**a) Pending the hearing and determination of the suit, an injunction be and is hereby issued restraining the respondents, whether by themselves, agents, servants or any persons acting on their instructions/under their direction, from publishing or further posting, publishing, circulating or causing to be reposted, republished or circulated of any defamatory story, words or images with reference to the applicant, specifically the allegations broadcasted and published on 16<sup>th</sup> August, 2020 in a purported investigative expose cited in the 4<sup>th</sup> defendant's NTV Prime Time News Bulletin titled: "Covid-19 Millionaires Corruption and Covid-19 moving at the same pace" ("The Publication") or any other such linking the plaintiff/applicant to the contacts by allegations of the publication in whatever form and manner published; verbal, oral, print or electronically.**

**b) Pending the hearing and determination of the suit, an order of mandatory injunction be and is hereby issued COMPELLING the defendants/respondents to remove, pull down, expunge and erase all forms of media including print, broadcast, digital and social media form or nature of publication relating to the applicant.**

**c) Costs of the Motion shall abide the outcome of the suit.**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 12<sup>th</sup> day of March, 2021.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents

..... for the 2<sup>nd</sup> Defendant/Respondent