REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. E132 OF 2020

JASWANT SINGH RAI.....APPLICANT

VERSUS

HON. MOSES MALULU INJENDI.....1ST DEFENDANT

WEST TV KENYA.....2ND DEFENDANT

RULING

The plaintiff/applicant filed a Notice of Motion dated 12th September 2020 under the provisions of Section 1, 1A, 1B, 3, 3A, 63 (c) & (e) of the Civil Procedure Act, Cap 21 , Order 40 Rules 2,3 & 5 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The prayers before this court for determination are;

1. ***...Spent***

2. ***... Spent***

3. ***…Spent***

4. ***THAT pending the hearing and determination of the Plaintiff's Suit a MANDATORY INJUNCTION be issued COMPELLING the Defendants, whether by themselves, agents, servants or any persons acting on their instruction/under their direction, to take down/retract/delete/purge the said broadcasts hosted on the YouTube Channel "West TV Kenya" as identified by the Uniform Resource Locator (URL)https://www.youtube.com/watch?v=kEAOCgbcdeg&t=1991s;***

5. ***THAT pending the hearing and determination of the Plaintiff's Suit a MANDATORY INJUNCTION be issued COMPELLING the Defendants, whether by themselves, agents, servants or any persons acting on their instruction/under their direction, to take down/retract/delete/purge the said broadcasts hosted on the YouTube Channel "West TV Kenya" as identified by the Uniform Resource Locator (URL)https://www.youtube.com/watch?v=kEAOCgbcdeg&t=1991s; and***

6. ***THAT the costs of this Application be provided for***

The application was canvassed by way of written submissions.

The application is premised on the grounds on the face of the application and the supporting affidavit of Jaswant Singh Rai, the Managing Director of the plaintiff, sworn on 12th September, 2020 who depones that on 10th July, 2020 the 1st Defendant uttered on the 2nd Defendant/respondent's television network as hosted on their YouTube Channel "West TV Kenya" on this link https://www.youtube.com/watch?v=kEAOCgbcdeg&t=1991s at minute 45 words that contained serious distortions and misrepresentations construed to mislead the general public which words were defamatory, libelous and scandalous as directed at and referring to the plaintiff/applicant.

The plaintiff/applicant has identified two issues raised in the Notice of Motion of 18th September, 2020 for determination by the court;

i) Whether the words uttered by the 1st respondent and broadcast by the 2nd respondent are *prima facie* defamatory and are they responsible for uttering and broadcasting those words respectively.

ii) Whether the applicant has met the burden for the injuctions sought.

The plaintiff states that in its natural and ordinary meaning, the offending words meant and were understood to mean that the plaintiff is a swindler, uncharitable, guilty of disobeying the law and acting with impunity and exploiting his employees for his own financial benefit.

The plaintiff/applicant submitted that they have met the conditions laid down in the case of ***Giella vs Cassman & Co. Ltd 1973 E.A 358*** on the requirement for grant of interlocutory injunction. The applicant submits that he has established a *prima facie* case, as the content and natural meaning of the words uttered by the 1st respondent are defamatory. The plaintiff/applicant submit that the damage caused to the applicant reputation cannot be compensated by damages. It is the plaintiff's submission that if the defamatory words are not deleted or otherwise removed from accessible record of the public, the publication would constitute assassination of the character of the applicant being the managing director of West Kenya Sugar Company and a prominent investor and entepreneur. It is the applicant's further submission that if the interlocutory orders are not granted, his constitutional rights and freedoms under Articles 28,29, 33, 33(2), 33(3) shall be infringed.

The plaintiff cited the case of ***Philomena Mbete Mwilu v Standard Group Limited(2018) eKLR*** where the court held that;

> ***"The defendant has advanced the view that in this case, even if the applicant was to succeed in her action, an award of damages would be an adequate remedy. However, I am alive to the fact that in some cases such as the instant one, once a person's reputation is damaged or lost, no amount of damages can be sufficient to compensate the offended party for such a loss. I wholly concur with the view expressed by Mbogholi J in Ahmed Adan V Nation Media Group Limited & 2 Others, [2016] eKLR that reputation like a name, is priceless."***

The plaintiff/applicant also relied on the case of ***Safaricom Limited v Porting Acess Kenya Limited & Another [2011]eKLR*** where the court cited the Gately criteria for injunction as enumerated at Page 934, paragraph 27.2 of the ***Gately's Book of Libel and Slander;***

> ***"Lord Esher M.R. in Coulson –vs- Coulson (1887) 3 TLR 846, observed that the court will grant an interim injunction, when,***
>
> ***(1) The statement is unarguably defamatory.***
>
> ***(2) There are no grounds for concluding that the statement may be true.***
>
> ***(3) There is no other defence which might succeed.***
>
> ***(4) There is evidence of an intention to repeat or publish the defamatory statement."***

The plaintiff submits that it has fulfilled the above criteria as set out in Gately's Book of Libel and Slander. The plaintiff/applicant contends that the words uttered by the 1st defendant/respondent to wit **"inanyanyasa wakulima, Rai umenyanyasa watu wa Malava....utalia na utalia kwa choo"** are undoubtedly defamatory towards him. Secondly, that the defence of justification/fair comment is an afterthought with no evidence to support the defamatory utterances and lastly that the continued presence of the video containing the 1st defendant words on the 2nd defendant's YouTube Channel is evidence of the defendants 'intention to repeat the defamatory statements.

The plaintiff/applicant further contends that the 2nd respondent has 17,200 subscribers on its YouTube Channel and the continued presence of the footage poses a grave threat to the Plaintiff/applicant's reputation and business operations. The applicant submits that he has proved on a balance of probabilities that he warrants the granting of an order of injunction against the respondents as sought in prayer number 4 of his application.

To support this position, the plaintiff/applicant has referred to the case of ***CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK) being sued through its officials namely Stephen Mutoro & 2 others[2014]eKLR*** where the Court stated;

> ***"In Kenya Breweries Ltd Vs Washington Okeyo Civil appl. NO. 332 of 2000 (UR) it was held that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. Also in Halsbury's Laws of England Vol. 24, 4th Edn at paragraph 948, the learned authors observe:-***
>
> ***"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 he case is clear and one which the court thinks ought to be decided at once, or if the act done is 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." (Emphasis added)***
>
> ***I have considered that the article complained of is not only defamatory but its continued publication on the world wide web may continue to damage the Plaintiff's international business, the Plaintiff is a bank of repute operating not only in Kenya but throughout Africa; the continued circulation of the article in the worldwide web of the Defendant may hinder or affect the Plaintiff's reputation and business operations; most of the averments by the Plaintiff in the Affidavit in Support and Further Affidavit were not denied. In addition, the act done can be summarily be remedied by removal of the offending publication. In my view, there exists special circumstances to warrant the granting of the interlocutory mandatory injunction. "***

The plaintiff/applicant has also relied on the case of ***Paul Mwaniki Gachoka & Another v Nation Media Group Limited & Another [2019]eKLR*** where the court held:

> ***"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. "

It is the 1st defendant's case that the applicant does not have a prima facie case as he has failed to file a plaint which forms the basis of whether the plaintiff has a prima facie case or not. The 1st defendant submits that the application should be dismissed on this ground and referred to the case of **Juja Coffee Exporters Ltd v National Bank of Kenya[2019]eKLR** where the court observed;

"The starting point and foundation of a suit is the initiating pleadings. In this case to discover what kind of a case the plaintiff presents, i am bound to look at the plaint, the witness statements and any documents filed therewith."

The 1st defendant maintains that the plaintiff/applicant has failed to prove a prima facie case because the alleged defamatory utterances he made was based on the petition he received and verified information. It is the 1st defendant's further submission that the complaints were made against the company and not the applicant in his own capacity and in any case the company has three other directors with the surname Rai. The 1st defendant has cited the case of **Solomon v Solomon [1897]AC 78** where the House of Lords held that a company is a separate legal entity from its members. The case of ***Wario Sala Guyo v Standard Ltd[2018]eKLR*** the court observed;

The name written in the impugned article is '... Public Health Officer Sala Wario'. The plaintiff fell short of not producing a payslip or a register of staff to show that it was indeed him that the publication was referring to taking into consideration that the name is common in the Borana community. Such evidence would have clarified and shown that he was the only staff by that name as declared by him. However, he produced one witness to corroborate his testimony. Nevertheless, I am of the view that this is not substantial proof. The identity of the person in the article has not been demonstrated to be referring to the plaintiff himself. The fact is that the plaintiff had the obligation to prove to this court that the person in the article was him taking into account that the name is a common name. He ought to have gone the extra mile and proved that it was him the article referred to. He produced only certificates of qualification as such officer but did not produce any proof that he was the public health officer for Isiolo at the time of the publication. Such is not an example of a properly argued case for such information is readily available in the records of the government. Or at least some confirmation thereof from the relevant employer would have been necessary. I am not arguing his case but I am simply showing that he failed to prove that the article referred to him.

It is also the 1st defendant's case that it is not for the plaintiff to assess whether a spoken or written words are defamatory but for the reasonable members of the public. The 1st defendant relied on the case of ***Transcend Media Group v Standard Group Limited [2017]eKLR:***

"At this point the Plaintiff cannot be said to have established a prima facie case to the standards required in a defamation suit.

In the case of ***George Mukuru Muchai Vs The Standard Limited [2001] eKLR*** *it was held that,*

"In my view the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complaint and not how he/she himself/herself feels the words portray about him/her."

It matters not what the Plaintiff perceives the publication to be but what the members of the public perceive it to be. In other words the threshold for determining whether a publication is defamatory is in the reasonable members of the public to whom the estimation of the plaintiff must be lowered."

It is the 1st defendant's submission that the petition raises issues of public interest which are already before parliament and an order of injuction would prevent the 1st defendant from discussing the same and has relied on the case of **Invesco Assurance Co. Limited v Nation Media Group [2004]eKLR** where the court held that;

"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."

It is the 1st defendant's further submissions that the statements made were not actuated by negligence or malice and that the issues raised by the union officials have a basis. To support this position, he has cited the case of ***Wycliffe A. Swanya vs Toyota East Africa Ltd & Another (2009) eKLR*** as referred to by the Court of Appeal Judges in ***Nation Media Group v Jakoyo Midiwo[2018] eKLR*** when the court held that;

"Both the Defamation Act and the Code of Conduct for the Practice of Journalism in Kenya emphasize accuracy and fairness in reporting; without malice and without gross negligence. Therefore, in a suit founded on defamation, the plaintiff must, among other elements, prove that the defamatory article was published maliciously. See: Wycliffe A. Swanya V Toyota East Africa Limited & Another (2009) eKLR. On the other hand, the maker of a statement will be protected if he might have honestly and with reasonable ground believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so. No evidence of malice or negligence was presented."

The 1st defendant contends that the orders sought are too wide and incapable of being enforced with precision since no specified words have

been identified by the plaintiff/applicant. He has relied on the ruling by Mabeya J. in the case of ***Francis Atwoli & 5 others v Kazungu Kambi & 3 others[2015] eKLR*** where it was stated;

> ***"One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case, must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid, the order sought was too general to have any precise meaning."***

The 1st defendant submit that the applicant's business has not suffered irreparable loss for the reason that there are no averments made with regards to the same. He refers to the case of ***Invesco Assurance Co. Limited v Nation Media Group (Supra)*** in support of his submission where the court stated that;

> ***"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."***

Similarly, the 1st respondent has cited the case of ***Gilgil Hills Academy Ltd v The Standard Ltd [2009] eKLR*** the Court held that;

> ***"On irreparable damage it is further alleged in the publications that upon reading the news of Linda's death in the defendant's said newspaper, many parents stormed the school and some sought to withdraw their children. The plaintiff fears that any such further publications may cause the school to collapse.***
>
> ***Is this fear founded? I think not. It is clear from the annextures to the affidavit in support of the application that the defendant repeated the story on three different days. But there is nothing in those affidavits or in counsel's submissions that children were actually withdrawn from the school as a result of that publication. So I cannot see the loss that the plaintiff will suffer that will not be adequately compensated by an award of damages bearing in mind the fact that there is no allegation that the defendant will not be able to pay the damages the plaintiff will be awarded if it succeeds."***

Lastly, the 1st respondent submits that the plaintiff's/applicant's application must fail on a balance of convenience. It is his contention that the court must balance between public interest freedom of speech as guaranteed under Article 33 of the Constitution vis a vis a private interest to reputation. It is submitted that the plaintiff/applicant has failed to demonstrate a clear case to warrant grant of an injunction and that the issuance of the injunction would curtail a discussion of an issue of public interest.

The 2nd defendant's case is that the applicant herein did not file the substantive suit through a plaint or otherwise and that the purported plaint is in relation to HCC E133 of 2020 and not the present suit.

It is the 2nd defendant's submission that words alleged to have been uttered by the 1st defendant which it broadcast were fair comments on matters of public concern raised in the petition by officials of the Kenya Union of Sugar Plantation and Allied Workers (KUSPAW), Kabras Branch to their elected Member of the National Assembly.

The 2nd defendant also contend that this court has no jurisdiction to grant an interlocutory injunction when justification or fair comment has been pleaded and further that since the matters complained of arose in Malava Constituency within Kakamega County, this court lacks geographical jurisdiction to hear and determine this suit and that the file should be transferred to Kakamega High Court.

The 2nd defendant has identified two issues for this court's determination;

i) whether the plaintiff has made out a case for grant of the injunctions sought; and

ii) Whether the reliefs sought are tenable in the circumstances.

On the first issue, the 2nd defendant has referred to the conditions laid down in the case of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358** thus;

> ***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience."***

Similarly, in the case of ***Nguraman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*** the Court of Appeal held that:

> ***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***
>
> ***(a) establish his case only at a prima facie level,***

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

The 2nd defendant submits that the plaintiff has failed to produce, as annexure, the audio or video clips of the alleged broadcast which is the basis of its claim and it is on this ground that the 2nd defendant claim that the plaintiff has failed to make a *prima facie case* with high probability of success. The 2nd relies on the court decision in ***Odero O. Alfred v Royal Media Group Limited [2015]eKLR,***

"The case before me is one of libel. I say so because, publication of words in the course of any programme included in a broadcasting service is treated as publication in a permanent form. GANTLEY ON LIBEL AND SLANDER 11TH ED AT PARAGRAPH 3.9, provides as follows:

'for purposes of the law of libel and slander the publication of words in the course of any programme included in a programme service shall be treated as publication in the permanent form'...there is no doubt that the effect of this is to make such broadcasts libel rather than slander.

It follows therefore that a duty lies on the plaintiff to produce evidence of such a broadcast. In our present case, the plaintiff did not produce such evidence."

Similarly the court in the case of ***Clement Muturi Kigano v Joseph Nyagah[2010]eKLR,*** the court held that;

"To prove his claim even in the absence of a defence? It does not appear so. He pleaded to do so but did not produce in court clips of the broadcasts or copies of newspaper reports containing the utterances of the defendant for this court to see (or even smell) the defamatory words complained of. Will it, nonetheless, be presumed that the plaintiff thus proved his claim? Not quite. He must have definitely been greatly perturbed by the utterances by the defendant and particularly at the time in question. The court was not in doubt about his testimony and that of his witness. But given to prove his claim, the plaintiff did not place before court the requisite evidence to prove the claim and so be awarded general damages."

The 2nd defendant has further submitted that the provisions of Defamation Act, Cap 36 protects the broadcast of the meeting between the union officials of Sugar Plantation and Allied workers (KUSPAW), Kabras Branch and cannot be therefore be the basis of a prima facie case. Paragraph 6 of the Schedule under Defamation Act, Cap 36 provides that;

6. A fair and accurate report of the proceedings of any public meeting in Kenya bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted.

The 2nd defendant has also relied on the case of ***Ibrahim Mukhtar Abasheikh v Royal Media Services & Another [2020]eKLR***, where the Court held that:

In my view, it is a matter of public interest and importance for human trafficking is global menace and any conspiracy places a duty to professional journalist publish such information for the public to know. Following the filing of the indictment in Court against the plaintiff, the proceedings and statements of the case can be accessed under Article 35 to access of information held by the state.

The facts of this case show the position taken by Lord Atkinson in Adam v Ward {1917} AC 309:

"A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or record, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reprocity is essential."

Reference has also been made to the case of ***Mrao Ltd v First American Bank of Kenya Ltd(2003)eKLR***, where the Court of Appeal held that a prima facie case is more than an arguable case, there must be evidence showing an infringement of a right, and the probability of success of the applicant's case upon trial. The Court further stated that it is a case that a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed based on the material presented to court.

The 2nd defendant has also referred to the case of **Fraser v Evans & Another[1969]1ALL ER 8,** the court stated:

"It all comes back to this, there are some things which are such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and make fair comment on it. This is an intergral part of the rights to free speech and expression. It must not be whittled away. The secondary times assert that in this case there is a matter of public concern."

It is the 2nd defendant's submission that its constitutional rights and fundamental freedom should not be sacrificed where no cause of action

is imminent and relied on the case of ***Ibrahim Mukhtar Abasheikh v Royal Media Services & Another [supra]*** where the Court stated that;

> ***"Further, being a matter of great constitutional importance an excellent exposition of Judges task is as contained in the case of Attorney General v Momodoa Jube {1984} AC 689 in which Lord Diplock said:***
>
> ***"A constitution and in particular that part of it which protects and entrenches rights and freedoms to which all persons in the state are to be entitled is to be given generous and purposeful construction."***
>
> ***In the case of Institute of Social Accountability & Another v National Assembly & 4 others {2015} eKLR it was stated that:***
>
> ***"The court is enjoined under Article 259 of the Constitution to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of Law, human rights and fundamental freedoms in the Bill of rights and that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 259 (2) of the Constitution to protect and promote the purpose and principles of the Constitution." (These remarks were also echoed in Njoya & Others v Attorney General & Another {2004} eKLR.)***
>
> ***An interesting aspect of the tort of defamation is its causal nexus with the provisions of Article 33 and 34 of the constitution. The permissibility of the tort of defamation ought to be tested, on account of these articles on the right to free speech and freedom of the media."***

On the ground of irreparable harm, the 2nd defendant submits that the plaintiff has failed to particularize the injuries and to which extent he is likely to suffer that is not capable of being compensated by an award of damages. Reference has been placed on the case of ***Nguraman Limited v Jan Bonde Nielsen & 2 Others [Supra],*** where the Court of Appeal held that;

> ***"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."***

The 2nd defendant further submit that any injury, if any, arising from the alleged defamation can be adequately compensated by an award of damages. In the case of **Nairobi Kiru Line Services Ltd v County Government of Nyeri & 2 others[2016]eKLR**, the Court held that;

> ***"In the present case the applicant has even included a prayer for special and general damages in the plaint. The is also a report filed in court authored by Komu & Associates which has computed loss incurred for the alleged period and has even given a figure of Ksh.63,773,000/= a confirmation that the alleged loss can be quantified. That in my view is the applicants undoing in this application. The applicant has not only included a relief for damages in the plaint but has gone further to compute the loss, a confirmation that his claim if any can be compensated by way of damages, thus effectively confirming that the application does not satisfy the second test."***

On balance of convenience, the 2nd defendant submit that the same is in favour against the grant of the interlocutory orders which have the highest potential of unnecessarily violating its constitutional and fundamental rights. Reference has been made to the case of ***Mumias Sugar Company Limited & 5 others v Musa Ekaya[2017] eKLR*** where Njuguna J. dismissed an application for interim orders for failure to demonstrate a clear case and stated that the applicants being managers of a public company are subject to criticism and it is only in clear cases where the court can grant an interim injunction.

The 2nd defendant further submit that where the defence of fair comment/justification is raised, the Court does not grant the injunction until evidence is analyzed and witnesses examined on the defence which can only be done at trial and not through an application. Reference was made to the case of **Transcend Media Group v Standard Group Limited [2017]eKLR**, where the court held that temporary injunction to prevent the publication of a defamatory statement can only be granted in the clearest cases and that courts have been hesitant to grant such orders where the defence of truth and fair comment has been pleaded.

Similarly, in **Ruth Ruguru Nyagah V Kariuki Chege & Another [2015] eKLR** the Court held that;

> ***"... it was submitted by the defendants that it is not sufficient to merely establish that the words complained of are capable of being defamatory, rather the court must be satisfied that in the final determination of the suit it would inevitably come to the conclusion that the words were defamatory. It was further submitted on behalf of the defendants relying on the case of Harakas & others v Baltic Mercantile & shipping Exchange Ltd and Another (1982) 2 All ER 701 where Lord Denning held;***
>
> > ***" where there was a defence of justification or qualified privilege in respect of a libel, an injunction restraining further publication would not be granted unless it would be shown that the defendant dishonestly and maliciously proposed to say or publish information which he knew to be untrue."***

And in **Mumias Sugar Company Limited & 5 Others v Musa Ekaya[Supra]** where the Court further addressed itself on the general principles in interlocutory injunctions stated;

> ***"The general principles to be considered in interlocutory injunctions as established in the Giella vs Cassman Brown have been modified to suit the uniqueness of defamation cases. Those principles, were settled in the case of Cheserem vs Immediate Media Services that;***
>
> ***"An interlocutory injunction is temporary and only subsists until the determination of the main suit. In defamation, the question of injunction is treated in a special way although the conditions applicable in granting an injunction as set out in the Giella v Cassman Brown & Co Ltd (1973) EA 358 generally apply…In defamation cases, those principles apply together with special law relating to the grant of injunctions in defamation cases where the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in clearest possible cases. The court must be satisfied that the words complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse…….The reason for so treating grant of injunction in defamation cases is that the action for defamation brings out conflict between private interests and public interest, more so in cases where the country's constitution has provisions to protect fundamental rights and freedoms of the individual, including the protection of the freedom of expression."***
>
> ***An interim injunction to prevent the publication of defamatory statement can only be granted in the clearest possible cases."***

The 2nd defendant has maintained that the orders sought are too wide that they are incapable of being granted but also enforced. The 2nd defendant has referred to the case of **John Ntoiti Mugambi Alias Kamukuru v Moses Kithinji Alias Hon. Musa[2016] eKLR,** where the Court held that**;**

> ***The above notwithstanding, there is a more serious problem with this application. The way the orders sought are styled- borrowing from the words of Justice Ringera- is a net cast too wide over a large body of water, and out of all the lake or sea, it will catch all manner of creatures. In defamation cases, it is not possible to issue such boundless injunction which restrain any and all persons from saying anything about the Applicant; that will be a complete impairment of freedom of expression and public interest that truth should be out. An injunction in such cases must be specific in order to prevent such impairment or impediment of freedom of free speech and expression. Care should be taken, therefore, not to issue injunctions which will rapture the law and the Constitution. See the underlined words in the order sought as reproduced below:-***
>
> ***A temporary injunction to restrain the defendant, his servants, agents, employees associates or otherwise from further authorizing, uttering, writing, distributing and or otherwise publishing <u>any interviews, articles, comments and or words that are libelous or injurious falsehood or any similar words defamatory of the plaintiff</u> pending the hearing and determination of this suit***

It has been submitted by the 2nd defendant that an order for mandatory injunction cannot be issued at interlocutory stage especially where a competent defence raising triable issues has been raised. Reference was made to the test set down by the Court of Appeal in the case of ***Kenya Breweries Limited v Washington Okeyo[2002]eKLR,***

> ***"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:***
>
> ***"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 march on the plaintiff …….. a mandatory injunction will be granted on an interlocutory application".***

Similarly in ***Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR,*** the Court of Appeal found that the trial court failed to consider important provisions of the law as well as pleadings before him and erroneously granted a mandatory injunction at the interlocutory stage after concluding that the case before him was a simple and clear one.

Lastly, the 2nd defendant submits that issues of public concern raised in the Petition by Kenya Union of Sugar Plantation and Allied Workers(KUSPAW) cannot be defamatory to warrant grant of orders of injunction. This position has been buttressed by the Court decision in ***Transcend Media Group v Standard Group Limited[Supra]*** where the Court dismissed an application on the ground that a clear case to warrat interim orders had not been demonstrated in a publication touching on public interest and concern.

The issue of jurisdiction has been raised. The 2nd defendant contended that this court lacks the geographical jurisdiction to hear and determine this suit since the cause of action arose in Malava Constituency, Kakamega County where the parties to the suit reside and/or operates its business.

Jurisdiction is everything and without it, a court has no power to make any step as was stated in the celebrated case of **<u>The Owners of the Motor Vessel "Lillian S"</u> Vs <u>Caltex Oil (Kenya) Ltd</u> (1989) KLR 1.** Jurisdiction is specified either by the Constitution or Statute and the Supreme Court of Kenya in the case of **<u>Samuel Kamau Macharia</u> Vs <u>KCB & 2 Others</u>, Civil Application No.2 of 2011** stated this:

> ***"A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is***

conferred upon it by Law"

The jurisdiction of this court is fortified by **Article 165(3)** which grants jurisdiction to this Court in the following terms:-

> ***"(3) Subject to clause (5), the High Court shall have:***
>
> ***(a) Unlimited original jurisdiction in criminal and civil matters;***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***
>
> ***(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
>
> ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
>
> ***(iii) any matter relating to Constitutional powers of State organs in respect of county governments and any matter relating to the Constitutional relationship between the levels of government; and***
>
> ***(iv) a question relating to conflict of laws under Article 191; and***
>
> ***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

The only limitation to the unlimited jurisdiction of the High Court is contained in **Article 165(5) which provides that the high** *court shall not have jurisdiction in respect of matters-*

> *i) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;*
>
> *ii) Falling within the jurisdiction of the courts contemplated in Article 162 (2).*

Additionally, Section 14 of the Civil Procedure Act, Cap 21 provides for place of suing and provides that;

> ***"Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts."***

It is worth noting that the Demand Notice dated 13th August, 2020 , the 2nd defendant's address has been indicated as Kedong House in Nairobi. The 2nd defendant in their Statement of Defence, have not denied the contents of the demand letter. This court finds that the suit is properly before this court on the ground that this court has unlimited original jurisdiction to hear and determine civil and criminal matters.

The court can transfer a suit filed in the High Court to another court of equal status for hearing and determination. The constitution gives weight to the requirement of substantive justice without undue regard to procedural technicalities where a party puts forth convincing grounds for such a transfer. The parties are at liberty to move the court appropriately if they so wish and have the matter transferred to the Kakamega High Court.

It is worth noting that the parties to this dispute have extensively argued this application and their entire case in their detailed pleadings and submissions. It is however, the principle of law that at an interlocutory stage, a court is not to make any definite findings so as not to prejudice the entire case and parties positions.

The issues for determination by this court in the present application are:

> i) Whether the plaintiff/applicant on the facts before this court and in the circumstances of this case has fulfilled the conditions for granting of orders of injunction and deserves the orders being sought against the defendants; and
>
> ii) What orders should this court make.

On the first issue, the plaintiff is expected to prove at this initial stage, taking into account the principles and conditions for grant of interlocutory injunction in defamation cases is; whether he has a prima facie case with probability of success and if the injunction is not granted, whether he stands to suffer irreparable loss not capable of being compensated by damages and if the court is in doubt the matter will be decided on a balance of convenience as espoused in the case of **Giella vs Cassman Brown & Co. Ltd (1973) 358. The principles in Giella v Cassman Brown was modified to suit defamation cases in the** case of **Cheserem vs Immediate Media Services (2000)2 EA**

371 (CCK) where the Court held that;

> ***"An interlocutory injunction is temporary and only subsists until the determination of the main suit. In defamation, the question of injunction is treated in a special way although the conditions applicable in granting an injunction as set out in the Giella v Cassman Brown & Co Ltd (1973) EA 358 generally apply…In defamation cases, those principles apply together with special law relating to the grant of injunctions in defamation cases where the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in clearest possible cases. The court must be satisfied that the words complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse…….The reason for so treating grant of injunction in defamation cases is that the action for defamation brings out conflict between private interests and public interest, more so in cases where the country's constitution has provisions to protect fundamental rights and freedoms of the individual, including the protection of the freedom of expression."***

The court of appeal defined a prima facie case in **Mrao Ltd v First American Bank of Kenya Ltd& 2 others[2003] eKLR,** and stated that:

> ***"...in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter." (per Bosire. J)***

The basis of the alleged libelious words alleged to have been uttered by the 1st defendant which was broadcasted by the 2nd defendant television network on its YouTube platform is a Petition dated 7th July, 2020 to the National Assembly by the officials of the Kenya Union of Sugar Plantation and allied workers (KUSPAW). The Petition is yet to be debated in the National Assembly and therefore the truth or otherwise of the allegations in the Petition is still unknown. The 1st defendant and 2nd defendant have not disputed uttering the alleged libelous statements and posting the same on their YouTube platform respectively in their statement of defence.

In the case of **Yellow Horse Inns Limited v Nduachi Company Limited & 2 others [2017] eKLR**, the Court of Appeal held that;

> ***"All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. So that if the applicant establishes a prima facie case, that alone will not avail him an injunction. The court must further be satisfied that the injury the applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no order of injunction should normally be granted, however strong the applicant's claim may appear at that stage."***

Paragraph 10 of supporting affidavit states the alleged defamatory words as follows:

> "It shows that truly West Kent exploits farmers, exploits workers, there is law applicable to all workers that West Kenya has refused to abide by and I will follow up on it to ensure all workers are not bribed I also pray that all workers participate in the strike planned for the 15 to ensure perhaps that their employer listen to them. First of all the Court has ordered West Kenya to employ its employees on permanent basis but it's astonishing that it is employing its employees as casuals
>
> "Surprisingly, this factory here, work such as welding and woodwork can be done by locals but were surprised by reports that there are foreigners doing this sort of work more than two hundred foreigners are doing their jobs and I wonder how the immigration office allowed their people to enter Kenya and travel to West Kenya to be employed in jobs that belong to the locals while the law is very clear on this issue that mon- locals they can only come in if they come to give expatriate advice."
>
> "So I want to tell Rai, Rai you have exploited the people of Malava for a very long time and perhaps its time that if you do not change you will cry in the toilet"
>
> "this Factory as I say this you people should look after your interests as exploitation of people, our workers from Malava the way you are used when your injured, in an accident you are neglected, not given medical treatment, this is animalistic behaviour. tis animalistic behaviour, I've heard the Union say that this one year contract peoople sign but do not understand it. How can you pay someone Two Hundred Shillings in a day surely, even citizens will hear and wonder, workers loading sugar cane are paid Kenya Shillings Two Hundred per day and the work they do is that they are employed to do after signing this type of contract. The Factory sponsors loans for two or three years and after a one year contract is renewed it stops paying money and now people's property is confiscated as a result."
>
> "All the sugar-cane farmers should know that West Kenya is stealing money from you. The money you get as an advance you should make sure that you have taken that payment manual so that when you go to the bank to take money it seems that is where theft is happening and you are unaware because you are going to take money at the bank without a voucher, you don't understand that your money is being stolen so it seems West Kenya is one of those rich persons that exploit people with impunity.
>
> They have no respect for court orders."

It is necessary to balance the interests of the parties herein. The fundamental rights and freedom under the constitution including the freedom of expression and the private rights of an individual. The defendants have raised a defence of justification and have further submitted that temporary injunction ought not be given even when the words uttered and complained of are libelous as held by Lord Denning in **Fraser Vs Evans,[1969] 1 All ER 8**. I find the circumstances of the case before Lord Denning and this one very different I am persuaded that on the

interim, the applicant has established a *prima facie* case with a probability of success, and that damages may not be adequate compensation in the event they establish their case against the defendants. The balance of convenience also tilts in favour of the applicant. At this stage, it is established that the words complained of can affect the plaintiff's business and their ordinary meaning can be interpreted to be having a negative view on the plaintiff.

The 2nd respondent has 17,200 subscribers on its YouTube Channel and the continued presence of the footage poses a grave threat to the Plaintiff/applicant reputation and business operations since the exposure is wide. The video was uploaded way before the respondent was given a chance to respond to the Petition or even get served with the court rulings being referred to and its continued presence on the YouTube platform portrays the applicant in bad light.

The defendants have argued that even if the applicant was to succeed in its action, an award of damages would be an adequate remedy. However, The reputation of the applicant is on the line and once reputation is lost or damaged, no amount of damages can sufficiently to compensate the offended party for such a loss.

In the case of ***Kenya Breweries Limited v Washington Okeyo [2002]eKLR,*** the court of appeal stated 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 march on the plaintiff …….. a mandatory injunction will be granted on an interlocutory application".***

The plaintiff is also seeking the court to compel the defendants to take down/retract/delete/purge the libelous broadcast hosted on the 2nd defendant's YouTube Channel "West TV Kenya" on its Uniform Resource Locator (URL)https://www.youtube.com/watch?v=kEAOCgbcdeg&t=1991s or any other means be it oral, print or electronic. The effect of this order is to stop any further hosting of the alleged defamatory words on the respondent's platform. The defendants cannot hide behind the constitutional provisions on freedom of speech and air information on their T.V or website which information is likely to injure the plaintiff's reputation. What harm will the defendants suffer by pulling down the impugned material. All what the applicant is seeking at this interim stage is for the material to be pulled down. Whether the information is true, justified or defendable can await the hearing of the main suit.

The respondents contend that there are three directors with the name "Rai" and the applicant has to establish that the words complained of refer to him. It is not denied that those words were uttered and are still available on its You tube website. If the words are found to be defamatory in their ordinary meaning, the defendants cannot allege that the words were aimed at a different director of the company and not the applicant. The most important thing to consider is whether the plaintiff is a director of the company and whether he is using the name Rai. Since the plaintiff is also using that name, I do find that he is within his right to seek legal action against the respondents.

In my view, granting the orders being sought will not interfere with the role of Parliament to undertake its mandate. The 1st defendant claim that he received a complaint from his constituents. That alone is not an issue. The 1st respondent is within his right as the area Member of Parliament to receive complaints or petitions from the people he represents. He is equally within his powers to take the petition to parliament. However, to convert the petition which is yet to be discussed in Parliament to be a personal issue and present it on private You tube or Television station and whose content is deemed as defamatory opens up the defendants to litigation. The court can injunct the defendants and allow parliament to investigate the matter. Parliament can summon all the concerned parties during its deliberations. Any order granted against the defendants will not impede on the work of parliament. Further, the 1st respondent will be at liberty to air his views on the matter during the parliamentary deliberations.

There are two suits relating to the dispute one was filed by the individual director (E132/2020) and the second one (E133/2020) was filed by the company. The applications in these two suits have been heard simultaneously. The respondents contend that the suit should be dismissed as there is no plaint. The plaintiff filed a plaint which gives the plaintiff's name as West Sugar Company limited instead of Jaswant Singh Rai. The 1st defendant has filed a statement of defence dated 12th January 2021 and it gives the plaintiff's name as Jaswant Singh Rai. The general presumption is that the plaint in case number E132 of 2020 relates to the individual director. The court files for both suits give two different parties, one for Jaswant Singh Rai and the other one for West Sugar Co Ltd. This position is different from a situation where no plaint is filed at all. The words complained of are contained in the affidavit of Jaswant Singh Rai sworn on 12th September 2020. The affidavit describes him as the plaintiff and the chairman of West Kenya Sugar Company Limited. I do find that the plaintiff's claim is properly before the court.

The applicant is seeking orders of injunction pending the hearing and determination of the suit as well as a mandatory orders of injunction compelling the respondents to remove from the You tube channel "West TV Kenya" the alleged defamatory words. The defendants contend that such an order will be tantamount to deciding the case at this interim stage. In my view, there is no need to wait until when the case is heard and a finding is made that the alleged words are defamatory then an order is made to have them pulled down. When a *prima facie* case is established then the court should order for the removal of the impugned words from a Website or any portal. Assuming the words are contained in a big notice board placed outside for the public to read, the court can order for the removal of the notice board pending the hearing and determination of the suit.

In the end, I am satisfied that the Notice of Motion dated 18th September, 2020 is merited and it is hereby allowed in terms of prayer 4 and 5 pending the hearing and determination of the main suit. Costs shall be in the cause.

Dated and Signed at Nairobi this 2nd day of March, 2021

.....

S. CHITEMBWE

JUDGE