



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. E094 OF 2020**

**MEGASCOPE HEALTHCARE KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....1<sup>ST</sup> DEFENDANT**

**MUTUMA MATHIU, THE EDITORIAL DIRECTOR**

**NATION MEDIAGROUP LIMITED.....2<sup>ND</sup> DEFENDANT**

**EMMANUEL JUMA, THE MANAGING DIRECTOR**

**NATION MEDIA GROUP LIMITED.....3<sup>RD</sup> DEFENDANT**

**DENNIS OKARI.....4<sup>TH</sup> DEFENDANT**

**GODWINS AGUTU.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me is the notice of motion dated 1/9/2020 taken out pursuant to the provisions of the *Judicature Act, the High Court Practice and Procedure Rules (Part 1 rule 3 (1) & 2; Articles 28, 31 and 33 (3) of the Constitution, Sections 1A, 1B, 3A and 63 (c) & (e) of the Civil Procedure Act; Order 40 Rules 2, 3 and 4 (1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010* in which the applicant is seeking for the following orders:

*a. That pending the hearing and determination of this suit, an order restraining the defendants/respondents, by themselves, their agents, servants or anyone acting on their behalf from writing, producing, broadcasting and publishing and/or republishing defamatory information in any manner whatsoever about the plaintiff/applicant particularly allegation broadcasted and published on 16/8/2020 Prime Time news bulleting in an alleged investigative story titled "Covid 19 Millionaire; Corruption and Covid 19 moving at the same pace" or words of similar nature linking the Plaintiff/Applicant to the contents of the said programme.*

*b. That pending the hearing and determination of the suit, an injunction order be issued compelling the defendants/respondents to remove, pull down, expunge and erase from all forms of media including print, broadcast, digital, and social media any form or nature whatsoever of the programme or similar words or statements or content of like effects relating to the Plaintiff/Applicant*

*c. That the costs of the application be provided for.*

2. The application was based on the grounds set out on the face of it and on the facts deposed in the supporting affidavit of Richard Ngatia, the Managing Director and Chief Executive Officer of the applicant. In it he deposed that the applicant was incorporated in Kenya in the year 2002 and is engaged in the supply and distribution of medical equipment and hospital disposables. It has since gained an unmatched reputation in its knowledge of vital hospital equipment used in critical patient care. As a result, the applicant partnered with the ministry of health in Kenya and as has undertaken several key projects which include the supply, installation, training and commissioning and maintenance for period of 7 years of medical equipment to all government hospitals. The applicant additionally has international recognition in its field evidenced by the numerous awards and recognitions that it has won over the years.

3. The respondents however, aired an interview on 16/8/2020 at 9pm conducted by the 5<sup>th</sup> and 4<sup>th</sup> Respondent which published and

distributed false, offensive, spiteful, misleading and malicious information. It purported that the applicant illegally, maliciously and unlawfully benefitted from the unprecedented Covid-19 pandemic.

4. The damaging allegations aired by the respondents caused extreme condemnation and prejudice against the applicant and culminated in the applicant receiving a 30-day notice of closure on 27/8/2020 for bank accounts held at Victoria Commercial Bank.

5. The applicants claim that malicious intent of the programme is evident with the fact that the respondents offered no evidence in support of their allegations to their viewers. The said interview continues to be viewed locally and globally through the 1<sup>st</sup> Respondents social media platforms and therefore continues to lower the good reputation that the applicant once held.

6. The motion was opposed by the respondents' grounds of opposition dated 9/9/2020 and the replying affidavit of Dennis Okari dated 22/9/2020 where they argued that the applicants had not met the test for granting their prayers. In his affidavit Dennis Okari averred that he is employed by the 1<sup>st</sup> defendant as a special projects editor for it television station NTV. As a special projects editor, his work involves carrying out investigations and highlighting matters that affect the public. This therefore occasioned in his investigation of KEMSA on how they utilized funds that were allocated for the purchase of PPE'S. In his investigation he discovered that the applicant and Crown Health Care Limited had been authorized to handle a consignment at JKIA with Covid 19 test kits that had been donated yet they were not clearing agents. As a result, he put together a report, that was not intended to be malicious, titled Covid 19 millionaires which subsequently aired on NTV.

7. I have considered the application, affidavits and submissions of the respective parties. This is an application for an injunction in a suit for defamation. The legal threshold for grant of injunctions in defamation cases is well captured in the case of **MICAH CHESEREM Vs IMMEDIATE MEDIA SERVICES (2000) 1EA 371** where it was held that:-

**“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in *Giella vs Cassman Brown & co. Ltd (1973) EA 258* generally apply. In defamation case those conditions operate in special circumstances. 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(Emphasis mine) The court must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Normally the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a humane, responsible, truthful and trustworthy defendant.”**

8. The reason why caution should be exercised in granting injunctions in defamation cases is because of the need to balance between the constitutional right to freedom of expression with the individual right to reputation. This is enshrined in Article 33(1) (a) of our Constitution which provides that every person has the right to freedom of expression, including the freedom to seek, receive or impart information or ideas.

9. It was held in **RENTON COMPANY LIMITED V PHILIP KISIA & 2 OTHERS [2012] eKLR** that

**“However, that freedom is limited by clause (3) thereof which provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.**

**It, therefore, follows that in suits for defamation the Courts must weigh between the freedom to express oneself and impart information against the respect for others’ rights and reputation. Where a person alleges that what was said is true, for example, to gag the dissemination of the information may be as detrimental as to allow false information to be published to the detriment of one’s reputation. Reputation once lost, it must be recognized may not be regained. The grant of interlocutory injunctions in defamatory cases, though follow the general principles in applications for interlocutory injunctions, have been modified to suit the unique subject of defamation.”**

10. The learned authors of *Gatley on Libel and Slander 12th Edition, Sweet and Maxwell* at paragraph 25.2 give guidance on what the court should consider in weighing whether or not to grant an interlocutory prohibitory injunction in defamation cases. The court must be satisfied of the following:

- i. That the statement is unarguably defamatory;
- ii. That there are no grounds for concluding the statement to be true;
- iii. That there is no other defence which might succeed;
- iv. That there is evidence of an intention to repeat or publish the defamatory statement.

11. On the first issue of proving prima facie case the applicant provided an excerpt of the programme that was defamatory which read as follows

**Dennis Okari: Has the pandemic produced Covid -19 millionaires?**

**Godwins Agutu:** Absolutely, absolutely. There are numerous millionaires because of Covid -19. This is not a laughing matter let me tell you.....

**Dennis Okari:** As consignment of testing kits and protective gear was being offloaded, two companies were involved in the clearing of the medical supplies. Strangely, the shipment disappeared to a private warehouse and no one wanted to talk about it.....

**Godwins Agutu;** when Jack Ma donated masks literally to help Kenya, where did the masks go? Where were the records? Are there at Kemsca to show this is exactly what we received from Jack Ma? This is what came in? We cleared the goods?

**Dennis Okari:** Megascop Healthcare and Crown Healthcare limited are the two companies that were appointed by Kemsca and authorized to clear the consignment from JKIA. There are records to show they received the Kits but there are no public records of what happened.

**Godwins Agutu:** the reason why the records are not there is because the whole system was manipulated. That consignment came, it was cleared and sold out. Some went to Tanzania. We know.

**Dennis Okari:** so do you know how much was taken to Tanzania or sold rather to Tanzania and what Kenyans received from the Jack Ma donation?

**Godwins Agutu:** Yes, I would approximate and tell you that over three-quarters were taken to Tanzania. The quarter that was left to circulate in the market we sold out to..... were sold out to other companies who were suppliers and are existing suppliers of Kemsca. Thereafter, they inflated the price and sold the goods back to Kemsca.

**Godwins Agutu:** These were all fraudsters fleecing and looting public money both donors and government money, some of these people are in government serving. If some of them are not in government but they jointly agreed to take advantage of the covid-19 to loot massively from the government.

**Godwins Agutu:** there is too much power play, there is too much power trade, there is too much influence because if you look at the people associated with the Megascop company, the Health Crown Company, these are people who really sit with who is who in this country. So, who would even imagine they would want to investigate these people.

**Dennis Okari:** Are you saying they are enjoying state protection?

**Godwins Ogotu:** I don't want to call that state protection. But, I know they are enjoying some protection somewhere.

**Dennis Okari:** Was this looting premeditated or an opportunity presented itself?

**Godwins Agutu:** I thank you this was an opportunity that came and it only came to the rich so that they could actually enrich themselves better.

**Dennis Okari:** At the expense if Kenyans **Godwins Agutu:** hy are normal suppliers on the streets not given a chance to loot? I believe they presented themselves. They wanted to be part and parcel of the system but look at the companies involved. Who are they? Who are they? They are big political financiers.

12. It was therefore the applicant's argument that the words used by the respondents in the programme were understood summarily to mean that the applicant is owned by the elites in society, mainly fraudsters that have taken advantage of the Covid 19 pandemic by diverting public funds for their own selfish pursuits. It was the applicants case that they were not involved in the clearance of the Jack Ma consignment from JKIA which was confirmed by Hon Chris Obure, the Chief Administrative Secretary of the ministry of Transport, Infrastructure Housing and Urban development. He confirmed that it was a government clearing agent that cleared the said consignment. As to whether the above excerpt was defamatory the applicant quoted **Alnashir Visram v Standard Limited [2016] eKLR** where it was held that;

**“84. The big question is whether the words as published of and concerning the plaintiff are defamatory of his character and reputation. A publication is considered to be defamatory of a person's character and reputation if it conveys a meaning which is likely to either lower the persons' reputation in the eyes of ordinary reasonable members of the community; lead those people to ridicule, avoid or shun or despise the person; or injure the person's reputation in business, trade or their profession.**

**85. It is worth noting that the meaning behind the publication can be implied or express. It all depends on the context and circumstances of each case. Thus, defamation may arise from the direct meaning of words used when taken on the face value, through an innuendo from the statement itself, or from an innuendo based on known facts that are not included in the statement. It is also irrelevant whether the publisher or author intended to make a defamatory statement of and concerning the plaintiff when he or she published the defamatory words complained of. The applicable test is an objective test; whether or not the statement is defamatory is judged against contemporary community standards from the stand point of a reasonable person.**

**86. Further, it is important to note that not all criticism or abuse is necessarily defamatory. The main issue is whether or not the ordinary person would tend to form a significantly lower opinion of the plaintiff because the plaintiff is the subject of that criticism.”**

13. On the contrary, the respondents in their submissions argued that Mr Okari stated that from his investigations he established that there existed a relationship between the applicant and Kemsu. He added that he obtained documents from his sources which showed that the applicant had been authorized by Kemsu to clear the consignment but added that he was not able to get copies of the letters as his sources feared reprisals. It was additionally argued by the respondents that the statement by Hon. Chris Obure on the consignment could not be relied on because it was not supported by any documents.

14. To me, the respondents' argument is a double standard because on the one hand they are asking this court to believe that the plaintiff was involved in the clearance of the consignment that carried testing kits yet they did not provide any documentation nor evidence in support of their claims. On the other hand, they ask this court not to consider the statement by Chris Obure which confirmed that the plaintiffs were not involved in the clearance of the said consignment because it was not supported by any evidence.

15. In **Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR**, the Court of Appeal defined a prima facie case as:

**"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".**

16. It is not disputed that the respondents published an expose indicating that the plaintiff unfairly benefitted from the Covid 19 pandemic by utilizing public resources and in light of this I find that the plaintiff has proved prima facie case.

17. On the second ingredient of proving irreparable loss or damage it was the applicant's argument that the protection of reputation is fundamental right enshrined under Article 33 (3) of the Constitution. They argued that the damage occasioned by the programme was substantial and can never be atoned for by damages. The respondents on the contrary argued that their constitutional right of self-expression outweighs the applicants right to protection of their good reputation.

18. On this it is my view that it is not always that the public interest outweighs the private interest. In defamation cases the results can be in favour of private interest vis a vie that which is public in nature. The question that one must therefore ask is whether there would be substantial risk of grave injustice if the injunction is not granted?

19. In the case of **Brigadier Arthur Ndoj Owuor v. Standard Limited [2011] eKLR** the court while allowing the plaintiffs application for injunction held that

**"Once reputation is lost, in view, monetary damages might not be an adequate compensation. Monetary damages might be a consolation, yes, but they will never be adequate compensation for lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in the memory possibly throughout his life."**

20. In this matter I agree with the applicants that there is a high probability that they stand to suffer irreparably if the injunction is not ordered. Having come to the above conclusions I find that the balance of convenience as a result tilts in favour of the applicants herein.

21. On the last issue, the considerations for granting interlocutory mandatory injunctions were well stated in the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** where the Court of Appeal said;

**"The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read:-**

**'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 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 plaintiffs ... a mandatory injunction will be granted on an interlocutory application.'**

The Court of Appeal quoted with approval an English decision in the case of **Locabail International Finance Ltd vs Agroexport and others (1986) 1 ALLER 901** where it was stated:-

**"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction."**

22. Also in the case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal said:-

**"It is strite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."**

23. On examination of the case at hand I agree with the applicants that if a mandatory injunction is not ordered the defamatory programme that is the subject of this suit will be available in the respondents online social platforms and will continue to be viewed by the members of the public which will continue to cause prejudice against the applicants.

24. In light of the above I find that the applicants have met the ingredients necessary for the grant of an injunction. Consequently, the motion dated 1<sup>st</sup> September 2020 is allowed, giving rise to the following orders:

**i. That pending the hearing and determination of this suit an order is granted restraining the defendants/respondents, by themselves, their agents servant or anyone acting on their behalf from writing, producing, broadcasting, publishing and/or republishing defamatory and/or disparaging information in any manner whatsoever about the Plaintiff/Applicant particularly, the allegations broadcasted and published on Sunday 16<sup>th</sup> August, 2020 Prime Time news bulleting or words of similar nature linking the plaintiff/applicant to the contents of the said programme.**

**ii. That pending the hearing and determination of this suit an injunction order is granted compelling the defendants/respondents to remove, pull down, expunge and erase from all forms of media any form or nature whatsoever of the programme or similar words or statements or content, of like effects relating to the Plaintiff /Applicants.**

**iii. Costs of the motion to abide the outcome of the Suit.**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 5<sup>th</sup> day of March, 2021.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> defendant

..... for the 3<sup>rd</sup> defendant

..... for the 4<sup>th</sup> defendant

..... for the 5<sup>th</sup> defendant