



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. E195 OF 2020

STANDARD INVESTMENT BANK LIMITED.....PLAINTIFF

VERSUS

CYPRIAN NYAKUNDI.....1ST DEFENDANT

KAHAWA TUNGU LIMITED.....2ND DEFENDANT

ROBERT ALAI.....3RD DEFENDANT

BUSINESS TIMES KENYA.....4TH DEFENDANT

RULING

The plaintiff/applicant filed a Notice of Motion dated 23rd November 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. An order compelling the Defendants, whereby by themselves, their servants or agents or otherwise, to forthwith remove all articles referring to the Plaintiff's product Mansa X listed in the following articles:

i) "Mansa X: The New Ponzi Scheme Dealing in Online Forex Trading".

ii) Regulator CMA Struggles to Explain Clearly What Ponzi-Like Forex Trader Mansa X Is All About"

iii) Where Do They Invest? Debunking SIB'S Mansa X, The Online Forex Trading Platform That Looks Like a Ponzi Scheme".

iv) SIB's Mansa X Seeks CMA 'Approval' Over Impractical Mode of Business."

v) Mansa X: Another Ponzi Scheme Trying to Fleece Kenyans?

vi) "CMA Fails to Answer Crucial Questions as They Move to Defend SIB'S Mansa X"

from the world wide web, all search engines such as Google, Bing, DuckDuckGo, Yahoo and any other search engines where the articles may be searched, all links making reference to the articles that appear in any search engine, their blogs and social media platforms such as Facebook, WhatsApp, Telegram, Instagram and Twitter and to remove all future references to the Plaintiff's product MansaX and any other articles connected and related to the Plaintiff's business from all internet search engines, their blogs and social media platforms and any printed media.

4. Pending the hearing of this suit an order do issue restraining the Defendants, whereby by themselves, their servants or agents or otherwise howsoever, from publishing and/or causing to be published, tweeting, retweeting, posting or reposting all articles referring to the Plaintiff's product Mansa X and in particular;

i) "Mansa X: The New Ponzi Scheme Dealing in Online Forex Trading".

- ii) *Regulator CMA Struggles to Explain Clearly What Ponzi-Like Forex Trader Mansa X Is All About*”
- iii) *Where Do They Invest? Debunking SIB’S Mansa X, The Online Forex Trading Platform That Looks Like a Ponzi Scheme*”.
- iv) *SIB’s Mansa X Seeks CMA ‘Approval’ Over Impractical Mode of Business.*”
- v) *Mansa X: Another Ponzi Scheme Trying to Fleece Kenyans?*
- vi) *“CMA Fails to Answer Crucial Questions as They Move to Defend SIB’S Mansa X”*

From the world wide web, all search engines such as Google, Bing, DuckDuckGo, Yahoo and any other search engines where the articles may be searched, all links making reference to the articles that appear in any search engine, their blogs and social media platforms such as Facebook, WhatsApp, Telegram, Instagram and Twitter and to remove all future references to the Plaintiff’s product MansaX and any other articles connected and related to the Plaintiff’s business from all internet search engines, their blogs and social media platforms and any printed media.

5. The costs of the application be the Plaintiff’s in any event.

The application is premised on the grounds on the face of the application and the supporting affidavit of Nicholas Ng’ang’a Wangunyu, the Executive Director of Strategy of the plaintiff, sworn on 23rd November, 2020 who deposes that on 6th November, 2020 the 1st Defendant caused to be published on his web-site <https://www.cnyakundi.com/> with links to his social media platforms of Facebook, Telegram, Instagram and Twitter an article “*Mansa X: The New Ponzi Scheme Dealing In Online Forex Trading*”. The article contained defamatory words and innuendos that intend to show that the Plaintiff’s product is meant to con Kenyans similar to a Ponzi Scheme and that the Plaintiff’s investment return of 24% per annum was unrealistic since the assets that would support the promised investment return on the shadowy product were not revealed. A further publication; “*Regulator CMA Struggles to Explain Clearly What Ponzi-Like Forex Trader Mansa X Is All About*” was published on 19th November, 2020 on the 1st defendant’s web-site <https://www.cnyakundi.com/> with links to his social media platforms of Facebook, Telegram, Instagram and Twitter another article. On 6th November, 2020 The 2nd and 3rd defendants on the other hand, published an article; “*Where Do They Invest? Debunking SIB’s Mansa X, The Online Forex Trading Platform That looks Like A Ponzi Scheme*” in the website <https://nairohost.co.ke> . The 2nd Defendant, on 19th November, 2020 caused on its blog <https://www.kahawatungu.com/tag/blog//> with links to the 3rd Defendant’s social media platforms Facebook, Instagram, Telegram, WhatsApp, Twitter and social media forum an article “*SIB’s Mansa X Seeks CMA ‘Approval’ Over Omractical Mode of Business.*”

The Plaintiff/applicant avers that the 4th Defendant published two defamatory articles on 5th and 19th November, 2020; “*Mansa X; Another Ponzi Scheme Trying to Fleece Kenyans?*” and *CMA Fails to Answer Crucial Questions as They Move to Defend SIB’s Mansa X,*” respectively on its blog called “business times” <http://businesstimes.co.ke/> .

The 1st defendant opposed the application through his Replying Affidavit dated 16th December, 2020. He admits publishing the articles referred to in paragraph 7 and 8 of the applicant’s supporting affidavit. However, he maintains that the articles were not defamatory but were published in good faith to raise genuine questions on the product being offered to the public.

The 3rd defendant also opposed the application through his Replying Affidavit dated 16th December, 2020 and avers that the articles he published on his official twitter handle, @robertalai, were not defamatory but he sought answers on the Plaintiff’s/applicant’s product, Mansa X, which was offered to the public.

The 2nd and 4th defendants/respondents neither entered appearance nor filed Replying Affidavits and therefore did not oppose the said application.

The parties agreed to have the application canvassed by way of written submissions. The Plaintiff’s and the 1st & 3rd Respondent have filed their submissions dated 13th January, 2020 and 21st January, 2020 respectively.

*The Applicant submits that the articles published by the defendants are libelous as they meet the tests set out in the case of **CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFECK) Being Sued through its officials namely Stephen Mutoro & 2 others [2014] eKLR**, where the Court listed the following:*

- i) That the words complained of were defamatory, that is, they tend to lower the claimant’s reputation in the estimation of right thinking members of society;*
- ii) The words referred to the claimant*
- iii) That the words were malicious.*

It is the Plaintiff’s/applicant’s submission that the defendants have not disputed that they published and republished various defamatory articles to their huge followers online against the Plaintiff’s Mansa X product on various dates. That the defendants did not seek clarification or adduce any evidence to support their concerted attacks on the plaintiff’s product.

*It is the Applicant’s submission that the defendants are liable to the publications that appear online and in all their social media sites and since filing of the present suit, no efforts have been made to pull down the defamatory articles. The applicant referred to the case of **Wishart vs Murray and Others [2013] 3 NZLR 246; [2013] NZHC 540** where Courtney J. set out one of the general rules relating to the law*

governing Information Technology and states that there is prima facie liability for anyone who participates in or contributes to the publication of defamatory statements of others. The case of *Emmens Vs. Pottle (1885) 16 QB 170*, has also been referred to in support of the above proposition, the court stated that it is clear that the absence of actual knowledge does not prevent a person who, prima facie, publishes a defamatory statement from being liable; there must also be no reason to think it likely that the material being published contained such statement.

It is the plaintiff's further contention that the defendants as publishers have a duty to verify the authenticity and correctness of statements before publishing which they did not undertake. This position was advanced in the case of *Patrick Nyoike vs People Limited [2013] eKLR*, where the court held that it was necessary for the defendant to check the veracity of the story from the plaintiff himself or the members of his staff who were obvious reference point.

The Applicant further submits that the defendants were liable for the continued republication of unverified information as propounded in Gatley on Libel and Slander, 9th Edition. Where the author states inter alia that **"if you repeat a rumour, you cannot say it is true by proving that the rumour in fact existed. You have to prove that the subject matter of the rumour is true."** This position was also upheld by Rawal J. (as she then was) in the case of *Safaricom Limited v Porting Access Kenya Limited & Another (2011) eKLR*, when she held that the repetition of rumour is a libel itself and quoted the case of *Lewis & Another –vs- Daily Telegraph Ltd. (1963) 2 ALL ER 151* wherein the court quoted *Blackburn J. in Watkins –vs-Hall (1868) LR 3QB at 401* and held inter alia;

"If one repeats a rumour one adds one's own authority to it, and implies that it is well founded, that is to say, it is true"

The Applicant further submit that the defendants have not met the ingredients for pleading the defenses of justification and fair comment since they have not given particulars of the facts on which their fair comments for the benefit of the public are based and secondly, they have failed to render any evidence to support the defamatory articles. Further, the Plaintiff/Applicant holds that the defendants published the defamatory statements which words referred to the Plaintiff and its product and were malicious for the reason that the Defendant published and continued to publish the libelous articles without into the facts thus meeting the ingredients of defamation as laid down by Odunga J. in *Phinehas Nyagah v Gitobu Imanyara[2013]eKLR* where Justice Odunga stated:-

"Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts.

The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. However, in libel, the words cannot be protected as mere abuse since it is presumed that the defendant had time for reflection before he wrote them. Secondly, the words must refer to the plaintiff. Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.

That, however, is not the end of the matter. The defamatory material must be shown to have been published by the defendant (emphasis mine)"

The Applicant has maintained that the defendants should not be allowed to hide behind the provision of Articles 33 and 46 and of the Constitution of Kenya to propagate defamatory statements. The Plaintiff has relied in the case of *Safaricom Limited v Porting Access Kenya Limited & Another (Supra)* where the Court held that;

"Our Constitution has now given all the parameters of the said right in Article 33. It gives every person the right of Freedom of Expression but in Article 33 (3) it also stipulated that in the exercise of the Right to Freedom of Expression every person shall respect the rights and reputation of others... Without fail the court, as has been enjoined by the Constitution, has to tread on the balancing rod even at this stage"

While in the case of *Phinehas Nyagah v Gitobu Imanyara(Supra)*, *Odunga J. at paragraph 15* held thus;

“However, before determining the above issues it is important to set out the various principles of the law of defamation. Under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion and provides that the freedom to express one’s opinion is a fundamental freedom. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.”

The Applicant has also referred to the case of *CFC Stanbic Bank Limited v Consumer Federation of Kenya (Supra)* where Mabeya J. held that;

“...when exercising the freedom of expression under Article 33 of the Constitution, there is a duty of care on the dignity and reputation of others. In the same breath, since the right to reputation is now a constitutional right, I hold that while exercising the consumer rights enshrined under Article 46 of the Constitution, the reputation and dignity of others must be respected.”

It is the Applicant’s further contention that the court can issue mandatory injunctions at an interlocutory stage and cites the *Safaricom Limited Case (Supra)* where the court granted an interlocutory injunction that was mandatory in nature restraining the defendants from making or publishing any derogatory words or statements pending hearing of the suit. The Court quoted **Lord Esher M.R in *Coulsen vs Coulsen (1887) 3 TLR 846*** who observed that the court will grant an interim injunction, when;

- i) The statement is unarguably defamatory.**
- ii) There are no grounds for concluding that the statement may be true.**
- iii) There is no other defence which might succeed.**
- iv) There is evidence of an intention to repeat or publish the defamatory statement**

Further, the applicant cited the decision in *Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR*, where the Court of Appeal dismissed an application by the Appellant that sought to set aside the mandatory injunctive orders granted by the High Court to remove a defamatory article from circulation until the determination of the suit where the respondent had established a *prima facie* case that the article complained of was defamatory. The court in the *Nation Media Group case (Supra)* referred to volume 24 **Halsbury’s Laws of England**, 4th Edition paragraph 948, where the learned authors state as follows:

“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 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 Applicant has also cited the case of *Nelson Omolo Achola v George Omondi Ajwala [2013] eKLR* where the Court while reiterating the principles of temporary prohibitory and mandatory injunctions as laid down in *Giella vs Cassman Brown & Co. Ltd (1973) E.A 358* stated that;

“An applicant for a temporary mandatory injunction must therefore show that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. The applicant must also fulfill the usual conditions necessary for granting interlocutory injunction set out herein above. In the case of *Shepherd Homes Ltd. –vs- Shadahu [1971] 1 ch.34, Meggery J. had this to say on interlocutory mandatory injunction;*

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

Reference is also made to the case of *Bob Collymore & Another v Cyprian Nyakundi[2017] eKLR* and the applicant submit that where the reputation of the plaintiff is at stake, the court can grant interlocutory mandatory injunction. The Court held that;

“The reputation of the Plaintiffs is at stake in view of the contents of the publications. Once a reputation is lost, monetary damages might not be an adequate compensation. The Plaintiffs are/were the CEO of the leading telecommunication mobile company in the country, Safaricom limited. They are people held in high esteem and regard amongst the members of the public and once their reputation is lost, it would be difficult for the same to be regained. Monetary damages might be a consolation but not adequate compensation in this case.”

In the case of *Whispering Palms Estate Ltd & 3 others v Cyprian Nyakundi & 4 others [2018] eKLR* the court held that the plaintiff had proved a *prima facie* case as the statement published in tweets/posts/words/matters/publications/utterances could not be justified and granted

an injunction against the defendant.

In opposing the application, the 1st and 3rd defendants submit that the applicant has not presented a *prima facie* case to warrant granting of the orders sought as established by the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR where the Court held:-

“A prima facie case in a civil application includes but is 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 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.”

In their joint submissions, the 1st and 3rd respondents rely on the case of *John Ntoiti Mugambi Alias Kamukuru vs Moses Kithinji Alias Hon. Musa* [2016] eKLR where the court cited with authority the case of *MICAH CHESEREM Vs IMMEDIATE MEDIA SERVICES (2000) 1EA 371* where the court laid down the legal threshold for granting injunctions in defamation cases and held:-

“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.”

Reference is also made to the case of *Transcend Media Group v Standard Group Limited* [2017] eKLR where the court observed 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.

The 1st and 3rd defendants maintain that the posts/comments were a fair comment made in good faith in response to the plaintiff’s Mansa X product, which they felt had not been adequately explained to the public. The 1st and 3rd defendants contend that the questions raised was in a bid to enforce consumer right to information under Article 46 of the Constitution of Kenya. The 1st and 3rd defendants have asked the court to take judicial notice of the fact that Kenyans have been conned in pyramid schemes thus necessitating the need for transparency, and that its only fair and just that questions are asked about such products.

It is the 1st and 3rd defendants’ further submission that the plaintiff/applicant has only speculated on possible loss but failed to demonstrate any loss it has suffered as a result of the defendants queries. Reference has been made to the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court of Appeal held that 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.

On balance of convenience, the 1st and 3rd defendants submit that since the applicant has failed to establish a *prima facie* case with a high chance of success and irreparable loss, it follows then that the balance of convenience should not be in its favour. The case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR where the Court held that if at all any doubt exists in the trial Judge’s mind as to whether the two tests above had been met, the application ought to have been determined on a balance of convenience.

Lastly, the 1st and 3rd defendants submit that a mandatory injunction to compel them to remove all the articles complained of should not be granted at an interlocutory stage in the absence of special circumstances and in the clearest of cases, of which the present case does not qualify for. In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeyo* [2002] eKLR cited by the 1st & 3rd defendants to buttress this position, the Court of Appeal cited the case of *Locabail International Finance Ltd. V. Agroexport and others* [1986] 1 ALL ER 901 at pg. 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 high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

Legal Analysis:

The principles and conditions for grant of interlocutory injunction has been laid down in case of *Giella vs Cassman Brown & Co. Ltd* (1973) 358, **the plaintiff needs to prove** a prima facie case with probability of success, irreparable loss if the injunction is not granted and lastly if the court is in doubt on the above two principles, the matter will be decided on a balance of convenience. **The principles in *Giella Case* were 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 in the case of *Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR* defined a *prima facie* case as one which on the material presented in 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 respondent.

The plaintiff's complaint is based on several alleged libelous articles regarding its product Mansa X deliberately published and republished by the defendants on its online platform with millions of followers on diverse dates to tarnish and ruin the plaintiff's company reputation. The 1st and 3rd defendants have not disputed that they indeed published the articles on their respective blogs and online platforms, however, they seek to justify the words in the articles as fair comments.

According to *Gatley on Libel and Slander, 6th Edition page 706*, the authors stated that;

"If the words complained of contain allegations of facts, the defendant must prove such allegations of facts to be true. It is not sufficient to plead that he bona fide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however bona fide. Bona fide belief in the truth of what is written may mitigate the amount, but it cannot disentitle the plaintiff to damages."

The 1st and 3rd defendants have not submitted any evidence to show that the plaintiff/applicant is likely to be a Ponzi Scheme. There is no evidence that they made any inquiries directly to the plaintiff's/applicants and/or the Capital Market Authority on the concerns raised in the articles. The burden of proving any allegations should be carried by the one who alleges and the duty is on the 1st and 3rd defendants to prove truthfulness of their statement as they are the publishers of the same.

The 1st and 2nd defendants have argued that the questions asked were in a bid to enforce consumer right to the information necessary for them to gain full benefit from goods and services as provided for under Article 46 of the Constitution. This right however is subject to the limitations under Article 24 of the Constitution and should therefore not prejudice the rights and fundamental freedom of others.

In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*, the Court of Appeal observed that 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 plaintiff has submitted that the continued presence of the publication of the articles are lowering the reputation of the plaintiff and hurting its business, I am satisfied that the applicant has a genuine concern considering that its core business is offering financial services and therefore thrives on goodwill and confidence it portrays with its potential and existing clients. The balance of convenience also tilts in favour of the applicant. The respondents will not suffer any loss if the articles or publications complained of are removed from publication. The respondents cannot portray themselves as the protectors of consumer rights of members of public and at the same time trample upon the rights of investors.

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".

This is an interlocutory application. The court has to balance between the rights of the applicant to protect its reputation and business on the one hand and the respondents' right to freedom of expression under Article 33 and freedom of the media under Article 34 of the Constitution. Indeed if the respondents wanted to raise concern on the applicant's product and if in their view the product may end up to be a ponzi scheme, they could have alerted the regulator of the financial institutions in Kenya and seek to find out whether the applicant's product had been given the greenlight to be presented to Kenyans. Such an action would have shown how concerned the respondents are. The respondents decided to clothe themselves with the responsibility of belittling the product and paint it negatively. As of now this court cannot agree with the respondents that the applicant's product is likely to turn out to be a ponzi scheme. Indeed the postings by the respondents do confirm that an explanation was given by the Capital Markets Authority but the respondents considered the explanation as unsatisfactory and considered it as an impractical mode of business.

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 prayers 3 and 4 pending the hearing and determination of the main suit. Costs shall be in the cause.

Dated and Signed at Nairobi this 10th day of March, 2021

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S. CHITEMBWE

JUDGE