



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. E042 OF 2021**

**OWEN KOIMBURI .....PLAINTIFF**

**VERSUS**

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

**SAM KIPLAGAT.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 11/2/2021 the plaintiff/applicants filed a notice of motion brought pursuant to *Section 3, 3A, 63 (e) of the Civil Procedure Act, Order 40 Rule 2, Order 51 of the Civil Procedure Rules 2010* and all other enabling powers of the court seeking orders that;

**a. Spent**

**b. Spent**

**c. Spent**

**d. Pending the hearing and determination of this suit, an interim injunction do issue directed at the defendants restraining them by themselves or any of them, their agents, servants or otherwise howsoever from posting on any electronic or print media, internet, web page and/or in any media platform or any other platform wheresoever or publishing or disseminating any manner whatsoever the defamatory words, statements or content or any similar words or statements or content of like effect arising from or relating to the plaintiffs engagement or tenure as the company secretary of Williams & Kennedy Company.**

**e. Pending the hearing and determination of this suit, a mandatory injunction be issued directed at the defendants compelling them by themselves, their agents, servants or otherwise howsoever to erase and remove in its entirety the defamatory article posted on their online platform [www.businessdailyafrica.com](http://www.businessdailyafrica.com) or from their various posts websites, blogs or their other forms of print, electronic and social media of any form or nature whatsoever whether online or not the said defamatory words, statements or content or any similar words or statements or content of like effect relating to the plaintiffs engagement or tenure as the company secretary of Williams & Kennedy Company.**

2. The application is based on the grounds set out on the face of it and on the facts deponed in the supporting affidavit of Owen Koimburi who swore that he is a certified public accountant practicing as a professional auditor and is currently the chairman and senior partner of an internationally affiliated Mazars certified public accountants (Kenya).

3. He stated that he played a key role in the establishment of the Institute of Certified Secretaries and the Institute of Certified Public Accountants.

4. On 7/9/2020 the defendants are alleged to have published on the Business Daily newspaper an article titled “*DCI cites ex-bank chief in Sh. 3bn property fraud*” where they stated defamatory statements where they indicated that the plaintiff could be charged with false assumption of authority, four counts of forging annual returns and altering a document with intent to defraud.

5. The article further stated that a Mr. Nganga colluded with the plaintiff to prepare fraudulent tax returns for the years 1984-1987 to make a dead company appear to be operating.

6. The defendants went ahead to post the said article on their website and added a photo captioned “*Sh. 800 million Kiambu Mall along Kiambu Road*”. The said defamatory articles are still accessible to the general public and continues to gravely injure the plaintiff’s professional reputation.

7. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants' who filed grounds of opposition dated 23/3/2021 where it was argued that the plaintiff/applicant has not met the test for an interlocutory injunction and the court ought not to issue a temporary injunction in a defamation matter as doing so will curtail the freedom of expression and freedom of the media.

8. The defendants additionally argued that the applicants seek a grant of mandatory injunction which ought not to be granted at an interlocutory stage.

9. On 24/3/2021 the parties by consent agreed to dispense the application by way of written submissions.

10. The plaintiffs in their submissions argued that they have a prima facie case that the contents published by the defendants was false and it was up to the defendants to verify and weigh the truth and their failure to confirm the authenticity of the DCI's letter amounted to malice.

11. On irreparable harm the applicant has argued that open access of the defendants' webpage and the fact the plaintiff is the senior partner/chairman of an internationally affiliated audit firm and that the continued publication of the defamatory article to a substantial number of readers has caused injury to the plaintiff's reputation which damages may not be restored.

12. On mandatory injunction the plaintiff argued in his submission that the defamatory article is available online and on the defendant's websites which continues to damage the plaintiff's reputation and the defamation can be summarily remedied by the removal of the offending article.

13. The plaintiff additionally argued that when it comes to freedom of expression, it is not disputed that Article 33 and 34 of the constitution guarantees freedom of expression and media freedom but these freedoms are not absolute and have to be exercised in a manner that does not interfere with the fundamental rights of others.

14. The defendant on the other hand contended that an interlocutory injunction is an equitable remedy and is discretionary therefore it should not be granted where the defendant was acting in public interest and relied on a report by the DCI.

15. The defendants added that what was published was fair and accurate account of the report that was contained in the documents filed in court, in proceedings and what was presented in court.

16. As for malice the defendants argued that they have set out what the basis of the publication was and clearly it was not intended to tarnish the reputation of anyone. Additionally, that the plaintiff has not established that the words by the defendants were defamatory and resulted in others shunning or avoiding the plaintiff.

17. The defendants further stated that no material has been placed before this court showing what loss the plaintiff suffered or stands to suffer from the publication. The defendants therefore maintained that the plaintiff has not made out a case for the grant of a temporary injunction nor a mandatory injunction.

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

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

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

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

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

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

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

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

22. On the first issue, it is the position of the applicant that the defamatory publication made by the defendants is false and malicious. They stated that the defendants did not verify and weigh the truth about the authenticity of the letter by the DCI. On the second issue the applicant argued that he is the chairman of an internationally affiliated audit firm and the publication of the article caused injury to the applicant's reputation.

23. Having considered the arguments put forward by the parties, this court is of the opinion that on the face of it that the subject publication would cause any reasonable person to perceive the applicant unfavorably and that the applicant would suffer a greater inconvenience if the

order of injunction is not granted. It therefore follows that the balance of convenience tilts in favor of the applicant.

24. On the last issue that concerns the prayer for a mandatory injunction is the applicant’s argument that the article is available on the defendants website and continues to damage the plaintiffs’ reputation and the defamation can be summarily remedied by the removal of the offending article.

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

**“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances it will not normally be granted. However, if the case is clear, and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff. A mandatory injunction will be granted on an interlocutory application.” ... From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a mandatory injunction at this stage. I also find that the applicant has not brought any credible evidence to show that the injury to his reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage.**

26. The defendants in their submission argued that the plaintiff did not establish that the words published resulted in others shunning or avoiding him. Indeed, this court agrees that the plaintiff did not communicate to the court how he suffered after the article was published, therefore this court finds that the plaintiff did not meet the criteria to award a mandatory order of injunction as there were no special circumstances.

27. The motion dated 11/2/2021 partially succeeds. It is allowed. Consequently, an order of prohibitory injunction is granted restraining the defendants by themselves, agents and/or servants from posting on any electronic or print media, internet and or webpage or from publishing, disseminating the defamatory words, statements or contents arising from or relating to the plaintiff’s engagement or tenure as the company secretary of Williams & Kennedy Company pending the hearing and determination of this suit.

28. The prayer seeking for a mandatory order of injunction is declined at this stage.

29. Costs of the motion to abide the outcome of this suit.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant