REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. E086 OF 2021

MEDIHEAL HOPSITAL & FERTILITY CENTRE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ROBERT ALAI.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the notice of motion dated 6th April 2021 seeking the following orders:

> **i)** and **ii)** Spent.
>
> **iii)** THAT this Honourable court do issue a temporary order restraining the defendant by himself or his agent, servants, from further publishing any social media posts including tweets, Facebook posts or in any way publishing defamatory words and/or similar words concerning the plaintiff pending the hearing of this application pending the hearing and determination of this suit.
>
> **iv)** THAT a mandatory order of injunction be issued directing the defendant to remove, bring down or delete any posts or tweets concerning the plaintiff pending the hearing of this suit.
>
> **v)** THAT costs of this application be awarded to the plaintiff

2. The application is premised on the grounds on its face and the supporting affidavit by Hon. Dr. Swakip Ranjan Mishra. A summary of which is that the deponent and his wife are the founders of Mediheal Group of Hospitals in Kenya, Rwanda and Addis Abbaba, (EXB SRM). The defendant /respondent has been described as a cyber- activist and a blogger running a number of social media accounts including a verifier Twitter account under the handle @robert alai, a facebook under the name Robert Alai, an histogram account under the handle @robertalai and blogs by the name www.kahawatungu.com and www.techmtaa.com (EXB SRM 3).

3. In paragraphs 8- 13 the deponent describes what the plaintiff stands for, what it has done and achieved in terms of provision of medical services. He depones that between 6th April 2020 – 28th March 2021, the defendant/respondent published on his social media accounts statements regarding the plaintiff and the deponent several words/statements and posted images of the deponent and words in respect to the plaintiff. All these extracts have been annexed in a bundle (EXB SRM 6).

4. He avers that the published statements are defamatory and have caused the plaintiff public embarrassment while the defendant/respondent makes economic profit from it. The publications he avers are affecting him and the business yet they are false. He therefore urged the court to restrain the defendant/respondent from publishing any further defamatory statements/articles relating to the plaintiff.

5. The defendant/respondent filed a replying affidavit sworn on 6th May 2021. Generally, he denies being the author of the articles complained of. He however adds that he believes in the rights of Kenyans expressing themselves and criticizing or calling out public officials for their actions or inactions.

6. He avers that if the posts indeed exist, were made by a person who shares a name with him or one who has created an account using his name.

7. The application was disposed of by written submissions. Mr. Thuita for the plaintiff/applicant has submitted that through his media platforms the defendant/respondent had published matters expressly and impliedly alleging the following:

- The applicant's hospitals are a hub for human organ trafficking and smuggling,

- Its hospitals are managed by criminals.

- The hospitals are engaged in the practices of exploiting patients and detaining security documents such as Title deeds illegally.

- The plaintiff is engaged in the exploitation and under payment of staff.

- The plaintiff's services are shoddy and not trusted by its own management staff.

8. Counsel submitted that the principles governing the grant of temporary injunctions in defamation cases are similar to those governing injunctions in other cases and the only additional requirement is that the orders are given in clear cases. He referred to the case of **John Ntoiti Mugambi alias Kamukuru V Moses Kithinji alias Hon. Musa [2016] eKLR** which cited the case of **Micah Cheserem v Immediate Media Services [2000] I EA 371** where it was held that:

> *"Applications 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 injunction set out in Giella vs Cassman Brown & Co. Ltd [1973] EA 258 generally apply. In defamation cases 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. 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."*

9. Counsel has submitted that the position of the plaintiff as a leading provider of medical services locally and regionally is not disputed. All the credentials of the main director and chairman of directors are not disputed. That the articles about the plaintiff are under the identity of a person known as "Robert Alai".

10. He contends that despite the defendant/respondent's denial of authoring the posts /articles the denial is unconvincing because of the following;

- He has not denied being a social media influencer.

- His accounts are verified. There is no other known Robert Alai.

- He is a recipient of a National award.

- Photographs used are those of the defendant/respondent.

- He has not lodged a complaint of imposters or people using his name to besmirch other.

11. The plaintiff/applicant contends that from a plain reading the tweets are offensive and there is nothing produced to show they are true. The allegations are serious and are ruining the operations of the plaintiff. He referred to the case of **Coulsen v Coulsen [1987] 3 TLR 846** where Lord Esther M.R stated that the court would 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.

He therefore submits that the plaintiff had established all the four (4) conditions required for issuance of a temporary injunction.

12. On irreparable harm that cannot be remedied by damages counsel has argued that no amount can be adequate compensation for a harm caused to one's reputation. On this he referred to the cases of:

i) Nguruman Ltd v Jn Bonde Nielsen and 2 others [2014] eKLR

ii) Brigadier Arthur Ndoj Owour v Standard Limited [2011] eKLR.

He argues that as a result of those defamatory posts the plaintiff is likely to lose patients and income.

13. Counsel submits that the balance of convenience tilts in favour of the plaintiff/applicant. He agrees that there is freedom of expression under Article 33 (3) of the Constitution but the same is limited. There is nothing for the defendant/respondent to lose if the orders are issued. On the other hand, the plaintiff/applicant is bleeding in the absence of the orders.

14. For the grant of the mandatory injunction counsel relied on the case of **Lucy Wangui Gachara v Minudi Okemba Lore (Malindi court of Appeal Civil Appeal No 4 of 2015) [2015] eKLR**. The Judges cited with approval the Indian case of **Bharat Petroleum Corp Ltd v Haro Chand Sachdeva**, **AIR 2003** where Gupta J of the Delhi High Court observed as follows:

> *"While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things."*

15. Counsel urged the court to grant the mandatory injunction since the defendant/respondent had continued to publish offending posts.

16. Were and Orange advocates for the defendant/respondent filed submissions dated 9th July 2021. Counsel submitted on what was set out in the case of **Giella v Cassman Brown & Co. Ltd [1973] E.A 358**, as principles for grant of an injunction. It's his submission that the plaintiff/applicant had not established a prima facie case for the issuance of the orders sought. He relied on the case of **Mrao Ltd V First American Bank of Kenya Ltd & 2 others [2003] eKLR** to define a prima facie case.

17. It's his submission that for the plaintiff to succeed it must first establish that indeed the alleged publication was made, it referred to the plaintiff, was defamatory and that it was made by the defendant. He argues that the plaintiff has failed to prove any of the above. That the annextures are inadmissible and they offend the provisions of section 106B and 106 B (4) of the Evidence Act. He relied on the case **of Mumias Sugar Company Ltd & 5 others V Musa Ekaya [2017] eKLR** in support of the submission that a certificate had to be tendered to give credence to the material tendered in court.

18. He contends that the plaintiff/applicant had to tender evidence to show that the defendant/ respondent owns the cited social media accounts. He further adds that the attached print outs reveal that the posts complained of are in reference to SWARAP MISHRA as a member of parliament for Kesses constituency. The Defendant/respondent did not therefore understand why the suit/application were brought by the plaintiff as a separate entity.

19. On irreparable damage counsel has cited the case of **Nguruman Ltd (**supra**)** and submits that there is no evidence of losses presented to the court to confirm the allegation. On the balance of convenience, he argues that since the first two conditions have not been met there was no need for this third limb to be considered.

20. While referring to the case of **John Ntoiti Mugamabi (**supra) he submitted that the present case is not one of the clearest of cases owing to the short falls he has already pointed out. Counsel has further submitted that a mandatory injunction should not be issued since the plaintiff/applicant has failed to prove essential ingredients in this case.

21. He referred to the case of **Kenya Breweries Ltd & another V Washington O. Okeya [2002] eKLR** where the court of Appeal stated thus:

> *"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."*

He finally urged the court to dismiss the application.

Analysis and determination

22. I have carefully considered the application, grounds and affidavits, both submissions and cited authorities. The principles on issuance of an interlocutory injunction are well set out in the **Giella v Cassman case (**supra**).** For such an injunction in a defamation case, the requirements go a notch higher as was held in the case of **Micah Cheserem (**supra**)** referred to by both counsel. Defamation cases fall in a special category.

23. The first issue is whether a prima facie case has been established by the plaintiff. The posts relied on by the plaintiff/applicant are from a Facebook account and Twitter handles of one Robert Alai. The defendant goes by that name. The posts as contained in EXB SW6 on the face of it are offensive. The defendant has denied authoring them questioning their authenticity. He claims that if they are genuine they were done by someone else. Counsel for the defendant/respondent submitted that because a certificate under Section 6b of the Evidence Act was not annexed or produced then the posts cannot be said to be authentic.

24. He relied on the case of **Mumias Sugar (**supra**).** A reading of that case shows that the defendant therein admitted being the author of the posts and being the holder of the Facebook account and even pleaded justification for the posts. The court however held that without the certificate the court could not grant the orders sought.

25. In this particular case the defendant who is known as Robert Alai has denied authoring the posts. He claims that there could be somebody else going by that name, which may be true or not. According to the plaint the last post was on 28th Match 2021. This application dated 6th April 2021 was filed on 7th April 2021 when a temporary injunction was issued. The said order has been extended until now.

26. I have not seen any complaint filed herein indicating that any other posts have been published by the said Robert Alai. What does that mean? The Robert Alai who was served with the order has complied with the said temporary injunction even without a certificate to confirm ownership of the account being filed. The rest will be a matter of calling evidence during the full hearing of the case.

27. For now, what should be done is to stop the publishing of the offensive posts and tweets. The court will after hearing all the evidence determine whether the author of the posts is the defendant/respondent or another Robert Alai as alleged.

28. I have gone through the offensive posts and found that some talk of Swarap Mishra and others talk of Mediheal Hospital and Fertility center. The said Swarap Mishra is one of the two directors of the plaintiff. The same posts refer to Swarap Mishra as one who owns Mediheal. He has in the supporting affidavit explained his relationship with the said Hospital and for now that is sufficient. He is one of the founders of the facility and one of the directors too.

29. Any patient reading the posts in EXB SW6 would not want to be associated with the said Health facility for fear of having their organs removed. This is a business entity and such offensive posts are impacting on it negatively. At this moment one would not expect the plaintiff/applicant to come up with a quantification of the losses incurred so far.

30. The loss of reputation must be guarded until the matter is heard and determined as monetary damages are unlikely to compensate such injury. The plaintiff has set up facilities in Kenya in Eldoret, Nairobi, Parklands, Eastleigh, Nakuru, which are serving a lot of patients. If the posts remain active the facilities will lose many more patients and a lot of income will not be generated. I find this to be a clear case where a temporary injunction should issue in terms of prayer no (iii) of the application. Prayer no (iv) will not issue at this stage as its one of the prayers in the main suit. Issuing it now will be determining the case before its heard.

31. The upshot is that the application is merited and a temporary injunction is granted in terms of prayer no (iii) of the application dated 6th April 2021.

Costs shall be in the cause

Orders accordingly.

Delivered online, signed and dated this 6th day of October, 2021 in open court at Milimani Nairobi.

H. I. ONG'UDI

JUDGE