



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. E096 OF 2021

UNGA GROUP PLC.....PLAINTIFF/APPLICANT

-VERSUS -

MAUREEN WANJIRU WANYAGA.....DEFENDANT/RESPONDENT

RULING

This ruling relates to the plaintiff/applicant's application dated 20th April, 2021 seeking the following orders:

1. Spent

2. Spent

3. THAT pending the hearing and determination of the suit filed herein, a temporary order of injunction be and is hereby issued barring the Defendant/Respondent by herself, her agents, assigns and/or servants from making and/or publishing defamatory statements against the Plaintiff/Applicant on her Facebook page or in any other news, electronic or social medium platform under her control, insistence or direction.

4. THAT pending the hearing and determination of the suit the Defendant/Respondent be and is hereby ordered to delete permanently any such defamatory statements, article or publications from her Facebook page or in any other news, electronic or social medium platform under her control, insistence or direction and to issue a public apology in the same platforms as the defamatory statements, article or publications were published.

5. THAT pending the hearing and determination of this suit the Defendant/Respondent is hereby restrained from making any public comments, giving interviews to the media, in relation to the Plaintiff/Applicant, its subsidiaries and associate companies, and its products.

6. THAT the costs of this application be borne by the Defendant.

The application is supported by the affidavit of **LYNDA BANJA**, the applicant's Legal Officer, sworn on 19th April, 2021 and the grounds on the face of the application. The grounds proffered are that the respondent by herself and/or her agents published or caused to be published false and malicious statements against the applicant, its associate companies, brands and products in various media houses and social media platforms. That the said publications which are still in circulation on social media have attracted a wide view, comments, likes and shares thus continues to impugn and defame the applicant's reputation.

In its submissions dated 4th June, 2021 the applicant has identified the following issues for determination by this court; whether the Applicant has satisfied the conditions upon which temporary injunction can be granted, whether the applicant's application seeks to limit the respondents's freedom of expression as guaranteed under Article 33 of the Constitution of Kenya, whether the facts and comments attributable to the respondent can be verified as facts and not malicious comments against the applicant; and who should bear the costs of these proceedings.

The applicant has referred this court to the case of **Giella vs Cassman Brown(1973) E.A. 358** where the court listed the legal requirements to be satisfied in an application for orders of injunction. These are;

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

b. The applicant must show that he/ she will suffer irreparable loss which cannot be compensated by an award of damages.

c. If the above two have not been satisfied, then the application should be determined on a balance of convenience.

The applicant submitted that in defamation cases, the test for grant of orders of injunction is subjected to higher standards as was highlighted in the case of **Ahmed Adan v Nation Media Group Limited & 2 Others [2016] eKLR** where Mbogholi Msagha J. (as he then was) stated that;

“I must decide in this application if the Plaintiff has placed before the court strong *prima facie* evidence that the words complained of are untrue. Is it manifest that the words complained of are libelous and that that fact is unlikely to change at trial? Is the defamation complained of obvious, atrocious and wholly unjustified? Has it inflicted the most serious injury to the Plaintiff’s character and reputation? The above questions are of course asked over and above the usual test for the grant of interlocutory injunction in ordinary cases. First and foremost, a plaintiff must establish a *prima facie* case with a probability of success. Then he must establish that unless the injunction sought is granted he stands to suffer irreparable loss. If he passes these preliminary hurdles, the court can then interrogate the higher standard required in defamation cases as set out above.”

In defining *prima facie* case, the applicant has relied on the case of **Mrao Ltd vs First American Bank of Kenya and 2 others (2003) KLR 125**, as cited in the case of **Moses C. Muhia Njoroge & 2 Others vs Jane W. Lesaloi and 5 Others[2014]eKLR**, where the Court of Appeal define *prima facie* in the following terms;

“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”.

It is the applicant’s submission that the test as to what amount to defamation is an objective one dependant on what a reasonable person would perceive on reading the statement. The court of appeal in the case of **Musikari Kombo v Royal Media Services Limited [2018]eKLR** listed the ingredients of what constitutes defamation to include; (i)The existence of a defamatory statement;(ii)The defendant published or caused the publication of the defamatory statement;(iii) The publication refers to the claimant.

According to the applicant, the social media posts published by the respondent would lead a reasonable man to perceive that the applicant’s rabbit products are the cause of death and loss of rabbits by rabbits farmers, including the respondent; that the applicant is responsible for the woes of rabbit farmers including those of the respondent by manufacturing sub-standard and contaminated rabbit products; and that the respondent’s posts seeks to cast doubt on the applicant’s other products e.g EXE Brand Products.

On whether it will suffer irreparable loss, the applicant submits that it has built its reputation over 100 years and is a household name in Kenya in the manufacture and distribution of broad range of human, animal nutrition and health products. Consequently, compensation of loss of the applicant’s reputation shall not be adequate. In support of the balance of convenience, the applicant has made reference to the case of **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & Others [2016]eKLR** .

It is the applicant’s submissions that the respondent has contravened the right to freedom of expression as provided for in the Constitution and would therefore not be prejudiced if the court intervenes. It is the applicant’s contention that the exercise of the right to freedom of expression is limited to the extent that the reputation of others is not harmed. It is further submitted for the applicant that whereas defamatory statements are taken to be false, it is the duty of the respondent to prove otherwise. Reliance was placed on the case of **Samuel Ndung’u Mukunya vs Nation Media Group Limited & Another [2015] eKLR** where the Justice Aburili made reference to **Gatley on Libel and Slander 6th Edition Page 706** observed as follows:

“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 defense of fair comment does not extend to cover misstatement of facts, however bona fide. Bonafide belief in the truth of what is written may mitigate the amount, but it cannot disentitle the plaintiff to damages.”

The applicant has also sought for costs of the application on the ground that it has satisfied the conditions upon which a temporary injunction can be granted. It has relied on the Supreme Court decision in the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others[2014]eKLR** where the court held that costs follow the event.

In opposing the application, the respondent filed a replying affidavit sworn on 7th May, 2021 in which she avers that she has been using and promoting Unga Feeds since 2017. That on or around 20th September, 2020 after purchasing 50 bags of rabbit feed from Unga Distributor(Spenza Farm Care), her rabbits started getting sick and subsequently died. That after consultation and investigation by the Unga Group doctors, she was advised to discontinue the usage of the said feed which was later changed. However, despite changing the feed and the distributor, her rabbits kept getting sick and dying. The respondent maintains that during the same time other rabbit farmers experiencing similar problems starting posting online through Kaka Sungura Social Media Platform.

The respondent avers that fair comment is not unlawful as it relates to issues of public interests. Further that the facts and comments attributable to her can be verified as facts and not malicious comments against the applicant. The respondent maintains that the application is an abuse of the court process as it only seeks to gag the respondent from speaking the truth and frustrating a genuine discourse and not to redress any loss or damage to their reputation.

In her submissions, the respondent sought to address the issue of whether the matter before this court is defamatory. The respondent submit

that the statements were made in good faith and in public interest this she argues was because its undeniable fact that rabbits died after consuming Unga Feeds in September, 2020. That postmortem reports and government laboratory test revealed that the applicant's defective batch of feeds had high levels of aflatoxin. In her further submissions, the respondent pleads fair comment and comments in public interest on all the allegations levelled against her by the applicant. The respondent has also raised issue with the failure by the applicant to join the media houses to these proceedings who were responsible for the publication of the interviews. She submits that this failure is not only in bad faith but is a means to intimidate a voice of a legitimate victim.

Analysis and Determination:

The principles and conditions for grant of interlocutory injunction were laid down in the case of **Giella vs Cassman Brown & Co. Ltd (1973) 358. The plaintiff needs to establish 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 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.”

As to what amounts to a *prima facie* case, the Court of Appeal in the case of **Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR** it stated that a *prima facie* case is 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.

In the present application, the applicant's complaint is based on the alleged publication of false and malicious statements by the respondent against its subsidiary companies, brands and products in various media houses and social media platforms which has attracted thousands of views, comments, likes and shares which is intended to cause maximum reputational damage. The alleged false and malicious statements was to the effect that the applicant's rabbit pellets “Fugo” together with its EXE products are toxic and are causing the death of rabbits and that the products should be boycotted. The respondent has not disputed that she indeed published the statements on her facebook page and attended various media interviews on the same subject she however seeks to justify her statements as fair comments made in public interest.

In my view and upon studying an excerpt of the impugned publication, on the face of it the same would likely cause any reasonable person to develop a negative perception of the applicant, its associate companies, subsidiaries, their brands and products, thereby causing its reputation to suffer gravely. I therefore find that the applicant has shown that it has a *prima facie* case with a probability of success. This court however takes note that its duty is not to delve into the merits of the case or to consider the evidence to be adduced at the trial, in order to determine whether a *prima facie* case exists. The Court of Appeal decision in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** states as follows:-

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

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 the amount of compensation can be measured with reasonable accuracy or the injury or harm is in such a nature that monetary compensation, of whatever amount, will never be an adequate remedy. The plaintiff has submitted that it is a household name having built its business in Kenya for over 100 years and therefore the continued presence of the publication of the articles are lowering its reputation and business. I am in agreement with the pronouncement by Justice Mbogholi Msagha(as he then was) in **Amir Grinberg & 2 others v Andrew Baker [2021] eKLR** that “when it comes to defamation, a name is the only thing a person has. It is priceless. A reputation once destroyed or lost may never be redeemed.”

Both parties have submitted on the provision of Article 33 of the Constitution which guarantees freedom of expression subject to the limitation set out under Article 33(2) and (3). The applicant has argued that the continuous circulation of the defamatory publications continues to injure the applicant's reputation and thus is a violation of its right under the Constitution. The respondent on the other side has argued that aside from being fair comment, the issue at hand is of public interest as it affects and threatened the livelihoods of hundreds of rabbit farmers all over Kenya.

It could be true that there was a batch of rabbit feeds that was poisonous and led to the dying of rabbits. That allegation may be supported by the post mortem results conducted by experts. However, in my view, that in itself cannot lead to a blanket conclusion that the plaintiff's products are poisonous. Such a statement may lead to a conclusion that all of the plaintiff's products, past, present and future are poisonous. It would require more explanation from the plaintiff to its customers that there was only one batch or batches of their products which affected the rabbits. Other clients might construe the comments to mean that the entire plaintiff's product line is poisonous.

I do find that the comment on the affected batch served its purpose and there is no need to keep on circulating and reinforcing the same issue. On a balance of probabilities, the plaintiff is the one who is likely to suffer more than the defendant. The freedom of information guaranteed in the constitution has to be exercised within certain limits and should not result into defaming and ultimately destroying one's business. No prejudice shall be suffered by the respondent if the orders are granted.

I do find that the application dated 20th April, 2021 is merited and is hereby granted as prayed. Costs shall follow the outcome of the main suit.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

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S. CHITEMBWE

JUDGE