



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. E078 OF 2021

LIMAVEST LTD.....1ST APPLICANT

ALICE SHICCO NGUNJIRI.....2ND APPLICANT

LEONARD WAWERU KURIA.....3RD APPLICANT

-VERSUS-

DIANA OMACH MARUA.....RESPONDENT

RULING

1. The live prayer in the motion dated 19th March 2021 seeks an injunction to restrain the Respondent, **Diana Omach Marua**, her agents, representatives, and associates from publishing further defamatory statements “*as relates to this subject suit*” (*sic*) pending the determination of the suit. The prayer as drafted is misleading, but from material canvassed, it is evident that the subject matter thereof is intended to be defamatory material relating to the business of 1st, 2nd and 3rd Applicants, namely, **Limavest Ltd, Alice Shicco Ngunjiri and Leonard Waweru Kuria**, respectively, and not to the suit *per se*.

2. The motion does not refer to Order 40 of the Civil Procedure Rules which donates power to issue interlocutory injunctions, but invokes section 1A, 1B, 3A of the Civil Procedure Act and section 3 and 5 of the Defamation Act. The motion is premised on the grounds on the face of the motion which are amplified in the affidavit in support of the motion, sworn by the 2nd Applicant, who describes herself as a sole shareholder in the 1st Applicant company and the 3rd Applicant as her husband and a director. The 2nd Applicant deposes that the 1st Applicant is involved in the business of real estate investments and farm management on behalf of clientele in respect of land acquired by the clients or owned by the 1st Applicant.

3. Concerning this dispute, she deposes that in furtherance of its business, the 1st Applicant had purchased a land parcel measuring 100 acres in Malindi which was still in the process of adjudication, hence without title; that subsequently the said land was offered to clients among them one **Jennifer Njeri Kamau** (hereafter Jennifer) who purchased two acres vide a sale agreement which clearly indicated that the land was under adjudication, and that Jennifer also executed a farm management contract for a further acre; that subsequently a dispute arose in respect of the latter contract which resulted in Jennifer demanding refund of all monies paid; that to resolve the dispute, an agency agreement was signed between the parties to facilitate the sale of Jennifer’s three plots by the 1st Applicant to another client who would remit the proceeds directly to her; that as of March 2021 a sum of shs. 100,000/- was outstanding from the said other client and the 1st Applicant cancelled the said agency agreement upon receiving threats by alleged agents of the Respondent to resolve the matter or be exposed as frauds on social media.

4. The deponent further states that on 9th March 2021 the Defendant published 8 posts on social media to the effect that the Applicants’ business was a scam, and the Applicants fraudsters out to fleece their clients. Included in the posts were alleged messages and a video by Jennifer and the Respondent’s own statement describing her relationship as a brand ambassador for the 1st Applicant, warning her social media fans that she had withdrawn from the project upon discovering that it was a scam and promising to ensure compensation for “*whoever had been conned*”. The deponent states that Jennifer, allegedly alarmed by the publication denied authorizing the Respondent to post details of her dispute on social media and that she and the Applicants tried in vain to get the Respondent to remove the offensive posts. It is deposed that the Applicants have worked hard to build a brand through aggressive marketing on online platforms.

5. It is deposed that the information published by the Respondent is false and has injured the reputation of the Applicants and their brand, causing loss of business. The deponent asserts that the Respondent’s persistent refusal to pull down the posts has led to significant damage to the Applicants in the form of reduction in new sales, souring of relationships with media houses and other influencers that have previously associated with the Applicants, as the credibility of the Applicants and its employees has been severely compromised; that existing clientele have stopped making payments pending further clarity; that other business run by the 2nd & 3rd Applicant have been adversely affected due

to the negative online publicity; and that some clients have withdrawn their business. Finally, the deponent asserts that the offending publication has been widely disseminated with negative repercussions on the Applicants and the court ought to grant a temporary injunction.

6. The motion is opposed by way of a replying affidavit sworn by the Respondent. The Respondent deposes that she is a public figure and a social media influencer with large number of followers and is involved in the marketing of various products and businesses on her social media account and platforms on behalf of clients and or businesses. She further deposes that at the request of the Applicants in November 2020 she had agreed to and did market the Applicants' business on her social media platforms in exchange for 2 pieces of land; that one of the clients who responded to her posts was Jennifer whom she referred to the Applicants; that later on, Jennifer contacted her to complain that the Applicants had failed to furnish her with a title for land she purchased from them and accusing the Respondent of working with fraudsters, threatened to expose her. The deponent asserted that in exercise of her right to defend her name and or reputation from being tarnished due to her association with the Applicants, she had published the material on her social platforms to highlight her plight and to warn the public.

7. In defence of the said publications, she asserted that the Applicants did not hold a title to the land they were offering for sale to members of the public; that the disclaimers respecting the title to the land as contained in the standard sale agreements with clients did not amount to adequate disclosure; and that Jennifer contacted her because the Applicants had made false promises concerning the title documents despite her having made payment of over Sh.700,000/- for her parcels. She deposed that her posts on social media accounts were justified, done in good faith and without malice, pursuant to her the moral duty to the public and to protect her reputation as a public figure and social media influencer with a large local and international following. She asserted finally that that motion has not met the threshold for the grant of an order of interlocutory injunction and ought to be dismissed.

8. The motion was canvassed by way of written submissions as directed by the court on 26th June, 2021. On behalf of the Applicants, counsel limited himself to canvassing considerations applicable to the grant of temporary injunctions in ordinary suits. He submitted that the Applicants had demonstrated a proper case warranting the grant of a temporary order of injunction. He relied on the *locus classicus* on the applicable principles, namely, **Giella v Cassman Brown & Co Ltd (1973) EA 358**. Further, citing the decisions on **Mrao Ltd v Frist American Bank of Kenya Ltd & 2 Others**, and **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR inter alia**, counsel argued the Applicants have demonstrated a *prima facie* case, as the publication of the defamatory statements is uncontested by the Respondent. He asserted that the consequence arising from the publication upon the Applicants is irreparable harm taking the form of loss of reputation, mental anguish, loss of business profits, loss of client confidence and ridicule by the public. He contended that the injuries cannot be adequately compensated by an award of damages, and that there is no evidence that the Respondent can satisfy such an award. He contended that the Respondent was not entitled to defame the Applicants while supposedly defending her own name and urged the court to grant the orders sought.

9. Counsel for the Respondent relied on the case of **Giella v Cassman Brown & Co Ltd** as cited in **Orawo & Another v Mistri & Others [1988] eKLR**, **Mrao Ltd v Frist American Bank of Kenya Ltd & 2 Others** (supra), and **Muhia Daniel Kimeu & Another v Equity Bank (K) Limited & Another [2017] eKLR** to submit that the Applicants have not demonstrated a *prima facie* case. Reiterating Jennifer's complaint and asserting that the Applicants did not own the land they offered for sale, counsel argued that the Respondent's publication was justified and made on an occasion of privilege arising from the Respondent's duty as a public figure and social media influencer. He argued that no evidence of malice was demonstrated. On this score, he relied on the case of **Phineas Nyaga v Gitobu Imanyara (2013) eKLR**. He stated that the Applicants have not shown that the publications were indeed false and defamatory by design. Counsel further contended that the Applicants do not stand to suffer irreparable damage if the injunction is not granted and called to his aid the decision in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**. He asserted that the balance of convenience is in the Respondent's favour, citing **Nawaz Abdul Manji V Vandeeep Sagoo & 8 Others (2017) eKLR**.

10. Regarding the applicable threshold for the grant of interlocutory injunctions in defamation cases, counsel contended that it is higher than that in ordinary cases as held in **Micah Cheserem v Immediate Media Services (2000) 1EA 371**, and that the jurisdiction must be exercised with the greatest caution. Relying on that decision and **Board of Trustees of Kiambu Institute of Science and Technology & 5 Others v Nation Media Group Ltd & Others** and **Francis Atwoli & 5 Others v Hon. Kazungu Kambi & 3 Others (2015) eKLR** he argued as follows.

11. That the court ought to proceed with caution in exercising its jurisdiction and only grant an interlocutory injunction in the clearest cases because such an injunction would impinge upon the Respondent's constitutional right to freedom of speech and to impart information as a social media influencer. Counsel took issue with the prayers in the motion, terming them vague. He submitted that in order to succeed, the Applicants must satisfy the court that the statement complained of is manifestly defamatory; that there are no grounds for concluding that it is true; that there is no defence with potential to succeed; and that there is evidence of an intention to repeat or republish the defamatory statement. Referring to the Respondent's plea of justification and qualified privilege in defence, counsel asserted that such defence can only be defeated if there is evidence of malice.

12. The court has considered the parties' rival affidavits and annexures as well as their respective submissions. There is no dispute that in the material period in 2020, the Applicants claiming beneficial ownership of some 100 acres of land in Malindi set out to offer it for sale to interested purchasers. In November 2020, or thereabouts, the Applicants approached the Respondent, a self-declared social media influencer to help market the business on her social media accounts including Instagram and You-Tube. The Respondent was to receive 2 plots out of the said property as payment in kind. Apparently, the Respondent had proceeded to launch a marketing campaign on behalf of the Applicants. It is not possible to tell with what success, but one buyer was Jennifer who had paid to the Applicants about Sh. 700,000/- in August 2020 for some 3 acres of the property. By March 2021, Jennifer was getting restless as she had not received her title to the land. It is not clear who was first between Jennifer and the Respondent to contact the other, but undeniably, Jennifer had communicated her grievance to the Respondent around September 2020.

13. Subsequently, the Respondent took to social media and on 9th March made several posts including among others, two personal posts by the Respondent entitled "**PART 1 # LIMAVEST_IS_ _A_SCAM** ", "**# PART 2# LIMAVEST_IS_ A_SCAM**", a post carrying the logo and name **Limavest** upon which was emblazoned a bold stamp impression in red , reading "**SCAM**" , a video and screenshot of text messages allegedly containing Jennifer's complaint to the Respondent and copies of receipts from **Limavest** acknowledging Jennifer's

payments.

14. In her personal posts, the Respondent described her engagement with the Applicants and Jennifer, admitted that she had not conducted due diligence prior to marketing the land and while distancing herself from the venture, promised that she would ensure compensation for those who may have been “conned”. She warned her followers that any engagement with the Applicants would be at their “own risk”. Admittedly, the material was widely disseminated, eliciting various responses and the Respondent did not pull down the posts as demanded by Jennifer and the Applicants subsequently by the letter dated 10th March, 2021.

15. The court’s duty is to determine whether the Applicants have made a case for the grant of an order of interlocutory injunction against the Respondent. The principles governing the grant of an interlocutory injunction as enunciated in **Giella v Cassman Brown & Co. Ltd [1973] EA 358** are settled. Similarly, as to what constitutes a prima facie case, this is settled too since the decision in **Mrao v First American Bank of Kenya Ltd & 2 Others C. A. No. 39 of 2002; [2003] eKLR**. Both decisions have been reaffirmed and applied by superior courts in countless subsequent decisions including the recent decisions cited in this case by the parties.

16. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** restated the principles governing the grant of interlocutory injunctions enunciated in **Giella’s** case and observed that the role of the Judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles. The Court cautioned that such a court ought to exercise care not to determine with finality any issues arising. The Court expressed itself as follows:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella’s case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

a) establish his case only at a prima facie level

b) demonstrate irreparable injury if a temporary injunction is not granted.

c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

17. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established, the court need not investigate the question of irreparable loss or balance of convenience.

18. As to what constitutes a *prima facie* case, the Court of Appeal delivered itself as follows: -

“Recently, this Court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The Applicant need not establish title, it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant’s case is more likely than not to ultimately succeed.”

19. This being a suit for defamation, the counsel contained in **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** is pertinent to the consideration of the instant motion. This is what **Khamoni J** (as he then was) stated in that case:

“Maybe counsel did not address me fully on the relevant law because it is not appreciated that the question of an injunction in defamation cases is treated in a special way. Here injunction is not treated in the way it is treated in other cases. I looked at the relevant authorities and considered the matter in the case of Francis P Lotodo vs Star Publishers & Magayu Magayu in HCCC No 883 of 1998 and found that though the conditions applicable in granting an injunction as set out in the case of Giella vs Cassman Brown & Co Ltd [1973] EA 358 generally apply, in defamation cases those conditions operate in special

circumstances. Those conditions have to be applied together with the special law relating to the grant of injunction 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 the clearest possible cases. The Court must be satisfied that the words or matter complained of are libelous. It must be satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.

But how will the Court be so satisfied when the application for an injunction in a defamation action is, like in the instant case, filed at the initial stage? It is filed before pleadings are closed. How will the Court be so satisfied?

Further, even when the Court is satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse, can the Court grant an injunction where the respondent has the defence of qualified privilege or where the respondent is pleading justification or fair comment? We will be at a stage where the Court has not yet heard and seen witnesses testify. Their evidence has not therefore been tested, canvassed and evaluated. The respondent or defendant is pleading qualified privilege and therefore justification or fair comment, being a defence which defendants in actions which are not for defamation normally do not have. Does the Court grant an interlocutory injunction?

From the authorities and the law, I considered in the case of *Francis P Lotodo*, I found that defamation cases are special actions as far as the granting of injunctions is concerned. This is because generally and basically, actions or cases of defamation bring out a conflict between private interest and public interest, and this is more so in Kenya where we have the country's Constitution which has provisions to protect fundamental rights and freedoms of the individual including the protection of freedom of expression".

20. The starting point therefore is the Constitution. Article 33(1) of the Constitution guarantees every person's right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that "*In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others*". Article 32(1) guarantees the right to freedom of conscience, belief and opinion, inter alia. Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. See also the provisions of the Defamation Act. Contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & Others* [1969]1 ALLER 8

"The right of speech is one which it is for the public interest that individuals possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed."

21. In *Halsbury's Laws of England 4th Edition Vol. 28* paragraph 10- a defamatory statement is defined as follows:

"...a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business".

22. Additionally, *Gatley on Libel and Slander 6th Edn.* states that:

"A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another"

23. As stated in *Selina Patani & another v Dhiranji V. Patani* [2019] eKLR, the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:

"In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward v Standard Ltd.* HCC 1062 of 2005 as follows:

- i. The statement must be defamatory**
- ii. The statement must refer to the plaintiff**
- iii. The statement must be published by the defendant**
- iv. The statement must be false."**

24. The Respondent has not disputed publication of the material in question concerning the Applicants on her social media platforms. Therefore, the alleged offensive publication may appear to pass the test (ii) and (iii) above. Regarding the other tests, the court must determine whether *prima facie*, the admitted publication was defamatory and false and or whether the plea of qualified privilege and justification *prima facie* shield the Respondent.

25. In the case of the *Onama v Uganda Argus Ltd* (1969) EA 92, the Court of Appeal for Eastern Africa stated as follows:

"In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those "who have a greater or special knowledge of the subject matter".

26. The Court stated in **Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR** that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the ***“probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published. -Clerks & Lindsell on Tort 17th Edition 1995-page 1018.”***

27. Upon a cursory look at the contents of the Respondent’s admitted social media posts of 9th March, 2021, there can be no doubt that the publications contain statements which clearly refer to the Applicants and, which, if false, are patently libelous of the Applicants. The Instagram post for instance, contains a logo of the 1st Applicant upon which is emblazoned in red colour and bold capital letters the word “SCAM”. The post appears to speak for itself. As for the two accounts in respect of the matter posted by the Respondent each is entitled “ # LIMAVEST_IS_A_SCAM” . This too appears to speak for itself. In the body of the posts, it is stated inter alia that:

“PART 1....I would like to say this is one of the hardest posts I have ever Written. I have really thought about it and this is after a few months of trying to get a Solution. @Waweru Kuria and @Shiccowaweru of @Limavest on this Picture approached me sometime Mid- Last Year wanting me to Be a Brand Ambassador of their Company @Limavest that deals in "Selling Land"... I committed myself to popularizing the business even before visiting the site. This was the First Mistake I made..... I was Delighted to attract Customers to buy land from them majorly from my following on Social Media and Fans from My YouTube Page. Some Fans went an extra mile to send Money to @Limavest even without seeing the Land being Sold out of the trust they had in me. To my followers, I apologize for not doing my due diligence to Confirm if the said Land had the right Documentation by the Time I was Making the trip to see the "LimaVest project" in MALINDI. See Next post....

#PART2.... On 25th of September, 2020, We went to Malindi for a Site Visit with some potential buyers and Customers Who had Paid in advance after seeing My YouTube adverts. This is when I had a Video call Conversation with #Jennifer Who is based in the US. She had sent her Brother to assess the 3 acres of Land she had bought. Prior to the site visit, #Limavest had lied to #Jennifer that her Land was already planted with Pineapples and the Title Deeds were being processed.

Attached are Chats of #Jennifer Who had paid over Ksh700,000. It's now over 6 months and she has not received any of her Title Deeds or documentation to prove ownership of the three acres of land she paid for. When she requested for a refund, there was a lot of back and forth and eventually @Waweru Kuria & @Shiccowaweru Told her to go to Court! How rude! That is When I realized that @limavest was not genuine. I immediately made a decision to stop the marketing. Months ago I distanced myself from this but It was a hard thing to decide how I will break the News to my followers that are still sending Money Wakiamini Diana hawezi Uza kitu mbaya; and that's why I had to do it today

I did not want to think that I have been used to mislead any of my innocent followers to investing in a Scam. As of today #WaweruKuria & @Shiccowaweru have blocked all calls from this specific client #Jennifer who is now crying out to me to ensure that her money is refunded.

*My team and I will do our best professionally and legally to make sure whoever has been conned is compensated. My apologize to Jennifer for what you are going through.. Let me take this opportunity to State that; I @Diana Marua am no Longer working with @limavest , #Waweru or @Shiccowaweru and I wish to distance Myself from this malicious act and any association with @Limavest
My dear followers please note that any land purchase, you engage yourself with them will be at your own risk. Thank You and May God Bless you all for your continued Support.” (sic)*

28. The total import of the above allegations is an imputation of acts of fraud on the part of the Applicants, namely, obtaining money by falsely pretending that they owned and were able to sell parcels of the land in Malindi to willing members of the public. Indeed, it is imputed that the Applicants hold no title to the said land and therefore were con artists out to defraud members of the public. Clearly, these are activities if confirmed, would be criminal in nature attracting penal sanctions. The Applicant’s contention is that the allegations are false. Through her replying affidavit defence statement and submissions, the Respondent appears to raise the defence of justification and qualified privilege.

29. In **Michah Cheserem’s (Supra)**, the learned Judge cited **Lord Coleridge CJ** (as he then was) in **Bonnard and Another V. Perryman (1891 -4) ALLER 968**, later quoted by Denning MR in **Fraser v Evans & Others**, to the effect that:

“Until it is clear that an alleged libel is untrue, it is not clear that any rights at all have been infringed, and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions”.

30. In her responses and defence, the Respondent appears to assert that her assertions were true mainly because the Applicants did not hold a title to the suit property and that there was a complaint by Jennifer, who has subsequently abandoned the Respondent denying that she instructed the Respondent to publicize her complaint concerning repayment of her monies by the Applicants. The text messages attributed to Jennifer as posted by the Respondent seem to show that Jennifer had due to various reasons, including non-delivery of title documents developed doubts about the completion of her agreement with the Applicants, but these alone do not seem to be a basis for the Respondent to paint the Applicant in broad strokes as fraudsters in the manner she did in her posts.

31. Moreover, the Applicants have attached an affidavit marked annexure “LL -2” which though not constituting a legal title indicates how the Applicants “acquired” interest in and became beneficial owners of the Malindi land which they say was under adjudication. Beyond legal arguments on the validity of that evidence, and what amounts to proof of ownership of land, there is nothing on the Respondent’s part to controvert the Applicant’s assertions that they held beneficial interest in the land in question at the material time.

32. In the court’s view, the duty lay with the Respondent to furnish some sort of material tending to support the alleged truthfulness of her

statements made on the 9th March, 2021. In **Uhuru Muigai Kenyatta V Baraza Leonard [2011] eKLR** the Supreme Court stated:

“While taking the defence of justification, or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification of qualified privilege does not inure the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.”

33. The defence of justification and privilege may be displaced by evidence of malice. It was held in **Adam v Ward (1917) AC 309**:

“A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”

34. By her response, the Respondent has all but admitted to rushing to make the offensive posts to protect her own name because Jennifer had threatened to “expose” her. The protection of her followers appears to come a distant second, because, after the site visit in September 2020, if her posts are believed, the Respondent had already seemingly developed doubts about the Malindi venture but apparently did nothing to warn her followers about it or even report to authorities. It was not until March 2021 when Jennifer allegedly threatened to “expose” her as colluding with “conmen” that she published her posts. In **Shah v Uganda Argus (1972) EA 80** it was held that a defendant is only entitled to protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose, but he will not avail himself of such protection if he uses the occasion for improper or indirect motive.

35. Further, in **Phineas Nyagah v Gilbert Imanyara [2013] eKLR** the court held:

“Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

....malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely.”

36. As stated in **Dorcas Florence Kombo V. Royal Media Services [2014] eKLR**:

“--- qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or the use of the privileged information for an improper purpose. “

37. Looking at the material in the Respondent’s affidavit, it appears that she neither conducted due diligence before commencing the marketing campaign on behalf of the Applicants, nor did she subsequent to alleged complaints by Jennifer make inquiries from the Applicants or verify information with any other persons before rushing to make her posts, which appear to be couched in a manner disproportionate to the facts, by outrightly portraying the Applicants as criminals and fraudsters. Her admitted conduct appears reckless *prima facie*, and self-serving. The mere fact that Jennifer had complained to the Respondent as alleged without more, does not appear to justify the publishing of several damaging posts before verification of facts. In my view the Respondent’s plea of justification and qualified privilege appear tenuous at this stage. It is my considered view that in my view therefore the Applicants have established a *prima facie* case.

38. Secondly, the Applicants have tendered material to demonstrate the effect of the publication, which was widely disseminated on social media, causing some of the clients to withdraw from the Applicants’ business venture and to demand refunds, not to mention the apparent loss of credibility of the business whose reputation has apparently been tarnished. (**See bundle of annexures marked LL-14 to LL-17**). The Applicants are equally entitled to have their reputation protected and may suffer irreparable damage if the court does not stop the Respondent who has taken an apparent strident posture that she is entitled to protect her own reputation by posting material concerning the Applicants on her social media accounts.

39. In view of the foregoing, the court is persuaded that this is a proper case for granting an interlocutory injunction in the following terms. That pending the determination of this suit, the Respondent, by herself, through her agents, representatives or associates is restrained from continuing to publish or publishing on whatever media, any statements or material defamatory of the Applicants and or their business. The costs of the motion are awarded to the Applicants.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 11TH NOVEMBER 2021.

C.MEOLI

JUDGE

In the presence of:

Mr Omakalwala for the Applicants

Mr Otieno h/b for Mr. Wajakoya for the Respondent

C/A: Carol