



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL CASE NO. 14 OF 2020

ENDMOR STEEL MILLERS LTD.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LTD.....1ST DEFENDANT

JOE AGEYO.....2ND DEFENDANT

ENOCK SIKOLIA.....3RD DEFENDANT

RULING

1. The Plaintiff filed a plaint on 15.7.2020 in which the substantive claim sought for general damages, aggravated damages and a mandatory injunction against the defendants for articles published by defendants, which articles were claimed to be defamatory of the plaintiff.

2. Filed contemporaneously with the plaint was a notice of motion dated 14.7.2020 that was brought under Order 51 Rule 1, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules as well as section 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The following orders were sought;

a) Spent

b) Spent

c) Pending the hearing and determination of this suit, there be an order of temporary injunction, restraining the defendants, their agents, employees or servants from further publication of the defamatory videos that the applicant/plaintiff complains of herein or any other defamatory article, words, material or remarks against, of and concerning the plaintiff or the ongoing National Environmental Tribunal Appeal No. 003 of 2019;

d) The costs of this application be provided for.

3. The application was supported by an affidavit deponed by Paul W. Gichu who is stated to be the co-director and shareholder of the plaintiff with authority of their board of directors (PWG1) to depon that affidavit. It was averred that the applicant, a private company incorporated in 2008 (PWG2) was licensed to and carried on the business of steel manufacturing on land parcel LR 12715/211 situate in Syokimau, Machakos County. It was averred that there was a dispute with the applicant and residents of Syokimau area in the National Environment Tribunal and that conservatory orders were issued (**PWG5(a)** and **(b)**) allowing the applicant to continue operating after a closure order dated 4.1.2019 (**PWG4a** and **b**) had earlier been issued by the tribunal. The deponent lamented that during the pendency of the tribunal proceedings, the defendants for three days ran a malicious defamatory story concerning the plaintiff and the story captioned “**We can’t breathe; the plight of Syokimau Residents in the face of air pollution**” which is available on you tube and which has raised unnecessary panic in the area. It was pointed out that the matter was sub judice and that the innuendo created was that the plaintiff lacked a license to operate and that it operated in a wrong residential area and was polluting the environment in conspiracy with the National Environment Management Authority which actions occasioned the death of Nazir Hakada’s daughter. It was emphasized that the plaintiff met all the regulatory requirements to operate and is legally situate within the locality; that the 1st defendant lacked professional competency to conduct a scientific audit of emission of toxic fumes but however decided to seek cheap publicity. It was stated that the defendants ran a false and malicious story that led to the suspension of the plaintiff’s license by the County Government of Machakos vide letter dated 13.7.2020 (PWG7). It was averred that the closure has occasioned an economic blow to the plaintiff and that the defendants unless restrained shall continue to taint the plaintiff’s name and cause it further loss. It was averred that the plaintiff had a strong prima facie case against the defendants with a likelihood of success and that the court was urged to allow the application.

4. In response, learned counsel for the defendants filed grounds of opposition dated 20.7.2020. Learned counsel was of the view that the applicant had not demonstrated a prima facie case with likelihood of success; had not established a case for grant of mandatory injunctions as was required by the case of **Kamau Mucuha v Riples Ltd (1993) eKLR**. Counsel stated that in line with the case of **Media Council of Kenya v Eric Orina (2013) eKLR** this was not a clear and exceptional case to warrant grant of an injunction. It was stated that damages would be an adequate remedy for the plaintiff and that the balance of convenience is in favour of the 1st defendant as it has not been proven that the 1st defendant will continue to air the story and further that the blanket order sought would gag press freedom under Articles 33 and 34 of the Constitution.

5. Directions were taken that the application be canvassed vide written submissions that are duly on record. Vide submissions dated 24.7.2020 learned counsel for the plaintiff's singular issue for determination was whether the applicant met the threshold for grant of the injunctive orders sought. Learned counsel referred to the general principles guiding the exercise of the court's discretion in the grant of injunctive relief as enunciated in the renowned case of **Giella v Cassman Brown Co Ltd (1973) EA 358** thus;

a) There is a prima facie case with probability of success.

b) The applicant stands to suffer irreparable harm.

c) On which side does the balance of convenience lie?

6. On the element of prima facie case, learned counsel while appreciating the case of **Mrao v First American Bank of Kenya Ltd & 2 Others (2003) KLR** submitted that the respondents refused to interview the plaintiff's lawyers before compiling the story or before considering the principle of sub judice. Further that the respondents failed to provide medical evidence on the cause of death of Nazir Hussein's daughter and also failed to provide numerical and medical data of the hundreds of people with respiratory diseases or those who died as a result of the alleged fugitive fumes.

7. On the element of irreparable injury, counsel placed reliance on the case of **Nguruman Ltd v Ian Bonde Nielsen & 2 Others (2014) eKLR** and posited that the applicant's factory without any backing in law had been shut down due to the defamatory clip of the respondents and that the clips continued to cause bad publicity. It was therefore the strong argument of counsel that the injuries could not be atoned by damages.

8. On the element of balance of convenience, counsel placed reliance on the case of **Charter House Investment Ltd v Simon K. Sang & 3 Others (2010) eKLR**. Learned counsel took issue with the defendant's reliance on the qualified privilege, justification and fair comment and cited the case of **Micah Cheserem v Intermediate Media Services & 4 Others (2000) eKLR** as well as **Mongare t/a Gekonga & Momanyi Advocates v Standard Ltd (2002) eKLR** that stated that comment could only be fair if the same was correct and that malice could be inferred if one was reckless as to the truth of the facts presented.

9. Submitting in opposition to the grounds of opposition, it was submitted that the plaintiff is a juristic person who could sue and that it was only public bodies that could not bring a claim for defamation. Reliance was placed on the case of **Nairobi City County Government v John Kamau & Another (2017) eKLR**. It was revealed that the closure order invoking the cancellation of the license of the plaintiff's factory was the subject of Machakos ELC Judicial Review 26 of 2020. The court was urged to dismiss the respondent's grounds of opposition and allow the applicant's application dated 14.7.2020.

10. Submitting on behalf of the defendants, learned counsel for the defendants submitted that in their defence they pleaded good faith and public interest as well as justification, privilege and fair comment on a matter of public interest. It was the strong argument of counsel that once they raised these defences then a court could only grant an injunction once it had heard the parties in the main trial. Reliance was placed on the case of **Fraser v Evans [1969] 1 All ER 8**. It was submitted by counsel that the court ought not to limit the exercise of the defendant's rights under Article 33 and 34 of the Constitution. It was submitted that there were no special circumstances to warrant the grant of an injunction and that the plaintiff had not demonstrated the conditions for grant of an injunction.

11. According to counsel, the injunction sought for by the plaintiff is a mandatory injunction disguised as an interlocutory injunction and this court ought not to grant the same. Reliance was placed on the case of **National Bank of Kenya v Duncan O. Shakali & Another, Kisumu Court of Appeal Civil Appeal 9 of 1997**.

12. Learned counsel further submitted that the plaintiff is entitled to compensation for defamation if they get judgement in their favour hence an injunction is not appropriate. Reliance was placed on the case of **Noormohammed v Kassmali (1953) 20 EACA 8**. The court was urged to find that defamation did not apply to companies and cited the book by Clerk and Lindsell on Tort. It was the argument of counsel that words in a libel claim ought to be pleaded verbatim, failing which it will be fatal to the pleadings. Reliance was placed on the case of **Veronica Wambui v Michael Wanjohi Mathenge (2015) eKLR**.

13. The court was urged to dismiss the application dated 14.7.2020 with costs.

14. The defendants contend that pending determination at the main hearing on whether the impugned material is libelous or not, the court ought not to restrain further publications on the issue, as to do so would be infringing the defendant's right of free speech on a matter of public interest. The plaintiff a factory stated that the publication and scrutiny of a matter that is the subject of ongoing litigation tainted their reputation in the locality where their factory situate and led to closure of the same.

15. The issue here, is clearly one of freedom of expression versus the protection of business reputation. The question arising for the determination of the court is whether an order of injunction can be issued to prevent publication of defamatory material of the plaintiff, a corporation where the defences of justification or fair comment on a matter of public interest, are raised.

16. The law on injunctive relief in defamation cases is well established. The principle being that, generally, a court will not grant an interlocutory injunction to prevent defamation, where the defences of justification; fair comment on a matter of public interest; qualified privilege or such other recognized defence is raised; unless the plaintiff can demonstrate that the matters complained of are false or if true in the case of fair comment and qualified privilege that they are actuated by malice. The *locus classicus* on the subject is **Bonnard v Perryman (1891) 2 Ch 269**. In that case, Coleridge C. J., stated as follows:

“the court will not restrain the publication of an article, even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest” (emphasis supplied)

To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore, jurisdiction is of a delicate nature. It ought only to be exercised in the clearest of cases where any jury would only say that the matter complained of was of a libelous nature and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel is untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It followed from those three rules that the court only on the rarest of occasions exercise the jurisdiction.”

17. In the case of **Gulf Oil (G B) Ltd. v Page & Others [1987] 3 ALL ER 14** where Lord Denning M. R. said:

“The principle has been established for many years ever since Bonnard v. Perryman [1891] 2 Ch 269. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge; but a better reason is the importance in the public interest that the truth should come out. As the court said in that case ‘the right of free speech is one which should be exercised without impediment, so long as no wrongful act is done’. There is no wrong done if it is true or if it is fair comment on a matter of public interest”.

At page 11, Lord Denning MR went on to state:

“There are some things which are of such public concern that the newspapers, the press, and, indeed, everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away.... The Defendants admit that they are going to injure the Plaintiff’s reputation, but they say that they can justify it; that they are only making fair comment on a matter of public interest; and therefore, that they ought not to be restrained. We cannot pre-judge this defence by granting an injunction against them.” (emphasis supplied)

18. In the case of **Albert Cheng & Another v Tse Wai Chun Paul Paul (2000) 3 HKCFAR 339** a decision of the Hong Kong Final Court of Appeal, Lord Nichols stated:

“The law now is that the Defendant who pleads fair comment is only guilty of malice if he has no belief in what he says. If he has such a belief, there is no malice even if he is pursuing his own private agenda or ambitions.”

19. The holdings in the above cases recognize the need to advance the fundamental right of speech, media and expression that are guaranteed under Articles 33 and 34 of the Constitution. The rationale being that there is important public interest that wrong doing must be exposed.

20. Denning M.R. as he then was, in the case of **Fraser v Evans [1969] I Q B. 349** stated:

“The right of speech is one which it is for the public interest that individuals should possess and indeed, that they should exercise without impediment. So long as no wrongful act is done. There is no wrong done if it is true or it is fair comment on a matter of public interest.

21. In the case of **Bestobell Paints Limited v Bigg [1975] F.S.R. 421** it was observed that:

“There is an old and well-established principle which is still applied in modern times and which is in no way affected by the recent decision in the House of Lords in the American Cyanamid Corporation v Ethicon, that no interlocutory injunction will be granted in defamation proceedings where the defendant announces his intention of justifying.... That was established towards the end of the last century and it has been asserted over and over again.... Interlocutory restraint in any case that is not obvious would operate as an unjust fetter on the right of free speech and the defendant’s liberty (if he is right) to speak the truth.”

22. Lord Denning M.R. as he then was, in the case of **Harakas v Baltic Mercantile & Shipping Exchange [1982] 1 W.L. R. 958** emphasized the role of the court not to restrain the right to free speech by way of court order, where the defendant claims the matters complained of, are actually true. He said:

“This court never grants an injunction in respect of a libel when it is said by the defendant that the words are true and that he is going to justify them. So also when an occasion is protected by qualified privilege this court never grants an injunction to restrain slander or libel..... unless it is shown that what the defendant proposes to say is known by him to be untrue so that it is clearly malicious...”

Lord Denning in allowing an appeal against an injunction granted by Boreham J, at first instance, held:

“Where there is a bureau of this kind- which is specially charged with the responsibility of obtaining information and giving it to those interested to warn them of possible dangers - it is very important that they should be able to give information to people who are properly interested: so long as it is done honestly and in good faith. That is all the Bureau wish to do in this case. They should not be prevented from doing so by an injunction unless it is clearly shown that they are dishonestly and maliciously saying what they know to be untrue. There is not a shred of evidence to support a suggestion of that kind. In my opinion this injunction should never have been granted: and should be discharged here and now.”

23. In this regard, the Learned Authors of **Halsbury’s Laws of England vol. 28 paragraph 108** rendered themselves thus:

“It is well settled that no injunction will be granted if the defendant states his intention of pleading a recognized defence. Unless the plaintiff can satisfy the court that the defence will fail. This principle applied not only to the defence of justification but also to the defences of privilege and fair comment, consent and probably any other defence. When qualified privilege or fair comment is to be pleaded, an injunction may nevertheless be granted if the plaintiff can satisfy the court on the issue of malice.

24. The question of **“express malice”** defeating the defence of qualified privilege even where the material complained of is actually true, was considered in the case of **Quartz Hill Consolidated Gold Mining Company v Beal [1882] 20 CHD 501**. Jessel M.R, stated that great caution is needed before granting interlocutory relief where the impugned document is prima facie a privileged communication and he stated:

“The circular appears on the face of it to be private in the nature of a privileged communication. It is issued by one shareholder to his brother shareholders, asking for their co- operation either in putting an end to the company or reconstituting it. As I said before, it may be answered that it is malicious and not entitled to protection, but that is very difficult to try upon interlocutory application. In the present case the defendant says he is acting bona fide, and there is no evidence against him. But if there were, I think a judge should hesitate long before he decides so difficult a question as that of privilege upon an interlocutory application, the circular being on the face of it privileged, and the only answer being express malice. Those are questions which really cannot be tried upon affidavit, or in the mode in which an interlocutory application is disposed of.”

25. The question on the principles applicable in considering the exercise of the court’s discretion on whether or not to grant interlocutory injunctive relief in defamation cases, were considered in the case of **Evans Kidero v John Kamau & another [2017] eKLR** where it was stated:

“The same sentiments were expressed in the case of Micah Cheserem v Immediate Media Services (2002) 1EA 371 where the court 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 cases, those conditions operate in special circumstances. Over and above the test set out in Giella’s case in defamation, the court’s jurisdiction to grant an injunction is exercised with 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. 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 human, responsible, truthful and trustworthy defendants”

26. Applying the law as outlined in detail above, to the facts of the present case, the corollary questions raised are: has the plaintiff demonstrated that the insinuation by innuendo, of lack of operating license, death of Nazir Hussain Hadaka by fugitive fumes from its factory and others as well as respiratory diseases on residents in Syokimau within the area that the factory situate is untrue? If so, that the attack on the plaintiff is actuated by malice, on the part of the defendants, such malice being **“absolutely overwhelming “and only intended to attack their reputation?** Further, that in doing so, this being an election year, whether the objective of the publication is to reduce the plaintiff’s chances of carrying on the business that it was set up to do? The plaintiff has denied any knowledge, of either the death of Nazir Hussain Hadaka by fugitive fumes from its factory and others as well as respiratory diseases on residents in Syokimau within the area where the factory is situated and denied the lack of operating license.

27. There is no affidavit evidence relied on by the defendants as they relied on grounds of opposition. There is no evidence that suggested that the plaintiff was a participant in the lack of operating license, death of Nazir Hussain Hadaka by fugitive fumes from its factory and others as well as respiratory diseases on residents in Syokimau within the area that the factory is situated alleged. The screaming headlines suggesting actual involvement of the plaintiff in lack of operating license, death of Nazir Hussain Hadaka by fugitive fumes from its factory and others as well as respiratory diseases on residents in Syokimau within the area that the factory situate prompted the plaintiff to move to court for redress.

28. In considering whether or not to grant injunctive relief the court is also guided by a number of factors. Where the defence of justification is pleaded, it must be demonstrated that the material complained of is actually untrue, the onus of doing so, being on the plaintiff. Falsehood defeats the defence of justification. When fair comment or qualified privilege are pleaded in defence, evidence of malice defeats the said defences.

29. Counsel for the defence in their submissions submitted that the interim relief on the particular facts of this case would be inappropriate as it would amount to pre-adjudicating their defences of justification and fair comment. The case of **Fraser v Evans & Another (1969) 1 All ER** was cited on page 8, paragraph 12 of their submissions. Counsel further urged, that the right to freedom of media and expression as guaranteed by the constitution would be interfered with in the event the injunction was granted.

30. I do quickly point out that the freedom of free speech or freedom of expression guaranteed in Article 33 and 34 of our Constitution is not absolute but subject to restrictions. The constitutional provision in material part states as follows:

33. Freedom of expression

(1) Every person has the right to freedom of expression, which includes—

- (a) freedom to seek, receive or impart information or ideas;**
- (b) freedom of artistic creativity; and**
- (c) academic freedom and freedom of scientific research.**

(2) The right to freedom of expression does not extend to—

- (a) propaganda for war;**
- (b) incitement to violence;**
- (c) hate speech; or**
- (d) advocacy of hatred that—**
 - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or**
 - (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).**

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

34. Freedom of the media

(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).

(2) The State shall not—

- (a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or**
- (b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.**

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

- (a) are necessary to regulate the airwaves and other forms of signal distribution; and**
- (b) are independent of control by government, political interests or commercial interests.**

(4) All State-owned media shall—

- (a) be free to determine independently the editorial content of their broadcasts or other communications....”**

31. The constitutional right to expression versus the protection of individual reputation was considered by Griffiths L J, in **Herbage v Pressdram [1984] 1. W. R. R. 1160** when he stated:

*“The principles which it is conceded generally apply to the grant of interim injunctions in defamation actions are helpfully summarized by counsel for the plaintiff’s in his skeleton argument: first, no injunction will be granted if the defendant raises the defence of justification. This rule is so well established that no elaborate citation of authority is necessary. It can be traced back to the leading case of *Bonnard vs Perryman*. Secondly, no injunction will be granted if the defence raises privilege, unless the evidence of malice is so overwhelming that the judge is driven to the conclusion.....it would be perverse to acquit the defendant of malice. Thirdly, that in the face of this long established practice in defamation actions, the principles enunciated by the House of Lords in *American Cyanamid Corp. Vs. Ethicon Ltd.* relating to interim injunctions, are not applicable in actions for defamation. These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press when balancing it against the reputation of a single individual who, if wronged, can be compensated in damages.”*

32. The tort of defamation is anchored on the recognition of the individual's right to his good reputation. Subject to the various defences protecting the balancing of interest between freedom of speech and an individual's good reputation the law confers a cause of action on any person of whom defamatory matter is published. The defence of justification rests on the premise that the words complained of are true. Hence, a defendant who pleads justification must give particulars of the facts relied on as showing that the defamatory statement is true. In the case of **McDonald Corp v Steel [1995] 3 ALL ER 615** it was held that

“The defendant should not plead justification unless he

(a) believes the words complained of to be true;

(b) intends to support the defence at trial;

(c) has reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegation will be available at trial.”

33. The defendant's defence herein was a combination of justification and fair comment as well as a right to freedom of expression. I have seen the defence that was filed by the defendant and noted that the defendant has clearly pleaded the particulars of the defence that they intend to rely upon. However, they have not pleaded the defamatory comments which they contend are protected by the defence of fair comment. I note that the defamatory statements complained of by the plaintiff are not pleaded and particularized.

34. At this point in time, I shall exclude consideration of matters extraneous to contents of the affidavits for example legal arguments and case law that are mentioned in the grounds of opposition by the defendant. The jurisdiction to grant interim injunction to restrain publication of defamatory statements is “*of a delicate nature*” which ought only to be exercised “*in the clearest of cases.*” That was stated in the case of **Media Council of Kenya v Eric Orina (2013) eKLR**, and it indicates the general approach of the court. The reluctance to grant interim injunctions is noted in view of the importance attached to the right of free speech. Thus the courts will only grant an interim injunction where:

a) The statement is unarguably defamatory;

b) There are no grounds for concluding the statement may be true;

c) There is no other defence which might succeed;

d) There is evidence of an intention to repeat or publish the defamatory statement. “

35. I will now proceed to consider the affidavit evidence in light of the requirements of above test in the order in which they appear.

a) Is the statement unarguably defamatory?

To suggest that a person is operating without a license imputes a commission of a criminal offence; to suggest that someone caused the death of or failing health of a person imputes the commission of an offence; this is unarguably defamatory. However, I see no indication of the exact words or statement that was made and/ or used by the defendant. What I see is a Compact disk that is annexed and marked PWG 6

b) No grounds for concluding the statement to be true.

In support of the suggestion in (1) there is no affidavit from the victims that categorically stated any involvement by the plaintiff in such activities hence there are no grounds on which the court can come to the conclusion that the statement could be true.

c) No other defence

The defendant pleaded justification and fair comment. Falsehood defeats the defence of justification which in essence is truthfulness of the materials complained of. Fair comment, as a defence rests on “*honest comment*” and is defeated where there is overwhelming evidence of malice. The legal meaning of “Malice” in the defence of free speech was set out in the case of **Horrocks v Lowe [1975] AC 135 at 149**. Lord Diplock's meaning of legal malice included the following observations:

“what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published.....if he publishes untrue defamatory matter recklessly, without consideration or caring whether it be true or not, he is in this as in other branches of law treated as if he knew it to be false.....”

36. The plaintiff asserted that the defendant's video clips captioned “**We can't breathe; the plight of Syokimau Residents in the face of air pollution**” created innuendo to the effect that the plaintiff lacked a license to operate, the plaintiff operated in a wrong residential area and was polluting the environment in conspiracy with the National Environment Management Authority which actions occasioned the death of Nazir Hakada's daughter. The said allegation has not been denied by the defendant who have not filed an affidavit to respond to the allegations. The defendant did not deny publishing the materials complained of and they did not state what the words in the video clips were intended to mean. I find nothing in the grounds of opposition from which the defence of fair comment could succeed.

d) Intention to repeat publication

I find nothing that establishes the requirement for meeting this test.

37. In answering the question stated by Lord Esher, in **Coulson v Coulson [1887] 3T.L.R. 846** “*libel or no libel?*” I find this requirement at interlocutory stage, is what constitutes the distinction between the general principles applicable in the grant of interlocutory injunctive relief in ordinary cases in contrast to defamation cases. In ordinary cases interlocutory injunction will be granted when there is a case to be tried whereas in libel cases the converse is true, an interlocutory injunction will be granted, only where there is clearly no case to be tried.

38. In the case of **American Cyanamid v Ethicon [1975]AC 135** it was stated that:

“A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages not injury that cannot be repaired.

... The object of interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial.”

39. On whether or not injunctive relief should be granted in libel matters, the learned authors of Gately on Libel and Slander 8th Edition at 640 state:

“In the case of an atrocious libel wholly unjustified and inflicting the most serious injury on the plaintiff, it would be quite proper for the court to exercise its jurisdiction”

40. The plaintiff’s grievance as I understand it, is the “*boomerang effect*” of the publication complained of which tend to project it as not only a killer but one who infects persons with respiratory diseases; one who operates without licenses. I have not had the benefit of hearing the publication and I believe counsel is well aware of how to tender a publication that is in video format. In answer to the question “*libel or no libel?*” the court is required to take into account the whole material complained of, the onus being on the defence to disclose the facts relied on in support of their assertion of the truthfulness of the allegations. On the affidavit evidence now before me, there are no facts supporting the lack of license, death and disease inclination suggested by the deponent. I also find the said projection is not supported by any facts suggesting truthfulness. Had there been materials placed before me that stated the exact words used by the defendant, it would appear that malice, actuated the publication. The defences of justification and fair comment being such as are defeated by falsehood and malice, respectively, I find, on the evidence now before me, the same defences not available to the defendants at the trial. In this regard, however I do not know what words that the defendants used.

41. The applicant, I note has annexed a copy of a compact disc that amounts to digital /electronic evidence. Electronic Evidence is any evidence stored in a digital form. It is a settled position that for electronic evidence to be admitted in evidence section 65, 78 as read with 106B of the Evidence Act sets out the non-technical conditions to warrant this court to rely on electronic evidence being the requirement of a certificate of electronic evidence. The purpose of the certificate is to satisfy the conditions laid out by sub-section (3) of section 78A as well as section 106B (4) of the Evidence Act. The certificate is to be executed/signed by a person occupying a responsible position in relation to the device through which the data has been produced. The certificate must identify the electronic record containing the statement, describe the manner in which it was produced and also give such particulars of any device involved in the production of the electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer. The certificate by dint of section 78A must also deal with any of the matters to which the conditions for admissibility relate. The entire idea behind the certificate is also to ensure the integrity of the source and authenticity of the data, so that the Court may be able to place reliance on it. This is important because electronic data is more prone to tampering and alteration and also to give technical assistance to the court.

42. Courts in Kenya have indicated willingness to accept such evidence to be admissible in evidence upon filing of the record along with the certificate under section 78A and 106B of the Evidence Act. See **Idris Abdi Abdullahi v Ahmed Bashane & 2 Others (2018) eKLR**. This would mean that in the absence of the same, then the court ought not to give much relevance to the evidence. I find that this court cannot at this stage accept the evidence in annexure PWG6 as I am not satisfied that the same meets the test of section 65(8), 78A and 106B of the Evidence Act.

43. In view of the scanty evidence that has been presented before me, I am of the view that at the hearing of the main suit, the applicants will be able to convince me whether or not the defendants satisfied the test for “responsible journalism”. This is what has now come to be known as the Reynolds defence that was set out in the case of **Reynolds v Times Newspaper Ltd [2001] A.C 127** by Lord Nicholls as follows:

“The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today’s conditions, to the importance of freedom of expression by the media on all matters of public concern. Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

1. The seriousness of all allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

4. The steps taken to verify the information.

5. *The status of the information. The allegation may have already been the subject of an investigation which commands respect.*
6. *The urgency of the matter. News is often a perishable commodity.*
7. *Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.*
8. *Whether the article contained the gist of the plaintiff's side of the story.*
9. *The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.*
10. *The circumstances of the publication, including the timing. This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case."*

44. As indicated earlier I am unable to say at this stage of the proceedings, that the plaintiff may not be able to establish its claim at the hearing. Even if the claim is established, I find that the plaintiff will be taken care of by way of damages if the claim is proved in the end. I find no exceptional circumstances, where it would be "just and convenient" to intervene and issue an injunction as prayed for by the plaintiff. It is proper to await the main suit as regards the determination of the issue of the defamation raised by the plaintiff and denied by the defendants. This court now notes that the earlier interim orders should be discharged and that the request for an injunction do await the hearing of the main suit. The application for interlocutory injunction in terms of prayer (c) in the application is to that extent, accordingly denied.

45. The upshot of the foregoing is that the plaintiff's application dated 14. 7. 2020 lacks merit. The same is dismissed with costs. The interim order of injunction granted on 16. 7. 2020 is hereby discharged and or vacated.

It is so ordered.

Dated and delivered at Machakos this 7th day of December, 2020.

D. K. Kemei

Judge