



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 109 OF 2017**

**DR. ALFRED MUTUA.....PLAINTIFF/APPLICANT**

**- V E R S U S -**

**THE STANDARD GROUP LTD.....1<sup>ST</sup> DEFENDANT**

**WELLINGTON NYONGESA ..... 2<sup>ND</sup> DEFENDANT**

**DAVID ODONGO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1) Dr. Alfred Mutua, the plaintiff/applicant herein, took out the motion dated 12.5.2017 in which he sought for inter alia:

- 1. .... *spent*
- 2. .... *spent*
- 3. .... *spent*

**4. THAT pending the hearing and determination of this suit, an order of temporary injunction be issued restraining the defendants whether by themselves, their agent, servants and or employees from writing, printing, publishing, broadcasting, circulating or further circulating any defamatory words relating to the plaintiff in his personal capacity or as Governor of Machakos concerning projects undertaken by the county government of Machakos.**

**5. THAT an order of injunction directing the defendants to publish a suitable declaration that the published stories on pages 1, 4 and 5 of The Nairobi weekly newspaper issue number 22 of 5<sup>th</sup> May, 2017 are false and to publish a suitable apology over the same.**

**6. THAT costs of this application be borne by the defendants.**

**7. Any other or further order the honourable court may deem just.**

2) The motion is supported by the affidavit of Dr. Alfred Mutua.

When served with the motion, The Standard Group Ltd, Wellington Nyongesa and David Odongo, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively, filed the replying affidavit of Wellington Nyongesa to oppose the application.

3) When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

4) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival written submissions. It is the submission of the plaintiff/applicant that on 30<sup>th</sup> March 2017, that the defendants threatened to publish defamatory material relating to the plaintiff. It is further pointed out that on 5.5.2017, that the defendants in their weekly newspaper known as “The Nairobi” extensively published malicious, false and defamatory material against the plaintiff titled “**Mutua chewed Dad’s cash – Kilonzo Jr**” which publication was accompanied by the plaintiff’s photograph. The plaintiff also averred that the defendants intend to publish in their subsequent editions highly defamatory and politically motivated stories concerning the plaintiff and intended to benefit the plaintiff’s political rivals. This court was further urged to find that the defendants’ actions are grossly detrimental to the plaintiff’s character and reputation and that unless the defendant is restrained by an order of injunction the defendants are

likely to cause the plaintiff a permanent and irreparable loss and damage.

5) The defendants opposed the motion arguing that the article they published was neither malicious nor false as concerning the plaintiff. They averred that the words used in the article were fair comment and of considerable public interest since they touch on expenditure, management and use of public funds in the County Government of Machakos. The defendants further stated that they were under legal, social and moral duty to publish the said words to the public who had a right to receive them. The defendants also pointed out that their report was based on the report of the Auditor General, the Hansard of Machakos County Assembly debates and the impeachment notice of motion dated 9.11.2016 presented to the Machakos County speaker. It was argued that the aforesaid reports and or documents are public documents which are easily accessible. The defendant further stated that they are ready to meet the Governor to give his side of story in vain.

6) In the motion the subject matter of this ruling, the plaintiff is basically asking to be given two substantive orders vizly:

First, an order for temporary injunction in terms of prayer 4

Secondly, an order for a mandatory injunction in terms of prayer 5

The principles to be considered in an application for injunction were stated in the case of **Giella vs= Cassman Brown (1973) E.A. 358** vizly

- i. An applicant to show a prima facie case with a probability of success.
- ii. That if the order for injunction is denied an applicant would suffer irreparable loss
- iii. Where the court is in doubt the application would be decided on a balance of convenience.

7) However, when determining an application for a mandatory injunction, an applicant must demonstrate that there exists special circumstances over and above those required in an application for a prohibitive injunction. In the plaint the plaintiff has given the particulars of defamation in respect of his claim. In paragraph 4 of their statement of defence, the defendants put forward the defence of a fair comment and justification.

8) The plaintiff aver that the publication was false and defamatory to his character and reputation. He further submits that the article was malicious and reckless and was published without caring about the truth. It is stated that the publication was politically motivated judging by the tone and timing around the time the official campaign period for the 2017 general elections.

9) The defendants aver that they have provided the court with the source of information which qualify the matter as one of public interest and how the same constitutes a fair comment. There is no doubt that a casual perusal of the publication will create an impression that the plaintiff is unscrupulous and unethical person who lacks integrity and unfit to serve in a public office. The question is whether the publication can be justified in the circumstances? It is not in dispute that the publication complained of was given prominence in bold and was accompanied by the plaintiff's photograph. The headline was sensational and was meant to be widely read. In part of the publication, the defendants claimed that the Machakos County Government is alleged to have lost ksh.161 million grant from Danida and World Health Organization. It is apparent that the defendants were insinuating that the plaintiff was responsible for the loss.

10) The defendants further alleged that the matter was being investigated by Ethics and Anti-Corruption Commission (EACC). The defendants aver that they have sought to get the plaintiff's side of the story in vain. There is no doubt in my mind that the issues raised in this suit will need to be interrogated via a trial, it is true the defendants have disclosed their sources of information but what remains to be determined is the veracity of the information disseminated. It may turn out to be untrue at the end of the case. It is also true that the defendants have put forward the defences of fair comment and justification. At this interlocutory stage, it is difficult to prove whether or not the defendants' article can be said to be fair comment or justified. I have already stated that the language used in the publication appear to be sensational. In my view the same is disproportionate in a situation where a party is making an objective reporting. In the end, I am convinced that the plaintiff has shown that he has a prima facie case with a probability of success. I am also convinced that unless the order for injunction is granted the plaintiff is likely to suffer irreparable loss. Consequently, the plaintiff is entitled to the prohibitive order of injunction.

11) The plaintiff has also sought for a mandatory order of injunction.

In seeking for such an order, the plaintiff is required to demonstrate that there exists special circumstances. I have perused the facts deponed in the plaintiff's affidavit and the submissions and I find that the plaintiff has failed to show the existence of special circumstances. The order for mandatory injunction is therefore denied.

12) In the end, the motion dated 12.5.2017 is allowed in terms of prayer 4 with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 11<sup>th</sup> day of May, 2018.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant