



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 115 OF 2018

WHISPERING PALMS ESTATE LIMITED.....1ST PLAINTIFF

AFRISON EXPORT IMPORT LIMITED.....2ND PLAINTIFF

HUELANDS LIMITED.....3RD PLAINTIFF

FRANCIS MBURU MUNGAI.....4TH PLAINTIFF

-VERSUS-

RADIO AFRICA GROUP LIMITED.....1ST DEFENDANT

JAMES MURIMI.....2ND DEFENDANT

FELIX OLICK.....3RD DEFENDANT

JAMES MBAKA.....4TH DEFENDANT

RULING

1. The plaintiffs herein took out the motion dated 28th May, 2018 under Sections 1, 1A, 1B and 3A of the Civil Procedure Act and Order 40, Rules 1, 2, 3 and 9 of the Civil Procedure Rules in which they sought for the following orders inter alia:

(i) Spent.

(ii) Spent.

(iii) THAT pending the hearing and determination of the suit this Honourable Court be pleased to issue a permanent injunction restraining the defendants jointly and/or severally and/or their agents, servants, employees and business associates from publishing and broadcasting the defamatory words/matters/posts/publications/utterances and statements published in the STAR NEWSPAPERS dated 12th April, 2018, 13th April, 2018 and 1st May, 2018.

(iv) Spent.

(v) THAT pending the hearing and determination of the suit this Honourable Court be pleased to issue a permanent mandatory injunction and/or order compelling the defendants jointly and/or severally and/or their agents, servants, employees and business associates, to pull down/remove from their website or the internet the defamatory words/matters/posts/publications/utterances and statements published in the STAR NEWSPAPERS dated 12th April, 2018, 13th April, 2018 and 1st May, 2018.

(vi) THAT the costs of the application be provided for.

2. The aforesaid motion is supported by the grounds set out on the body thereof and the affidavit sworn by **Francis Mungai Mburu**.

The defendants filed the replying affidavit of Linda Musita to oppose the motion.

3. The motion was canvassed by way of written submissions. The plaintiffs essentially argued that the publications made by the defendants vide the STAR NEWSPAPERS dated 12th and 13th April, 2018 and 1st May, 2018 respectively were false, malicious and defamatory in nature.
4. The defendants on their part denied that the publications made were defamatory. The defendants added that the plaintiffs have not demonstrated that they are entitled to the injunctive prayers sought.
5. This court has considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion and the rival written submissions filed by the respective parties.
6. It is apparent from the material placed before this court that the main issue which commends itself for consideration and determination is whether or not the plaintiffs are entitled to an interlocutory order of injunction. The guiding principles to be considered in such applications were restated in the case of Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR *inter alia* as follows:

Firstly, the applicant must establish a prima facie case with a probability of success. **Secondly**, the applicant must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages. **Thirdly**, where the court is in doubt, then the balance of convenience should tilt in favour of the applicant.
7. The plaintiffs submitted that the articles published by the defendants would, in the mind of any right thinking member of society, be interpreted to mean **inter alia** that the plaintiffs were fraudulent, and corrupt in their dealings.
8. The defendants' response was that the publications were true and were made in good faith, without malice and as a matter of public interest.
9. Having considered the arguments by the respective parties together with the annexed documents, this court is of the view that the aforementioned publications would very well cause any reasonable person to perceive the plaintiffs unfavourably. It is noted that the plaintiffs have argued that the publications were made without taking into account their side of the story.
10. This was not denied by the defendants save that they pleaded *inter alia* that the publications were true, fair comment and public interest. The defendants went on to acknowledge that a public apology was made to the plaintiffs and the story published on 4th May, 2018 was subsequently pulled down from the STAR website, as evidenced in the newspaper article dated 4th May, 2018.
11. Upon considering all the relevant material, this court has come to the conclusion that the plaintiffs have met the first threshold, that is, they have established a prima facie case with a probability of success.
12. It is the plaintiffs' submission that they have suffered and continued to suffer irreparable loss, damage and prejudice resulting from the defendants' publications which have not been withdrawn. The plaintiffs further averred that in view of the fact that they are involved in international businesses, the publications have had a damaging effect on them.
13. This court has taken into account the defendants' assertion that the publications were made truthfully and without malice. However it should be appreciated a party's reputation is invaluable and once tarnished, cannot adequately be compensated by way of damages. In this regard, this court is of the opinion that the plaintiffs have suffered and are likely to continue suffering irreparable loss unless granted an interlocutory injunction restraining the defendants from making further publications of a similar nature.
14. It is the this court's consideration that the plaintiffs stand to suffer a greater inconvenience if the injunction is not granted in comparison to the inconvenience that would befall the defendants if the same was allowed. It therefore follows that the balance of convenience tilts in favour of the plaintiffs.
15. The prayer for mandatory injunction which the plaintiffs have sought in the motion cannot be granted at this stage because it may erase the evidence required at the trial thus prejudicing a fair trial.
16. In the end, the motion is allowed in terms of prayer (iii). Costs shall abide the outcome of the suit.

Dated, Signed and Delivered at Nairobi this 14th day of December, 2018.

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J.K. SERGON

JUDGE

In the presence of:

.....for the Plaintiffs/Applicants

.....for the Defendants/Respondents