



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

**CIVIL SUIT NO. 444 OF 2015**

**SENATOR MOSES MASIKA WETANGULA.....APPLICANT**

**VERSUS**

**BRITISH BROADCASTING CORPORATION (BBC).....RESPONDENT**

**RULING**

1. The application dated 21<sup>st</sup> December, 2015 seeks orders that the Respondent and/or the Respondent's employees, agents or representatives be restrained from airing, broadcasting or presenting the contents of its news story and the panorama programme titled "The secret bribes of big tobacco" and "The secret bribes of big tobacco paper trail" which mention or refer to the Applicant or any edition, form or variation thereof that mention or refer to the Applicant until the hearing and determination of this suit.
2. The application is predicated on the grounds stated in the body of the application and is supported by the affidavit of the Applicant, Senator Moses Masika Wetangula. It is stated that on the 30<sup>th</sup> November, 2015, the Respondent broadcasted a television programme under the title **"the secret bribes of the big tobacco"** that the Applicant had solicited for an air ticket to London for his wife and that the Applicant was to be hosted at the Globe House at the British American Tobacco (hereinafter BAT) London Headquarters. That the substance of the said television programme was replicated in the business section of the print version of the BBC World News panorama programme under the title **"the secret bribes of the big tobacco paper trail"**
3. According to the Applicant, the said publication was false and defamatory and was subsequently picked up by the mainstream media in both the print and electronic form and was also republished worldwide on the internet and social networks. That several local newspapers, radio and television stations also republished the words and images with the Standard Newspaper reprinting the story under the title **"Graft allegations, Wetangula named in BAT bribery scandal – BBC."**
4. The Applicant's contention is that the said false publication seriously damaged his reputation and caused him considerable distress and embarrassment. The Applicant stated that he has been a member of parliament for more than 18 years, a Cabinet Minister in charge of Foreign Affairs and later the Trade portfolio in the Grand Coalition Government and also chaired a board of a state institution. That as a Cabinet Minister he attended high level meetings at the United Nations, African Union and various global and regional bodies, has travelled all over the world as a state officer and is well known across the continent. The Applicant is apprehensive that the Respondent may further disseminate the publication and that other news networks may also make similar allegations. The Applicant termed the meeting between him and the BBC producers where he was confronted with the allegations as unplanned and with no justification for the rude and wild questions put to him.

5. The application is opposed. The Respondent filed the grounds of opposition dated 18<sup>th</sup> March, 2016. The said grounds are as follows:

**“1. The power to grant an interlocutory injunction in a defamation case should be exercised with the greatest caution and only in the clearest possible cases. This is not such a case.**

**2. The defendant has pleaded a defence of qualified privilege based on the general public interest in the matters the subject of the Panorama programme broadcast by the defendant.**

**3. The burden of proof is on the plaintiff to satisfy the Court that the defendant is unlikely to make out this defence at trial. The defence set out in paragraph 2 above is substantial and *bona fide* and raises issues which should go to hearing and the court should not grant an interlocutory injunction.**

**4. All the matters raised in the affidavits of Richard Cookson and Andrew Head filed in opposition to the application.**

6. The Respondent's Executive producer of the BBC current affairs programme panorama, Andrew James Head and Richard Henry John Cookson the producer of the said BBC programme swore affidavits in response to the application. It is conceded that the Respondent broadcasted the programme in question on 30<sup>th</sup> November 2015 on BBC1 and on 4<sup>th</sup> December, 2015 on the BBC World Service television channels. That online articles associated with the programme were published on 30<sup>th</sup> November, 2015. It is further stated that following claims by a whistle blower by the name Paul Hopkins in May, 2015 in regard to allegations of widespread corruption and bribing engaged in by BAT through its operations in Eastern and Central Africa, Mr. Cookson the investigative journalist and producer aforesaid was commissioned by the Respondent to proceed and investigate the claims. That the investigations were carried out and the veracity of the information tested especially taking into account that the whistle blower was a former employee of BAT whose employment had been terminated and the matter had ended up with a suit filed at the Employment Tribunal in London.

7. It was further deposed that the said investigations involved a lengthy process with enormous volumes of documents. That steps were taken to verify the documents among them emails which included a pseudonymous email account by East and Central Africa Corporate Regulatory Affairs (CORA) Senior Manager, Ms Adell-Owino requesting for the purchase of a business class ticket for the Plaintiff's wife which transaction was to be paperless, with no receipts and no name of the plaintiff on it and to be given to the plaintiff's body guard. That BAT in its response in the London Employment Tribunal proceedings made certain admissions in relation to the CORA payments which included facilitation of bribes by Mr. Hopkins the whistle blower and by Ms. Adell-Owino of CORA. It is further stated that Ms. Adell-Owino left employment over the said payments.

8. It is further averred that the Applicant was given an opportunity to respond and was interviewed during the producer's investigation into the allegations. That the Applicant denied the allegations. That prior to the publication in question the Supreme Court of Kenya made findings that the Applicant herein had engaged in treating of voters and bribery in connection with the 2013 General Election. That following the decision of the Supreme Court of Kenya, the Independent Electoral & Boundaries Commission (hereinafter IEBC) was directed to make a decision on whether the Applicant herein ought to be struck off the voter register, thereby preventing him from standing for public office. That there was strong public interest in the matter as the Applicant was a prominent Kenyan politician hence the inclusion of the Applicant in the BAT exposé which also included an extract of the interview with the Applicant in which the Applicant strongly denied the allegations. It was further stated that the programme was made without any financial benefit to BBC or payment to the whistle blower except for reasonable expenses incurred in connection with the programme.

9. The application was argued by way of written submissions which were highlighted before me. I have considered the said submissions.

10. The general principles for a grant of an interlocutory injunction in defamation cases were stated in the case of **Cheserem v Immediate Media Services (2000) 1EA 371 (CCK)** where it was held that:-

**“Applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases because they bring out a conflict between private interest and public interest, though the conditions applicable in granting interlocutory injunctions set out in *Giella v Cassman Brown and Co. Ltd (1973) EA 258* generally apply, in defamatory cases those conditions operate in special circumstances. Over and above the test set out in *Giella’s case*, in defamation cases 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 the verdict to the contrary would be set aside as perverse.”**

11. In the case of **HCCC No. 544 of 2009 Uhuru Muigai Kenyatta v The Standard Limited**, the court stated, *inter alia*,

**“The court has jurisdiction to grant interlocutory injunction in defamation cases but only in the clearest of the cases. The jurisdiction has been said to be of a delicate nature and will only be exercised with great caution. See *Gatley on the Law of Libel and Slander 8<sup>th</sup> Edition* paragraph 1571.”**

12. The publication in question is not denied. The Respondent has raised the defence of qualified privilege on the basis of public interest touching on corruption by BAT, an international organization.

13. The counsels for the parties herein have relied, *inter alia* on the case of **Raynolds v Times Newspaper Ltd [2001] AC 127** and **Flood v Times Newspapers Ltd [2012] 2 AC, 273** in their submissions in regard to the defence of qualified privilege. The case of Reynolds sets out the parameters to be considered when considering the defence of qualified privilege. It was stated, *inter alia*;

**“Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.**

- 1. The seriousness of the 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 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 statement of fact.**

## 10. The circumstances of the publication, including the timing.”

14. The freedom of expression of the media as guaranteed under Article 33 of the Constitution of Kenya in the bill of right is not absolute. There are limitations set out in Article 34 of the Constitution. The Constitution balances the rights of freedom of expression with the rights and reputation of others. I am persuaded by the case of **Cheserem (Supra)** where it was stated;

**“Before I conclude I will try to correct three things. First, the right of a journalist to freedom of speech and expression as guaranteed by the Constitution of Kenya is not absolute and it is not correct for the Respondents to say that, that right cannot be taken from the press. I have already discussed the limitation of the freedom of expression elsewhere. Secondly, it is not sufficient and I think it is dangerous and not good for a journalist to disseminate information based solely on good faith. He should base the information on factual truth if he expects the law to protect him. Thirdly, it is not correct to say as the Respondents say that; “Where public interest conflicts with private interest, the public interest shall prevail.” This is public interest (versus) private interest in defamation actions and the end result is not always the same. The result can be in favour of the public interest or in favour of the private interest. If there is a substantial risk of grave injustice and the private interest in preventing the publication the Applicant seeks to prevent outweighs the public interest, then the court will declare that private interest prevails over public interest, and from my discussion in this chamber summons dated the 13<sup>th</sup> March 2000, that is exactly the way I am ending this ruling.”**

15. Turning to the case at hand, there is no positive averment that the words complained of are true. Indeed the Respondent’s counsel stated in his oral submissions that there was no specific reference to the Applicant even in the London Employment Tribunal proceedings but that there was admission by BAT that there were corrupt practices in the BAT office, Nairobi. On the emails said to be from Ms. Adell-Owino of the British American Tobacco CORA office, reference is made to the Applicant’s body guard. The in-depth and lengthy investigations said to have been carried out by the investigative journalist do not bear any evidence of any investigations carried out to ensure the name of the Applicant was not being used by third parties for their own benefit. There is no evidence to show whether the air ticket in question was used in connection with any travel or whether the Applicant was hosted at the BAT Globe House.

16. It is apparent at this stage of the case that the information used by the Respondent in respect of the Applicant was not verified. As stated in the case of **Reynolds (supra)**

**“.....unverified information from unidentified unofficial sources may have little or no status, and where the defamatory statements of fact are to be published to the widest audience on the strength of such sources, the publishers undertakes a heavy burden in showing that the publication is fairly warranted by any reasonable exigency.”**

There is no right to disseminate information that is not true and no public interest can be served by publishing information that is not true.

17. *Prima facie*, the reputation of the Applicant is at stake. The alleged defamatory information has been published not only by the Respondent but also by various local media and it is in the public domain. There are chances that other international and local media may pick up the published information and thereby cause the Applicant further harm to his reputation. I am therefore convinced that the Applicant has demonstrated a *prima facie* case.

18. With the foregoing, I allow the application as prayed. Costs in cause.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of Jan., 2017

**B. THURANIRA JADEN**

**JUDGE**