**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 77 OF 2016**

**NANCY WANJA GATABAKI.....1ST PLAINTIFF**

**DR. SAMUEL MUNDATI GATABAKI.....2ND PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....1ST DEFENDANT**

**BRIAN WASUNA.....2ND DEFENDANT**

**R U L I N G**

The Plaintiffs herein have lodged a plaint in court dated the 16th day of March, 2016 alleging that they have been defamed by the Defendants. They have sought General Damages, aggravated damaged for libel, costs of the suit and any other relief that the court may deem just to grant in the present circumstances and in the interest of justice.

Together with the plaint , the Plaintiffs took out a motion on notice dated the 16th March, 2016 under Sections 1A, 1B of the Civil Procedure Act, Cap 21 Laws of Kenya; order 40, Order 51 Rules 1, Rule 3 of the Civil Procedure Rules and all other enabling provisions of the law seeking the following orders: -

1. Spent

2. That pending the hearing and determination of this application and thereafter pending the hearing and determination of this suit a mandatory injunction be issued compelling the first defendant to pull down/withdraw the article titled **'Karume's, Gatakabi's fight over Ksh.200m prime Nairobi Land'** published in the world wide web in the address www.businessdiairlyafrica.com and available at http://www.businessdailyafrica.com/Karumes--Gatabakis-fight-over-Sh200m-prime-Nairobi-land/-/539546/-/item/0/-/qesvx9z/-/index.html.

3. That costs of this application be borne by the Defendants.

The motion is premised on the grounds set out in the body of the same and on the annexed supporting affidavit of Nancy Wanja Gatabaki, the 1st Plaintiff, wherein she contends that she is the wife of the 2nd Plaintiff and they have been married for the last 47 years. That they have many friends both in Kenya and outside Kenya and that she knows the family of the Late Njenga Karume and Mr. Karume was personally known to her and her husband (the second Plaintiff).

That she is a business woman within Nairobi and she has investments across many fields in Kenya including investments in Fourways junction real estate project. That she carries out her businesses with

the highest standard of business ethics and her clients and/or tenants come from across the world.

That on the 16th November, 2015, her daughter Wangari Gatabaki called her from the United States and told her there was an article in the Business Daily with her photo on it which was to the effect that she was fighting with the Karume family.

That she immediately went to the Ridgeway's mall at Nakumatt Supermarket and purchased a copy of the said Newspaper and she saw her photo on the front page with the heading.

> ***"Karume's, Gatabaki's fight over Ksh.200 Million Prime Nairobi Land"***

That the same story was published in the World Wide Web at: ***http://www.businessdailyafrica.com/Karumes--Gatabakis-fight-over-Sh200m-prime-Nairobi-land/-/539546/-/item/0/-/qesvx9z/-/index.html.***

That the newspaper has a wide circulation within Kenya and internationally and can be accessed by any user of the world wide web and it exposed her to ridicule. According to her, the article was false, malicious and motivated by ill will right from the start as it proceeded as follows: -

*"Nancy Gatabaki, the woman who nearly brought the construction of upmarket Fourways Junction Estate in Nairobi to a stop four years ago, has opened a fresh court battle against the family of the late Kiambu politician and business magnate Njenga Karume"* which she avers presented her as a woman who has picked a fight with the Karume Family.

That the article in another instance state as follows: -

> ***"M/S Gatabaki's latest court fight now threatens to seal a lucrative deal that would have seen Mr. Karume's firm earn a massive profit."***

She further averred that the publication went on to give details of an alleged dispute between the Karume family and herself which to her is absolutely not true as they have never had any dispute with the Karume family. That the article is meant to portray her as a woman who picks fights and that she is fighting with the Karume family. She has set out what she believes, the article meant to portray her as, in paragraph 11 of the affidavit.

That the publication injured her reputation both in Kenya and internationally since she has family members and friends in the United States of America who read the publication online and saw her photo and questioned why she was fighting with the Karume Family. That the words in the article were malicious as they sought to introduce her past law suits some of which had been concluded. It was her contention that the Defendants did not seek her input as to the accuracy of the publication before publishing the article. They also did not call the 2nd Plaintiff who read the article on the Defendants Daily website while he was in the United States of America.

The Defendants filed grounds of objection on the 8th August, 2016 on the following grounds:; -

1) The Plaintiffs have failed to show a prima facie case with a probability of success.

2) Damages (if any are awardable) is an adequate remedy and not that of an injunction.

3) The balance of convenience lies against the granting of an injunction.

4) The orders being sought are too wide, vague and not capable of being enforced (if granted).

5) The orders sought are in effect gagging the press.

6) The Plaintiffs are at interlocutory stage trying to have the matter tired.

7) The application has no merits.

The application was canvassed by way of written submissions. In their submissions, parties have to a great extent reiterated the contents of their respective affidavits and in addition, the Plaintiffs/Applicants averred that the Defendants have not responded with any facts and evidence having failed to file a replying affidavit. To buttress this point, counsel for the Plaintiffs cited the case of **Nation Media Group and 2 others Vs John Harun Mwau, Civil Appeal No. 298 of 2005** by the Court of Appeal in which the court stated as follows: -

> ***"We have earlier stated that the Respondent's depositions in his affidavit in support of the application for interlocutory mandatory injunction were not controverted by the Appellants. No reason was advanced by the Appellants for failing to respond to the Respondent averments in his affidavit. The grounds of opposition advanced by the Appellants could not suffice as answer to the factual depositions made by the Respondents. In the circumstances, we are satisfied that the trial Judge was right in holding that the Respondent had established a prima facie case with a probability of success."***

The Court of Appeal further stated: -

> ***"Without endorsing the learned judge's foregoing statement which appears definitive, considering the fact that the Appellant did not swear a replying affidavit to dispute the Respondent's contention that the maintenance of the article in the Appellant's website was affecting the Respondent's business, We are satisfied that, prime facie, the Respondent had made out a case for grant of the orders sought in the interlocutory application."***

Counsel for the Plaintiffs/applicants also made reference to the impact of lack of a replying affidavit and referred to the case of **Ruth Ruguru Nyaga Vs Kariuki Chege & another**, High Court Case No 73 of 2015 in which Judge Aburili had this to say about failure to file a replying affidavit;

> ***"The 2nd Defendant has not filed a replying affidavit rebutting the averments in the Plaintiffs supporting affidavit and as was correctly submitted by the Plaintiff, the first Defendant cannot purport to swear an affidavit with the authority of the 2nd Defendant who has not given that authority in writing and which authority must be filed as required under order 1 Rule 13(1) and (2) of the Civil Procedure Rules and as espoused in Crown Berger Ltd Vs Karpech Vasuder Devan & Another, CA 246/2006. In the absence of a replying affidavit rebutting the averments in the applicant's supporting affidavit, the 2nd Defendant has not controverted the Plaintiff/Applicants claim and allegations against him…."***

On whether the Plaintiffs have established a prima facie case, it was submitted that in view of the Harun Mwau case (supra) the Plaintiffs have established a prima facie case as the Defendants did not file factual dispositions in response to the application by the Plaintiffs.

It was further submitted that all what the Plaintiffs/Applicants need to establish is that from a reading of the article, the words used will cause the reader to have a negative image or perception of the persons referred to in the article. They relied on the case of **CFC Stanbic Bank Vs Consumer Federation of Kenya & Another**, High Court Case No. 315 of 2014 in which Justice Mabeya set out what the court should consider in determining whether a prima facie case has been set out.

On whether the orders, if granted, will amount to suppressing the media freedom, it was submitted that this is a wide statement and its not supported by any facts. That the constitution must be read as a whole in that though the constitution guarantees the freedom of press under Article 34, such freedom must be used responsibly with due regard to the Plaintiff's right to dignity and reputation. The Plaintiff's further averred that there is no way the application will amount to hearing the full matter and all what the Plaintiffs are seeking are injunctive orders pending the hearing of the suit.

On the part of the Defendants, it was submitted that the nature of the orders sought by the Plaintiffs being a mandatory injunction can only be granted in very special circumstances at the interlocutory stage. To support this contention, they have relied on the case of **Stephen Kipkebut T/a Riverside Lodge Vs Naftali Ogola** and that of **Kenya Railways Corporation Vs Thomas M. Ngiti & 6 Others**, Civil Appeal No. 210 of 2004 and argued that for a court to issue a mandatory injunction at the interlocutory stage, the Plaintiff's case has to be unusually strong and clear. That the Plaintiff's case herein does not meet the aforesaid tests.

The Defendants argued that it is not in dispute that the Plaintiffs herein have had disputes with Njenga Karume's family some of which have been concluded thus ascertaining the veracity of the published article and that no special circumstances have been established by the Plaintiffs as to why the Defendants should be compelled to pull down and/or withdrew the article. They contended that it is trite law that an order which results in granting a major relief claimed in the suit may not be granted at full hearing ought not to be granted at an interlocutory stage. They cited the case of **Stephen Kipkebut** (supra) in which the court held: -

> ***"An order which results in granting a major relief claimed in the suit, which may not be granted at the final haring, ought not to be granted at the interlocutory stage."***

On whether the Plaintiffs have a prima facie case, it was submitted that the article the subject matter of this application raises issues with regard to the legal disputes between the Plaintiffs and the Njenga Karume family over land on which the Four Ways Junction Development stands. That the applicants have conceded to the fact that there is an ongoing and finalized law suits that concern the said property between the Plaintiffs and the Njenga Karume family which is a matter that has generated a lot of public interest. The Defendants also averred that the defence of a qualified privilege, fair comment and fair information among others are available to it with regard to the publication and/or the article complained of as they are based on court proceedings and the pleadings filed therein and the same can only be found to have merits or not at a full hearing. To stress this point, the Defendants have cited the case of **Invesco Assurance Co Ltd Vs The Nation Media Group** in which the learned Judge's conclusion was that: -

> ***"Establishing whether or not that Defence succeeds is, firstly, a matter reserved to the hearing of the suit, to be done by examination and cross-examination of witnesses and secondly, a matter for authoritative pronouncement only by the court itself. I do not think it is possible at all at this interlocutory stage to establish the veracity of the claim that the allegedly defamatory statement is the truth."***

It was further submitted that on the basis of this and in particular the defence of qualified priviledge under the Defamation Act, the Plaintiffs have failed to show a prima facie case with probability of success. Taking into account the more stringent conditions for granting an injunction now well recognized in defamation cases and that if it were to be found at the hearing that the Plaintiffs have been defamed, damages would be adequate remedy.

On balance of convenience, it was submitted that the issues complained of are matters of public interest for public benefit and the public has a right to know of the said issues. That if the injunctive orders are granted, it will amount to barring the Defendants from enjoying their freedom of the media as enshrined in the constitution regarding matters of great public interest and importance. That the Plaintiffs have not given an undertaking as to damages which must be given on every interlocutory injunction and that an interlocutory injunction in defamation ought to be granted in the clearest of cases and should be exercised with great caution.

After having laid down the respective positions by the parties, I now set out to identify the issues for determination, which in my view are as follows: -

a) Have the Plaintiffs established a prima facie case?

b) Whether the Plaintiffs stand to suffer irreparable harm unless the orders sought in the application

are granted.

c) Whether by granting the orders, the Defendant's freedom of expression will be violated.

Before I can tackle the issues as aforesaid, let me start by appreciating the position regarding the granting of interlocutory injunctions in a defamation matter as was laid out in the case of **Cheserem Vs Immediate Media Services (2000) 1EA 371** (CCK) 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 as 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. 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 come out and the court aims to protect humane, responsible, truthful and trustworthy Defendant."***

1. The same position was advanced in the case of **Gilgil Hills Academy Ltd Vs The Standard Ltd (2000) eKLR, Maraga J** (as he then was) stated:-

> ***"To justify the granting of an injunction in defamatory cases at interlocutory stage therefore, the court must have prima facie evidence to come to a decision that the two words complained of are untrue. See Bonnard v Perryman,(1891). If on the material placed before the court at the interlocutory stage, it entertains any doubt on the efficacy of that defence, then that should be one of the factors to be considered whether or not an injunction should be granted. "***

The court has considered the article complained of titled ***"Karume's, Gatabaki's fight over Ksh.200 Million Prime Nairobi, Land".***

The Plaintiffs have denied having any fight with the Karume's family. They have deponed that the words used against the 1st Plaintiff were false, malicious and were not a just and truthful account of any court proceedings by the Plaintiffs herein. It has also been averred that the Defendant's words are not accurate and fair public comment and are malicious with intention of soiling the relationship between the Plaintiffs and the Karume family and that the same is not a truthful reporting of any court proceedings.

These allegations have not been denied by the Defendants by way of an affidavit. They opted to file grounds of objection rather than filing an affidavit. Though they have purported to argue their case by way of submissions, its important for this court to point out that facts contained and/or argued through submissions do not form part of evidence unlike an affidavit that has been sworn under oath. Facts put by way of submissions do not have any probative value as they have not been made under oath. The importance of filing a replying affidavit was emphasized by the Court of Appeal in Civil Appeal No. 298 of 2005 (**Nation Media Group & 2 others Vs John Harun Mwau(supra)**

The Defendants have relied on the defences of qualified priviledge, fair comment and fair information. For the Defendant to establish a prima facie defence with a probability of success, they can only do so by being able to rely on the four main defences for defamation. The court has noted that no defence has been filed in this matter though counsel for the defendants told the court that it has not been done because they have not yet been served with the summons to enter appearance.

In the case of Nation Media Group (supra), the court observed that in the absence of a replying affidavit, the learned judge was not satisfied that the Appellants had a valid defence to the Respondents' claim.

They further observed that by doing so, the learned judge was not shifting the burden of proof from the Respondent to the Appellants. The Defendants ought to have prima facie justified their defences which they failed to do.

This court is alive to the fact that establishing whether or not the defence succeeds is a matter reserved to the hearing of the suit to be done by examination and cross-examination of witnesses but as the Court of Appeal observed in **the Nation Media Group Cas**e, the Defendants have also to establish a prima facie defence with a probability of success.

It is not enough for the Defendants merely to plead the defences aforesaid and especially in the case herein where the Plaintiff's have alleged that the words were not accurate. I have not seen any particulars of facts on which the defence of qualified privilege and fair comment are based. The court proceedings referred to have not been annexed and this court has not been told what the facts of that case are so that it can make a finding as to whether the Defendants have a prima facie defence as submitted.

As to whether by granting the orders sought herein it will amount to gagging the press, my considered view is that the freedom of the media must be balanced against the Plaintiffs' right to a good reputation.

In the premises and for the aforegoing reasons, I find the application to be meritorious and allow the same as prayed. I also award costs of the application to the Plaintiffs.

Dated, signed and delivered at Nairobi this 16th day of February, 2017.

**…….**

**L NJUGUNA**

**JUDGE**

***In The Presence of***

**……** ***For The Plaintiffs***

**…….** ***For The Defendants***