



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 37 OF 2016

1. PERFORMANCE PRODUCTS LIMITED.....1ST PLAINTIFF/APPLICANT

2. ROBIN KUNGU NJOGU.....2ND PLAINTIFF/APPLICANT

VERSUS

1. DR. HASSAN WARIO ARERO.....1ST DEFENDANT/RESPONDENT

2. PROF. DR. MONI WEKESA.....2ND DEFENDANT/RESPONDENT

3. ROYAL MEDIA SERVICES LIMITED.....3RD DEFENDANT/RESPONDENT

4. WAIHIGA MWAURA.....4TH DEFENDANT/RESPONDENT

5. MIKE OKINYI.....5TH DEFENDANT/RESPONDENT

6. HANS JOACHIM HAJO SEPPELT.....6TH DEFENDANT/RESPONDENT

7. YOU TUBE.....7TH DEFENDANT/RESPONDENT

8. A.R.D. GERMAN T.V.....8TH DEFENDANT/RESPONDENT

RULING

1. Before this court is the plaintiffs' Notice of Motion dated 11th February, 2016. The plaintiffs seek the following orders:

i. That pending the hearing and determination of this suit an injunction be issued restraining the defendants, their servants, employees and/or agents from writing, printing, publishing, airing defamatory statements about the plaintiffs or otherwise defaming the plaintiffs.

ii. That pending the hearing and determination of this suit, an injunction be issued restraining the 1st defendant, his servants, employees and/or agents from raiding the plaintiffs' shop, harassing, arresting or in any other way intimidating and or interfering with the directors, employees, operations and customers of the plaintiff.

2. The 2nd plaintiff who is the Director of the 1st plaintiff swore an affidavit on 11th February, 2016 in support of the motion. He stated that the 1st plaintiff engages in the business of selling food supplements and distribution of consumable goods and food products. He stated that on 30th October, 2015 at around 11:00 am the 1st defendant, plain clothed police and journalists walked into the 1st plaintiff and illegally ransacked the 1st plaintiff. That when he got to the 1st plaintiff, he, a customer by the name **Hellen Wanjiru Mugo** and an employee **Fredric Omondi** were arrested, detained at Special Crime Unit. They were interrogated by the police and officers from Pharmacy and Poisons Board about the business and some prescription medicine that were taken from one of the salesmen. They were later charged under section 324 (2) of the Penal Code at Kibera Law Courts. He stated that on the same day the 1st defendant held a press conference with reporters from the 3rd defendant and made defamatory claims against the plaintiffs. That at the conference, the 1st defendant claimed that the information was available through the 6th defendant and anti-doping task force headed by the 2nd defendant. That further on 15th February, 2015, the 3rd defendant maliciously and without justifiable cause aired a programme in a series titled “*poisoned spikes*” during its 9.00 O’clock bulletin on Citizen TV. That in the programme, the 4th and 5th defendants interviewed the 6th defendant with the sole intention of potraying the 1st plaintiff as a distributor of illegal Erythropoiesis Stimulating Agents (EPOs). That the defamatory clip is still being viewed at the world wide website of the 7th defendant. The 2nd plaintiff lamented that the said words have injured his character and reputation and the plaintiffs have been exposed to ridicule, hatred, scandal odium and contempt in the eyes of right thinking members of the society. That unless the defendants are restrained by a court order, they will continue to make and publish material defamatory to the plaintiffs.

3. In response thereto, the first respondent filed grounds of opposition on the 2nd day of June, 2016 on the grounds that

1. That petition lacks merit and is on abuse of the court process.
2. There is an ongoing criminal case against the 2nd applicant at Kibera Law Courts with regards to this matter and being a competent court, this does not amount to intimidation or harassment of the applicant.
3. That the applicant discloses the defamatory words alleged against the 1st respondent.

4. The 2nd respondent filed a preliminary objection dated 18th February, 2016 on the following grounds:

- i. That the plaintiffs did not serve a demand letter to the 2nd defendant before instituting this suit.
- ii. That RKN 6- ‘Anti-Doping Taskforce Final Report’ bears no signatures and is therefore inadmissible in evidence.
- iii. That in any case the 2nd defendant became functus officio the moment the report under RKN6 was handed over to the Cabinet Secretary responsible for sport in or about April, 2014.
- iv. That upon handing over the impugned report, the said report became the property of the Government which government has it under its custody.
- v. That by dint of the proviso in section 4 (2) of the Limitation of Actions Act (Cap 22 as revised in 2012) the plaintiffs are time barred to raise a matter touching on an alleged libel contained in a report published more than 12 months ago.
- vi. That the 1st plaintiff was incorporated in July 2015 long after the impugned report had been completed. It is not possible that the 1st plaintiff was defamed by the 2nd defendant in the impugned report at a time when the 1st plaintiff was non- existent.

- vii. That there is no mention of the 1st plaintiff in the impugned report.
- viii. That there is no mention of the 2nd plaintiff in the impugned report.
- ix. That paragraph 10 of the supporting affidavit the only paragraph that refers to the impugned report connected to the 2nd defendant does not disclose the defamatory words complained of or at all.
- x. That even the plaint at paragraph 15 does not disclose the defamatory words complained of.
- xi. That the two witness statements on record do not mention the 2nd defendant.
- xii. That the injunctive orders sought against the 2nd defendant are inapplicable.
- xiii. That in view of the foregoing the 2nd defendant has not mentioned any of the plaintiffs by name and therefore the orders sought relating to defamation as against the 2nd defendant are misplaced.
- xiv. That documents marked RKN1 bear no relationship to the plaintiff and there is no evidence that they had the requisite approvals to engage in the business of food supplements.

5. The 3rd 4th and 5th defendants filed grounds of opposition as follows:

- i. That the application is frivolous, vexatious, incompetent, misconceived and an abuse of the process of court.
- ii. That orders sought are not available to the plaintiffs in view of the non- existence of 1st plaintiff at the material times and in view of the 2nd plaintiff being non- suited and as well as the filing of the defences herein.
- iii. The programme and the words complained of were reported fairly and accurately and aired in good faith, on a matter of great public concern and interest prompted by reports of widespread use of banned substances by Kenyan athletes.
- iv. The programme and words complained of did not refer to the plaintiffs at all or as alleged.
- v. The programme and words complained of did not bear any meaning defamatory of the plaintiffs.
- vi. The programme and words complained of, particularly that there was suspicion of Kenyan athletes engaging in doping were true in substance and in fact. The existence of such doping is a notorious fact in Kenya and judicial notice is invited.
- vii. The programme and words complained of were fair comment on a matter of public interest.
- viii. The programme and words complained of were not calculated to disparage the plaintiff in any office, profession, calling or trade whatsoever.
- ix. The cause of action and the allegations by the plaintiffs are too remote when compared with the programme and words complained of.
- x. The cause of action is time barred.
- xi. That applicant has neither shown a case with probability of success nor loss and damage that cannot be compensated by an award of damages.

6. The 6th defendant in his replying affidavit filed on 31st May, 2016 denied having made any defamatory remarks against the plaintiffs. He stated that he sometime in the year 2012 participated in the publication of the documentary titled 'geheimsache doping' which was based on true facts and was published without malice. That the documentary was meant to highlight the secrets of doping and dangers posed by doping on athletes. He stated that the documentary did not make any specific words that referred to the plaintiffs and therefore the claim for defamation against them cannot stand. That the said documentary was based on matters of public interest both nationally and internationally and were without malice on his part. He denied having participated in the publication 'poisoned spikes' but averred that the same was based on true facts and the same were matters of public interest. He denied having published 'anti-doping task force final report' and stated that no claim for defamation can therefore arise against him.

7. The 8th defendant responded to the motion vide the replying affidavit of Peter Ndungu Mungai who is the Administrator of the 8th defendant. He denied that the 8th defendant made any defamatory remarks and has ever participated in the publication as alleged. He stated that the alleged defamatory remarks do not meet the threshold required to sustain a suit against the 8th defendant for defamation. He contended that the 8th defendant did not publish 'anti-doping task force report' and 'poisoned spikes'.

The plaintiffs filed a further affidavit on 11th July, 2016. They contended that 6th and 8th defendants first published documentaries titled 'the secrets of doping: how Russia makes its winners' that can be found at <https://www.youtube.com/watch?v=in9B-ty9JCY> as well as 'The Secrets of doping-The Shadowy World of Athletic' found at <https://www.youtube.com/watch?v=nlkiCiTOGA> on the internet and which are currently running. That the 6th defendant did an expose on doping by athletes in Russia in the 1st documentary after which he turned his attention to Kenya in his 2nd documentary after he claimed to have received a data stick with IAAF data which he has not confirmed as an official data. He stated that the 6th defendant claimed to have received information about a special store in down town Nairobi near the Hilton and that while showing a footage of the 1st plaintiff he claimed to have purchased an EPO doping substance from the 2nd plaintiff at 90 Euros or 90 Dollars. That the 6th defendant claimed to have had a hidden camera which he used to take pictures of and on the premises. That the story he was looking for was not true since he bribed an employee to source for him EPO a product that could have been purchased at any well stocked chemist in town. He stated that the 6th defendant bribed Fredric Omondi with 2000 Euros and convinced him to purchase for him EPO at a neighbouring Chemist with a view to capture the hangover of the drug from the plaintiffs' employee with a hidden camera. That the 6th defendant thereafter returned to Germany and aired the 2nd documentary linking Patrick Makau and Kenyan athletes generally to doping and saying that the athletes purchased this products from the 1st plaintiff. That it is after the said documentary that the 1st defendant appointed a task force led by the 2nd defendant to investigate the allegations into abuse of performance enhancing drugs and substance abuse by Kenyan athletes. That on or about 7th April, 2014 the 2nd defendant presented the report to the 1st defendant. That in the report, the 2nd defendant accused the 1st plaintiff of supplying athletes and the Kenya Rugby team with drugs.

9. The 2nd defendant filed a further replying affidavit where he denied the allegations on the plaintiff's further supporting affidavit.

10. In their submissions, the plaintiffs stated that they had adduced evidence that the defendants acted with malice and that the defamation led to damage of the plaintiffs' reputation. That as a result of the said defamation the plaintiffs have suffered ridicule, shame and contempt. That on a balance of probability the plaintiff has shown that it shall be prejudiced if the orders sought are not granted. It was submitted that there is no alternative remedy available to the plaintiff other than temporary injunction and they cited **Bonnard v. Perryman [1891] 2CH 269** in support of their case.

11. The 1st defendant relied on the principles of granting an injunction set out in **Giella v. Cassman Brown** and cited with approval in **Olympic Sports House Limited v. School Equipment Centre Limited [2012] e KLR**. It was submitted that the grant of injunctive orders should not contravene a statutory

provision. That the grant of injunctive orders in this case would go against section 30 of the Anti- Doping Act.

“That the orders sought would hinder the Anti- Doping compliance officers from discharging their duties under the Act. Citing *Brigadier Arthur Ndong Owuor v. The Standard Limited [2011] e KLR and Francis Atwoli & 5 Others v. Kazungu Kambi & 3 Others [2015] e KLR*, it was submitted that the plaintiffs have failed to disclose the exact alleged defamatory words alleged to have been published against them which is a requirement for the grant of the orders sought. It was further stated that the 1st defendant raised the issue that the suit is statutorily time barred under section 3 (1) of the Public Authorities Limitations Act.

12. On behalf of the 3rd 4th and 5th defendants, it was submitted that the plaintiffs are not entitled to the orders sought as the 1st plaintiff was not in existence at the time of the alleged publication. It was further stated that the 1st plaintiff therefore had no locus. The 1st defendant cited Halsbury’s Law of England Libel and Slander vol. 28 4th edition at paragraph 39 where the authors stated:

In Reference to the Plaintiff

“ Statement must be published of and concerning the plaintiff”.

Words are not actionable as libel or slander unless they are published of and concerning the plaintiff.”

It was submitted that the plaintiff has not shown the nexus between the 1st plaintiff and the clinics mentioned in the alleged defamatory reports. It was stated that the drug store mentioned in the investigative programme aired by the 3rd defendant had been closed as at the time of airing. That the plaintiffs have not adduced evidence that their store was the same as the one in the programme. It was further submitted that the 1st plaintiff is a company and it is imperative that the alleged defamatory imputation must reflect upon the company itself and not upon its members or officials only. The 1st defendant on this issue cited the latter book at paragraph 25 where it is stated;

“A corporate body may maintain an action for libel or slander in the same way as an individual. However, the imputation must reflect upon the company or corporation itself and not the officials. Unlike an individual, a company has no feelings, so the only damage it can suffer is to its reputation...”

On the issue that the plaintiff must show that the words complained of refer to it/him, the 1st defendant relied on **Francis Atwoli** case (supra). It was submitted that the plaintiff has not satisfied the requirements for the grant of the orders sought as was highlighted in **Ahmed Adan v. Nation Media Group Limited & 2 others [2016] e KLR** and **Cheserem v. Immediate Media Services (2000) I EA 371 (CCK)**. It was submitted that public interest weighed heavily on the publication and that the report was made in exercise of journalistic duty and constitutional right to freedom of expression and freedom of media as was found in **Gilgil Hills Academy Ltd v. The Standard Ltd [2009] e KLR**. It was further submitted that the plaintiff’s suit was time barred under section 4 of the Limitation of Actions Act since it was to be brought within one year of the date of the cause of action.

13. The court has considered the application and the arguments by all the parties. The threshold for grant of interlocutory injunctions in defamation cases were set own in the decision of **Cheserem v. Immediate Media Services (2002) EA 371 (CCK)** that:

“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 is 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 cases the court's jurisdiction to grant an injunction is exercised with the 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 come out and the court aims to protect a humane, responsible, truthful and trustworthy defendant."

14. The above position is reiterated in *Gatley on Libel and Slander, 12 Edition, Sweet and Maxwell at paragraph 24.2* that:

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 cases"....." Thus the court will only grant an interim injunction where:

- a. The statement is unarguably defamatory;
- b. There are no good 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.

15. In *Gilgil Hills Academy Ltd v. The Standard Ltd (2000) e KLR 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 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 defendants maintain that they have not published and neither do they intend to publish any defamatory words concerning the plaintiff hence an injunction against them would not lie."

16. In *Harakas & others v Baltic Mercantile & shipping Exchange Ltd and Another (1982) 2 All ER 701* Lord Denning held;

"where there was a defence of justification or qualified privilege in respect of a libel, an injunction restraining further publication would not be granted unless it would be shown that the defendant dishonestly and maliciously proposed to say or publish information which he knew to be untrue."

Considering that none of the annexures relied on by the plaintiffs refer to them I am of the view that no prima facie case has been established for the grant of an injunction.

17. In *Media Council of Kenya vs Eric Orina (2013) e KLR Onyancha J* applied the reasoning in *Bonnard & another v Perryman* when he held:

" The reasons for the court to deal with the issue of granting an injunction to restrain the publication of a defamatory material at this stage where the case has not been heard or evidence in the case known , can be picked from the above very old case they include:

- a) *That free speech should not without strict proof of its violating individual wrong, be fettered.*
- b) *That the right to free speech is one which is for the public interest and therefore one which*

individuals should Have and should exercise without impediments, even if such impediment is by means of court injunction at the interim stage.

c) That even where there is clear evidence that publication or repeated publication of a libel is likely to cause injury to an individual, protection of the right to free speech would force the court to deny restraint thereof even at the risk of such injury occurring in anticipation that the individual injury, will be compensated by ordinary damages or even aggravated damages.

d) That otherwise the publication of the injurious material will be justified because it may be true and should be published in public interest or as fair comment.

18. The court in issuing injunctive orders should be guided by the principles stated in the case of Giella Vs. Cassman Brown though injunctive orders in a defamatory suit should be granted in very clear cases. The applicant must prove;

(a) A prima facie case

(b) He stands to suffer irreparable loss if the orders are not granted.

(c) If the court is in doubt it shall decide the case on a balance of convenience.

19. On whether the applicants have established a prima facie case, they have to show that the article was defamatory, there was malice on the part of the defendants, the article was not true and that it referred to them.

On whether the article was defamatory, the court has perused through the various publications attributed to the defendants herein. It is noted that none of them mentions the first plaintiff by name and more importantly, by the time the publication was done, the first plaintiff had not been incorporated and in the premises it lacks capacity to seek the interlocutory orders that it is seeking. It is not possible that the first plaintiff could have been defamed before it came into existence.

20. With regard to the 2nd plaintiff, it is true that his name is mentioned in a caption published in a Newspaper article annexed and marked RKN2 to the 2nd plaintiff's supporting affidavit. I have carefully perused the contents of that article and the same is titled;

City Trader in Doping Claim Granted Bail

what I am able to gather from the article is that it was reporting about the criminal case at Kibera, the fact that the 2nd plaintiff had been released on cash bail of Kshs.50,000/-. It is on record that the 2nd plaintiff was charged with a criminal offence at Kibera Law Court and this fact has not been denied. In the premises aforesaid, the publication against the second plaintiff is prima facie true and the defendants did not have any malice in publishing the same as they were merely reporting what transpired in court".

21. The 3rd, 4th and 5th defendants have invited the court to take judicial notice of the nefarious reputation that the country has attracted with regard to doping scourge, a fact evidenced by near ban that the country faced from the world anti-doping Agency during the Olympic Games in the Rio Brazil. That the programme "poisoned spike" was made in good faith and fairly due to the doping crisis.

This court at the invitation by the three defendants has taken judicial notice of that fact as the doping scourge was a matter of public interest.

The court having taken judicial notice as above the balance of convenience tilts more on the defendants and in not granting the orders sought by the plaintiffs.

In the result, I find and hold that the plaintiffs have failed to establish a prima facie case with a probability of success and I therefore dismiss the application dated the 18th February, 2016.

Costs are awarded to the defendants.

Dated, signed and delivered at Nairobi this 23rd day of March, 2017.

.....

L NJUGUNA

JUDGE

In the presence of

.....*For the 1st Plaintiff*

..... *For the 2nd Plaintiff*

..... *For the 1st Defendant*

..... *For the 2nd Defendant*

..... *For the 3rd Defendant*

..... *For the 4th Defendant*

..... *For the 5th Defendant*

..... *For the 6th Defendant*

..... *For the 7th Defendant*

..... *For the 8th Defendant*