



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 431 OF 2015

PETER NYABUTI. PLAINTIFF

VERSUS

NATION MEDIA GROUP 1ST DEFENDANT/RESPONDENT

DAVID HERBLING. 2ND DEFENDANT/RESPONDENT

RULING

The application before the court for determination is the Notice of Motion dated the 14th December, 2015 brought under Order 40 Rules 1-3, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya, Article 159 (2) (d) of the Constitution and all other enabling provisions of the law.

The Plaintiff/applicant has sought the following orders: -

1. Spent.
2. That, pending the hearing and determination of this application inter parties, there be an order of temporary injunction, restraining the Defendants, their agents, employees, servants or any other person claiming through them from further publishing any article, words, material or remarks against, of and concerning the Plaintiff in relation to the alleged **“Tanzanian Big Loan Scandal.”**
3. That pending the hearing and determination of this suit, there be an order of temporary injunction, restraining the Defendants, their agents, employees, servants or any other person claiming through them from further republishing any article, words, material or remarks against, of and concerning the Plaintiff in relation to the alleged **“Tanzanian Big Loan Scandal.”**
4. The costs of this application be provided for.

It is premised on the grounds set out on the body of the same and it is supported by the affidavit of PETER NYABUTI sworn on the 14th December, 2015.

The deponent who is the Managing Director of Astra Insurance Brokers Limited, depones that on the 8th December, 2015, the Defendants herein, maliciously, recklessly and without any justification whatsoever published and caused to be published in the **“Business Daily Newspaper”** defamatory articles of and concerning him entitled: -

“How a Kenyan engineered big loan scandal” in relation to the alleged “Tanzanian Sovereign

Note Big Bribery Scandal”.

That sometimes in the year 2011 he was approached by Dr. Fratern Mboya (deceased) and Henry Katilya who requested him to join their company, Enterprise Growth Market Advisors (hereinafter referred to as EGMA) whose main objective was to give financial advice to investors in terms of investment. He was requested to promote the business and assist in sourcing for the investors and customers in the Kenyan Business Market.

That he joined the company as a non-executive Director whereas Dr. Fratern Mboya who has since retired as the Chief Executive Officer of Tanzania’s Capital Markets Authority, was at all material times the Managing Director of EGMA.

He further depones that in the year 2012, the Government of Tanzania needed to raise public funds in order to support Tanzania’s ongoing **“Five year Development Plan”** and to meet the key infrastructural requirements within the country, the Standard Bank and Stanbic were awarded the mandate to raise those funds for the Government of Tanzania by way of sovereign note private placement. In the year 2012, Dr. Fratern Mboya and Mr. Henry Katilya informed him that EGMA had received a business proposal from Stanbic Bank – Tanzania to act as a local agent to facilitate in the aforementioned transaction.

He avers that at no time was he involved in the negotiations with Stanbic Bank as Dr. Fratern Mboya who was the Managing Director carried out all the negotiations with Stanbic Bank and was identified as the contact person on behalf of EGMA in the transaction.

The negotiations culminated into a collaboration agreement with EGMA to establish a Consortium, to collaborate the transaction that arranged for the financing of the initial amount of United States Dollar Six Hundred Million. The agreed fee payable to EGMA by Stanbic Bank was to be the equivalent of 1% of the gross proceeds raised in the financing by Stanbic Bank. The payments were made to the players in the transaction including EGMA. He further depones that notwithstanding that the transaction was successfully completed, the Daily nation in an article published in the **“Business Daily”** on 8th December, 2015, falsely, maliciously and without any justification whatsoever published and/or caused to be published defamatory words in an article titled **“HOW A KENYAN ENGINEERED TANZANIA’S BIG LOAN SCANDAL”** and subtitled **“Insurance Mogul named in UK Court Comments as Chief Architect of 600 Million Scandal of 2013”**.

“A Kenyan insurance executive has been named as one of the people who pocketed part of the \$6 Million bribe that Stanbic bank – which operates in Kenya as CFC Stanbic Bank – paid wheel-dealers to help win a lucrative fundraising deal from the Tanzanian Government.

Peter Nyabuti, the Managing Director of Astra Insurance Brokers in Tanzania is listed as a co-signatory in documents that were used to withdraw the kickbacks that Standard Bank Plc paid in March, 2013... that he is a shrewd businessman and has been reported in local dailies attending fundraising events in his home area Kisii County”.

He avers that the said article was defamatory of him and that the Defendants failed, refused and/or neglected to ascertain whether there was any “Tanzanian Sovereign Note Big Bribery Scandal and if he was involved in such a scandal or impropriety as alleged. That by reason of the publication of the said defamatory words by the Defendants, he risks attracting public spite from the public, both in Kenya and in Tanzania where he carries business and serve as the Managing Director of Astra Insurance Brokers Limited. He further avers that he risks losing his long standing reputation built over the years, as one of the leading players in the Corporate leadership in the Republic of Kenya and the Republic of Tanzania, a public figure, a family man and a person of known good reputation and high standing in the Society. He avers that unless the Defendants are restrained by this Honourable court, his reputation will further be irretrievably tainted, blemished and lowered in the estimation of right thinking members of the public and he will suffer irreparably.

Though the Defendants filed a statement of defence, they did not file a replying affidavit and/or grounds

of opposition to the application. An order was given for filing of submissions to the application which the Defendants failed to comply with and the court had to write the ruling without the benefit of their submissions.

The Plaintiff filed his submissions on the 19th May, 2013 together with the list of authorities which this Honourable court has duly considered.

In his submissions, the Plaintiff has submitted that the parameters for consideration by the court in an ordinary application for interlocutory injunctive orders were considered in the famous case of **Giella Vs Cassman Brown & Co. Limited (973) E.A. 358** in which the Applicant has to demonstrate that he has

1. Prima facie case with probability of success.
2. An applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that an award of damages will not adequately compensate the damage.
3. If the court is in doubt then it shall determine the application on a balance of convenience.

The applicant has relied on the cases of **Cheserem Vs Intermediate Media Services (2000) 2EA 371** wherein the court applied the principle of **Giella Vs Cassman Brown** in a defamation case and further stated that an interlocutory injunction in defamation cases is granted in clear cases of defamation. Therefore, to succeed in such an application, the applicant must demonstrate a clear case of defamation, irreparable loss and a favourable balance of convenience where the court is in doubt.

On prima facie case, the Plaintiff submitted that a Prima facie case is established when the words complained of tend to lower the Plaintiff's reputation in the estimation of the right thinking members of the society, the words refer to the Plaintiff and that the words are malicious and false.

The Plaintiff further submitted that the article was malicious in that the Defendants were not concerned with the truth nor did they inquire into the veracity of their facts and in support of this contention, he has relied on the case of **Phineas Nyagah Vs Gitobu Imanyara NRB HCCC No. 697 of 2009 (2013) eKLR**.

It was the Plaintiff's further submission that the publication but the Defendants would lower the applicant in the estimation of right thinking members of the society, permanently, unless this Honourable Court intervenes to redeem the already tainted reputation.

The court has carefully considered the application, the supporting affidavit and the submissions by the Plaintiff. This being an interlocutory application, I am alive to the fact that at this stage, the court should not make any definite findings as to do so will prejudice the entire case and may embarrass the trial court. What the Plaintiff is expected to prove at this stage is whether he has prima facie case with a probability of success and whether he stands to suffer irreparable loss if the application is not granted and if the court is in doubt, it shall decide the matter on a balance of convenience as exposed in the case of **Giella Vs Cassman Brown & Co. Limited (supra)**.

The article complained of is contained in paragraph 13 of the Plaint. The article refers to the Plaintiff by name and it alleges that he was one of the people who pocketed part of the \$6 million bribe that was paid by Stanbic Bank. That article further alleges that the Plaintiff is a co-signatory in documents that were used to withdraw the kickbacks that Standard Bank paid in March 2013 and that he is a shrewd businessman. The Plaintiff avers that the said article was defamatory of him in that the contents of the same are malicious and fake. I have perused the statement of defence by the Defendants wherein it is admitted that they published the words complained of but denies that the said words were false and/or malicious and that they are defamatory to the Plaintiff.

The question then is, has the plaintiff established a prima facie case? In **Gatley on Libel and Slander** the author observes that: -

“... a prima facie cause of action is established once the Plaintiff proves that defamatory words have been published about him; he does not have to prove that the defamatory words are false, for the law presumes this in his favour.”

The article alleges the Plaintiff received a bribe and that he is a shrewd businessman which allegations if not true are defamatory of him but this can only be established by the trial court after taking evidence by the parties and it is for this reason that in the case of **Cheserem Vs Intermediate Media Services Limited** the court observed that the court’s jurisdiction to grant an injunction in defamation cases should be exercised with the greatest caution so that an injunction is granted only in the clearest possible cases. But considering the seriousness of the allegations contained in the article against the Plaintiff and the damage those allegations could cause to his reputation, if true, and on the balance of probability it is only fair that an interlocutory injunction is issued in favour of the Plaintiff to protect his reputation pending the hearing and determination of the suit. In making this finding, the court has been guided by the principle that reputation is an integral and important part of the dignity of an individual and once a reputation is lost, the same cannot be regained and no amount of damages can compensate a Plaintiff for loss of his reputation.

In the premises aforesaid, the application dated 14th December, 2015 is hereby allowed in terms of prayer 3. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 8th day of September, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... **for the Plaintiff/Applicant**

..... **for the Defendant/Respondent**