



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 409 OF 2015

- 1. ALNASHIR POPAT**
- 2. HANIF SOMJI**
- 3. JINIT SHAH**
- 4. ANWAR HAJEE**
- 5. VISHNU DHUTIA**
- 6. MUKESH PATEL**
- 7. OMUREMBE IYADI**
- 8. ERIC BENGI PLAINTIFFS**

VERSUS

CONSUMERS FEDERATION OF KENYA (being sued through its
officials namely **STEPHEN MUTORO, EPHRAIM KANAKE AND HENRY OCHIENG'**

RULING

1. By their notice of motion dated 2nd December, 2015, the Plaintiffs seek the following:
 - i. An order of injunction restraining the Respondent whether by itself, its officials, officers, employees, servants and/or agents from publishing, causing to be published, republished and/or disseminating, distributing or otherwise reproducing, whether partially or in its totality, the article titled, "COFEK" speaks to Imperial Bank Chairman on Fraud" or any of the words complained of, on its official website at <http://www.cofek.co.ke> or on any other website, and/or on any media platform including print media and/or social media, pending the hearing and determination of this suit.
 - ii. An order of injunction restraining the Respondent whether by itself, its officials, officers, servants and/or agents from publishing and/or causing to be published, any material of and concerning the Applicants, in relation to their directorships at Imperial Bank Limited ("in receivership") pending the hearing and determination of this suit.
 - iii. An order of injunction restraining the Respondent whether by its officials, representatives,

Employees, servants and or agents, from publishing, disseminating and or making copies of the Respondent's representative's tape recording of his or her telephone conversation with Alnashir Popat on or about 20th November, 2015 and requiring that the Respondent to deliver up to the court, the said tape recording and any copies thereof, pending hearing and determination of the suit.

2. The Plaintiffs' gravamen is that the Defendant maliciously caused to be published a libelous article on 20th November, 2015 about them. It was contended that given the sensitivity of the issue of the Bank's closure as well as the allegations against the Plaintiffs, the Defendant ought not to have published the article prior to giving the Plaintiffs an opportunity to respond to the allegations. That the Defendant informed the Plaintiffs' advocates that it has a tape recording of its representative's call to the 1st Plaintiff which recording was done without his knowledge and or consent.

3. In opposing, the Respondent relied on the replying affidavit by Stephen Mutoro sworn on the 10th December, 2015. He averred that the Plaintiff's confirmed being directors of Imperial Bank. That the Plaintiff's as currently constituted are full Board of the Bank that is under receivership and they cannot purport to be filing this suit against the Respondent in their individual capacities in relations to acts that are related to the bank that is under receivership nor have they attached a company resolution to authorize filing of the suit.

4. That the published article only mentioned the 1st Plaintiff and that the 1st Plaintiff had a conversation with Mr. Mutoro and he was made aware that his name would appear on the article but he did object to that.

5. That none of the executive directors including the 1st Plaintiff have demonstrated any form of reputational injury arising from the article noting that the issues are in the public domain and the bank has been adversely mentioned in various forums for the malpractice that led to the Central Bank of Kenya stepping in and placing it under receivership. That the 1st Plaintiff was offered the right of reply but ignored.

6. It was deponed that the Plaintiffs are not personally known to the Defendants in any capacity and as such there was not intended malice but a fair comment on issues that were affecting consumers and that by virtue of Article 46 of the Constitution of Kenya, it is the right of the consumers to have relevant information for them to attain full benefits of the goods and services offered and that the closure of the bank was a matter of public interest.

7. In a further affidavit sworn by Jinit Shah on the 18th December, 2015 he avers that the Plaintiffs are suing as directors of the bank and they did not require a resolution to file the suit. That the 1st Plaintiff was not shown an advance draft of the Article before it was published by the Defendant. It is denied that a right of reply was offered to the 1st Plaintiff. That the article does not amount to fair comment nor does it attract the defence of fair comment as contemplated under Section 15 of the Defamation Act and that the Defendant's right to inform the consumers on current issues as alleged is not a licence to publish defamatory articles.

8. The Applicants have sought interlocutory injunctive orders pending the hearing and determination of the suit. This being a defamation matter the court's discretion in granting such a remedy should be exercised with greatest caution so that an injunction is granted only in the clearest possible cases In this regard I find the case **Cheserem Vs Immediate Media Services (2000) 1EA 371 (CCK)** very helpful where it was held:-

“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. 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 out and the court aims to protect humane, responsible, truthful and trustworthy Defendant.”

9. This position was repeated in **Gatley on Libel and Slander**, 12th Edition, Sweet and Maxwell at paragraph 24.2 as follows:-

“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.”

10. In **Fraser v. Evans & Another (1969) 1 All ER 8** at page 12 Lord Denning had this to say:-

“It all comes back to this: there are some things which are of such public concern that newspapers, the press, and indeed everyone is entitled to make known the truth and make fair comment on it. This is an integral part of the right to free speech and expression. It must not be whittled away. The Sunday Times assert that in this case there is a matter of public concern. They admit that they are going to injure the plaintiff’s reputation, but they say that they can justify it; that they are only making fair comment on a matter of public interest ; and therefore, that they ought not to be restrained. We cannot prejudge this defence by granting an injunction them. I think that the injunction which has been granted should be removed. The Sunday times should be allowed to publish the article at their risk. If they are guilty if libel or breach of confidence, or breach of copyright, that can be determined by an action hereafter and damages awarded against them. But we should not grant an interim injunction in advance of an article when we do not know in the least what it will contain.”

11. In **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 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.”*

12. The court has considered all the material before it. The Applicants have sought interlocutory injunction against the Defendant, this being a defamation matter, the court’s jurisdiction to grant an injunction should be exercised with greatest caution. This was the holding in the case of **Cheserem Vs Immediate Media Services (2000) IEA 371 (CCK)**.

13. The Defendants have deponed that the 1st Plaintiff was offered the right of reply but he ignored and the conversation was captured in a tape a fact which the 1st Plaintiff has not denied under oath.

14. The Defendant has further averred that the closure of Imperial Bank was a matter in the public domain and therefore of public interest. They have pleaded the defences of justification and public interest.

15. In the case of **Fraser Vs Evans & Another (supra)** as Lord Denning has rightly put, it there are some things which are of such public concern that Newspapers, the press and indeed everyone is entitled to make known the truth and make fair comment on it.

16. This court would wish to borrow those words of wisdom by the learned Judge and find that this is a matter of great public interest and in view of the defences raised by the Defendants, the injunctive orders sought are declined at this stage.

17. Ultimately, the application dated 2nd December, 2015 is hereby dismissed with costs to the Defendants.

Dated, signed and delivered at Nairobi this 10th day of November, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... **For the Plaintiffs**

..... **for the Defendant**