



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

**AT MOMBASA**

**HC.COMM. 87 OF 2016**

**VIKRAM C. KANJI**

**SANJEEV KHAGRAM**

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**SANJEEV KHAGRAM**

**FAIYAZ ANJARWALLA**

**P/A A.B. PATEL & PATEL, ADVOCATES.....PLAINTIFFS**

**VERSUS**

**ZAHID RAFFIQ.....1<sup>ST</sup> DEFENDANT**

**MOHAMED JAMIL RAFFIQ.....2<sup>ND</sup> DEFENDANT**

**MILESTONE CARS (K) LIMITED.....3<sup>RD</sup> DEFENDANT**

**MILESTONE CARS LIMITED.....4<sup>TH</sup> DEFENDANT**

**SUKHVIR SINGH.....5<sup>TH</sup> DEFENDANT**

**WASEEM LADHA.....6<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. Before the court for determination are two applications being:

Notice of Motion dated 19/8/2016 seeking to be certified urgent and orders injunction against the defendant for:-

**1. This Application be certified urgent and service hereof upon the Defendants be dispensed within the first instance.**

**2. Restraining the Defendants jointly and severally whether by themselves or through any directors, agents or servants or howsoever else from further publishing the defamatory words**

complained of in this suit and/or any other similar words defamatory of the Plaintiffs pending the hearing and determination of the application inter-partes.

3. Restraining the Defendants jointly and severally whether by themselves or through any directors, agents or servants or howsoever else from further publishing the defamatory words complained of in this suit and/or any other similar words defamatory of the Plaintiffs pending the hearing and determination of the application of the suit.

4. Restraining the First, Second, Third and Fourth Defendants and, in particular the First or Second Defendants, from contacting and/or communicating with the Plaintiffs whether by in person, phone, SMS texts or any other electronic means including social media and e-mail communication or by any other manner or form of communication or howsoever else or by coming within 100 metres of the Plaintiffs, their place of work or residence pending the hearing and determination of this application inter-partes.

5. Restraining the First, Second, Third and Fourth Defendants and, in particular the First or Second Defendants, from contacting and/or communicating with the Plaintiffs whether by in person, phone, SMS texts or any other electronic means including social media and e-mail communication or by any other manner or form of communication or howsoever else or by coming within 100 metres of the Plaintiffs, their place of work or residence pending the hearing and determination of this application of this suit.

6. Mandatory injunction compelling the First Defendant to remove the offensive publication from the World Wide Web and replace it with an article apologizing to the Plaintiffs and acceptance of the falsity, malice and malevolence emanating from the completely unfounded and baseless allegations made with an order for a similar apology and e-mail communication as aforesaid to be circulated by the Defendants jointly and severally to all the other third parties to whom the Defendants circulated the defamatory and offensive articles complained of.

7. Leave be granted to the Plaintiffs to serve the summons to Enter Appearance in this case as well as any order made herein by substituted service by means of an advertisement in any one of the Daily Newspapers in Kenya.

8. Costs of this Application be awarded to the Plaintiffs.

2. Notice of motion dated 15/9/2016 and seeking orders that:-

1. This Application be certified as urgent and be heard as a matter of priority in this matter.

2. The First and Second Defendants namely, ZAHID RAFFIQ and MOHAMED JAMIL RAFFIQ, be committed to prison for blatantly refusing, neglecting and/or failing to comply with the orders of this Honourable Court made on the 19<sup>th</sup> August 2016.

3. The costs of these contempt proceedings be borne by the said ZAHID RAFFIQ and MOHAMED JAMIL RAFFIQ.

3. The two applications are supported by the affidavits of one VIKRAM

KANJI and SANJEEN KHAGRAM respectively.

### **The Application for injunction**

4. The application is grounded on the plaint and the facts disclosed on the face of the application and deponed in the affidavit of VIKRAM KANJI Advocate. Prayers 1, 2, 4 & 7 were disposed of *ex parte* on 19/8/2016. Briefly the complaint by the plaintiffs is that being lawyers and the firm under which they

practice, they have been offended and aggrieved by what they deem highly defamatory publications by the defendants on a facebook pages on the world wide web purposely designed to extort from the plaintiffs a concession to cease acting for a client as a petitioner in **Mombasa Constitutional Petition No. 54 of 2013**; that the defendants conduct is accentuated by malice and malevolence and continue to cause to the plaintiff grave loss of reputation being based on material falsehood and thus not protected by any defence of fair comment or justification as the sole purpose is to curtail the plaintiff the right to conduct their profession ceasing to represent a client in the matter disclosed above. A sample of the email read as follows:-

**Sunday March 20 2016**

**“Is your firm so incompetent not to have carried out a survey on the property!....”**

**“The fuck-ups have been created by sheer negligence!”**

**Tuesday April 5, 2016 the 1<sup>st</sup> defendant wrote:-**

**“What kind of outfit are you running! You may as well have a slogan on your firm name, specialists in defrauding people and certifying fee.**

**Lastly, matters relating to Jessica, you best quit charing shit. I have one question whose consent did Ajesh of Aum insurance in 2003! You also carried out the transfer on false Government of Kenya title deed for 264 and 265 when you well know that the plot xx2 comprised 3 plots.**

**Wednesday July 27, 2016**

**AB Patel has wasted for years, Our time by using deceptive delay tactics.....**

**“A B PATEL DO NOT THINK OF BRIBING GOVT OFFICIALS! WHICH YOU SEEM TO BE YOUR PRACTICE! TO VICTIMS TO DEFRAUD INNOCENT PEOPLE FOR THE SIMPLE FACT OF ENRICHING YOURSELVES”**

5. These, as said before, are just but samples of the voluminous publications complained about both by email on face book and by text messages. A better reading is to be found in the bundle of documents filed in court with the plaint on 19/8/2016, supplementary list of documents filed on the 15/9/2016 and further supplementary list of documents filed in court on the 15/9/2016.

6. In opposition to the application, the defendants beyond the statement of defence filed by the firm of Mwarandu & Co. Advocates, equally filed a Notice of preliminary objection dated 19/9/2016 and replying affidavits sworn by the 1<sup>st</sup>, 2<sup>nd</sup> defendant and on CHRISTOPHE OKELO the manager of the 3<sup>rd</sup> & 4<sup>th</sup> defendants.

7. In summary the Replying affidavit take the common stand that there has been no defamation on the plaintiff because as publication is denied, the effect of the published words, even if, published are equally denied and there is an averment that the defendants computers were hacked or otherwise manipulated to fix and otherwise connect the defendants with the offending words. In equal measure the defendants challenge the authority of the 1<sup>st</sup> plaintiff to swear the affidavit on behalf of the other plaintiffs. The issue then emerges as the core and substratum of the Notice of Preliminary Objection dated 19/9/2016.

8. When the matter came up for hearing of the application Mr. Abed appeared on behalf of the plaintiffs while Mr. Wachenje held brief for Mr. Mwarandu for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant. The court was informed by Mr. Abed that there were negotiations going on between the plaintiffs one side and the 5<sup>th</sup> & 6<sup>th</sup> defendants on the other side hence the plaintiffs were not seeking any orders against the said two defendants. Consequently the orders now sought must be seen to be aimed as against the 1<sup>st</sup> – 4<sup>th</sup>

defendants only.

9. In oral submissions in support of the application, Mr. Abed urged the court to take notice that the publications complained about having been posted on the internet, the same were available for reading and access to a very large group of persons and the entire world. Taking into account the plaintiffs standing as a firm of lawyers and legal practitioners, the publications as much as they not only allege professional misconduct but also criminal offences were defamatory of the plaintiffs and unless stopped the plaintiff were exposed to be injured in their reputation in a manner that is not reparable. He wholly relied on affidavit sworn by the 1<sup>st</sup> plaintiff in support of the application and urged the court to grant the injunction.

10. On his part Mr. Wachenje, for the defendants opposed the application and submitted that the legal threshold established in the case of GIELLA –VS- CASMAN BROWN had not been met. He pointed out that on behalf of the 3<sup>rd</sup> & 4<sup>th</sup> defendant there was no evidence that both had effected any publications on behalf of the 1<sup>st</sup> & 2<sup>nd</sup> defendants. Mr Wachenje submitted that there were no telephone numbers or social media account numbers to link the defendants with the alleged defamatory publications. He equally stressed the point that there was no authority on the 1<sup>st</sup> defendant to swear the affidavit in support on behalf of the other plaintiffs and further that the plaintiffs having failed to file witness statements with the plaint, the plaint was bare and did not disclosed a case of action.

11. The second application was grounded on the alleged facts that even after this court had issued the orders of injunction on the 19/8/2016, the 1<sup>st</sup> and 2<sup>nd</sup> defendant have continued with their publication of the offending words and the plaintiff relied on the supplementary and further supplement list of documents filed in court on the 15/9/2016 to contend that the Respondents have been in breach of the court orders.

12. I will deal with the two applications seriatim and in the order of the dates on when they were filed. That is to say I will determine the application for injunction first then proceed to the application for contempt thereafter.

### **Notice Of Motion Dated**

**19/08/2016**

13. Whether or not to grant an interim prohibitory injunction and there conditions of such grant is now a well beaten path. An applicant is duty bound to prove a prima facie case with probabilities of success and proceed to demonstrate that unless the orders are granted, he stands to suffer an injury that is incapable of compensation by an award of damages.

14. I have at the beginning of this ruling reproduced some of the materials complained about as being defamatory. It has also been pleaded and not disputed that the plaintiffs are legal practitioners of many years and own reputation a fact which is equally not disputed.

15. Indeed reputation for a professional who sell services is everything. I only need to add that reputation is so integral to some professions, if not most, that it may be all one needs to carry out the profession. The flipside is that when it is put to risk then the persons' whole and entire profession is itself at risk.

16. I have taken into account the statement of defence filed on behalf of the defendants and noted that it is denied that the defendants were the authors of the material complained about. There is however no denial that whoever may be the author the materials are shown to emanate from them and are not exalting nor in praise of the plaintiffs. Prima facie and without making a final determination, I form the opinion that the publications are not only objectionable but have the potential of being injurious to the plaintiffs reputation character and professional undertakings. I am convinced that the plaintiffs have demonstrated an arguable case and that the case even at this juncture is not pretentious nor frivolous.

17. Equally, I find that to the extent that the statements tend to cast the plaintiffs as dishonest, negligent and fraudulent, in their professional engagement, at trial they may just prove that the attack on that professional calling is in fact a tort that is actionable *per se*. In that eventuality I have asked myself whether damages this court may accord at the conclusion of the case may be sufficient for a professional career which may stand ruined if the publications are not halted by an order of injunction. To this court, the natural consequence that must flow from continued publication is the permanent ruin of the plaintiff who, I take judicial notice, are not young and upcoming lawyers able to start a fresh. I form the opinion that damages would not be an adequate remedy. Equally, I hold the view that some of the words having been posted in the world wide web, will remain there unless pulled down. This can only be achieved by a mandatory order of injunction.

18. If I was wrong on this view, I would still hold the view that one is entitled and cannot be denied the right to safeguard the reputation purely because he may get damages. I find that the plaintiffs are entitled to the orders of injunction as prayed against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants being prohibitory injunction as well as mandatory injunction in terms of prayers 3, 5 & 6. I also award to the plaintiffs the costs of the application.

APPLICATION DATED 15/9/2016.

19. On the 19/8/2016, this court granted to the plaintiffs interim orders of injunction in terms of prayer 2,4 & 7, the record reveals that the order was executed and service upon the defendants effected by substituted service.

20. Pursuant to that service the defendant has engaged an advocate filed papers and attended court to oppose the application.

There is therefore no doubt that the service was effective upon the defendants.

21. However by the supplementary and further supplementary lists of documents filed on the 15/9/2016, it is evidence that the publication attributed to the 1<sup>st</sup> and 2<sup>nd</sup> defendants has continued unabated. For example, there are text messages attributed to one Zahid London. I take it that this is the 1<sup>st</sup> defendant. The following words have been published:-

**“Mentioning my brother was a big mistake that you will pay for asshole and for the initial fraud. CBK and CID gonna be all over you over IBL fraud”**

**“One month after you have my cousin killed you go carry out a transfer on our property”.**

This among others were text messages sent to the plaintiffs. That was a communication prohibited by the interim order of constitution.

22. On 22/8/2016, the 2<sup>nd</sup> defendant wrote a letter to the plaintiffs advocate and of importance is the 3<sup>rd</sup> last paragraph which reads:-

**“In conclusion at the meeting the posts on social media or on the platform facebook had been desalted and I had explained to both Mr. Kanyi and Mr. Khagram in the presence of their client Ajesh Ngravat that such posts on social media will cease once we have a confirmation of the terms of settlement in writing.**

**However, no acknowledgement, of the meeting or discussion ever came and this resulted in Mr. Zahid Raffiq venting his frustration on social media”.**

23. That was not the end. On 26/8/2016 while acknowledging receipt of an affidavit by my Khanji, the 1<sup>st</sup> defendant wrote.

**“...you are either colluding with him to defraud us! or do not know the entire facts .... But you have chosen to defend fraudsters or have something to gain”.**

24. Again on 6/9/2016, the same 1<sup>st</sup> defendant wrote :-

**“Mr. Balala, you go ahead and represent AB & P, those fraudsters have asked you to represent them why?!!! Because you have something to do with defrauding my family”.**

25. I entertain no doubt that the orders restraining the defendant from further publication and from contacting the plaintiffs by calls text or any other electronic media were breached fragrantly in equal measure. That not only negates the purpose of the court and the duty on every citizen to obey court orders but are in themselves a recipe for break of social order and rule of law. It is not for the personal dignity or prestige of a judge that court punish for contempt but for the large good of the society that social cohesion and civilization is best guaranteed when directions and orders by the court are obeyed.

26. In this case fragrant disobedience or just disregard to the need to comply has been wholly disregarded and outrightly shunned. There would be no better example of contempt if this is not.

27. This court is bound to safeguard the rule of law and the need to obey court orders. I find that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in breach of the orders issued herein on the 19/8/2016.

28. The upshot of the foregoing is that I grant to those plaintiff an order in terms of prayers 3, 5 & 6 of the applications dated 19/8/2016.

29. I find that the 1<sup>st</sup> and 2<sup>nd</sup> defendant have refused and failed to comply with the court orders of 19/8/2016 to extent that even after the orders were issued and duly served, have continued with the publications complained about for which reason I find them to be in contempt of the court orders and order that they attend court on the 9/11/2016 to show cause why the two should not be punished in accordance with the law.

30. I award the costs of the applications to the plaintiff applicants.

Dated and delivered at Mombasa this **26th** day of **October 2016**.

**HON. P.J.O. OTIENO**

**JUDGE**

**9/11/2016**

Coram

Before Hon. Justice P.J.O. Otieno J

Court Asst. – Linda

Mr Wachenje for Mwarandu for the 1<sup>st</sup> to 4<sup>th</sup> defendants

Mr. Khagram for Abed for the plaintiff

**Mr. Wachenje**

Matter is due for the 1<sup>st</sup> and 2<sup>nd</sup> to show cause why they should not be punished for contempt. However,

Mr. Mwarandu has filed an application seeking stay and the 1<sup>st</sup> defendant is in the U.K. receiving treatment. We pray for an adjournment to enable the 1<sup>st</sup> Respondent recover and attend court.

**Mr. Khagram**

This is a frivolous attempt to insult the intelligence of the court. The Respondents do not have regard for the rule of law. They are making an attempt to avoid attending court. May the court issue a warrant of arrest to be executed by the D.C.I.O Mombasa to arrest them and come to court.

**Court**

I do not believe that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are genuine in their advocates explanation for failure to come to court and show cause. I agree with the plaintiffs that there is an attempt at avoiding attendance. I think the depositions by 2<sup>nd</sup> Respondent are not complied. In order to enforce their attendance, I now direct that warrant of arrest do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent to be executed by the D.C.I.O Urban Police Station, by arrest and presentation of the two before court to show cause why they should not be punished for contempt.

This matter will be mention on 16/11/2016 to confirm if the D.C.I.O shall have executed the warrants.

**Hon. P.J.O. Otieno J**

**9/11/2016**