



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO. 377 OF 2013**

**THE STAR PUBLICATION LIMITED..... 1<sup>ST</sup> PLAINTIFF**

**WILLIAM PIKE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**AHMEDNASIR ABDULLAHI.....1<sup>ST</sup> DEFENDANT**

**NAIROBI LAW MONTHLY LIMITED.....2<sup>ND</sup> DEFENDANT**

**MEDIAMAX NETWORKS LIMITED.....3<sup>RD</sup> DEFENDANT**

**APOLLO KAMAU.....4<sup>TH</sup> DEFENDANT**

**NATION MEDIA GROUP LIMITED.....5<sup>TH</sup> DEFENDANT**

**LARRY MADOWO.....6<sup>TH</sup> DEFENDANT**

**RULING**

By a Notice of Motion dated 10<sup>th</sup> September 2013, the Plaintiffs herein are seeking restraining orders against the Defendants from further broadcasting, publishing or causing to be published in any way whatsoever, any news items statements, articles, words and pictures on television , Radio, internet, newspapers, magazines, facebook, twitter, YouTube and whatsapp, linking and /or associating the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff with espionage on behalf of Mi6, Mossad, the Republic of Uganda , the United Kingdom, the state of Israel or at all, or any news items , statements articles words and images similarly defamatory of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, pending the hearing of the suit. The application is premised on the grounds appearing on the face of the application.

The application is opposed. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed grounds of opposition dated 16<sup>th</sup> September 2013 while the 5<sup>th</sup> and 6<sup>th</sup> Defendants also filed grounds of opposition dated 17<sup>th</sup> September 2013. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed an application seeking the court to set aside the interim orders issued on the 17<sup>th</sup> September, 2013 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant by Honourable Justice Waweru. On 18<sup>th</sup> February 2014 the court ordered that the two applications be canvassed together.

The Applicants case is that the Defendants have published three publications in which the 1<sup>st</sup> Defendant

has used the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendant to defame the 1<sup>st</sup> Plaintiff. That on 22<sup>nd</sup> August 2013, the 3<sup>rd</sup> and 4<sup>th</sup> Defendant hosted the 1<sup>st</sup> Defendant in their prime time news bulletin when the 1<sup>st</sup> and 4<sup>th</sup> Defendants uttered and published or participated in the publication of injurious falsehoods and defamatory statements about the Plaintiffs as contained in the transcript marked as exhibit WP2. According to the Plaintiffs the publication claimed that the 2<sup>nd</sup> Plaintiff is a British spy, an agent of the British spy network MI6 who worked as such with President Yoweri Museveni of Uganda. The publication further claims that he was also used by the British Government to spread propaganda that Uhuru Kenyatta used the Mungiki during the post-election violence.

In the month of September 2013, the 1<sup>st</sup> Defendant on K24 TV, claimed that he had a dossier on the 2<sup>nd</sup> Plaintiff which would be published in the 2<sup>nd</sup> Defendant publication. And that the same were also published and continue to be published on YouTube at [www.youtube.com](http://www.youtube.com).

That on the 6<sup>th</sup> September 2013, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant released for circulation and sale, volume 4, issue number 8 of their September 2013, edition of the **Nairobi Law Monthly** in which they continued and continue to repeat the defamatory statements against the Plaintiffs.

The Plaintiffs claim that the 1<sup>st</sup> Defendant is a regular columnist in the daily nation and Sunday Nation. The Plaintiff is apprehensive that 1<sup>st</sup> Defendant may continue to publish the injurious falsehood and defamatory statements about the Plaintiffs.

During the oral canvassing of the applications, Ms Ngania for the Plaintiffs submitted that the publication and broadcast have no single truth to them since the source of the information has not been identified. That the Defendants have not filed any evidence to persuade the court to conclude that there was truth in the publications.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendant case is that granting of interim injunction by the Honourable Justice Waweru in its very self-prejudges the entire suit at the preliminary stage therefore denying the court the benefit of hearing all the relevant issues raised in this case. The 1<sup>st</sup> Defendant asserted that the 2<sup>nd</sup> Defendant had conducted investigations on the 2<sup>nd</sup> Plaintiff for 18 months and has even interviewed many people in Kenya and Uganda who confirmed that he was a spy working for MI6 and that therefore the article and publication are true and genuine.

In his supporting affidavit dated 18<sup>th</sup> September 2013, the 1<sup>st</sup> Defendant avers that the 2<sup>nd</sup> Defendant has unearthed a more comprehensive dossier on the 2<sup>nd</sup> Plaintiff which is to be a cover story for the October edition. He maintains that it is their duty as magazine to publish the truth and the court should not regulate the content or editorial policy of the 2<sup>nd</sup> Defendant.

He stated that the interim injunction was granted during a mention on the 17<sup>th</sup> September 2013 contrary to well established principle that substantive orders cannot be granted at a mention. He argued that interim injunction cannot lie in libel suits where the publisher anchors its defence on justification and more so where the applicant can be adequately compensated by way of damage.

On behalf of 3<sup>rd</sup> and 4<sup>th</sup> Defendant, the 4<sup>th</sup> Defendant swore a replying affidavit dated 7<sup>th</sup> November 2013. He denied having uttered and published or participated in any injurious falsehood and defamatory statements about the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. He further stated that he has no control over what the 1<sup>st</sup> Defendant was going to say nor does he have power to prevent him from speaking during the interviews since the matter was of national interest.

The 6<sup>th</sup> Defendant also contested the application. He swore a replying affidavit on behalf of the 5<sup>th</sup> Defendant. He stated that on 8<sup>th</sup> September he invited the 1<sup>st</sup> Defendant as a member of the Judicial Service Commission (JSC) to explain to the audience the correct position on the controversy surrounding the disciplinary action that the JSC had taken against the Chief Registrar of the Judiciary, Gladys Boss

Shollei. During the interview the 1<sup>st</sup> Defendant was asked questions on issues of public interest. Among them was the allegation about the 2<sup>nd</sup> Plaintiff who is a media personality. He stated that the 1<sup>st</sup> Defendant had alleged on social media and the 2<sup>nd</sup> Defendant publication that the 2<sup>nd</sup> Plaintiff was a British spy in Kenya and was an MI6 agent. During the interviews the 1<sup>st</sup> Defendant confirmed that he had evidence to justify the allegations he made on social media and in publication about the 1<sup>st</sup> Plaintiff. He avers that the questions were not in any way malicious but in discharge of his duty to practice responsible journalism. He maintains that the 1<sup>st</sup> Defendant addressed matters that were of national importance which he believes were only fair and just.

I have carefully considered the Plaintiffs application and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant application in detail as well as, the oral submissions and the contents of both the supporting and replying affidavits.

The first issue for determination is the 1<sup>st</sup> and 2<sup>nd</sup> Defendant Application dated 18<sup>th</sup> September 2013.

It is settled law that an interlocutory injunction will be set aside or discharged if it has been obtained by means of misrepresentation or concealment of material facts. In the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim that the orders were obtained during a mention. The Defendants argued that substantive orders cannot be granted at a mention. The granting of temporary injunction is a matter within the discretion of the court. The court, no doubt has inherent powers to make such orders as may be necessary for the ends of justice. Under **Section 63 of the Civil Procedure Act Cap 21** which summarizes the general powers of the Court in regard to interlocutory proceedings. It provides, in inter alia –

**63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed –**

a) .....

b) .....

**c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.**

d) .....

e) .....

In this case, I do not find any reason to set aside the interim injunction since the court has a duty to handle all matters presented before it and the parties had been properly notified, that the mention was for court directions in consultation with the parties involved. An injunction may be granted in all cases in which it appears to the Court to be just, and convenient to do so. The record before the court shows that the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants were in court when counsel for the Plaintiffs sought the interim orders stating that the Defendants have the intention to publish the defamatory materials in their October issue. In making its ruling the court considered the submissions and was persuaded to grant the injunction in terms of prayer 2 of the Notice of motion dated 10<sup>th</sup> September 2013. In my view the Notice of Motion dated 18<sup>th</sup> September 2013 has no merit and could have been dismissed.

We now move on to the second issue for determination which is the Plaintiffs' application dated 10<sup>th</sup> September 2013. The Plaintiffs are seeking an interlocutory injunction pending the hearing and determination of the suit. It is settled law that the principles of law applicable in a case seeking interim injunction in defamation cases are the same as those laid down in the case of **Giella Vs Cassman Brown and Co. Ltd (1973) EA 358** : A party needs to show that they have a prima facie case with a probability of success; that they stand to suffer irreparable damage that cannot be compensated by an award in damages and that in the event of any doubt in regard to the above two conditions that the balance of

convenience having regard to the circumstances of the matter tilts in favour of the applicant.

Also in defamation case the Courts must weigh between the freedom to express oneself and impart information against the respect for others' rights and reputation. The freedom of expression is enshrined in **Article 33(1) (a) of the Constitution** which provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However that freedom is limited by clause (3) thereof which provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

The Defendants in this case have argued that the application seek to deny them the right to give fair comment on matter of public interest and in the process gag an independent publication from discharging its mandate. They maintain that the matters complained of are fair comment on matters of public concern. The Plaintiffs on their part have stated that there is no evidence in the claims being peddled by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and if the court does not stop them they will continue to publish the defamatory material which would destroy their personal and/or individual reputation.

In the case of **Media Council of Kenya Vs Eric Orina [2013] eKLR** I asserted that the above cited principles in the **Giella** case, are applied in a special way in defamation cases. The said principles are applied with the greatest caution so that the injunction sought is granted only in the clearest of cases. The court has to be satisfied that the words or matters complained of are clearly libelous and that they are so manifestly defamatory, that any verdict to the contrary would likely be set aside as perverse. I therein extracted the following reasons which should apply to this defamation case, why, inter alia, the court should apply the **Giella** case principles with caution: -

- a) *That free speech should not without strict proof of its violating individual rights, be fettered.*
- b) *That the right of free speech is one which is for public interest by dint of human rights as protected by our Constitution and therefore one which individuals should have and should exercise without impediments, even if such impediments is by court injunction such as the one sought herein, at this interim state of suit.*
- 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 persuade 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 or aggravated damages or both.*
- 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 or true comment.*

In this case, the Defendants have asserted and even insisted and persisted that the material they already have and intend to publish, are true. That they publish the material because they are true and are in fair comment. They are aware that the material might be libelous and to what extent. They are equally aware that if the material are not true and are of little public concern publication would expose them to heavy general, exemplary and or aggravated damages by the trial court. In the circumstances, this court could in the name of the right of free speech and public interest, act with great caution in granting orders of injunction to restrain the defendants. To the same end I will now quote **Lord Denning in Fraser Vs Evans & Another [1969] 1 ALL ER, 8** where he stated thus: -

***“It all comes back to this. There are some things which are of such public concern that the newspapers, the press and indeed, everyone, is entitled to make known the truth and make fair comment on. This in an integral part of the right of 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 be restrained. We cannot prejudge this defence by granting an injunction against 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 of libel... that can be determined by an action hereafter and damages awarded against them. But we should not grant an injunction in advance of an article when we do not know in the least what it will contain...”***

I cannot choose better words in this case. I do not know exactly what the Nairobi Law Monthly Limited, the Mediamax Networks Limited and the Nation Media Group Limited intend to publish following their persistence to do so. They will do so at their own risk as to all kinds of damages. The Plaintiffs are at liberty to amend this pleading to seek additional damages if the present pleadings are not up to such. But as to this court, the correct and fair thing to do is to protect more a public concern and the right to free speech as compared to individual right in a suitable case such as this, even if such may discharge the earlier orders granting an injunction in the interim.

The end result is, therefore, that this application has no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 11<sup>th</sup> day of February, 2015.

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**D A ONYANCHA**

**JUDGE**