REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 73 OF 2015

RUTH RUGURU NYAGAH ……..…….PLAINTIFF

VERSUS

KARIUKI CHEGE……..…..1ST DEFENDANT

DAVID H. GRAY ……..……..2ND DEFENDANT

RULING

This ruling determines the plaintiff's application by way of Notice of Motion dated 30th February 2015 wherein she seeks from this court orders that:

1. Spent

2. Spent

3. This honourable court be pleased to restrain the 1st and 2nd defendants, by themselves, or though any of their servants, and argents from uttering any defamatory words, publishing any defamatory information, verbally or in writing to individuals, groups, body or bodies, companies or to any other institutions whether local or international, of or concerning the plaintiff pending the hearing and determination of this suit;

4. That costs of this application be provided for.

The plaintiff first approached this court on 23rd February 2015 when the Honourable Mbogoli Msagha J granted an interim temporary order of injunction under certificate of urgency. That interim order is still on record pending this ruling.

The applicant's application is supported by her supporting affidavit sworn on 20th February 2015 and her supplementary affidavit sworn on 1st April 2015. The application is predicated on the grounds that:-

1. The plaintiff is an international citizen advising on Horticulture in Tanzania and Mauritius and sitting in International Boards on certification based in Cologne, Germany and San Jose, Costa Rica;
2. That the plaintiff is a past Managing Director of Africert Ltd, a company where the 1st and 2nd

defendants sit as board members from which the plaintiff honorably resigned;

3. That the 1st and 2nd defendants maliciously thinks the plaintiff is in completion with the said Africert Ltd in offering Consultancy Services and in a bid to spoil for the plaintiff from getting any jobs, the defendants have been publishing defamatory words of and concerning the plaintiff which words have led to such international bodies sidelining the plaintiff in the award of the said jobs;
4. That the defendants have vowed, or are intent on continuing to issue such false or defamatory information about the plaintiff unless they are restrained from doing so;
5. That it is just and reasonable to grant the orders sought to preserve the plaintiff's name and reputation.

In her supporting affidavit, the plaintiff deposes that she is the founder member and not executive director of Africert Ltd, a limited liability company engaged in third party certifications for private standards. That she subsequently upon formation of the said company, invited the defendants herein Kariuki Chege and David H. Gray to buy shares therein and they too became directors . That she was the company's Managing Director until 2013 when she honorably resigned to pursue her PhD studies and also offer consultancy services in Horticulture, something she could not do while serving as a Managing Director in the said Africert Company which company was approved to offer independent certification services but not approved to offer consultancy services in the area that they offer certification.

That upon resignation as Managing Director she nonetheless remained a non executive director and formed her own company Kencert International Ltd which company is not engaged in similar services but in consultancy services which she uses to bid for consultancy jobs.

The plaintiff deposes that upon her resignation she notified her esteemed partners at Africert of that decision and also introduced to them the new Chief Executive Officer and contact person but that that notwithstanding, the defendants herein have maliciously published information including adverts in the newspapers that she is no longer their contact person of Africert Ltd, meaning that she dishonestly still offers herself as the contact person for the Africert Company.

That in early 2014, USAID floated a tender through its KAVES project which required consultancy and not certification services which rules of accreditation do not allow Africert Ltd to undertake and she bid for the said tender and was shortlisted to be awarded the tender but the 2nd defendant maliciously wrote defamatory emails to the said USAID –KAVES project with the result that the plaintiff was denied the job.

In addition, the plaintiff deposed that the defendants have threatened to continue publishing defamatory materials about the plaintiff and to spoil all her future job prospects where she may take part.

The plaintiff further deposes that the defendants have reported her to the criminal investigation department for investigation and were actively pressing that she be charged with a criminal offence purportedly for paying staff of Africert Ltd un authorized salaries which salary increments according to her, were provided for in annual company budgets and the same approved by the defendants herein in the monthly payroll with either defendant being signatories to the decision thereof.

It is further contended that the plaintiff is a global citizen and one of the few experts in International private standards and a co-author of various publications hence her name and any information accompanying the same especially in the Daily Nation which through its digital edition has global distributions and readership attracts attention and any defamatory words published of and concerning about the plaintiff are bound to be read worldwide and deny her job/consultancy opportunities being an rare expert in that rare field.

The defendants filed grounds of opposition dated 9th March 2015 and a replying affidavit sworn by Kariuki Chege the 1st defendant on 7th April 2015.

The defendants oppose the plaintiff's application and contend in the Grounds of Opposition that the plaintiff's application lacks merit, the publications complained of are not defamatory as alleged and that the plaintiff has not established a prima facie case.

Further, that the defendants will rely on the defence of justification and fair comment hence an injunction does not lie as a matter of law. That the application seeks to invoke the court to be involved at the interlocutory stage to analyze an consider the merits of the claim and the likely results of the substantive suit which should be reserved for a full trial or hearing. That the grant of interlocutory injunction in terms of the prayers sought would amount to violation and restriction of the defendant's freedom of expression entrenched in the Constitution and a concurrent stifling of the public interest in that freedom of expression.

That there is no demonstration of any real or reasonable apprehension or legitimate threat on intent to further publish any articles relating to the plaintiff. It is further contended that the alleged defamatory statements, should they be proved, can clearly be compensated by an award of damages as sought in the plaint.

Further, that the balance of convenience heavily tilts in favour of the defendants and finally that the orders sought are incongruent and incompatible with the prayers sought in the plaint.

In the affidavit of Kariuki Chege the Chairman and non executive Director of Africert Ltd it is conceded that the plaintiff was the CEO of the Africert Ltd and a shareholder. She resigned as CEO from 31st December 2013 after giving 3 months written notice in early October 2013 but remain a shareholder and non executive Director. That while serving as CEO of the company, she incorporated Kencert (K) Limited on 28th July 2004 to be in direct competition with the Africert Company in the field of Agribusiness certification in Kenya, which was a clandestine move and that upon her resignation as a CEO, she, without approval of the company communicated directly to stakeholders on her resignation with a request that they get in touch with her privately and unilaterally designated two contact persons at the company as Ag CEO and a junior manager without approval of the company. It is deposed that such information, in accordance with the company policy, ought to be communicated by the chairman on behalf of the Company Board of Directors.

That the company found it necessary to issue a statement relating to the plaintiff's resignation and the conduct of further business by existing and prospective clients hence the notice of 11th July 2014 in the Daily Nation was a general public notice relating to the plaintiff's position.

It was also deposed that what was published was true in substance and no defamatory meaning can be construed from the publications. Further, that the USAID –KAVES tender that was made by the plaintiff necessitated clarification by the company since she had listed in her documents, employees of the company as being part of her team.

That the defendants were not aware that the plaintiff had been unsuccessful in her bid but nonetheless their inquiry did not have any influence in the decision making process at the USAID. That the defendants have not published and do not intend to publish any such defamatory statements as alleged.

The defendants further contended that they had reported financial impropriety to the CID for investigations and therefore any publications made are not defamatory in any way hence the orders sought ate without merit and if granted would be in violation of the defendant's constitutionally guaranteed freedom of expression.

In her supplementary affidavit sworn on 18th April 2015 the plaintiff denied that she was the Chief Executive Officer of Africert and that Kencert Ltd never did any work in competition with Africert Ltd and that it would only work within its mandate and rules of accreditation as annexed to the supplementary affidavit.

The plaintiff also contended that the annexed rules of the company permitted the Managing Director to communicate with stakeholders on resignation and she would directly communicate with all stakeholders on her resignation. In addition, she maintained that an officer from USAID-KAVES personally called and informed her that the contract for which she had been shortlisted could not be awarded to her because of correspondence from the defendants. She also annexed copy of a letter of appreciation for working for SAN- Sustainable Agriculture Networks Board of Directors for her positive contribution to their mission dated 30th October 2014.

The plaintiff further contended that the defendants' correspondence concerning her are not sanctioned by the company and that they are defamatory of her and the emails they disseminated were send to her by those recipients.

The parties respective advocates agreed to dispose of the application by way of written submissions which thy dutifully filed and exchanged.

On behalf of the plaintiff, the submissions were filed on 29th April 2015 reiterating the contents of the application, the grounds thereof, and her depositions in her two affidavits in support and supplementary, and which I need not replicate herein as I have reproduced them verbatim .

In addition, the plaintiff emphasized in her submissions that the publication by the defendants through emails to her prospective employers and the public at large are defamatory of her in that they are understood to mean that she is masquerading as the CEO of the Africert Company and that she embezzled the company money which information made her to be shunned by USAID.

In her view, the plaintiff has met the conditions for grant of an interlocutory temporary injunction as enshrined in the case of **Giella vs Cassman Brown Co. Ltd (1973) EA 358** and that the injunction in defamation cases is more special than any other.

On whether she has established a prima facie case with a probability of success, the plaintiff submitted that the defendants had told the whole world through newspaper a advertisement that she would try to transact business on behalf of Africert Ltd even after resigning which is the same as telling the world to shun her as evidenced from the loss of the tender she bid with USAID/KAVES project. She also submitted that the defendants' freedom of expression is not absolute and should not infringe upon her rights and reputation as provided in Article 33(3) of the Constitution.

The plaintiff avers that she has a right to work both locally and internationally too but the so called right to freedom of repression by the defendants should never be allowed to injure her reputation. The plaintiff further submitted that damages would not be an adequate remedy since she bid for international jobs and is constantly moving from county to county offering her services at the invitation of various bodies and as a co-author of various materials that are internationally read and that not only does she get rewards but recognition as an authority or expert in her field hence damages will not be an adequate remedy.

As to in whose favour the balance of convenience tilts, the plaintiff submitted that if the injunction is not issued she stands to suffer irreparably than if the defendants are restrained from uttering their defamatory statements since there is no corresponding duty from the public to receive misleading statements from the defendants about the plaintiff. She also submits that the failure by the 2nd defendant to oppose the application is an indication that her averments are true and that the 1st defendant's purported authority to swear an affidavit on behalf of the 2nd defendant flies in the face of Order 1 Rule 13(1) and (2) of the Civil Procedure Rules as such authority must be in writing and signed by the party giving it and shall be filed in the case. In this case, it was submitted that no such authority was filed. The plaintiff therefore prayed that this court grants her the orders as prayed.

In their opposing submissions, the defendants relied on their grounds of opposition and replying affidavit by Kariuki Chege.

The defendants submitted that the applicant had not fulfilled the 3 conditions for granting of interlocutory injunctions as was clearly spelled out in the case of **Giella vs Cassman Brown (supra)**. The defendants proposed to address 3 issues:

a) Whether the plaintiff has a right to be granted an interlocutory injunction;

b) Whether grant thereof would amount to an egregious/violation of the defendant's freedom of expression; and

c) Whether the plaintiff stands to suffer irreparable harm unless the orders sought in the application are granted.

On the first issue, the defendants submitted that the plaintiff's application does not meet the threshold for grant of interlocutory injunctions in defamation cases, relying on the decision of **Cheserem vs Immediate Media Services (200) 2 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 case 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 care 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 out and the court aims to protect a humane, responsible, truthful and trustworthy defendant."***

The defendants submitted that 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.

Applying the above principles , the defendants argued that it is an undisputed fact that the plaintiff resigned and that the notice in the newspaper advert just stated that truth adding that she was not authorized to transact any business on behalf of the company which cannot be construed to be defamatory of her and that as the said words as published on 11th July 2014 in the Daily Nation Newspaper were true.

The defendants also relied on **Gilgil Hills Academy Ltd vs 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 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."

In addition, it was submitted by the defendants that it is not sufficient to merely establish that the words complained of are capable of being defamatory, rather the court must be satisfied that in the final determination of the suit it would inevitably come to the conclusion that the words were defamatory. It was further submitted on behalf of the defendants relying on the case of **Harakas & others v Baltic Mercantile & shipping Exchange Ltd and Another (1982) 2 All ER 701** where 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."

In the defendants' view no prima facie case has been established for the grant of an injunction.

On whether the grant of an injunction would infringe the defendants' freedom of expression the defendants relied on the constitutional provisions of Article 33 of the Constitution and urged this court to balance the interest of the public with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals as was set out in the case of **Bonnard & another v Perryman (1891-4) All ER 965-968 that:**

……..(1) it is obvious that the subject matter of an action for defamation is no special as to require exceptional caution in exercising the jurisdiction to interfere by an injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is on which is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done, and unless an alleged libel is untrue, there is no wrong committed; but, on the contrary , often a very wholesome at is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any rights of all have been infringed; and the importance of leaving free speech unfettered is a strong reasons in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

The defendants also relied on the case of **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 on 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.

In the defendants' view, the plaintiff has not demonstrated any reasonable apprehension or legitimate

threat or intent on the part of the defendants to publish any defamatory articles relating to the plaintiff and that there is no evidence that the defendants have threatened to publishing, or uttering defamatory material about her or threatened her future employment prospects hence the court cannot grant an injunction where there is no evidence and no reasonable grounds to infer that the defendants threaten or intends to publish words which are untrue, and that to do so would be inhibiting the defendant's constitutional right to free speech. They defendants also relied on the case of **Fraser vs Evans & Another (1969) 1 All ER 8 at page 12** where Lord Denning stated:-

> ***"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."***

In the defendant's considered view an injunction will not only infringe on their constitutional rights of freedom of expression but also stifle the public interest in that freedom of expression.

On whether the plaintiff stands to suffer an irreparable harm if the injunction is not granted, the defendants submitted that in this case an award of damages would adequately compensate the plaintiff were the application to be refused and the defendants to be allowed to continues uttering or publishing any words regarding the plaintiff. The defendants relied on the decision on **Andrew Oloo Otieno v Benjamin Shamala Imbogo (2008) e KLR** where the court refused to grant an application for an order of temporary injunction where the plaintiff failed to demonstrate that he stood to suffer irreparable loss unless the order sought was granted stating:-

> ***" if the court has to weigh the defendant's constitutional right of self expression against the plaintiff's right to protection of his good reputation, the court will* favour the constitutional right because appropriate damages will be available to the plaintiff."**

In the defendants' conviction, it would be easy to quantify any consequential loss and harm that would arise from the alleged defamatory words as the principles for the award of damages in defamation cases have been clearly laid down in Kenya. The defendants therefore concluded that as no irreparable harm would be suffered by the plaintiff in the circumstances of this case, an injunction should be refused with costs.

Having set out the background to this matter and the parties' respective positions and decided cases which I have all considered in detail, I now set out to indentify issues for determination. But before I frame those issues, it is worth noting that both parties to this dispute tended to argue out the entire case in their detailed pleadings and submissions. However, the principle of law is that at an interlocutory stage, a court is not to make any definite findings as to do so will prejudice the entire case, parties positions and even embarrass the trial court.

This case is a clear one that the plaintiff Ruth Ruguru Nyagah is seeking for a temporary injunction against the defendants, to restrain them from publishing or uttering any libelous matter of and concerning the plaintiff which in her view will be injurious to her profession and reputation.

What the plaintiff is expected to prove at this initial stage, taking into account the principles and conditions for grant of interlocutory injunction in defamation cases is whether she has a prima facie case with probability of success and if the injunction is not granted, whether she stands to suffer

irreparable loss and if the court is in doubt the matter will be decided on a balance of convenience as espoused in the case of **Giella vs Cassman Brown & Co. Ltd (1973) 358.**

The impugned publications which the plaintiff alleges are defamatory of her are contained in the Daily Nation July 11th 2014 showing that Africert had issued a Notice to its partners, clients and the general public that the plaintiff, with her identification and photograph was no longer the CEO of Africert Ltd with effect from 1st January 2014 and that she was not authorized to transact any business on behalf of that company, notwithstanding the fact that she remained a shareholder and a non-executive director of the company.

The publication also directed all communication and or inquiries relating to Africert Ltd to be directed to the CEO Susan M. Wambugu or through the email provided or dropping zone as provided.

The plaintiff also complains that beside that advertisement, the defendants had in their emails of 17th October 2014 at 2.05 pm written to Africert staff of and concerning the plaintiff to the effect that the plaintiff had embezzled funds of the company according to the DAKKS audit assessment which had shown that the Managing Director of Africert Company Ltd who is the plaintiff herein had committed serious financial mismanagement of the company in the period leading to her voluntary departure after setting up a parallel company.

Another email published on 9th July 2014 to internal staff also communicated what the 2nd defendant had done – written to USAID/FINTRAC after learning that the plaintiff had put in bids for the KAVES project and been shortlisted. The third email was a letter written to KAVES notifying them that the plaintiff was still a director of the Africert Ltd yet she had been shortlisted for the consultancy and that she had listed a number of Africert employees as her support team which would pose a serious conflict of interest; and her direct involvement in competition with a company of which she is a director and founder is contrary to the undertakings as a Director of Africert Ltd. That particular letter asked the USAID/KAVES to investigate and explain.

Then there is the allegation that the defendants had reported the plaintiff to the CID for investigations into financial mismanagement of the company wherein she was alleged to have increased staff salaries, among other misfeasance, without approval from the Board of Directors, according to the audit report done by DAKKS. According to the plaintiff, the above publication and emails were false and put her in bad light and professional standing with USAID/KAVES who declined to award her the consultancy job for which she is highly qualified and that being an international and a global organizations member, and co-auditor of several publications, her reputation and standing is lowered and she is unlikely to get any work with any prospective employer.

The defendants on the other hand do not deny the publications and aver that those publications are true in substance and justified, fair comment made in the public interest and or qualified privilege which have no defamatory connotations and that they will adduce evidence to prove their defenses of truth, justifications, fair comment and public interest. They also contended that to grant an injunction will inhibit their constitutionally guaranteed freedom of expression and against the public interest.

In addition, the defendants seriously contended that in defamation claims, courts have over time been reluctant and will normally not grant interlocutory injunctions even if the published matter is defamatory, to allow free speech, since an award of damages would be sufficient even if the publications are found, at the end of it all, to be defamatory.

The defendants also contend that the plaintiff has not satisfied the conditions for the granting of interlocutory injunctions as was settled in the **Giella vs Cassman Brown Co. Ltd case(supra)** and more so, the conditions for grant of interlocutory injunctions in defamation cases as has been in a number of cited cases both from this jurisdiction and elsewhere.

Therefore, from the above exposition, I would draw 2 issues for determination, flowing from the **Giella vs Cassman Brown** case on principles for granting of interlocutory injunction and conditions

espoused in the **Cheserem v Immediate Media Services (supra)** citing **Bonnard and Another v Pennyman (supra)** for grant of Interlocutory temporary injunctions in defamation cases.

The issues are:

i. whether the plaintiff/applicant on the facts before this court and in the circumstances of this case, deserves the orders sought against the defendants;
ii. What orders should this court make?

On issue No. i above, This court has, in dealing with injunctions in defamation cases to weigh between the freedom of expression as espoused in Article 33 of the Constitution which is intended to impart information to the public against the respect of other rights and especially the right to the protection and respect of one's reputation and the inherent dignity and to have that dignity respected and protected as espoused in Article 28 of the Constitution.

In other words, the general principles and conditions precedent to the grant of interlocutory injunctions as established in the **Giella v Cassman Brown** have been modified to suit the uniqueness of defamation of claims. Those principles, as correctly submitted by counsel for the defendants were settled in the case of **Cheserem vs Intermediate Media Services (supra)** among others that:

> ***"An interlocutory injunction is temporary and only subsists until the determination of the main suit. In defamation, the question of injunction is treated in a special way although the conditions applicable in granting an injunction as set out in the Giella v Cassman Brown & Co Ltd (1973) EA 358 generally apply… In defamation cases, those principles apply together with special law relating to the grant of injunctions in defamation cases where the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in clearest possible cases. The court must be satisfied that the words complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside perverse…….The reason for so treating grant of injunction in defamation cases is that the action for defamation bring out conflict between private interests and public interest, more so in cases where the country's constitution has provisions to protect fundamental rights and freedoms of the individual, including the protection of the freedom of expression."***

This court has meticulously examined the pleadings by the plaintiff and the responses by the defendants. The defendants timeously filed defence to the primary suit admitting the publication but settling for the defenses of truth, justification, fair comment and public interest, beside qualified privilege.

However, a careful examination of the impugned publications reveals the following trite facts:

1. The Daily nation publication was done by Africert Ltd and not any of the defendants that have been sued.
2. In all the emails whether written to the internal staff or USAID /KAVES project, the author is clearly stated as DHG ostensibly the second defendant, Mr David H. Gray, and he has not denied that fact.
3. I have not come across any email written by Mr Kariuki Chege of and concerning the plaintiff, albeit he swore an elaborate affidavit of justification.
4. Apart from the email by the 2nd defendant to USAID/KAVES project, the rest of the emails were internal memos and there is no evidence (prima facie) that they were copied to any other person other than staff, in as much as the plaintiff secured a copy forwarded to him by an undisclosed person.
5. Albeit it is contended that the plaintiff lost a consultancy contract with the UDAID/KAVES project because of the correspondence from the defendants, there is no evidence that the 2nd defendant was writing that letter in concert with the 1st defendant or on behalf of the 1st defendant who is the Director-Chairman of Africert Ltd, a limited liability company.
6. The 2nd Defendant has not filed any replying affidavit rebutting the averments in the

plaintiff's supporting affidavit and as was correctly submitted by the plaintiff, the 1st defendant cannot purport to swear an affidavit with authority of the 2nd defendant who has not given that authority in writing and which authority must be filed as required under Order 1 Rule 13(1) and (2) of the Civil Procedure Rules and as espoused in **Crown Berger Ltd v Kalpech Vasuder Devan & Another CA 246/2006**. In the absence of the replying affidavit rebutting the averments in the applicants' supporting affidavit, the 2nd defendant has not controverted the plaintiff/applicant's claim and allegations against him.

Based on the above observations, I find as follows:

1. That no prima facie case with a probability of success has been established that the publication of July 11th 2014 was done by the two defendants as the caption is clear that it was done by Africert Ltd who are not parties to this suit. Furthermore a limited liability company is an artificial person incorporated and it is a legal person or entity separate from its owners or directors unless the corporate veil is lifted as was espoused in the case of **Salomon v Salomon (1897) AC 22**. Where it is clear that the publication was done by the company in its corporate name, then individual directors cannot be held to be the ones personally responsible for the publication prima facie, even if they did so without the authority of the company since the company has the capacity to sue and be sued in its own corporate name.
2. That there is no prima facie case established with a probability of success against the 1st defendant since there is nothing exhibited to show that he authored or directed the writing or uttering of any of the impugned publications or emails purporting to defame the plaintiff. The only emails written by Mr Chege are the ones dated 9th January 2014 and 30th June 2014 which do not reveal any semblance of defamatory matter of and concerning the plaintiff.
3. That the email of 9th July 2014 which was addressed to internal staff of Africert Ltd, in my mind view is qualified privileged communication, unlike the emails of 18th June 2014 to USAID/KAVES – Subcontracts@ fintrac.com which was written by the 2nd defendant David H. Gray asking KAVES to investigate and explain the issue of conflict of interest involving the applicant's bids for the consultancy contract.
4. That there is no evidence that the email of 18th June 2014 was official communication from Africert Ltd Company for which the plaintiff is a co-director, was authorized by the Board of Directors to the 2nd defendant to write to USAID/KAVES project. The said email was therefore written by the 2nd defendant in his personal and individual capacity.
5. The 2nd defendant, as I have stated, did not swear any affidavit to rebut the allegation that the said letter to KAVES was defamatory and malicious and was intended to injure the reputation of the plaintiff and that as a result, she lost that KAVES tender for which she had been shortlisted and that an official at KAVES called her personally and notified her of the reasons for her not being successful was due to that correspondence. As to whether the content of that letter /email are true or not is a matter to be determined at the trial. However, prima facie, this court finds that the allegations of conflict of interest are serious allegations which if proven to be true, against the plaintiff, have dire consequences and would damage the reputation of the plaintiff.
6. I therefore find that the plaintiff/applicant has made out a prima facie case with a probability of success as against the 2nd defendant David H. Gray. I also find that email of 18th June 2014 to be manifestly libelous- (**See Gatley on libel).** No good grounds have been provided by the 2nd defendant to enable this court concludes that that statement of conflict of interest may be true. There is in my view no other defence which might succeed on that aspect and there is so far no suit pending against the applicant by the Africert Company or any other person seeking to bar her from engaging in what is perceived to be unfair competition with Africert. There is also no counterclaim in this case against her and neither has Africert as a company sought to be enjoined to the proceedings to protect its interests against any perceived infringement by the plaintiff/applicant.
7. As to whether the plaintiff would suffer irreparable loss if an injunction is not granted at this stage, as against the 2nd defendant, the plaintiff avers that the publication targeted at her

prospective employers will destroy her reputation and career. On the other hand and as I have stated there is no rebuttal if this averment by the 2nd defendant.

I am therefore inclined to find for the plaintiff that such publication targeted at her prospective employers thereby denying her employment opportunities would ruin her livelihood and no amount of damages can adequately compensate a person's lost career opportunities .

The publication as impugned, prima facie discloses that the plaintiff is engaging in competition with her former employer Africert. There is in law an available remedy fair unfair competition which the Africert Company, as a limited liability company can seek and obtain, but not the 2nd defendant to snoop around or to eavesdrop on the plaintiff, trying to find out which lucrative employment or consultancy that she might secure and warn them of possible conflict of interest. That act or actions by the 2nd defendant, in the absence of any evidence to the contrary, can be construed to mean vilification of others.

The freedom of expression must be balanced against the other party's right to work and eke a decent living. In my view, there will be more irreparable lose to the plaintiff than to any public if the 2nd defendant, his agents or servants are not tamed by a restraining order from uttering /disseminating such publications of and concerning the plaintiff. On the other hand, I do not phantom any injury that the public is likely to suffer should the 2nd defendant be restrained from disseminating similar information to the public concerning the plaintiff. In other words, the balance of convenience tilts in favour of the plaintiff.

In my view, prima facie there are special circumstances in this case that warrant a temporary injunction to issue, restraining the 2nd defendant, David H. Gray his agents, servants or proxies from publishing any defamatory information verbally or in writing to individuals, groups, bodies, companies or to any other institution whether local or international of or concerning the plaintiff, pending the hearing and determination of this suit and I so order.

There is, however no prima facie case established against the 1st defendant and I dismiss the application as against the 1st defendant Kariuki Chege.

Costs of the application shall abide the outcome of the main suit.

I further order, pursuant to Order 40 Rule 2(2) of Civil Procedure Rules, and in order not to let the plaintiff get the temporary order herein and develop an inertia, that the plaintiff do set in motion the process of readying this suit for hearing and determination within a period of a 9 months from the date hereof failure to which the temporary injunction granted herein against the 2nd defendant shall lapse unless otherwise ordered by the court.

Dated, signed and delivered in open court at Nairobi this 8th day of July 2015.

R.E. ABURIRLI

JUDGE

8.7.2015

Coram R.E. Aburili J

C.C. Samuel

Present:

Mr Nyangau Advocate for plaintiff /applicant

Mr Adogo for defendant/respondent

Court- Ruling read and pronounced in open court as scheduled in the presence of all the parties' advocates.

R.E. ABURILI

JUDGE

8/7/2015