



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 137 OF 2013

SAFARICOM LIMITED.....PLAINTIFF

-VERSUS-

ROBERT ALAIDEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 23rd April 2013 and filed on 24th April 2013. The same is brought under Section 63(e) of the Civil Procedure Act Cap 21, Order 40 Rule 2 and 4, Order 5 Rule 17 & Order 1 of the Civil Procedure Rules 2010.
2. The applicant seeks the following orders;
 - i. Spent.
 - ii. That pending the hearing and determination of this application inter partes, or until further orders of the court an order of temporary injunction do issue restraining the defendant the defendant whether by himself or associates from further publishing any articles on the internet or any other medium libelous of the plaintiff.
 - iii. That pending the hearing and determination of this application inter partes, or until further orders of the court mandatory injunction do issue restraining the defendant to forthwith remove the articles published on the website www.techmtaa.com titled 'safaricom Now retiring and Muzzling call center staff impaired by cheap Headsets' and 'another chilling letter from safaricom call center staff'
 - iv. That the plaintiff be allowed to effect service of summons, plaint, the present application, effectual order and hearing notice upon the defendant via substituted service through an advertisement in a newspaper with national circulation.
 - v. That pending the hearing and determination of the substantive suit order of a temporary injunction do issue restraining the defendant whether by himself or associates from publishing any articles on the internet or any other medium libelous of the plaintiff.
 - vi. That pending the hearing and determination of the substantive suit order of a mandatory injunction do issue directing the defendant to forth with remove the article published on website 'safaricom Now retiring and Muzzling call center staff impaired by cheap Headsets' and 'another chilling letter from safaricom call center staff';
 - vii. That pending the hearing and determination of this application *inter partes*, or until further orders of the court an order of temporary injunction do issue restraining the defendant whether himself or associates from further publishing any articles on the internet or any other medium libelous of the plaintiff

viii. That costs of this application be provided for.

The grounds and facts are summarized as follows;

3. The motion is based on the grounds on the face of the application and the supporting affidavit of Daniel M. Ndaba dated 24th April, 2013. That the grounds and facts are summarized as follows; that the defendant has sensationally published and widely disseminated articles on the internet making false and libelous statements against the plaintiff in relation to alleged malpractice, mistreatment of staff, bribery of unnamed individuals and unsubstantiated claims of intimidation; that he continues to solicit inflammatory comments from bloggers and general public on his libelous articles hosted on www.techmtaa.com; that failure to grant a temporary injunction would be defeated by delay as the injury complained about is ongoing due to further dissemination on the www.techmtaa.com; that there is likelihood of the defendant continuing to publish libelous articles about the plaintiff; that there is real and present risk and danger of the defendant further publishing articles libelous of the plaintiff therefore exacerbating the injury to the plaintiff's corporate reputation; that the plaintiff has a prima facie case premised on tort of libel against the defendant for malicious and false article posted by the defendant in that the defendant does not substantiate the sensational articles published on www.techmtaa.com, twitter and social media and makes direct references to the plaintiff as the subject of the blog and has recklessly and maliciously posted offensive and defamatory articles without verification of what he presents as facts; that the effects of the alarmist, false and sensational articles published by the defendant are likely to cause the plaintiff damage by adverse publicity which damage may not be capable of quantification and adequate redress by monetary damages; that balance of convenience tilts in favour of an order being issued to restrain the continued damage to the reputation of a corporate person causing public outrage and bias premised on fabricated alarmist article; that the defendant through his article clearly demonstrates that he has no respect to the rights and reputation of others; that the articles published by the defendant are false and injurious to the Plaintiff's reputation; that the remarks made by the defendant attribute criminal culpability to the plaintiff by falsely asserting that the plaintiff is involved in acts of bribery intimidation and what he refers to 'arm twisting'; that the adverse publicity will have a negative impact on the plaintiff's corporate image, corporate social responsibility initiatives, goodwill from partners and disdain from its huge customer base which may not be quantifiable in monetary terms; that some of the comments made by the defendant touch on matters pending in court and potentially have the effect of severely prejudicing the plaintiff's position. The applicant quoted contents of article and letters and extracts of the blog.
4. The application is opposed and Mr. Robert Alai filed a Replying affidavit dated 3rd July, 2013. He depones that he is a stranger to the allegations made by the applicant and denies publication by him on the plaintiff or its chief Executive officer relating to malpractice, mistreatment of staff bribery and unsubstantiated claims of intimidation. He avers he is a stranger to the averments so far as they claim the existence of the alleged publication, their falsity, allegations of injury to the reputation of the plaintiff; he denies making any allegations attributed to criminal culpability of the plaintiff through false assertions about bribery, intimidation, arm twisting as alleged. He denies making use of social media and blogs to disparage the plaintiff by posting false comments either in the past or present and denies having abused the social media and blogs or other platforms to disseminate vitriol and half truths about the plaintiff or any other person and that he is responsible for the alleged publication and indicated that he cannot perpetuate the said publication or postings. He denies being the proprietor or agent and had no connection or relationship with them and it would be unjust and unfair for the court to require him to delete the subject matter article; that him not being the proprietor and agent of the said website and as such has no control over the said media and as such cannot be held responsible for the said defamatory matter. He avers that the alleged article and subject matter appearing on the social media and other internet platforms are aspects of freedom of media as guaranteed by the constitution as they are true and accurate reporting on judicial proceedings and amount to fair information and comment on public interest; that the application does not raise any reasonable cause of action and denies any connection responsibility or control of the subject matter complained of and appearing on www.techmtaa.com; that allowing the orders would be a great injustice to him as he will be

required to take responsibility and stop or delete publications, posting which he has no control over and that this case is not proper for orders for temporary injunction as the plaintiff has no prima facie case with probability of success and urges the court to disallow the application.

5. Parties filed written submissions, the plaintiff and defendant filed their written submissions on 28th November 2013 and 17th December, 2013 respectively. I have read and considered the said written and oral submissions made in court.
6. The applicant submitted that they had evidence and that they should be granted interlocutory injunction as well as mandatory injunction and referred to the case of ***Giella vs Cassman Brown Ltd [1973] EA 358***. It submitted that they had proved they have a prima facie case with a probability of success. That the defendant had posted two libelous articles “ ” and “ ” consequently geared towards injuring the plaintiff’s reputation and that there is eminent threat that the defendant \shall continue to post libelous articles against the plaintiff at the peril of suffering further irreparable loss if not stopped. The applicant also referred to the case of ***Mrao Ltd. –vs- First American Ltd and 2 others***. It was further submitted that the defendant has not given any foundational basis for the content of the publication nor justified the claims made on the blog but only asserts that he is not the proprietor of the said website. The applicant referred the court to the annexures where it claimed it depicted the defendant as the person responsible for posting the offending blog, one annexure to a phone number and email and submitted that the defendant could not refute that he was associated with the said accounts identifying him by name and the said publication bears the name of the author and publisher. It was further submitted that the defendant was acclaim for the updates given on the ‘westgate siege’ and appears to distance himself from the said blog only when its’ convenient for him and that the publication is permanent and is within reach by millions of people and as such the plaintiff stands to suffer irreparable injury or loss if injunction is not granted; that upon the issuance of the temporary court order and service of the same upon the defendant further publication stopped; that this is a clear indication that the defendant was responsible for the said blog as the same would have continued if the defendant was not responsible. It was further Submitted that the publication by content was meant to create a bias among the right thinking members of the public who have high regard for the applicant by portraying him as guilty of malpractice and unethical conduct against its employees through denying them legal assistance. That if a temporary injunction is not issued restricting him from proceeding with the libelous publication the same will greatly affect the reputation and business of the applicant and added that the respondent doesn’t stand to suffer any loss should the injunction order be issued in favor of the plaintiff. That the affairs of the plaintiff would have direct impact on the plaintiffs stock in the market and which is intrinsically linked to its corporate reputation. The applicant argued that the telecommunication industry is highly competitive both locally and abroad and that the loss the applicant stands to suffer cannot be compensated by damages. That the implication depicts the plaintiff as a ‘sweat shop’ that has no regard to its employee. On has balance of convenience, it was submitted that the injustice to be suffered by the plaintiff should the injunction not granted far outweighs that which would be suffered by the defendant, if any should the injunction be issued. The applicant relied on the case of ***Film Rover International Ltd. –vs- cannon Film sales Ltd (1986)3 All E R 722***.

“.....in which case the court was required to feel a high degree of assurance that the plaintiff would succeed at trial before an injunction could be granted) or exceptional in that because withholding an injunction with it a greater risk of injustice than granting it”.

On whether the plaintiff has established a case for temporary restricting the defendant from continuing with his libelous acts and mandatory injunction on this point the applicant relied on the case of ***Kenya breweries Limited vs Okeyo (2002) 1E.A.L.R*** where it was held a mandatory injunction should be granted in very clear cases and in the absence of special circumstances.

It was further submitted that there is need to issue a mandatory injunction to compel the defendant to take down the publication made on the internet. That the plaintiff continues to suffer harm from the blogs that continue to exist and are presently accessible online. That a mandatory injunction will remedially address

the permanent and continuing injury which is still subsisting. That the earliest this case might be heard is in 2015 and as such if the offending article is not removed the plaintiff will continue to suffer harm that it is only a mandatory injunction that can salvage the plaintiff's reputation. That there would be no prejudice sustained by the defendant neither will there be injustice occasioned.

7. Counsel for the respondent submitted that the plaintiff's prayer for mandatory injunction against the respondent is not available to the applicant in that the court does not have jurisdiction under Order 40 Rule 2 and 4 to grant a mandatory injunction on this point he sought to rely on the case of ***Belle Maison Ltd -Vs- Yaya Towers Ltd Cc 2225*** and ***Jane Wanjiku Chege -Vs- Housing Financing Company Of Kenya Limited HCCC 635 Of 2005***. He submitted that even if the plaintiff formed a basis for grant of a mandatory injunction they are yet to meet grounds for granting a mandatory injunction as laid down in the case of ***KAMAU MACUHA -VS- RIPPLES LTD CA NO. NAI. 186 OF 1992*** where it was held that a mandatory injunction can only be issued in the clearest of cases as granting it at an interlocutory stage amounts to granting a major relief claimed in the action and its effect is to determine the suit absolutely. That a mandatory injunction ought not to be granted on basis of affidavit evidence, that it is also established in case law that courts cannot issue a permanent injunction without evidence being taken at full trial. Here he relied on the case of ***WACHIRA MURITHI KIBUCHI -VS- JADSON MARANGA NYAGAU HCCC 280 OF 2006***.

He further submitted that the applicant is not entitled to the orders of temporary injunction sought against the defendant there he relied on the case of ***Giella -vs- Cassman Brown*** which has settled principles of granting interlocutory injunctions. Whether a prima facie case has been made, he submitted that the respondent as failed this test in that he has not shown that the respondent is the author, editor, disseminator, publisher or writer of the said articles. He has also failed to show any nexus between the article and the defendant and submitted that a prima facie case has not been made by the plaintiff. That the applicant has failed to show that there was malice or malicious intent on the part of the respondent or that the offending statements are already in the public domain in civil suit no 148 of 2013 wherein the applicant is charged with failing to provide the plaintiff with proper hearing devices, failure to provide safe working conditions, exposing the plaintiff therein to damage and knowingly exposing the plaintiff therein to injuries. He submitted further that the applicant was a company listed in the stock exchange and any action would attract a huge public interest and that it is in the public interest that sensitive issue ranging around be afforded to the press and its freedom wherefrom anyone in the social media would express their opinion on the same. He submitted that the plaintiff has not proved what loss they stand to suffer on account of the said articles and that the burden of proof of damage is on the plaintiff/applicant. He submitted that the balance of convenience tilts in favour of the defendant in that the applicant has failed to establish the alleged twitter account belong to the respondent, that the alleged defamatory material was published and disseminated by the respondent, how they have suffered loss and damage of the alleged defamatory material and whether the alleged defamatory material was more damaging than a truthful statement would have been and that the said article is an aspect of freedom of the media as guaranteed by the constitution. He sought to annex an article that indicated that 1 in 10 twitter accounts are fake and submitted that the element of false accounts, hacking and deceit in the social media is not an alien concept in this suit but an ongoing prevalent fact. He submitted that the applicant has no prima facie case and as such his prayer for mandatory and temporary injunction must fail and urged the court to dismiss the application with costs.

8. I have considered the facts as deponed by the applicant, the grounds of opposition filed, together with the submissions made by both counsels. The applicant seeks an injunction. The principles of granting an injunction are that the applicant has to establish a prima facie case with probability of success, the applicant has to show that he will suffer irreparable loss and if the court is in doubt it will decide the case on a balance of convenience (see ***Geilla Vs. Cassman Brown Ltd Company E.A 1973 C.A 51 of 1972*** at page 358).

From the facts as deponed it is not in dispute that the applicant is a telecommunication company with a large clientele. From what is deponed and annexed in the affidavit in support am persuaded that the applicant has established a prima facie case. I find that this is a matter where if I were to consider in

detail the dispute between the parties by referring to the quoted blog and letters there is a danger of making a determinations that could affect the findings to be made at a full hearing. I also find that should the said allegations prove false the plaintiff's reputation will be greatly affected and stands to suffer irreparable loss that might not be adequately compensated by an award in damages and the balance of convenience tilts in favor of the applicant.

With regard to the applicants' prayer for mandatory injunction am guided by the case of **LOCABAIL INTERNATIONAL FINANCE LTD -VS- AGRO- EXPORT & ANR [1986] I ALL ER 901** where the Court held:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction.”

I find that granting the mandatory order sought by the applicant would be tantamount to issuing final orders as such this prayer fails. For avoidance of doubt the applicant's application succeeds in prayer 5. Costs shall be in the cause.

Orders accordingly

Dated, signed and delivered this **6th** day of **March** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent

.....Court Clerk