



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 595 OF 2012

MANFRED WALTER SCHMITT.....PLAINTIFF

-VERSUS-

DUBAI BANK LIMITED.....1ST DEFENDANT

HASSAN ZUBEDI..... 2ND DEFENDANT

THE STANDARD GROUP LIMITED.....3RD DEFENDANT

RULING

1. The application before this Court is a notice of motion dated 19th December, 2012 brought pursuant to section 3A of the Civil Procedure Act, Cap 21 laws of Kenya, Order 40, rules 2(1) and Order 51 rule 1 of the Civil Procedure Rules, 2010.
2. The applicant seeks the following orders.
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing of this application *inter-partes* the Honorable Court be pleased to issue temporarily injunction restraining the 1st and 2nd defendants/respondents from releasing any or further details of and concerning the plaintiff's finances and financial information.
 - iv. That pending the hearing of this application *inter-partes* the Honorable Court be pleased to issue temporarily injunction restraining the 3rd defendant / respondent from writing, printing and publishing highly sensitive and confidential financial information of or concerning the plaintiff.
 - v. That upon hearing of this application this Honorable Court be pleased to issue an injunction restraining the 1st and 2nd defendants from releasing any or further details of and concerning the plaintiff's finances and financial information.
 - vi. That upon hearing of this application this Honorable Court be pleased to issue an injunction restraining the 3rd defendants from writing, printing and publishing highly sensitive and confidential financial information of or concerning the plaintiff.

vii. That leave be granted to the plaintiff to put in Nerea Michael Said's statement within 15 days.

viii. That costs of the application be awarded to the Plaintiff/applicant.

3. The motion was based on the grounds on the face of the application and the supporting affidavit of Manfred Walter Schmitt dated 19th December, 2012 where he depones that he is a resident in Kenya for over 20 months, a businessman, investor, with sound and vast business acumen and profile developed over 40 years, a director of several companies including Schmitt Computer Systems, Escom Ag and Sparkyben limited; that the 1st and 2nd defendant released to the 3rd defendant private confidential details of the plaintiff's bank details without consulting him and without any justifiable cause indicating that the plaintiff was involved in suspicious transactions when it knew the same to be totally untrue, baseless, malicious and defamatory; that the 3rd defendant on 15/12/12 caused the same to be written, printed and published in the Standard Newspaper under the heading of, "**suspicion over triangulated 700million**"; That in so doing the defendants were in flagrant breach of section 31 of the Banking Act Cap 488 laws of Kenya which only allow for release of such information to other banks, micro finances and deposit taking microfinance licensed under the Microfinance Act, 2006; That there are well laid out modalities of reporting such suspicions under the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009; That the release of the plaintiff's bank details by the 1st and 2nd defendant to the 3rd defendant was in breach of the Banker-Customer relationship and exposed the plaintiff to great security risk and jeopardized the plaintiff's business interests both in the country and beyond as the said acts did not meet the exceptions with regards to the 1st and 2nd where the disclosure is under compulsion by law, where there is a duty to the public to disclose; that where the interests of the bank requires disclosure, disclosure is made by the express or implied consent of the customer; that on 15/12/2012 the plaintiff's advocate received a call from the Nation Media who intimated that they had received documents from 1st and 2nd defendants and sought comments on them; that it is clear from the foregoing of the defendant's intention to continue injuring him; that on 17/12/12 the 3rd defendant further published an article heading "**Former bank Manager denies sh. 630 Million Laundering claim**"; that the continued publication of the said articles by the defendants without verifying the veracity of the said contents greatly exposed the plaintiff to unwarranted public scrutiny, odium and contempt; that the act of publishing the said articles greatly infringed on the plaintiff's fundamental rights and freedoms to inherent dignity and to have his dignity respected as enshrined under Article 28 of the Constitution of Kenya as the plaintiff is now deemed as to be involved in money laundering a criminal offence under the laws of Kenya; that the said publication is an affront on the plaintiff's presumption of innocence as the content of the article is full of tenor and effect implies that the plaintiff is guilty of suspicious transactions with respect to its bank accounts and undermines the plaintiff's right to fair trial as there is a case pending in Court regarding the same issues and facts; that the defendants in releasing and publishing the said article was an affront on the plaintiff's right to privacy as guaranteed under Article 31 of the Constitution; that his business interests have been greatly affected and undermined as his reputation as a re-known and respected investor natured over the years has been discredited and subjected to odium, contempt, scandal and ridicule; that the defendant's actions were in clear breach of express provisions of the law particularly with regard to fiduciary responsibility and releasing confidential information which has subjected the plaintiff to great risk and affected his business interest, injured his credit and reputation and subjected him to social trauma, ridicule; that he stands to suffer irreparable harm and damage and therefore prays for the application to be allowed as prayed.

4. The application was opposed. The 1st and 2nd defendant joins issues and filed grounds of objection dated 24th march, 2013. They state that the plaintiff does not have a cause of action in defamation as the words complained of are not defamatory; that cause of action for breach of fiduciary duty as the defendants do not owe the plaintiff fiduciary duty; that there is no violation of the applicant's right to privacy, right to presumption of innocence and right to dignity as alleged or any fundamental right if at all; that both the application and the suit are frivolous, vexatious and a gross abuse of the Court process. The 3rd defendant filed grounds of opposition dated 18th January 2013 and stated that the applicant's application is an abuse of the Court process, the same is frivolous

and vexatious and that the defendant had a good defence.

5. The applicant, 1st and 2nd respondents respondent filed their written submission on 6th June, 2013, 28th June 2013 respectively. I have carefully considered the said submissions and cases relied on.

6. Miss Simiyu for the applicant sought to rely on the case of **Giella Cassman Brown**. On the issue of *prima facie* definition from Black's law dictionary establish a right and show that the same has been violated. She submitted that the defendants released plaintiff's private details and account numbers and as a result his reputation was breached due to suspicion; That section 31 of the Banking Act provides that the client's consent is required before release of information and that release has to be a banking institution or micro finance on this point she relied on the case of ***Cream Holding Ltd – vs- Banerjee (2004) UKHL AA*** where it was held that;

“a Court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favorable to justify such an order being made in the particular circumstances of the case.”

She submitted that the plaintiff has established the rights that have existed have been breached and the plaintiff has *prima facie* case and he stands to suffer irreparable harm. She argued that the plaintiff's reputation as a business man is at stake that as a result of the publications made the general public, his colleagues and friends have avoided him and his esteem has been lowered and he lives in fear of his security on this argument she sought to rely on the case of ***Safaricom Limited -vs- Porting Access Kenya Limited & Another (2011) eKLR*** where an injunction restraining the defendants from making or publishing any derogatory words or statements of the plaintiff were issued where the facts are similar to the present case and the case of ***Cheserem-vs- Immediate Media Services [2002] 2 E.A. 371*** where it was held that the Court has to be satisfied that the words or matter complained of are libelous and also that the words are manifestly defamatory that the verdict to the contrary would be set aside perverse. On the argument for balance of convenience she relied on the case of ***Cream Holding Ltd –vs- Banerjee (supra)*** and indicated that the Court should look at the interest of justice.

7. Mr. Muchoki for the 1st and 2nd defendant submitted that the application was bad in law and bears no legal basis; that the application wrongly assumes that the 1st and 2nd defendant were behind the release of the plaintiff's financial information and details to the 3rd respondent and there is no evidence before the Court to justify such allegation; that the orders the applicant seeks to stop the release of the plaintiff's financial details and submitted that equity must follow the law; he urged the Court to critically analyze the said article before rendering its decision; that the article mentions the 2nd defendant in part as *“...if it wasn't for DTB they wouldn't have known the suspicious acts”*....it is further stated that the matter is under investigation and further adds that the information was released by Nerea Michael who wasn't an employee of the bank. That the plaintiff claims that his advocate received a phone call informing him of the said information were un substantiated and there was no affidavit on record regarding the same and that the said Mr. Nerea Michael who is not even a party to the said proceedings. He submitted that the principles of granting a temporary injunction were set out in the case of ***Mrao Ltd –vs- First American Bank of Kenya Ltd and 2 others [2003] KLR 125*** where it was stated that;

“I would say that in Civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an examination or rebuttal from the latter”.

On the issue of *prima facie* case he sought to rely on the case of ***Microsoft Corporation –vs- Mitsumi Garage Ltd. [2001] E.A. 129*** where it was held;

“the existence or other wise of prima facie case is to be adjudged on the evidence adduced and not pleadings or statements by counsels on the face of the application or in the certificates of urgency

since the latter are not evidence and a Court cannot, without more, predicate legal rights and obligations thereon.”

On the issue on balance of convenience he submitted that the same is on the Court and in the present case the same should not be considered. That there are no triable issues for the Court to look at and he sought to rely on the case of *Fraser –vs- Evans and other [1969] 1 All E.R. 8* where it was stated; “there is no wrong do if it is true, or if it is fair comment on a matter of public interest.”

He further submitted that a keen look at the nature of orders sought what the applicant is seeking is actually a *Quia timet* injunction he relied on the case of *Kwality Candies & sweets Ltd –vs- Industrial Development Bank Ltd [2005] eKLR* where it was held that: “the principle upon which a *quia timet* injunction is granted are not different from those which restrictive injunctions are granted with one exception. In an application for a *quia timet* injunction a heavy burden is placed upon him to prove its case for a preventative injunction that is an application for a restrictive injunction”, and that the plaintiff has failed to discharge the burden placed on him.

It was further submitted that the right of confidentiality relied on by the plaintiff is not absolute and here he relied on the case of *Pharaoh and others –vs- bank of credit and Commerce International S A (in liquidation) [1998] 4 All E.R. 455* while relying on the decision in *Price Waterhouse (a firm) BCCI Holdings (Luxembourg) S A [1992] BCLC 583*”

“the duty of confidentiality, whether contractual or equitable, is subject to a limiting principle. It is subject to the right, not merely the duty, to disclose information where there is a higher public interest in disclosure than in maintaining confidentiality.”

8. Miss Simiyu in reply submitted that equity requires one to come to equity with clean hands and that a person must be vigilant in asserting his rights what the plaintiff is seeking to do. That the 3rd respondent affirms that the defendants were engaged in releasing the information to say didn’t is contrary to the evidence of the article published on 15/12/12. She further submitted that the other cases mentioned by the defendant’s pertain to other parties. That it is clear the defendants breached plaintiff’s rights and here she relied on the case of *Bonnard –vs- Perry[1981] E.R.* quoted by the respondents implies that there is the duty of confidentiality and information has to be released to the proper people. In conclusion she stated that the applicant had proved he has a prima facie case and urged the Court to grant the orders sought.

9. I have considered the submissions made, cases cited, the law. The applicant is seeking orders for temporary injunction against the defendants. In determining whether to grant the injunction as sought by the applicant. The principles of granting an injunction are clear and well laid out, (see *Giella Vs. Cassman Brown Ltd E. A 1973 at page 358*). That the appellant must establish a prima facie case with a probability of success, the applicant has to show he will suffer irreparable loss if the orders are not granted and if the Court is in doubt it will decide the case on a balance of convenience. It is not in dispute that there are 2 publications published by the 3rd defendant have revealed the details of the plaintiff financial accounts. The sources of the said information shall be determined at the hearing of the main suit. The said publication can be taken to impute the plaintiff’s character by associating the plaintiff with suspicious financial behavior in relation to his accounts. The plaintiff is a businessman and it is clear that the publications made if proved untrue would have injure the plaintiff’s reputation to his peers and even business partners which will lead to business loss on his part which may not be adequately compensated by an award in damages. The 1st defendant is the plaintiff’s banker, while the 2nd defendant is the 1st defendant’s former employee who would naturally have had access and is custodian of the information pertaining to the plaintiff’s financial dealings and account information. I therefore find that the plaintiff’s application is merited and he has indeed proved he has a prima facie case and that he stands to suffer irreparable loss should the actions of the defendant continue. In the interest of justice I therefore allow the plaintiff’s application and grant the temporary injunction as follows;

- i. That pending the hearing and determination of the suit 1st and 2nd defendants are restrained from releasing details of the plaintiff's finances and financial information.
- ii. That pending the hearing and determination of this suit the 3rd defendant is restrained from writing, printing or publishing confidential information concerning the plaintiff.
- iii. Leave is granted to the plaintiff to put in Nerea Michael said written statement. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **4th** day of **June** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Applicant/Plaintiff

.....For the 1st & 2nd Respondents/1st and 2nd Defendant

.....For the 3rd Respondent/3rd Defendant