IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL CASE NO. 315 OF 2014

CFC STANBIC BANK LIMITED ..... PLAINTIFF

VERSUS

CONSUMER FEDERATION OF KENYA (COFEK)

Being sued through its officials namely **STEPHEN MUTORO,**

EPHRAHIM KANAKE AND

HENRY OCHIENG.....DEFENDANT

RULING

1. On or about 1st October, 2014, the Defendant caused to be published in its web-site http://www.cofek.co.ke an article entitled ***"How true is this allegation on Stanbic Bank Juba Branch on Foreign Exchange Transactions."*** In the said article, there were allegations against the Plaintiff's Juba branch of lack of integrity in Foreign Exchange dealings; breach of Bank of South Sudan and Central Bank of Kenya regulations; arrogance by the Plaintiff's Foreign Exchange dealer; breach of consumer rights and lack of integrity and responsibility by the Plaintiff's management team.
2. On 2nd October, 2014, Messrs Wamae & Allen Advocates the Plaintiff's advocates demanded from the Defendant the immediate removal of the said article from the Defendant's website, facebook and Twitter accounts. On receipt of the said demand, the Defendant responded that they were not the authors of the said anonymous article but had brought the said article to the attention of the public in general to have more complaints and have a public explanation given.
3. Aggrieved by the Defendant's acts, the Plaintiff lodged a plaint in this court on 08th October, 2014 alleging that it had been defamed by the Defendant and claimed for damages for libel, aggravated damages and for a permanent injunction to restrain the Defendant from publishing the words contained in the said article.
4. Together with the Plaint, the Plaintiff took out a Motion on Notice dated 8th October,2014 under Sections 1A and 1B of the Civil Procedure Act and Order 40 of the Civil Procedure Rules seeking various injunctive orders against the Defendant. The grounds upon which the said Motion was grounded upon were set out in the body of the Motion and the Supporting Affidavit of Willis Angila and the Further Affidavit of Nancy Salamba. It was contended by the Plaintiff that the words complained of were defamatory; that the Defendant's website was open to general access by any user of World Wide Web, Facebook and Twitter and to thousands if not millions had free and open access thereto; that the Defendant had declined to remove the offending article from its

website and had published the same to the Central Bank of Kenya "CBK") and had intimated that it shall continue to publish the same and invite more comments thereon from the public.

5. The Plaintiff further contended that as a reputable bank in Africa, the publication of the offending article was affecting its reputation; that by republication of the article to the CBK and the public, the Defendant was actuated by malice; that the Defendant has the power to control those who post on its site by blocking users; that the Plaintiff's reputation was at stake as the continued publication of the offending article was causing immense reputational damage to it and that the defences of fair public comment and justification were not open to the Defendant.
6. At the hearing of the application, Mr. Allen Gichuhi, Learned Counsel for the Plaintiff relied on his written submissions and further submitted that the Defendant had admitted having published the article from an anonymous author; that publication on its twitter account amounted to a republication. Relying on the Newzealand case of **Ian Wishart vs Christophe Murray H.C AK Civ. – 2012-4040-001701**, Mr. Gichuhi submitted that the Defendant had control of what is posted on its website; that it was no defence that the publication of the same sought verification of what was contained in the article; that the court has to strike a balance between the right to freedom of expression and the right not to be defamed as was held in the case of **Phinehas Nyaga Vs Gitobu Imanyara (2013) eKLR**. It was further submitted that the Defendant had breached its duty to verify information before publication as held in **Patrick Nyoike Vs People Ltd (2013) eKLR.** Citing the Court of Appeal decision in **Nation Media Group & 2 others Vs John Harun Mwau (2014) eKLR** counsel urged that this was a proper case to grant the mandatory orders sought.
7. The Defendant opposed the application through the Replying Affidavit of Stephen Mutoro sworn on 27th October, 2014. It was contended that the Defendant is a public interest organization, independent, self funded and non-political which is committed to, inter alia, consumer protection, research, education and customer – care issues. That the Defendant was neither the author nor originator of the article complained of; that it was the legitimate expectation of the anonymous author that the Defendant would cause incisive investigations on the issues raised in the article; that it was for the Plaintiff to investigate the issues raised; that the article constituted fair public comment and was not defamatory of the Plaintiff and that since the Plaintiff had not produced a report to show that what was contained in the article was false or unfounded or that it was actuated by malice, the Defendant was entitled to rely on the defences of fair public comment and justification.
8. It was further contended by the Defendant that although the Plaintiff's South Africa Headquarters had promised to carry out investigations and revert to the Defendant on its findings, nothing was forthcoming therefrom. That the action by the Plaintiff in bringing the current suit was to undermine the provisions of Article 46 of the Constitution and the Consumer Protection Act, 2012. That since the issues raised in the article were very specific, they were of public and consumer interest; that the current application is an affront to the National Values set out in Article 10 of the Constitution as well as Values and Principles of Public Service set out in Article 232. That in publicizing the article, the Defendant sought to aid the Plaintiff and the regulator to collect and collate data to inform the envisaged investigations and that the consumer and legislative interest in the matter overrides the Plaintiff's commercial interest.
9. Mr. Kurauka, Leaned Counsel for the Defendant orally submitted that; since the Defendant was not the author of the offending article, the Plaintiff's claim against the Defendant cannot succeed; that all the Defendant had done was transmit the contents of the article to both the Plaintiff and the regulatory authorities; that the suit is premature in that when the article was forwarded to, among others the Plaintiff, it promised to carry out investigations but had not yet reported on the outcome of those investigations; that the article was not defamatory of the Plaintiff and that if the report of investigations had been given to the Defendant, the Defendant could have carried a correction of the article. Counsel therefore urged that the application be dismissed.
10. I have considered the pleadings, the Affidavits on record, written and oral submissions of Learned Counsel. I have also considered the authorities relied on. This is an injunction application. All the Applicant has to do is; firstly to establish that it has a prima facie case with a probability of success; secondly; show that if the injunction is not granted, it stands to suffer loss and damage that cannot be compensated by way of damages and finally, if this court is in doubt, it will decide the matter based on the balance of convenience.

11. In the case of **Mrao ltd Vs First American Bank of Kenya Ltd & 2 others (2003) IKLR 125** at page 137, the court defined prima facie case in civil cases to be:-

> ***"..... 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 explanation or rebuttal from the latter."***

12. The existence of the subject article is not denied. What is contended by the Defendant is that; the Defendant is not the author thereof; that the article is not defamatory; the defences of fair public comment and justification have been pleaded and that the application and the suit generally are in breach of Articles 46 and 236 of the Constitution of Kenya.
13. I have examined the article as reproduced both in the Plaint and the Supporting Affidavit. The Plaintiff has contended that words in the article meant or were understood to mean that the Plaintiff as a bank engages and condones corrupt practices; that the Plaintiff does not follow the law and international standards of banking; that the Plaintiff does not care about its customers and that the Plaintiff and its employees lack professionalism and ethical standards.
14. In an action for defamation, the claimant must establish three things. Firstly, that the words complained of are defamatory, that is, they tend to lower the claimant's reputation in the estimation of right thinking members of society; secondly, that the words refer to the Claimant and finally, that the words are malicious. It is not in dispute that the words complained of referred to the Plaintiff. The issue is whether those words were defamatory. The words complained of alleged lack of integrity on the part of the Plaintiff's employees in Foreign Exchange dealings; they alleged breach of the law (Bank of South Sudan and Central Bank of Kenya Regulations); arrogance on the part of the Plaintiff's employees dealing in Foreign Exchange; breach of consumer rights by unfair treatment of its customers and finally lack of integrity and responsibility on the part of the Plaintiff's management team.
15. For a bank of international or even national repute, such allegations are not light. In my view, any person or corporate entity in the world of commerce reading such information may be slow in dealing with such an entity. An entity which does not mind the welfare of its customers, which has rogue employees and whose management team is irresponsible and lacks integrity is not an entity a right thinking member of society would easily be willing to deal with. To my mind therefore on a prima facie basis the words may be defamatory.
16. On malice, **Odunga J held in Phineas Nyagah Vs Gitobu Imanyara (2013) eKLR** that:-

> ***"Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice. ..... Malice may also be inferred from the relations between the parties.....***
>
> ***The failure to inquire in the facts is a fact from which inference of malice may properly be drawn."*** *(Underlining mine)*

17. From the evidence on record, it is clear that upon receiving the article from anonymous sources, the Defendant did not seek to verify the authenticity of the contents thereof before republication. When asked to remove the same, the Defendant declined and further published to what it called "the regulatory authorities" i.e. CBK, Secretary to Treasury and the Kenya Bankers Association.
18. In view of the foregoing and without making any firm findings, it is arguable that on a prima facie basis, a tort of defamation has been disclosed by the Plaintiff.
19. The other issue to consider is whether there has been publication and if so, whether the Defendant is responsible therefor. It is not denied that the article was from an anonymous author and an anonymous sources. It is also not disputed that the article was received by the Defendant at its address hotline@cofek.co.ke (see paragraph 4 of the Replying Affidavit). It is also not in dispute that the Defendant then posted it to its website http://www.cofek.co.ke, Facebook and Twitter Accounts. It is further not disputed that the Defendant has followers on its Website, Facebook and Twitter accounts. In my view, by posting the offending article on its Website, Facebook and Twitter accounts, the Defendant had published the article.

20. I am persuaded by the holding in the case of **Wishart Vs Murray (supra)** that the Defendant has power and control of what is to be posted or remain maintained at its Website, Facebook and Twitter accounts. It has the power to block access thereto and to remove therefrom any material that it desires to. In the **Wishart Vs Murray (supra)** case, it was held that:-

> ***"116.I consider that the notice board analogy is apt in considering publication via Facebook. The host of a Facebook page has established what is, essentially, a notice board. It may be a public "notice board", on which anyone can post comments. It may be a private "notice board", available to a specified group. In either case, he host had the power to control the content by deleting postings. The host also has the power to control those who post on the site by blocking users. Those blocked may include potential plaintiffs, affected by what is posted but unable to see the offending content and complain.***
>
> ***117. Those who host Facebook pages or similar are not passive instruments or mere conduits of content posted on their Facebook page. They will be regarded as publishers of postings made by anonymous users in two circumstances. The first is if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it. A request by the person affected is not necessary. The second is where they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory. (****Emphasis supplied)*

21. In the present case, the Defendant could block from its Website undesirable material. It could have deleted or had removed the article from its Website. However, the Defendant did not only decline to remove the article after being requested to do so by the Plaintiff, but it insisted that it was soliciting for comments on the same. Accordingly, I import in this case the holding in the **Wishart and Murray case** and apply the same accordingly. I hold that prima facie, it has been established that the Defendant had published the article at its website as contended by the Plaintiff.
22. In any event, as held in **Safaricom Limited Vs porting Access Kenya Ltd (2011) eKLR,** repetition of a rumour is libel itself. By republishing what is libelous, the Defendant is taken to have assumed responsibility in respect hereof. The learned writers in **Gatley on Libel and Slander 9th Edition Sweet & Maxwell 1998** at pages 150 – 152 have observed that:-

> ***"At common law every republication of a libel is a new libel and, if committed by different persons, each one is liable as if the defamatory statement had originated with him.....***
>
> ***To say that a person who repeats a defamatory allegation originated by another is liable is not to say that nature and extent of his liability is the same as that of the originator. "The nature and quality of the defamatory publication may vary, dependent upon whether it is a report of what another has said and whether it is adopted, repudiated or discounted. The purpose of the republication will also have a significant bearing. ..... When a defamatory publication purports to repeat or report the defamatory statement of another it is an essentially different libel from one where the same imputation is conveyed directly. It may require to be charged or defended differently..... it may also be relevant on damages."*** *(Emphasis added)*

23. In this regard, I hold that on the evidence on record, the Defendant took responsibility on the article when it repeated the publication.
24. There is the issue of the consumer rights guaranteed under Article 46 of the Constitution. That article provides:-

> ***"46.(1) Consumers have the right:-***

a. ***To goods and service of reasonable quality***
b. ***To information necessary for them to gain full benefit from goods and services.***
c. **.....**
d. **.....**

> ***(2) Parliament shall enact legislation to provide for consumer protection and for fair honest and decent advertising."***

25. From the foregoing, it is clear that consumer rights are guaranteed under our Constitution. In this regard, it cannot be disputed that for a consumer to make an informed decision, he/she is entitled to full information about the goods or services he/she intends to procure. The Defendant's position is that it was necessary to invite comments from the public, the Plaintiff as well as the regulatory authorities in order to establish the authenticity of the issues or allegations raised in the article complained of.
26. I have on my part examined Articles 46 and 236 of the Constitution and the Consumer Protection Act, 2012 and I have seen nothing to suggest that the right to reputation that is guaranteed by Article 33(3) of the Constitution is compromised. Both courts in the **Safaricom Ltd's case (supra) and Phineas Nyaga case (supra)** were in agreement that when exercising the freedom of expression under Article 33 of the Constitution, there is a duty of care on the dignity and reputation of others. In the same breath, since the right to reputation is now a constitutional right, I hold that while exercising the consumer rights enshrined under Article 46 of the Constitution, the reputation and dignity of others must be respected.
27. Finally, the Defendant put forth the defences of fair public comment and justification. I have not seen any particulars of facts on which the defence of fair comment is based. Further, no particulars of facts relied on to establish the truth of the allegations in the article to entitle the Defendant to the defence of justification. Since no defence had been filed as at the time the application was being argued, I am unable to dismiss those defences. However, suffice to state that since none of those particulars were on record, I am unable to uphold those defences at this juncture.
28. In this regard, I am of the belief that on the material before court, a prima facie case has been established. As regards damages, the impact the allegations may have on the business interests of the Plaintiff cannot in my view be quantified. Damages cannot be an adequate remedy.
29. I am aware that this is not an ordinary injunction application. In the case of **Cheserem Vs Immediate Media Services (2000) 1EA 371 (CCK)** it was held that:-

> ***"Applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases because they bring out a conflict between private interest and public interest, though the conditions applicable in granting interlocutory injunctions set out in Giella Vs Cassman Brown and Co. Ltd (1973) EA 258 generally apply, in defamatory cases 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 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 are libelous and also that the words are so manifestly defamatory that the verdict to the contrary would be set aside as perverse."*** *(Emphasis added)*

30. The foregoing notwithstanding, I am alive to the fact that some of the prayers sought by the Applicant are mandatory in nature. In **Kenya Breweries Ltd Vs Washington Okeyo Civil appl. NO. 332 of 2000 (UR)** it was held that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. Also in **Halsbury's Laws of England Vol. 24, 4th Edn at paragraph 948**, the learned authors observe:-

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if he case is clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily***

<u>remedied</u>, or if the defendant attempted to steal a match on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application." *(Emphasis added)*

31. I have considered that the article complained of is not only defamatory but its continued publication on the world wide web may continue to damage the Plaintiff's international business, the Plaintiff is a bank of repute operating not only in Kenya but throughout Africa; the continued circulation of the article in the worldwide web of the Defendant may hinder or affect the Plaintiff's reputation and business operations; most of the averments by the Plaintiff in the Affidavit in Support and Further Affidavit were not denied. In addition, the act done can be summarily be remedied by removal of the offending publication. In my view, there exists special circumstances to warrant the granting of the interlocutory mandatory injunction.
32. In the premises, I find the application to be meritorious and I allow the same as prayed. I also award the costs of the application to the Plaintiff.

It is so ordered.

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A. MABEYA

JUDGE

Dated, signed and delivered at Nairobi this 5th day of December, 2014

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D. A. ONYANCHA

JUDGE