



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 337 OF 2012

MONTYS WINES AND SPIRIT LIMITED.....PLAINTIFF

VERSUS

CONSUMER FEDERATION OF KENYA.....DEFENDANT

R U L I N G

The Plaintiff's Notice of Motion before me is dated 24th May, 2012. The same is brought under Orders 40 and 51 of the Civil Procedure Rules, Article 159 of the Constitution and Sections 1A, 1B and 3B of the Civil Procedure Act. It seeks three orders being:-

“1. Pending the hearing and determination of this suit a permanent injunction be issued restraining the defendant from further circulating the email sent on 13th April, 2012, by Mr. Andreas Needham to the defendant by way of electronic mail or by any other form of media.

2. Pending the hearing and determination of this suit Mandatory Orders do issue requiring the defendant to remove from its official website, the email sent to it on 13th April, 2012, by Mr. Andreas Needham to the defendant.

6. Mandatory orders requiring the defendant to publish an apology on its website with a similar prominence and for the same amount of time accorded to the email sent to it on 13th April, 2012, by Mr. Andreas Needham to the Defendant.”

The application was made on the grounds on the face of the Notice of Motion as well as the Supporting Affidavit of Nila Rajesh Rajani.

The Plaintiff contended that it operates a chain of shops at Westlands and Nakumatt Junction, Nairobi in the name of Monty's, that on 13th April, 2012 one Andreas Needham sent an email to the Defendant claiming that he had been mistreated at the Plaintiff's shop at Nakumatt junction on 24th March, 2012, that without seeking any clarification from the Plaintiff, the Defendant rebranded the email calling it **“Kenya's moment of shame and a Senior UNHCR officer incident at Nakumatt Junctions' Monty's shop,”** then circulated the same in its website. That the Defendant had continued to circulate the said electronic mail to 3rd parties and make derogatory statements which have affected and continue to affect the Plaintiff's commercial reputation, that a demand letter from the Plaintiff's Advocates did not elicit any response but only led to the publishing and circulation of further scathing statements against the Plaintiff. On the foregoing, the Plaintiff contended that its commercial reputation was at stake unless the Defendant was restrained from further circulating the said electronic mails or retaining the same in its website.

Mr. Mwangi learned Counsel for the Plaintiff submitted that the Plaintiff's business reputation and therefore goodwill was at stake, that under Article 260 of the Constitution the Defendant was a person in law capable of being sued. Counsel urged that the application be allowed as prayed.

The Defendant did not file any response to the application. The Notice of Preliminary Objection dated 8th June, 2012 was directed against the whole suit and an application dated 29th May, 2012 which had been determined. The Defendant also filed a Notice of Motion dated 22nd June, 2012 which this court ordered on 3rd July, 2012 that the same be heard together with the Plaintiff's Motion under consideration. Although an order had been made on the said 3rd July, 2012 for filing of written submissions for both applications, the Plaintiff filed its submissions in respect of both applications but the Defendant did not. On 6th July, 2012 when the applications came up for hearing, there was no appearance on the part of the Defendant. The court, therefore, dismissed the Defendants Notice of Motion dated 22nd June, 2012 for non attendance. Accordingly, the Plaintiff's application was not only argued ex parte but is also unopposed.

I have seen a copy of the electronic mail complained off. The same was produced as "NRR2", I have read the contents therein. The mail is in the form of the original complaint from one Andreas Needham as addressed to the Defendant, but the Defendant has entitled the email "**Kenya's Moment of Shame and a Senior UNHCR Officer incident at Nakumatt Junction's Monty's shop**". The contents therein do not reflect well of the Plaintiff. However, if the contents therein are true it would be very unfortunate. The Defendant has, however, failed to appear and explain its position regarding the said document. I am satisfied that there being no explanation by the Defendant on the said document, the publication and circulation thereof may damage the business reputation of the Plaintiff. I am satisfied that the Plaintiff has established a prima facie case with a probability of success.

As regards damages, I am alive to the submission of counsel for the Plaintiff that goodwill is the advantage of a good reputation in relation to trade or business, that creation of good reputation and accumulation of goodwill takes a lot of resources care and diligence, that any attack on the reputation can be disastrous for the well being of any business such as the Plaintiff's.

This is an injunction application although I have found that the Plaintiff has established a prima facie case, the Plaintiff did not allege that it will suffer any damage that cannot be compensated by an award of damages if the orders sought are not granted. The Plaintiff left it to the court to make its own deductions and inferences from counsels' submissions.

Be that as it may, since the application was not opposed, I will allow the same as prayed with costs to the Plaintiff.

DATED and delivered at Nairobi this 13th day of July, 2012.

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A. MABEYA

JUDGE