

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 4988 OF 1992

DP & OTHERS.....PLAINTIFF

VERSUS

KENYA TIMES MEDIA TRUST LTD.....DEFENDANT

RULING

The plaintiffs have brought this suit against the defendants for libel. The plaintiffs obtained a temporary *ex- parte* injunction restraining the defendant, one of the national dailies, from repeating the publication of the alleged defamatory matter or of similar words having the same effect. The granting of this injunction has been contested by the defendant and has now heard argument whether the injunction should be confirmed or discharged.

The plaintiffs are eight in number. The first plaintiff is the recently registered Democratic Party of Kenya which is a political party and an unincorporated association registered under the Societies Act. Whilst a trading corporation or a company which is a legal entity, can because of its corporate trading character might be ruined by defamation bring an action in defamation for words which are calculated to injure its reputation in its trade and business, the same cause of action might not be open to an unincorporated association such as the first plaintiff in its own name (see *Gatley on Libel and Slander*, 4th Edition Paragraph 954 and *Halsbury's Laws of England*, Fourth Edition paragraph 26 p15)

But if DP, to employ the popular acronym of the first plaintiff, cannot as such, maintain the present action, then who may? The president for instance of DP could. The second, third and fourth plaintiffs are described in the plaint merely as “ registered officials” of DP, without specifying which particular offices they hold in DP, and “ bring this suit for and on behalf of all the registered members and on their own behalf.” If the particular offices that these plaintiffs hold in DP were specified that would indicate why they should, because of the peculiar positions they hold, regard the alleged defamation which referred without naming names, to certain elements and security personnel of DP, as necessarily referring to them. This omission in the plaint makes the *locus standi* of these plaintiffs uncertain and ambiguous.

But the second, third, and fourth plaintiffs also purport to bring this suit as a representative action on behalf of all the registered members of DP. In support of his view that the chairman, secretary or any member of an un-incorporated association or body of persons cannot bring a representative action for libel published of the association, Mr Dhanji for the defendant has drawn my attention to the English case of *Jenkins v John Bull*, Times, April 20th , 1990 and that statement of legal principle in *Gatly on Libel and Slander* 4th Edition p 427. In the more modern case of *EEPTU v The Times Newspaper* [1980] 3 WLR at p 101, one of the reasons given why no representative action can be brought in libel concerning an un-incorporated association is that a libel on the whole is not a libel on the members. Whilst it can be said for example that the chairman of a society can be said to have been libeled by a libel of his society because he is expected and indeed would be presumed as such, to know what goes on in the society, the same cannot be said of the members of the society at large. At this stage, it is therefore doubtful of the second, third and fourth plaintiffs can bring a representative suit on behalf of all the registered members of DP.

With respect to the fifth to the eighth plaintiffs, their case is that the defamatory words though they are not specifically named therein, apply to them because of their previous military service. These plaintiffs

are described in the plaint, not as members of DP, but vaguely as “working and supporting the Democratic Party of Kenya.” Whether the libel can be said to clearly refer to them, is a matter that can only be established not the trial of the suit.

The foregoing constitute the preliminary and technical facts why at this stage, I cannot say that the plaintiffs have shown that they have a *prima facie* case with a probability of success to support the confirmation of the *ex-parte* injunction. Have I not so held already, I would say that also on a balance of convenience, the *ex-parte* injunction should be discharged because of the legal uncertainty of first to the fourth plaintiffs to maintain this suit and the position that at this stage, the only evidence to suggest that the fifth to the eighth plaintiffs are the ones described in the libel is the following rather weak and inconsequential assertion contained in the affidavit of advocate for the plaintiffs and not as one would expect, in that of the fifth to eighth plaintiffs themselves:

“That I am further informed by my clients, which information I verily believe to be true that the 5th, 6th, 7th, and 8th plaintiffs are all ex-servicemen who have worked for the Armed Forces.”

I have considered the subsequent publications by the defendant and all the comments I have already made apply to them with equal price.

In the result the injunction granted on 21st September, 1992 is hereby discharged with costs for the defendant.

All the text books and leading authorities agree that a Court has discretion to grant an interlocutory restraining injunction restraining further publication of a libel where the defendant continues to publish the libelous matter complained of. But this jurisdiction is a delicate one which will only be exercised with great caution and only in the clearest of cases. The principle is also put this way in *Gatly opus cit* paragraph 1571:

“It will not in general be exercised unless there is strong *prima facie* evidence that the statement complained of is untrue for until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed.”

See also *Bonnard & another v Perryman* (1891-4) CA All ER 965. Had I not already come to the conclusion that the injunction granted on 21st September, 1992 should be discharged. I would have on the principle I have just adverted discharged that injunction on the ground that being in doubt whether the plaintiffs have a *prima facie* case with a probability of success the balance of convenience so dictates.

Dated and delivered at Nairobi this 6th day of October 1992

A.M AKIWUMI

JUDGE