



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MUSINGA & OUKO, JJ.A.)

CIVIL APPEAL NO. 298 OF 2005

BETWEEN

NATION MEDIA GROUP.....1ST APPELLANT

WILFRED KIBORO.....2ND APPELLANT

WANGETHI MWANGI.....3RD APPELLANT

VERSUS

JOHN HARUN MWAU.....RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi, (Osiero, J.)

delivered on 2nd June, 2005

in

HCCC. No. 480 of 2005)

JUDGMENT OF THE COURT

This appeal arises from the ruling by Osiero, J. dated 2nd June, 2005. The ruling was in respect of an application by the respondent, who was the plaintiff in HCCC No. 480 of 2005 seeking the following orders:

“1. That pending the inter partes hearing of this application, the defendants jointly and severally, either through themselves, servants or agents be restrained by temporary injunction from further making, printing, broadcasting, televising or publishing in the internet or its online edition defamatory and/or in any way libelous statements or articles of, concerning or against the plaintiff.

2. That pending the hearing and determination of this suit, the defendants jointly and severally and either through themselves, servants or agents be restrained by temporary injunction from further broadcasting, printing, posting or making or publishing in any way any defamatory and libelous statements in the internet or online articles and statements against the plaintiff.

3. That the defendants jointly and severally through themselves, servants or agents to immediately and unconditionally remove and/or delete the defamatory articles and/or against the plaintiff posted, published and broadcasted at the world wide web by the defendants pending the determination of this suit.”

In his plaint, the respondent had claimed that on 27th April, 2004 the appellants, with intention to mar, nullify, undermine or sabotage his reputation, integrity and character, had jointly and severally falsely and maliciously published a news article in an online edition of their “**Daily Nation**” Newspaper, of and concerning himself the following words:

“MP to be quizzed over import racket

An MP and former Anti-Corruption Authority Boss Harun Mwau are to be questioned by police investigation(sic) on a multi million shillings tax evasion racket at the port of Mombasa.

CID officers yesterday were looking for Mr. Mwau and Juja MP William Kabogo to assist in their investigations into contraband goods seized at Mombasa in containers which had been labeled to disguise their contents.

The goods were bound for the Pepe International Container Terminal owned by Mr. Mwau and were seized in Mombasa in a massive security raid following a tip off.

When a combined team from the Kenya Revenue Authority, Kenya Bureau of Standards, CID and Anti-Corruption Unit swooped at the port, they found the imports about to be re-shipped to Mumbai.

However, all documents indicated they had recently been offloaded from a ship and were to be verified at Mr. Mwau’s depot at Embakasi Nairobi.

The goods worth more than Sh15 million were different from what was indicated in the container labels, said the Kenya Revenue Authority corporate and public Affairs Manager for Southern Region, Mrs. Lucy Njoe said(sic).

It is not clear who owned the exports or whether Mr. Mwau and Mr. Kabogo were linked to them but Mrs. Njoe said the assorted goods were seized when their owners attempted to re- ship them to Mumbai after they had already paid duty for them.

“The owners claimed the goods were destined for Mumbai and had come to Mombasa in a mix-up. We however, became suspicious after learning that duty had already been paid for them,” she said.

Investigators broke into the eight containers yesterday and discovered that most of the goods declared were different from the containers’ contents.

“Although the importers had indicated that the containers had false ceiling material, redo (sic) cassettes, gypsum powder, suitcases and honey we have discovered assorted goods that include shoes, jackets, office stationery, lamination machines and even tomato sauces.” she said.

Police said the owners of the containers had even obtained a court injunction to prevent port officials and the police from opening the containers, but which has been set aside.

“The Government officials involved in the operation are still going through the tedious process of establishing what is contained in all the eight containers even as we are talking,” police said.

Mrs. Njoe said the operation against tax evaders at the port Mombasa (sic) involved officers from different arms of the Government.

The cost (sic) deputy Provincial Commissioner, Mr. Wilson Lithole, said the anti- tax evasion campaign at the port of Mombasa would be intensified until all unscrupulous traders who deny the Government revenue were brought to book.

It is understood the importers of the eight containers had applied for their verification to be carried out as one of the six independent Container Freight Stations or dry ports.

A KRA official said unscrupulous traders were using Container Freight Stations (CFS) to deny the Government millions of shillings in revenue.

They used them for false declaration, under-evaluation and importation of counterfeit goods.

The Government has been losing billions of shillings in revenue due to under valuation and false declaration of motor vehicles and goods described as personal and household effects.

Documents seen by the Nation shows that one importer paid (US \$7,500) Shs.85,000 for a Toyota Hiace mini-bus manufactured in 1998 from Japan but only paid duty based on (US \$5,250) Shs.409,500 value, denying the Government more tax revenue.

In another instance a vehicle valued at (US \$4,500) Sh351,000 was declared as worth (US \$3,500) Shs.273,000. In another case concerned a Toyota manufactured in 1997 whose nominal scum (sic) value was (US \$4,700) Shs.366,600 and for which the importer only paid taxes on (US\$3,000) Shs.243,000 value.

Another case involving a Toyota Rav 4 with customs nominal value of (US\$6,500) Shs.507,000 had duty paid on only (US\$4,000) Sh.312,000.

It is also suspected that the container goods (sic) imported through the freight stations were declared as foodstuffs and personal effects yet most of them were new electronic equipment and other high value goods.

Available documents show that all the seized goods were destined for the same consignee address and the packages were of similar quantity and from the same source.

Container Freight Stations or dry ports were started by the Government with the aim of decongesting the port but have become a route for tax evasion and diversion of transit goods into the local market.

Recently, the Government introduced stringent measures for CFS operators as part of efforts to deal with malpractices.

Among the conditions was the need for CFS to have a large area to ensure enough room for stacking and loading containers and availability of cargo handling equipment.

Besides the stipulated conditions, stations must not be less than 3,000 square feet and suitable for use as a customs warehouse, with floodlights.”

The respondent had further contended in the plaint that he is a local and international businessman of repute and the publication of the aforesaid article was quite injurious to him in his business operations. He added that the article portrayed him, *inter alia*, as a person involved in multi million shillings tax evasion racket at the port of Mombasa, a corrupt person working in cahoots with one William Kabogo, as a criminal on the run and one who was dealing in contraband goods.

The publication was false, defamatory and maliciously calculated to injure his reputation, the respondent averred. He set out the particulars of malice and falsity. The respondent sought, *inter alia*, exemplary and aggravated damages for defamation, special damages of **KShs.156,000,000/-** and a permanent injunction

to restrain the appellants from further making, printing, broadcasting, televising or publishing defamatory and libelous statements against him.

In their joint statement of defence, the appellants admitted that the article complained of by the respondent was published in the “Daily Nation” Newspaper on 27th April, 2004 and on the 1st appellant’s website but denied that the same was done either falsely and/or maliciously. They also denied that the article was defamatory, false or libelous as alleged or at all. They further denied that the article was published as a result of malice, spite or ill will or with intention to cause injury to the respondent in his business.

The appellants further contended that the article complained of consisted of facts or was substantially true and in so far as it consisted of opinions, the same were fair comment on a matter of public interest, namely that the public has a right to know of any transactions involving operations at a public utility such as the port of Mombasa. They urged the court to dismiss the respondent’s suit.

The respondent’s application for injunctive orders was supported by his own affidavit which basically reiterated the contents of his plaint. He also annexed thereto a copy of the internet publication referred to in the plaint. The appellants did not file any affidavit in response to the respondent’s affidavit. The trial court was, therefore, urged to find that the respondent’s depositions were uncontroverted. The appellants had, however, filed grounds of opposition stating that:

- “1. The application is based on speculative and unsubstantiated facts that cannot establish a prima facie case with a probability of success.***
- 2. So far as the application was aimed at enabling the plaintiff to travel to China on 30th April, 2005, the same has been overtaken by events and the orders sought are thus in vain.***
- 3. The application does not meet the legal test required for the grant of a mandatory injunction.***
- 4. Since the defendants intend to rely on the defence of fair comment on a matter of public interest, the plaintiff cannot be entitled to an injunction.***
- 5. The application has been brought after undue and unreasonable delay.***
- 6. The application is frivolous, vexatious and the same amounts to an abuse of the process of the court.”***

In his considered ruling, the trial judge held that the respondent had made out a case for grant of the orders sought in the interlocutory application and granted the orders as sought. The appellants were aggrieved by the said ruling and preferred an appeal to this Court. The memorandum of appeal consists of four grounds as follows:

- “1. THAT the learned Judge erred in law and in fact in finding that the respondent had made out a case for the grant of an interlocutory mandatory injunction;***
- 2. THAT the learned Judge erred in fact and in law in finding that the respondent had discharged the burden necessary for the grant of an injunction against the appellants;***
- 3. THAT the learned Judge misdirected himself in fact and in law in finding that the defence of fair comment on a matter of public interest was not available to the appellants in the circumstances.***
- 4. THAT the learned Judge erred in law and in fact in shifting the burden of proof from the respondent to the appellants to show a prima facie defence with probability of success for the grant of temporary injunctive reliefs.”***

Arguing grounds 1 and 2 of appeal, **Mr. Mogere** for the appellant submitted that the respondent had not made out a case for grant of interlocutory mandatory injunction and therefore the same should not have been granted. He pointed out that although the trial Judge had stated at page 32 of the impugned ruling that: **“Having considered the requisites of defamation, I find that the plaintiffs/applicant has established a prima facie case with a probability of success”**, the court had not made any definitive finding whether the article complained of was defamatory. At page 33 of the ruling the trial Judge stated:

“Whether the article complained of is defamatory or false is not up for decision but for another day. The issue before this honourable court now is to decide whether the mandatory injunction prayed for by the applicant/plaintiff pending the determination of the main suit should issue.”

Mr. Mogere submitted that the order for the interlocutory injunction could only issue if the court had reached the finding that the article was indeed defamatory. Further, counsel submitted that a mandatory injunction could only be issued in special circumstances and that had not been demonstrated by the respondent. He criticized the learned Judge’s holding at page 34 of the ruling to the effect that:

“The balance of convenience alone is the only principle on which a case of mandatory injunction can be decided and a court has to balance and weigh the mischief or inconvenience to the (sic) either side before granting or withholding an injunction. Since the court is looking at the balance of convenience, it does not matter that the applicant/plaintiff has a prima facie case in his favour, this does not mean that the order of injunction should flow in his favour. However, in this case, I find that the balance of convenience tilts heavily in favour of the applicant/plaintiff.”

The appellant’s counsel did not make submissions in respect of ground 3 of the appeal. But in respect of ground 4 of the appeal, Mr. Mogere stated that the burden of making out a prima facie case lay with the respondent. In his view, the learned trial Judge erred in law in holding that:

“For the Defendants/Respondents to establish a prima facie defence with a probability of success, they can do so by being able to rely on the four main defences for defamation as stipulated above, that is to say fair comment, justification and absolute and qualified privilege, consent to the publication and innocent dissemination.”

Our understanding of the above quoted portion of the ruling is that in the absence of a replying affidavit, the learned Judge was not satisfied that the appellants had a valid defence to the respondent’s claim. We do not think that the learned Judge was shifting the burden of proof from the respondent to the appellants. This finding disposes of ground 4 of the appeal.

Opposing the appeal, **Mr. Odera**, learned counsel for the respondent submitted that the learned trial Judge relied on the correct principles in granting the interlocutory order of injunction. He pointed out that the respondent had filed a detailed affidavit in support of the application showing that the article complained of was highly defamatory of him but the appellants chose not to controvert his depositions by swearing and filing any reply thereto. The appellants’ defence on its own was not sufficient, counsel added. He defended the trial Judge’s ruling saying that, since what was before him was an interlocutory application for an injunction, the court was not required to make a definite finding that the article complained of was defamatory. The court was only required to make a prima facie finding based on the material raised before it. He added that the article complained of was in continuous circulation on the internet, and as long as the same was prima facie defamatory to the respondent, the trial judge was right in granting an interlocutory injunction to compel its removal.

The learned trial Judge did not grant the said injunction purely on a balance of convenience as alleged by Mr. Mogere, Mr. Odera submitted. The trial court’s view was that in a matter of that nature the court had to look beyond the balance of convenience.

In determining the appeal, this Court must remind itself that the appeal arises from an interlocutory application. The main suit that is **HCCC No. 480 of 2005, JOHN HARUN MWAU vs. NATION**

MEDIA GROUP LIMITED & 2 OTHERS, is still pending trial before the High Court. The Court must therefore refrain from making definite or final findings on disputed facts at this stage as doing so may embarrass the trial court. We must however determine whether on the basis of the pleadings and affidavit before the trial court, the respondent had made out a case for grant of an interlocutory mandatory injunction.

It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of and special circumstances. See **KENYA BREWERIES LIMITED vs. WASHINGTON OKEYO**, Civil Application No. 332 of 2000.

Likewise, in volume 24 **Halsbury's Laws of England**, 4th Edition paragraph 948, the learned authors state as follows:

“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 the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff.... a mandatory injunction will be granted on an interlocutory application.”

The respondent had stated in his affidavit in support of the application that the article complained of was not only defamatory but its continued publication on the worldwide web by the respondents was malicious and seriously damaging to his image as an international businessman. He however stated that in seeking the mandatory temporary injunction to restrain the respondents from further publishing the information complained of, he was not intending to gag the 1st appellant but was seeking to be relieved from continued suffering and anguish that was being caused to him and his family by the appellants. The respondent further averred that by allowing the defamatory article to continue circulating in the worldwide web the appellants were hindering his business operations. He alleged that he had been unable to obtain a Chinese Visa due to the continued acts of the appellant's publication of the defamatory article in the internet.

We have earlier stated that the respondent's depositions in his affidavit in support of the application for interlocutory mandatory injunction were not controverted by the appellants. No reason was advanced by the appellants for failing to respond to the respondent's averments in his affidavit. The grounds of opposition advanced by the appellants could not suffice as answer to the factual depositions made by the respondents. In the circumstances, we are satisfied that the trial Judge was right in holding that the respondent had established a prima facie case with a probability of success.

In granting the mandatory injunction the learned trial Judge stated as follows:

“Whether the article complained of is defamatory or false is not up for decision now but for another day. The issue before this honourable court now is to decide whether the mandatory injunction prayed for by the applicant/plaintiff pending the determination of the main suit should issue. Having arrived at the above conclusion, the only issue that remains is that of whether the balance of convenience tilts in favour of the defendants/respondents or the applicant/plaintiff. The defendants/respondents must be earning income from their website and I exercise my discretion against them, to remove the article from circulation until the determination of this suit.”

We agree with Mr. Mogere that in an application for a mandatory injunction the balance of convenience is not the only principle which an applicant has to satisfy as stated by the learned Judge at page 34 of the ruling. A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction can only be

granted in exceptional and in the clearest of cases. See **KENYA AIRPORTS AUTHORITY vs. PAUL NJOGU MUNGAI & OTHERS Civil Application No. 29 of 1997 (CA)**. As the court stated in the case of **LOCABAIL INTERNATIONAL FINANCE LTD. vs. AGROEXPERT & OTHERS [1986] 1 ALL ER 901**, the court has to have “**a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.....**”. That notwithstanding the trial judge had come to a conclusion that, *prima facie*, the respondent had demonstrated that the article complained of was defamatory. Even though the learned Judge did not specifically set out the exceptional and special circumstances that he had taken into consideration in granting the mandatory judgment he had come to the conclusion that:

“I find that the article is not news as it is not current and the defendants’/respondents’ continuation of circulating the said article throughout the world depicting the applicant/plaintiff as a criminal is not right, it is not fair. The defendants/respondents acts of continuing circulating the complained of article internationally as news while it is over a year old can only be accentuated by malice and ill-will.”

Without endorsing the learned Judge foregoing statement which appears definitive, considering the fact that the appellant did not swear a replying affidavit to dispute the respondent’s contention that the maintenance of the article in the appellant’s website was affecting the respondent’s business, we are satisfied that, *prima facie*, the respondent had made out a case for grant of the orders sought in the interlocutory application. We must therefore reject grounds 1 and 2 of the appeal.

As regards the defence of fair comment on a matter of public interest, we think that this is an issue that must await determination by the trial court and we will refrain from making any further comments on the same.

All in all, we find this appeal lacking in merit and dismiss the same with costs to the respondent.

Dated and Delivered at Nairobi this 17th day of October, 2014

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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