



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1445 OF 2016

KEVIN ISIKA MULECLAIMANT

VERSUS

HFC LIMITEDRESPONDENT

RULING

1. Ruling herein relates to application, dated 27th January, 2017 filed by the respondent, HFC Limited. Both parties filed written submissions and orals arguments in court. The application is seeking for orders that;

1. ...

2. ...

3. *Pending the hearing and determination of the suit herein, an order by way of a super injunction be issued to restrain the publication of this application and/or any order granted pursuant to this application and further the publication of any article relating to the materials filed in these proceedings or the publication of or otherwise disclosure of or making public any confidential information regard HFC Limited, its business, directors, shareholders, members of staff or its customers and their accounts.*

4. *Any such order as may be necessary to facilitate a fair and just trial of this action.*

5. *Costs of this application.*

2. The application is supported by the affidavit of Patrick Mokaya, Director Business Development and on the grounds that arising from documents filed by the claimant in these proceedings, false and malicious articles are being published in the mainstream and alternative media of and about the respondent's business that are defamatory of the respondent and which are meant to portray the respondent as being riddled with fraud, endemic mismanagement and on the verge of collapse.

3. The offending articles relate to details of the respondent's customers' bank accounts which information is confidential. It is unclear how the media came across this information and the publication of the said information constitutes a breach of the respondents and its customer's rights to privacy and confidentiality. The offending articles are intended to usurp the court's jurisdiction of hearing and making a determination of the allegations made in the pleadings in this suit and further to tarnish and discredit the reputation of the respondent and that of its officers. It is also intended to seriously harm and damage the respondent's business. Given that the respondent is a public listed company; its shares at the Nairobi Stock Exchange may be adversely affected should the orders sought not be granted. There is real

likelihood that the media will continue publishing the offending articles or cause the said or similar article with the result that the respondent will suffer irreparable damage that cannot be compensated by an award of damages.

4. In the supporting affidavit, Mokaya avers that as the director, business development for the respondent he is engaged in acquisition of new customer, developing and selling new products and services, relationship management of customers and managing risks.

5. The claimant was employed by the respondent and he has filed a claim dated 19th July, 2016 on an employer and employee dispute. He has filed documents in their nature came to him by virtue of his employment. These are documents containing confidential information and impose a legal duty upon the respondent bank to its customers to maintain as confidential. The claimant has also made allegations against respondent employee and where proved to be false shall constitute defamation. These employees are not parties herein to be able to defend themselves.

6. Following the claimants filing his suit, the media has purported to report the same and proceeded to publish allegations concerning the respondent and its customers which is inaccurate and in some cases false. The respondent owes to its clients a duty of maintaining confidentiality and by the publication snow made risks exposure to suits. Social media riding on these proceedings have taken the opportunity of publishing the untrue articles. Several questions have been sent to the respondent on its business stability following the publications.

7. Mokaya also avers that the nature of respondent business relies on public confidence and the continued publication of false articles and sharing customer confidential details will harm and damage the business that cannot be secured by way of payment of damages hence the nature of the orders sought. The pleadings before court are not privileged and that is privileged in the contemporaneous reporting of the proceedings. The nature of reporting amounts to making determinations to matters awaiting hearing of the evidence and determination by the court.

8. In reply, the claimant filed Grounds of Opposition on the basis that the application is an abuse of court process and made with unclean hands as before this application the respondent had put out two advertisements and notices on divers dates in the media and commenting on this matter and by itself impugned the nature of the claimant's case while putting up a spirited defence of its position. The application herein if granted will deny the claimant the right to reply. The application seeks to gag the media, claimant and the court and thus a gross violation of tenets of justice.

9. Other grounds are that the respondent has failed to show which matters are confidential and reported without truth, unfairly or with breach of confidence. The application seeks to protect the interests of persons who are not before the court or enjoined in the suit as account holders who have not sought the protection of the court yet they are not disabled or disqualified from seeking protection if at all necessary.

10. Other grounds are that the orders sought are an exercise in futility as it cannot be served to internet users so as to block alleged publication. Super injunctions are no longer issued in the United Kingdom which has rendered obsolete due to internet growth. Such an injunction is not provided for in the Civil Procedure Act or rules thereto, would contravene article 50, 41, 34 and 35 of the constitution, 2010, contravene the Employment Act, 2007 and article 19 of the International Covenant on civil and Political Rights. Such an order would offend the Companies Act, the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2016 and the Capital Markets Act and its regulations.

Submissions

11. The respondent submits that when the claimant filed his Memorandum of Claim with this court he chose the forum for arbitration of his employment claims and does not require the media or bloggers to urge his case. Such parties have gone ahead to make conclusions on matters herein and the claimant in reply does not seem to note anything wrong with that. To thus guard the court integrity and jurisdiction, the Contempt of Court Act as section 4 has given the court mandate to issue the orders sought.

12. The matters publishers in the media and social sites are matters in their nature obtained from proceedings herein. Information relating to personal and private affairs of the respondent's clients and directors and other employees has been published and will harm the respondent business if not restrained by an order of this court. Adrian Zukerman in '*Super Injunctions – Curiosity-Suppressant Orders Undermine the Rule of Law*' has defined a *Super Injunction* as an order restraining a person from doing something, publishing, or informing others of the content of the order and of the fact that the order was made.

13. There are various articles in the mainstream media and social site where the proceedings herein have been relied upon to publish information of and on the respondent. The opposition by the claimant herein to the grant of the orders sought implicates him as the source of the media publications. Even where the right to expression is protected under the constitution, the same is qualified to the extent that such right to expression should respect the rights and reputation of others.

14. The respondent has also relied on the following cases, **Republic versus Kenya Revenue Authority Ex Parte Webb Fountaine Group FZ-LLC & 3 others [2015] eKLR; JIH versus News Group Newspapers Ltd [2011] EWCA; Ntuli versus Donald [2010] EWCA.**

15. The claimant in response submits that the impugned articles were published by mainstream media, Nation Media Group in the Business Daily and East African Standard, Sunday Standard and by an online blogger known as Kenyan Wall Street by a blogger, Cyprian Nyakundi. These publications read on context give a fair, objective and balanced report and have extracted the averments obtained in the pleadings. They have stated the case made out by both sides objectively. The respondent has not demonstrated how the publications are inaccurate, in contempt of court process or usurping jurisdiction. Where there is defamation, there is a remedy in defamation proceedings in a civil suit and this has not been done. There is nothing defamatory.

16. The blogs by Cyprian Nyakundi are ravings and rants of a private blogger on social media and cannot be contained by a court order. This blogger has not been served with the court orders and to purport that the blogs affect the jurisdiction of the court is ridiculous.

17. The respondent has published two articles on this matter and making effort to defend itself. The respondent moved the court seeking the restraining orders which is done with mischief and should be declined.

18. The claimant has relied on the following authorities; **R Sussex Justices ExParte McCarthy [1924] 1 K.B; Home Officer versus Harman [1983] 1 A.C; LNS versus Persons Unknown [2010] EWHC 119 QB; Centre for Rights Education and Awareness (CREAW) & others versus the AG, Petition No.16 of 2011; Reef Building Systems Ltd versus NCC HCCC 1357/01 [2001] LLR.**

Determination

19. Having considered the pleadings, the written submissions and the highlights by oral submissions in court and the list of authorities, this is the court determination.

20. It is common ground that the suit herein commenced by the claimant against the respondent is an employer and employee dispute. The claimant being aggrieved by the actions of the respondent against him has moved this court and seeking various remedies.

21. Following the filing of this suit, various matters have been published in the mainstream media and by blogger(s) on different internet sites. Such information is now widely shared from such media to various publics.

22. On the one hand, the respondent asserts that such publication of matters herein should be restrained as it relates to matters and information of their customers, directors, employees and if unrestrained has potential of damaging the business and being in breach of confidentiality and duty to the various entities

mentioned therein with regard to the internal affairs of the respondent. Such matters have only come to the attention of the media through the claimant's filed documents and or information source herein. On the other hand the claimant asserts that the publications and blogs are out there and if defamatory of any party such should be addressed in civil suits and to restrict such information would be to infringe on the freedom of expression. The respondent has published information relating to matters herein and equally is culpable and by moving the court for a super injunction they are with unclean hands the published information gives a fair, objective and balanced report of proceedings herein.

23. Pending hearing of this application, the court issued interim restraining orders with a super injunction. At this stage and respondent is seeking that the same be confirmed and the principles on which the court will grant an injunction are well addressed by the Court of Appeal in **Nguruman Limited versus Jan Bonde Nielson 7 2 others, [2012] eKLR** as follows;

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,*
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and*
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.*

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

24. In this case, the respondent's case is that where the publication of material obtained herein is not restrained, they stand to suffer loss and damage, the named customers, directors, shareholder, and employees stand to suffer exposure of their confidential records held with the respondent and such would amount to breach of their right to privacy and duty of care and would result to defamation and civil suits filed against the respondent. as such there is great potential of loss and damage that cannot be quantified in damages and the irreparable harm is apparent. The damaging information already published touch on the private and personal lives of customers, directors and employees of the respondent based on information and materials obtained by the claimant in the course of his employment with the respondent. such information was held in confidence and once filed herein should not be allowed to infringe on the rights of other persons or parties as ultimately the respondent should hold the same in confidence. That the only way to address the matter is by the grant of the orders sought.

25. In this regard therefore, I find the respondent has well set out the special circumstances that warrant the grant of the rare order of a super injunction. In **Nation Media Group & 2 others versus John Harun Mwau [2014] eKLR** the Court of Appeal held as follows

It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction 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 injunction can only be granted in exceptional and in the clearest of cases.

26. The breach of confidence or privacy with regard to records of the respondent held with regard to its customers or clients, its directors, shareholder or employees and which have come into the hands of the claimant by virtue of his employment would cause harm where there is unauthorised publication of the same. Such records, material and information are in their nature held in trust and ought to remain as such unless authorised by the persons named. For the claimant or other third parties to pick and use the same in a manner that is prejudicial to the respondent's business, and by virtue of such being available through these proceedings, such would not meet the ends of justice. The purpose for filing this suit would be lost.

27. restraining publication is the primary remedy. If the private material is published extensively, its private nature is lost and the purpose for which the respondent holds such record and information for its customers, directors, shareholder and employees is also lost.

28. The above put into account, both parties have submitted to the jurisdiction of this court. The constitutive Act for the Court, the Employment and Labour Relations Court Act, 2014 at section 12 (1) and (4) give the court jurisdiction to hear and determine all disputes referred to the court in accordance with Article 162(2) of the constitution and the issue orders as the court may determine and deem just. The law provides as follows;

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including

(2) ...

(3) ...

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

29. As set out above, the parties having submitted to the jurisdiction of the court, once the claim was filed, and the respondent filed a response, the Rules of the Court, the Employment and Labour Relations Court (Procedure) Rules, 2016 dictates that proceedings be determined in terms of Rule 14 and 15. To go outside of the court jurisdiction and subject the matters herein to other forum, whether the mainstream media or blogs would be tantamount to trial by third parties or at the public gallery as it were.

30. The fact of the claimant readily opposing the respondent's application and qualifying published matters as being fair, objective and balanced does not aid his defence at all. If anything such shutters his clown and directly supports such publication.

31. Once the claimant filed his claim with the court and he requires any material from the respondent to aid his case, such provision is well addressed in law and under the Employment Act, 2007 read together with the Employment and Labour Relations Court Act, 2014 and the Rules thereto. The published headlines are an affront to his case and by supporting the same; such only exposes the claimant's claims.

32. As correctly cited by both parties, to issue a super injunction should only occur in the rarest of cases. In addressing the matter as to why super injunctions should issue, in Adrian Zukerman - '*Super Injunctions – Curiosity-Suppressant Orders Undermine the Rule of Law*' at page 227, Lord Rodger is quoted as follows;

[73] Although it has effects on the individual's private life, the purpose of a freezing order is public: it is to prevent the individual concerned from transferring funds to people who have nothing to do with his family life. So this is not a situation where the press are wanting to publish a story about some aspect of an individual's private life, whether trivia or significant. Rather, they are being prevented from publishing a complete account of an important public matter involving this public individual, for fear of the incidental effect that it would have on M's private

and family life.

33. Therefore, the suit herein is between a specific claimant as against a specific respondent. The involvement of the mainstream media and blogger(s) where necessary and requires to publish information relating to the respondent or of the respondent should remain clear and clean of proceedings herein. The line between using proceedings herein to made a fair, objective and balanced comment is thin.

34. For the court to be able to hear both parties on their merits and without any party herein being put under the pressure or weight of third parties in addressing the dispute herein, the restraining order is herein justified. The publishers of the impugned matters need not be served or notified in these proceedings as the purpose for seeking the restraining orders in the nature sought would render no purpose. There will be no prejudice suffered by the claimant.

35. The court once moved by the respondent on 27th January, 2017 issued interim orders. There is no claim by any party that such orders were oppressive or in infringement of their right to expression. I find no prejudice to the claimant with the orders sought being confirmed.

36. The claim shall be heard on its merits. The rights of both parties herein secured.

Accordingly, Pending the hearing and determination of the suit herein, an order by way of a super injunction is hereby issued restraining the publication of this application, the orders granted, the pleadings herein and stoppage to further publication of any article relating to the materials filed in these proceedings or the publication of or otherwise disclosure of or making public any confidential information regarding the respondent [HFC Limited] business, directors, shareholders, members of staff or its customers and their accounts.

Costs in the cause.

Delivered in open court at Nairobi this 28th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor: Court Assistants

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