



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 46 OF 2019

PAUL MWANIKI GACHOKA.....1ST PLAINTIFF

PAUL MWANIKI GACHOKA & RAPHAEL NDIRANGU T/a MWANIKI

GACHOKA & CO. ADVOCATES.....2ND PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENANT

WANJOHI GITHAIE.....2ND DEFENDANT

RULING

The plaintiffs brought this suit against the defendants jointly and severally for damages following a publication by the defendants which the plaintiffs considered defamatory. Alongside the main suit, the plaintiffs filed an application by way of Notice of Motion for injunction orders to restrain the defendants by themselves, their agents, servants or employees from publishing any defamatory posts or publications with reference to the plaintiffs and the transaction of the property known as LR No. 29123 between Miaraho Limited and Hydro Developers Limited.

In the same application, an order was sought that there be a mandatory injunction directed at the defendants to pull down any defamatory publication put up and posted in the 1st defendants web site www.nation.co.ke on 24th February, 2019 with reference to the plaintiffs and the transaction relating to the same property.

The application is opposed and the defendants have filed an replying affidavit. The parties have filed extensive submissions and cited several authorities. I must state from the outset that, some of the submissions and related authorities address issues that are likely to arise during the main trial. As the application relates to injunctory orders, caution must be exercised so that, whatever is said at this interlocutory stage may not prejudice the trial when the parties eventually have their day in court. I have had time to read the submissions and the authorities cited by the parties. It may not be necessary for me to make specific reference to all the cases, but that should not be considered wanting in substances.

I note that pleadings have been closed and the matter awaits certification after compliance with Order 11 of the Civil Procedure Rules. When issues for determination are crystallised, then the court will be in a better position to address the salient issues raised by the parties.

For now, the plaintiffs have the duty to persuade the court that there is a prima facie case against the defendants with the probability of success, that damages may not be adequate compensation for the damage they have suffered in the event they succeed, and if the court is in doubt then the matter shall be decided on a balance of convenience. See **Griella vs. Cassman Brown & Co. Ltd (1973) EA 357, Mrao Ltd v. First American Bank of Kenya Ltd & 2 others (2003) KLR 125**. In the Mrao case, Kwach JA stated as follows,

“So what is a prima facie case? I would say that in Civil Cases it is 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.”

See also **Bob Collymore and another vs. Cyprian Nyakundi (2017) e KLR** and **Cheserem vs. Intermediate Media Services (2000) 2 EA 371**.

In defamation cases, the court is presented with a delicate position of balancing the rights of the plaintiffs as individuals and public interest as

advanced by the defendants see Fraser vs Evans & Another (1969)1 ALL ER 8. Where the court stated,

“There are some things which are of such public concern that the newspapers, the press, and indeed everyone is entitled to make known the truth and make fair comments on it. This is an integral part of the right of free speech and expression. It must not be whittled away.”

The courts must however constantly bear in mind that, all determinations are based on evidence which must be persuasive and tested under cross-examination. It is not always safe to depend on investigations which may be one sided, malicious or advanced by parties, who may have an interest in the subject matter, but remain faceless.

That is why pending the hearing and determination of any dispute, the names reputations and positions of the parties, be they the plaintiffs or the defendants require protection from the court.

I make these general statements for good reason. This matter is yet to be heard. Further publications are likely to cause more harm on issues yet to be substantiated. I recognize that a name and reputation is everything a person has. Be it an individual, company or institution. Even where damages are awarded, a damaged reputation may never be salvaged. In the case of Samuel Ndungu Mukunya vs. Nation Media Group Limited (2015) e KLR the court observed as follows,

“Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation a reputation can be damaged forever especially if there is no opportunity to vindicate ones reputation.”

This reinforces my observation above and since the time for full hearing is yet to come some protection of the plaintiffs is required at this stage.

I have balanced the interests of the parties herein. I am persuaded that on the interim, the plaintiffs have established a *prima facie* case with a probability of success, and that damages may not be adequate compensation in the event they establish their case against the defendants. I have no doubt in reaching that conclusion. Even if I were however, I would still find that the balance of convenience tilts in their favour.

The 1st defendant’s publication, “The Nation” enjoys wide coverage locally and internationally. It is one of the main stream print media. The exposure of the plaintiffs is therefore wide and if not restricted may continue cause more the said damage. In the case of Kenya Breweries Limited vs Washington Okeyo (2002) 1 EA 109; (2002)e KLR the court stated 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 a simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the plaintiff. A mandatory injunction will be granted on an interlocutory application.”

The order sought by the plaintiff under this prayer is targeted at the 1st defendant website. The posts were done before the truth of the allegation was tested by evidence and rejoinder thereof. If it continues to exist then the plaintiffs shall be exposed before they are heard.

It is for that reason that I must also order a mandatory injunction as sought by the plaintiffs for the defendants to pull down the post on their website as sought. The plaintiffs’ application therefore succeeds in terms of prayers 2 and 3. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 14th Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE