REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 333 OF 2014

ANNE WAIGURU…….. PETITIONER

AND

GOOGLE INC…….. 1ST RESPONDENT

GOOGLE KENYA LIMITED……..2ND RESPONDENT

AND

DIRECTOR OF CRIMINAL INVESTIGATION .....

DEPARTMENT……INTERESTED PARTY

RULING

Introduction

1. The Petitioner in this matter is Anne Waiguru who is the Cabinet Secretary for Devolution and Planning in the Government of the Republic of Kenya. She filed the Petition dated 15th July 2014 alleging that on or about the 14th of April 2014, it was created, posted and published in the **"Daily Post",** an online publication, a story titled '***CONFIRMED: It is Anne Waiguru who wanted to sleep with Janet's Mbugua's Boyfriend Gor Samelango"*** and included her photo prominently in the post. She claims that the said post is defamatory of her character and further claims that having been aggrieved by the offending publication, she has a right to seek legal redress but she cannot exercise that right without the information held by Google Inc. the 1st Respondent and Google Kenya Ltd, regarding the owners, authors and publishers of the **"Daily Post",** being provided. In the Petition aforesaid she has therefore sought the following orders;

"(1) Pending the hearing and determination of this Petition, conservatory orders be issued in terms of the Notice of Motion filed herewith.

(2) A declaration be issued to declare that the Respondents' conduct infringed the Petitioner's rights under Articles 28, 35, 48 and 50 of the Constitution.

(3) The Honourable Court be pleased to uphold the Petitioner's rights by issuing an order compelling the Respondents to disclose the following information to the Petitioner within fourteen (14) days of such order; The identity/identities including name, address, telephone number, verification email address, access logs, any sign-up IP address, account status of persons(s) who own, control, publish or post in URL,http://www.kenyan-post.com> site known titled "Daily post".

(4) The Honourable Court be pleased to issue an order directed to the Respondents to remove or cause to be removed and permanently delete all defamatory statements concerning the Petitioner in URL http://www.kenyan-post.com site known as/and titled "Daily post" and permanently restraining the Respondents form allowing the google.com and google.co.ke returning search results from the said the "Daily Post" on the offending materials concerning the Petitioner.

(5) The Costs of the Petition be awarded to the Petitioner."

2. Before the Petition could be heard, on 21st July 2014, the 2nd Respondent, Google Kenya Ltd, a company incorporated in Kenya which allegedly carries on the business of marketing and service support for services provided by other google entities including Google Inc, the 1st Respondent, filed the Application dated 15th July 2014 subject of this Ruling seeking that it be struck out of the proceedings and also for an award of costs of the Application. The Application is supported by an Affidavit sworn by Joseph Muchiri, the 2nd Respondent's Country Manager. It is based *inter alia* on three main grounds; firstly, that the Petitioner does not have a cause of action against the 2nd Respondent. Secondly, that the 2nd Respondent is not in a position to comply with Prayers 3 and 4 of the Petition requiring it to disclose details of the identity of the internet site titled **"Daily Post"** as it does not have access to that information and lastly, that the Petition does not disclose any violation of the Petitioner's fundamental rights and freedoms by the 2nd Respondent.

The 2nd Respondent's submissions

3. The 2nd Respondents case is straight forward and it is that whereas the 1st Respondent is a shareholder of the 2nd Respondent, that fact alone cannot be a basis for concluding that they are inextricably linked. That the two are separate legal entities and that the 2nd Respondent only markets the services of the 1st Respondent and is also a commercial agent for the latter and benefits economically from the 1st Respondent. That those facts do not create any linkages in law to warrant that in a Petition such as the present one, they should be presumed to be the same or lawfully interlinked.
4. Ms. Kashindi for the 2nd Respondent further submitted that the 2nd Respondent does not have the information sought by the Petitioner as it does not own or operate the platform that hosts the offending website or the website itself. That the platform that hosts the website, **"www. Blogger.com",** is owned and operated by the 1st Respondent and in any event, she submitted that the 1st Respondent has been in touch with the Petitioner's Advocates and has informed them of the process the Petitioner should follow in identifying the owners and operators of the website. Instead of following that procedure, the Petitioner chose to file the Petition in an effort to force the 2nd Respondent to reveal information it does not have and it was therefore her submission that the Petitioner is abusing the court process. She relied on the case of ***The Kenya Section of the International Commission of Jurists vs The Attorney General & 2 Others (2012) eKLR*** in support of that position.

5. In support of her claim that 2nd Respondent is not inextricably linked to the 1st Respondent, Ms.

Kashindi referred the Court to the following Commonwealth decisions where the matter has previously been determined;

1. ***A vs Google New eland Ltd HC Auckland, CIV: 2011-404-002780-, 10th September 2012.***

The Plaintiff was a medical practitioner who practiced as a psychiatrist. Defamatory statements about him were posted on a website in the United States hosted by a third party to which the public was directed when his name was searched on the internet through a search engine available at www.google.co.nz. The search results included reference to the defamatory material, and link to the third party website. On a claim for defamation against Google New Zealand Limited, the Court found that the operation and control of the Google search engine resided with Google Inc and not Google New Zealand.

2. ***Janice Duffy vs Google Inc & Google Australia (2011) SADC 78, 15th November 2011.***

The Plaintiff had sought an interlocutory injunction against Google Australia Pty Ltd but the application was dismissed because the Court found that there was no evidence that Google |Australia had the ability to remove URL links and snippets from the Google search results. The Plaintiff relied on the fact that six of the URL links that were the subject of her claim were removed from the domain www.google.com.au after her Court proceedings were served on Google Australia Pty, but before it was served on Google Inc. The Plaintiff sought to infer that Google Australia Pty had control over the search results returned by the search engine. The Court found the Plaintiff's inference to be 'weak and speculative'. The Court held that it could not grant an injunctive order against Google Australia Pty as it would not be able to comply with the order.

3. ***B.V.B.BA Servercheck vs B.V Google Netherlands A.R 2007/AR/1209, 31st October 2001.***

The issue in this case was who owned and managed the Google Internet Search Engine and "Google Suggest" option on the Google Internet Search Engine. The Court found that they were managed and owned by Google Inc. and not Google Netherlands.

4. ***Tarmiz vs Google Inc and Google UK Ltd [2012] EWHC 449 (QB)***

The Plaintiff complained of defamatory material that appeared on a blog. The Plaintiff brought proceedings against Google Inc and Google UK. The Court held that Google UK Limited does not control or operate blogger.com (the platform that hosted the blog) and was therefore joined in the proceedings inappropriately.

Her submission in that regard was that all the cases point to the fact that an entity in a similar position to that of the 2nd Respondent is not in control of the platform that hosts the website such as the one being complained of.

6. It was therefore her submission that any relationship between the 1st Respondent and the 2nd Respondent has to be discerned on the basis of common law, the facts of the case and the applicable statutes such as the **Companies Act (Cap 486 Laws of Kenya).** That the Court cannot rely on the decision of the European Court of Justice (ECJ) in ***Google Spain SL and Another vs Agencia Espanalo de Proteccion De Datos (AEPD) and Another (Mario Costeja Gonzalez Case) of 13th May 2014*** as that case is distinguishable from the case before this Court because the linkage between the Google Inc and Google Spain was found on the basis of an Interpretation of the Provisions of **Articles 2(b)** and **4(1)(a)** of the **European Union Data**

Protection Directive 95/46 that contains broad definitions that linked the activities of Google Inc to Google Spain.

7. It was also the 2nd Respondent's case that in any event, the Petitioner has failed to disclose any violation of the Constitution on the part of the 2nd Respondent. That a party who alleges a constitutional violation must plead with some degree of precision such a violation as was the holding in the case of ***Annarita Karimi Njeru vs Republic (1976-1980) KLR 1272*** and ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) e KLR***. It argued in that regard that the Petitioner's claim is a claim for defamation against the owners and publishers of the website **"Daily Post"** and this Petition is a thin veiled attempt to litigate a defamation dispute under the guise of a constitutional petition.

8. Ms. Kashindi lastly urged the Court to strike out the name of the 2nd Respondent as the Petitioner had failed to disclose a cause of action against it and further that it is incapable of complying with any orders that may be granted by this Court.

The Petitioner's Submissions

9. In response to the Application, the Petitioner filed a Replying Affidavit sworn by the Petitioner on sworn on 31st July 2014. She deponed in it that she has used all reasonable and available means to ascertain the identity of the publishers of the **"Daily Post"** but she has failed to do so. That the 2nd Respondent is a subsidiary of the 1st Respondent and ought to have that information contrary to its claims that it has no means of doing so.

10. Miss Ngigi presented her case and it was her submission that the Petitioner is entitled to the information relating to the identities of the owners, authors and publishers of the **"Daily Post"** under **Article 35(b)** of the **Constitution** so that she may be able to seek legal redress against the wrongdoers. She relied on the case of ***Norwich Pharmacal vs Customs and Excise Commisisoners (1974) AC 133*** and the case of ***Rugby Football Union vs Viagogo Ltd (2011) EWCA*** where it was held that there is a general duty to disclose a wrongdoer. On this point, she further claimed that the alternative process urged by the Respondents for the Petitioner to obtain the information is lengthy, expensive and uncertain.

11. It was her further submission that the 2nd Respondent is a party to the wrong doing of the 1st Respondent as are the owners, authors and publishers of the **"Daily Post".** That even if it does not have the information sought at hand, it has the means of obtaining such information.

12. Miss Ngigi relied on the case of ***Google Spain SL and Another vs Agencia Espanalo de Protection de Datos (AEPD) and Another (Mario Costeja Gonzalez) C-131-2012 Judgment of 13th May 2014*** where it was held by the European Court of Human Rights that there is an inextricable linkage between Google Inc and its subsidiaries, in that case, Google Spain. She thus concluded that the **Google Spain Case (Supra)** was conclusive evidence of the manner in which Google Inc and its subsidiaries relate all over the world, including Google Kenya.

13. In addition, that the admission that the 2nd Respondent carries out marketing services for the 1st Respondent is clear evidence that it knows the companies which advertise on its platform. That it is also by implication a fact that the 2nd Respondent as a local agent of the 1st Respondent has to know the source, place and record for such advertisements and there is therefore a connection between the two Respondents akin to that of principal/agent. Further, that the burden of proving or disproving this relationship is shifted by **Section 115** of the **Evidence Act (Cap 80 Laws of**

Kenya) to the Respondents and under **Section 112** of the **Evidence Act,** the 2nd Respondent has the burden of proving that it does not have the information which it is expected that it would have.

14. It was also Miss Ngigi's submission that the evidence contained in the Affidavit of Joseph Muchiri should be disregarded by this Court because it offends the rule that the contents of an Affidavit should be confined to such facts as the deponent is able of his own knowledge to prove. That in that regard, the deponent has not stated his current position with the 2nd Respondent and further, that his Affidavit contains mere denials and none of the Petitioner's averments are denied or adequately responded to by the 2nd Respondent. It was thus her submission that the Court has no way of determining the truth of those matters given the unreliability of the evidence of the 2nd Respondent and on this point reliance was placed on the case of ***Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd (1998) e KLR .***

15. Lastly, Ms. Ngigi submitted that the 2nd Respondent is a subsidiary of the 1st Respondent and the mere fact that they are separate legal entity does not preclude a Court to pierce the corporate veil should it be in the interests of justice to do so. On this point she relied on the decision of the United States Supreme Court in ***Prest vs Petrodel Resources Ltd and Others (2013) UKSC 34***. It was therefore her submission that if the 2nd Respondent is expunged from record, there is a real danger that the 1st Respondent would not submit itself to the jurisdiction of this Court and therefore deprive the Petitioner of her right to access justice. She thus urged the Court to dismiss the Application and allow the proceedings to continue as against both Respondents.

The 1st Respondent's and Interested Party Submissions

16. The 1st Respondent, Google Inc and the Interested Party, The Director of Public Prosecutions, both filed no response nor made any submission on the Application under consideration.

Determination

17. From the pleadings before me and the Parties' submissions as summarized above, it is clear that the Petitioner, in her Petition dated 15th July 2014, has sought this Court's assistance in getting disclosure of the identities, owners and publishers of an internet site known as **"Daily Post"**. It is undisputed in that regard that the **"Daily Post"** is published on a platform provided by the 1st Respondent in the form of its Content Management System- www.blogger.com. It is also not in dispute that the 2nd Respondent offers market and service support for services provided by other Google entities including the 1st Respondent. The 2nd Respondent has however claimed that it cannot offer the information as sought against it since it does not have such information and that the information can only be availed by the 1st Respondent. It has thus sought to be struck out of these proceedings. In my view that is the only issue for determination in this Application and to address it. I will first have to determine whether the Petitioner has demonstrated that she has a cause of action against the 2nd Respondent.

18. The arguments made on the relationship between the Respondents are that on the one hand, 2nd Respondent submitted that it is not a subsidiary of the 1st Respondent while the Petitioner submitted that the 2nd Respondent was indeed a subsidiary of the 1st Respondent. They both referred the Court to various decisions made on that issue in various jurisdictions.

19. In ***A vs Google New Zealand Ltd (Supra),*** the Plaintiff was a medical practitioner who practiced psychiatry. Defamatory statements were allegedly published against him on a website in the

United States hosted by a third party to which the public is directed when his name was searched on the internet using a search engine accessed through the internet domain www.google.co.nz. The Plaintiff alleged that the Defendant, Google New Zealand, had defamed him and sought summary judgment against the Defendant. The Judge while dismissing the claim stated as follows;

"I am satisfied by the evidence before the Court that the defendant does not have the requisite control of or responsibility over Google search results, and accordingly, that the Plaintiff does not have a reasonable arguable case.

In the absence of any evidence pointing to such a possibility, I see no basis to exercise the Court's residual discretion not to enter summary judgment so as to allow the Plaintiff to obtain discovery. In saying that, one can have sympathy with the Plaintiff's position. The creator of the main website carrying the defamatory material appears to be based in the United States, and has a policy of not removing any material upon request. It would be a difficult and expensive exercise to take proceedings against that party to try to compel removal. The defamatory material has been posted on that website by an anonymous person, apparently resident here in New Zealand. It is likely to be impossible to identify that person. Unfortunately, that is an aspect of the internet. However, I take into account that Google Inc has informed the Plaintiff of steps that he can take to request removal of identified URL's on an ongoing basis and that it will respond to those requests."

Similarly, in **Duffy vs Google Inc (supra)** the Plaintiff, Dr. Janice Margaret Duffy, had instituted defamation proceedings against the 1st Defendant, Google Inc, and the 2nd Defendant, Google Australia Pty Ltd (Google Australia), in respect of certain alleged defamatory material appearing on internet websites or domains owned by Google Inc. The Court held as follows;

"The Plaintiff's Application for injunctive relief against Google Australia must fail if for no other reason that there is no evidence Google Australia has the ability to remove URL links and snippet from the Google Search index.

The Plaintiff's case in this regard is based upon a weak inference that she seeks to draw from the following circumstances. After the Plaintiff's proceedings were served on Google Australia, on or about 18 February 2011, but before they served on Google Inc., six of the URL links that were the subject of her claim were removed from the domain www.google.com.au. On 29 May 2011, Google search conducted by or on behalf of the Plaintiff on www.google.com.au.using the keywords "Dr. Janic Duffy" provided a list of URL links at the bottom of which appeared the words "In response to a legal request to Google, we have removed 6 result(s) from this page".

As I understand the Plaintiff's argument, it is suggested that it can be inferred from the removal of the URL links prior to Google Inc being served that Google Australia had some control over their removal. The argument is entirely speculative. Google Inc. may have decided, as a result of earlier requests from the Plaintiff, to remove the URL links without any input from Google Australia. It may be the case that Google Australia contacted Google Inc and requested the removal. Even then, it does not follow that it has the legal capability to conduct such removals whether acting alone or as an accessory to Google Inc. There are, of course, other possible explanations for the removal of the URL's upon which the Plaintiff relies."

Further, in ***Payam Tamiz vs Google Inc and Google UK (supra),*** Mr. Payam Tamiz had sued both Google Inc and Google UK Ltd in relation to eight comments which are said to have been defamatory of

him and which were posted on a blog bearing the name **"London Muslim"** at various times between 28 and 30th April 2011. As to liability against Google UK, the Court held that;

"Google Inc provides a range of Internet services including via Blogger.com (also based in and managed from the USA). This is described as a "platform" which allows any Internet user, in any part of the world, to create an independent blog free of charge. If someone uses that service, without having his/her own web address (URL"), then Blogger.com allows users to host their blogs on Blogger.com URLSs. This was the case with the blog on which the comments complained of in these proceedings were posted. Google UK Ltd simply carries on sales support and marketing business within this jurisdiction. It does not operate or control Blogger.com and has therefore been joined in these proceedings inappropriately. This was explained in a defence served on 8 December 2011. The English company takes no part in the applications before me."

20. From the above authorities, it is clear that Google entities in the named countries have been found not to have any control over the information published in the 1st Respondent's website, ww.blogger.com

21. But on her part, the Petitioner relies on the European Court of Human Rights case of ***Google Spain and Google Inc vs AEPD and Mario Costeja Gonzelez (supra)*** to argue to the contrary***.*** The facts of that case were that on 5th March 2010, Mr. Costeja Gonzalez, a Spanish national resident in Spain, lodged with the AEPD a complaint against La Vanguardia Ediciones SL, (which publishes a daily newspaper with a large circulation, in particular in Caladonia, Spain) against Google Spain and Google Inc. The complaint was based on the fact that when an internet user entered Mr. Costeja Gonzalez's name in the search engine of the Google Group (Google Search), he would obtain links to two pages of La Vangauardia's newspaper of 19th January and 9th March 1998 respectively, on which an advertisement mentioning Mr. Costeja Gonzalez's name appeared for a real estate auction connected with attachment proceedings for the recovery of security debts. Mr. Costeja had requested the La Vangauardia to remove those pages with his personal data and by its decision of 30th July 2010, the AEFD rejected the complainant in so far as it related to La Vangauardia. The AEFD, in doing so, took the view that the publication of the information was legally justified as it took place upon the order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible. It was therefore partly held that;

"It is not disputed that Google Spain engages in the effective and real exercise of activity through stable arrangements in Spain. As it moreover has separate legal personality, it constitutes a subsidiary of google Inc. on Spanish territory and, therefore, an 'establishment' within the meaning of Article 4(1)(a) of Directive 95/46.

In order to satisfy the criterion laid down in that provision, it is also necessary that the processing of personal data by the controller be 'carried out in the context of the activities' of an establishment of the controller on the territory of a Member State.

Google Spain and Google Inc. dispute that this is the case since the processing of personal data at issue in the main proceedings is carried out exclusively by Google Inc., which operates Google Search without any intervention on the part of Google Spain; the latter's activity is limited to providing support to the Google group's advertising activity which is separate from its search engine service.

He went further to state***;***

"Nevertheless, as the Spanish Government and the Commission in particular have pointed out, Article 4(1)(a) of Directive 95/46 does not require the processing of personal data in question to be carried out 'by' the establishment concerned itself, but only that it be carried out 'in the context of the activities' of the establishment.

Furthermore, in the light of the objective of Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data, those words cannot be interpreted restrictively (see, by analogy, Case C-324/09 L'oreal and Others EU:C:2011:474, paragraphs 62 and 63)

It is to be noted in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particularly broad territorial scope."

He then concluded as follows;

In the light of that objective of Directive 95/46 and of the wording of Article 4(1(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.

In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, he means enabling those activities to be performed."

22. I have read all the authorities referred to by the parties in relation to the issue at hand and I opine as follows;

23. As regards the joinder of the 2nd Respondent in the present case, the former Country Manager of Google Kenya Ltd, Mr. Joseph Mucheru, in his Supplementary Affidavit has given the following evidence as to the operations of 2nd Respondent;

"By an email dated 15th May 204 the 1st Respondent outlined the process that the Petitioner needs to follow in order to access the information being sought. A copy of the email of 15th May 2014 from the 1st Respondent is annexed as part of exhibit AW-3 in the Affidavit in support of the Petition.

The 2nd Respondent has no access to the information sought by the Petitioner and the Petitioner has been made aware of this by the email of 15th May 2014 from the 2nd Respondent to the Petitioner's advocates. A copy of the email is annexed as part of exhibit AW-3in the Affidavit in support of the Petition.

The 2nd Respondent does not sell advertising space and does not have any advertising revenue funds.

The 2nd Respondent's sole revenue source is a fee paid to the 2nd Respondent by Google Ireland Limited for the 2nd Respondent's marketing and service support activity for Google Ireland Limited"

24. All that is before me at this stage of proceedings therefore are confutations on the operation of the Respondent. I do not yet know whether in its operations the 2nd Respondent had knowledge of the offensive publication against the Petitioner or it could have, for instance, prevented the publication of the offensive material or whether it had the ability to access the publication of the offensive material. Mr. Mucheru has stated that the 2nd Respondent makes money out of a fee paid by Google Ireland Ltd (a body which is not a party here) and surprisingly not Google Inc, for marketing and service support activity. What is the nexus therefore as between Google Ireland Ltd and the 2nd Respondent and between the two of them and Google Inc" I do not, at this stage have answers to those questions.

25. The difficulty I also see that the Petitioner may face is whether or not the 1st Respondent has some influence and interlinkages over the 2nd Respondent, and at this stage of the proceedings, I am unable to make a determination on that issue. I say so because the 2nd Respondent has admitted receiving a fee for the marketing and service support services it renders. The question I must ask is who pays the 2nd Respondent for that marketing and service support service and what is the liability that attaches to such a transaction"

26. Secondly, the issue of responsibility of a publication made on the google website is a novel one in Kenya so far as I know. It is therefore apparent from the above facts that the resolution of the dispute before me requires determination of complex issues of law in a proper factual context. Given the significance and complexity of the issue as well as the fact that it concerns a developing area of the law, striking out the 2nd Respondent at this stage of the proceedings would be clearly inappropriate. In my view, it is necessary to consider the evidence available and facts in their totality at the trial in light of the fact of novelty of the issue and also given the conflicting foreign authorities relied upon by the Parties. It would also be inappropriate to consider the liability or otherwise of the 2nd Respondent at his interlocutory stage. I am thus of the view that the involvement of the 2nd Respondent in this Petition is necessary as the relationship between the two Respondents forms the background of the Petition.

27. In any event, I do not see any prejudice the 2nd Respondent may suffer by participating in the proceedings if its joinder will be useful in having the Petition determined. In the event that the Court does not find any wrongdoing on its part, then appropriate orders will be made at that stage.

28. Lastly, and even more fundamentally, as was stated in **Donovan Earl Hamilton vs Ian Hayles Claim No.2009 HCV 04623** by the Supreme Court of Judicature in Jamaica, striking out pleadings or a party in a Constitutional Petition should be done in the clearest of cases and this is not one such case.

29. In the circumstances, let the Petition be set down for hearing and only then can this Court be in a position to determine whether the 2nd Respondent has any role in regard to the information being sought by the Petitioner.

30. The Application dated 18th July 2014 is hereby dismissed. Let costs abide the hearing of the Petition.

31. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Miss Ngige for Petitioner

Mr. Kiragu and Mr. Ochieng for 2nd Respondent

Order

Ruling duly read. Mention on 22/1/2015.

ISAAC LENAOLA

JUDGE