



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 692 OF 2004

DAVID NJOGU GACHANJA.....PLAINTIFF/APPLICANT

VERSUS

THUO MATHENGE..... 1ST DEFENDANT/RESPONDENT

ANTHONY MWANGI..... 2ND DEFENDANT/RESPONDENT

THE PEOPLE LTD. 3RD DEFENDANT/RESPONDENT

RULING

1. Application, Depositions, Responses

The plaintiff moved the Court by Chamber Summons dated and filed on 28th June, 2004 and brought under Order XXXIX, rules 2 and 3 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap. 21). There are two outstanding prayers in the application:

(i) that, the Court do issue an order restraining the defendants by themselves, their agents, servants, employees and/or attorneys from further causing to be published, publishing and/or printing further defamatory words and/or similar words of and concerning the plaintiff herein pending the hearing and determination of this suit;

(ii) that, the costs of this application be provided for. The application rests on the following grounds:

(a) that, the defendants have falsely and maliciously caused to be published, published and printed defamatory words of and concerning the plaintiff in a newspaper article in The People Daily, a newspaper with a wide circulation in Kenya;

(b) that, the defendants continue to cause to be published, publish and print further and/or similar defamatory words of and concerning the plaintiff despite written demand and notice of the defamation having been served by the plaintiff.

(c) that, unless the defendants are restrained by an order of this Court from further causing the publication of, publishing and printing defamatory words of and concerning the plaintiff, he stands to suffer irreparable harm and damage to his credit and reputation.

The applicant depones, in his supporting affidavit of 28th June, 2004 that he is an advocate practising under the name and style D. Njogu & Co. Advocates. He avers that on or about 28th May, 2004 the defendants herein caused to be published, published and printed an article entitled "Mbo-I-Kamiti Director Arrested", in the issue of The People Daily for Friday, **28th May, 2004** (annex "D.N. 1"). He deponed that The People Daily is a newspaper owned and published by the 3rd defendant, whereas the impugned article was written by the 2nd defendant, and the same was based on statements emanating inter alia from the 1st defendant. The plaintiff averred that in the said article the defendants published false account in these terms:

"Police in Kiambu have arrested two directors of the trouble-ridden Mbo- I-Kamiti Farmers Company and are looking for a Nairobi lawyer who allegedly colluded with the officials to swindle the company [of] over Kshs.91 million."

It is deponed that the defendants, in the same article, went on to publish the following words:

"Lawyer David Njogu Gachanja has since allegedly gone into hiding after learning that the police were looking for him. The Kiambu DCIO David Mutie had summoned him yesterday."

Further impugned reports in the same issue of The People Daily said to be about the deponent are:

(i) "Yesterday, Mathenge told The People Daily that the directors had colluded with Njogu to have the money obtained from the sale of the 4,500 acres Ol Morogi Farm near Naivasha deposited in Njogu's account, instead of the company's as is the procedure."

(ii) "He explained that a sum of Kshs.91,058,519/= was transferred to Njogu on May 4 this year, but to-date the money has not reached the company's accounts. Mathenge said that the company feared that in a situation where Njogu fled the country, the company would collapse immediately since the Ol Morogi Farm was the only asset the shareholders had authorised for sale."

The plaintiff averred that all the aforementioned words published by the defendants, were false and were, in their natural and ordinary meaning, defamatory of him — as these words depicted him as a swindler, a fugitive, a conspirator in criminal acts, a fraudster, and a dishonest lawyer/legal practitioner, in the eyes of the readership of The People Daily.

The plaintiff avers that he had not at all been in hiding from the police, and on 27th May, 2004 at 11.00 a.m. he had attended a meeting with the Kiambu DCIO; and he was subsequently arrested and detained at the Kiambu Police Station, at about 8.00 p.m. He depones that he thenceforth remained in police custody, until he was eventually released on 31st May, 2004 at 6.00 p.m.

The plaintiff deponed that his detention by the police between 27th May, 2004 and 31st May, 2004 is a

controversial matter in respect of which he has filed judicial review proceedings, in High Court Miscellaneous Application No. 658 of 2004 [**Republic v. Director of Criminal Investigations, District Criminal Investigations Officer, Kiambu & The Attorney General, ex parte David Njogu Gachanja t/a D. Njogu & Co. Advocates**], and the said proceedings commenced on 28th May, 2004.

The plaintiff depones that he had acted as an advocate through his firm, for Mbo-IKamiti Farmers Company Ltd. and its wholly-owned subsidiary, OI Morogi Ltd, in the sale of their OI Morogi Ranch. He avers that he rendered his services to the two companies professionally and in accordance with common conveyancing practice, which included the giving and receipt of undertakings for the benefit of his clients, and the facilitation of the expeditious and proper conclusion of the sale transaction.

The plaintiff depones that he did, indeed, receive the sum of Kshs.91,058,519/= from the purchaser's advocates in the said sale transaction; but he received the said monies for and on behalf of his clients as is the normal conveyancing procedure where advocates have exchanged professional undertakings in such transactions (annexures "DN 2", "DN 3", "DN 4" and "DN 5" — being copies of instructions and various letters of undertaking exchanged between the advocates).

The plaintiff depones that he and his family live in Kenya, where he carries on his business, with no intentions of fleeing the country as alleged in the impugned publication by the respondent. He depones that he would not stand to blame if Mbo-I-Kamiti as a company were to collapse, as that company has continuously been characterised by strife over the prolonged period of some two decades.

The plaintiff depones that his advocate, **Mr. K. Kariuki Gathungu** had on 28th May, 2004 sent demand letters to the defendants, over the alleged defamatory publication; but the defendants have failed and/or refused to retract the defamatory statements and publish apologies. Instead, it is further deposed, the defendants have caused to be published, published and printed a further article in the Saturday 18th June, 2004 issue of The People Daily, which further defames the deponent (annexed as "DN 7").

The plaintiff pleads that if the defendants are not stopped from causing further publication of, publishing and/or printing the impugned defamatory words and/or similar defamatory words, he stands to suffer loss and damage to his reputation and credit as an upstanding citizen, and in his professional standing as an advocate.

The 1st defendant, on 13th July, 2004 filed his grounds of objection to the plaintiff's Chamber Summons of 28th June, 2004. In the objection it is asserted as follows:

- (i) that, the application as against the 1st defendant is frivolous, vexatious and an abuse of Court process;
- (ii) that, the application as against the 1st defendant, lacks merit, is speculative and unsustainable in law;
- (iii) that, the words complained of were not uttered by the 1st defendant, and the 1st defendant has not published them to anyone;
- (iv) that, the 1st defendant does not direct police investigations and does not determine what the media or the police publish;
- (v) that, the suit and the application do not disclose any cause of action against the 1st defendant.

On 12th August, 2004 the 2nd defendant/respondent, **Anthony Mwangi**, filed a replying affidavit, which

is expressed to be on behalf of both himself and the 3rd defendant.

The 2nd defendant depones that on or about 26th and 27th May, 2004 while in the course of his duties as a reporter he found out that the police were carrying out investigations on a transaction involving the sale of land in Naivasha, a transaction in which Mbo-I-Kamiti Farmers Company Ltd. was involved. As part of his inquiries, the deponent called the Kiambu District Criminal Investigations Officer, **Mr. Daniel Mutie**. The deponent did believe the information he received from **Mr. Daniel Mutie** — that he had arrested four of the Mbo-I-Kamiti directors and that he, **Mr. Mutie**, was now looking for the plaintiff. **Mr. Mutie** gave the further information that he had summoned the plaintiff to his office, but the plaintiff had failed to respond — and on this account the police were seeking to use their powers of arrest. The deponent avers that he did verify the information with the Kiambu Police Chief, **Mr. Atanacius Munyagia**; and thereafter he prepared his report, which was published in The People Daily of 28th May, 2004, and in his report he stated his sources of information. The 2nd defendant deposes that the story published in The People Daily of 28th May, 2004 contained factual information and did not bear any meaning that was defamatory of the plaintiff. Following the said publication on 28th May, 2004 the deponent did call **Mr. Mutie** and confirmed that the plaintiff had reported to the police on 27th May, 2004; and after police interrogation the plaintiff had been arrested and detained in the police station. The deponent later found out that the plaintiff and the arrested directors of Mbo-I-Kamiti Farmers Company Ltd. had been held at the Police Station for five days, from 27th May, 2004 to 31st May, 2004; and they were subsequently released on a bond in the sum of Kshs.20,000/=.

The 2nd defendant deposed that the fact that the police had arrested the plaintiff, as had been indicated by **Mr. Mutie**, indicated that the account in The People Daily of 28th May, 2004 was true. The deponent avers that the article published on 28th May, 2004 did not in any way imply that the plaintiff had unlawfully retained the said sum of Kshs.91,058,519/=, or was a fraudster who intended to flee the country.

The second defendant averred that the contents of the articles complained of by the plaintiff contained true factual matters of public interest. He further averred that the 2nd article carried in The People Daily of 18th June, 2004 did not mention the plaintiff, nor did it insinuate or refer to the plaintiff in any manner at all.

2. Submissions for the Applicant

Mr. Kariuki for the applicant stated the concern in the application as being, to obtain injunctive relief — against the printing of defamatory words. He contended that the defendants had earlier on published material defamatory of the applicant, and all demands made on that account by the applicant, had been ignored. The consequence, counsel contended, was that irreparable harm was likely to be caused to the applicant, in his credit and reputation. Counsel stated that a second publication by the defendants had been published which regurgitated the content of the first — and this signified the need to restrain the respondents, as they might in the future continue to regurgitate and re-publish the very same offending matter. The offending articles, counsel submitted, were printed and published by the 2nd and 3rd defendants, but the false information thus used had in the first place come from the 1st defendant. Counsel contended that the impugned words were untrue, and were published maliciously, or with gross negligence as regards the verification of their validity; and averred that it was on the prima facie evidence of those situations that the Court had issued interim orders in favour of the plaintiff. He urged that the same be confirmed until the determination of the suit. Counsel submitted that the impugned article had been published with intent to create a misleading impression, considering that the monies featuring in the defendants' story could quite properly have been held professionally by the plaintiff, and so it was defamatory to create the impression that he had been involved in a swindle.

3. Submissions for the 1st Respondent

Ms. Goretty for the 1st respondent denied that the words used in the impugned publication indeed depicted the plaintiff as a swindler; and she maintained that the 1st respondent did not cause the said articles to be published. As publication had followed the 2nd respondent's confirmation of the facts with the Kiambu District Criminal Investigations Officer, counsel submitted, the DCIO and not the 1st respondent was the source of the information that was published, and which is now said to be defamatory. The DCIO had confirmed having summoned the applicant and then detaining him.

Learned counsel maintained that the impugned story was factual and was by no means defamatory: for it was established and confirmed by the plaintiff himself, that the sale proceeds for the OI Morogi Ranch (in Naivasha) had been transferred to the applicant's accounts and was not remitted to Mbo-I-Kamiti Farmers Co. Ltd. Counsel stated that even as he confirmed having received the OI Morogi monies in the sum of Kshs.91,058,519/=, he remained silent on whether these monies were ever remitted to Mbo-I-Kamiti Farmers Co. Ltd.

Ms. Gorretty submitted that the applicant had not demonstrated a prima facie case to warrant the grant of an injunction.

4. Submissions for the 2nd and 3rd Respondents

Mr. Mukoma for the 2nd and 3rd respondents argued that they have a constitutional right to report on matters of public interest, and on this account it would be inappropriate to grant the applicant the injunction he was seeking. The essential point here was that granting the applicant an injunction would restrict the 2nd and 3rd defendants' right of reporting, and would also compromise the public interest in media coverage of public matters.

Obviously, such an argument is in every respect a logical one, save that reasonable accuracy and truthfulness must be observed, as essential protection for the individual, in relation to personal or professional or social or economic credibility and reputation.

Counsel also argued that an injunction in favour of the applicant would be inappropriate, for the further reason that one of the intended defences is justification; and in the event that the 2nd and 3rd defendants are able to prove that the impugned publication actually stated the truth, it would have been a wrong application of the law if the two defendants would have been restrained at the interlocutory stage from publishing for the public readership, and on a matter of public interest, what was true in the first place. This argument, so far as it goes, is, with respect, a valid one which carries a recognised legal principle.

Factual correctness, counsel submitted, arose from the fact that the 2nd and 3rd defendants were, on 26th and 27th May, 2004 in the course of their media duties, and while so engaged they found that the police were investigating Mbo-I-Kamiti Farmers Company Ltd. matters, especially in relation to land which was being purchased in Naivasha. The Kiambu DCIO informed the 2nd and 3rd defendants that four directors of Mbo-I-Kamiti

Farmers Co. Ltd had been arrested, and the plaintiff was also being sought as he had kept away notwithstanding police summons. Counsel stated that the impugned article was purely factual, and had quoted its sources of information; and moreover, such information had also been confirmed by the plaintiff himself. Counsel noted that on the day the impugned article was published, the plaintiff was arrested and detained for five days; and thus the matters reported actually did come to pass.

Counsel submitted that the factual accuracy of the impugned article is demonstrated by the fact that the plaintiff has conceded that he had held the sum of Kshs.91,058,519/= belonging to Mbo-I-Kamiti Farmers Co. Ltd.; but he had not given further information on matters like, the stage reached in the purchase transaction; whether he was still keeping the money belonging to Mbo-I-Kamiti Farmers Co. Ltd; arrangements for restoring those monies where they belong; etc. Counsel contended that, with such gaps in the facts deponed by the plaintiff, it was a legitimate suspicion whether the said sum of Kshs.91,058,519/= was being swindled. Counsel submitted that this was a straightforward factual matter of media interest, which entailed no malice or ill-will. On that basis, it was urged that the plaintiff had not established that he had a prima facie case with a high probability of success; and hence he was not entitled to an interlocutory injunction. Counsel contended that the plaintiff had not established that the words complained of had defamed him in his character.

Learned counsel relied on the Ugandan case, *Odongkara v. Astles [1970] E.A. 374* to support his contention that words said to be defamatory must not be regarded as such in the abstract; they must be related to the actual situation on the ground, in any particular case. In that case, *Phadke, Ag. J* had thus remarked (p.377):

“It has been rightly said that it is in general useless and often misleading to quote authorities to show that particular words have been held in particular cases to be defamatory, as the meaning of particular words may vary with the context and the circumstances in which they are published...”

5. Plaintiff's Response

Learned counsel, Mr. Kariuki, submitted that the 1st defendant could not extricate himself from the claims in the instant application, because there are paragraphs in the supporting affidavit which clearly show the 1st defendant as the originator of the impugned words in the publication in The People Daily.

On the mode of holding of the funds that are the subject-matter of the impugned report, counsel considered that the plaintiff had produced sufficient documentary evidence on how the applicant came to hold the same. Counsel submitted that the said monies could not have been deposited in the company's account, as it was held in the trust by the advocate.

Mr. Kariuki doubted the cogency of the defence of the 2nd and 3rd defendants based on justification — because such a defence would presuppose that all the statements in the impugned publication are truthful. He doubted whether a claim of collusion with Mbo-IKamiti directors to steal money would satisfy the test of justification. He observed further that it was not true that the plaintiff was in hiding: he was under arrest, instead.

Learned counsel doubted whether the fact of the plaintiff just being under arrest had much to do with the constitutional liberty of the media to publish as they saw fit. In the submission of counsel, the fact of the plaintiff having been arrested could not create a fitting occasion for publication as exercise of constitutional rights — because at this stage only the opinions of police officers and investigators were at play — but no Court had as yet established criminal culpability. Counsel was urging that any tendency to impute criminal liability at this stage was premature, and there was no accrued factual situation to report then, in which members of the public had any vested interest, nor one in respect of which the defendants had constitutional rights to report. Mr. Kariuki submitted that the applicant did have a prima facie case

which deserved interim protection through injunctive orders.

6. Further Analysis, and Orders

One **Joseph Mwangi** of Mbo-I-Kamiti Farmers Co. Ltd. (who, however, does not disclose the corporate capacity in which he gives instructions) did write to M/s. D. Njogu & Co. Advocates on 7th April, 2003 as follows:

"We hereby instruct you to act for us in this matter of the sale of our Ol Morogi Farm.

"You may also issue an undertaking on our behalf to M/s. Highland Valuers for the payment of their charges to enable them [to] release the valuation report to you for onward transmission to the purchaser."

The lack of clarity as to the status of the person instructing notwithstanding, somehow business got started; and on 7th November, 2003 **Mr. T. M. Macharia of Ndonge, Mbugwa, Atudo & Macharia Advocates** wrote to M/s. D. Njogu & Co. Advocates as follows:

"Thank you for your letter dated 30th October, 2003 the contents of which I have noted.

"I now return herewith the duly executed Sale Agreements for execution by your clients..."

"My client's cheque for... [Kshs.17,000,000/=] on account of the 10% deposit on purchase price, which you are to hold as stakeholder and not to release to the vendor or any other party pending successful completion of the transaction, is also enclosed herein."

The same firm of advocates, again, wrote to M/s. D. Njogu & Co. Advocates on 11th February, 2004, and with reference to "PROPOSED SALE OF L.R. NOs. 5295/1, 6562, 5234 & 425/4 (OL MOROGI LTD). & L.R. No. 6563 (MBO-I-KAMITI FARMERS CO. LTD) TO INTERNATIONAL CONTROLS LIMITED OR NOMINEE", as follows:

"I refer to the telephone discussion that the undersigned [T.M. Macharia]; held with you yesterday (10th February 2004) and advise that the cheque for Kshs.153,000,000/= on account of the balance of the purchase price is in my custody. A copy of the same is annexed hereto.

"My client has instructed me to forward the funds to you, on receipt of your undertaking not to forward or release the same to your clients or any other party and to hold such funds to my order pending the successful registration of the transfers and conveyance in favour of my client."

The firm of **D. Njogu & Co. Advocates** responded to the firm of **Tom Maina Macharia, Advocate** on 11th February, 2004, as follows:

"We are in receipt of your letter of 11th February, 2004 and confirm that our client is ready to execute the transfer at our chambers today (11th February, 2004) at 3.00 pm and give possession tomorrow (12th February, 2004) at 10.00 a.m. at the farm in Gilgil.

"We also give our professional undertaking that we shall hold the proceeds of the cheque at your

order and not release the same to our client until the transfers are registered in favour of your client.”

It must be out of the transactions described above, that the sum of Kshs.91,058,519/= which is at the centre of the instant application arose.

Although I have remarked at least one aspect of the relevant correspondence which is not quite clear, the impression I get is that the plaintiff in the instant case was, as a fact, holding the monies in question as part of the normal process of conveyancing. In that case, the suspicions entertained by the Kiambu Police when they arrested and detained the plaintiff, would sooner or later have been cleared. It would have been the responsibility of the police, in that case, to provide unexaggerated information to the media to enable a more factual reporting to take place. Be that as it may, however, *the media would always remain under duty to ensure balanced reporting, even as they exercised their constitutional rights, and as they responded to the public interest by reporting on relevant subject-matter.*

It is not clearly shown that the plaintiff had taken cover, to avoid police summons; but there is clear evidence that he was arrested and remained in the custody of the police for some five days. In the end the police set him at liberty. But the reporting in The People Daily of 28th May, 2004 which is attributed to police sources, carried allegations which would be perceived to associate the plaintiff with crime, and with absconding the criminal process pursued by the police.

From the foregoing review, it is not at this interlocutory stage obvious that a defence, as intended by the 2nd and 3rd defendants, of justification will readily avail those parties. It is, however, only at the full trial that it can be determined whether that defence will advance the defence case.

I have taken the facts before me at this interlocutory stage, and given anxious consideration to the submissions of counsel. I have come to the conclusion that, pending the full determination of the issues at the trial, the status quo represented by the orders made by Mr. Justice Kihara Kariuki on 29th June, 2004 shall be maintained. Consequently I hereby act on the plaintiff's Chamber Summons of 28th June, 2004 by making the following Orders:

(a) I hereby issue an order restraining the defendants by themselves, their agents, servants, employees and/or attorneys from further causing to be published, publishing and/or printing further defamatory words and/or similar words of and concerning the plaintiff herein pending the hearing and determination of this suit.

(b) A date shall be taken within 21 days of the date hereof, for the hearing of the main suit. This shall be given on the basis of priority.

(c) The costs of this application shall be in the cause.

DATED and DELIVERED at Nairobi this 13th day of May, 2005

J. B. OJWANG

JUDGE

Coram: Ojwang, J. Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Kariuki, instructed by M/s. D. Njogu & Co. Advocates For the 1st Defendant/Respondent: Ms. Goretty, instructed by M/s. Amena Amendi J & Co. Advocates

David Njogu Gachanja v Thuo Mathenge & 2 others [[222000000555]] e eeKKLLRR 16 For the 2nd & 3rd Defendants/Respondents: Mr. Mukoma, instructed by M/s. Nyiha, Mukoma & Co. Advocates



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