

MISC. APP 218/2023

2023

A.

NO.17

IN THE HIGH COURT OF SIERRA LEONE
GENERAL CIVIL DIVISION

BETWEEN:

FAISAL ANTAR

- 1ST PLAINTIFF

HUSSEIN ANTAR

- 2ND PLAINTIFF

AND

THE COMMENT NEWSPAPER

- 1ST DEFENDANT

PASTOR MOHAMED SESAY

- 2ND DEFENDANT

(THE PUBLISHER/MANAGING EDITOR

THE COMMENT NEWSPAPER

THE COMMENT NEWSPAPER

- 3RD DEFENDANT

SUBMISSIONS OF COUNSEL

COUNSEL

O. JALLOH and F. I. BOCKARIE for the Plaintiff

A. KAMANDA for the Defendant

RULING

HONOURABLE MR. JUSTICE

ABDUL RAHMAN MANSARAY J.

27TH DAY OF MARCH 2024

BACKGROUND

1. This is an application by way of notice of motion dated the 18th of December 2023, in which the applicants, hereinafter the plaintiffs, are seeking injunctive orders to temporarily restraint the respondents, hereinafter the Defendants, from publishing, republishing or otherwise disseminating, causing the publications or republications of any material libeling, slandering the plaintiffs in any news/social media medium or by any means whatsoever during the pendency of the action, initiated by a generally indorsed writ and a statement of claim herein. This application is supported by the affidavit of Frederick Ishmail Bockarie, counsel on record for the plaintiffs, sworn to on the same date as the motion. The said application is strongly challenged, and the 2nd defendant swears to an affidavit in opposition on the 9th of February 2024.

SUBMISSIONS OF COUNSEL

2. This matter comes up on diverse days and the first two orders on the face of the application, which also seek injunctive orders during the pendency of this application, have been spent. So, the court's business now is to determine the 3rd prayer on the application as stated supra - whether or not to restraint the defendants until the determination of the action herein. I turn now to the submissions of counsel, and I shall do so by stating, in a snapshot, their arguments. F. I. Bockarie moves this court pursuant to O. 35 r. 1(1) and (2) and r. 9 of the High Court Rules ¹ (hereinafter the Rules). He submits that the defendants defamed the plaintiffs and directs the court to Ex "A" in the affidavit in support. He also refers to a plethora of authorities, both local and international, where libelous and defamatory issues are dealt with.

¹ The High Court Rules, 2007 (Constitutional Instrument No.8 of 2007)

3. Mr. Bockarie further submits that the principle for granting of an injunction by the court was categorised in three limbs and refers the court to the American Cyanamid v. Ethicon² and PC Dr. Alpha Madseray Sheriff II v. Att. Gen. & Minister of Justice et al³. As regards the limb – a serious issue to be tried – he directs the court to Ex “A” in the affidavit in support. He argues that a publication was made which was defamatory and had injured, impaired, and hurt the reputation of the plaintiffs. He refers to sections 25(2)(a)(ii) and section 15 of the Constitution of Sierra Leone⁴. He adds, in this regard, that the defendants also had provided an affidavit in opposition. As regards the limb – damages are not sufficient remedies – he submits that it was for the court to protect the plaintiffs’ credit and character. He makes mention of the plaintiffs’ standing in society in their private and public life both local and international.
4. As regards the limb – balance of convenience – he points out that the plaintiffs’ reputations were at stake and not the defendant who could make other publications and trade would continue with no practical consequence. A. Kamanda, of counsel for the defendants in answer submits that the defendants as professional journalist had the responsibility to be professional, ethical, responsible, and tried to hear the other side. He contends that the defendants were unaware of what the claims of the plaintiffs were. He refers to para. 1 of the statement of claim and argues that it was a question and not a claim. He also refers to para. 3 of the same statement of claim and draws the court’s attention that those paragraphs referred to a trailer and not

² [1975] 1 All ER 504 - 512

³ [2011] SC. MISC. APP 2 (Unreported)

⁴ The Constitution of Sierra Leone, 1991 (Act No.6 of 1991)

publication. He goes on to draw a distinction between a trailer and a publication.

5. He submits that the plaintiffs' action was no more than exercising their power and resources to muzzle free speech and frustrate the fight against corruption. He argues that trailer was a tool in journalism employed when the other side was inaccessible. He refers to the affidavit in support and submits that same contained no address for the plaintiffs. He concludes his submission by referring to para. 12 of the affidavit in opposition. He submits that the act mentioned therein bruised the ego of the defendants whereas the instant case was the contrary. He then states that the balance of convenience tilt in not granting the injunction as the application lacked a cause of action. Mr. Bockarie in reply, states as follows. Ex. "A" in the affidavit in support contained not only the question but an article that was put out and same was defamatory.
6. As regards the defendant previous publication to which they had apologies, Mr. Bockarie submits that it was made without reaching out to the plaintiffs. So, he argues that in the present publication the defendants did not reach out to the plaintiffs. He points out that the failure was an act of unprofessionalism and the defendants acted on malice, he then draws the court's attention to regulation 3 of the I.M.C. Print and Electronic Media Regulation 2022.

CONSIDERATION OF THE COURT

7. I turn now to the application and the role of the court in such cases. The guiding principle the court should follow in the exercise of its discretionary powers has been laid down in the well-known case - American Cyanamid v. Ethicon, per Lord Diplock. The first is whether

there is a serious issue to be tried. It is not the business of the court at this stage to investigate whether the applicants have any chance or likelihood to succeed in the trial. Mr. Kamanda says the defendants were unaware of what the plaintiffs' claim were. He argues that the plaintiffs were erroneously referring to a trailer as a publication. He contends that even if that were a publication it was not libelous. He concludes that the plaintiffs had no cause of action. Is that so? Well, if the court is to hold that those contents are trailer and not publication, then the court would have to conduct a thorough investigation to establish the following.

8. The definition of a trailer and a publication. The distinction between a trailer and a publication. What content constitutes a trailer and a publication. This is not the business of the court at this stage. At the trial the court would definitely unearth all of that. It is also not the function of the court currently to resolve conflicts of evidence as to fact which the claims of the applicants depend. It is however, and undoubtedly so, as stated by Lord Diplock: "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, there is a serious question to be tried."⁵ The concern of this court in this regard is whether the contents on the Comment Newspaper of the defendants, printed and disseminated on the 14th of December 2023 which concerns the plaintiffs, infringes the rights of the plaintiffs.
9. Mr. Kamanda submits that the defendant did that to get the plaintiffs to reach out in order to get the other side of the story. Whereas the plaintiffs are saying as a result of the said content they were receiving calls in and out of the country – para 16 in the affidavit in support.

⁵ [1975] 1 All ER 510

The defendants' intention according to Mr. Kamanda was to seek the attention of the plaintiffs. But according to the plaintiffs the act had ripple effect which had sought the attention of the world over. This conflicting views, in and of themselves, are sufficient grounds that there is a serious issue to be tried. In the opinion of this court para.1 of the statement of claim contains serious issue for the court to determine in the trial of the main. This now takes the court to the next consideration which is the balance of convenience.

10. The question is where does it lie? The court must determine whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. The first part of the scale in my mind poses the following questions for consideration. (1) Whether compensation would be adequate as an award of damages if the plaintiffs herein were to succeed at the trial; (2) whether damages would be an adequate remedy; and (3) whether the defendants are financially capable to pay damages. In answer to the first, the plaintiffs depose in paras. 11 and 12 of the affidavit in support that the first plaintiff was a retired businessman and the second plaintiff a member of the diplomatic Corp representing the Islamic Republic of Pakistan as its honorary consul general to Sierra Leone. In this regard, Mr. Bockarie submits that if the second plaintiff's reputation was soiled, he could have no opportunity to vindicate or absorb himself.
11. The ^{now} defendant responded to this in para. 11 of his affidavit in opposition that, the 2nd plaintiff claimed in one breath being a member of the diplomatic Corp and in the other a Sierra Leonean. So, he (defendant) was confused what the 2nd plaintiff really was. Well, if he is a member of the diplomatic Corp the stakes are high because he is an individual of note. But even if he is an ordinary Sierra Leone does

not make him a lesser human. So, it is the business of the court to protect his credit and character. In other words, the court should act quick in other for same not to be hurt. Because if the plaintiffs were to succeed at the trial compensation as an award of damages would not be enough. This opinion is strengthened and supported in the case of *Loutchansky v Time Newspaper Ltd and others*⁶.

12. The court (Court of Appeal) therein in highlighting the considerations likely to feature prominently in the court's thinking when deciding whether the standard of responsible journalism has been satisfied; referenced the speech of Lord Nicholls in *Reynolds v Times Newspaper Limited*⁷ in respect of the damaging consequence of the individual's reputation.

"Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damage forever, especially if there is no opportunity to vindicate one's reputation. When this happens society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."

13. On the same subject of reputation, in *Philomena Mbete Mwilu v Standard Group Limited*⁸ the court held: "The defendant has advanced

⁶ [2001] All ER (D) 44 (Dec)

⁷ [2001] 2 AC 127

⁸ [2018] eKLR

the view that in this case, even if the applicant was to succeed in her action, an award of damages would be an adequate remedy. However, I am alive to the fact that in some cases such as the instant one, one's a person reputation is damaged or lost, no amount of damages can be sufficient to compensate the offended party for such a loss. I wholly concur with the expressed by Mbogholi J in Ahmed Adan v Nation Media Group Limited & 2 others, [2016] eKLR that reputation like a name, is priceless."

14. It follows from the above authorities that, if the first question whether compensation is adequate as an award of damages is answered in the negative; the second question too is negative. That is whether damages are adequate remedy. I find support in the case of Brigadier Arthur Ndoj Owuor v Standard Limited⁹; the court while allowing the plaintiffs application for injunction held that "once reputation is lost, in view, monetary damages might not be an adequate compensation. Monetary damages might be a consolation, yes, but they will never be adequate compensation for lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in the memory possibly throughout his life."

15. As regards my third question, this too is negative, whether the defendants are financially capable to pay damages. In para. 8 of the affidavit in opposition the defendants admitted publishing an earlier content which was defamatory to the plaintiffs, and when they were called out, and found that the information was untrue they rendered unreserved apology. It is the opinion of the court that if the plaintiffs are to be successful at the trial the defendants will again bruise their

⁹ [2011] eKLR

ego, as they put it, by apologizing unreservedly. Thus, these three questions on one hand of the scale, when answered in the affirmative according to the lay down principle, the injunction should not be granted but if in the negative then the injunction ought to be granted.

16. Similarly, on the other end of the scale, also poses the like questions to assist the court in determining where the balance lies. These are, (1) whether, in the case of the plaintiff succeeding, damages would not be an adequate remedy; (2) whether the defendant would be adequately compensated under the plaintiff's undertaking as to damages if the defendant succeeds at the trial; and (3) whether the plaintiff would be in financial position to pay. Well, the first question has been answered in considering the first part of the scale, that the plaintiffs if successful at the trial damages would not be an adequate remedy. On the second question, it is my opinion that adequacy of anything is completely a different realm altogether. Nonetheless, there would be always something to make up for loss incurred or suffered. Mr. Bockarie submits that there was no practical consequence upon the defendants if they were injunct because, they could make other publications and trade continue.

17. Besides, the plaintiffs have given an undertaking to pay damages, see Ex "G" in the affidavit in support. This undertaking is executed by the plaintiffs themselves. This is in satisfaction of O. 35 r. 9(1) of the Rules and the principles enunciated in the American Cyanamid case. As regards the third question, whether the plaintiffs would be in financial position to pay the damages awarded by the court. Mr. Kamanda in his submission accosted the plaintiffs, that their action was no more than a show of power and resources to frustrate free speech and the fight against corruption. So, it no doubt that if the defendants are

successful at the trial, the plaintiffs have the capacity to compensate them as per the order of the court. Another factor worth considered under balancing of convenience is special factors.

18. In the instant case the one special factor that stands out conspicuously is the interest of the public. This is measure in my opinion by the plaintiffs' credit and character and the impact on society as a whole. This court lends support in the speech of the House of Lords in the Reynolds case which reads in part: "When this happens society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely." So, in my opinion, the court must make it a duty to protect the individual as a member of society and the society as a whole. This must be done whether the individual is a person of note or peasant.

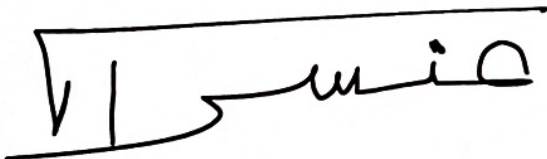
19. Hence public interest dictates that the general good is best served if the application is granted. Consequently, I hereby hold as competent and sustainable the notice of motion dated the 18th of December 2023. And I shall make bold and haste to give direction at once for the future conduct of the action without the necessity of either party taking out a summons for directions. I shall also abridge time for doing any of the things I shall direct to be done, to ensure that the compliance hearing will be held on the third week after the Easter break and that the action will be ready for trial immediately therefrom. I shall therefore make the following orders:

- i. An interlocutory injunction is hereby granted restraining the defendants herein whether themselves, their servants, agents,

privies, or howsoever otherwise from publishing, republishing or otherwise disseminating, causing the publications or republications of any material libeling, slandering the plaintiffs in any news/social media medium or by any means whatsoever touching and concerning the plaintiffs pending the hearing and determination of the action.

- ii. That not later than Monday 15th of April 2024, the plaintiffs and the defendants shall serve on the other the following:
 - i. List of all documents intended to be used at the trial that is in the possession, custody, or power of each party.
 - ii. List of witnesses.
 - iii. Witness statement of all such witnesses.
 - iv. Admission of fact if any.
 - v. List of issues in dispute.
 - vi. Nature of evidence to be called.
- iii. All documents in respect of which inspection is required by either side, shall be so inspected within 2 days therefrom, (i.e. 16th and 17th of April 2024) of the service of such lists, at such time and at such place as shall be indicated by the party of whom inspection is required. Any party requiring copies of any document or documents in the custody and possession of the other party shall so indicate to that other party at the time of inspection.
- iv. That the plaintiffs shall set down the action for trial on the 19th of April 2024 and shall state the estimated length of the trial. On the same date, i.e. 19th of April, the defendants shall indicate and identify to the plaintiffs those documents central to their case which they wish to be included in the court bundle.

- v. The plaintiffs shall, on Wednesday 24th of April, lodge two bundles consisting of one copy each of the documents listed in order 40 rule 9(2) paragraphs (a) to (c) inclusive of the High Court Rules, 2007.
- vi. There shall be liberty to restore this direction for further directions.
- vii. This file shall be put before me on Thursday 25th April at 10:00 a.m. for the purpose of ensuring compliance with these directions, and for the further purpose of fixing a date of trial.
- viii. This matter is adjourned to Thursday 25th ~~March~~ ^{April} 2024 at 10:00a.m.
- ix. Cost in the cause



HONOURABLE MR. JUSTICE
ABDUL RAHMAN MANSARAY J.