

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.93 OF 2019

(ARISING FROM Miscellaneous App No. 67 of 2019 and H.C.C.S NO.38 OF 2019)

AFRICAN GOLD REFINERY----- APPLICANT

VERSUS

1. ENOUGH PROJECT

2. THE SENTRY----- RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application by way of Chambers summons against the respondents under Section 98 of the Civil Procedure Act, and Order 41 r 1 and 2 of the Civil Procedure Rules, for orders that;

a) A temporary injunction be issued restraining the respondents, their workers, agents and servants from hosting, publishing or otherwise distributing on their respective websites or any other platform or medium report titled **“GOLDEN LAUNDROMAT: the conflict gold trade from eastern Congo to the United States and Europe”**.

b) Costs be provided for.

The grounds in support of this application are set out in the affidavit of Mr. Alphonse Katareebe one of the directors of the applicant which briefly states;

1. That the respondents published a report on their respective websites which in the plaintiffs view is defamatory and has filed a suit for a declaration that the report published on their websites titled Golden Laundromat: the Conflict gold trade from Eastern Congo to the United States and Europe is defamatory.

2. The civil suit filed against the respondents before this honourable court has a very high probability of success as the respondents have no defence.
3. That the defamatory report is hosted on the 2nd respondent's website www.thesentry.org/reports/the-golden-laundromat and a link to the report is also found on the 1st respondent's website www.enoughproject.org.
4. That due to the hosting of the report on the respondent's respective websites, the report has been readily available for viewing and download to millions of people both domestically and internationally.
5. The applicant's reputation has suffered and continues to suffer severe harm and injury as a direct result of the publication and continued hosting of the said reports that raises many baseless accusations attacking and demeaning the applicant's business, integrity and reputation.
6. That the report further undermines the credibility of the conduct of the applicant's business as it makes conclusions that the applicant is a grand conspiracy to perpetuate the illegal trade of gold and launder money through connections.
7. That the said report has already been quoted and relied upon by other journalists and news outlets in further attacking the applicant's reputation with the latest being an article that was published in the Sunday Vision dated 11th November 2018 titled US report pins "**Ugandan Firm on Gold Exports**" where the reporter quotes the false and defamatory allegations in the report throughout the article.
8. That the applicant continues to lose business, clientele service providers and suppliers who have all stopped doing business with the applicant and have raised concerns about the integrity of the applicant's business as a

direct result of the continued hosting and publishing of the report by the respondents.

9. That there is very high risk that unless the orders of this application are granted by this honourable court, the applicant stands to suffer irreparable and devastating injury to its reputation, integrity and business.

In opposition to this Application the Respondents filed different affidavits in reply and supplementary affidavit through Brad Brooks-Rubin-(American of Sound mind and the Managing Director for both the respondents wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. That on or about 30th January 2020, he received a news Article published in the Belgian newspaper DE Standaard, which reported the criminal convictions and sentencings of Sylvain Goetz and Allan Goetz, the founder of the Applicant AGR, by the Criminal Court of Antwerp.
2. That according to the said article, both Sylvain Goetz and Allan Goetz were convicted on 30th January 2020 for forgery and money laundering as part of a fraud system whereby customers could anonymously sell gold for cash. They were sentenced to 18 months of prison (suspended) and to confiscation of illegal proceeds for an amount of euro 9,200,000. Sylvain Goetz and Allan Goetz stated in court that the traders from whom they purchased merely sold the gold they privately owned to the Goetzes' refinery, Tony Goetz NV. The court, however, did not credit this explanation, given the frequency of the transactions and large quantities of gold purchased by Goetzes.
3. That the said Alain Goetz, founder and longtime CEO of AGR, has been part of the driving mind of the applicant.
4. In "*The Golden Laundromat: The Conflict Gold Trade from Eastern Congo to the United States and Europe*" (the report) dated 2018, The Sentry reported concerns" that the corporate network controlled by Belgian tycoon Alain

Goetz has refined illegally-smuggled conflict gold from Eastern Congo at the African Gold refinery (AGR) in Uganda and then exported it through a series of companies to the United States and Europe. Report at 1. The Sentry reported on documents detailing significant amounts of Gold exported to an apparent affiliate of refinery Tony Goetz NV. AGR acknowledged to the Sentry that it sourced undocumented gold but insisted it came through scrap sources. Report at 2. The Sentry also reported on the role of Sylvain Goetz, Alain's brother and business partner, in the network of companies. Report at 20-22.

5. That the convictions of the Goetzes for conduct analogous to what The Sentry reported in "The Golden Laundromat," especially with respect to the apparent failure to conduct a proper due diligence on gold sourcing, only confirms in his mind the accuracy of the documents and sources The Sentry reviewed in its careful preparation of its report.

In the interest of time the respective counsel were directed to file written submissions by the first trial judge and i have considered the respective submissions. The applicant was represented by *Ms Nanteza Hasifa* whereas the respondents were represented by *Mr. Tom Magezi*

The applicant's counsel submitted that, the grounds for granting of a temporary injunction in defamation cases is well captured in a Kenyan persuasive decision of ***John Ntoiti Mugambi alias Kamukuru v Hon. Moses Kithinji alis Hon Musa 2016 eKLR*** in which the court relied on the case of *Micah Cheserem v Immediate media Services [2000] 1 EA 371* where it was court held that;

*Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in *Giella vs Cassman Brown & Co Ltd [1973] EA 258* generally apply. In defamation case those conditions operate in special circumstances. Over and above the test set out in *Giella's case*, in defamation cases the jurisdiction to grant an injunction is exercised with greatest caution so*

that an injunction is granted only in the clearest possible cases. The court must be satisfied that:

- 1. The words or matter complained of are libelous and*
- 2. Also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse.....*

The applicant's counsel contended that the words complained of are defamatory in nature and that there are serious questions to be tried as to whether the statements complained of in the report are manifestly libelous and defamatory in nature.

The applicant's counsel also submitted that the applicant will suffer irreparable damage and international injury to the reputation of the applicant. There is award of damage that can make good al already injured reputation.

The respondents' counsel raised a preliminary point of law premised on: *Whether this Honourable court has jurisdiction to issue restraining the respondents' domiciled in the United States of America from hosting and publishing their Report published in 2018 on the Respondents websites in the United States of America?*

The respondents' counsel submitted that there is no bilateral treaty or multilateral convention in force between the United States and Uganda on reciprocal recognition and enforcement of Judgments and Court Orders.

U.S Courts, in accordance with the Securing the protection of our Enduring and Established Constitutional Heritage Act, (SPEECH ACT), Pub. L. No. 111-223, and 2(2),124 Stat.2380, (2010) (Codified at 28 U.S.C and 4101-4105) are prohibited from recognizing or enforcing foreign libel Judgments or Court Orders against any United States persons or entities unless the foreign country in which the Judgment/order was made protects freedom of speech to the same degree as the United States.

It was the respondents' counsel submission that an Injunction issued in Uganda for a defamation matter premised on a publication hosted and published in the

United States in compliance with the laws of freedom of speech in the United States of America is not enforceable in the United States America.

Determination

The grant of a temporary injunction is an exercise of judicial discretion as was discussed in the case of **Equator International Distributors Ltd vs Beiersdorf East Africa Ltd & Others Misc.Application No.1127 Of 2014.**

Discretionary powers are to be exercised judiciously as was noted in the case of **Yahaya Kariisa v Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29.**

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as his legal right is invaded as was discussed in the case of **Titus Tayebwa v Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009.**

The court should always be willing to extend its hand to protect a citizen who is being wronged or is being deprived of property without any authority of law or without following procedures which are fundamental and vital in nature. But at the same time, judicial proceedings cannot be used to protect or perpetuate a wrong committed by a person who approaches the court.

The court's power to grant a temporary injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of temporary injunction being equitable remedy, it is in discretion of the court and such discretion must be exercised in favour of the plaintiff or applicant only if the court is satisfied that, unless the respondent is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff/applicant. The court grants such relief *ex debito justitiae*, i.e to meet the ends of justice. See **Section 64 of the Civil Procedure Act.**

The applicant in the present case contends that the reports posted on respondents websites contain defamatory statements against the applicant and

are being cited by other journalists as they report about gold mining in Eastern Congo.

The right to reputation is acknowledged as an inherent personal right of every person. A man's reputation is his property and perhaps more valuable than any other property. Indeed, If we reflect on the degree of suffering occasioned by loss of character and compare it with that occasioned by loss of property, the amount of injury by defamation far exceeds that of loss of property.

The essence of defamation is 'publication' which excites others against the plaintiff to form adverse opinions or exposes him to hatred, contempt or ridicule, or injure him in his trade, business, profession, calling or office or to cause him to be shunned or avoided in society.

According to ***Black's Law Dictionary 11th Edition 2019***, defamation means; Malicious and groundless harm to the reputation or good name of another by the making of false statement to a third party

This court agrees with the 1st and 3rd respondent's submissions and authorities cited in favour of not granting a temporary injunction.

Francis Atwoli and 5 Others v Hon Kazungu Kambi and 3 others HCCS No. 60 of 2015; Court observed that while the principles set out in *Giella v Cassman Brown [1973] EA 358* are applicable. A fourth principle is applicable in defamation cases. That is; that the injunction will be granted only in clearest of cases.

In the same suit, the court cited with approval the decision of ***Cheserem v Immediate Media Services and 4 others [2000] EA 371***, where the court noted that in defamation, the principles set out in *Kiyimba Kaggwa* apply together with the special law relating to the grant of injunctions in defamation cases where the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is only granted in the clearest of cases.....the reason for so treating grant of injunctions in defamatory cases is that the action of defamation brings out conflict between private interest and public interest.....

It can be deduced from the above authorities that the courts are generally more cautious about interlocutory injunctions in defamation cases, and will grant such injunctions only where it is clear that the words complained of were libelous and no defence could possibly apply.

The rationale lies in public interest in the freedom of speech. Caution should be exercised against interfering with such a right prior to the determination of the merits at trial. Without a trial, there would not be an opportunity for the falsity or truth of the statements and other defences to be tested via the disclosure of documents and cross examination. See ***Greene v Associated Newspapers Ltd [2005] QB 972***.

The Court of Appeal of Singapore reasoned that with respect to:

“...an application for an interlocutory injunction in a defamation action, whether mandatory or prohibitory, the jurisdiction of the court was not to be simply on American Cyanamid guidelines but with great caution and should generally only be granted where it was clear that the statement complained of was libelous and no defence could possibly apply. Having satisfied this test, the court must further be satisfied that this is a case where special circumstances exist which warrant the issue of an exceptional relief like an interlocutory mandatory injunction.” See ***Chin Bay Ching v Merchant Ventures Pte Ltd [2005] 3 SLR(R) 142***

Therefore, an application for a prohibitory injunction should be denied as one of the essential conditions is evidence of “a threat or intention to repeat the defamatory remarks. In this case there is no evidence that respondents have threatened to repeat or intended to continue the alleged defamatory publication.

According to ***Gatley on Libel and Slander, 12th edition, Sweet & Maxwell at paragraph 24.2***; The jurisdiction to grant an injunction to restrain publication of defamatory statements is of a delicate nature which ought only to be exercised in the clearest of cases.....Thus the court will only grant an injunction where (a) the statement is unarguably defamatory (b) there is no good ground for the statement

to be true (c) there is no other defence which might succeed (d) there is evidence of an intention to repeat or publish the defamatory statement.

The respondents contend that the statements are true since they were obtained from different disclosed sources which the applicant has not denied. There are documents from Financial Intelligence Authority of Uganda requesting the Director of Public Prosecutions to prosecute the applicant for non-compliance with Anti-Money Laundering Act. A letter from the Directorate of Geological Survey and Mines in Uganda detailing the illegalities of the Applicant's operations and non-compliance of the Applicant with Statutory Procedures of Gold trade.

In the case of *Hararkas & Others v Baltic Mercantile & Shipping Exchange Limited and Another [1982] 2 All ER 701* Lord Denning held; *"Where there is a defence of justification or truth, an injunction restraining further publication should not be granted unless it is shown that the defendant honestly and maliciously published information which he knew to be untrue..."*

The applicant has failed to persuade this court to exercise its discretion in granting the application for temporary injunction against the respondents.

This application is dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered be email at Kampala this 28th day of September 2020

SSEKAANA MUSA
JUDGE
28th/09/2020