**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MISCELLANEOUS CAUSE No. 817 OF 2016**

***(Arising from Civil Suit No. 619 of 2016*)**

1. **JAMES MUSINGUZI GARUGA**
2. **KINKIZI DEVELOPMENT CO. LTD ::::::::::::::: APPLICANTS**

***Versus***

1. **DR. CHRIS BARYOMUNSI**
2. **THE NEW VISION PRINTING &**

**PUBLISHERS COMPANY LIMITED :::::::: RESPONDENTS**

1. **THE EDITOR IN CHIEF NEW VISION**

**BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA**

**RULING:**

This is an application for a temporary injunction, and costs brought by Chamber Summons under Order 41 rules 1, 3 and 9 of the Civil Procedure Rules S.I 71-1.

The orders that the applicants seek from this court are that;

1. A temporary injunctive order doth issue restraining the respondents, their servants and or agents from publishing further libel or defamatory statements against the applicant, or make further slanderous, malicious statements or any further defamatory publication pending the hearing of final disposal of the main suit.
2. The costs of this application be provided for.

The application is supported by the affidavit of the 1st applicant dated 26th September 2016 and the affidavit of Jackson Twinamasiko a Director in the second applicant Company. The 2nd and 3rd respondents filed an affidavit in reply sworn by John Kakande the Editor of New Vision publication of the 2nd respondent dated 7th October 2016. The 1st respondent filed an affidavit in reply dated 2nd December 2016. The applicants did not file an affidavit in rejoinder.

At hearing of this application Counsel Turyamuhebwa Francis appeared for the 1st respondent, Counsel Tonny Kirabira appeared for the 2nd, 3rd and 4th respondents. Mujurizi Jamil together with Kiconco Katabazi appeared for the applicants**.**

This court directed the parties to file written submissions. The applicant filed submissions on 12th December 2016, the 1st respondent filed on 19th December 2016 and the 2nd, 3rd and 4th respondents filed on 19th December 2016. The applicant didn’t file submissions in rejoinder.

Briefly the background to this application is that on the 16th Day of August 2016 the 1st defendant caused the writing, publication and circulation of a letter addressed to the Inspector General of Government which the applicants deemed defamatory. The letter was entitled Request to help in the recovery of UGX.1,316,000,000/= fleeced from Kanungu Teas Nursery operators by Mr. James Musinguzi Garuga of Kinkizi Development Company addressed to the Inspector General of Government. That the 1st defendant copied the letter to several offices and Government Department and offices. He also allegedly cause a publication in the Daily Monitor News Paper dated 7th September 2016. On 17th September 2016 the 2nd, 3rd and 4th defendants jointly and severally caused the writing publication and printing of an article which the applicants considered defamatory in nature. It is because of this trend of events that the applicants felt wronged and filed HCCS No. 619 of 2016 for defamation together with this application for temporary injunction.

The law on what should be considered and the principles governing grant of temporary injunctions are well settled.

An injunction is an equitable remedy in the form of a court order whereby a party is required to do or to refrain from doing certain acts. The key word here being equity which means it is all about fairness. The High Court has power to grant injunctions to restrain any person from doing any act as may be specified by the High Court, see Section 38 (1) of the Judicature Act Cap. 13. Under Order 41 rule 2 of the Civil Procedure Rules S.I 71-1the court has power to issue an injunction to restrain an injury and this may be applied for where there is a continuing injury at any time after the commencement of the suit but before judgment.

Injunctions are intended to maintain the status quo. In this case the status quo is not in dispute. It is undisputed that the applicants are aggrieved by a publication which was done by the respondents.

For this court to grant a temporary injunction the applicant must show;

1. That the main case has a prima facie case with possibility of success.
2. That if the order is not granted they shall suffer irreparable loss/damage/injury which cannot be compensated by an award of damages.
3. If the court is in doubt, the applicants must show that the balance of convenience is in their favour.

See: ***Giella Vs Cassman Brown Co. Ltd [1973] EA 358*** and ***Kiyimba Kaggwa Vs Katende [1985] HCB 43.***

I shall consider each of these in the same order.

1. **Prima facie Case:**

Prima facie case does not mean that the case must succeed. What it means is that there should be a triable issue, that is, an issue which raises a prima facie case for adjudication as was held in ***Kiyimba Kaggwa Vs Hajji Abdu Nasser Katende [1985] HCB 43.*** At this stage the court should not delve into the merits of the case as per ***Gapco Uganda Limited Vs Kaweesa Badru & Anor Miscellanous Application No. 259 of 2013.***

In the case of ***American Cyanamid Co. Vs Ethicon Ltd [1975] 1 ALL ER 504 Lord, Diplock*** pointed out that to prove a prima facie case, court must be satisfied that the case is not frivolous or vexatious. In other words that there is a serious question to be tried in the main cause.

To demonstrate that the applicants have a prima facie case with a likelihood of success, learned counsel for the applicants submitted that from paragraphs 6, 7, 8, 9, 10, 12 and 13 of the 1st Applicant’s affidavit in support it is shown how the 1st applicant has been defamed by the publications of the respondents and the respondents show the sources of the information. Further that under paragraphs 5-17 of the 2nd Applicant’s affidavit in support of the application it is clearly demonstrated how the 2nd applicant has and is likely to suffer due to the defamatory statements and publications of the respondents. That the respondents in their affidavit in reply do not deny or traverse the facts stated in the applicant’s affidavits.

Further learned counsel submitted that it is also clear from the affidavit evidence on record that the 2nd – 4th respondents’ publications against the applicants are out of malice, bad faith and unprofessional since they are stories riddled with falsehoods and concussions intended to discredit the name and image of the applicants. That these matters need to be investigated by court before the respondents completely tarnish the name and image of the applicants. That moreover under section 33 of the Judicature Actthe court can make any orders to meet the ends of justice and avoid multiplicity of suits. That by allowing the respondents to continue with false and challenged publications amount to a cause of action.

That the above affidavit evidence of the applicants show that there are serious questions of law to be tried by the court hence entitling court to exercise its discretion by granting the orders prayed for. That therefore the application should succeed.

In reply the 1st respondent submits that looking at the applicants’ affidavits there is no prima facie case made out. That the applicants’ case is not only frivolous and vexatious but it is against the provisions of Articles 226, 225 of the Constitution, sections 8 and 9 of the Inspectorate of Government Act 2002 and section 1, 2 and 9 of the Whistle Blowers’ Protection Act 2010.Further that the prima facie case which the applicants must prove is not that their case is not frivolous or vexatious but rather that it is one with a serious case to be tried by court. That this position was confirmed in the case of ***David Nyakana Bahinda & 2 Ors Vs Joseph Ahimbisibwe Miscellaneous Application No. 172 of 2006.***

That in this case the 1st respondent wrote to the IGG in a letter dated 16th August 2016 calling for investigations against the applicants’ conduct in NAADS Tea Project. That it is clear in paragraphs 3, 4, 7, 8, 9, of the 1st Respondent’s affidavit that he did this on behalf of the people and farmers of Kinkinzi East as their leader, who were meant to benefit from NAADS Tea Project but were being cheated by the applicants. That in doing this the 1st respondent was not only acting in good faith but also within his mandate of effective representation, monitoring and oversight as a Member of Parliament. That therefore a suit arising from such circumstances is frivolous and vexatious.

Further that the applicant is not immune to investigation by the IGG as long as they are dealing with public funds. That this is in line with Article 225 (1) (c)of the Constitutionwhich empowers the IGG to among others investigate any act, omission, advice, decision or recommendation by a public officer. Counsel added that this function is also provided for under section 8 (1) (e) of the Inspectorate of Government Act 2002.That the 1st and 2nd paragraph of annexture “A” to the applicant’ affidavitin support of the application show that the letter was indeed under the jurisdiction of the IGG by virtue of section 9 (o) of the Inspectorate of Government Act 2002 and Article 226 of the Constitutionsince the applicants were dealing with public funds.

That the applicants’ case seeks to curtail the Constitutional Mandate of the IGG.

Further counsel submits that the 1st respondent being a Minister of State for Housing and a Member of Parliament is protected by the Whistle Blowers’ Protection Act 2010 which was established to among others provide for protection against victimization of persons under Section 2. That as such the case of the applicants is frivolous and vexatious. That the ***Kiyimba Kaggwa*** case is distinguishable from this one since in that case it was all about determining land rights yet in this case the applicants seek to curtail Constitutional Rights.

That annexture “B” to the applicants’ affidavit in support of the applicationwas just in verification of the contents of the letter written to the IGG and had nothing new in it. In conclusion counsel submitted that granting the injunctive relief in a suit that seeks to frustrate the IGG mandate is against the Constitution and seeks to suppress information under the ***Whistle Blowers’ Protection Act 2010.*** That as such the applicants’ case does not spell out a prima facie case.

Counsel for the 2nd, 3rd and 4th respondents submits that the applicants have no prima facie case with probability of success. To demonstrate this counsel relied on paragraphs 2 and 5 of the affidavit of Twinamasiko and paragraph 2 of Garuga’s affidavit in support of the applicationwhich show that the applicants are aware of the complaint against them in IGG’s office.

I have considered the submissions of counsel. I am inclined to find that the respondents’ submissions delve too much into the merits of the case. Whether or not the applicant has a prima facie case depends on whether or not they have a cause of action with chances of success. In this case the applicants have a cause of action in defamation which is a very sensitive cause of action that this court cannot know at this stage with certainty that it shall succeed or not. However, what is clear is that the respondents have authored in the news paper dailies articles that are not so pleasant to the reputation of the applicants.

As to whether or not the publications have damaged and lowered the applicants’ reputation in the eyes of right thinking members of society is an issue to be considered in the main suit. At this stage this court need to delve into the merits of the case.

The respondents submit that the applicants’ main suit is frivolous and vexatious. “Frivolous” and “vexatious” generally mean different things, however, both are typically grouped together as they relate to the same basic concept of a complaint or claim not being brought in good faith.

A frivolousclaim or complaint is one that has no serious purpose or value. Often a *“frivolous”* claim is one about a matter so trivial or one so meritless on its face that investigations would be disproportionate in terms of time and cost. The implication is that the claim has not been brought in good faith because it is obvious that it has no reasonable prospect of success and/or it is not a reasonable thing to spend time complaining about.

A*“vexatious”* claim or complaint is one (or a series of many) that is specifically being pursued to simply harass, annoy or cause financial cost to their recipient.

I do not think any of these definitions describes the suit brought by the applicants. This court finds that the suit brought by the applicants is serious and based on publications made by the respondents. It is not baseless or without any legal merit. It is a valid cause of action that is worth investigating by court.

For the reasons I have stated, I find that the applicants have a prima facie case against the respondents.

1. **Irreparable injury:**

The applicant on this point submitted that relying of paragraphs 1, 12, 13, 14, 15, 16, 18 and 19 of the 1st Applicant’s affidavit in support and the affidavit of Jackson Twinamasiko a Director in the 2nd Applicant paragraphs 11, 12, 13, 14, 15, 16 and 17shows that the loss may not be atoned for by way of damages and the applicants have shown how they shall suffer irreparable loss. Further that the applicants have a big name and reputation with a long list of achievements and success. Counsel added that the 2nd Applicant is involved in multimillion dollar projects and partnerships with international and national organizations and governments among others. That any refusal to grant the order will allow the respondents to unjustifiably and maliciously tarnish the image and name of the applicants even more before the main suit is disposed of.

That the applicants are implementing a tea development project to enhance household income in Uganda and have numerous business achievements and records with a good track record and have done this for a long time of 10 years and so they will be the ones to suffer irreparable damage in the event the order is not granted by this court. That damages alone cannot atone for the loss that the applicants will suffer if the injunction is not granted. That the 1st applicant will be viewed by his family, relatives and business associates as a dishonest man. That therefore the applicants have shown that they will suffer irreparable damage if this application is not granted.

On this point counsel for the 1st respondent submitted that the damage that the applicants may suffer can be adequately atoned for in damages. For this submission counsel relied on paragraph 17 of the 1st respondent’s affidavit in reply. That the applicants among the remedies they seek from court are consequential order for publication of an unqualified apology to the applicants retracting the articles which should cover a bigger part of the Uganda’s leading news paper front page. That damages are awarded to such extent as to place the plaintiff in as good position as far as money can do it as if the acts complained of had not occurred. That therefore, the damage in this case is reparable. That even the claim that the damage will cause the applicants’ business associates to view them as dishonest persons can be atoned for by the apology which the applicants seek in the main suit. That the 1st respondent is not bankrupt he can pay the money which this court may order in the event it finds merit in the main suit. That therefore this court should find that the applicants will not suffer any irreparable loss.

Counsel for the 2nd, 3rd and 4th respondents submits that according to the ***American Cyanamid*** case where the loss likely to be incurred can be atoned for in damages under common law and would be an adequate remedy where the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted no matter how strong the case may be. That the New Vision news paper has the means of paying if it loses the case. That the position that damages can be awarded for injured reputation to adequately compensate the plaintiff has been followed in the cases of ***Kiirya Jillary Vs New Vision and J.N. Ntabgoba Vs The Editor in Chief of the New Vision News Paper & Anor HCCS No. 113 of 2003***where court awarded adequate damages. In conclusion counsel submitted that therefore as per the authorities cited damages would be adequate compensation for the applicants.

I agree with the submissions of the respondents that there is no clear evidence as to how the applicants are likely to be affected if this application is not granted. However, it appears that all can be atoned for in damages as there are many cases where court have awarded damages for damaged reputations. This court is in doubt as to whether or not the loss shall be irreparable and so finds that the applicant has failed to prove this ground.

1. **Balance of convenience:**

This is only considered if the court is in doubt. Having found that the applicant has a prima facie case but court is in doubt as to whether or not they shall suffer irreparable loss, I must consider the balance of convenience.

On this point counsel for the applicants submits that the balance of convenience is in favour of the applicants because the respondents are just trying to tarnish the name and image of the applicants to get them out of business of tea seedlings supply which they have carried out for over 10 years yet they are aware that the applicants have highly invested in such business and projects but they continue using their unprofessional media strategy.

The 1st respondent submitted that what the applicants are attempting to do is to block themselves from being investigated and from the public knowing what is exactly happening in the Tea Project. That granting an injunction of this nature would mean the applicants are immune from being investigated which places them above the law. That granting an order of this nature in a case such as this one would mean that any official from any Ministry that has an attachment to NAADS Tea Project even when tasked by the Speaker of Parliament will not make and present any report either verbally or in writing to any office not even on the floor of Parliament as he or she will be in contempt since such a report cannot be made without mentioning the applicants who have been directly involved. Further counsel submitted that if this application is granted it will set a bad precedent to the extent that one can frustrate the operations of the IGG and shield himself from being investigated. That the application does not merit the orders sought as it does not satisfy the elements for the grant of a temporary injunction and in the interest of justice the application should be dismissed.

Counsel for the 2nd, 3rd and 4th respondents submits that the balance of convenience is in favour of 2nd, 3rd and 4th respondents. Further that the applicants’ submission that the respondents seek to tarnish their name is not sustainable because whether or not the respondents are tarnishing the name of the applicants cannot be determined at this stage. It is an issue for the main suit. Counsel also submitted that the grant of this injunction will deprive the farmers of knowledge of the extent of their complaint and will infringe on the media’s role in reporting accurate news and information. That this application should fail.

The respondents seem to suggest that they are immune to injunctions. That the whole word of media and press will come to a standstill if this application is granted. They also in a cocky manner say that whatever the magnitude of damage, they can and shall pay the applicants. As if to say; if we can pay then why not let us disgrace them just a bit more.

I do not agree with this attitude. In a proper case, an injunction can properly issue against the media. I hold the opinion that the right to engage in a lawful occupation is not less essential than that of free speech and freedom of press. All Constitutional Rights must be exercised in accordance with the *maxim sic utere tuo ut alienum no laedas* (which translates into – use your own as not to injure another’s property or right). This certainly means in this case that the press should not unjustifiably be employed to ruin another’s occupation or reputation and where such a ruin is imminent the dangerous weapon of injunction becomes a proper one to be employed.

Unfortunately, this case is not one of such cases. A temporary injunctive order restraining the respondents, their servants and/or agents from publishing further libel or defamatory statements against the applicant, or make further slanderous, malicious statements or any further defamatory publication pending the hearing and final disposal of the main suit is too ambiguous an order to grant. It would be difficult to enforce. It may curtail the right to information by the public. The balance of convenience lies in not granting the injunction. However, this court will take into consideration any further injurious publications in awarding damages if the main suit succeeds.

For the reasons in this ruling this application is dismissed. The costs of the application shall be in the cause.

**Stephen Musota**

**J U D G E**

**01.03.2017**