

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. E249 OF 2021

CYTONN INVESTMENT MANAGEMENT PLC...PLAINTIFF/APPLICANT

-VERSUS-

1. WYCLIFFE M. SHAMIAH
2. CAPITAL MARKETS AUTHORITY.....DEFENDANT/RESPONDENTS

RULING

1. This Ruling is with respect to the Plaintiff's **Notice of Motion** application dated **6th October, 2021** and the Defendant/Respondents' **Notice of Preliminary Objection** dated **28th January, 2022**.
2. The Plaintiff's Application is brought pursuant to **Sections 1A, 1B & 3A** of the **Civil Procedure Act, Order 40 Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** seeking for the following orders:-

a) Spent;

b) That pending the hearing and determination of the suit filed herein, a temporary order of injunction be and is hereby issued barring the 1st and 2nd Defendant/Respondent by themselves, their agents, assigns and/or servants from making and/or publishing defamatory statements, articles, utterances, or reports against the Plaintiff/Applicant on the 2nd Defendant/Respondent website and their other platforms or reports;

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c) That the 1st and 2nd Defendant/Respondents are ordered to delete permanently any such defamatory articles, utterances, statements and reports from the 2nd Defendants/[Respondents website and other platforms relating to the Plaintiff/Applicant and issuance of a public apology in the same platform that the defamatory articles, statements, utterances and reports were published;

d) Spent;

e) Costs be awarded to the Plaintiff/Applicant.

3. The Application is based on twelve (12) grounds on its face and further supported by the affidavit of its legal officer, **Faith N. Claudi** sworn on **6th October, 2021**. The Plaintiff's case is that it is an Independent Investments Management Company and the financial investment business it engages on is built on good reputation in the marketplaces. However, the 1st Defendant/Respondent in his capacity as the Chief Executive Officer of the 2nd Defendant has incessantly been publishing various articles meant to injure the Plaintiff's reputation in the eyes of right-thinking members of public through their website "Capital Markets Authority". Consequently, the Plaintiff wrote to cease and desist notices to the Defendant but the same landed on deaf ears.

4. Some of the utterances complained about by the Plaintiff is the statement by the 1st Defendant released to the media and which can be accessed on NTV's You Tube Channel purporting that the Plaintiff is not properly

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sanctioned, statements published on the 2nd Defendant's website on **20th April, 2020** and on **17th June, 2021** respectively insinuating that the Plaintiff's products were not unregulated unlawfully, statements by the 1st Defendant in his report dated **6th July, 2021** to the Parliamentary Committee on Finance and Planning maliciously made to discredit the Plaintiff's business and lastly, the press release on **17th June, 2021** cautioning investors against investing in unregulated products offered by unlicensed firms and in that matter held that the Plaintiff was not only unlicensed but also an unapproved entity.

5. It is averred that the statements by the 1st Defendant connotes that the Plaintiff was unlicensed and was raising money from the public without any approvals hence the business was tainted with criminal activities which could only be reported to the police. That in the report to the Parliamentary Committee on pages 8 and 9, the 1st Defendant avers that they were unable to bring the unregulated products by the Plaintiff under regulation hence the forwarding of the complaints to Capital Markets Financial Investigations Unit. The Plaintiff avers that the utterances have caused irreparable damages which cannot be redressed by an award of damages.

6. Further, the Plaintiff avers that to the contrar, it is within the sanction by

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law and has engaged the defendants through various correspondences including the letter dated **17TH February, 2016** requesting for a meeting with the Defendants for clarification of what kind of offers by the Plaintiff would be considered private offers. The meeting was subsequently held and vide a letter dated **14th April, 2016**, the Defendant advised on the concerns raised by the Plaintiff. To ensure further compliance, in **June 2018**, the 2nd Defendant requested the Plaintiff to change the name from the then Cytonn Cash Management Solution to the current name Cytonn High Yield Solutions which was approved by the Plaintiff's board of Investors on **20th June, 2018**. On **5th July, 2018**, the Plaintiff advertised through the Daily Nation the announcement for change of its name as per the Defendants requests.

7. Thu, the Plaintiff maintains that the publications are defamatory for being malicious since the Defendant knows the truth and the advice they have given to it to ensure compliance but later turn around to publish false statements hence causing harm to the Plaintiff's business and over 16,000 clients. So far, according to the Plaintiff, the Defendant has never reached out to the Plaintiff to substantiate the false allegations and as such the court is sought to make a finding that the Plaintiff has made a prima-facie case.

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8. In opposing the application, the Defendant/Respondents filed a **Replying Affidavit** sworn by the 1st Defendant/Applicant on **22nd October, 2021** together with the **Preliminary Objection**. In his affidavit, the 1st Defendant stated that in his knowledge, Cytonn Investment Management PLC is a holding company and one of its associates is Cytonn Asset Managers Limited which has been licensed by the 2nd Defendant pursuant to **Section 11(3) of the Capital Markets Act** for offering five products namely, Unit Trust 9Fund, Pension Fund Portfolio Management, Real Estate Finance, Real Estate Investments and Private Equity. Consequently, after compliance, Cytonn Asset Managers Limited was issued with a Fund Manager license on **22nd March, 2018** and that was the first step in recognizing its business.

9. Further, the deponent added that the 2nd Defendant Authority has the mandate to protect investors and upon numerous enquiries by members of public on the Licensing status of **Cytonn Investment Group**. it issued a Press Statement dated **20th April, 2020** clarifying that the only licensed entity is **Cytonn Asset Management Limited** but not the holding company, Cytonn Investments within the meaning of **Section 2** of the **Capital Markets Act**. He stated that in so far as the Defendants are concerned, the statements were truthful and in performance of their duties so that the products of an unregulated entity such as **Cytonn**

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Investments are reported to the **Capital Markets Fraud Investigation Unit** so that the defendants can accordingly advise the investors. He confirmed that the above position was stated in several forums including a report to the **National Assembly's Department Committee** and a press release in an interview with NTV news channel.

10. The 1st Defendant reiterated that in making the press statements, he was acting in good faith in his capacity as the CEO of the 2nd Respondent and as such he, together with the 2nd Defendant Authority are protected from personal liability under **Section 10(1)** of the **Capital Markets Authority**. He therefor thinks that the application and the entire suit are an affront to the said **Section 10(1)**. It is his further view tha the report he made to the Parliamentary Committee has privilege rights under **Section 21** of the **Parliamentary Powers and Privileges Act** and no cause of action can be founded against it.

11. In a brief summary, the Defendants admit having uttered the statements and made the publications but plead justification in that, the publications depict the truth, they were made in the good faith to protect the general public and investors, they were made as fair comment and are within the statutory privilege. As such, the Defendants opine that the Plaintiff has not made a *prima-facie* case and granting any injunction would amount to

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barring them from exercising their statutory mandate.

12. In the **Preliminary Objection**, the key ground raised is that the suit and the **Notice of Motion** are an affront to **Section 10** of the **Capital Markets Act** and **Section 21** of the **Parliamentary Powers and Privileges Act**. The explanation thereunder is as averred in the **Replying Affidavit** and summarized above.
13. The above averments elicited the Plaintiff's further affidavit sworn by its legal officer on **17th December, 2021**. She clarified that Cytonn Investments is a holding Company with various subsidiaries which are all regulated and duly licensed as opposed to allegations by the Defendants. Therefore, by its nature, Cytonn Investments has but private and public offers and whereas the public offers are within the Ambit and Control of the Defendants; the Private offer is not. Hence, the statements by the Defendants in alleging that the Cytonn Investments is not duly licensed, impacted on the thinking of members of society to have a meaning that Cytonn Investment Business is a fraud, illegal, corrupt, collects money illegally so that investing in it would be engaging in a great risk.
14. The Plaintiff therefore purports that the Defendants had the duty of care not to harm its reputation and since the utterances and publications were made recklessly without any clarification being done, the Defendants

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cannot claim any legal privilege or protection. Indeed, it is deponed that the Defendants do not enjoy a blanket legal protection since under **Section 18 of the Capital Markets Authority**, protection is only on utterances made in good faith.

15. Both the Application and the **Notice of Preliminary Objections** were canvassed by way of written submissions following this court's directions on **25th October, 2021**. Both parties have obliged, and filed their respective submissions which I have thoroughly read through together with the case digest relied on in support thereof. Since a better portion of the submissions largely reiterate the summary above, I will not repeat the same here but discuss their content through my analysis.

Analysis and Determination

16. I have considered the pleadings, affidavits on record sworn in support and in opposition of the application, the written submissions of learned counsels and the authorities relied on. Having done, so I am of the view that the issues for determination are as follows:-

- a) Whether the preliminary objection is merited enough to dispose of the application and the entire suit;*
- b) Whether orders of temporary injunction can issue given the circumstances of this case; and*
- c) Who bears the costs.*

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a) Whether the Notice of Preliminary objection dated 28th January 2022 is merited.

17. As stated in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696:

"... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion". (emphasis added)

18. The key issue raised in the **Preliminary Objection** is the question of the applicability of the various immunity provisions to the matters herein and more specifically the protection accorded under **Section 10** of the **Capital Markets Act** and privilege under **Section 21** of the **Parliamentary Powers and Privileges Act**.

19. There is no dispute that on **20th April, 2020**, the 1st Defendant made a Press Statement stating, what the Defendants say to be true, that Cytonn Investments was an unregulated and unlicensed entity within the meaning of **Section 2** of the **Capital Markets Act**. There is also no dispute that the first defendant was at all material times acting in his statutory position as the C.E.O of the 2nd Defendant Authority. The Defendants thus submitted that under **Section 10** of the **Capital Markets Act**, the 2nd Respondent and its officers are protected from liability in respect of decisions and actions they take in the execution of their statutory

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mandate. In any event, Plaintiff has not shown lack of good faith on part of the Defendants. The said **Section 10** of **Capital Markets Act** provides as follows;

10. **Protection from legal action**

(1) ***“Neither the Authority, any of its members, officers nor servants shall be personally liable for any act which is done in good faith or purported to be done by such person, on the direction of the Authority or in the performance or intended performance of any duty or in the exercise of any power under this Act or the regulations, guidelines or notices made thereunder” (emphasis added)***

20. It is my view that the protection accorded by the above objective in nature can only be invoked once the court is convinced on whether the act done by the respective person under the instruction of the Authority was so done in good faith. The question is one on fact and in the present case, it requires ascertainment on whether the Defendants, in making the utterances and publications were acting in good faith as it is disputed by the Plaintiff. Therefore, the limb of the Preliminary Objection based on immunity derived from **Sections 10** of **Capital Markets Act** is in this instance is not a pure point of law capable of disposing of the suit in limine. I fully associate myself with the finding in the case of **Oraro –vs- Mbaja, (2005) 1 KLR 141**, where the court held that ***“any assertion which claims to be a Preliminary Objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a***

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true Preliminary Objection which the court should allow to proceed". Therefore, the first limb of the Preliminary Objection fails.

21. I Will Now Consider The Second Limb Of The Preliminary Objection that the report produced before the Committee of the National Assembly cannot be used as evidence in this court by dint of **Section 21 (1) and (2)** of the **Parliamentary Powers and Privileges Act**. The Defendants have cited various authorities to support their argument that privilege is not only extended to documents presented before the committee but also to the witness who testify with respect to such evidence. On the other hand, the Plaintiff asserted the view that such privilege does not extend to evidence which is tainted with *malafides* as the Defendants did. In any event, the report is subject to the rules of evidence and cannot form a firm ground upon which to base a Preliminary Objection.

22. My view on the foregoing is that before it is settled that particular evidence is privileged within the meaning of **Section 21** of the **Parliamentary Powers and Privileges Act**, the court has to first inquire on whether a privilege exists with respect to such evidence and determine its scope and extent. A similar view was adopted by the court in the case of Republic -vs- Clerk of the National Assembly & Another Ex-parte Bernard Njiinu Njiraini; Cabinet Secretary,



Ministry of Industrialisation, Trade & Enterprise Development
& 4 Others (Interested Parties) [2021]eKLR, while citing the
Canadian Supreme Court case of Canada (House of Commons) –vs-
Vaid, (2005) 1 S.C.R. 667, stated;

“the authority for court to determine whether privilege actually exists is reflected in the doctrine of necessity under which courts preserve their jurisdiction to inquire into the existence and scope of privilege, but once a privilege has been found to exist, but once it is found to exist, the court will not question on how it is exercised”

23. The same court went on to observe as follows;

“To this extent, the issue of whether, and to what extent the 1st and 2nd Respondents are protected by parliamentary privilege is one of fact and legal argument, and on which the Court is given express powers and discretion to decide upon.”

24. I am of the same view that the question as to whether the Defendants/Respondents are protected by parliamentary privilege is one of fact. It has to be argued legally between the parties on whether the said report fits the scope aligned under **Section 21** of the **Parliamentary Powers and Privileges Act** and if so, to what extent? As earlier stated, a question of fact and evidence cannot be determined by way of preliminary objection and similarly the second limb of the objection fails.

b) Whether orders of temporary injunction can issue?

25. In the case of Giella –vs- Cassman Brown & Co. Ltd (1973) 358,

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the court categorically laid down the principles to govern the grant of temporary injunctions as being that, *the Applicant must establish; a prima facie case with probability of success, irreparable loss if the injunction is not granted and lastly if the court is in doubt on the above two principles, the matter will be decided on a balance of convenience.*

26. However, the test is a little bit stringent in defamatory cases as over and above the principles set in the case of **Giella case (supra)**, the Applicant has to show that the words or matter complained of are libelous and also that the words are so manifestly defamatory. In the celebrated case of **Cheserem -vs- Immediate Media Services & 4 Others** [2000]eKLR, the court guided that in defamation cases the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in the clearest possible cases and where the Defendant pleads justification or fair comment then the injunction should not issue. However, the court implied that in such a scenario, the Defendant has to prove that he/she is responsible, truthful and trustworthy.

27. In this instant case, the plaintiff's case is that of protection of its reputation arguing that the investment business it has ventured into purely depends on depiction of a good name and the utterances by the

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Defendant that it is unregulated and unlicensed, is injurious to its good reputation and trusts it has built on its investors. On the other hand, the Defendants maintained that they have the statutory mandate to protect unsuspecting citizens by telling the truth and warning them against the unregulated investors. Therefore, according to the Defendants, it is for the public good that the truth is told, and they are justified in stating that the Plaintiff is not licensed. However, the Defendants are agreeable that the Plaintiff's subsidiary, **Cytonn Assets Managers Ltd** is duly licensed and regulated. It is also not denied that the Plaintiff offers both public offers which are within the ambit of the Defendant and Private offers which are not per se regulated by the Defendant.

28. To establish whether the Plaintiff has established a *prima-facie* case, this court has for the umpteenth time stated that a *prima facie* case is one which, based on the material placed before the court, will lead to a conclusion that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter. In addition, the tort of defamation is anchored on the recognition of the individual's right to his good reputation.

29. In the instance case, the Plaintiff has submitted that the utterances by the Defendant that it is engaging in unlicensed and unregulated business has

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damaged its reputation by leading a right thinking person to believe that the Plaintiff's business is tainted with fraud, fraud, illegalities, corrupt and investing in it would be engaging in a great risk. Therefore, I am satisfied that the utterances and publications are per se defamatory and in that respect the court is satisfied that the Plaintiff has established a *prima facie* case with a likelihood of success.

30. As for whether damages would be an appropriate remedy, in my mind it is ample enough to believe that if the Plaintiff's image on the business arena is tainted on illegalities which are not fully ascertained, it may result to down fall which may not be properly redressed by an award of damages.

31. The Defendants have however argued that where justification is pleaded, an interlocutory injunction should not issue. However, I have stated in the preceding paragraph that such would be subject to the Defendant showing to the satisfaction of the court that it is responsible, truthful, and trustworthy.

32. In this case, it has not been denied that the Plaintiff's subsidiary, **Cytonn Assets Managers Ltd** is duly licensed and regulated within the meaning of **Section 2** of the **Capital Markets Act**. The Defendants have also not denied having been engaged by the Plaintiff for the purpose of clarifying what a Public/Private offer would entail. The defendant has also not

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rebutted that it has no mandate or control over the Plaintiff's private offers and all these issues have to be ascertained before a line is drawn or a conclusion is made to the effect that the Plaintiff's business is unregularized and/or licensed. Therefore, for the afore said reasons and in this court's view, the balance of convenience tilts in favour of the Plaintiff.

33. In the upshot, I do find and hold that the Plaintiff has succeeded in demonstrating a case for grant of temporary injunction in the manner prayed. However, for clarity, the following orders do issue;

a) The Defendants' Notice of Motion dated 28th January 2022 is hereby dismissed for want of merit.

b) That pending the hearing and determination of this suit, an order for temporary injunction be and is hereby issued barring the 1st and 2nd Defendant/Respondent by themselves, their agents, assigns and/or servants from making and/or publishing defamatory statements, articles, utterances, or reports against the Plaintiff/Applicant on the 2nd Defendant/Respondent website and their other platforms or reports.

c) Whether an order for permanent deletion of the articles, utterances, statement, and reports and for issuance of a public apology, should issue,

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the same shall be an issue for determination upon full hearing.

d) Costs of the application shall follow the main cause.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT
NAIROBI THIS 10TH DAY OF MAY, 2022.


D. O. CHEPKWONY
JUDGE

In the presence of:

Mr. Omamo counsel holding brief for M/S Awuor for Plaintiff/Applicant

No appearance for Defendants/Respondents

Court Assistant - Gitonga