

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CORAM: R. MWONGO, PJ
HIGH COURT CIVIL SUIT NO. 59 OF 2017

BRIDGE INTERNATIONAL

ACADEMIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL UNION OF

TEACHERS.....1ST DEFENDANT/RESPONDENT

WILSON SOSSION.....2ND DEFENDANT/RESPONDENT

RULING

Background

1. The Applicant is a low cost private school operating in several countries in Africa and in India. In Kenya it operates over 400 academies. The 1st Respondent is the umbrella teachers union for primary school teachers, with a membership stated to be over 200,000 teachers. Its objects include the promotion and improvement of education and the establishment of a common system of education in Kenya. The 2nd Respondent is the Secretary-General of the 1st Respondent.
2. According to the applicant, it has been recognised in Kenya by the Ministry of Education Science and Technology as a critical institution in the promoting the Alternative Provision of Basic Education Training (APBET), and has received international recognition in this regard. However, the Ministry has made guidelines for regulating and implementing APBET, and for facilitating registration of APBET institutions. As this is an on-going process, according to the applicant, no institution has yet received such full registration or recognition.

3. The applicant perceives that a non-governmental organisation known as Education International has a philosophy of education which is at variance with the applicants', and has been working to undermine the applicant in countries where the applicant has a presence. According to the applicant, the 1st and 2nd respondent, and particularly the 2nd respondent, are the mouthpieces of the organisation Education International.
4. Against this background, the applicant alleges it was defamed by the defendants through letters dated 1st and 15th March, 2017, and various other articles and fora initiated or held by the defendants, details of which are attached to the applicant's affidavit.

The application

5. By a motion dated 16th March, 2017 the applicant seeks injunctive remedies as against the respondents vide the following orders:

"1.

2.'Pending the inter partes hearing and determination of this Application, this Honourable Court do issue an injunction, prohibiting/restraining the Defendants, their officials, representatives, agents, and/or their members, or any of them from making, publishing or causing to be published, on any platform, any statements defamatory or otherwise of or concerning Bridge International Academies.

3. Pending the inter partes hearing and determination of this application, this Honourable Court do issue an Injunction prohibiting/restraining the Defendants, their officials, representatives, agents, employees and/or their members from causing, effecting, inciting or otherwise calling for any activities aimed at discussing, piling pressure, recommending closure, defaming and or in any other way injuring the Plaintiff's reputation at meetings, seminars, workshops, rallies and demonstrations including those planned for 17th March 2017 or any other demonstrations.

4. Pending the hearing and determination of this Application and the suit herein, the Defendants, whether by themselves, their servants or agents or otherwise howsoever, be restrained from printing, circulating or publishing, making oral defamatory

statements or further publishing, the said words complained of or any similar words defamatory of the Plaintiff published in the forum of 5th December 2015, in print and electronic media and further contained in the Letter of 1st March 2017 titled "Urge to pile pressure and ensure Bridge International Academies (BIA's) in Kenya are closed" until further orders of the Honourable Court.

5. Pending the hearing and determination of this suit herein an injunction do issue, prohibiting/restraining the Defendants, their officials, representatives, agents, and/or their members from publishing or causing to be published on any platform any statements defamatory or otherwise of or concerning Bridge International Academies.

6. Pending the hearing and determination of this suit herein the Honourable Court do issue an Injunction compelling the Defendants to retract the defamatory statements published at the forum held on Monday, 05th December 2015, statements published in the Defendant's pamphlet titled Education Business a Threat to Education and all correspondence published by the Defendants.

7. Pending the hearing and determination of this Suit, this Honourable Court do issue an Injunction prohibiting/restraining the Defendants, by themselves, their officials, representatives, agents, employees and/or their members from causing, effecting, inciting or otherwise calling for any activities aimed at discussing, piling pressure, recommending closure, defaming and or in any way injuring Bridge International Academies' reputation at meetings, seminars, workshops, rallies and demonstrations including those planned for 17th March 2017 or any other demonstrations,,

8. The Honourable Court do issue a permanent Injunction to restrain the Defendants by themselves, their officials, representatives agents, employees and/or their members from publishing words contained in the Report of December 2015 titled Bridge vs. Reality, statements published in the Defendant's pamphlet titled Education Business a Threat to Education, the words statements published at the forum held on Monday, 05th December 2016 and the Defendant's letters.

9. This Honourable Court be pleased to order for substituted service of summons on the Defendants by advertisement in any in any of the daily newspapers with national circulation/coverage."

6. By consent, prayer 2 above was granted, on 28th March, 2017, on the basis of the respondents' concession that no prejudice would thereby be suffered by any of the parties.
7. The respondents oppose the application through the replying affidavit deposed by the 2nd respondent on his own behalf and on behalf of the 1st respondent.

Parties' Submissions

8. At the hearing, the applicant argued that the reports relied on concerning the applicant, were on matters on which the Applicant had not been given an opportunity to comment or respond. For example, the reported percentage of the Applicant's teachers that were trained was 14.3% as captured by the Respondents, was wrong since over 30% had P1 qualifications. The applicant also refuted the notion spread by the respondents that the Applicant was only in the education business for profit.
9. The applicant further submitted that there is an assumption that the Applicants are not registered. Examples of such assumption were that In Uganda, for example, there is a claim that all schools under the applicant are closed, with a similar fate in Liberia. The applicant refutes this contention submitting instead that the fact was that in Uganda there are 64 schools which are open and that in Liberia there are on-going negotiations in respect of the applicants' work.
10. In addition to placing reliance on **Giella v Cassman Brown & Co. Ltd (1973) EA 258**, on establishment of conditions for grant of injunction, the applicant relied on **CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK)** on the question as to whether it will suffer irreparable injury not compensable by an award of damages. It submitted that the defamation is not only local but international and is in varied media. Given the international reach of the applicant, it submitted that if the defamation is not stopped the applicant may face complete collapse.

11. On the balance of convenience, the applicant submitted that the balance was in favour of the protection of the applicant's business and reputation.
12. The applicant argued that although the respondents had pleaded truth, fair comment and public interest, they failed to provide particulars in support thereof. In the absence of these particulars, and in reliance on **Phineas Nyagah v Gitobu Imanyara** (*supra*), it was urged that the Respondents cannot rely on those defences, moreso since defamation has a constitutional underpinning.
13. With regard to the mandatory injunction sought by the applicant, it argued that the standard for grant of the same had been set out in the case of **Vimalkurmar Bhimji Depar Shah & another v Stephen Jennings & 5 others [2016]**. The standard is that if the applicant is able to show special circumstances, then a mandatory injunction lies. It was counsel's submission that a mandatory injunction would suffice to stop the respondents continued acts of defamation.
14. The respondents oppose the motion arguing, inter alia, that the 1st Respondent has over 200,000 members and its activities are done in the interest of the public. It pointed out that whilst there have been various newspaper articles on the applicant, those newspapers had not been sued. For their information, the respondents relied, for example, on the report entitled: '*Bridge vs. Reality*'. They also rely on the decision of the court in **Republic v The County Education Board & another Ex parte Bridge International Academies Ltd [2017] e KLR**, a case concerning closure of the applicant's schools in Busia County.
15. The respondents were of the view that the core issues for determination are: whether the matters complained of are true and constitute fair comment; and whether the applicant's reputation has been injured.
16. It was submitted for the respondents that the respondents ran into regulatory headwinds because they were not authorised to open any new centres pending issuance by the government of new regulations governing the sub-sector; that it is uncontested that the applicant is not properly registered and is in the process of putting its house in order; that there have been many court decisions making findings against the applicant for being non-compliant; that it is uncontested that in Uganda, for example, the High Court there ordered the closure of the applicant's sixty three schools after a government inspection found them to be substandard.

17. The applicants assert that the many reports published concerning the Applicant were as a result of interviews with students, the applicant's staff, teachers and parents where necessary. The said reports were reviewed and endorsed by many international bodies. Thus the assertion that the applicant was not given opportunity to comment on the reports is untrue as many of its staff were interviewed; and that it is impossible to believe that all the international agencies and bodies that had endorsed the reports had colluded against the applicant.
18. On whether the orders sought should be granted, it was submitted that the grounds for granting the orders has been set out in various cases which include; **Giella v Cassman Brown** (supra), **Cheserem v Immediate Media Services [2000] e KLR**, **Renton Company Limited v Philip Kisia and 2 Others [2012] e KLR**, and **Fraser v Evans & others (1969) All ER 6** (cited with approval in **Alnashir Popat & 7 others vs. COFEK [2016] e KLR**):
19. Finally, the respondents contended that where a defendant pleads justification and fair comment in a defamation matter, the case collapses. The respondents stated that the question for determination would be affected by a finding that the applicants had been found to be non-compliant; had not been registered; and that such evidence was to be found in public documents. It was submitted that all that had been stated was the truth and such truth is not defamatory.

Analysis, Discussion and Determination

20. Having carefully considered the parties submissions and the documents availed by the parties, it is the court's view that the question for determination is whether under the circumstances, this court ought to grant the prayers for interlocutory injunction as sought by the Applicant.
21. The time tested principles for the grant of an interim injunction are well set out in **Giella**. It holds that an applicant ought to demonstrate a *prima facie* case with a probability of success; that, without the grant of the interlocutory injunction, it will suffer irreparable injury which would not be adequately compensated by an award of damages; and if the court is in doubt, it will decide on an application on the balance of convenience.
22. In the **Cheserem case** the court clearly stated the special premises for injunctive relief in defamation cases as follows:

*“.... the question of injunction in defamation cases, is treated in a special way...although the conditions applicable in granting an injunction as set out in the *Giella v Cassman Brown & Co Ltd* (1973) EA 358 generally apply, in defamation cases, those conditions operate in special circumstances. Those conditions have to be applied together with the special law relating to the grant of injunction in defamation cases where the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in clearest possible cases. The court must be satisfied that the words complained of are libelous and that the words or matter complained of are libelous. It must be satisfied that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse....” (Emphasis supplied)*

23. The court in **Cheserem** went on to hold that the reason for so treating grant of injunction in defamation cases is that the action for defamation:

“...brings out conflict between private interests and public interest, more so in cases where the country's constitution has provisions to protect fundamental rights and freedoms of the individual, including the protection of the freedom of expression.”

Similar positions were held in **Gilgil Hills Academy v The Standard Limited** and in **Renton Company Limited v Philip Kisia & 2 Others** [2012] e KLR.

24. The critical question which must then be asked is whether this is a clear case in which the court is satisfied that the confluence of private interest in education and the public interest renders the words complained of as so manifestly defamatory to any reasonable person.
25. The starting point in the discussion is to note the constitutional and statutory basis for any discussion about education and children. **Article 53** of the **Constitution 2010** enshrines the right of every child to **“free and compulsory basic education”**. In addition, the same provision states that *a child's best interests are of paramount importance in every matter concerning the child*. Further, the **Basic Education Act, 2013** has the objects: *“....to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of*

institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes”.

26. In order to ensure that basic education is carried out in accordance with the dictates of the Constitution, and with the best interests of the child in focus, Parliament enacted **Section 76 of the Basic Education Act, 2013**. This provides for licensing, registration and accreditation of persons and institutions of education, training and research in the following terms:

“(1) A person shall not offer basic education in Kenya unless the person is accredited and registered as provided for under this Act.

(2) A person or organization intending to establish an institution offering basic education shall make an application in the prescribed manner to the relevant County Education Board.

(3) Upon the receipt of an application, the County Education Board shall-

(a) record the application; and

(b) if satisfied that the establishment of the institution conforms to the prescribed requirements, notify the applicant within thirty days.

(4) Where an application is approved the County Education Board shall inform the office representing the Education, Standards and Quality Assurance Council at the county in the case of a pre-primary, primary or secondary school.”

27. **Section 78 of the Basic Education Act** provides as follows:

“(1) A person shall not engage in the promotion, management, or teaching of basic education unless such person is accredited and registered in accordance with the provisions of this Act.

(1) A person may not use any premises or facilities to provide education and training through face to face, open

distant or electronic learning or any other mode of delivery unless the institution has undergone quality review and approved in accordance with this Act.

(3) Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to a fine not exceeding twenty million shillings or a term of imprisonment not exceeding three years or to both."

28. It is not disputed that the applicant has not been fully registered and accredited in terms of **sections 76 and 78** of the **Basic Education Act**. It admits that the process is on-going, although there is no indication in the Act of any interim processes of registration. To the extent of such non-registration, any article published or referred to by the respondents relative to the applicant's un-registered status is strictly not inaccurate.
29. The Applicant's case is that on various occasions, the Respondents have published several false, malicious and defamatory statements about the Applicant which has continued to injure the Applicants' reputation and that of its employees and schools. The Respondents answer is that as the apex teachers' body and representative they are a major stakeholder in the education sector. As such, it is their recognised responsibility and function always to be at the forefront in engaging with the concerned authorities and other sector players in ensuring: that the sector is properly streamlined; that all players operate within the prescribed legal provisions; and that the institutions tasked with providing such education are properly regulated. This includes appropriate engagement with the applicant.
30. The Applicant described itself as renowned internationally. It stated that it operates in various countries in low cost private schools. Further, that it is an education innovation company developing high-quality teacher and learner resource materials aligned with each country's standard and its aim is to bridge the gap for education for children drawn from low income households. These characteristics of the applicant: innovative; engaged in basic education; engaged in low cost schools, are all matters that would naturally attract attention, interest and concern of the public
31. **Order 2 rule 7** of the **Civil Procedure Rules** provides as follows concerning defamation:

"(1) Where in an action for libel or slander the defendant alleges that the words or matters complained of were used in

a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

(2) Where an action for libel of slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and insofar as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

(3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not support the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred."

32. I have already pointed out the paramount constitutional place given to matters of education in the life of the nation. Further, the centrality of the role of the respondent in basic education in the life and affairs of the nation cannot be gainsaid. As such there can be no doubt that matters of education in this country are matters of great public importance. Not only does the Constitution guarantee every child the right to basic education, it is also a fact that education is of such importance that the public are often engaged in questioning the happenings in public and private education issues at all times.

33. The **Basic Education Act, 2013** in recognition of this right makes provision for the licensing, registration and accreditation of persons and institutions of education, training and research. It can therefore be maintained without doubt that education matters in Kenya are generally matters of great public concern and of great general interest. What then are the circumstances under which the court should grant a temporary injunction in defamation cases such as this one?

34. With regard to what would constitute a public concern, Lord Denning MR in **Fraser v Evans & Others (1969) All ER 6 ,10** stated as follows:

“There are some things which are of such public concern that newspapers, the press and indeed everyone [else] is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away....

There is no wrong done if it is true, or if it is fair comment on a matter of public interest”

35. In this light, the roles and place of the 1st Respondent as a major stakeholder in the education sector in the country has already been pointed out. The 2nd Respondent is the 1st Respondent's Secretary General, and its mouthpiece. Can it not be said that the comments made by them in respect of the standards of education; in respect of registration of any person or body engaging in education in Kenya; in respect of methods and means employed or deployed in education, are all matters of public interest or concern? The Respondents have pointed out, and it is not contradicted, that there have been publications by newspapers and reports made about the applicant which are in the public domain. It is urged that the contents have been made public as part of a larger discourse in maintaining and fostering advancement of the highest levels of educational standards through exposing entities that may not meet the set legal standards.
36. It is apt to point out that the element of public concern is raised a notch higher when, as demonstrated in the respondents' exhibits, the applicant was found by the High Court of Uganda (**Misc. Cause 146 of 2016 (Judicial Review) Bridge International Academies v AG**) to have been *“operating its academies in contravention of the law [and that] The PS MoES made all the necessary efforts to engage the applicant to remedy its inadequacies but the applicant did not take the requisite action”*. In that case the court allowed the closure of the applicant's academies in Uganda.
37. Similarly, as shown by the respondents in **R v The County Board of Education & Another Exparte Bridge International Academies Ltd [2017] eKLR**, the applicant's application for review of the Busia County Education Board's decision to close all the applicant's academies in Busia, resulted in an order to quash the Board's decision insofar as two schools only were concerned. The closures were stated to be on account of non-

compliance with the Basic Education and Learning Institutions Registration Requirements under the Basic Education Act.

38. These cases highlight the chequered journey of the applicant in charting its course in the education sectors in Kenya and elsewhere, matters which are in the public domain. As such they shine a spotlight of public interest upon the applicant, matters that cannot be ignored by this court in an interlocutory application for injunction such as is before this court..
39. Further, as earlier stated, the applicant concedes that it is yet to register as an alternative to the provision of basic education and training. It has been shown that there have been various publications on the nature of education services being provided by the applicant. It must also be noted with utmost importance, and I so note, that this matter is at the interlocutory stage. As such, the court is required to assess whether the applicant has fulfilled the requirements for grant of an interim injunction in a case of defamation, and involving a matter of great public concern. Has the applicant discharged this requirement?
40. I do not think so. There have been reports, newspaper comments and queries concerning the applicant's ability to provide quality education. There are questions and inquiries that have been shown to have been raised very publicly in other countries concerning the applicant's engagement in education in those countries. These are matters in the public domain. The court obviously takes no position on the accuracy or veracity thereof. It can only note their existence in the public domain, as part of what Lord Denning in **Fraser v Evans** says: everyone is entitled to make their comment on. The court cannot close its eyes to their existence or shut out other commentators on such public matters, at an interlocutory stage.
41. Even if the court were to grant an injunction as prayed for by the Applicant that, in my considered view, would not stop other entities and persons – not party to this suit – from 'commenting' on the issues at hand. Further, education being a matter of public concern it cannot be said that making comments such as were in issue in the circumstances herein, would be injurious to the applicant. This is especially and particularly so where such comments have not been confined to the respondents alone, but are widespread in the public arena.

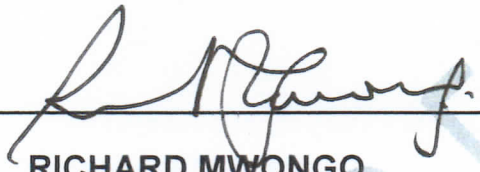
Disposition

42. The upshot of the foregoing discussion is that this court is not satisfied that a case has been made out for grant of an interlocutory injunction in this matter.

43. Accordingly, the application is dismissed with costs, and the interim injunction granted in terms of prayer 2 of the application herein is hereby discharged as an order of this court.

Orders accordingly.

Dated and Delivered at Nairobi this 20th Day of February, 2018



RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1. Mr Samurafor the Plaintiff/Applicant
2. Mr Ronofor the 1st Defendant/Respondent
3. Mr Ronofor the 2nd Defendant/Respondent

Court Clerk.....Jeff Omuse