



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**HCCC NO. E025 OF 2021**

**HON. DR. ALFRED MUTUA.....PLAINTIFF**

**-VERSUS-**

**BONIFACE MWANGI.....DEFENDANT**

**RULING**

1. On 26<sup>th</sup> October, 2021, this Court (**Muigai, J**) issued an order of injunction restraining the Defendant from publishing in any print or electronic media, on any electronic or web hosted platform, and from repeating any publication of, any innuendoes, insinuations, allegations, or statements that the Plaintiff either as having destroyed, actually caused the damage to the Defendant's house in Lukenya, and/or having contributed to such damage and that the Defendant is a rapist, a thief, a corrupt individual, a molester, a murderer, a philanderer, a charlatan, or otherwise any material defamatory of the Plaintiff as contained in the Defendant's Video posted and hosted on 21<sup>st</sup> October, 2021 on the Defendant's Facebook page (which were specified) commencing at minute 4.06 thereof in the said Facebook webpage or any subsequent versions of the said publication, or otherwise howsoever publishing such defamatory material of, and concerning the Plaintiff. That order was issued pending the hearing of the Motion dated 25<sup>th</sup> October, 2021. The said order was extended from time to time till 4<sup>th</sup> February, 2022.

2. However, before that date, the Plaintiff vide Contempt of Court Application Notice expressed to be brought under Section 5(1) of the *Judicature Act*, Part 81.1, Rule 81.1 of the *English Civil Procedure Rules (Amendment No. 3) Rules, 2020* and Part 81.1, 2, 3, 3, 4, 5, 6 & 7 thereof and Inherent Power of the Court, the Plaintiff sought an order that the Defendant shows cause why he should not be held in Contempt of Court for having expressly breached, and acted in violation of the aforesaid order. The Plaintiff, amongst other orders, sought that the Defendant be personally present in Court on all the dates appointed for the hearing of the Application.

3. When the matter was placed before me on 24<sup>th</sup> January, 2022, I directed that the Respondent be served for further orders on 8<sup>th</sup> February, 2022. I also directed that the Respondent attends the Court on that day in person.

4. On 8<sup>th</sup> of February, 2022, learned counsel for the Plaintiff, **Mr Kinyanjui** appeared physically before the Court while **Miss Gikonyo** who was holding brief for **Mr Mbugua Murithi**, Learned Counsel for the Defendant/Respondent appeared virtually. The Defendant/Respondent also appeared virtually.

5. **Mr Kinyanjui**, in his address to the Court, submitted that the Court had directed that the matter proceeds in open court and the both the Defendant and his counsel were duly served with the notice requiring the Defendant's personal attendance, physically. **Mr Kinyanjui** relied on Rule 81.7(1) of the *English Civil Procedure Rules (Amendment No. 3) Rules, 2020* (hereinafter referred to as "*the English Rules*").

6. According to **Mr Kinyanjui**, on 24<sup>th</sup> January, 2022 this Court confirmed that the hearing for 8<sup>th</sup> February, 2022 was to be a physical hearing. He submitted that all contempt proceedings are to be listed and heard in public irrespective of the parties' consent and hence such hearings must not be virtual. In support of this contention, he relied on Rule 81.8(1) of *the English Rules*.

7. It was therefore submitted that in the absence of the Defendant who was duly notified, a warrant should issue as demanded by the law since the contempt provisions are a direct flow from the rule of law that binds us. According to learned counsel, the dignity, honour and integrity of the court order is being trampled upon and hence the need to issue a bench warrant.

8. In response to the said submissions, **Miss Gikonyo**, learned counsel for the Defendant submitted that though they did receive the notice, the same simply indicated that the Defendant was to appear in person rather than physically hence the appearance of the Defendant virtually. She submitted that on 24<sup>th</sup> January, 2022, their firm did not get the actual link to enable them join the proceedings and that by then their client, the Defendant, had already received in invitation to attend an out of the country function and was in fact in Tanzania at the time of the

hearing though he was virtually present.

9. Learned counsel therefore prayed that the Defendant be pardoned and disclosed that they were intending to file a reply within 14 days. She therefore prayed that the Defendant be given time to attend the Court and adequately defend himself.

10. In a rejoinder, **Mr Kinyanjui** noted that even the Defendant's counsel who ought to have been present physically was not present and no reason was advanced for that. He submitted that there was nothing to show that the Defendant was in Zanzibar as alleged and there was no indication as to the date when the invitation was received, when he travelled and what he did after receipt of the notification. It was argued that what the Defendant did was to subjugate the court summons to his personal social function.

### **Determination**

11. I have considered the submissions of learned counsel hereinabove.

12. It is true that currently, and regrettably so, we do not have our own legislation dealing with contempt of court. This is so because in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR**, **Mwita, J** declared that the entire ***Contempt of Court Act*** No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and found that the said Act as enacted encroached upon the independence of the Judiciary. I respectfully agree with that decision. I gather support for this position from the **Supreme Court of India's holding in Bar Association vs. Union of India & Another [1998] 4 SCC 409** where the court dealt with constitutional powers vested in it under Article 129 read with Article 142(2) of the Constitution of India and those of the High Court under Article 215 of the Constitution to punish for contempt and remarked that no act of Parliament can take away the inherent jurisdiction of the Court of record to punish for contempt.

13. Before the enactment of the nullified ***Contempt of Court Act*** which deleted section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya, the first port of call with respect to the procedure for institution contempt of Court proceedings in this country was and therefore is section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya. That section provides:

**(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.**

**(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.**

14. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the ***Judicature Act***.

15. Under Rule 81.4 of the ***English Civil Procedure Rules (Amendment No. 3) Rules, 2020*** provides for the requirements of a contempt application and provides that:

**(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.**

**(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—**

**(a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);**

**(b) the date and terms of any order allegedly breached or disobeyed;**

**(c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;**

**(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;**

**(e) confirmation that any order allegedly breached or disobeyed included a penal notice;**

**(f) the date and terms of any undertaking allegedly breached;**

**(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;**

**(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;**

**(i) that the defendant has the right to be legally represented in the contempt proceedings;**

- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

16. Rule 81.5 deals with the manner of service of the application and provides that:

- (1) Unless the court directs otherwise in accordance with Part 6 and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally.
- (2) Where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, an alleged contempt is committed—
  - (a) the contempt application and evidence in support may be served on the representative for the defendant unless the representative objects in writing within seven days of receipt of the application and evidence in support;
  - (b) if the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence supporting it and take all reasonable steps to ensure the defendant understands them;
  - (c) if the representative objects in writing, the issue of service shall be referred to a judge of the court dealing with the contempt application; and the judge shall consider written representations from the parties and determine the issue on the papers, without (unless the judge directs otherwise) an oral hearing.

17. Rule 81.7 then deals with directions for hearing of contempt application and provides that:

- (1) The court shall give such directions as it thinks fit for the hearing and determination of contempt proceedings, including directions for the attendance of witnesses and oral evidence, as it considers appropriate.
- (2) The court may issue a bench warrant to secure the attendance of the defendant at a directions hearing or at the substantive hearing.
- (3) The court may not give any direction compelling the defendant to give evidence either orally or in writing.

18. Rule 81.8 then deals with hearings of such applications and provides that:

- (1) In accordance with rule 39.2, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs.
- (2) Advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public.
- (3) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the Press Association.
- (4) The court shall consider any submissions from the parties or media organisations before deciding whether and if so to

what extent the hearing should be in private.

**(5) If the court decides to sit in private it shall, before doing so, sit in public to give a reasoned public judgment setting out why it is doing so.**

**(6) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.**

**(7) The court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought.**

**(8) The court shall be responsible for ensuring that judgments in contempt proceedings are transcribed and published on the website of the judiciary of England and Wales.**

19. My understanding of the foregoing provisions is that at the stage of directions, the Court has the power to direct the manner of the hearing of the application and this may include directions for the attendance of witnesses and oral evidence, as it considers appropriate. In exercise of this power, it may direct that the witnesses, if any, attend and give oral evidence. It may also decide to determine the matter by way of written representations since the decision to direct the attendance of witnesses and giving of oral evidence is not mandatory and depends on whether the Court considers it appropriate to do so. Again, the Court may at that stage issue a bench warrant to secure the attendance of the defendant at a directions hearing or at the substantive hearing. However, the Court may not compel a Defendant to give evidence either orally or in writing. In other words, the Court's power is limited to securing the attendance of the Defendant but it is upon the Defendant to decide whether or not to give evidence and if so whether to do so orally or in writing.

20. In this case what the Court directed was that the Defendant would appear in person. It is clear that recent developments in technology has made it possible for court proceedings to be conducted virtually and such proceedings are for all intents and purposes deemed to constitute attendance by parties and counsel. Therefore, unless the attendance is expressly stated to be physical, my understanding of Rule 87.1(1) of *the English Rules* is that attendance may either be virtual or physical since the said *English Rules* provide that a Defendant cannot be compelled to give evidence in such proceedings. However, nothing bars the court from directing a Defendant to attend the proceedings physically. In this case, however, no such direction was given and the said Rules do not state that the attendance be physical.

21. It was further submitted that pursuant to the provisions of Rule 81.8(1) of the said Rules, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs. The Court is expected to carry out its proceedings in open, unless it orders otherwise. However, the mere fact that a Court decides to conduct the proceedings virtually does not turn such proceedings into a private session as long as the public are given an opportunity to access the proceedings. It must however be appreciated that depending on the platform of choice, the number of the members of the public may necessarily be restricted. Even where a physical hearing is being conducted, the number of the people who may be physically present may depend on the space available. Therefore, the mere fact that the number of those having access to the platform is limited does not derogate from the hearing being a public hearing.

22. In my view, considering the seriousness with which the Court takes contempt of court proceedings, every stage of the hearing must be expressly clear to the Defendant and any ambiguity must be resolved in favour of the Defendant since such proceedings are quasi-criminal in nature, otherwise a benefit of doubt would inure to the benefit of the Defendant. In this case, the order requiring attendance of the Defendant required him to attend "in person". It did not state "physically". To my mind, in-person attendance means that the Defendant do appear by himself/herself even if represented by counsel. However, that self-attendance may be virtual or physical unless a particular mode of attendance is expressly directed. The Defendant herein was in attendance virtually hence I cannot fault him for not appearing physically.

23. I must point out that what section 5 of the *Judicature Act* provides is that the High Court and the Court of Appeal have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power extends to upholding the authority and dignity of subordinate courts. It is also my view that the Court in exercising such power ought as much as our circumstances permit adopt the procedure in England for the time being. That, however, does not mean that the said procedure must be copiously followed. That procedure must, where necessary, be modified to fit our circumstances. For example, Rule 81.8(8) of the English Rules provides that:

**The court shall be responsible for ensuring that judgments in contempt proceedings are transcribed and published on the website of the judiciary of England and Wales.**

24. We are not expected to also publish our judgements on the website mentioned in the said Rules.

25. I must however point out that it is sad that in this age and era, we still have to determine our legal affairs with reference to the legal regime for the time being in force in another country. It does not speak well of our legislature that we are unable to come up with a valid piece of legislation guiding how we ought to deal with contempt in our jurisdiction. The learned author of *Oswald on Contempt of Court* 2<sup>nd</sup> ed. (1895) at pp. 10 and 11 may not have been aware of our situation when he expressed himself as hereunder:

**“There is probably no county in which Courts of law are not furnished with the means of vindicating their authority and preserving their dignity by calling in the aid of the executive in certain circumstances without the formalities usually attending a trial and sentence. Of this the simplest instance is where the judge orders the officers to enforce silence or to clear the court.**

26. It was probably due to that that the former Chief Justice, **Hon. Mr. Justice J. E. Gicheru's** in his article titled **Independence of the Judiciary: Accountability and Contempt of Court** published in the Kenya Law Review (2007) Vol. 1:1 opined that:

The English law that we are obliged to apply has a Contempt of Court Act of 1981 which supplements its common law contempt of court offences. A question may then arise whether the law applicable in Kenya is the common law before the enactment of the Contempt of Court Act, 1981 or the law as it exists today. Section 5 of the Judicature Act appears to import the law as it exists and is applied at the time an application is made as it provides that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is “for the time being” possessed by the High Court of Justice in England. For the sake of upholding the sovereignty of our State and Parliament, section 5 of the Judicature Act should be repealed and replaced by a substantive enactment on Contempt of Court Act of Kenya. I welcome discussions and contributions on this proposal.

27. However, for contempt of court law to be worthy of its name, the editors of *Borrie and Lowe’s Law of Contempt* 2<sup>nd</sup> ed. 1983 observe that:

“The rules embodied in the law of contempt of court are intended to uphold the effective administration of justice. As Lord Simon said in *A-G v Times Newspapers Ltd* they are the means by which the law vindicates the public interest in the due administration of justice. The law does not exist, as the phrase ‘contempt of court’ might misleadingly suggest, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of the parties or litigants...Contempt of court plays a key role in protecting the administration of justice. It is an impotent adjunct to the criminal process and provides the final sanction in the civil process.”

28. In our case, it is clear that what was intended by the legislators, when they enacted the now nullified *Contempt of Court Act*, was to assuage the discomfort that a particular class of contemnors were likely to undergo by restricting the extent of sentences the Court could impose. In other words, the objective of the Act was to defeat the very purpose for enacting contempt of court legislation.

29. All in all, having considered the submissions made by learned counsel in this matter, I find no reason to fault the Defendant at this stage. Accordingly, I decline to issue the bench Warrant, at least not yet.

30. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 22<sup>ND</sup> FEBRUARY, 2022**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Harrison Kinyanjui for the Plaintiff/Applicant**

**SC Martha Karua, with Ms Gikonyo for the Defendant/Respondent**

**CA Susan**