



**Ongili v National Media Group PLC & 3 others (Petition E012 of 2020)
[2022] KEHC 13173 (KLR) (Constitutional and Human Rights) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E012 OF 2020

HI ONG'UDI, J

SEPTEMBER 30, 2022

BETWEEN

PAUL ONGILI PETITIONER

AND

NATIONAL MEDIA GROUP PLC 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

STEPHEN GITAGAMA 3RD RESPONDENT

JOSEPH ODINDO 4TH RESPONDENT

RULING

1. The petitioner filed the Notice of Motion dated March 1, 2021 pursuant to Order 40 & 51 of the [Civil Procedure Rules 2010](#), Section 5 (1) of the [Judicature Act](#) Cap 8 Laws of Kenya, Order 52 Rule 3 of the Rules of the Supreme Court of England 1965; Practice and Procedure Rules (Part 1 rule 3); Section 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya; and all other enabling provisions of the law. He seeks the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That this Honourable Court be pleased to issue orders compelling the 1st respondent, to pull down any materials and/or news coverage from all its online platforms depicting the petitioner/applicant as having already been convicted in Criminal Case No 110 of 2020 pending the hearing and determination of the petition.



- iv. That upon hearing and determination of this application the Honourable Court do cite the following persons for being in Contempt of a Court Order issued on the July 22, 2020 and the orders therein.
 - a. Mr Stephen Gitagama– Director.
 - b. Mr Joseph Odindo- Group Managing Editor.
- v. That an order of committal to civil jail be made against:
 - a. Mr Stephen Gitagama– Director.
 - b. Mr Joseph Odindo- Group Managing Editor.for such period as this Honourable Court may deem fit and just in that they have blatantly disobeyed and frustrated the express Orders made herein by this Honourable Court on the July 22, 2020.
- vi. That in the alternative to (iv) and (v) above, the Honourable Court do impose appropriate fine penalties to the persons listed in (iv) and (v) above for being in Contempt of the Court Order issued on the July 22, 2020 and the Orders therein.
- vii. That this Honourable Court do issue any other orders it may deem just, fit and fair in the circumstances.
- viii. That the cost of this application be in the cause.

The petitioner / applicant's case

2. The application is grounded on the applicant's supporting affidavit sworn on March 1, 2021 and the grounds on the face of the application. He deposed that this Court issued an Order dated July 22, 2020 restraining the 1st respondent from further writing, printing, publishing, circulating, disseminating or causing to be written, printed, published, disseminated in any manner whatsoever words and statements in a manner depicting him as already convicted in respect to Criminal Case No 110 of 2020 pending the inter partes hearing of this application.
3. He deposes that in disobedience of the court order, the 1st respondent on October 16, 2020 at 9:00 pm aired a prime-time exclusive story titled 'Babu May Walk What of DJ Evolve?' He observed that this infringed on his right to presumption of innocence and was in contempt of Court. His advocates wrote the letter dated October 17, 2020 expressing his protest against the aired story. There was no response to this letter.
4. He further deposed that on the February 19, 2021, the 1st respondent aired on its television channel a video clip ([https://www.youtube.com/watch?v=\[BEdKSdSKOg\]](https://www.youtube.com/watch?v=[BEdKSdSKOg])) which once again painted him as already convicted in Criminal Case No 110 of 2020 particularly at minute 9:38 of the said clip. He urged the court to intervene in this matter as his rights were being, infringed by the 1st respondent's conduct. He averred that the 1st respondent's continued airing of the said news on its various news platforms which cover a wide viewing was injuring him.

The 1st & 3rd respondents' case

5. The 1st respondent filed its replying affidavit dated September 20, 2021 sworn by Sekou Owino, the 1st respondent's head of legal department and a further affidavit dated March 10, 2022. He deposed that the story that had been aired on October 16, 2020 was not an exclusive story as alleged. Rather it was



a report regarding the Court's ruling in Criminal Case No 110 of 2020; Republic v Paul Ongili dated October 9, 2020. The ruling concerned the request by the complainant to withdraw the case against the petitioner. As such he averred that the aired story only captured the ruling with no suggestion of guilt on the part of the petitioner as alleged.

6. He further deposed that the 1st respondent had responded to the petitioner's letter dated October 17, 2020 vide its letter dated October 21, 2020. The letter denied the petitioner's assertion that the 1st respondent was in breach of the Court Orders. He averred that the 1st respondent's story dated February 19, 2021 similarly was not geared towards depicting the petitioner as already having been convicted. He denied that the 1st and 3rd respondents were guilty of contempt of court.

The petitioner/applicant's submissions

7. The petitioner through his advocates Okatch & Partners, Advocates filed written submissions dated October 27, 2021 where Counsel identified the issues for determination as:
 - i. Whether, the respondent's news coverage items of October 16, 2020 and February 19, 2021 depicted the petitioner as having been convicted in Criminal Case No 110 of 2020.
 - ii. Whether the 1st respondent's news coverage items of October 16, 2020 and February 19, 2021 amounted to contempt of Court.
8. To begin with Counsel submitted on the importance of obedience of court orders. Relying on the opine in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] KLR 828* it was noted that it is essential for the maintenance of the rule of law and order that the authority and the dignity of courts be upheld at all times. Therefore, the Court would not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.
9. In this matter Counsel submitted that one of the elements required to prove contempt is knowledge of the existence or service of the Orders as held in the case of *Simmers Plaza Ltd v National Bank of Kenya [2015] eKLR*. He noted that vide their replying affidavit the 1st respondent acknowledged existence of the Court Orders dated July 22, 2020.
10. Further he submitted that the respondents having reproduced several Court proceedings in Criminal Case No 110 of 2020 confirmed that they were aware that the petitioner had pleaded not guilty to the offence and the particulars of the offence as well. In view of this it was argued that accusations of a crime or offence are tried in a Court of Law and not in media briefings and pronouncements. Counsel submitted that there exists a plethora of judicial decisions guarding against instances where parties assume that they can technically circumvent Court Orders in order to evade being cited for contempt.
11. In support the case of *Hadkinson v Hadkinson. (1952) ALL ER 567* was cited. In the said matter it was held that a party who knows of an order whether null or void, regular or irregular cannot be permitted to disobey it. Additional support was placed on the cases of *Amos Mathenge Kabutbu v Simon Peter Mwangi [2015] eKLR* and *Republic v, Ahmad Abolfathi Mohammed & Another, Cr App No 2 of 2018*. It is Counsel's contention that the petitioner proved its case against the respondents.

The 1st & 3rd respondents' submissions

12. The 1st & 3rd respondents through the firm of Hamilton Harrison & Matthews filed written submissions and a list of authorities dated March 23, 2022. Counsel identified the issues for determination as:



- i. Whether the applicant has followed the correct procedure in bringing the application.
 - ii. Whether the court should admit the video evidence produced by the applicant.
 - iii. Whether the applicant has made out a case for contempt of court against the third respondent.
 - iv. Whether the court should grant the orders sought by the applicant.
13. On the first issue Counsel submitted that a charge of contempt of court is a serious charge and is criminal in nature. In view of this each stage and step of the procedure in instituting these proceedings must be scrupulously followed and observed. To support this he relied on the Court of Appeal case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR* where the procedure was discussed. It was held that the application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and it ought to be supported by affidavit(s) containing all the evidence relied upon. The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.
 14. Additional reliance was placed on the cases of *Woburn Estate Limited vs Margaret Bashforth [2016] eKLR*; *Eleri Company v George Anyona & 3 others (2011) eKLR*; *Republic v Principal Magistrate's Court & 2 others Ex-parte Jack & Jill Supermarket Limited [2014] eKLR* and *Bryan Yongo v National Media Group Limited [2019] eKLR*.
 15. Counsel argued that the petitioner had only cited the 3rd respondent for contempt while no explanation was given why the applicant did not cite the 1st respondent yet it is a party to this case and a separate legal entity with capacity to be cited for contempt as held in *Katsuri Limited v Kapurchand Depar Shab [2016] eKLR*. It was stated that since the duties of the CEO are administrative and he/she cannot be aware of all issues, it is the company and not the CEO that ought to be cited for contempt.
 16. He submitted further that the applicant who had not enjoined the 3rd respondent in its petition initially did not seek this Court's leave to bring him in as a party in these proceedings. As such there is no basis upon which this Court can now be asked to issue punitive orders against the 3rd respondent.
 17. In support reliance was placed on the case of *Directline Assurance Company Limited vs Mercy Nyambura Wangui [2021] eKLR* where it was held that it is highly irregular for an applicant to bring in non-parties in the original cause and seek to obtain orders against such parties without leave of the court. The court further held that even if it found that there was contempt of a court order, the court would not make orders against non-parties to an action where joining of such non-parties was not sanctioned by the court. He argued thus that the applicant had failed to follow the strict procedure for bringing contempt of court applications.
 18. On the second issue, he submitted that any party seeking to rely on electronic evidence must comply with the provisions of Section 106B of the *Evidence Act*. It was argued that the applicant had in his affidavit sworn on March 1, 2021, produced a CD recording as an exhibit marked P0-2 urging the Court to rely on a video a clip through a link set out at paragraph 9 of his affidavit. It is stated that the video footage referred to had not been produced and neither was the certificate required under Section 106B of the *Evidence Act* to authenticate the two videos, produced.
 19. Counsel thus submitted that the effect of this omission rendered this evidence inadmissible as held in the cases of: *Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 others [2017] eKLR*; *Nonny Gathoni Njenga & another vs Catherine Masitsa & another (2014) eKLR*; *London Distillers*



(K) Limited v Mavoko Water & Sewerage Company & 2 others [2019] eKLR and County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR.

20. On the third issue, he submitted that the court in the case of *Katsuri Limited v Kapurchand Devar Shah* (supra) noted the ingredients of a charge for contempt of court to be
 - i. The terms of the order were clear and unambiguous and were binding on the defendant,
 - j. The defendant had knowledge of/or proper notice of the terms of the order, the defendant acted in breach of the terms of the order and the defendant's conduct was deliberate. The Court as well noted that although the proceedings are civil in nature, an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases.
21. Counsel contended that the publication dated October 16, 2020 was a fair, accurate and balanced account of the court proceedings held on September 24, 2020, October 7, 2020 and the ruling of October 9, 2020 in the criminal case. Additionally it was argued that the 1st and 3rd respondents had not depicted the petitioner as being guilty of the offence of attempted murder in its story published on February 19, 2021. As such there was no proof that the two publications breached the Court order dated July 22, 2020.
22. Counsel submitted that the proceedings herein were geared towards punishing the 3rd respondent for contempt of court on account of a fair and accurate report of the court proceedings which in turn constituted a curtailment of the respondent's freedom of expression and freedom of the media as guaranteed by Article 33 and 34 of the Constitution. In this regard reliance was placed on *Shadrack BO Gutto & 4 others v Hillary Ng'weno & 3 others HCC 888 of 1981*.
23. In conclusion, he submitted that the applicant was not entitled to the orders sought. In support of this point reliance was placed on the cases of *Katsuri Limited v Kapurchand Devar Shah* (supra) and *Showind Industries Limited v Guardian Bank Limited and another (2002) 1 EA*.

Analysis and Determination

24. I have carefully considered the application, affidavits, cited cases and the law. The application herein is founded on this Court's Orders dated July 23, 2020 issued by J Makau, J The particular Order directed as follows:

The 1st respondent whether by itself, officers, members, agents, servants and/or employees or otherwise howsoever be restrained from further writing, printing, publishing, circulating, disseminating or causing to be written, printed, published, circulated, disseminated in any manner whatsoever words and statements in a manner depicting the petitioner as already convicted in respect to Criminal Case No 110 of 2020 pending the inter partes hearing of this petition.
25. Bearing all this in mind I find that the issue that arises at this point for determination is:

Whether the applicant adhered to the procedure in filing the application for contempt and whether he has met the threshold for proving contempt proceedings.
26. The importance of contempt of Court proceedings cannot be overstated. The topic has been aptly discussed in a plethora of cases as cited in the parties' submissions which I concur with. The Court



in the case of *Samuel MN Mweru & Others v National Land Commission & 2 others [2020] eKLR* summarized the importance as follows:

' 33. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.[32]

34. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.[33] The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.[34]

35. A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with.'

27. The Court of Appeal in this regard pronounced itself in the case of *Dr Alfred Matiangi Vs Miguna Miguna & 4 others (2018) eKLR* as follows:

' We need to make it clear that as a Court we do not take lightly allegations of contempt of court. No court should. When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.'

28. The law on contempt of Court proceedings following the nullification of the *Contempt of Court Act, 2016* finds its bearing under Section 5 of the *Judicature Act* Cap 8. This Section provides as follows:

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.

29. In light of this, the procedure for instigating contempt of Court proceedings was accordingly stated by the Court of Appeal in the case of Christine Wangari Gacheche (supra) as follows:

' Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.



Order 52 RSC, until 2012 as alluded to earlier provided the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:-

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
- ii. An application for leave must be made ex parte to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
- iv. Where an application for leave is refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.'

30. The Court went further to note that:

' The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.

It is clear from this summary that leave, now called 'permission' is not required where committal proceedings relate to a breach of a judgment, order or undertaking.'

31. Once the contempt of Court proceedings have been instigated and in the proper manner the next question the Court ought to determine is whether the applicant has met the threshold for contempt of court proceedings.

32. The Court in Samuel MN Mweru & others (supra) aptly discussed the threshold as follows:

' 40. There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- i. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- ii. The defendant had knowledge of or proper notice of the terms of the order;
- iii. The defendant has acted in breach of the terms of the order; and
- iv. The defendant's conduct was deliberate.



43. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.
44. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.'

33. The Court concluded by noting that:

' 46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.[49]'

34. The petitioner challenged the 1st respondent's publications dated October 16, 2020 titled 'Babu May Walk What of DJ Evolve' and the other dated February 19, 2021 which he claimed violated the Court Order issued on July 22, 2020. Undoubtedly the petitioner is required to prove the existence of all the established principles to attain a pronouncement in his favour. It is important that the petitioner shows that the terms of the order were clear and binding on the defendant, that the defendant had knowledge of/or proper notice of the terms of the order, the defendant has acted in breach of the terms of the order and the defendant's conduct was deliberate.
35. A look at the material placed before this Court displays that the terms of the Order were clear and it is not in dispute that the respondents were aware of the Order directed at all its members. My examination of the contents of the media clips discloses that the impugned publications deliberated on pieces showing that the petitioner was likely to walk out of the court a freeman. There was no insinuation of him being convicted. That in essence was the gag by the court order
36. The question therefore is what then demonstrates that the publication was inherently different from the usual media briefs of such nature as pleaded by the respondents? This essentially means that the petitioner would have to demonstrate to the Court this element by adducing sufficient evidence. This in my opinion has not been satisfactorily proven in the context of contempt proceedings that require a higher standard of proof.
37. Further I have found the present application to be defective. To begin with and as pointed out by the 1st & 3rd respondents, the petitioner enjoined the 3rd & 4th respondents without seeking the leave of



the court. I have perused the record and do not find anything to show how the two respondents were enjoined in the proceedings. There is even no evidence to show that the said respondents were aware of the conservatory orders issued on July 23, 2020. Besides that this application was never served on the 3rd & 4th respondents yet they are shown as parties in the said application. Based on the guidelines espoused by the Court of Appeal in the Christine Wangari Gacheche case (supra), this application is incompetent. It is not in line with Rule 81.4 of Civil Procedure Rules (Amendment No 2) Rules 2012 of England which requires as follows:

' An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as 'application notice' (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.'

38. A perusal of the grounds in support of the application just reveals general statements. The discs mentioned in the grounds and affidavit have not been annexed as claimed. There is therefore nothing to substantiate the allegations.
39. In light of the foregoing it's my humble conclusion that the application dated March 21, 2021 does not satisfy the established requirements for this Court to grant the orders sought. The application is therefore dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

