



**Nation Media Group v Child Welfare Society of Kenya (Civil Appeal
E174 of 2020) [2022] KEHC 15708 (KLR) (Civ) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E174 OF 2020

JN MULWA, J

NOVEMBER 24, 2022

BETWEEN

NATION MEDIA GROUP APPELLANT

AND

CHILD WELFARE SOCIETY OF KENYA RESPONDENT

*(Being an Appeal from the Ruling and Orders of the Hon. D. O. Mbeja delivered on
4th August 2020 in Milimani Chief Magistrate's Court Civil Case No. 7192 of 2019)*

JUDGMENT

1. By a Plaint dated October 1, 2019, the Respondent instituted a defamation claim against the Respondent herein. Alongside the Plaint, the Respondent filed a Notice of Motion dated October 1, 2019 through which it sought an injunction to restrain the Appellant acting by itself or through its employees, representatives, officers or agents from broadcasting or publishing the story 'Sins of Saviours' or any related article touching on the Respondent and forming the subject of the proceedings in that case. Upon considering the application ex parte, Hon MW Murage (SRM) issued an interim injunctive order and ordered that the Appellant be served with the Order.
2. The Appellant aired the story on the same day, October 1, 2019, during their 9.00pm prime time news on its NTV television channel.
3. Subsequently, by a Notice of Motion dated October 4, 2019, the Respondent herein sought to have the Appellant's agents, Edmond Nyabola and Emmanuel Juma, held in contempt of court for disobeying the court order of October 1, 2019 and for the two to be consequently detained in civil jail.



4. Vide a ruling delivered on August 4, 2020, Hon DO Mbeja found the Appellant, acting through its two aforesaid agents, guilty of contempt of court orders and ordered summons to issue to the two to appear in the said court to show cause why they should not be punished.
5. Aggrieved by that decision, the Appellant lodged an appeal in this court vide a Memorandum of Appeal dated August 6, 2020. The Appeal is based on the grounds That:-
 1. The Learned Magistrate erred in law and in fact in finding that the Appellant had been properly served with the court order on October 1, 2020.
 2. The Learned Magistrate erred in law and fact in finding that pasting a court order at the Appellant's reception constituted proper service on the alleged contemnors.
 3. The Learned Magistrate erred in law and fact in declining cross-examination of the deponents of the various affidavits relating to service and only relying on the evidence of the process server who admitted that he did not serve the Appellants properly.
 4. That the Learned Magistrate erred in law and fact in disregarding the evidence of the contemnors that they had not have knowledge of the order issued and served on the October 1, 2020.
 5. That the Learned Magistrate erred in law and fact in finding that the strict test for service or knowledge of the order was not met.
 6. That the Learned Magistrate erred in law and fact in finding the alleged contemnors guilty of contempt even though there was no proof that they were served with the order or had knowledge of the order.
 7. That the Learned Magistrate erred in law and fact in finding that the Appellant was served and further finding that the alleged contemnors ought to carry the weight of the alleged willful disobedience.
 8. That the Learned Magistrate erred in law and fact in making a finding of proper service when it was beyond peradventure that the process served was unable to serve the order and elected to paste it on the Appellant's reception.
 9. That the Learned Magistrate erred in law and fact in making a finding of proper service when the Respondent had extensively admitted being unable to serve the order on October 1, 2019.
 10. That the Learned Magistrate erred in law and fact in finding the alleged contemnors guilty against the weight of evidence.
 11. That altogether, the Learned Magistrate erred in law and fact in finding that the Respondent had discharged the requirements for service of the order on October 1, 2019.
6. The Appeal was canvassed through written submissions.

The Appellant's main contention is that there was no timely and proper service of the court order of October 1, 2019. The Appellant submitted that the Court Order was served on its company secretary on October 2, 2019, a day after the broadcast that is the subject of the contempt had been aired, hence



compliance was impossible. It was submitted that since the Court Order was directed to the Appellant which is a public listed company, the Respondent ought to have followed the procedure laid out under Order 5 Rule 3 of the Civil Procedure Rules which deals with service on a corporation. It was submitted that under the said provision, service on a corporation can only be effected through the company secretary, director or principal officer or by leaving a copy of the document at the company's registered office during business hours, which was not the case herein. In this regard, the Appellant contended that pinning the order in a conspicuous place at its business premises after 5.00pm, did not constitute proper service that would justify holding the Contemnors herein in contempt.

7. Further, the Appellant took issue with the fact that the Respondent's process server did not pin the court order together with any letter directing the same to its legal officer for compliance. It also faulted the said process server for failing to demonstrate that he made any reasonable efforts to inquire about alternative means of service from the Appellant's receptionist on October 1, 2019 upon being informed that the company secretary was not within the premises. Additionally, it was the Appellant's submission that leaving a copy of the order at the mail room did not constitute proper service as the same was also done after hours. For that reason, the Appellant faulted the trial magistrate for ignoring the uncontroverted averments that the mailroom is run by an outsourced company and any letter or document delivered to the mailroom after 4.30pm, could only be dispatched to the relevant department the following day as was done in this case.
8. Additionally, the Appellant urged that the allegation by Mr Felix Kiprono Advocate that he served the Court Order on both Contemnors through WhatsApp texts was improper and inadequate service since there was no proof that the numbers exhibited in the Advocate's Affidavit belonged to the contemnors. The Appellant further argued that the Contemnors were not the right parties to be cited for contempt as they are merely employees of the company. It stated that in any event, Emmanuel Juma is no longer engaged as an employee of the Appellant hence it is impossible for him to perpetuate the contempt as alleged by the Respondent. Edmond Nyabola on the other hand, was not only not on duty when the subject broadcast was aired but is not responsible for the management and control of the Appellant's social media platforms. As such, once the story was aired, Mr Nyabola had no control of its consumption or dissemination.
9. In the Appellant's view therefore, it has ably demonstrated that the alleged contemnors did not willfully disobey the court order of October 1, 2019 and thus they cannot be held in contempt of the same. The Appellant cited the following cases in support of its submission: Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR, Samuel MN Mweru & Others v National Land Commission & 2 others [2020] eKLR, Mutitika v Baharini Farm Ltd [1985] eKLR, and, Peter K Yego & 3 Others v Pauline Nekesa Kode [2009] eKLR.
10. On the other hand, the Respondent maintained that the Contemnors were well aware of the existence of the court order of October 1, 2019 but willfully and deliberately elected to disobey it. The Respondent noted that the Appellant's advocate cross examined the process server, Mr Willis Agayi, who narrated to the court the actions he took when serving the Court Order on the Appellant and the Contemnors. In its view, those actions demonstrated that there was proper service.
11. Further, the Respondent contended that despite being found in contempt, the Appellant and the Contemnors have remained unperturbed as they have refused and/or failed to pull down offensive articles relating to the story from the Appellant's official twitter handle as demonstrated by annexure 'IM1' to the further Supplementary Affidavit of Irene Mureithi filed in the lower court. To the Respondent, this is an indication that the Appellant and the contemnors have never deemed it necessary to purge their contempt and have thus approached the court with dirty hands. This therefore disentitles them from any audience before this court as well as the reliefs sought in the appeal.



12. To support their submissions, the Respondents referred to the Court of Appeal decision in the case [Kenya Union of Post Primary Teachers & 3 others v Njeru Kanyamba \[2018\] eKLR](#) where the Court refused to hear the applicants after it found their contempt to be blatant and deliberately calculated to impede the cause of justice. Reliance was also placed on the following cases *Hadkinson v Hadkinson* [1952] 2 All ER 567, [North Tetu Farmers Co Ltd v Joseph Nderitu Wanjohi \[2016\] eKLR](#), [Dickson Daniel Karaba v John Ngata Kariuki & 2 others \[2010\] eKLR](#) and [Fred Matiang'i v Miguna Miguna & 4 Others \[2018\] eKLR](#).

Analysis and Determination

13. The court has carefully evaluated the Record of Appeal and the parties' respective written submissions. The issues which fall for determination are: Whether the Order dated October 1, 2019 was served upon the Appellant; and, whether the trial court erred in citing the Contemnors for contempt.

14. It is a fundamental rule of law that court orders must be obeyed unless and until the order is varied or discharged. For that reason, willful and/or deliberate disobedience of a court order which enjoins a person to do or refrain from doing a particular act will generally result in the person being found in contempt. Why is it necessary for courts to punish contemnors of court orders? In [Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui \[2021\] eKLR](#), Mwita J pronounced himself as follows:

' The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice.'

15. The elements of civil contempt as laid out in [Contempt in Modern New Zealand](#) cited in *North Tetu Farmers Co Ltd v Joseph Nderitu Wanjohi* [supra] are:-

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.
- b. The defendant had knowledge of or proper notice of the terms of the order.
- c. The defendant has acted in breach of the terms of the order and.
- d. The defendant conduct was deliberate.'

16. The terms of the trial court's order of October 1, 2019 were as follows:

1. That the Application dated the October 1, 2019 be and is hereby certified urgent.
2. That pending the hearing and determination of this application inter partes, an injunction order be and is hereby issued restraining the Defendant whether by itself, its Employees, Representatives, Officers, and/or agents including other Media Houses, from further broadcasting, publishing or causing to be broadcasted or published in any way whatsoever any news items, statements, articles, words, pictures and video clips, television, radio Internet, newspapers, magazines, Facebook, Twitter, Instagram, YouTube, WhatsApp the story title



'Sins of Saviors' or any related article touching on the plaintiff and forming the subject of this proceedings.

3. That hearing on October 14, 2019 before Hon. Ocharo, Principal Magistrate.
 4. That Application to be served.'
17. The terms of the above Order were very clear and straightforward as to what was required of the Appellant. The Appellant and the contemnors, being its employees, representatives, officers, and/or agents, were restrained from broadcasting or publishing in any manner whatsoever, anything relating to the story 'Sins of Saviours' until the Respondent's Application dated October 1, 2019 was heard inter partes and determined by the lower court. This much is not disputed by the Appellant.
 18. It is also not disputed that the Appellant aired the story 'Sins of Saviours' which the subject Court Order sought to stop, on their NTV Television Channel at 9.00pm on the same date that the Order was issued. The Appellant and the Contemnors vehemently denied being served with the Order personally or otherwise before the broadcast was aired. They claimed to have learnt about it through their legal officer on October 2, 2019 at 3.00pm, by which time the same had already been overtaken by events. This turns on the question of whether the Appellant and the Contemnors had any knowledge of or notice of the said court order when the story was aired.
 19. Indeed, it is very important that the court fully satisfies itself that the person alleged to be in contempt intentionally committed the act complained of or refused to do something that he is required to with full knowledge or notice of the existence of the court order issued in that regard. For this reason, proof of contempt must be higher than that of balance of probability although not beyond reasonable doubt. This is because contempt of court proceedings are quasi-criminal in nature and may result in imposition of criminal sanctions which involves possible deprivation of a person's liberty.
 20. From the lower court's record, there are two Affidavits sworn on October 4, 2019 in relation to service of the said order. One is the Supporting Affidavit sworn by Mr Felix Kiprono Advocate in support of the Respondent's contempt application and the other is an Affidavit of Service sworn by a process server, Mr Willis Agayi. In the supporting affidavit, Mr Kiprono averred that upon extracting the court order on October 1, 2019, he wrote a letter to the Appellant's managing editor, Mr Emmanuel Juma, notifying him of the contents of the order and enclosed a copy of the order. It was also his averment that he personally delivered the letter to the Appellant on the same October 1, 2019 at 4.20pm and receipt was duly acknowledged by stamping on the face of his return copy.
 21. Further, Mr Kiprono stated in his Affidavit that he also personally went to the Appellant's premises at Nation Centre along Kimathi Street in Nairobi when he learnt that there were attempts to defeat service. Upon introducing himself, the security guards directed him to a Mr James Juma who informed him that he was the Appellant's employee and was duly authorized to receive documents on behalf of the Appellant. He served Mr Juma with the documents at 4.45pm since he was informed that he could not be granted further access into the Appellant's premises and James Juma duly acknowledged receipt by stamping on his return copy which he annexed to his Affidavit at page 7 of the Respondent's exhibits in support of the contempt application. Additionally, Mr Kiprono averred in his Affidavit that the contents of the Order were also brought to the attention of the Contemnors herein through WhatsApp via their mobile phone numbers xxxx and xxxx respectively on October 1, 2019 at 4.00pm.
 22. In the Affidavit of Service of the process server, Mr Agayi, he set out the futile efforts that he made to effect personal service of the Court Order on the Appellant before deciding to pin copies of the same at conspicuous places in the Appellant's premises. The record shows that Mr Agayi was summoned to court on June 29, 2020 for cross examination on the contents of his Affidavit of Service. He stated that



- he had served the Appellant with Summons in the past and the same were received by Sekou Owino, the Appellant's legal officer. He noted that normally, one is given a gate pass which he was however denied on October 1, 2019 when he first went to serve the subject court order. He maintained that the pinning of the court order at a conspicuous place was prompted by resistance of service and denial of access.
23. In re-examination, he stated that he expected to be given a gate pass so he could proceed to serve the documents as usual but he was denied access to the Appellant's business premises by a lady at the reception. He realized there was some mischief as the two receptionists were whispering while looking at him. Further, he stated that he served the letter addressed to Mr Emmanuel Juma on two occasions being 1st and October 2, 2019.
 24. The Appellant responded to the contempt application in the lower court through four affidavits sworn by its legal officer, Mr Sekou Owino, the two Contemnors herein and Mr James Juma. The general theme in all these Affidavits is that service was not properly effected.
 25. Mr Sekou Owino claimed to have received the court order on October 2, 2019 at 3.00pm. He averred that the reason the process server pinned the court order at the Appellant's premises was because he got there past 5.00pm when all the people who are authorized to receive mail had already left for the day. Both contemnors also denied being served with the court order on October 1, 2019 whether personally or via WhatsApp. Lastly, Mr James Juma who described himself as an employee of Foresight Innovations Limited but seconded to Appellant's mailroom admitted that Mr Agayi went to the Appellant's offices on October 1, 2019 at about 4.30pm but stated that the mail room had already closed by then. James claimed that the process server handed him an envelope addressed to Mr Emmanuel Juma but since he was not given any further instructions, he treated it as a normal email and left it for sorting out the following day, as is their office practice. As such, the mail was handed to Emmanuel Juma on October 2, 2019.
 26. Before proceeding to analyze the above, this court wishes to make some observations on the Record of Appeal filed herein. Firstly, the court has seen the letter of October 1, 2019 which was duly annexed to the Mr Kiprono's Supporting Affidavit in the trial court. Although the receiving stamp thereon is not clear, it has a date and signature which prima facie shows that it was actually received on October 1, 2019. Secondly, the court notes that the Record of Appeal omitted page 7 of the Respondent's exhibits in support of the contempt application which Mr Kiprono stated contains a return copy on which James Juma duly acknowledged receipt by stamping. Page 93 of the Record of Appeal has page 6 of the Respondent's exhibits while page 94 of the Record has page 8 of the exhibits. This leaves the court wondering whether this was an inadvertent mistake on the part of the Appellant who filed the Record of Appeal. However, since this issue was not addressed by the Respondent, the court does not know what to make of the outright omission and will not make any further comments on the same.
 27. Moving on, the court agrees with the Appellant's contention that service via WhatsApp was not an acceptable mode as at October 1, 2019 when Mr Kiprono allegedly served the contemnors with the Subject Court Order on WhatsApp. Service of court documents through mobile-enabled messaging services was introduced vide Legal Notice No 22 of 2020 dated February 26, 2020 and is now embodied in Order 5 Rule 22C of the Civil Procedure Rules. This court cannot therefore regard the Contemnors to have been aware of Order by virtue of the alleged WhatsApp texts.
 28. However, the court is satisfied that the Appellant was duly served with the court order on October 1, 2019. There was no proof that the mail room where the letter addressed to Mr Emmanuel Juma was received was run by an outsourced company which did not work beyond 4.30pm as alleged. To this court, leaving the letter in the mail room constituted proper service on the Appellant as per the



provisions of Order 5 Rule 3(b) (i) of the Civil Procedure Rules which allows a process server to leave a document at the registered office of a corporation if he is unable to find the secretary, director or other principal officer of the corporation for purposes of service.

29. Additionally, the court is satisfied that affixing of court order on conspicuous places by the Respondent's process server on October 1, 2019 also constituted proper service. Indeed and as required by law, Mr Agayi set out in his Affidavit of Service and on cross examination all the futile attempts he made at effecting personal service of the court order on the Appellant's company secretary before he decided to affix a copy of the court order to the premises. This was in compliance with Order 5 Rule 14 of the Civil Procedure Rules which provides that:

' Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.'

30. The court notes that Respondent duly annexed photographs showing Mr Agayi affixing the order on several places including the Appellant's reception desk. This evidence was not controverted by the Appellant and in any event, the above provision does not specify that the document to be served can only be affixed during working hours. The Appellant being a large media house that has both television and radio stations with programmes that are broadcasted till late in the night cannot be heard to be claiming that they were served after working hours. If the letter addressed to Mr Emmanuel Juma was indeed not opened until October 2, 2019 as alleged, then the Appellant has other authorized employees or staff who must have surely seen the order that was conspicuously affixed at its premises.

31. The current position in law is that knowledge of a court order suffices to prove service and dispenses with personal service for purposes of contempt proceedings. In the case of *Basil Criticos v Attorney General and 8 Others [2012] eKLR* Lenaola J pronounced himself thus:-

' The law has changed and as it stands today knowledge supersedes personal service where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary'

32. For the foregoing, the court finds that the Appellant and indeed the Contemnors were properly served with the court order of October 1, 2019.

Whether the trial court erred in citing the Contemnors for contempt

33. The Appellant aired the story 'Sins of Saviours' in its 9.00pm prime time new after service of the Court Order of October 1, 2019 had been effected. At the time, it was well aware of and had proper notice of the terms of the said Order having been properly served with the same. However, its managing editor at the time, Mr Emmanuel Juma sanctioned the story and its news broadcaster, Mr Edmond Nyabola proceeded to broadcast the story in disobedience of the court order. The upshot is that the court finds that the Appellant, through its employees the contemnors herein, deliberately and willfully disobeyed a valid court order. The trial court did not therefore err in citing the two employees for contempt of court.



Conclusion

34. Accordingly, the Appellant's appeal has no merit and is hereby dismissed with costs to the Respondent. The Contemnors, Mr Emmanuel Juma and Mr Edmond Nyabola, shall appear before the trial magistrate as ordered to show cause why they should not be punished for contempt.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 24TH DAY OF NOVEMBER 2022.

J. N. MULWA

JUDGE

