



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 71 OF 2020

THE STANDARD GROUP PLC.....1ST PLAINTIFF/APPLICANT

ORLANDO LYOMU.....2ND PLAINTIFF/APPLICANT

-VERSUS-

CYPRIAN NYAKUNDI.....DEFENDANT/RESPONDENT

RULING

1. The 1st and 2nd plaintiffs/applicants in the present instance took out the Notice of Motion dated 11th September, 2020 supported by the grounds laid out on its body and the facts stated in the affidavits of advocate Fidelis M. Limo and the 2nd applicant. The applicants sought the following orders from this court:

(i) Spent.

(ii) THAT Cyprian Nyakundi be committed to civil jail for a period of six (6) months or the property of the defendant be attached as compensation to the plaintiffs, for the defendant's contempt of court in respect of the order issued on 12th June, 2020.

(iii) THAT a temporary injunction be and is hereby issued directing Cyprian Nyakundi by himself or through his servants, employees or agents to immediately permanently remove the publication dubbed "Standard Group losses tied to CEO Orlando Lyomu's Bad Management."

(iv) THAT the Kenya Police Criminal Investigation Department (DCIO) Makadara to assist in effecting this Order.

(v) THAT this court be pleased to grant any other of further orders, for the purpose of protecting the dignity and authority of the court.

(vi) THAT the costs of the suit and application be provided for.

2. The defendant/respondent opposed the Motion by a replying affidavit he swore on 15th February, 2021 in addition to Grounds of Opposition dated 7th February, 2021, to which the 2nd applicant countered with a supplementary affidavit. Both parties have filed written submissions to address the application.

3. I have considered the grounds presented on the face of the Motion, the facts stated in the affidavits supporting and opposing the Motion, the Grounds of Opposition, and the competing written submissions plus the authorities cited.

4. A background of the dispute is that the applicants lodged a defamatory suit against the respondent by way of the plaint dated 27th May, 2020 and sought a variety of reliefs including damages and a permanent injunction. The plaint was accompanied by the Notice of Motion application of like date, wherein the applicants sought temporary injunctive orders to subsist pending the hearing and determination of the suit.

Upon hearing the parties on that application, the court granted the temporary injunctive orders in its ruling delivered on 10th June, 2020. The instant Motion is premised on the aforesaid ruling, specifically the contention that the respondent is in contempt of the orders made therein, by way of his publication of the impugned article titled: "Standard Group Losses tied to CEO Orlando Lyomu's Bad Management."

5. However, before I address the merits of the Motion, there are two (2) preliminary issues which were raised in the respondent's Grounds of Opposition. The *first* issue concerns competency of the Motion. In his Grounds, the respondent argues that the 2nd applicant had no authority to sue on behalf of the 1st applicant.

6. On his part, the 2nd applicant through his supplementary affidavit states that he is authorized to swear the affidavit on behalf of the 1st applicant and annexed a copy of the Board Resolution in support thereof. Furthermore, in their joint submissions, the applicants cite the case of **Britind Industries Limited v APA Insurance Limited [2017] eKLR** in which the court determined that where the Board of Directors of a plaintiff had not passed a resolution to institute a suit, the proceedings could still be ratified.

7. Order 4, Rule 1(4) of the Civil Procedure Rules, 2010 states as follows:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

8. From my perusal of the record, I observed that the verifying affidavit in support of the plaint was sworn by the 2nd applicant, being the Chief Executive Officer and Managing Director of the 1st applicant, stating that he had authority to swear the same under seal of the 1st applicant. However, it is apparent that the relevant authority was not availed. Be that as it may, the applicants annexed a copy of the resolution as “OL-1” to the supplementary affidavit authorizing the 2nd applicant to perform necessary actions on behalf of the 1st applicant in the suit. The respondent has not challenged the validity of the said resolution.

9. In the case of **Britind Industries Limited v APA Insurance Limited [2017] eKLR** relied upon by the applicants, the court borrowed from the authority of **Mavuno Industries Limited & 2 Others V Keroche Industries Limited HCCC No. 122 of 2011** in which the court held that failure to file the requisite authority together with the plaint does not invalidate a suit. I associate myself with that position and find that the suit and instant Motion are not incompetent in the absence of the Board authority of the 1st applicant. This facet of the Grounds of Opposition cannot be sustained.

10. The second preliminary issue touches on whether the electronic evidence relied upon by the applicants is inadmissible in the absence of the certificate of authenticity pursuant to Sections 106A and B of the Evidence Act Cap. 80 Laws of Kenya.

11. In his supplementary affidavit, the 2nd applicant states that the impugned article was captured by their advocate and printed, and has annexed a copy of the certificate of electronic evidence as “OL-2.” From my perusal of the said certificate, in the absence of any evidence or material to indicate otherwise, I am satisfied that the certificate is in compliance with the requirements set out under Sections 106A and B (supra) on admissibility of electronic records.

12. On the merits of the instant Motion, Section 5 of the Judicature Act, Cap. 8 Laws of Kenya is the substantive law granting superior courts the power to punish for contempt. The section stipulates the following:

“(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.”

13. The term ‘contempt’ is defined in the **Black’s Law Dictionary** as follows:

“a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

14. The guiding principles in determining whether there has been contempt of court orders, as expressed in **Pinnacle (K) Travel and Safaris Limited v Omar Faruk Osman & 5 others [2017] eKLR** and echoed in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** cited in the applicants’ submissions, are:

- a) That the order was clear, unambiguous and binding on the defendant.
- b) That the defendant had knowledge of or proper service of the terms of the order.
- c) That the defendant acted in breach of the terms of the order.
- d) That the defendant’s conduct was deliberate.
- e)

15. On the *first* principle above, it is not contested that the court vide the ruling delivered on 10th June, 2020 granted temporary injunctive orders against the respondent herein and was therefore binding upon him.

16. Concerning the *second* principle, Fidelis M. Limo and the 2nd applicant in their supporting affidavits state that a copy of the ruling was served upon the respondent through the email address: hello@cnyakundi.com provided on his blog and Facebook wall, and hence he was made aware of its existence. This was restated in their submissions.

17. In reply, the respondent states and submits that he was never served with the ruling and order, and only became aware of their existence upon being served with the instant Motion. The respondent further submits that the aforementioned email address had been down for two (2) weeks as at 3rd June, 2020 and was therefore inaccessible, and yet the applicants did not attempt to forward a copy of the ruling to an alternative address.

18. As per the record, neither the respondent nor his advocate was present in court during delivery of the aforesaid ruling. Needless to say that the applicants annexed copies of email extracts which show that the ruling and order were forwarded to the respondent's email address on 12th June, 2020. The record shows that the said email address had previously been used for purposes of sharing the pleadings in the suit and there is an affidavit of service on record to show that the application which triggered the ruling was served upon the respondent, which goes to show that the respondent had or ought to have had knowledge of the existence of the application to begin with.

19. It is apparent from the record that when the applicants sent a previous email on 3rd June, 2020 they received feedback on 4th June that the email address in question had been down for two (2) weeks. Nevertheless, there is nothing to indicate that at the time of sending the particular email forwarding the ruling and order, the said email address was functionally down. In the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** cited by both parties, the Court of Appeal rendered itself as follows:

“The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise...”

20. In view of the foregoing, more particularly the evidence of service by the applicants, I find it more plausible than not that the respondent had or was at least given proper notice of the ruling and order in question.

21. This brings me to the *third* and *fourth* principles which I shall address contemporaneously. The applicants have taken the position that despite notice of the ruling and order in question, the respondent went ahead to publish defamatory material on 11th September, 2020 in total disregard of the order. In response, the respondent avers and submits that at the time of making the impugned publication, he had no knowledge of the ruling and that immediately upon learning of its existence, he pulled down the said publication.

22. Upon my perusal of the record, it is not in dispute on the one hand that the impugned publication was made by the respondent, though I note that the copy availed to this court does not indicate the date of publication. Be that as it may, it is apparent that at the time of the impugned publication, the temporary injunctive orders were already in force. On the other hand, I have taken into account the respondent's assertions that he has purged the contempt by taking down the impugned publication, though I cannot overlook the fact that this action was undertaken following the filing of the instant Motion. Consequently and for the foregoing, the only reasonable conclusion is that the respondent's breach of the ruling of 10th June, 2020 is an act of total disregard of the court order which he had, or ought to have had knowledge of and therefore amounts to contempt.

23. The second order sought for a temporary injunction has been overtaken by events since it is apparent that the impugned publication has been taken down.

24. Accordingly, I find merit in the Motion and will allow it. The following orders are made:

- a) Cyprian Nyakundi, the defendant/respondent herein, is found to be in contempt of the ruling and order issued on 10th June, 2020.
- b) Consequently, the defendant/respondent is hereby ordered to appear on a date to be fixed by this court for mitigation and penalty.
- c) The 1st and 2nd plaintiffs shall have the costs of the Motion to be borne by the defendant.

Dated, signed and delivered at **NAIROBI** this 27th day of May, 2021

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Limo for the 1st and 2nd Plaintiffs/Applicants

N/A for the Defendant/Respondent