



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. E032 OF 2021

CYTON INVESTMENT MANAGEMENT PLC.....PLAINTIFF/APPLICANT

VERSUS

JOHN BOSCO MATHEKA alias

JAYBEE MATHEKA.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff's Application dated 28th April 2021 is seeks orders that;

1.This honorable court do find and hold that the Defendant/Respondent has committed contempt of court for disobeying and defying the orders made by this honorable court on 10th February, 2021 pursuant to an application for interim orders filed on 10th February, 2021.

2. Consequently, the Respondent be committed to civil jail for a term of six (6) months for contempt.

3. The Respondent be further denied audience before this honorable court until such a time as he shall have purged his contempt by, inter alia:

a). refraining from making and/or publishing, airing on social media and/or any other platform, any statements, remarks, innuendo and defamatory statements about the Plaintiff, its investment vehicles and/or any subsidiaries of the Plaintiff.

b). performing any such act this Honorable Court may in its discretion deem fit to order the Respondent to perform.

4. Costs of the Application.

2. The application is premised on the grounds in the Application and the supporting affidavit by Jennifer Solovea. It is stated that on 10th February, 2021, the Applicant filed a suit against the Respondent seeking for an order that;

“Pending the hearing of this Application, a temporary order of injunction is hereby issued barring the Defendant/Respondent by himself, his agents, assigns and/or servants from making and/or publishing, airing, on social media and/or on any other platform, any statements, remarks, innuendo and defamatory statements about the Plaintiff, its investment vehicles and/or any subsidiaries of the Plaintiff.”

3. It is stated that the above prayer was granted and was served upon the Respondent via email correspondence on 2nd of February, 2021. Further that despite service and clarity of the court order, the Respondent has persisted in the contemptuous acts such as publishing further defamatory articles on his Facebook page as evidenced in the attached screenshots. That the Defendant's advocate has appeared twice in court since they were served, wherein the interim orders were extended and cannot, therefore, claim not to know of its existence. That the Respondent has committed deliberate, inexcusable and contemptuous acts which have brought this honorable court into ridicule, odium and disrepute to the great prejudice of the Applicant.

4. It is the Applicant's contention that disregard for court orders is an affront to judicial authority which undermines the rule of law and being on the rise, it is in the public interest that such conduct is frowned upon and punished in order to uphold the sanctity of the court process. Further that the instant proceedings are not meant to protect neither the Applicant's private interests, nor the judge's ego but to check conduct that is inimical to the rule of law.

5. In reply, the Respondent states that he is not in contempt of any orders issued by this court. That he has not published nor authorized any publication of any posts, articles nor writing against the Plaintiff/Applicant as the social media accounts referred to by the Applicant are pseudo accounts not owned by the Respondent.

6. In the alternative, it is stated that the Respondent was not personally aware of the extension of the interim orders as the said extended orders were not served on the Respondent's advocate on record. Further that mandatory orders and their extension with the effect of limiting ones' personal liberties and freedoms must be served on them personally. That the orders sought by the Applicant are an affront to justice seeking to bar the Respondent from pursuing his case against the Applicant successfully.

7. The Application was canvassed by way of written submissions which I have considered.

8. Order 40 Rule 3(1) of the Civil Procedure Rules with regards to breach or contempt of court orders provides as follows;

“In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release”

9. The High Court in *Sam Nyamweya & Others v Kenya Premier League Ltd and Others* [2015] eKLR defined contempt of court as:

“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

10. In their submissions, the parties herein have cited authorities to the effect that contempt of court proceedings are quasi-criminal in nature due to the penal consequences attached to the same. I am in full agreement with the position taken in this respect.

11. Contempt of Court Proceedings have the effect of putting one's liberty and fundamental freedoms at stake. The standard of proof is therefore quite high compared to other civil cases. The Court of Appeal in the case of *Mutitika v Baharini Farm Ltd* [1985] eKLR as regards standard of proof in contempt proceedings stated as follows;

“ The courts, nevertheless take the view that where the liberty of the subject is, or might be, involved, the breach for which the alleged contemnor is cited must be precisely defined

... In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved

“with such strictness of proof ... as is consistent with the gravity of the charge ...”

We draw attention to the following passage from the 3rd Edition of *Oswald on Contempt* at page 16.

“The court, however, has power to restrain by injunction threatened contempt's. It is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not”.

12. The High Court in *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* [2016] eKLR while citing excerpts from the book, *Contempt in the Modern New Zealand* set out the elements to be proved in contempt proceedings as follows:

Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:

"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:

(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's conduct was deliberate.

13. The order which is the subject of the instant Application was as follows:

“Pending the hearing of this Application, a temporary order of injunction is hereby issued barring the Defendant/Respondent by himself, his agents, assigns and/or servants from making and/or publishing, airing, on social media and/or on any other platform, any statements, remarks, innuendo and defamatory statements about the Plaintiff, its investment vehicles and/or any subsidiaries of the Plaintiff.”

14. This order in my view is self-explanatory in its terms. The terms were clear and unambiguous and required the Respondent to cease from publishing, airing on social media any statements, remarks, innuendo and defamatory statements about the Plaintiff. The orders were also binding on the Respondent.

15. The Respondent claims that the Social Media Account in question is not his and that he is not the publisher of the said account. He described the accounts as pseudo accounts not owned by him. However, the Respondent in his Amended Statement of Defence and Counterclaim has admitted paragraph 3 of the plaint which described the Defendant as the person known as Jaybee Matheka on Facebook, a social media platform.

16. On the question of service of the court orders that are the subject of the application at hand, it is noted that the said orders were issued on 10th February, 2020. The Applicant’s uncontroverted evidence is that the Respondent was served by way of e-mail and subsequently appeared in court through counsel representing him. Indeed, the interim orders were extended herein on 4th March, 2021 and on 22nd March, 2021 in the presence of both counsel for the parties herein. I therefore hold that the Respondent had knowledge of the orders herein.

17. In the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR (supra)** the Court of Appeal stated thus:

"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. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the Wambora case (supra) affirmed the application of these requirements.

... On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved."

18. With regard to production and admissibility of electronic evidence, the Evidence Act, Cap 80 Laws of Kenya at Section 106B provides;

“106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether

—
(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

19. The Applicant attached screenshots photographed by an unknown device and printed by yet another unknown device contrary to the mandatory requirements of 106B (4) above. The Applicant was required by this section to provide a certificate identifying the electronic record and describing the manner the screenshots were obtained, giving the particulars of the device used in production and signed by a person in a responsible position in control of the device.

20. The section on admissibility of electronic evidence is enacted in mandatory terms and cannot be cured by the Oxygen Principle under Article 159 of the Constitution of Kenya 2010 or Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The Court of Appeal in **County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR** had this to say:

65. Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”

66. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.

21. The Applicant’s documents having not satisfied the mandatory requirements of production of electronic documents for want of certificate are hereby inadmissible. Rectification cannot be possible at this stage. The requirement of a certificate is not only want of form but also want of substance on the question of authenticity and the integrity of the publications in question. Consequently, the application fails with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCT., 2021

B. THURANIRA JADEN

JUDGE