



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 104 OF 2017**

**HF GROUP LIMITED.....PLAINTIFF**

**VERSUS**

**CYPRIAN NYAKUNDI.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. On 12<sup>th</sup> April 2019, the Plaintiff's and Defendant's Advocates recorded a consent in the following terms:-

**BY CONSENT OF THE PARTIES:-**

**1. The Plaintiff's Notice of Motion dated and filed on 14<sup>th</sup> July 2018 be compromised in the following terms:-**

- a. THAT a permanent injunction restraining the Defendant, his employees, servants and/or agents from publishing any further or similar defamatory material of or concerning the Plaintiff.**
- b. THAT an order be and is hereby issued directing the Defendant to take remedial steps to retract the said defamatory articles and delete them from his web-site and any other platform that may host the said articles.**
- c. THAT the matter be mentioned on 10<sup>th</sup> May 2018 to confirm the Defendant's compliance with Order 1(b) hereinabove.**
- d. THAT there be liberty to each party to apply.**
- e. THAT each party to bear its own costs of the said application and suit filed on 10<sup>th</sup> May 2017.**

2. On 10<sup>th</sup> May 2018, the Defendant's counsel informed the court that the Defendant had not yet complied with the court orders. A further mention was taken for 25<sup>th</sup> June 2019.

3. On 25<sup>th</sup> June 2018, the court was again informed that the Defendant had not yet complied with the terms of the consent. Counsel for the Defendant indicated that she had not been able to get in touch with him since the last time the matter was mentioned.

4. On 2<sup>nd</sup> November 2018, the Plaintiff filed a Notice of Motion application of even date. The same was brought pursuant to Sections 4(1)(a), 5(b), 28 and 29 of the Contempt of Court Act (Act 46 of 2016), Section 1A, 1B, 3A and 63 of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Article 165(3) of the Constitution of Kenya and all powers enabling the court. Prayer No (1) was spent. It sought the following remaining orders:-

- 1. THAT CYPRIAN NYAKUNDI do stand committed to civil jail for such period as this Honourable Court may determine for contempt of Court in that being aware of the Orders made by this Court on 12<sup>th</sup> April 2018 (hereinafter referred to as "the said Orders") knowingly and wilfully violated and/or disobeyed and/or disregarded and/or thwarted and undermined the effect and purpose of the said Orders.**
- 2. THAT this Honourable Court do impose a fine on the Defendant/Respondent for breach of this Honourable Court's order**

**for every day that the offending publications did remain published henceforth.**

**3. THAT such further or other order be made as may deem just to the Honourable Court.**

5. The Plaintiff's Written Submissions were dated 12<sup>th</sup> February 2019 and filed on 13<sup>th</sup> February 2019 while the Respondent's were dated and filed on 5<sup>th</sup> March 2019.

6. Parties requested the court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

#### **THE PLAINTIFF'S CASE**

7. The Plaintiff's present application was supported by the Affidavit of its Company Secretary and Chief Executive Officer, Regina Anyika, that was sworn on 2<sup>nd</sup> November 2019. She swore a Further Affidavit on 17<sup>th</sup> January 2019. The same was filed on 18<sup>th</sup> January 2019.

8. The Plaintiff case was that despite the Defendant having been duly served with the court order of Seron J of 22<sup>nd</sup> June 2017, it failed to comply with the same necessitating it to file the present application.

9. It averred that the Defendant had cynically sought to frustrate and/or undermine the effect of the order and had continued to act in absolute disregard of the said order with complete disdain to this court.

10. It was emphatic that the Defendant's website cnyakundi.com where posting was done, was still operational and had never been suspended as the Defendant had contended.

11. It asserted that it was just, equitable and in the interest of justice that this court acted swiftly and decisively in the face of such wilful and blatant disregard and dignity.

12. It therefore urged this court to allow its application as prayed.

#### **THE DEFENDANT'S CASE**

13. In response to the said application, the Defendant swore a Replying Affidavit on 18<sup>th</sup> December 2019. The same was filed on 19<sup>th</sup> December 2019.

14. He averred that he was a law abiding citizen of good standing and that he had never violated, disobeyed, disregarded, undermined and/or thwarted any valid court orders made known to him by his counsel.

15. He stated that his previous advocate on record never explained to him the contents and effect of the said consent order. He averred that the mistake of his previous advocate should not be visited on him.

16. He said that the present application was based on old facts for the reason that his twitter account and website were suspended and that he had no web site with the publications complained of by the Plaintiff.

17. He added that the present application was bad in law as it was based on the Contempt of Court Act that was declared unconstitutional by Mwitia J in **Kenya Human Rights Commission vs The AG [2017] eKLR** on 9<sup>th</sup> November 2018.

18. He termed the said present application as frivolous, vexatious, not grounded on law and procedure and an abuse of the court process. He thus urged this court to dismiss the same with costs.

#### **LEGAL ANALYSIS**

19. The Plaintiff relied on the case of **Katsuri Limited vs Kapurchand Depar Shah [2016]** in which Mativo J cited the case of **Econet Wireless Kenya Ltd vs Minister for Information & Communication Kenya & Another [2005] eKLR** where it had been held that courts will treat contempt of court with the seriousness it deserves to uphold the authority and dignity of courts and hence a contemnor will not be given audience by the court unless he purges the contempt.

20. It also referred to the South African Case of **Kristen Carla Burshell vs Barry Burshell (Eastern Cape Division Case No 364 of 2005)** that was cited by Mativo J in **Katsuri Limited vs Kapurchand Depar Shah [2016]** in which it was held that for an applicant to succeed in contempt of court proceedings, he had to prove the following:-

**1. The terms of order.**

**2. Knowledge of the terms by the Respondent.**

**3. Failure by the Respondent to comply with the terms of the order.**

21. On his part, the Defendant submitted that he was a stranger to the websites the Plaintiff had attached to its application and that it had not proved that he was its author and/or owner.

22. In this regard, he placed reliance on the cases of **Brooke Bond Liebig (T) Ltd vs Mallya [1075] EA 266 at 269** and **Diamond Trust Bank of Kenya Ltd vs Ply J. Panels Ltd [2004] EA** at page 40 where the common holdings were that a consent judgment or order will be set aside if there were grounds to justify their setting aside, such as ignorance or misapprehension of material facts.

23. It emphasised that the present application had been overtaken by events due to the Ruling by Mwita J in the case of **Kenya Human Rights Commission vs The AG** (Supra).

24. He referred this court to the case of **Gabriel O Ochieng & Another vs Pamela Apondi Omino [2015] eKLR** where the Court of Appeal held that contempt of court had criminal consequences and as such, no assumptions should be made. Instead, all the procedural steps set out in the Rules must be strictly complied with.

25. Notably, the Plaintiff's present application was filed on 2<sup>nd</sup> November 2019 pursuant to Sections 4(1) (a), 5(b), 28 and 29 of the Contempt of court Act Cap 406 (Laws of Kenya). The decision of Mwita J in **Kenya Human Rights Commission vs The AG** (Supra) was made a week later on 9<sup>th</sup> August 2019. In his Ruling, the learned Judge held as follows:-

**1. A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null and void.**

**2. A declaration is hereby issued 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 encroaches on the independence of the Judiciary.**

**3. No order as to costs.**

26. It was therefore evident that the present application having been filed under the Contempt of Court Act, was no longer sustainable and it only lend to it being struck out for being based on a non-existent law.

27. It is, however, important to point out that it is not that courts no longer have power to punish for contempt of court.

28. Rule 39 of the High Court (Organisation and Administration) (General Rules, 2016 provides as follows:-

**(1) The object of this Part is to—**

**(a) uphold the dignity and authority of the Court;**

**(b) ensure compliance with the directions of the Court;**

**(c) ensure the observance and respect of due process of law;**

**(d) preserve an effective and impartial system of justice; and**

**(e) maintain public confidence in the administration of justice as administered by court.**

**(2) The Court has power to—**

**(a) punish a person for contempt on the face of the Court; and**

**(b) uphold the dignity and authority of subordinate courts.**

**(3) The Court has the same jurisdiction, power and authority in respect of contempt of subordinate courts as it has in contempt before it.**

**(4) In any other case, other than contempt on the face of a subordinate court, the Court shall, in the exercise of its supervisory powers and on**

**application by any person to the Court, punish contempt of court.”**

29. It did appear to this court, however, that under the said Rules the court only has power to punish or contempt of court before it and in the face of the subordinate and in any other case, in the exercise of its supervisory powers and on the application by any person. The Rules did not provide for the High Court having power to punish in any other case where there was contempt of court by way of disobedience of court orders.

30. Having said so, the power to punish for contempt of court in respect of wilful disobedience of court orders and or directions is inherent in a court. If that power was not inherent in court and was dependent on other statutes, there would be anarchy as laws can be repealed and/or

struck out for being unconstitutional such as what happened to the Contempt of Court Act that was declared unconstitutional.

31. The Plaintiff satisfied this court that the Defendant had been duly notified of the injunctive orders that had been granted by Serگون J on 22<sup>nd</sup> June 2017 by way of substituted service. Evidence of the notice in the Newspaper was attached to its application.

32. To determine who between the Plaintiff and the Defendant was being truthful, the court searched and found the website known as cnyakundi.com. It took judicial notice and noted that the said website had not yet been suspended as the Defendant had averred and that there were articles and images relating to the Plaintiff as late as 2019.

33. The Defendant had clearly disobeyed the court orders. To avoid being cited for contempt, he quickly entered into the consent on 12<sup>th</sup> April 2018.

34. As contempt of court proceedings attract sanction and there was no evidence that the Defendant was personally served with the consent order of 12<sup>th</sup> April 2018, having said his advocate had duped him, this court was prepared to give him benefit of doubt that he was not aware of the contents of the same.

35. Notably, a court must ensure that a party purges its contempt before it (the party) can be given audience by the court. The consent order had not been set aside and consequently the same remained in place. It had to be obeyed.

### **DISPOSITION**

36. For the foregoing reasons, the upshot of this court's decision was that although the prayers sought in the Plaintiff's Notice of Motion application dated and filed on 2<sup>nd</sup> November 2018 could not be granted as it was based on an impugned Act.

37. The Defendant was fully aware of the order of 12<sup>th</sup> April 2018 during the hearing of the present application and he cannot go scot free. He must purge the content.

It is hereby directed that the Defendant complies with Order 1(b) of the consent order that was recorded by the court on 12<sup>th</sup> April 2018 within the next seven (7) days from the date of this Ruling. For the avoidance of doubt Order 1(a) of the said consent order that was recorded on 12<sup>th</sup> April 2018 remains in force.

38. In the event, the Defendant shall not comply with the directions given in Paragraph 37 hereinabove, the Plaintiff will be at liberty to move the court appropriately for purposes of upholding the authority and dignity of the court.

39. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of September 2019**

**J. KAMAU**

**JUDGE**