



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO 179'A' OF 2018

- GEORGE KYAKA.....1ST PLAINTIFF
DR. JOHN JARED ODUOR.....2ND PLAINTIFF
GERALD ODIWUOR KELLY.....3RD PLAINTIFF
JULIUS W.KIMANI.....4TH PLAINTIFF
MOSES TANGARA.....5TH PLAINTIFF
ZACHARY KIBALIACH.....6TH PLAINTIFF
- (Suing in their capacities as Office Bearers of **KINGS OUTREACH**
CHURCH Occupying the respective positions of Chairman,
Vice Chairman, Secretary, Ass. Secretary, Treasurer, and Assistant Treasurer)
- JOHN LITUNDA.....7TH PLAINTIFF
ZABLON MWITI.....8TH PLAINTIFF
JAYNE NJERI GATHAARA.....9TH PLAINTIFF
CHARLES GERO.....10TH PLAINTIFF

(Suing in their capacities as Officer Bearers of **MINISTRY OF**
REPENTANCE AND HOLINESS (Occupying the respective positions of
Chairman, Vice Chairman, Secretary General and Vice Treasurer)

VERSUS

- KEVIN KIRIGA.....1ST DEFENDANT
PAUL NANGABO AKHOYA.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs’ Notice of Motion application dated and filed on 17th August 2018 was brought under Section 5 of the Judicature Act, Cap

8 Laws of Kenya, Section 63 of the Civil Procedure Act 2012, Order 40 Rule 1 & 2 of the Civil Procedure Rules, Section 4(1) (a) & (2) of the Contempt of Court Act No 46 of 2016, Rule 3(1) and (2) of the High Court (Practice and Procedure Rules). Prayer No (1) was spent. It sought the following remaining prayers:-

1. Spent.
2. That the court be pleased to find the Defendants herein in Contempt of Court.
3. That the contemnors be committed to civil jail for such terms as this Court may deem fit unless or until they purge their contempt by honouring this Court's proceedings that were commenced on the 27th of July 2018.
4. That this court be pleased to grant leave to the Applicants to fine each of the contemnors a sum of Ksh 200,000/=.
5. That this court grants such further or other relief as the Honourable Court may deem just and expedient to grant.
6. That costs and further incidentals to this application be borne by the Respondents.

2. The Plaintiffs' Written Submissions were dated 1st February 2019 and filed on 4th February 2019. The 1st Defendant's Written Submissions and List of Bundle of Authorities were dated 27th February 2019 and filed on 28th February 2019. The 2nd Defendant's Written Submissions were dated 18th February 2019 and filed on 19th February 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFFS' CASE

4. The Plaintiffs' present application was supported by the Affidavit of Bishop/Rtd Major General George Kyaka, the Deputy Assistant Bishop in Kings Outreach Church, on his own behalf and on their behalf. It was sworn on 17th August 2018. He also swore a Further Affidavit in support of the said application on 22nd August 2018. It was filed on 23rd August 2018. His Supplementary Affidavit was sworn on 1st February 2019 and filed on 4th February 2019.

5. The Plaintiffs averred that they filed an application and their Complaint which came up for hearing on 2nd August 2018 and that the Defendants entered appearance and received all the documentation. The matter was subsequently fixed for hearing on 29th August 2019.

6. However, despite knowing what their case entailed, they stated that the Defendants made copies of the court documents, took selfies with them, posted and openly discussed them on social media that they (Defendants) solely owned and operated.

7. They asserted that the 1st Defendant was the owner of the social media platforms and that in all his complaints to Youtube seeking to pull down their videos, he had signed off using his name. They said that the Defendants, who were using pseudonyms, were traced and arrested by the police.

8. They added that the Defendants also infringed on their copyright and continued to copy, alter and distribute various teaching of the Plaintiffs which they circulated widely on Youtube with intent of diminishing, damaging and distorting their message with a view to disparaging their image in the eyes of right thinking members of the public.

9. It was their case that the Defendants' actions were in blatant violation of Section 4 of the Contempt of Court Act No 46 of 2016 and that their actions were in bad faith and had not been innocently published but rather that they were carried out with a view to influencing the courts and impeding the administration of justice, which they said was parallel to **"trial by media."**

10. They therefore urged this court to allow their application so as to protect their intellectual property rights and to avert any further infringement.

THE 1ST DEFENDANT'S CASE

11. In response to the present application, the 1st Defendant swore his Replying Affidavit on 17th December 2018. It was filed on 19th December 2018.

12. He was emphatic that an accurate reporting of proceedings could not amount to contempt of court and that the same was protected by the law. He stated that he was not aware of any law barring discussion of the matter that was pending before court.

13. He denied having been the owner of the alleged social media platforms and contended that this was an issue that could only be determined during trial and not by way of affidavit evidence.

14. He was emphatic that he had not violated any of the provisions of Section 4 of the Contempt of Court Act or made any publication which sought to scandalise or prejudice court proceedings.

15. He stated that the present application was an abuse of court process and urged this court to dismiss the same with costs.

THE 2ND DEFENDANT'S CASE

16. In response to the said application, the 2nd Defendant filed his Replying Affidavit on 28th August 2018. He swore the same on 27th August 2019.

17. He termed the Plaintiffs' present application as a non-starter, bad in law and lacking in merit. He was emphatic that the Plaintiffs were not candid and had concealed material facts which implied bad faith on their part.

18. He pointed out that this was a replica of their Notice of Motion application dated 26th July 2018 in which they were denied orders and that they were only hood-winking the court to grant them orders which had initially been denied. He also filed Grounds of Opposition dated 22nd January 2019 on 25th January 2019. The grounds were as follows:-

1. That the application is a non-starter, frivolous and vexatious.

2. That there is no known order existing to warrant the mounting of a contempt application.

19. He was emphatic that a fair and accurate record of court proceedings could not amount to contempt of court and that no particular order had been cited which he had disobeyed to warrant granting of the orders sought as had been framed. He further averred that the Plaintiffs had not complied with the laid down procedures so that contempt could be said to have arisen.

20. He contended that there were no compelling reasons that had been advanced by the Plaintiffs to warrant granting of the orders they had sought and that the application was an afterthought and a desperate attempt to circumvent the real issues in question and thus frustrate him with protracted litigation.

21. He therefore urged this court to dismiss the present application to enable the parties canvass their Notice of Motion application dated 26th July 2018.

LEGAL ANALYSIS

22. The Plaintiffs submitted that Article 50(1) of the Constitution of Kenya provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

23. They stated that their present application had been brought on the wings of the Common Law Doctrine of Contempt of Law and specifically the offence of sub-judice which prohibited publicised comments on pending legal proceedings and scandalising the court

24. They were emphatic that they would not focus on civil contempt which was the wilful disobedience of court orders as contemplated under Section 4(1) (a) of the Contempt of Court Act.

25. They referred this court to several cases where the common thread was that the dignity of the court must be upheld at all times-See **A.G. vs BBC [1981] AC 303** amongst other cases.

26. They also relied on Section 5(1) of the Judicature Act Cap 8 (Laws of Kenya) that gives power to the High Court and Court of Appeal to punish for contempt of court. They further placed reliance on several English cases where it was held that trial by mass media was wrong and should be prevented.

27. They argued that the posts in the media targeting the 7th Defendant were intended to humiliate and discredit him in public.

28. They cited several posts that had been posted by the Defendants and in one such post, the 2nd Defendant had alluded to their application thus identifying him as the owner of the platform that he had denied owning in his Replying Affidavit.

29. On his part, the 1st Defendant referred this court to the case of **Vimalkumar Bhimji Depar Shan & Another vs Stephen Hennings & 5 Others [2016] eKLR** where it was held that contempt of court proceedings are a trial within a trial and that the outcome being very final, a court ought not to render a judgment condemning a person without sufficient evidence being adduced as to the guilt of that person.

30. He submitted that the Plaintiffs had not demonstrated that there was any misreporting of the court proceedings, that the 7th Plaintiff had been intimidated, that the posts had the effect of influencing the court, that they had discussed the court proceedings or that the Defendants herein had been identified as the owners of the said social media platform.

31. He pointed out that the email the Plaintiffs had alluded to with a view of subverting the course of justice was not applicable in the circumstances of the case because it did not make any reference to the court case and had in fact, been allegedly sent on 28th July 2018 by which time he had not entered appearance.

32. He was categorical that the electronic evidence the Plaintiffs intended to rely upon was inadmissible as it required them to produce a Certificate under Section 106A to 106I of the Evidence Act Cap 80 Laws of Kenya.

33. In this regard, he placed reliance on the case of **Vimalkumar Bhimji Depar Shan & Another vs Stephen Hennings & 5 Others** (Supra) where an application for contempt of court was dismissed as the electronic evidence was not properly produced.

34. On his part, the 2nd Defendant submitted that contempt of court proceedings were *quasi-judicial* in nature and hence, the standard of proof was higher than proof on a balance of probabilities.

35. He argued that for the Plaintiffs to succeed in civil contempt proceedings, they had to demonstrate that he had failed to comply with a court order deliberately and in bad faith.

36. He further submitted that in contempt of court proceedings, a respondent will only be committed for contempt if there is no reasonable doubt that indeed he was guilty of the contempt complained about.

37. It was clear from the Plaintiffs' Written Submissions that they were not seeking orders to cite the Defendants for contempt of court under the Contempt of Court Act which was declared unconstitutional by Mwita J in his decision of 9th November 2018 in the case of **Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR** that was relied upon by the 1st Defendant.

38. The Plaintiffs' argument was hinged on the Strict Liability Rule that had been set out in the Contempt of Court Act in arguing that they had proved that the Defendants had been in contempt. However, the said arguments were immaterial in view of the fact that the said Contempt of Court Act was declared unconstitutional for want participation as contemplated under Articles 10 and 118(b) of the Constitution of Kenya and for encroaching on the Independence of the Judiciary,

39. Having said so, the high court has not been left without any powers to punish contempt of court. Rule 39(2) of the High Court (Organisation and Administration (General) Rules, 2016.

40. Rule 40 of the High Court (Organisation and Administration) (General) Rules states that:-

“Without prejudice to the generality of subsection (1), such Rules may provide for the—

- a. conduct of the election of the Principal Judge;**
- b. procedure of removal of the President of the Court;**
- c. disposal of urgent and priority matters during Court recess;**
- d. disposal of matters within twelve months from the date the Court sets the matters down for hearing;**
- e. automation of Court records, case management, protection and sharing of Court information and the use of information communication technology;**
- f. form, style, storage, maintenance and retrieval of Court records; and**
- g. procedure relating to contempt of court.(emphasis court)**

41. The object of punishing for contempt of court is provided in Rule 39 of the High Court (Organisation and Administration) (General) Rules that provides that:-

(1) The object of the provisions 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 shall have power to—

- (a) punish 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 respect of contempt of the 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

42. It was therefore evident that the High Court has no power to punish for contempt in any other circumstances as had been submitted by the Plaintiff. Indeed, Rule 39(1) of the High Court (Organisation and Administration) (General) Rules is very clear what the object of contempt of court proceedings is. It is to uphold the dignity and authority of courts.

43. The Plaintiffs were aggrieved that the Defendants uploaded their application filed on 27th August 2018 on social media. The statements posted in the social media that aggrieved them were as follows:

“Are you depressed? Let me humour you. Imagine being sued by John Litunda a man who has died and resurrected TWICE....”

“Interim Orders Denied!!

This is the beginning of the end...”

“Wassupy’ all.

We were really hoping and praying and fasting for something heavy only to be hit with Section 138 of our Penal Code.

You got jokes.

CID are yet to execute their warrants over 3 weeks. Unconfirmed reports tell us that they are waiting for the fourth witness to be killed and resurrected and raptured in Budapest sometimes after rapture.

And they are yet to take our statements.

We are yet to be summoned, and of course this means no charge sheets have been drafted.

Once they are done explaining what Special Crimes Division are doing pursuing misdemeanours may be they will come for us.

We don’t care and we are not hiding...

What else have you got?

Our memory verse for the day:

Q

1 Samuel 17:26 (KJV)

Who is this UNCIRCUMCISED PHILISTINE that they should defy the armies of the living God?”

“...I just received a strike on my video below and I can assure you we will meet in court, and you will loose badly...

Furthermore, the case will be so publicized that Owuor will be even further exposed.

You have a choice:

1. Retract and hope nobody find the truth in the video

2. Meet in court

My number

0720xxxxx...”

“All your strikes are coming off.

Your channels are back up,

Should we receive any such nonsense again, we will permanently bring down your channels.

Leave us alone, and never contact us by any changes known or unknown.

If you are aggrieved you may pursue any of the following

1. Pray to your Gods to strike us with cancer, leprosy, blindness, etc to stop us.
2. Kill us
3. Pray to your Gods to kill us
4. Pray that Jehovah stops us
5. Sue us”

“...Display name uploader: vooke...”

My channel is:

<http://www.youtube.com/c/Keyanese>

...

My full details:

Name: Kevin Ndungu Kiriga

Email: vooke3014@gmail.com

Phone number: +254724268148

Physical address: Jamia Mall, Stall#233, Kapedo Town, Turkana County, Kenya”

“Interesting moment ahead. The mightiest mightiest prophet has found his way on us.

We are soon discussing the Bible in the Kenyan Courts

What you see me holding is not a Bible but an application done by Owuor against I and a friend.

Am expected to appear in the High Court of Kenya this Thursday the 2nd August 9am

May God find his Glory in this matter.”

“Owuor is peddling a very dangerous strain of religion and there precedents to this. Jim Jones was a man in the likeness of Owuor. He drained from all his followers, the power to reason. If you haven't heard the story here you had it: <http://tinyuri.com/04zkkkr>. He murdered 918 people in Guyana in 1978. That's the reason it should concern everyone what Owuor is doing as there are clear signs he's going to cause mass casualties sooner or later. He's a very dangerous man. I mean it in the literal sense of the word. Paul Weringa has good reasons to be concerned and do what he is already doing; to expose Owuor and put some end to this kind of madness.”

“So this people wanachukua opportunity hatiaifai people of God solve their matters in court, so that they can spread rumours and hide the truth from people shame on you.”

“Repentance and Holiness is a cultic my brother. All indications show that.”

“Josephat Kirui, Owuor is a pagan who teachers men to WORSHIP HIM...”

“Stay Strong! You’ll win this case. Now they want to make it criminal to criticize Owuor and the ministry, isn’t that what they want? I pray that the court find this case frivolous and hence throw it out of the window. We stand with you all the way to the end. Owuorianism is a mental disorder nahadaiwa!”

44. Looking through the provisions of what constitutes contempt, this court did not see how the Defendants were in contempt of court. It had never issued any order prohibiting the persons who had posted the statements from doing so. If it had and the Defendants continued to post the statements, then they would be punished for failing to comply with the courts directions.

45. This court did not wish to comment on the effect of the words that were posted in the social media as there was a danger of coming to a conclusion without first establishing who were the authors of those statements. This was a matter of evidence during trial. Notably, the Defendants had vehemently denied having posted the words on social media or owing the platforms. The Plaintiffs were at liberty to seek appropriate orders in furtherance of their case.

46. Accordingly, having considered the affidavit evidence, Written Submissions and case law that was relied upon by the parties herein, this court came to the firm conclusion that the Plaintiffs had not demonstrated how the Defendants were in contempt of court as no orders had been issued in respect of their Notice of Motion application dated 27th July 2018 which was pending hearing and determination.

DISPOSITION

47. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiffs’ Notice of Motion application dated and filed on 17th August 2018 was not merited and the same is hereby dismissed. In view of the bad blood and hostilities between the parties herein, costs of the application will be in the cause.

48. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of September 2019.

J. KAMAU

JUDGE