



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISC.CIVIL CASE NO. 18 OF 2016

KAPLAN & STRATTON ADVOCATES.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE'S COURT.....1ST RESPONDENT

BANKING FRAUD INVESTIGATION UNIT....2ND RESPONDENT DEFENDANT

RULING

1. The genesis of this matter is what is now popularly known as The National Youth Service (NYS) episode One.
2. Commenced as a Miscellaneous Application on 1st February 2016, Kaplan & Stratton Advocates (the Applicant or Law Firm), undoubtedly a reputable Law firm established over 80 years ago, sought the following two Orders:-
 2. THAT there be a stay of execution of the funds preservation order made in Chief Magistrate's Court in Misc. case No.230 of 2016 in respect of the applicant's account No.0945022833 in Barclays Bank of Kenya or in any Bank in the name of the Applicant pending the hearing and determination of this application inter parties.
 3. THAT the funds preservation order and the warrants issued in Chief Magistrates' Court in Misc. case No. 230 of 2016 in respect of the Applicant's account No. 0945022833 in Barclays Bank of Kenya or in any other bank in the name of the Applicant be vacated forthwith.

The Subordinate Court had issued the Preservation Order on the strength of an Application by the Directorate of Criminal Investigation who were investigating receipt of Ksh.3,077,000 by the Law Firm from Mayfox Mining Company Limited (Mayfox) allegedly being part of money stolen from NYS.

3. The Law firm asserted that Mayfox instructed it in early 2014 to act in connection with the private placement of its Shares and that on 19th March 2015 the Law firm received Kshs.3,077,080 from Mayfox being the required amount for payment of Stamp Duty and other related costs incurred for the increase of the Company's nominal Capital. Further that the money was disbursed on behalf of Mayfox in accordance with a Deposit Request Note that was shown to Court as an annexure to an Affidavit.
4. Now before Court are contempt proceedings against one Brian Wasuna (Brian) who is employed by the Nation Media Group Limited as a Reporter. The Nation Media Group is the Publisher of "The Business Daily" and Brian is a Court Reporter for "The Business Daily".
5. The Law Firm has drawn up charges for Contempt of Court against Brian Wasuna. In the nature of the proceedings before this Court, the Court is obliged to reproduce the Statement of Charges dated 4th March 2016 in its entirety:-

"1. Mr. Wasuna is the author of the two articles which were published in the Business Daily newspaper on 3rd February, 2016 ("the 1st Article") and 5th February, 2016 ("the 2nd Article") in which he purported to report on these proceedings which were pending at the time of the publication of the impugned articles.

2. The impugned articles were not neither fair nor accurate and indeed effectively prejudiced and held/or found the Plaintiff guilty matters in issue before this resolution by this Honourable Court thus adversely affecting the Plaintiff's right to have its case determined by a fair and independent tribunal.

Particulars

a. On the front page of the issue of the Business Daily newspaper, dated 3rd February, 2016, the 1st Article was published by Mr. Wasuna under the sensational banner headline 'Nairobi law firm Kaplan & Stratton entangled in NYS funds theft probe. "Police accused lawyers of helping a mining firm buy property using proceeds of grand theft." It then proceeded to allege that:

"Kaplan & Stratton is the second law firm to be entangled in the NYS theft scandal".

Thereby suggesting that the Plaintiff was deeply involved in the NYS theft scandal, notwithstanding that it had listed other law firms, which it claimed to be under investigations, on its first page".

b. The 2nd Article was printed and published on page 9 of the issue of the Business Daily dated 5th February, 2015, under the heading "*Banking fraud police make fresh Kaplan & Stratton NYS cash claims*". The text of the article contained the following;

"The BFIU says Mayfox received sh.10.8 million from one of the prime suspects in the NYS theft, whom it has declined to name to avoid interfering with the probe. The law firm (meaning Kaplan & Stratton) says Mayfox sent it the amount to pay for stamp duty and other charges for the increase of the mining firm's nominal capital".

This was once more a mischievous misrepresentation of the proceedings in Court which, apart from sensationalizing the proceedings, was intended to connect the Plaintiff to the theft of NYS Funds.

c. In both impugned articles, Mr. Musa reported that;

i. The Plaintiff is deeply involved in the NYS theft scandal.

ii. The Plaintiff received part of the stolen Sh.791 million National Youth Service (NYS) money in cash from suspects other than Mayfox Mining Company.

iii. The Plaintiff used its bank accounts to help launder part of the sh791 million stolen from the NYS.

iv. The Plaintiff allowed itself to be used as conduit for the laundering of illicit proceeds of money stolen from public funds.

v. The Plaintiff deliberately or recklessly neglected to conduct any diligence on its client's and the source of their funds.

vi. The Plaintiff, a reputable law firm, fell short in its ethical obligations.

vii. The Plaintiff was complicit in the looting of public funds.

3. In consequence thereof, Mr. Wasuna created a substantial risk of serious prejudice to the Plaintiff's right to have its case adjudicated by a fair and independent tribunal.

6. Brian denies the charges and filed Grounds of Opposition and two Affidavits sworn on 14th March 2016 and 8th March 2017 respectively.

7. Apart from issues of Law which shall be disclosed shortly, Brian makes the following Defence. That from Media Report, Brian became aware that investigations into the loss of NYS funds were commenced by various Government Agencies including The Banking Fraud Unit. A number of people, companies and firms were interviewed as part of the investigations.

8. Brian was aware that the issue of the loss of funds belonging to NYS was in the Public Domain and was a matter of great Public interest. He also became aware of these proceedings and perused the Court file and subsequently authored two articles which were published in "The Business Daily" Editions of 3rd and 5th February 2016.

9. Brian asserts and maintains that the articles were based on documents and affidavits filed by the parties in Court as well as the proceedings before Court. He states that he sought to ensure that the articles were a fair and accurate account of the contents of application and the proceedings. Indeed he believes that the two articles constitute a fair and accurate account of the proceedings and documents filed in Court.

10. In paragraph 17 of his affidavit of 14th March 2017, Brian attempts to demonstrate the accuracy of his Report. There will be occasion to discuss this in detail later in this Decision.

11. Brian raises three other issues. First, that as a Reporter he does not author the Newspaper Headlines and that responsibility rests with the Editorial team. His role is to write the body of the story. Secondly, that he exclusively writes for "The Business Daily" and clarifies that he does not write for its sister publication, "**The Daily Nation**". Brian's position, therefore, is that his Articles could only be published in "The Business Daily" and not in any other publication even those owned by the Nation Media Group Limited.

12. Third, Brian has acknowledged that on 25th January 2017, the Law firm filed a Claim for Defamation against a Mr. Ochieng Rapuro, The Nation Media Group and himself. The suit being Nrb Hcc No.16 of 2017, Kaplan & Stratton Advocates vs. Brian Wasuna, Ochieng Rapuro, Nation Media Group Limited is premised on the Tort of Libel.

13. Before delving into the merit of the Application, it is necessary for this Court to discuss the procedure adopted by the Applicant in

bringing the contempt proceedings. As a starting point the nature of the complaint must be understood. This is because, as will be apparent shortly, at the time of presentation of the Charges the procedure to be followed depended on the nature of the contempt.

14. To be drawn from the language used in the contempt Charges is that due to inaccurate and unfair reporting of the Court's proceedings the Applicant's Right to have its case determined by a fair and independent Tribunal has been adversely affected. In its arguments to this Court, the Applicant characterizes Brian's conduct as amounting to contempt in the face of the Court Record because the Statements were in respect to a Record of the Proceedings.

15. In Arlidge, Eady & Smith on Contempt (2nd Edition), Contempt in the face of the Court is said to be,

“...The category which involves some form of misconduct in the course of proceedings, either within the Court itself or, at least, directly connected with what is happening in Court”. (*my emphasis*)

So Contempt in the face of the Court is that which happens in the vicinity of the Court (often in the presence of the Judicial Officer) but extends to misconduct which is intimately connected with the proceedings of Court. This extension is necessary because some conduct, though not in the vicinity of the Court, can be so directly connected to the proceedings of the Court that it has to be treated as though it happened in the face of the Judicial Officer. An example is where a Newspaper publishes an Article that maliciously and inaccurately ridicules a Judge in regard to Court proceedings. Such affront can be as disrespectful as hurling insults to the Judicial Officer to his/her face in the course of proceedings.

16. From the evidence before Court, the contents of the Articles were based both on the documents and affidavits and also on proceedings before the Court (*see paragraph 14 of the Affidavit of Brian Wasuna*). A report of the pleadings of parties may not, for purposes of characterizing a conduct of contempt of Court, be said to be contempt in the face of the Court. This is because the Pleadings simply capture or reflect the respective cases of the Parties and copies could even be obtained from the parties themselves. On the other hand there would be contempt in the face of the Court if the Report is in respect to proceedings before Court which are under the control and management of the Judicial Officer.

17. Taking the Charges and the Response by Brian, I reach a decision that in so far as the conduct complained of is also in respect to a Report of the Court proceedings, there is an allegation that Brian's conduct was in contempt on the face of the Court. This is a conclusion I draw notwithstanding that there is also an allegation that the Report adversely affected the Plaintiff's Rights to have its case determined by a fair and independent Tribunal which is another specie of interference with the administration of justice.

18. The Charges herein were presented on 4th March 2016. This was prior to the commencement of the Contempt of Court Act which came into force on 13th January 2017. At the time of presentation of the charges, the Law on contempt in relation to interference with the due administration of justice was found in various statutes. One is section 36 (prior to its repeal) of The High Court (Organization and Administration Act) which read:-

“(1) A person who-

- a. assaults, threatens, intimidates or willfully insults a judge, judicial officer or a witness, involved in a case during a sitting or attendance in a court, or while the judge, judicial officer or witness is travelling to and from a court;
- b. willfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;
- c. within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken;
- d. having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being heard or taken after the witnesses have been ordered to leave such room;
- e. causes an obstruction or disturbance in the course of a judicial proceeding;
- f. while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken;
- g. publishes a report of the evidence taken in any judicial proceeding that has been directed to be held in private;
- h. attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence;
- i. dismisses a servant because he or she has given evidence on behalf of a party to a judicial proceeding; or
- j. commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is heard or taken, commits an offence.

2. A police officer may, by order of the Court, take into custody and detain a person who commits an offence under subsection (1) until the Court adjourns.
3. A person who commits an offence under subsection (1) shall on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both.
4. In exercise of its powers under this section, the Court shall observe the principles of fair administration of justice set out in Article 47 of the Constitution”.

While Chapter XI of The Penal Code is dedicated to offences related to the Administration of justice.

19. Section 36 of The High Court (Organization and Administration Act) did not provide for the procedure to be used save that it directed that, in exercise of its Powers to punish for contempt, the Court should observe the Principles of Fair Administration of Justice set out in Article 47 of The Constitution.

20. For procedure, therefore, resort had to be made to Section 5 of The Judicature Act which gave the High Court the same power to punish for contempt as is held in the High Court in England. At the time of presentation of the Contempt proceedings herein, the power to punish for contempt and the procedure for Committal by the High Court of England was found in The Civil Procedure (Amendment No.2) Rules 2012.

21. Because the Charges reveal two specie of interference with Administration of Justice and is therefore a hybrid, the relevant provisions on procedure would be in Sections 3 and 5. Starting with the latter, section 5 on Contempt on the face of the Court, Rule 81.16 reads,

“(1) Where—

(a) contempt has occurred in the face of the court; and

(b) that court has power to commit for contempt, the court may deal with the matter of its own initiative and give such directions as it thinks fit for the disposal of the matter”.

The Rule does not require that the Committal Application receives the permission of the Court.

22. On the other hand for committal applications in relation to interference with due administration of justice which is not in the nature of contempt committed on the face of the Court or constituting of disobedience to an order of the Court or breach of an undertaking to the Court, Rule 81.12 reads:

“(1) This Section regulates committal applications in relation to interference with the due administration of justice in connection with proceedings—

(a) in the High Court;

(b) in a Divisional Court;

(c) in the Court of Appeal;

(d) in an inferior court (which includes a county court); or

(e) which are criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court.

(2) This Section also regulates committal applications otherwise than in connection with any proceedings.

(3) A committal application under this Section may not be made without the permission of the court.

(The procedure for applying for permission to make a committal application is set out in rule 81.14.)

(Rules 81.17(5) and (6) make provision for cases in which both this Section and Section 6 (Committal for making a false statement of truth or disclosure statement) may be relevant.)”

Here permission of the Court is mandatory before the presentation of a Committal application.

23. In so far as the Charges presented by the Applicant may be of a hybrid nature, the Applicant should have, in my view, sought the permission of the Court because one part of the Charges required seeking of permission. I take this view because in its very nature Committal proceedings can lead to the taking away of a person’s liberty and where the Law prescribes a procedural step that is antecedent to proceedings which may lead to the taking away of a person’s liberty then there must be meticulous compliance with procedure. The Right to Liberty is a Fundamental Right (Article 29) which can only be curtailed in a manner that is reasonable and justifiable in an open and

democratic society. Where such society prescribes a procedure in which the Right can be curtailed then it must be assiduously observed.

24. Where the contempt application consists of some aspects which require permission and others which do not, and where it is not desirable or feasible to separate them, then the Applicant should nevertheless seek permission for the entire Application. It is for this reason that I would agree with Brian and fault the manner in which the Applicant has proceeded because permission was not sought. This would be good enough reason for me to dismiss the Charge. But I may be wrong and therefore constrained to discuss the merit of the Charges.

25. But first another preliminary issue. It is argued by Brian that a Charge of Contempt of Court is Criminal in nature and a failure by the Applicant to state the legal basis upon which the charges are brought violates Articles 50(2)(9b) of The Constitution which guarantees every accused person the Right to be informed of the Charge with sufficient details to answer it. The application is assailed for not specifying whether the Charges are brought under the provisions of Section 36 of The High Court (Organization and Administration) Act, 2015 or Section 121 of The Penal Code.

26. This is not a difficult objection to deal with. The invocation of Section 121 of The Penal Code would have to be before a Criminal Court qua Criminal Court. On the part of this Court it is considering a quasi-Criminal matter in its civil jurisdiction. Section 121 of The Penal Code cannot, obviously, be the basis of the charges. It would have to be Section 36 of The High Court (organization and Administration) Act 2015 and Section 5 of The Judicature act, with the latter providing the route for procedure. In any event, save for not specifying the legal provisions under which they are brought, the Charges are in such detail that Brian has been able to mount a robust defence. He does not seem to have been prejudiced in any way. This objection is without merit.

27. As I turn to determine the merit of the Charges, I observe that, the two Articles which have offended the Applicant were not placed before this Court. The onus of doing so would have been on the Applicant who brought the charges. The Court will therefore proceed on the available evidence.

28. The complaint is in respect to two Articles. On the Article dated 3rd February 2016 the Applicant sets out the following particulars:-

d. On the front page of the issue of the Business Daily newspaper, dated 3rd February, 2016, the 1st Article was published by Mr. Wasuna under the sensational banner headline 'Nairobi law firm Kaplan & Stratton entangled in NYS funds theft probe. "Police accused lawyers of helping a mining firm buy property using proceeds of grand theft." It then proceeded to allege that:

"Kaplan & Stratton is the second law firm to be entangled in the NYS theft scandal".

Thereby suggesting that the Plaintiff was deeply involved in the NYS theft scandal, notwithstanding that it had listed other law firms, which it claimed to be under investigations, on its first page".

Is this a fair and accurate Report of the proceedings and documents and affidavits filed herein?

29. In an Affidavit sworn by Mr. Peter Gachuhi sworn on 1st February 2016 in support of the substantive matter herein, he attaches an affidavit of one CPL Saulet Jeremiah Matipei, sworn on 26th January 2016 made in support before the subordinate Court. In Mr. Matipei's Affidavit he states,

"THAT I the applicant am undertaking investigations on an alleged offence of Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code in relation to

- Chase Bank of Kenya, Head office which relates to Account Number 0052304988001, in the names of Ogola and Mujera Advocates.
- Kenya Commercial Bank of Kenya Head Office which relates to account number 0945022833, in the name of Kaplan and Stratton.
- NIC Bank of Kenya Head Office which relates to account number 1000182849, in the name of Akili Minerals Services Limited".

30. He further states,

"That the money which was deposited in these Bank Accounts was later transferred to the above Banks which were then used to buy properties through Advocates".

It seems to me that the Statement that "police accuse Lawyers of helping a mining firm buy property using proceeds of grand theft" was not an inaccurate Report of what Cpl. Malipei (a Police officer) had alleged.

31. There is then the Statement "Kaplan & Stratton is the second Law firm to be entangled in the NYS theft scandal". From the affidavit of Cpl. Malipei (See above) two Law firms are mentioned, Ogola and Mujera Advocates and Kaplan and Stratton, and to that extent a portion of the Statement is fair and accurate. However, the Applicant asserts that the use of the word entangled suggested that the Law Firm was deeply involved in the NYS theft scandal.

32. In the Concise Oxford English Dictionary, 12th Edition, the word 'Entangled' means,

i. make tangled

ii. involve in complicated circumstances

Elsewhere, Entangle has been assigned the following definition:-

i. to wrap or twist together

2.a) to involve in a perplexing or troublesome situation. Became entangled in a lawsuit.

b) to make complicated. The story is entangled with legends.

(merriam-webster-<https://www.merriam-webster.com>)

33. From the affidavit of Mr. Matipei, the Police were alleging that some monies stolen from NYS was deposited in the Bank Account in the name of Kaplan and Stratton and was then used to buy properties through Advocates. Given this allegation by the police, can it be said that the Law firm was involved in complicated circumstances or in a perplexing or troublesome situation? On my reading of the impugned part of the Report and my understanding of the word 'entangle' (as defined) I am unable to say that the allegations made by the Police did not place the Law firm in a troublesome situation. That is, that the accusation itself was troubling. This is not the same as saying that the Law firm was deeply involved in the NYS theft scandal or guilty of any wrongdoing. The Headline itself was clear that the issue of the theft was under probe. While the Reporter could have used a more benign word, I am unable to find the Report was inaccurate in the manner suggested by the Applicant or at all.

34. The Court makes this finding aware that Brian had argued that the Headline is made by the editorial team while the Reporter is responsible for the body of the story because the word 'entangled' was also found in the body of the story.

35. I turn to the publication of 5th February 2015. On this, the Applicant takes issue as follows:-

“The 2nd Article was printed and published on page 9 of the issue of the Business Daily dated 5th February, 2015, under the heading “Banking fraud police make fresh Kaplan & Stratton NYS cash claims”. The text of the article contained the following;

“The BFIU says Mayfox received sh.10.8 million from one of the prime suspects in the NYS theft, whom it has declined to name to avoid interfering with the probe. The law firm (meaning Kaplan & Stratton) says Mayfox sent it the amount to pay for stamp duty and other charges for the increase of the mining firm’s nominal capital”.

This was once more a mischievous misrepresentation of the proceedings in Court which, apart from sensationalizing the proceedings, was intended to connect the Plaintiff to the theft of NYS Funds”.

Did the Publication misrepresent the proceedings in Court? Were they sensational and/or intended to connect the Applicant to the theft of the NYS Funds?

36. This Court has familiarized itself with the Affidavits and documents which Brian alleges were the source of this Report. In this regard the Affidavit of Sautet Jeremiah Matipei sworn on 2nd February 2016 is the star Document.

37. In the first affidavit of 26th January 2016, the Police had asserted that ‘money which was deposited in these Bank Accounts was later transferred to the above account which were then used to buy properties through Advocates’. One of the ‘above’ accounts was an account in the name of Kaplan and Stratton. In addition, this was in respect to the suspects or suspects named in that affidavit. On 2nd February 2016, Mr. Matipei makes the following allegations,

“The Respondent believes the Applicant might have received the stolen Funds from National Youth Service, from other means such as cash deposits or from other suspects that made it difficult to determine the amount received by the Applicant”. (*my emphasis*)

In this second affidavit the Police Officer makes further allegation in the following respect,

(i) the money received by the Applicant was not only through inter-account transfer but also in cash.

(ii) the money was from other (unnamed) suspects.

These were fresh allegations and the Headline was a fair Report.

38. As to the body of the Report as set out in the particulars of Charge it is a faithful reporting of what was deponed in the filed affidavits. In respect to the statement,

“The BF14 says Mayfox received Kshs.10.8million from one of the Prime suspects in the NYS theft, whom it has declined to name to avoid interfering with the probe”

are two dispositions on the affidavit of Mr. Matipei,

“10. THAT Mayfox Mining Company Limited received Kshs.10,800,000 from one of the Prime suspects who is still at large who received money from National Youth Service, and RTGS Swift is annexed hereto and marked ‘SSM2’ ,,,,,,

16. THAT investigations in this matter are ongoing and revealing any further information at this stage will prejudice the ongoing investigations and potential witnesses are likely to be intimidated and/or interfered with and crucial evidence/exhibit lost”

39. There is then the position attributed to the Applicant which is as follows,

“The Law firm (meaning Kaplan & Stratton) says Mayfox sent it the money to pay for stamp Duty and other charges for the increase of the Mining firms Nominal Capital”.

Yet there is another passage which Brian depones was also part of the story (and which has not been controverted by the Applicant):-

“Kaplan & Stratton has denied that the Khs.3.077 million received from Mayfox is part of funds looted from NYS”.

40. Reading the two together, the Court has to find that it is a faithful Report of what Mr. Peter Mbutia Gachuhi (*a partner in the Law firm*) deponed in paragraph 6 and 7 of his affidavit of 2nd February 2016 which is reproduced below:-

6. THAT in respect to paragraph 11 of the Replying Affidavit the Applicant states that on the 19th of March 2015 it received the sum of Khs.2,077,080 from its client Mayfox Mining Company Limited being the required amount for payment of stamp Duty and other related costs incurred for the increase of the company’s entire nominal capital. It is therefore not admitted that the said amount was part of the alleged money stolen from the National Youth Service. Annexed hereto and marked as “PMG 2” is a true copy of the firm’s Deposit Request Note dated 15th January 2014 (*sic*). This should read 2015 and not 2014.

7. THAT the amount of Kshs.3,077,080 was disbursed on behalf of the Company in accordance with the Deposit Request Note towards payment of stamp duty on increase of the Company’s Nominal Capital and related costs. I respectively believe that no preservation order should therefore be made in these proceedings.

Annexed hereto and marked as “PMG 3” are true copies of receipts reflecting the said payments. (*my emphasis*).

41. As would now be clear, this Court is unable to find that the Reports published in “The Business Daily” Editions of 3rd February 2016 and 5th February 2016 were an inaccurate or unfair Report of the Affidavits and Documents filed in these proceedings. Neither were they a false account of the proceedings themselves. For all the reasons stated, I find no merit in the Committal Application and it is hereby dismissed with costs.

Dated, Signed and Delivered in Open Court this 22nd day of June 2018.

F. TUIYOTT

JUDGE

In the presence of:

Dat h/b Amako for Applicant

Ochieng for Brian Wasuna

Nixon-Court Assistant