



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 2 OF 2018

JOSPHAT MURIUKI KITHUMBU.....APPLICANT/PLAINTIFF

VERSUS

ETHAN NJERU KITHUMBU.....1ST DEFENDANT/RESPONDENT

ROYAL MEDIA SERVICES LTD T/A

WIMWARO FM.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the application dated 22/05/2018 seeking for orders that the 1st defendant be held in contempt of the orders issued on 22/02/2018 and be committed to (6) months imprisonment or pay a fine of Kshs.10,000,000/= or have his private property attached.
2. The grounds supporting this application are that the 1st respondent/1st defendant has continued to defame the applicant even after this court's temporary orders to restrain the defendants from doing so. The respondent has continually maligned the applicant by way of verbal defamatory utterances/words in their home village which has greatly injured the applicant.
3. This continued disobedience by the respondent has continued to injure the applicant's reputation and caused hostility against the applicant from his family. It has also caused a threat to the applicant's personal security in the village where he comes from. In the event that the respondent is not punished for contempt, he is likely to continue with the same conduct which will greatly injure the plaintiff.
4. In his replying affidavit sworn on 31/08/2018, the respondent denies the allegations that he has continued to defame the applicant even after the orders of the court. He further states that the applicant is his younger brother and is using his powers as the County Executive Commissioner to intimidate and harass him.
5. In the further affidavit of one Stephen Ngari Mbui a witness of the applicant sworn on 29/06/2018, it is deposed that on 13/05/2018 the deponent found the respondent/1st defendant addressing a number of people unknown to him. He was telling them that the applicant was trespassing on his land with the intention of stealing it from him. The respondent further said that the applicant was using his powers as the County Executive Commissioner to take the shamba from the respondent. The deponent then telephoned the applicant and informed him.
6. The respondent in his supplementary affidavit denied the allegations of continued defamation adding that the witness of the applicant had been paid to make false dispositions before the court.
7. The applicant filed submissions in which he identified the issue for determination in this application is whether the applicant is in contempt of the orders issued on 22/02/2018. The importance of obeying court orders was emphasized by the applicant who relied on the case of ***ECONET WIRELESS KENYA LTD VS MINISTER FOR INFORMATION & COMMUNICATIONS OF KENYA & ANOTHER*** ***1KLR 828*** where Ibrahim, J. as he then was, held:-

It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.

8. It was argued that this court issued orders restraining the respondent from uttering defamatory words against the applicant or/and publishing such words in any manner pending hearing inter parties of this application.
9. The applicant submitted that the orders of the court were clear and unambiguous and that the applicant was served with them as required

by the law. Service was duly acknowledged by the applicant by appending his signature on the relevant documents.

10. It was further stated that the orders have not been vacated and are therefore still valid. The applicant has adduced evidence as to the disobedience of the court's orders which has not been denied.

11. The issue in this application was stated by the applicant broadly, that this court has an obligation to determine whether the respondent has disobeyed this court's orders issued on 22/02/2018. This main issue consists of the following components:-

i. *Whether this court has jurisdiction to determine this application for contempt of court.*

ii. *Whether there exists any valid orders of the court.*

iii. *Whether the said orders were served on the respondent.*

iv. *Whether the respondent is in contempt of the orders.*

12. The importance of jurisdiction was explained in the case of **LILLIAN "S" VS CALTEX KENYA LIMITED [1998] KLR 1** by Nyarangi, J. as follows:-

Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it hold the opinion that it is without jurisdiction... Where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

13. The jurisdiction to hear cases of contempt is donated to the Court of Appeal and to the High Court by virtue of Section 5 of the Judicature Act. It provides:-

(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 such 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.

14. It is imperative to examine the purpose served by court orders and the importance of obeying such orders. As was observed in the case of **ECONET WIRELESS (supra)**, obedience of court orders serves the purpose of maintaining the rule of law and promoting order in society. This position was affirmed in the case of **BOB COLLYMORE & ANOTHER VS CYRIAN NYAKUNDI [2016] eKLR** where the court cited the holding of the Court of Appeal in **WILDLIFE LODGES LIMITED VS NAROK COUNTY COUNCIL & 3 OTHERS [2011] eKLR** as follows:-

It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, resulting the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...

15. The applicant filed this case of damages for defamation on 22/02/2018. Accompanying the plaint and the plaintiff's statement of evidence and the list of documents was a notice of motion dated 22/02/2018 under certificate of urgency in which the following orders were issued pending hearing inter partes:-

(a) That pending the hearing and determination of this application inter partes, a temporary injunction be and is hereby issued restraining the defendants/respondents, jointly and severally, whether by themselves, their servants, agents employees, officials or any other person whomsoever from publishing by way of radio, social media or any other method, defamatory words or information against the plaintiff/applicant.

(b) That pending the hearing and determination of this application inter partes, a temporary injunction be and is hereby issued restraining the 1st defendants/respondents, jointly and severally, whether by themselves, their servants, agents employees, officials or any other person whomsoever from moving uttering all manner of defamatory words or publication in person and/or by way of radio, social media or any other method, against the plaintiff/applicant.

(c) That this application be heard on 14/03/2018 upon being served on the respondents.

16. The record shows that the orders of the court are still in existence for they have not been vacated. The wording of the order is such that they are clear and capable of being understood.

17. The orders were served on the respondent on 26/02/2018 by one Dickson Kariuki a process server. The affidavit of service sworn on

12/03/2018 was filed in court on 14/03/2018. The respondent has not denied service of the said orders.

18. The supporting affidavit of the applicant and the further affidavit of Stephen Ngari Mbui states that on 13/05/2018 the respondent was found addressing a group of people on the same subject of alleged defamatory nature that gave rise to the filing of this suit.

19. In his replying affidavit the respondent denies that he is in contempt of the court orders. He did not give any details of his denial. In response to the further affidavit, the respondent uttered defamatory words on 13/05/2018. He dismisses the deponent of the affidavit as a liar who has been paid by the respondent.

20. The respondent gives a general denial to the serious allegations of contempt. It lacks any details to controvert the evidence on oath of the applicant's witness.

21. The applicant in his submissions argue that the respondent is not remorseful in that he stated in his replying affidavit that he was "just giving his views and grievances strict proof thereof.

22. I have looked at the two replying affidavits sworn by the respondent on 15/03/2018 and on 31/05/2018. The first affidavit is in answer to the notice of motion dated 22/05/2018, which is still pending hearing. It is this affidavit paragraph 6 that contains the statement referred to. The affidavit in answer to this application for contempt does not contain such words.

23. However, I find that the respondent was served with the orders of the court issued on 22/02/2018. The orders were still valid at the time the respondent was heard uttering the words alleged. The respondent has not adduced any evidence on oath to sufficiently controvert the allegations made against him.

24. In my considered opinion, the applicant has satisfied the requirements in this application.

25. I find him guilty of contempt of court in respect of the orders issued on 22/05/2018 and he is hereby convicted accordingly.

26. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 31ST DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muthama for Kamunda for applicant

Respondent in person