



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT
CIVIL SUIT NO 431 OF 2015

PETER NYABUTI.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT

DAVID HERBLING.....2ND DEFENDANT

RULING

This is a Ruling emanating from an application for contempt dated 21st June, 2016 filed against the Defendants. The facts as contained in the pleadings are that an order was issued on 23rd day of December, 2015 restraining the defendants, their agents, employees, servants or any other person claiming through them from further publishing any article, words, material or remarks against, of and concerning the plaintiff in relation to the alleged 'Tanzania Big Loan Scandal'. That in 2006 and in furtherance of the disobedience of the court's order, the 1st Defendant continued to publish the defamatory articles against the plaintiff.

The defendants opposed the application on two major grounds; that the alleged order was not properly served and that the scope of the order did not include pulling down of the online publications concerning the Applicant. In his grounds of objection, the 1st Respondent maintains that he has complied with the order issued on the 23rd December, 2015. From the above facts, the following issues fall for determination.

- i) Whether the Respondents had knowledge of the order of the court issued on 23rd December, 2015.
- ii) Whether the said orders were vitiated by the Respondents.

I. Whether the 1st Respondent had knowledge of the order of the court issued on the 23rd December, 2015.

It is absolutely important to appreciate the facts that knowledge of the order is the basis for breach and contempt. The court of Appeal has pronounced itself in this matter in **Shimmers Plaza Ltd Versus NBK (2015) eKLR Karanja Mwewa Mwilu JJA** approved the growing jurisprudence right from the High Court that has reiterated that knowledge of a court order suffices to prove service and overrides everything. It dispenses with personal service for the purposes of contempt proceedings.

The 1st Respondent has stated that there was no proper service as there was no personal service of the order. However, in the grounds of objection it has admitted that he has complied with the order save that the alleged breach did not fall within the scope of the order. This only leaves an impression that the 1st Respondent was aware of the existence of the order. **Lenaola J in Basil Criticos versus Attorney General & 8 others (2012) eKLR** had this to say concerning the knowledge of the order in contempt proceedings;

“...the law has changed and as it stands today knowledge supersedes personal service.... Where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

Accordingly, in the matter, clearly, the 1st Respondent cannot be said to have been unaware of the existence of the order. The company knew that an order had been issued by the court since as per their own admission; they partly complied with its terms. The court also notes that the defendants were represented by an advocated who at all material times was aware of the court order and was expected to communicate the same to her clients.

II. Whether the said orders were vitiated by the 1st Respondent.

The order was issued in 2015. As per the Affidavit sworn by the Applicant and the annexures thereto, in 2016, the applicant continued with the publication. This was uncontroverted by the Respondent. All the Respondent had to say is that the order did not compel them to pull down online publication. In other words, the Respondents impute the scope of the allegedly disobeyed order. In case of **Kenya Tea Growers Association Versus Francis Atwoli and 5 others (2012) eKLR** Lenaola J observed

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the court is punishable as contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal.... Even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provide no excuse for disobeying it. The Remedy is to vary or discharge it.”

From this conceptualization, it is imperatively important to note that obeying court’s order is paramount. This is in line with protecting the integrity of the court as held in **Teacher Service Commission Versus Kenya National Union of Teachers & 2 others**. If one is dissatisfied with an order the remedy is to challenge or discharge it through a sound process. It is not enough to impute its scope. Accordingly, a review of the annexures reveals that the publication was taken in 2016 one year after the order had been issued. These points at one direction, that the publication was made in total disregard of the court order and in disobedience to this Honourable court. It is for this reason that I proceed to find the Respondent is guilty of contempt.

Order 40 rule (3) 1 of the civil procedure Rule provide that “ in case of disobedience or breach of any such terms, the court granting an injunction may order that property of the person guilty of such disobedience or breach be attached and, may also order such person to be detained in prison for a term not exceeding six months.

The contempt of court Act 2016 also provides an alternative of a fine. Having found the defendants guilty of contempt, i hereby fine each of them ksh 200,000 for the contempt and in default to serve three months in jail. The fine to be paid a within 14 days failing which a warrant of arrest to be issued.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 22nd Day of **September, 2017.**

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiff

..... for the Defendant