



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 111 OF 2016

CECIL MILLER.....PLAINTIFF/APPLICANT

VERSUS

JACKSON NJERU.....1ST DEFENDANT/RESPONDENT

JACQUELINE ACHIENG.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff moved this Honourable court by way of a Notice of Motion dated the 4th day of July, 2016 seeking the following orders;

- 1) Spent
- 2) THAT an order of committal to prison be made against the 1st Defendant/Respondent for a period of six months.
- 3) THAT an order be made directing the 1st Defendant/Respondent to shut down his face book page known as buyer beware.
- 4) THAT the Honourable court grants any other Oder or further orders of the Honourable court geared towards protecting the dignity and authority of the Honourable Court deemed expedient in the circumstances.
- 5) THAT costs be provided for

The application is premised on the grounds set out on the body of the same and it's supported by the affidavit sworn by the plaintiff, Cecil Miller.

The plaintiff avers that on the 14th day of June 2016, the court made an order citing and convicting the defendants herein for contempt of court after they intentionally disobeyed the court orders restraining them from posting on the face book or any other social media platform, commenting, writing or producing any platform for comments by the general public about the plaintiff.

That on the same day 14th June, 2016, the first defendant posted on his face book page the words, Jackson Njeru;

I don't know why the court didn't produce the people who wrote the contempt. This is the path I chose and as they say Choices have consequences na jela haikujengewa wanyama;

Freddy Holysan City boy;

“Judiciary Nonsense fuck it nkt why is the same judiciary not jailing akina Muthama and Kuria? Let them go to hell meen,”

Kiprotich Koskey Koimur; **“Fuck the Judiciary; dead institution”;**

Kevin Ouek Lithumi; **“Kazi ianze sasa”**,

Pauline Kamanda; **“Who was the presiding Judge?”**

Jackson Njeru; **“Msagha Mbogholi.”**

The Applicant avers that the first Respondent's Facilitation and instigation of the said discussions are in breach of the court orders issued by the court on the 12th day of April, 2016 and confirmed on the 25th day of April, 2016. He is apprehensive that the defendants/Respondents and/or their agents shall continue to breach the said orders of the court thereby persistently attacking the dignity and authority of the court, despite the punishment meted out on 14th June, 2016.

The Respondent opposed the application by way of the grounds of opposition, notice of preliminary objection and a replying affidavit all dated the 23rd September, 2016. The common grounds in the three documents are that;

1. Leave was not obtained before filing the application.
2. The Electronic printout annexed to the plaintiff's affidavit is inadmissible for want of mandatory certificate as required by Section 106 (4) (B) of the Evidence Act.
3. The contempt involves potential loss of liberty and demands a high threshold of proof which the plaintiff has not met.
- 4 The application was brought to vex and oppress the Respondent using the legal process and that the orders were given without disclosure of the existence of other two cases involving the parties herein.
5. The prayer for mandatory injunction should not issue as the same has not been sought in the plaint.
6. The plaintiff's prayer to court to have the first Respondent imprisoned for a period of 6 months has no basis in law.

The application proceeded by way of written submissions. In his submissions, Counsel from the plaintiff submitted that the first Respondent posted on his face book page the words set out earlier in this ruling and those comments elicited comments from the members of face book page.

The Applicant further submitted that it is not in dispute that the first Respondent was aware of the court order because he had just been found guilty of contempt of the same orders on the same day.

On the contents of the replying affidavit, Counsel for the applicant submitted that there are only two suits between him and the Respondent being **Criminal Case No 549/2016 (Republic Vs Jackson Njeru)** and the suit herein for defamation. On the issue of leave, the applicant submitted that the application herein arises from breach of a court order and therefore it was not necessary for the applicant to seek leave

before filing the same. The **case of Christine Wangari Gachege Vs Elizabeth Wanjiru Evans and 11 others** was relied on.

On the allegation that the application does not meet the requirements of Section 106 (B) (4) of the Evidence Act, it was contended that a supplementary affidavit was filed in court on the 7th November, 2016 which addressed that issue and the same was filed by consent of the 1st Respondent and in any event, it was submitted, the evidence annexed to the said affidavit is not disputed. The court was urged to grant the application so that the dignity of the court should be preserved and that by granting prayer 3 of the application, the 1st Respondent would be deterred from trampling on the court's dignity and the Applicant's rights.

On his part, the first Respondent submitted that the law applicable at the material time was the repealed Section 36 (3) of the High Court Organization and Administration Act 2015 which provided for a maximum sentence of 5 days or a maximum of Ksh.100,000 or both.

It was further submitted that the application ought to have sought leave under Rules 81:11 and 81:12 of the Civil Procedure (Amendment) Rules, 2012. Reliance was made on the **case of Wangari Gachege Vs Elizabeth Wanjiru Evans (2014) eKLR** where the court held that the plaintiff's failure to seek leave is fatal to the application.

Submitting on the electronic evidence, Counsel for the Respondent argued that the authenticity of that evidence has not been tested to enable the court consider its weight. He contended that the supplementary affidavit filed by the Applicant was prejudicial and oppressive and ought to be disregarded as it disrupts the adversal nature of the proceedings. That the same was filed as a ploy to fill in the defects in the applicant's case after the Respondent had filed his grounds of opposition. He urged the court to strike it out.

It was contended that the applicant has not proved beyond reasonable doubt that the first Respondent is in contempt of court as the print out relied on by the applicant is hearsay, the same having originated from one Peter Wena who did not swear an affidavit to verify the source of the information. It was further submitted that the criticisms in the posts were directed at the court and not the applicant. He relied on the defences to contempt of court as laid out in the Contempt of Court Act and argued that the posts containing fair comments on the general working of the court were made in good faith and that it was fair and substantially accurate report of judicial proceedings.

On whether a prayer of mandatory injunction should issue, the court was told that no prayer for a mandatory injunction was ever made in the plaint and therefore that prayer should fail. That the plaintiff has not demonstrated how the protection of his reputation warrants the closure of the face book page which would be an excessive invasion of the defendant's freedom of expression and information. Finally, the court was told that the real dispute between the plaintiff and the first Respondent is a pending maintenance, Cause No.1114/2012 which has been pending in court while the plaintiff drags the 2nd Respondent and anyone perceived to be close to her through endless criminal cases and applications such as the one herein. The court was urged to dismiss the application.

The court has carefully considered the application, the affidavits and the submissions made by the respective parties herein. In my view, the following are the issues for determination;

1. Was the leave of the court necessary before taking out the contempt of court proceedings?
2. Is the electronic evidence relied on by the Applicant inadmissible for want of the mandatory certificate under section 106 (4) (b) of the evidence Act cap 80 laws of Kenya.
3. Can a prayer for mandatory injunction be granted in an application when a similar prayer is not prayed for in the plaint.

4. Is the 1st Respondent guilty of contempt of court?

From the facts as pleaded by the Applicant, the Respondent is alleged to have posted in his face book page, some phrases which according to the applicant, he had been restrained from posting vide a court order that had been issued on the 14th day of June 2014. For avoidance of doubt, I find it fit to reproduce herein below the relevant part of the said order thus;

“A temporary injunction be and is hereby granted restraining the defendants/ Respondents whether by themselves their agents and/or servants from posting on fence book or any other media platform, community, writing or providing any platform for comments by the general public about the plaintiff’s/applicant on any media platform.”

The said orders were to remain in force for 14 days from the date of the order but the record shows that when the matter came up before Justice Aburili on 25/4/2016, they were confirmed to last until the suit is heard and determined. The suit is yet to be heard.

Following the posting by the first respondent, there were various reactions on his face book page by his followers, the particulars whereof have been set out earlier in the ruling. Those comments are what necessitated the filling of the application herein.

What is contempt of court? According to the Black’s Law Dictionary;

“Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolvent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body”

In the case of **Econet wireless Kenya Limited Vs minister for information & Communication of Kenya & Another**, the court stated as follows;

“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 the 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.”

Again, in the case of **Teachers Service Commission Vs Kenya National Union of Teachers & 2 others (2013) eKLR Ndolo J** observed that;

“The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of Justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguard the rule of law”

The judge went further to state;

“I am of the same persuasion that the reason why power is vested in courts to punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and the respect for law and order. As it was in the time of Chief Justice Mckean in 1786 so it is today that courts have a duty to ensure that Citizens bend to the law and not vice versa./ Indeed, if respect for law and order never existed, life in

society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and the rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally, without exception. An order is meant to be obeyed and not otherwise.”

The statutory basis of contempt of court in so far as the High court is concerned is section 5 of the Judicature Act. Section 63 (c) of the Civil Procedure Act provides that a disobedience of an order of a temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor’s property.

Section 5 (1) of the Judicature Act provides as follows;

“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 that power shall extend to upholding the authority and dignity of subordinate courts.”

5(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 (emphasis added)

As to whether leave is necessary before filling of contempt of court proceedings, the rules of Supreme Court made under the Supreme Court of Judicature Act, 1973 provided the procedure of commencing the contempt of court proceedings. Under the said procedure, an application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted, but following the implementation of the famous Lord Wolf’s;

“Access to justice Report 1996” the Rules of the Supreme court of England are gradually being replaced with the Civil procedure Rules, 1999. In the year 2012 the Civil Procedure Rules 2012 come into force and PART 81 thereof effectively replaced order 52 RJC in its entirety. PART 8 (Applications and proceedings in relation to contempt of court”

provide different procedure for four different forms of violations.

Rule 81:4 relates to committal for breach of a judgment order or undertaking to do or abstain from doing an act.

Rule 81:11 committal for interference with the due administration of justice. Rule 81:16 committal for contempt “in the face of the court” and Rule 81:17 committal for making false statement of truth or disclosure statement.

In the case of **Christine Wangari Gachege Civil Case No 456 of 2011**, the court of Appeal correctly pointed out that leave now called “permission” is not required where committal proceedings relate to a breach of a Judgment, order or undertaking. However, leave is still a requirement for applications under Rules 81:12 and 81:17 cited above. I concur with that finding by the court of Appeal.

On the admissibility of the electronic evidence, the same is governed by Section 106 B(4) of the Evidence Act, Cap 80 Laws of Kenya which provides that for electronic evidence to be deemed admissible, it must be accompanied by a certificate in terms of the aforesaid section. The respondent avers that the electronic print out annexed to the affidavit of the applicant is inadmissible as it has not been accompanied by a certificate under Section 106(A) (B). This court has clearly perused the record and it shows that the plaintiff/applicant filed a supplementary affidavit on the 9th day of November 2015. In paragraph 4 of the same, a copy of the certificate is annexed and marked “annexture” CM4”. Though the respondent seems to have issues with the said affidavit, the same is part of the court record and as long as it has not been

expunged from the record, the court cannot shut its eyes to it. I find that the certificate annexed thereto is valid and therefore the electronic evidence sought to be relied on by the Applicant is admissible in evidence.

As to whether a prayer for mandatory injunction can issue where a similar prayer is not made in the plaint, I wish to rely on the case of **Morris and Company Limited Vs Kenya Commercial Bank Ltd & others (2003) 2 EA 605** where it was held inter alia that even though the plaintiff's application for injunction was expressed to be grounded under Rules 1 (a) and (b) and 2 it falls under Rule 2 only. That there being no prayer for a permanent injunction appearing in the plaint, the plaintiff's application for interlocutory injunction was incompetent and was struck out.

Similarly, in the case of **Sunrise Properties Limited Vs Just Investments Ltd & Another (2007)** the court held that the interim relief could not be granted as it was not anchored in the plaint and that failure to anchor it in the claim disentitles the applicant of the same. This court is of the same view as there is no reason for it to depart from the same as they state the current position in law.

As to whether the Respondent is guilty of contempt of court, the element of a Civil Contempt as espoused in a book titled "**Contempt in Modern Newzealand**", were set out as follows:

- a) The terms of the order (or injunction or undertaking were clear and unambiguous and were binding on the defendant.
- b) The defendant had knowledge of or proper notice of the terms of the order.
- c) The defendant has acted in breach of the terms of the order and.
- d) The defendant conduct was deliberate.

These four elements must be proved to make a case for Civil Contempt. Although the proceedings are civil in nature, it is well established that the degree of prove is almost that beyond reasonable doubt but definitely higher than on balance of probability.

Considering the four elements set out hereinabove, I find that the terms of the order were clear, the respondent had knowledge of the order, he acted in breach of the terms of the order and his conduct was deliberate.

This court therefore finds the 1st defendant/Respondent guilty of contempt of court and I convict him accordingly. I decline to grant prayer 3 of the Application. The matter shall be mentioned in a month's time for mitigation and sentencing.

Dated, signed and delivered at Nairobi this 20th day of **December, 2017**.

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L. NJUGUNA

JUDGE

In the presence of

..... ***for the Plaintiff/Applicant.***

..... ***For the 1st Defendant/Respondent.***

..... ***For the 2nd Defendant/Respondent.***