



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 422 OF 2015**

**CYRIAN NYAKUNDI.....PLAINTIFF/APPLICANT**

**VERSUS**

**LARRY MADOWO.....DEFENDANT/RESPONDENT**

**RULING**

1. The application dated 24<sup>th</sup> February 2016 seeks orders *inter alia*:-

**“That this Honourable Court be pleased to order that the Respondent be committed to civil jail for contempt for disobedience of the orders issued on 25<sup>th</sup> January, 2016 by Hon Lady Justice Aburili, sitting in the High Court of Kenya at Nairobi, in HCC No. 422 of 2015 for such a reasonable period as this Honourable Court may deem fit”.**

2. The application is predicated on the grounds stated in the application and is supported by the affidavit sworn by the Applicant, Cyprian Nyakundi

3. The Applicant’s case is that the orders the subject of the instant application were made in the presence of the Respondent’s counsel. It is stated that the Respondent’s counsel requested the court for more time to file a response to the application. That the Respondent’s counsel gave an undertaking that the Respondent would not publish any further defamatory words concerning the Applicant. It is further stated that despite the court order, the Respondent has continued to make defamatory statements in respect of the plaintiff on social media. The Applicant exhibited a screen shot of the Respondents Facebook status update of 10<sup>th</sup> February, 2016 which stated as follows:

**“One of Kenya’s finest lawyers Donald Kipkorir and his esteemed firm KTK Advocates represent me in this frivolous suit by an infamous blogger of broke ‘bigwigs’, social media ‘influencers’ and Sh.50m tweets.”**

4. The Application is opposed. The Respondent filed the grounds of opposition dated 7<sup>th</sup> March, 2016 which state as follows:-

**“i. That there is no substratum to the application, the plaintiff having refused to comply with mandatory provisions of Orders 3 & 5 of the Civil Procedures Rules, 2010.**

**ii. That the application doesn't meet the law on contempt proceedings**

**iii. That the application is fatally defective.**

**iv. That the application is non-meritorious and not maintainable."**

**v. That the suit and application are for dismissal for being an abuse of the court process. "**

5. I have considered the application, the reply to the same and the written submissions filed by the respective counsels for the parties herein.

6. Section of the Judicature Act Cap 8 Laws of Kenya gives this court the power to punish for contempt of court. The said Section provides as follows:

**"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."**

7. On the Applicable procedural law, Section 63 Civil Procedure Act provides as follows:

**"In order to prevent the ends of justice from being defeated,**

**the court may, if it is so prescribed—**

**(a).....**

**(b) .....**

**(c)grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;"**

8. Order 40 rule 3 provides for consequences of disobedience. Order 40 rule 3(1) stipulates as follows:

**"(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months**

**unless in the meantime the court directs his release.**

**(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.**

**(3) An application under this rule shall be made by notice of motion in the same suit"**

9. Black's Law Dictionary (9<sup>th</sup> Ed) defines contempt of court as:-

**"Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."**

10. In the case at hand the plaint dated 9<sup>th</sup> December, 2015 and the Notice Motion application of the same date were filed contemporaneously on 9<sup>th</sup> February, 2015. The plaint sought *inter alia*, damages for

libel. The Notice Motion sought orders of injunction in respect of the alleged defamatory publication. when the application dated 9<sup>th</sup> December, 2015 came up for hearing *inter-partes*, the Respondent's counsel gave an undertaking not to publish any defamatory words concerning the Applicant.

The Applicant's counsel stated in court as follows:

**"We have agreed to come back on 25<sup>th</sup> February, 2016 for inter-partes hearing. We need two weeks to file a replying affidavit. The plaintiff to have leave to file supplementary affidavit. If need be - my client undertakes not to publish any more stories of the plaintiff."**

The court thereafter granted the orders sought and ordered the Defendant to restrain from publishing any defamatory words concerning the Plaintiff. It is therefore clear that the Defendant was aware of the court orders but defied the same.

11. In the case of **Shimmers Plaza Limited (supra)** the Court of Appeal stated thus:

**"The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to *willfulness and mala fides disobedience*. This Court in the Wambora case (supra) affirmed the application of these requirements.**

**... On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved."**

12. Coming back to the facts of the present application, the Defendant on his facebook page published the words complained of. The publication was definitely contrary to the court orders. I find that the Defendant is in contempt of the court order dated 25<sup>th</sup> January 2016. As stated by the Court of Appeal in the **Shimmers Plaza Limited case (supra)**:-

**"The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy .We think we have said enough to send this important message across."**

13. It has been argued by the Respondent's counsel that Order 3 & 5 Civil Procedure Rule 2010 have not been complied with. According to the Respondent's side, they were only served with the application dated 9<sup>th</sup> February, 2015 which was under certificate of urgency. That to-date, they have not been served with the plaint and the summons. According to the Applicant, the application dated 9<sup>th</sup> February, 2015 together with the plaint were served on the Respondent personally and also served on the Respondent's then Advocates, that is Ms. Owino & Co. Advocates on 21<sup>st</sup> January, 2016. I observe that the allegations of lack of service have been made from the bar. There is no affidavit evidence by the Respondent. The Respondent's counsel was in court on 25<sup>th</sup> January, 2016 when he made the undertaking that is the subject of this application. If the Respondent had not been served one would have expected the matter to have been raised in court at that point. No questions arose at that stage in regard to whether the Respondent had been served with the plaint and the summons. I find that ground without merit.

14. Having arrived at the conclusion that the Respondent is in contempt of court, I allow the application and make the following orders:-

- a) That summons to issue for the Respondent, Larry Madowo to personally appear in Court to show cause on why he should not be committed to civil jail or otherwise penalized for contempt of court.
- b) Mention on 16<sup>th</sup> February,2017 for further directions.
- c) Costs of the application to Applicant.

**Dated, signed and delivered at Nairobi on 30<sup>th</sup> day of Nov.,2016**

**B THURANIRA JADEN**

**JUDGE**