



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**JUDICIAL REVIEW CASE NO. 02 OF 2020**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF: AN APPLICATION UNDER SECTION 3 AND 31 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT 1999, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, SECTIONS 8 AND 9 OF THE LAW REFORM ACT,**

**SECTIONS 2 (1), 7 (1) (B) , 7 (2) (A) (I) & (II) , 7 (2) (D) , 7 (2) (F) , 7 (2) (I) (11), 7 (2) (J) , 7 (2) (N) AND 9 (2) FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015, ARTICLES 10, 20, 21, 22, 42, 69, 70 AND 159(2) OF THE CONSTITUTION OF KENYA 2010;**

**REGULATION 10, 11, 12, 13, 14, 15 AND 16 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION (WATER QUALITY) REGULATIONS 2006; AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

**BETWEEN**

**ERDEMANN PROPERTY LIMITED.....APPLICANT**

**VERSUS**

**EXPORT PROCESSING ZONES AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**WATER RESOURCES AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**AND**

**LONDON DISTILLERS (K) LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**MAVOKO WATER & SEWERAGE COMPANY.....2<sup>ND</sup> INTERESTED PARTY**

**COUNTY GOVERNMENT OF MACHAKOS, DEPARTMENT OF**

**ENVIRONMENT & NATURAL RESOURCES.....3<sup>RD</sup> INTERESTED PARTY**

**DENVIC PROPERTY MANAGERS LIMITED.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

By a Notice of Motion application dated the 12<sup>th</sup> February, 2020, the 1<sup>st</sup> Interested Party/ Applicant seeks for the following orders:

1. Spent
2. That Summons be issued for the personal attendance of NANCY MWIRERIA Advocate and JOHN ZEYUNG YANG the Director and

proprietor of ERDEMANN PROPERTY LIMITED at the hearing of this application on a date to be determined by this Honourable Court.

3. That NANCY MWIRERIA Advocate and JOHN ZEYUNG YANG the Director and proprietor of ERDEMANN PROPERTY LIMITED be cited for contempt of this Honourable Court and consequently be committed to civil jail for a period of not less than six (6) months or any other period and or any other sanction as this Honourable Court may deem fit and appropriate.
4. The Warrants of arrest be issued to the Directorate of Criminal Investigations to be executed through OCS Central Police Station Nairobi and or Kilimani Police Station for the production of NANCY MWIRERIA Advocate and JOHN ZEYUNG YANG the Director and proprietor of ERDEMANN PROPERTY LIMITED RITY before this Honourable Court in handcuffs immediately to enforce prayer (2) and arraignment before this Honourable Court of the said NANCY MWIRERIA Advocate and JOHN ZEYUNG YANG on the date and time indicated pending the hearing and determination of this application.
5. Pending the hearing of prayer (c ) for committal herein , NANCY MWIRERIA Advocate and JOHN ZEYUNG YANG the Director and proprietor of ERDEMANN PROPERTY LIMITED be ordered to purge the suit contempt and in so doing, to publish by way of paid advertisement a press statement and apology to this Honourable Court for the false and reckless statements made on 30:01:2020 by NANCY MWIRERIA Advocate and JOHN ZEYUNG YANG the Director and proprietor of ERDEMANN PROPERTY LIMITED within 3 days of service in bold print in 3 daily newspapers having nationwide coverage as well as on the online platforms and in default NANCY MWIRERIA Advocate and JOHN ZEYUNG YANG the Director and proprietor of ERDEMANN PROPERTY LIMITED should therefor not be heard in this application unless he contempt is purged.
6. This Honourable Court be pleased to issue a recommendation to the Law Society of Kenya for appropriate disciplinary proceedings to be commenced against NANCY MWIRERIA Advocate for professional misconduct and the cancellation of her Licence to practice as an Advocate.
7. This Honourable Court be pleased to issue such other or further orders as it shall deem just in the circumstances.
8. That costs of this Application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of BENJAMIN LANGWEN who claims NANCY MIRERI Advocate under instructions of JOHN ZEYUN YANG hired journalists on 30<sup>th</sup> January, 2020 to cover court proceedings in the instant case and made an oral application before the Judge to recuse himself. It contends that in a press statement to the journalists, thereafter, caused to publish that LONDON DISTILLERS (K) LTD was emitting effluent that was hazardous to life and environment. Further, failing to conceal to the public that these are active proceedings and evidence before court. It referred to various press statements in several newspaper articles including social media and insists as a result of the said publications the sanctity of the court was scandalized, demeaned and exposed to public ridicule and contempt. Further, the dignity of the court has been dealt a fatal blow and stands to suffer irreparable harm. It reiterates that the 1<sup>st</sup> Contemnor NANCY MIRERI Advocate knowingly interfered with the due process of the court by attacking the personal character of the Judge.

The application is opposed by the ex parte Applicant/ Respondent that filed Grounds of Opposition dated the 25<sup>th</sup> February, 2020 including a replying affidavit sworn by ZEYUN YANG, its director where he deposes that the said application is mischievous and in bad faith, manifestly scandalous as well as amounts to assault of the character of the persons sought to be cited for contempt. He does not deny that the instant matter was slated in court on 30<sup>th</sup> January, 2020. He contends that the allegations by the 1<sup>st</sup> Interested Party that he hired a battery of journalists to specifically cover the proceedings of the instant date are misleading, uncorroborated and untrue. He insists Court proceedings are public unless attendance is restricted. He avers that the instant application does not demonstrate how together with the Counsel who appeared for the ex parte Applicant interfered with administration of justice nor does it evince to the required standard of proof. He states that the said publications are neither offensive nor abusive and were not meant to bring the Court into disrepute nor were they meant to interfere with administration of justice. Further, there is no evidence that the publishers of the alleged impugned statement acted in malice or imputed improper motives on the part of the court. He insists the excerpt depicting the impugned statement by Counsel who appeared for the ex parte Applicant is not a true reflection of the entirety of the statement given by the said person. Further, none of the statements has been annexed.

The application was canvassed by way of written submissions.

#### **Analysis and Determination:**

Upon consideration of the Notice of Motion application dated the 12<sup>th</sup> February, 2020 including the respective affidavits, grounds of opposition and rivalling submissions, the only issue for determination is whether NANCY MIRERI Advocate and JOHN ZEYUN YANG are in contempt of court having made comments to the media in respect to Court proceedings dated the on 30<sup>th</sup> January, 2020.

The 1<sup>st</sup> Interested Party/ Applicant in its submissions reiterated its claim and insisted that the parties named above should be cited for contempt. Further, that the contemnors should be punished for contempt of court and referred to the articles relied on in its affidavit in support of the instant application. It also sought for costs. To support its arguments, it relied on the following decisions: **Nairobi HCCC No. 773 of 2004 Equip Agencies Limited Vs Credit Bank Limited; Teachers' Service Commission V Kenya National Union of Teachers & 2 Others Petition NO. 23 of 2013 and Samson K. A. Tim V D. M Machage (2019) eKLR.** The ex parte Applicant in its submissions aver that the instant application should have been brought under the realm of Rule 81.12 which deals with committal applications in relation to interference with due administration of justice and not committed on the face of court. Further, that the 1<sup>st</sup> Interested Party ought to have sought for leave of court before filing the instant application. It contends that the evidence led by the 2<sup>nd</sup> Interested Party has not met the evidentiary threshold warranting the grant of orders sought. To support its arguments, it relied on the following decisions: **Kaplan & Stratton Advocates V Chief Magistrate 's Court & Another (2018) eKLR; Christine Wangari Chege V Elizabeth Wanjiru Evans & Others (2014) eKLR** as restated in the case of **Terry Wijenje & 5 Others V Directline Assurance Company Limited & 6 others (2020)**

eKLR; E. M V K. F. M. & N. G. K (2020) eKLR and JGK V FWK (2019) eKLR.

Black's Law Dictionary (10th Edition) defines contempt of court as: **“Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”**

In the instant case, I note the 1<sup>st</sup> Interested Party claims NANCY MIRERI Advocate and JOHN ZEYUN YANG hired journalists to cover the court proceedings of 30<sup>th</sup> January, 2020 and thereafter made malicious reports on media claiming the 1<sup>st</sup> Interested Party was emitting effluent that was hazardous to life and environment, yet this had not been proven. It contends that the alleged reports in the media culminated in this court suffering ridicule. It sought for the two aforementioned parties to be cited for contempt; the Advocate to undergo disciplinary proceedings and for the ex parte Applicant to publish bold apologies in the three newspapers as well as both alleged contemnors to be committed to civil jail for six (6) months.

On the issue of Civil contempt, Justice Mativo, in the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** stated that: **' writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

**‘there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (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's conduct was deliberate.’**

See also the decisions of **Kaplan & Stratton Advocates V Chief Magistrate ‘s Court & Another (2018) eKLR; Woburn Estate Limited v Margaret Bashforth [2016] eKLR** and **Samuel M. N. Mweru & Others V National Land Commission & 2 Others (2020) eKLR.,**

*Section 29 of the Environment and Land Court Act, provides that contempt of Court is an offence punishable, upon conviction to a fine not exceeding Kshs.20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.*

I have had a chance to peruse the annexures to the application for contempt and I note the issues raised herein concern reporting of a case pending in court within the media. Section 109 of the Evidence Act provides that: **‘ The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.’**

Insofar as I have seen newspaper and media articles in respect to the proceedings herein, I opine that the burden of proof was upon the 1<sup>st</sup> Interested Party to prove how the two cited persons were acting in contempt of court. I note in the newspaper article the media reported on the instant case and it is trite that court cases are public unless there is an express order stopping the media from reporting it.

Further, the 1<sup>st</sup> Interested Party did not furnish court with some of the recordings. It is my considered view that if the 1<sup>st</sup> Interested Party felt that it had been defamed by the media reports, it had recourse to commence civil proceedings for defamation. It is trite that Contempt proceedings are criminal in nature and hence the burden of proof on the 1<sup>st</sup> Interested Party to prove that the same is ongoing which is not the case in this instance. I note certain prayers sought in the instant application touch on interference of administration of justice and have been brought under the realm of Rule 81.12 of the UK Civil Procedure (Amendment No.2) Rules 2012, which applies in this instance by virtue of section 5 of the Judicature Act. Further, I note the said Rule deals with committal applications and in associating myself with the decision of **Kaplan & Stratton Advocates V Chief Magistrate ‘s Court & Another (2018) eKLR**, I am of the view that the 1<sup>st</sup> Interested Party ought to have sought for leave of court before filing the instant committal application.

Based on the facts as presented while relying on the legal provisions cited above and associating myself with the quoted decisions, I find that the 1<sup>st</sup> Interested Party has failed to tender adequate evidence to prove how NANCY MWIRERIA Advocate and JOHN ZEYUNG YANG are in contempt of an order of the court. I opine that the 1<sup>st</sup> Interested Party has failed to demonstrate how there was willful and mala fides disobedience of the Court Order since the issues raised were published in the media. Further, I am of the view that if the 1<sup>st</sup> Interested Party had grievances with the Exparte Applicant's Counsel, it can proceed to lodge disciplinary proceedings, with the Law Society of Kenya and will not require an order of this court to do so. Further, there is no demonstration of Contemnors deliberate and intentional violation of the court's dignity or authority. I find that the 1<sup>st</sup> Interested Party's' allegations herein have not met the threshold required in contempt proceedings as envisaged by the law as the standard of proof in the said proceedings is higher than the balance of probabilities and almost beyond reasonable doubt

It is against the foregoing that I find the Notice of Motion application dated the 12<sup>th</sup> February, 2020 unmerited and will proceed to dismiss it. Costs will be in the cause

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**