



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 338 OF 2012

PETER M. F. MBITHI.....PLAINTIFF

V E R S U S

1. JOSEPH MWANZIA MBITHI
2. JOSEPHAT MWEU MWANZIA.....DEFENDANTS

RULING

The Plaintiff's suit filed by plaint dated 6th July, 2012 is for a permanent injunction and damages in defamation and related reliefs.

Together with the plaint the Plaintiff filed Notice of Motion on the same date seeking temporary injunction pending disposal of the suit to restrain the Defendants from publishing or causing to be published words whose import or effect would be to defame the Plaintiff. Upon that application an **interim injunction was granted on 11th July, 2012 in the presence of both parties where the Defendants undertook not to publish any more defamatory material.**

The Plaintiff has now come to court by **Notice of Motion dated 19th February, 2013** seeking orders that the 1st Defendant be cited for contempt of court, his property attached and sold and sentenced to prison for a term not exceeding 6 months for disobeying a court order.

The sum total of the grounds on the face of the application is that the 1st Defendant is in contempt of the aforesaid order of 16th July, 2012 by further publishing words defamatory of the plaintiff in Mbaitu FM on 6th February 2013. The application is supported by the affidavit of the Plaintiff.

To the supporting affidavit are annexed the formal order of 16th July 2012 **together with a penal notice.**

Through a replying affidavit the 1st Defendant swore on 12th April 2012, he raises points of objection which include –

- i. That the application contains lies, spite, malice and half-truths and is only brought with the aim of intimidating and frustrating him
- ii. That he hasn't in any way disobeyed the court orders as alleged in the application as he has not given any information to the said radio station;
- iii. That the Plaintiff should sustain such action of defamation against Mbaitu FM Radio as it was Hon. Muthama who wrote a letter to the Police Commissioner;

In a rejoinder, the Plaintiff has sworn a supplementary affidavit on 7th May 2013 where he contends –

- i. That the replying affidavit was not sworn by the 1st Defendant as the signature it bears does not belong to him;
- ii. That he has never set out to cause the 1st Defendant or his family pain or torture with a view to defeating justice;
- iii. That he successfully sought quashing of the Kangundo Criminal Case No. 5 of 2012 maliciously instituted against him. The Director of Public Prosecutions and Police Commissioner were also prohibited from prosecuting him;
- iv. That he has rightfully sustained an action against the 1st Defendant as he is the one who published the said defamatory statements on Mbaitu FM in breach of the Court order.

The parties filed written submissions. Those on behalf of the Plaintiff were filed on 15th July 2013 while the 1st Defendant's were filed on 30th June 2014. I have considered those submissions and the authorities cited.

In the supplementary affidavit the Plaintiff alleges that the signature in the replying affidavit doesn't belong to the 1st Defendant yet he does not even attempt to show the Court any samples of the 'true' signature. Secondly, the statements said to have been in contempt of the court's order of 16th July 2012 were made at a radio station by the name of Mbaitu FM which does not in any way point to the 1st Defendant as the originator of the information. The radio station seems to have drawn information from various sources including the criminal case that involved the parties and a letter written by the Hon. Muthama who sought to amicably resolve the disputes between the parties.

As correctly pointed out by the 1st Defendant, it is this Mbaitu FM that the Plaintiff should take offence with and probably institute a claim against it.

Contempt of court is a criminal offence. The standard of proof is quite high. The punishment can lead to loss of liberty and property. As a result, there can be no room left for doubt on whether contempt of court has been proved or not.

Having considered the above, I am not persuaded that the 1st Defendant acted in contempt of the order of the court dated 12th July 2012. The Notice of Motion dated 19th February 2013 is without merit. It is hereby dismissed with costs to the 1st Defendant. It is so ordered.

Dated and delivered at Nairobi this 10th day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE