



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KAKAMEGA  
CIVIL CASE NO. 41 OF 2008**

**MUMIAS SUGAR COMPANY LTD. :.....;.....: PLAINTIFF**

**V E R S U S**

**FRANCIS MANYASA }  
MICHAEL MASHERE }.....: DEFENDANTS**

**SIMON WESECHERE t/a MUMIAS SUGARCAN  
FARMERS ASSOCIATION }  
SIMON WESECHERE t/a MUMIAS SUGARCAN  
FARMERS ASSOCIATION }**

**R U L I N G**

In its application dated 23<sup>rd</sup> October, 2009 the plaintiff/applicant is seeking an order to commit to prison the three respondents and/or for attachment of their property for being in contempt of court. The applicant also seeks costs.

Mr. Ombito, counsel for the applicant submitted that while this suit is pending in court, the three respondents disseminated letters with the intention of intimidating the applicant’s Company Secretary. The letters were based on the affidavit filed by the said Company Secretary in this suit. Counsel further submitted that the said contemptuous and offending letters were copied to media houses. Counsel relied on **section 77 (8)** of the Constitution and **121** of the Penal Code. The said letters are scandalous to an officer of the court and the respondents have not denied writing the letters.

Mr. Mashere, the 2<sup>nd</sup> respondent opposed the application on his own behalf and on behalf of the two respondents. He relied on his replying affidavit sworn on 11<sup>th</sup> November, 2009 and the annexures thereto. Mr. Mashere contends that the plaintiff filed three different suits against the Mumias Sugarcane Farmers Association and when the defendant stood firm the cases were withdrawn. He further submitted that under **section 79** of the Kenya Constitution one is free to express his mind. The counsel for the plaintiff, Mr. Ombito, was rejected as a magistrate. He stood by the alleged offending letters.

The respondents herein confirm that they wrote the two alleged offending letters. The first letter is dated 6<sup>th</sup> October, 2009 and is addressed to one Emily Otieno of Mumias Sugar Company Ltd. What can be deduced from this letter is that the said Emily Otieno on 30<sup>th</sup> September, 2008 swore an affidavit before a Commissioner of Oaths which affidavit was false. The respondent sought to have the affidavit be withdrawn within 7 days or they would hand over the matter to rightful hands to investigate and charge the said Emily Ominde. It is also indicated in the latter that Mr. G. Ombito was rejected as a magistrate and wrote a letter to the Attorney General under a cover of an Advocate.

The 2<sup>nd</sup> letter is dated 15<sup>th</sup> October, 2009. It is addressed to Mumias Sugar Co. Ltd. but for the attention of Mrs Emily Otieno. The letter is titled as follows-

**RE: Unreliable or and silly statement in court affidavit dated 30<sup>th</sup> September, 2008 in Kakamega HCCC 41 of 2008 Before I.M. Mgesi Commissioner for Oaths.**

Part of the contents of the letter are as follows-

***“Please withdraw some unworthy and silly words FRAUDULENT and CHEATING in the quoted affidavit. If you are legal affairs manager as you quoted in the first paragraph of the sworn affidavit, then you did not attain true certificate at the end of your studies if you attended any university.***

***Legal personnel are lawyers who are very careful with tongues. Here we think that you signed on a statement written by the rejected magistrate but working under the cover of advocates as Ombito & Company Advocates or written by M.S.C. Managing Director who is a good manager but not a lawyer. We handed some of your papers to the local medias and hope that you will soon read and the entire Kenyans and beyond.”***

The applicants contend that the said two letters are contemptuous as they refer to issues pending before this court and is aimed at intimidating potential witnesses. On the other hand the respondent maintains that **section 79** of the Constitution empowers them to express their mind.

The record shows that a replying affidavit sworn by Emily Otieno on 30<sup>th</sup> September 2008 was filed in court on the same date. This is the affidavit the respondents wanted to be withdrawn as it is “*unreliable or and silly statement.*”

The main issue for determination is whether the respondents are indeed in contempt of court and whether their conduct is disrespectful and the process.

A proviso to **section 77 (8)** of the Constitution state as follows-

***“.....provided that nothing in this sub-section shall prevent a court from punishing a person for contempt notwithstanding the act or omission constituting the contempt is not defined in a written law and the penalty therefore is not so prescribed.”***

Similarly, **section 5(1)** of the Judicature Act, Chapter 8 Laws of Kenya provide 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 powers shall extend to upholding the authority and dignity of subordinate courts.”***

The above two provisions empowers the High Court and the Court of Appeal to punish anyone who the courts would find to be in contempt of court. It is not in dispute that the main suit herein is pending in court. The respondent admit writing the alleged offending letters but maintain that they did so in exercise of their constitutional right of freedom of expression as fortified by section 79 of the Constitution.

The source of the dispute is that the respondent find the affidavit sworn on 30<sup>th</sup> September, 2008 by Emily Otieno to be offending or to be untrue. If that position by the respondents is correct they had the right then to make an application under Order XVIII of the Civil Procedure and urge the court to strike out the slanderous, irrelevant or oppressive paragraphs as per Order VIII rule (6). The respondents resolved to settle the issue by writing to the plaintiff directly and seek the withdrawal of the affidavit. There is no bar to litigants from writing correspondences between themselves. However, such correspondence should not be aimed at intimidating or threatening another party.

The respondents’ letter to the plaintiff dated 15<sup>th</sup> October, 2009 is undoubtedly offensive. The wording of the letter was meant to elicit annoyance, fear and intimidation on the part of the plaintiff’s Company Secretary who only swore an affidavit on behalf of the plaintiff who is her employer. The respondents maintain that they are within their Constitutional limits of freedom of expression. The provisions of section 79 do not provide one with an outright licence to abuse and intimidate others. There is a limit to the exercise of the rights and freedoms provided for in the Constitution.

I am satisfied that the three respondents are contemptuous of the court process. They knew this case was still pending and yet went ahead and issued abusive letters to the plaintiff. They were even happy to copy the letters to the local media and threatened to have the said Emily Otieno investigated and charged in court. The respondents seems not to be remorseful and it is evident that they do enjoy intimidating other litigants as evidenced by some of the proceedings in Mumias SRMCC No. 26 of 2008 whereby they were made to render an apology.

Courts will not allow litigants to abuse one another in the name of freedom of expression. The respondents are hereby found guilty of contempt of court. I do not see the need to commit the respondents to civil jail and do decline to issue a committal order. I do order that the three contemnors do file a written apology to this court and the same to be filed herein within fourteen (14) days thereof. I do also order that the respondents meet the plaintiff’s costs of this application. It is so ordered.

**SAID J. CHITEMBWE**  
**J U D G E**

***Delivered, dated and signed at Kakamega this 30<sup>th</sup> day of June, 2010***

**ISAAC LENAOLA**

**JUDGE**