



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 423 OF 2009**

**CAPTAIN MOSES KARIUKI WACHIRA.....PLAINTIFF**

**VERSUS**

**JOSEPH MURIITHI KANYITA .....1ST DEFENDANT**  
**MONICA JAMES.....2ND DEFENDANT**  
**JOHN MAINA MBURU.....3RD DEFENDANT**  
**INVESTMENTS & MORTGAGE BANK LTD.....4TH DEFENDANT**

**RULING**

1. The notice of motion dated 21<sup>st</sup> January 2010 is brought under the provisions of order 52 of the Rules of the Supreme Court of England, Section 5 of the Judicature Act and section 1(a) 3(a) and 63 of the Civil Procedure Act. It is brought by the 3<sup>rd</sup> defendant **John Maina Mburu** who is seeking for an order that the plaintiff herein **Captain Moses Kariuki Wachira** be punished for contempt. This is on the grounds that on 6<sup>th</sup> November 2009; the plaintiff filed a suit against the 1<sup>st</sup>, 2<sup>nd</sup> and three other persons before the Superior Court in the State of California in Case No.37-2009-00101776-CU-FR-CTL.

2. In that case the plaintiff is alleged to have made unfounded, ill-intended and contemptuous allegations against officers of this court thereby bringing the integrity of the officers and this Honorable Court into disrepute. The particular words complained about are contained on page 9 line 19 in those pleadings and are in the following words;

***“The matter was placed in front of a corrupt Judge who was a classmate of John Mburu the third-party buyer and the Judge ruled I had given the house to Monica; she was someone else wife and she had a right to sell it at any value she pleased. My only legal recourse is for civil suit for damages from Monica, Joseph, Jane and others for the losses and the damages”***

3. According to the applicant the respondent filed a suit on 15<sup>th</sup> June 2009, and also filed a chamber summons dated 30<sup>th</sup> May 2009 which was seeking for an order of injunction against the defendants who he sought to be restrained by an order from transferring property known as **Nairobi/Block 94/170 Nyali** pending hearing and determination of the suit. That application was heard and a ruling was delivered on 24<sup>th</sup> July 2009 by **Kimaru J.** The plaintiff appealed to the Court of Appeal and also filed an interlocutory application being civil application No. 237 of 2009 seeking for an interim order of injunction or a stay of execution of the ruling and order of **Kimaru J.**

4. Meanwhile, on 6<sup>th</sup> November 2009, the plaintiff filed a complaint against the 1<sup>st</sup> and the 2<sup>nd</sup> defendants and three other individuals in the Superior Court of California in the County of San Diego in the United States of America. It is in that case where the plaintiff pleaded the words complained about which have are false, misleading, and, contemptuous of the office of a Judge who presided over the

matter and lowered the dignity of the court. Counsel for the applicant urged the court to punish the plaintiff of contempt. The plaintiff has not purged the contempt. Counsel made reference in the **case of Republic vs. Tony Gachoka and the Post Limited** in that case the Court of Appeal cited with approval a definition contained in **Halsbury's Laws of England Vol.9 (4<sup>th</sup> edition) paragraph 27** thus-

**"27. Scandalizing the court**

***Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court. Thus scurrilous abuse of a judge or court, or attacks on the personal character of a judge, is punishable contempts. The punishment is inflicted, not for the purpose of protecting either the court as court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. In consequence, the court has regarded with particular seriousness allegations of partiality or bias on the part of a judge or a court.***

***On the other hand, criticism of a judge's conducted or of the conduct of a court, even if strongly worded, is not contempt provided that the criticism is fair, temperate and made in good faith and is not directed to the personal character of a judge or to the impartiality of a judge or court."***

5. According to Mr. Gatheru, counsel for the 3<sup>rd</sup> defendant/ applicant, the words published in those proceedings were an attack on the personality of the Judge and the court. The language used is defamatory and courts have always taken such an attack seriously not only within our jurisdiction but all over the Commonwealth. He also cited the case of **Nyamondi Ochieng Nyamogo & Another vs. KP & Tel Corp; Nairobi Court of Appeal unreported Civil appeal No.264 of 1999 and Moses P.N. Njoroge & others vs. Reverend Musa Njuguna & Others; Nakuru unreported HCCC NO. 247 "A" of 2004** among others.

6. Mr. Gatheru further submitted that this application was served upon the plaintiff who resides in the United States of America; the service was done at a considerable cost because he had to use the services of Attorney in the United States to effect service. Out of abundant caution, counsel also sent the documents by registered mail and by email address. The plaintiff by filling two affidavits in this matter confirms the service was effected. One affidavit is sworn by the plaintiff while the other was sworn by one Kent Casady a lawyer in California who filed the proceedings complained about. He confirmed that the proceedings were amended to remove the words complained about and to purge the complaints by the applicants.

7. On the part of the plaintiff he swore an affidavit dated 25<sup>th</sup> February 2010 and apologized for the words complained about. However, Mr. Gatheru submitted that what is stated in the plaintiff's affidavit was not an apology, it cannot be a purge the contempt committed by the plaintiff. He asked the court to strike the two affidavits because they do not even attach the pleadings to show that the words complained about have been purged. Moreover, the statement that contained the words complained about was a deposition which cannot be purged by a mere amendment. He asked the court to find the plaintiff guilty of contempt and commit him to civil jail or order him to pay a fine and failure to do so the proceedings filed by the plaintiff should be struck off and he be denied audience before this court and the Court of Appeal.

8. This application was opposed by the plaintiff. At first the plaintiff was represented by Mr. Kibunja who sought to address this court on his own capacity. Mr Kibunja exonerated himself from the pleadings filed in the United States. On his part he undertook to advise the plaintiff to apologize to the court because said he disassociated himself from those pleadings and said he had absolute faith in Judge Kimaru and the court. Mr. Kibunja subsequently withdrew from this case and Miss Kimiti argued the application on behalf of the plaintiff. She contended that once the plaintiff was served with the application for contempt, he drew up two affidavits in which he apologized to the Judge. He also sought to demonstrate that he relied on incorrect information and he has now purged the contempt.

9. On the merit of the application, counsel for the defendant relied on the decision in the case of; **Godfrey Kilatya & 6 Others v Malindi Municipal Council [2005] e KLR** to support the point that when the application for leave was made the Attorney General was not notified as required under rule 3 (3) of order 52 of the Rules of the Supreme Court. Moreover the statement of claim does not give the description and address of the applicant. She urged the court to dismiss the application. This application

was supported by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

10. The first point to determine in this matter is whether this application is properly before the court. Proceedings governing contempt proceedings in Kenya according to section 5(1) of the Judicature Act which 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.”**

The jurisdiction of the High Court of justice in England to punish matters of contempt is found in the rules of Supreme Court in particular order 52 rule (2) which provides:-

**“No application to a Divisional Court for an order or committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.”**

After leave is granted a formal application must be filed within eight days after the leave. I find in this application leave was granted on 19<sup>th</sup> January 2010, and the substantive motion and the statements were filed on 21<sup>st</sup> January 2010 that is within the prescribed period.

11. The next point to determine is whether the words complained about by the applicant are contemptuous of this court and lowers the dignity and integrity of this court and the Judge who made the orders. I think that is not an issue because even the plaintiff and his advocates all admit that the words complained about were inappropriate and uncalled for. That is why the plaintiff and his lawyer contend that they offered an apology. The issue for determination is whether the apology offered by the plaintiff is suitable and purges the contempt.

12. I have gone through the affidavit by the plaintiff. Apart from paragraph 3 and paragraph 20 the rest of the averments in that affidavit by the plaintiff are kind of justification for the use of the words. Paragraph 3 states:-

**“I would like to apologize most profusely to the Learned Honorable Justice Kimaru for the unfortunate misinformed and the poor choice of words in my complaint drafted and filed in USA by my lawyer Kent Casady that a corrupt judge ruled against me and he was a classmate of the 3<sup>rd</sup> defendants John Mburu.**

...

#### **Paragraph 20**

**“ I do not condone the choice of words that a corrupt judge ruled in favor of the defendants and he was a classmate of the 3<sup>rd</sup> defendant and I apologize for the poor choice of unsubstantiated accusations base don incorrect information given to me by a lawyer claiming to the judge confident and former law firm partner.”**

Is this an apology for that vicious and malicious attack on the character of the Judge and the entire Court? The plaintiff did not even annex a copy of the pleadings where he claims the use of those words was purged. Moreover, that pleading was by way of a deposition. The plaintiff can only withdraw the entire pleadings as a sign of apology and that is the only way it can be purged from the record of that court. It is unfortunate the plaintiff used very inappropriate words which were based on unfounded and unsubstantiated falsehoods to malign the character of a Judge and lower his integrity and that of the Court. That behavior must be abhorred and discouraged as the integrity of the Court must at all the times be protected from malicious attacks. Most paradoxically the plaintiff is still a litigant in this Court. He must be discouraged and be made to bear the responsibility of his reckless publication.

13. I find the so called apology not satisfactory, and hold the plaintiff guilty of contempt of this court. The plaintiff is fined a sum of **Ksh.300,000/- (three hundred thousand)** and in default one (1) month imprisonment, the plaintiff is given 21 days within which to pay the fine. The plaintiff will also pay the costs of this application. It is so ordered.

**RULING READ AND SIGNED ON 25<sup>TH</sup> JUNE 2010 AT NAIROBI.**

**M.K. KOOME**  
**JUDGE**