Yatani v Raso (Civil Suit E029 of 2021) [2023] KEHC 2150 (KLR) (Civ) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2150 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E029 OF 2021

CW MEOLI, J

MARCH 16, 2023

BETWEEN

HON. UKUR YATANI ..... APPLICANT

AND

HON. DIDO ALI RASO ..... RESPONDENT

RULING

1. The motion dated November 22, 2021 by Hon Ukur Yatani (hereafter the applicant) seeks *inter alia* that the court be pleased to find that Hon Didi Ali Raso (hereafter the respondent) is in contempt of court for disobedience of the orders issued by this court on September 21, 2021; that summons do issue to the respondent, requiring him to appear in person to show cause why he should not be punished for contempt; that the court does issue an order for the respondent to be committed to civil jail for a period of six (6) months for contempt of court; and that the court be pleased to grant any other orders as the interest of justice dictates for the purpose of protecting the dignity and authority of the court. The motion is expressed to be brought under section 5 of the *Judicature Act*, section 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* and order 51 of the *Civil Procedure Rules*.

2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the applicant who deposes that by a ruling delivered on September 29, 2021, Ongudi, J issued interim injunctive orders restraining the respondent from uttering any defamatory statement regarding the applicant pending the hearing and determination of this suit. That on October 4, 2021 the applicant's advocates on record served a certified copy of the interim orders of the court upon the respondent and that despite being served, the respondent in flagrant and inexcusable disobedience of the said orders, uttered defamatory statements during a televised interview on November 5, 2021.

3. He asserts that in another televised interview on the same date, the respondent proceeded to utter defamatory statements by which words the respondent published to the whole world that the applicant was responsible for the bandit attack along Marsabit-Badasa road in Marsabit county on November

4, 2021 in which six people died and several others were injured. That the defamatory statement, constitutes injury to the applicant's reputation and has subjected him to spite and public odium by people who respected him. He asserts that the order of September 21, 2021 and terms were clear and the respondent's conduct was deliberate and in blatant breach manifesting disdain and disobedience of the authority of the court. Hence the motion ought to be allowed as prayed.

4. The respondent filed a replying affidavit dated January 27, 2022 in opposition to the motion. The gist of the response is that he is not in contempt, as the interim order of Ongudi, J related to a different defamatory statement made on January 18, 2021. And that the applicant has misconstrued the orders to apply widely and indefinitely against the respondent who has not made any comment relatable to the order in the instant suit. He contends that the allegations of defamatory utterings on November 5, 2021 relate to killings that occurred on November 4, 2021 and represent a new cause of action that is not yet before the court and the applicant has not denied the veracity of the statements in question. He further contends that whether the new statements are defamatory or not is a question of both law and fact to be tried in court.

5. That without prejudice to the foregoing, the purported offending statements constitute true and fair comment in relation to matters of security and of public interest in Marsabit county. He asserts that the said statements were made in due exercise of his democratic right both as a leader and in the public interest whereas an order prohibiting him from commenting on such important matters would be in contravention of the national values and principles of governance in the *Constitution*. In conclusion, he deposes that he stands to suffer immense prejudice if the motion is allowed as he would be condemned unheard without the benefit of qualifying the truth and facts in the alleged fresh statements. Therefore, that it is in the interest of justice and fairness that the motion be dismissed.

6. The motion was canvassed by way of written submissions. Regarding the question whether the respondent is in contempt, counsel for the applicant cited a raft of decisions including *Sam Nyamweya & others v Kenya Premier League Ltd & others* [2015] eKLR, *Peter K. Yego & others v Pauline Wekesa Kode* ACC No 194 of 2014, and *Katsuri Limited v Kaourchand Depor Shah* [2014] eKLR . He contended that despite being aware of the unequivocal order of the court, the respondent willfully declined or refused to comply therewith and was in blatant disobedience of court orders hence liable for contempt. He argued that the respondent failed to take into consideration, the full scope and purport of the orders which was effectively to pre-empt any subsequent defamatory statements by the respondent, pending hearing and determination of the suit.

7. Concerning whether the respondent ought to be punished, counsel called to aid the decisions in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* civil application No 233 of 2007 and *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] eKLR to assert that the respondent is guilty of contempt and failure to punish such disobedience compromises the rule of law. In conclusion, counsel invoked the provisions of section 27 of the *Civil Procedure Act*, the decision in *Eve Malenya v Orange Democratic Party & another, Independent Electoral & Boundaries Commission & 2 others* [2020] eKLR to urge the court to order the committal of the respondent to civil jail.

8. On his part, counsel for the respondent anchored his submissions on *Gatley on Libel and Slander*, 8th Edition, page 425, para 1005 to contend that the two statements complained of herein constitute two separate causes of action. Counsel called to aid among others, the Canadian decision in *Carey v Laiken*, 2015 SCC 17, the Indian decision in *Indian Airports employees Union v Ranjan Catterjee & another* [Air 199 SC 880: 1999(2) SCC:537], *Peter K Yego* (supra) and *Republic v Boniface N – Chief Licensing Officer Central Firearms Bureau & another Ex-Parte Brian Yongo Otumba* [2015] eKLR to submit that the motion is predicated on the applicant's interpretation of the orders of the court, and that the

misrepresentation of wide and obscure court orders by one party cannot be used to assert disobedience of the said orders by the other party.

9. Concerning the standard of proof regarding contempt proceedings, counsel relied on the decisions in *Gathatia K. Mutikika v Baharini Farm Limited* [1985] KLR 227 and *Wildlife Lodges Ltd v County Council of Narok & another* [2005] 2 EA 344 to submit that such proceedings are in the nature of criminal proceedings and a case against a contemnor must be proved to a degree higher than a balance of probabilities. He further argued that committing a person to civil jail is a draconian measure that ought not to be taken lightly and a person ought not to be condemned unheard. It was counsel's position that the motion is premature for the key reason that the second offending statement constitutes a separate libel yet to be adjudicated upon by a competent tribunal.

10. Several decisions including *Carey* (supra), and *Progress Welfare Association of Malindi Kenya National Chamber of Commerce and Industry & another v County Government of Kilifi, County Executive Committee Member Lands Housing Physical Planning & Urban Development & 4 others* [2021] eKLR were cited to support the foregoing submission. In conclusion, the court was urged to dismiss the motion with costs.

11. The court has considered the rival affidavit material and submissions in respect of the motion as well as the record herein. The court is called upon to determine *inter alia* whether the respondent in contempt of the orders of this court issued on September 21, 2021. The applicants' motion invoked *inter alia* section 5 of the *Judicature Act* and section 1A, 1B & 3A of the *Civil Procedure Act*. Section 5 of the *Judicature Act* provides that;-

> "(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."

12. *Black's Law Dictionary* (Ninth Edition), defines contempt of court as "conduct that defies the authority or dignity of a court." The Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR held that in punishing contempt the court exercises ordinary criminal jurisdiction. In *Stewart Robertson v Her Majesty's Advocate*, 2007 HCAC 63 it was stated that:

> " Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings."

13. The Supreme Court of Kenya in *Republic v Ahmad Abolfathi Mohammed & another* (2018) e KLR explained the reason why courts punish contempt as follows :-

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> " (24) In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & another* civil application No 39 of 1990 (unreported), where the Court of Appeal stated as follows:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *Hadkinson v Hadkinson (*1952) 2 All ER 567, it was held that:

It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."...

(26) The Court of Appeal in *A B & another v R B*, civil application No 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in *Burchell v Burchell*, case No 364 of 2005 where it was held:

"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The constitution states that the rule of law and supremacy of the constitution are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."...

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of courts, but they also deride the rule of law. This must not be allowed to happen..."

14. The Supreme Court proceeded to explain the rationale for the high standard of proof of contempt as follows:

"

" [28] ....We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

"In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."

"[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order.

[30] The question that begs an answer, thus, is: did the applicant willfully disobey this court's orders?"

15. The two related ingredients of willful disobedience and knowledge of the order are critical in a successful contempt proceeding. In the past, it was held by superior courts that for an applicant to succeed in contempt proceedings, he must prove personal service of the subject orders and the attendant penal notice upon the alleged contemnor. See the Court of Appeal decision in in *Nyamogo & another v Kenya Posts and Telecommunications Corporation* [1994] KLR 141.

16. In recent years however, superior courts have stated that where the applicant is able to demonstrate awareness by such alleged contemnor of the orders and not necessarily personal service of the order upon the contemnor, such awareness is sufficient. See *Kenya Tea Growers Association v Francis Atwoli & others* [2012] eKLR. Notably, the courts emphasize the high degree of proof required, and reiterating the exhortations in *Mutikika v Baharini Farm Limited* [1985] KLR 227, that;-

> "A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.
>
> However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit made, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

17. In this case there is no dispute that an order was issued on September 21, 2021 against the respondent and he was duly served and was therefore aware of the orders in question. It is not disputed that during the subsistence of the orders, the respondent published the statements complained of, against the applicant. The respondent's answer as I understand it is this: the second or subsequent statements by him represent a new cause of action and are not covered by the previous orders which he seems to view as wide and obscure, and which the applicant has misconstrued. And secondly, that not having been tested in a court, the subsequent statements cannot be presumed to be defamatory per se, therefore attracting punishment and that such a course would be contrary to the rules of natural justice.

18. Two ingredients key to a finding of contempt are knowledge of the order, in this case admitted, and willful disobedience. The order made by Ongudi, J in allowing the applicant's motion dated February 8, 2021, was in the following terms:

> "That interim injunctive orders be and are hereby issued restraining the respondent by himself, servants and or agents or otherwise from uttering any defamatory statements against the applicant or further disseminating or causing to be disseminated any defamatory

material of or concerning the applicant pending the hearing and determination of the suit filed herewith."

19. The suit arose from a statement published by the respondent on January 18, 2021, in respect of alleged banditry attacks that occurred in Marsabit county on January 15, 2021. An excerpt of the said statement reads as follows; -

> " We as leaders have since established that on Ukur Yatani who is the cabinet secretary in the treasury is actually the owner of these militias, he is the one who is sponsoring them, he is the one who is funding them and is providing logistics to them.....I want to be on record to say that Ukur was calling the county commissioner, the police commanders and intimidating them telling them that they should not take any action, or they should not harass members of his community.....we call upon the president.....for the immediate sacking of Ukur because he has blood on his hands and is a liability to his government".

20. The respondent's statements subsequent to the court order, published on November 5, 2021 which are the subject of the present motion related to further alleged banditry attacks that occurred in Marsabit county on November 4, 2021 and in part stated:

> " The attack that happened yesterday is politically instigated. We know the person behind it is Ukur Yatani, who is the CS treasury...The CS interior..... Do your executive duties to make sure that the people of Marsabit are secure. Secondly, some of the attackers are known. These attackers must be pursued, and they must be pursued, and they must be brought to book. Thirdly, we have said, the CS treasury is very much implicated in this particular ".

21. It is not in dispute that both statements relate to alleged banditry attacks. Secondly, both statements were made in relation to banditry attacks in the county of Marsabit. Thirdly, the subsequent statement, like the initial one, alleges that the applicant was involved in the attacks that occurred on November 4, 2021. The respondent has not demonstrated his assertion that the order of September 21, 2021 was wide and obscure. On the contrary, the said order is clear, *ex facie*.

22. The effect of the order cannot be conceived merely on a bare textual reading but must be read in the context of material tendered before the court and circumstance which it was made to address. Effectively, the court restrained the respondent from further disseminating or causing to be disseminated any defamatory material of or concerning the applicant pending the hearing and determination of the suit. And although the order did not says so, the matters giving rise to the order related to imputations that the applicant was involved in the funding and protection of militia and was therefore a facilitator of banditry in Marsabit county.

23. And clearly, although the order is indeed general, the nature of the defamatory material envisaged therein includes the making of further statements associating the applicant with banditry in Marsabit county, *inter alia*. There is a definite commonality between the earlier statement leading to the first restraining orders, and the subsequent statements, that is the association of the applicant with banditry, itself a criminal activity, in Marsabit county. While it is true that each incident of libel can found a separate action, I am of the considered view, that here the respondent is splitting hairs to escape sanction for what are essentially related statements.

24. It would amount to an absurdity for the court to accept a proposition whose effect is that: if A publishes a statement today to the effect that B is a thief, having stolen money in a preceding month, and A is thereafter restrained by the court from "further defaming B", A is immunized from any sanction by the court for making a similar statement of B on the next day following, relating similarly to theft of

money by B but in a different month. All because the latter publication amounts to a separate action which is yet to be filed and adjudicated separately and found defamatory. Such an approach would make nonsense of court orders restraining parties from defaming others.

25. While there is some merit in the respondent's indirect assertion that orders restraining defamatory statements ought to be crafted in a precise manner, the court does not agree with him that the order sought to be enforced herein has been misrepresented by the applicant, is too wide and or obscure in its terms. Indeed, if he considered the orders too wide or obscure for observance, he ought to have applied to the court to have the orders set aside, varied and or clarified. Consequently, the respondent's specious arguments in defence of his admitted published statements concerning the applicant on November 5, 2021 do not hold water. In my considered view his actions are deliberate and constitute willful disobedience of the interim orders of the court.

26. In concluding, I can do no better than echo the words of Ojwang, J (as he then was) in *B v Attorney General* [2004] 1 KLR 431 that:

> " The court does not, and ought not to be seen to, make orders in vain; otherwise, the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

27. And as the Supreme Court cautioned in *Ahmad Abolfathi's* case (supra) citing the South African case of *Burchell v Burchell* that;-

> " Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."...

28. In the result, the court is persuaded that the motion dated November 22, 2021 is merited. It is allowed by way of a finding that the respondent is in contempt of the order of Ongudi, J of September 21, 2021 and a notice shall forthwith issue for the respondent to appear in person on May 9, 2023 to show cause why he should not be punished for the contempt. In the meantime, and for this purpose, the respondent may file an affidavit and or submissions within 21 days, and upon service, the applicant may equally file an affidavit and or submissions. The costs of the motion are awarded to the applicant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Koech h/b for Ms. Saina

For the Respondent: Mr. Otieno

C/A: Carol