



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Mwangi (Civil Case E025 of 2021)
[2023] KEHC 23700 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E025 OF 2021**

FR OLEL, J

OCTOBER 16, 2023

BETWEEN

HON. DR. ALFRED MUTUA PLAINTIFF

AND

BONIFACE MWANGI DEFENDANT

RULING

A. Introduction

1. The Notice of Motion under consideration is dated 11th January 2022. It is presented to this court under provisions of section 5(1) of the *Judicature Act*, Part 81.1, Rule 81.1 of the *English civil procedure rules (Amendment No. 3) Rules* 2020 & Part 81.1,2,4,5,6 & 7 of the said rules. The appellant also relied on the inherent powers of this court and sought for orders that : -
 - a. That the Defendant herein Boniface Mwangi show cause why he should not be held in Contempt of Court for having expressly breached and acted in violation of paragraph 4 of the Order of this Honourable Court dated 26th October 2021 injunctioning him in specific terms forbidding him from publishing in the print, electronic and online media defamatory material of, and concerning the plaintiff, which the defendant did by his Twitter account publications published on 6th January 2022 and on 9th- January 2022.
 - b. That Boniface Mwangi Be held In Contempt of Court for having acted and in acting in breach of paragraph 4 of the Order of the Court issued on 26th October 2021, duly served upon him and whose terms are well known to him at all material times.
 - c. That Boniface Mwangi do show cause why in consequence of his contempt of court acting in breach of paragraph 4 of the order of the court issued on 26th October 2021, he should not be committed to civil jail for such period as shall be determined by this honourable Court and / or fined in lieu thereof such sums of money as this honourable court shall determine and /



or in lieu thereof his assets be sequestered under such terms as this honourable Court shall determine, and/ such expedient sentence be imposed on the defendant as this Honourable Court shall deem fit.

- d. That the cited respondent herein Boniface Mwangi, be personally present in Court on all the dates appointed for hearing of this application.
 - e. That in purging his contempt and only in lieu of sequestering the defendant's/ respondent's assets and monies held in his bank accounts and /otherwise held, this Honourable Court be pleased to direct the said Boniface Mwangi ,to forthwith, and not later than 7 days of the making of this order issue a public apology to the plaintiff herein and the Judiciary of Kenya(or in such a manner as the Court may direct) published in a full page daily newspaper of national circulation in Kenya, and on the internet via the defendant's twitter page and all such twitter web pages and electronic media as the offending publications have been made , as approved by the plaintiff or as this honourable court directs.
 - f. That this Honourable Court issues such further directions on the determination of this Application as may be expedient.
 - g. The defendant/ respondent pays the Applicant's cost of these proceedings in any event.
2. The Application is supported the grounds stated on the face of the said application and by the supporting affidavit of the plaintiff/Applicant dated on 11th January 2022, supplementary affidavit dated on 21st January 2022 and the 2nd supplementary affidavit dated 3rd March 2022. This application is opposed by the Defendant/Respondent who did file his Grounds of opposition dated 4th February 2022 and a replying affidavit dated 6th June 2022.

B. Pleadings

3. The plaintiff/applicant did obtain an order from this court dated 26th October 2021, which at paragraph 4 thereof were explicit in injuncting and restraining the Defendant/Respondent from publishing in any print media or electronic media, or on any electronic or web hosting platform and from repeating any publication of, any innuendos, insinuations, allegations or statements concerning the plaintiff as specified in the said order. The Defendant/ respondent was personally served with the said order on 27th October 2022 and an affidavit of service with respect to the said service duly filed before the court.
4. Despite having knowledge of the said order, the defendant/applicant did on 6th January 2022, 9th January 2022, 18th January 2022, 22nd January 2022, 21st February 2022, 27th February 2022, and finally 2nd March 2022 publish offensive tweets/Facebook posts, concerning the person of the plaintiff/ applicant, while well aware that paragraph 4 of the order of 26th October 2021 was and remained in force and expressly forbid him in express terms from posting on his social media accounts or otherwise howsoever from repeating the same defamatory publications of and concerning the plaintiff/ applicant.
5. It was the plaintiff's contention that, the defendant/respondent's action was deliberate and it did show that he was not remorseful, nor did he intend to abate or purge his contemptuous conduct. Further by his action, the defendant/respondent was literally thumbing his nose at this court and therefore the court could not fold its hands and watch the Defendant/contemnor act with impunity and continue to defy the express injunctive orders issued by this court.
6. The defendant/respondent action was detrimental to the good and just administration of justice process and the said acts without doubt constituted contempt of court under Part 81.1 of *The English*



civil procedure (Amendment No. 3) Rules 2020 . The authority of the court and the dignity of its processes had to be maintained and the court orders respected. This court was thus urged to punish the Defendant/ respondent for the deliberate and flagrant disregard of the court order issued to restore the dignity of the court.

7. The Defendant/Respondent did on the other hand oppose the said application and stated in his grounds of opposition/replying affidavit that the publication complained of, was not made in contempt of court. Further he had de-published/pulled down the complained publications from his twitter and Facebook handles on being notified of the alleged contempt. The publication complained of was a cry for justice and for equal protection and equal benefit of the law under Article 27(1) of the Constitution of Kenya 2010 as a crime had been committed as against his property and the plaintiff/ applicant had not been exonerated from the complained criminal allegations made to the police.
8. Further the complained of material (publications), comprise of legitimate expression of opinion expected of a complainant and victim of a crime regarding the criminal and violent destruction of his house. The application as filed was thus brought in bad faith, was malafides, a red herring and further that it was actuated by the applicants desire to suppress, jeopardize and scuttle independent police investigations into the crimes which had been committed as against him. The court had to exercise a fair balance of the competing claims herein and exercise restraint by declining to commit him to civil jail for contempt of court.
9. The final issue raised by the respondent was that the application as filed did not comply with provisions of part 81 of the English civil procedure Rules. The applicant did not give him seven (7) days' notice, failed to join the Attorney General, which was the equivalent of the crown office and did not seek leave under Rule 81.1(2) of the English civil procedure rules to institute contempt of court proceedings.

C. Appellants Submissions

10. The applicant advocate did in his oral submission refer court to filed submissions, but none was seen in the court file as at the time of writing this ruling. However, in his oral submission the applicants advocate did reiterate that the respondent's acts were deliberate and were repeated severally, yet he had been served with the court order, which had a penal notice. The respondent had not appeal as against the said order nor had he applied to have it set-aside or stayed and therefore it remained binding on him.
11. Further the respondent had not denied that the said "tweets" were from his twitter handle, and his actions did show that he was not remorseful. He could thus not hide behind the provisions of Article 27(1) and 33 of the Constitution of Kenya to disobey court orders. The court was thus urged to act in order to stop the respondent from undermining the court's authority.

D. Respondents Submissions

12. The respondent filed his submissions on 6th June 2022 and raise two issues for determination, namely;
 - a. Whether the Respondent is in contempt of the orders issued by this Court or was the respondent exercising his freedom of expression;
 - b. Were there procedural lapses in the Contempt Application as filed;
13. On the first issue it was submitted that the publication complained of, was not published in defiance any court order, and further that the respondent had de published/pulled down the publications complained of, from his "twitter and Facebook accounts" on being notified of the alleged contempt. The complained of publication was a cry for justice and equal protection of the law under article 27(1) of the constitution of Kenya 2010, as a crime had been committed against the respondent. The



- current application as filed had been brought to defeat justice and deny the respondent his freedom of expression.
14. The respondent further did submit that Article 33 of *the constitution* of Kenya, did provide for freedom of expression and that the alleged contemptuous acts constituted fair criticism in a free, open and democratic society and such criticism did not impair the capacity of the applicant to perform his duties. The applicant was thus unlawfully attempting to suppress the respondent's fundamental rights through these proceeding. Reliance was placed in the case of *Indian Express Newspapers (Bombay) Pvt Ltd & Others v. Union of India & Others*(1985) (1) SCC 641 to buttress the importance and purposes of freedom of expression.
 15. The other aspect of the procedural lapses noted in the contempt application, was that the said application had invoked both section 5 of the *Judicature Act* and Order 52 of the *Rules of the Supreme Court of England*, and that meant that the applicant had to first seek leave of the court, to institute the proceedings which was the subject of the present ruling. No leave was sought and non was granted. Further the application itself was also fatally defective for failing to provide the name, description and address of the person sought to be committed.
 16. Once leave was granted under rule 52 of the *Supreme Court of England*, the substantive application had to be filed within 14 days as required under Order 52 rule 3(3), and personally served on the person sought to be committed, which act in this instance was not done. Any application filed outside the prescribed time without any extension of time being sought rendered the all process of citing the respondent to be a nullity since the sub-rule stated that "unless within 14 days after such permission was granted the claim form is issued, the permission shall lapse."
 17. In support of this contention, reliance was placed in the case of *Charles Kagema Muraya v David Mutboka Mutangili*[2012] eKLR (Justice Odunga), where the court did emphasized that contempt of court proceedings are special proceedings and accordingly the special procedures provided by law must strictly be adhered to since there are good reasons for such stringent procedures. The respondent also placed further reliance on *Christine Wangari v Gachege Evans & 11 others* (2014) eKLR, *Anne Barongo v Awiliyo Abdi Ahmed & 2 others* (2015) eKLR & *Buruburu Farmers Ltd v Joseph Kiongo & 2 others* (2012) eKLR to emphasis this fact.
 18. The plaintiff/applicant was also faulted for failing to give notice before filing the motion and also for failure to personally serve the contemnor, which acts were mandatorily provided for in rule 81.4 and 81.8 of the Civil Procedure Rules of United Kingdom. The said rules did provide that unless the court dispenses with service, a judgement or order may not be enforced by way of committal, unless a copy of it has been served upon the person required to do or not to do the act in question.
 19. The Court therefore could not invoke its inherent power to save the defective application. Reference was made to the case of *Buruburu Farmers Limited Case* where the Court held that the oxygen rule cannot be invoked in contempt application since there are specific procedures provided under section 5 Of the *Judicature Act*. The respondent thus did pray that that the contempt application be dismissed.

D. Determination

20. I have considered the application, affidavits in support and in opposition, submissions and authorities relied upon by parties and discern that the issues for determination are:-
 1. Whether the Contempt application as filed has serious procedural lapses and thus is frivolous and incompetent.
 2. Whether the Respondent's actions warrant citing him for contempt of court?



A. Whether the Contempt application as filed has serious procedural lapses and thus frivolous and incompetent.

21. The first port of call with respect to the procedure for institution contempt of Court proceedings in this country is section 5 of the Judicature Act Cap 8 Laws of Kenya. The law that was previously applied in this regard was the Contempt of Court Act of 2016, until the act was found to be invalid by a decision of the High Court (J. Chacha Mwita) made on 9th November 2018 in Kenya Human Rights Commission v Attorney General & Another, [2018] e KLR. The said decision declared the Contempt of Court Act of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.

22. Section 5 of the Judicature Act does provide 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 that 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.

23. The law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the Judicature Act imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought. This duty was noted by Platt J and Porter J in the matter of an application by Gurbaresh Singh & Sons Ltd as follows:-

“The second aspect concerns the words of Section 5-“for the time being”, which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules.”(Emphasis supplied)

24. The Court of Appeal In Christine Wangari Chege v Elizabeth Wanjiru Evans & Others also observed as follows: -

“Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act, the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queens Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of courts in England



and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.

Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice: -

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
- ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
- iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

25. The learned Judges in the above case correctly pointed out that the rules applicable in the United Kingdom have been applied in Kenya with uneven degree of consistency and cited several examples. The only consistency in the decided cases is that leave was a requirement.

26. However, following the implementation of the famous Lord Woolfs "Access to Justice Report, 1996," The Rules of the Supreme Court of England were gradually replaced with the Civil Procedure Rules, 1999. On 1st October 2012, the Civil Procedure (Amendment No.2) Rules, 2012 came into force and Part 81 thereof effectively replaced Order 52 RSC in its entirety. Part 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedure for four different forms of violations.

Rules 81.4 relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

Rule 81.11 - Committal for "interference with the due administration of justice" (applicable only in criminal proceedings).

Rule 81.16 - Committal for contempt "in the face of the court", and

Rule 81.17 - Committal for "making false statement of truth or disclosure statement."



27. An application under Rule 81.4 (breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The said Rule 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020 provides that:
1. Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
 2. A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
 - (a) The nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
 - (b) The date and terms of any order allegedly breached or disobeyed;
 - (c) Confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
 - (d) If the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
 - (e) Confirmation that any order allegedly breached or disobeyed included a penal notice;
 - (f) the date and terms of any undertaking allegedly breached;
 - (g) Confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
 - (h) A brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
 - (i) that the defendant has the right to be legally represented in the contempt proceedings;
 - j. that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
 - k. that the defendant may be entitled to the services of an interpreter;
 - l. that the defendant is entitled to a reasonable time to prepare for the hearing;
 - m. that the defendant is entitled but not obliged to give written and oral evidence in their defence;
 - n. that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
 - o. that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
 - p. that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;



- q. that if the defendant admits the contempt and wishes to apologize to the court, that is likely to reduce the seriousness of any punishment by the court;
 - r. that the court's findings will be provided in writing as soon as practicable after the hearing; and
 - s. that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.
28. Further, rule 81.5 English Civil Procedure Rules (Amendment No. 3) Rules, 2020 deals with the manner of service of the application and provides that:
- a. Unless the court directs otherwise in accordance with Part 6 and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally.
 - b. Where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, an alleged contempt is committed—
 - i. the contempt application and evidence in support may be served on the representative for the defendant unless the representative objects in writing within seven days of receipt of the application and evidence in support;
 - ii. if the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence supporting it and take all reasonable steps to ensure the defendant understands them;
 - iii. if the representative objects in writing, the issue of service shall be referred to a judge of the court dealing with the contempt application; and the judge shall consider written representations from the parties and determine the issue on the papers, without (unless the judge directs otherwise) an oral hearing
29. In short, for an applicant to succeed, he must in his application, set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and support his claim by affidavit(s) containing all the evidence relied upon. The court order must have a penal notice and be personally served upon the respondent, who has a right to legal representation during the contempt proceedings. Rule 81.5 also allows for such contempt application to be served upon counsel for the contemnor, who may accept service or object in writing within seven (7) days. If the do object the application will have to be served upon the contemnor personally.
30. The respondent did content that the application under consideration was defective and incompetent for the reasons that; the applicant did not seek leave of court to institute these proceeding, the plaintiff/ applicant was also faulted for failing to give notice before filing the motion and also for failure to personally serve the contemnor, which acts were mandatorily provided for in rule 81.4 and 81.8 of the Civil Procedure Rules of United Kingdom. Contempt applications were quasi criminal in nature and it was also mandatory for the applicant to serve the Attorney General. The applicant had failed to undertake all the above requirements and thus the application as filed was flawed and defective.
31. In Christine Wangari Gacheche the Court of Appeal correctly pointed out that leave, now called "permission" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. However, leave is still a requirement for applications under Rules 81.12 & 81.17 cited above. After evaluating the above Rules, the Court of Appeal concluded that "we find that on the basis of the new Civil Procedure Rules (of England) contained in the Second Supplement to the 2012



White Book, no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court's order..." On that basis, I find that it was not necessary for the applicant to seek leave before filing this application.

32. Similarly, the submission by the respondent that there was need to serve the Attorney General with this application, or that there was need to give notice before commencement of the contempt proceedings is misplaced as the same is not a requirement under Rule 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020. To the contrary, the application as filed contained all the basic requirements as provided for under the aforesaid Rules. The application is thus not incompetent nor does it breach any provisions of the law upon which it is based.

B. Whether the Respondent's actions warrant citing him for contempt of court?

33. According to Black's Law Dictionary,

(14) "Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

34. In *Re Bramblevale* (1970) 1 Ch. 128 Lord Denning, stated as follows:

Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honored phrase, it must be proved beyond all reasonable doubt.

35. It is also an established principle of law that in order for an applicant to succeed in civil contempt proceedings, he/she has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

36. Further, the court must determine based on the unique facts presented whether the breach that was committed was 'deliberate and mala fide.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.

37. The learned authors of the book 'Contempt in Modern New Zealand' also succinctly stated that :-

"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) that:

- (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.

38. I do find that the first two elements are not disputed by the Respondent. The validity of the court order is not contested by the Respondent. The terms of the said order were clear and unambiguous



and indeed the respondent was served by the said order electronically and an affidavit of service dated 28th October 2021 filed in court. Indeed, even in the Grounds of opposition and replying affidavit filed, service of the said court order and knowledge of the said court order is not disputed.

39. Even after being served with the said court order and despite have knowledge of the restraining order, the respondent did on various dated specified (on 6th January 2022, 9th January 2022, 18th January 2022, 20th January 2022, 21st February 2022, 27th February 2022 and ultimately on 3rd March 2022), did openly tweet and also posted on his Facebook page various publications which were directly prohibited by the injunction order of 26th October 2022.
40. The various tweets/publications no doubt directly referred to the plaintiff and besmirched the plaintiff's character. In response, the respondent averred that he de-published/pulled down the complained materials on twitter and Facebook on being notified of the alleged contempt. He further averred that the complained material was a cry for justice and equal protection and benefit of the law under Article 27(1) of *the Constitution* for the crime committed against him and his property. His right of Expression under Article 33 of *the constitution* of Kenya 2010 should not be curtailed and that the court Order in question could not have intended to injunct/gag or stop him from pursuing his right to equal protection by the law by pointing out and naming persons genuinely suspected to be behind crimes against him and his property. According to the Respondent, he had not disobeyed the court orders and the complained publications comprises legitimate expression of opinion expected of a complainant and victim of a crime regarding the criminal and violent destruction of his property.
41. The court's view is that the conduct of the Respondent clearly establishes disobedience of the court order in question. The respondent from the nature of tweets/Facebook posts published knew that his action would attract sanction from the court but continued to so "tweet" despite being warned to operate within the confines of the court order in correspondences exchanged between counsels herein, he undoubtedly failed to do so. Indeed, the Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited*(supra) stated:

"Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and center. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy .We think we have said enough to send this important message across."

42. The Constitutional Court of South Africa in *Burchell v. Burchell*, Case No 364/2005 also underlined the importance to the Rule of Law, and compliance with court orders in the following terms: -

"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 courts and requires other organs of state to assist and protect the courts. 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 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."



43. If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts has to be respected, protected and upheld at all costs. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. Every litigant/ every person against, or in respect of whom, an order is made by a court of competent jurisdiction, has unqualified obligation 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. See *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).
44. The Respondent attributed his non-compliance with the Order to freedom of expression and equality before law. However, the terms of the court Order dated 26th October 2022 was very clear and it restraining the respondent from publishing in any print or electronic media, on any electronic or web hosting platform, and from repeating any publication of, any innuendo, insinuations, allegations, or statements that the plaintiff either as having destroyed, actually caused damage to the Defendant's house in lukenya and/or having contributed to such damage. Further the said order did also restrain the respondent from refereeing to the applicant as a rapist, a thief, a corrupt individual, a molester, a murderer, a philanderer, a charlatan, or otherwise howsoever publishing such defamatory material of and concerning the plaintiff.
45. This Court is satisfied that the Respondent was aware of the Court order dated 26th October 2022, which order he failed to obey and repeatedly disobeyed. His actions were willful, deliberate and obviously done in bad taste. In as much as *the Constitution* guarantees freedom of expression and equal protection of the law, such individual rights have corresponding obligations, which place upon the respondent, an obligation of similarly not infringing on other persons rights and where a conflict arises, the same be forwarded to the appropriate legal forum for resolution.
46. The respondent also did submit the he had de-published/ pulled down the complained materials immediately from the social media platforms once informed by his advocate. That maybe so but the contempt complained of was committed repeatedly. Such de publishing is a mitigating factor and at this stage is not a factor to be considered.

D. Disposition

47. The Court finds that the plaintiff application dated 11th January 2022 has Merit and the same is allowed in terms of prayer 3 and 4 thereof. This court does hold that;
- a. The Respondent is held to be in contempt of court order issued on 26th October 2021, which was duly served upon him and whose terms were known to him at all material times and having so acted repeatedly did breach the said court order.
 - b. The respondent is hereby summoned to personally appear before this court to show cause why he should not be committed to civil jail for such period as the court shall determine and/or fined in lieu thereof such sums of money as this Honorable court shall determine and/or in lieu thereof his assets be sequestered under such terms as this Honorable court shall determine and/or such expedient sentence be imposed on the Defendant as this Honourable court shall deem fit.
 - c. The applicant is awarded costs of this Application.
48. It is so ordered.



RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 16th day of October, 2023.

