



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 92 OF 2018

BRYAN YONGO.....PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL MEDIA GROUP LIMITED.....DEFENDANT/RESPONDENT

RULING

1) Bryan Yongo, the Plaintiff/Applicant herein, took out the motion dated 15th January 2019 and sought for the following orders inter alia:

i) THAT this court do find and declare the Defendant and its officers are in contempt of the court for disobeying the court orders made on 28th May 2018 by the Honourable Justice J.K Serگون and extended on the 11th June 2018 by the Honourable Lady Justice Kamau.

ii) THAT this court does order that the following officers of the Defendant be committed to civil jail for a term not exceeding six (6) months for disobeying the court orders

- A. Stephen Gitagama: Chief Executive Officer**
- B. Mutuma Mathiu: Group Editorial Director**
- C. Ng'ang'a Mbugua: Editor , Saturday Nation**
- D. Wayua Muli: Editor**
- E. Simon Mburu: Contributor.**

iii) THAT this court does order that the property of the Defendant viz: Nation Centre, Kimathi street, be attached.

2) The Applicant filed an affidavit he swore in support of the motion. When served with the aforesaid motion, Nation Media Group Ltd, filed the replying affidavits of Stephen Gitarama, Wayua Muli, Simon Mburu and Mutuma Mathiu to oppose the motion. The Applicant sought for leave to file a supplementary affidavit to respond to the averment made in the replying affidavits. The application was disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have further considered the rival written submissions. The background of the motion is the simple and straightforward. On 28th May 2018, the Applicant obtained an ex parte order of injunction issued against the Defendant. The aforesaid order was varied and or rephrased by the court upon hearing the parties on 11th June, 2018 to read as follows:

“Pending the hearing and determination of this application inter partes, this Honourable court be pleased to issue a temporary order of injunction restraining the Defendant/Respondent whether by itself, its employees and or agents or otherwise from publishing and or causing to be published the words being complained of namely in the Defendant’s Sunday Nation publication of 6th May 2018, and or any similar words defamatory to the Plaintiff and Neptune credit Management Ltd”

4) On 5th January 2019 during pendency of the aforesaid orders, the Defendant/Respondent published in its Saturday Magazine an article, an article titled **“1001 ways to make money (SCAM)”**

- 5) The Applicant is of the opinion that the material published therein was in total contravention of the orders issued on 28th May 2018 and rephrased on 11th June 2019. It is said that the article alleged that the Plaintiff /Applicant has over the years been busted for his involvement in shady business dealings. For this reason the Plaintiff/Applicant was prompted to take out the current motion citing the Defendant/Respondent together with some of its employees for contempt.
- 6) It is the submissions of the Plaintiff/Applicant that the Defendant was restrained from publishing the Plaintiff's court cases filed against Invesco Insurance, Equity Bank and in respect of the ownership of Kitisuru house and other cases mentioned in the original article.
- 7) The Plaintiff pointed out that the article published by the Defendant on 5th January 2019 is a replica of the earlier story which talks of the Plaintiff's disputes with Invesco Insurance Company, Equity Bank and the other dispute over the house. He pointed out that the article contains the same words that are defamatory of the Plaintiff and his company, Neptune Credit Management Ltd.
- 8) He further argued that the article speaks of his character and puts him in bad light, disrepute and is defamatory of him. The Applicant also argued that the Defendant/Respondent undertook not to publish the words complained of and contained in the Sunday Nation Publication of 6th May 2018. This court was urged to mete out a stiff penalty for contempt against the Respondent.
- 9) The Defendant/Respondent is of the submission that the Plaintiff's application is improper and incompetent. It submitted that since the current application was made under the provisions of section 5 of the Judicature Act, the Plaintiff ought to have ensured that the procedure and practice of the High court of Justice in England on contempt of court is followed. It was pointed out that the application was not instituted in strict compliance with the Law and is therefore incompetent. The Defendant stated that the Plaintiff should have filed an application notice instead of a motion. It was also stated that the persons cited were not personally served.
- 10) In response to the above submissions, the Plaintiff stated that the proper test is whether the alleged contemnor had knowledge of the court order as opposed to personal service. With respect, I agree with the Plaintiff's argument that knowledge of the existence of court order supercedes personal service.
- 11) In this matter, it is not in dispute that the Defendant and the persons cited were not personally served with the order issued on 6th May, 2018 and rephrased on 11th June, 2018. The order was rephrased in the presence of the advocates appearing for the Respondent. The Defendant therefore had knowledge of the existence of the order. Therefore, the Defendant's objection cannot stand.
- 12) The Plaintiff did not address this court on the issue touching on the competency of the application. The Applicable substantive proceedings is section 5 of the Judicature Act (Cap Laws of Kenya) Under the above provision, it would appear that the jurisdiction relating to contempt of court proceedings in Kenya, courts have to keep on checking upon the current law in force in England and apply it in exercise of this jurisdiction. It appears that a party seeking to commence such proceedings can do so by filing an application notice as opposed to a notice of motion pursuant to the provisions of Rule 81.4, Civil Procedure Rules (Amendment No. 2) Rules 2012(England).
- 13) The court of Appeal in the case of **Christine Wangari Gachege Vs Elizabeth Wanjiru Evans and 11 others { 2014} eKLR** stated inter alia as follows:
- “An application under Rule 81.4 , now referred to as ‘ application notice’ (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the Judgment or order was made or undertaking given the application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.**
- 14) The court of Appeal proceeded to strike out the notice of motion for being incompetent and contrary to the new Civil Procedure Rules (of England). This court has been urged to do the same to the Plaintiff's motion prima facie, it is clear from the Plaintiff's motion that the same is brought under the provisions of section 5 of the Judicature Act.
- 15) The Plaintiff ought to have therefore followed the procedure and practice of the High Court of Justice in England on contempt of court. I am persuaded by the Defendant's argument that the Plaintiff's motion does comply with the provisions of Rule 81.4 of the Civil Procedure (Amendment No 2) Rules of 2012 of England. Consequently, the same is found to be incompetent hence should be struck out.
- 16) The Defendant has also pointed out that the Plaintiff's application lacks merit. The Defendant stated that the Plaintiff failed to disclose any disobedience of any order made by the court. It is also the submissions of the Defendant that the allegations of breach were not proved to the required standards in contempt proceedings which standard is higher than a balance of probabilities.
- 17) The defendant further submitted that the article which forms the basis of the Plaintiff's motion did not reproduce the article complained of in the substantive suit. It is also said that the same did not contain any similar words which are defamatory of the Plaintiff or Neptune Credit Management Ltd.
- 18) I have already taken note of the fact that the Plaintiff is of the submission that the words published on 5th January 2019 are similar to those published on 6th May, 2018 in which the Defendant had been restrained from publishing. I have carefully perused and compared the two articles. This court is aware of the fact that the substantive suit is yet to be heard hence this court is cautious not to make conclusive determination on the question as to whether or not the words published are defamatory of the Plaintiff. This should be left to the judge who will eventually hear the substantive suit.
- 19) The article allegedly published on 6th May 2018 is titled

“WHISTLE BLOWERS OR CON ARTISTS WHO TARGET THE RICH”. The contents of the aforesaid publication is set out in paragraph 7 of the plaint and in paragraph 5 of the Plaintiff’s affidavit filed in support of the application dated 8th May 2018.

20) The publication of 5th January 2019 is titled **“1001 ways to make money (SCAM)”**. A keen examination of the contents of the aforesaid publications will reveal that the authors were discussing near similar contents save that they only used different words to publish the same. This court will not determine at this stage the question as to whether the aforesaid articles were defamatory or not but instead leave it for the trial court to determine the same at a trial.

21) In its submissions, the Defendant avers that it did not reproduce the article complained of in the suit. It also argues that the articles were not defamatory of the Plaintiff or Neptune Credit Management Ltd. In sum, I am satisfied that there is sufficient evidence that the Defendant went against the court order restraining it from publishing the article complained of. I would have convicted the Defendant and its employees and or agents but I decline to do so because the application before me is incompetently before this court. In other words, the application is not the one envisaged under rule 81.4 of Civil Procedure Rules (Amendment No 2) Rules 2012 of England.

22) In the end, the Plaintiff’s motion dated 15/1/2019 is hereby ordered struck out and dismissed with costs abiding the outcome of this suit.

Dated, signed and delivered at Nairobi this 15th of January, 2020.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant