REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

CIVIL CASE NO 5 OF 2019

MIKE MAINA KAMAU.....1ST PLAINTIFF

MUTHITHI INVESTMENTS LIMITED.....2ND PLAINTIFF

VERSUS

GIDEON MBUVI SONKO.....DEFENDANT

RULING

1. The Plaintiffs' Notice of Motion application dated and filed on 6th May 2019 sought orders that the Defendant be compelled to retract defamatory words made on 2nd May 2019 and issue an unconditional apology, that he be found in contempt of orders that were issued on 28th January 2019 and subsequently extended on 21st February 2020, that he be committed to civil jail for six (6) months and pay a fine of such amounts as may be ordered by the court, that his properties be sequestered and/or attached for the amount to be determined pending the purging of the contempt and for any other order this court would deem fit to grant.

2. The said application was supported by the Affidavit of the 1st Plaintiff that was sworn on 6th May 2019. He stated that despite this court having restrained the Defendant from making any defamatory words and/or making defamatory publications in reference to him and the 2ndPlaintiff, on 2nd May 2019, he made the following comments:-

> **"…Hata mkora mwengine pale anajifanya rafiki ya rais, aliiba ploti ya fire station ya county akajenga hotel inaitwa "Marble Arc" (Crowd jeers, "Mwizi huyo; mkora…"**

3. It was the Plaintiffs' assertions that if the court did not intervene, there was real risk and likelihood that their reputation would be damaged. They added that it was necessary that the orders be granted to uphold the dignity, authority and honour of the court and promote the fair administration of justice. It was their contention that the application was the only means of enforcing the orders they had sought and thus urged this court to allow their application as prayed.

4. In opposition to the said application, on 27th May 2019, the Defendant filed Grounds of Opposition dated 14th May 2019. The gist of the said grounds of opposition was that the said application was frivolous, an abuse of the court process and without merit, that in as much as jurisdiction was divested under the Contempt of Court Act, the same was not law, no jurisdiction existed where the applicant had violated the procedure set out in the England's Civil Procedure (Amendment No 2 2) Rules (2012), Part 81.4, that there had been no personal service of the order upon him, that there was no evidence that had been tabled before the court to prove the alleged contempt in accordance with the Evidence Act Cap 80 (Laws of Kenya), that the parties alleged to have been contemned had not been cited and that the court had no jurisdiction to sequester his property.

5. There has been a chequered history relating to the law of contempt in Kenya, the same having been based on foreign law. To domestic our own laws, the High Court (Organisation and Administration) Act and the Court of Appeal (Organisation and Administration) Act were enacted. The High Court (Organisation and Administration) Act was enacted in 2015. The High Court (Organisation and Administration) Rules were made in 2016.

6. The objectives of Part VIII of the said High Court (Organisation and Administration) Rules were to:-

a. uphold the dignity and authority of the Court;

b. ensure compliance with the directions of the Court;

c. ensure the observance and respect of due process of law

d. preserve an effective and impartial system of justice; and

e. maintain public confidence in the administration of justice as administered by court.

7. Rule 39(2) of the High Court (Organisation and Administration) Rules further provided that the High Court had power to:-

a. punish a person for contempt on the face of the Court; and

b. uphold the dignity and authority of subordinate courts.

c. When the Contempt of Court Act was enacted in 2016, it deleted Section 5 of the Judicature Act and proceedings relating to contempt of court as was envisaged in the High Court (Organisation and Administration) Act. Indeed, Section 36 of the Contempt of Court Act No 46 of 2016 provided that:-

"The provisions of this Act shall supersede any other written law relating to contempt of court."

9. Notably, Section 38 of the Contempt of Court Act stated that:-

"The Judicature Act (Cap. 8) is amended by deleting section 5."

10. Section 39 of the Contempt of Court Act stipulated that:-

"The High Court (Organization and Administration) Act (No. 27 of 2015) is amended by deleting section 36."

11. With this repeal by the Contempt of Court Act, the law of contempt under the High Court (Organisation and Administration) Act, the Court of Appeal (Organisation and Administration) Act and the proceedings under the Judicature Act which had incorporated the High Court of Justice in England were made obsolete. The Contempt of Court thus became the law under which contempt of court could be punished.

12. Section 3 of the Contempt of Court Act had set out the objectives of the said Act as follows:-

a. uphold the dignity and authority of the court;

b. ensure compliance with the directions of court;

c. ensure the observance and respect of due process of law;

d. preserve an effective and impartial system of justice; and

e. maintain public confidence in the administration of justice as administered by court.

13. Section 4 (1)(a) of the Contempt of Court Act provided that:-

"Contempt of court includes:-

civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court"

14. Section 5 of the Contempt of Court Act stipulated that:-

Every superior court shall have power to –

a. punish for contempt of court on the face of the court;

b. punish for contempt of court; and

c. uphold the dignity and authority of subordinate courts.

15. Section 9 of the Contempt of Court Act further provided that:-

> **"An offence of contempt of court shall be tried Summary summarily and the court shall keep a record of the proceedings."**

16. It was clear that the spirit of the High Court (Organisation and Administration) Act, the Court of Appeal (Organisation and Administration) Act and the Contempt of Court Act were to come up with a local mechanism to punish for contempt without resorting to English law as was contemplated under Section 5 of the Judicature Act.

17. Notably, the Contempt of Court Act repealed the provisions relating to punishing contempt of court under the High Court (Organisation and Administration) Act and Court of Appeal (Organisation and Administration) Act. The said Contempt of Court Act provided the legal framework where all courts were to apply the same procedure and/or mechanism for punishing for contempt of court.

18. Having said so, the court noted the Defendant's submissions that the Contempt of Court Act was declared unconstitutional by Mwita J on 9th November 2018 in the case of **Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR**. However, having interrogated the aforesaid case in the case of **George Kyaka & 9 Others vs Kevin Kiriga & Another [2019] eKLR**, this very court found and held that the High Court had not been left without powers to punish for contempt of court and could proceed to do so under the High Court (Organisation and Administration) Act.

19. This court's position was fortified by the holding of the Court of Appeal in **Kiru Tea Factory Company Limited vs Stephen Maina Githiga & 14 Others [2019] eKLR** in which it rendered itself as follows:-

> **"16. In this matter, it has been urged the Contempt of Court Act having been declared unconstitutional and Section 5 of the Judicature Act having been deleted by the Contempt of Court Act, this Court has no legal framework to punish for contempt in this matter.**
>
> **17.We wish to dispose of this argument at this stage. By *Section 38, Section 5* ofthe Judicature Act was repealed by deleting it. Similarly *Sections 39* and *40* of the Contempt of Court Act repealed by deleting *Sections 36* and *35* of the High Court (Organization and Administration) Act and the Court of Appeal (Organization and Administration) Act, respectively. It must be stressed that once an Act has been declared unconstitutional, it is void *ab initio* as if it had never been enacted. Consequently, the Contempt of Court Act having been declared unconstitutional, it follows that anything done under or pursuant to it is a nullity and for that reason Section 5 of the Judicature Act, section 36 of the High Court (Organization and Administration) Act** as well as **section 35 of the Court of Appeal (Organization and Administration) Act were never deleted and remain in force as the legal framework for this Court to punish for contempt. (See Supreme Court decision in Mary Wambui Munene - v - Peter Gichuki King'ara & 2 others [2014] eKLR).**"

20. The legal framework and/or power to punish for contempt under the Judicature Act, the High Court (Organisation and Administration) Act and the Court of Appeal (Organisation and Administration) Act thus returned to the same position as they were before they were repealed by the Contempt of Court Act. In addition to the above, this court took judicial notice that a court could still invoke its inherent powers to make such orders as may be necessary to prevent abuse of the process of court under Section 3A of the Civil Procedure Act Cap 21 (Laws of Kenya).

21. Indeed, Section 3A of the Civil Procedure Act stipulates that:-

> **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

22. Having settled that this court had jurisdiction to punish for contempt of court contrary to what the Defendant herein had submitted, this court now delved into the merits or otherwise of the Plaintiffs' application.

23. This court agreed with their argument that no leave was required before they could institute contempt of court proceedings relating to a breach of court order as was held in the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** and that such permission was only required where a committal application had been made in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or Court of Appeal as provided in Rule 81.17 of the English Civil Procedure (Amendment No 2) Rules, 2012 (hereinafter referred to as "the English Civil Procedure Rules"). As the Defendant did not really contest this averment, this court did not find it necessary to delve into the issue further.

24. The Plaintiffs were categorical that it was not necessary for the Defendant to have been personally served with the order that was made by the court on 28th January 2020for the reason that his advocates were present in court at the time the same was made. They referred this court to the cases of **Basil Criticos vs Attorney General & 8 Others [2012] eKLR** and **Bob Collymore & Another vs Cyprian Nyakundi [2016] eKLR** where it was held that personal service of an order was rendered unnecessary in line with the dispensations of Rule 81.8 of the English Civil Procedure Rules.

25. They further placed reliance on the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR** where it was held that notice of service of order was satisfied if a person's agent or counsel was present in court when the judgment or order was made.

26. The Defendant took a diametrically opposite view. He pointed out that Rule 81.6 of the English Civil Procedure Rules stipulates that service of the order must be personal upon the person who is to be served with the same. He submitted that the Plaintiffs herein had not provided proof of personal service of the order upon him. It was his contention that they had failed to comply with the provisions of Rule 81 of the English Civil Procedure Rules which was a grave departure of the mandatory provisions of the law.

27. In this regard, he placed reliance on the cases of **Sam Nyamweya & 3 Others vs Kenya Premier League & 2 others -2015] eKLR** and **Anne Barongo vs Abdi Ahmed & 2 Others [2-15] eKLR** where the common thread was that personal service of an order and a penal notice was a requirement in contempt of court proceedings.

28. Rule 81.8 of the English Civil Procedure Rules provides as follows:-

> **"In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person had notice of it-**
>
> **a. By being present when the judgment or order was given or made;**
>
> **b. By being notified of its terms by telephone, email or otherwise."**

29. This court's interpretation of use of the word **"otherwise"** in Rule 81.8 of the English Civil Procedure Rules envisaged many other modes of how a person could be notified of judgment and order and that it was not only limited to notification by telephone and email. In fact, restricting the mode of how notification could be done in this technological era would be foolhardy as the means of electronic communication evolve with each passing day.

30. Consequently, having considered the rival submissions of both the Plaintiffs and the Defendant, this court was more persuaded by the formers' submissions that because the Defendant was duly represented by his counsel at the time this court gave its order of 28th January 2020 and subsequently extended thereafter, personal service was dispensed with as was contemplated under Rule 81.8 of the English Civil Procedure Rules.

31. Going further, the Defendant averred that the Plaintiffs application was incompetent for the reason that it did not invoke Section 5(1) or any provision of the Judicature Act. In this respect, he relied on the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others**(Supra).

32. On their part, the Plaintiffs contended that failure to cite the provisions of the Contempt of Court Act was not fatal. In this regard, they referred this court to the case of **Kenya Ports Authority vs Kenya Power & Lighting Company Limited [2012] eKLR** amongst other cases to buttress their argument.

33. Notably, Order 2 Rule 14 of the Civil Procedure Rules, 2010 states that:-

> **"No technical objection may be raised to any pleading on the ground of any want of form."**

34. In addition, Order 51 Rule 10 of the Civil Procedure Rules provides that:-

> **"No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."**

35. Most importantly, Article 159 (2) (d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities. In any event,the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others** (Supra) that the Defendant relied upon had only stated that "**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."**

36. The said holding made no reference to the fact that the law under which the application notice had been brought had to be cited. It was therefore this court's considered opinion that the Plaintiffs' present application was not rendered fatally defective for having failed to cite the applicable contempt of court act as had been argued by the Defendant herein.

37. In determining whether or not the Defendant breached the court order, this court noted that it made the following order:-

> **"THAT pending the hearing of the application interpartes, a temporary injunction be issued directed at the Defendant restraining him from making any defamatory statements and/or making defamatory publications in reference to the Plaintiffs."**

38. The Plaintiffs placed reliance on the cases of **Econet Wireless Kenya Limited vs Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828**, **Wildlife Lodges Limited vs County Council of Narok & Another [2005] 2 EA 344 (HCK)** and **Teachers Service Commission vs Kenya National Union of Teachers & 2 Others [2013] eKLR** where the common thread was that orders, whether regular or irregular, had to be obeyed and where there was disobedience, then a court should punish for contempt of law to safeguard the rule of law.

39. On his part, the Defendant averred that the Plaintiffs had not separately and numerically listed each of the listed acts of contempt and that the same were not supported by any affidavit (s)as was held in the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others** (Supra).

40. As can be seen hereinabove, on 2nd May 2019, the Defendant was said to have uttered the following words:-

"…Hata mkora mwengine pale anajifanya rafiki ya rais, aliiba ploti ya fire station ya county akajenga hotel inaitwa "Marble Arc" (Crowd jeers, "Mwizi huyo; mkora…"

41. It was evident from the 1st Plaintiff's Affidavit in support of the present application that he had set out the averments separately. They may not have been identified numerically but the same were in bullet form. The way they were set out was sufficient have given him notice of what the Plaintiffs were complaining about. In the mind of this court, the setting out of the averments separately and numerically was only intended to provide clarity to the issues to courts and to the person complained of.

42. To insist that those averments must be numerical would be placing precedence of form over substance which would be against the spirit of Order 2 Rule 14, Order 51 Rule 10 of the Civil Procedure Rules and Article 159 (2)(d) of the Constitution as had been stated hereinabove. Whether or not the uttered words were defamatory was a matter of evidence.

43. The Plaintiffs attached to the 1st Plaintiff's Supporting Affidavit, a Compact Disk(CD) Exhibit "MM 2" and a Certificate of Electronic Records by Francis Munyao that was certified at Nairobi on 6th May 2019. The said Certificate identified the recording and the manner in which it was obtained and/or produced and transcribed. It was indicated that the same had been downloaded from a computer which was in working condition. The serial number of the computer was given as HP-Probook 450 G4 Serial No 5CD7107L29. The date it was downloaded and transcribed was also given.

44. Section 106B (4) of the Evidence Act provides as follows:-

In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

a. identifying the electronic record containing the statement and describing the manner in which it was produced;

b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

… shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

45. It was therefore not correct as the Defendant had contended that the Plaintiffs had not provided a Certificate of Electronic records in accordance with Section 106B (4) of the Evidence Act.

46. It is undisputed that courts must jealously guard their integrity and stamp their authority by ensuring that court orders are complied with. They must never shy away from punishing contemnors because failing to do so has the risk of making a mockery of the entire judicial system.

47. Having said so, courts should not be so overzealous to punish parties merely because their opponents have alleged that they have breached court orders. They must be satisfied that such contempt exists. In the absence of such proof, they must decline to grant such drastic orders because they have the potential of restraining a person's freedom as enshrined in Article 29 of the Constitution of Kenya.

48. Article 29(a) of the Constitution of Kenya provides as follows:-

"Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without unjust cause."

49. Save for filing Grounds of Opposition, the Defendant did not swear any affidavit to rebut the Plaintiffs' assertions that the utterances were made. In this respect, this court was ready to accept that certain utterances were made by the Defendant and that the Plaintiffs had presented evidence to prove the same.

50. However, this court nonetheless found that it could not ascertain to whom the words **"mkora mwengine"** referred to or who the person who constructed the said Marble Arc in grabbed land was. Notably, there was nothing to show the connection between the Plaintiffs herein and the Marble Arc. The connection may have been obvious to the Plaintiffs and to those who knew them. However, this was not obvious to the court which was expected to be a neutral arbiter and make determinations based on facts that had been placed before it.

51. Courts should not infer relationships or go out of their way to make enquiries so as to make a case for one party. The judicial system in Kenya is adversarial, not inquisitorial. At no time should a court descend into the arena of a dispute between parties to ascertain facts that are not placed before it because doing so would be tantamount to it prosecuting a case on behalf of one party to the detriment of the other.

52. From the affidavit in support of the present application, the relationship between the 1st and 2nd Plaintiffs was, however, clear. The 1st Plaintiff had deponed that he was the 2nd Plaintiff's Managing Director. Applying the law of contempt of court to the facts of the case presented herein, the court found and held that the ordinary and plain meaning of the words complained of by the Plaintiffs herein did not show that it was them who were necessarily being referred to in the utterances. This is because they did not demonstrate their connection to the said Marble Arc. This was a gap that greatly weakened their application.

53. In view of the aforesaid lacuna that failed to show the nexus between the Plaintiffs herein and the said Marble Arc or the **"mkora"** who

was alluded to, this court was not persuaded that it should cite the Defendant for contempt of court and/or sequester his property as had been sought by the Plaintiffs' herein. The averments complained of evidence that were best interrogated during trial. It would not be prudent to make a determination on the deponed facts at this interlocutory stage.

DISPOSITION

54. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs' Notice of Motion application dated and filed on 6th May 2019 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.

55. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **7th** day of **May** 2020

J. KAMAU

JUDGE