



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 52 OF 2012

ALNASHIR VISRAM.....PLAINTIFF

VERSES

THE STANDARD LIMITED.....DEFENDANT

RULING

1. The application dated 29th October 2018 seeks orders that:

- 1. That Chief Executive Officer of the defendant, Standard Group Limited and the Chairman of the Board of Directors of the Defendant herein be committed to prison for a term of six months for being in contempt of the court decree made on 25th August, 2016.**
- 2. The Officer Commanding Parklands Police Station or any other Station the court may order be directed to enforce the warrants of arrest to be issued by this court.**
- 3. Leave be granted to the plaintiff to file further affidavits to bring additional documents or material before the court touching on the matter in question.**
- 4. The court do grant any other order it deems appropriate in the circumstances.**
- 5. That the costs of this application be provided for**

2. The gist of the application is that on 25th August, 2016, the court issued a decree requiring the Defendant to publish an apology and retraction of similar prominence as the publication that the court found to be defamatory of the Plaintiff. That on 26th August, 2016 the Defendant published an apology in small print which did not match the prominence of the offending article, thereby offending the court's order.

3. The application is opposed as per the grounds of opposition dated 2nd November, 2018 which state as follows:

- 1. It has not been shown that there has been a wilful disobedience of a court order or at all;**
- 2. The judgment of the court and the extracted decree were precise and unambiguous that the apology 'be given the widest possible circulation similar to the publication the plaintiff complained about.' There was no reference in the judgment to 'similar prominence' which the plaintiff specifically sought as a prayer (a) in the plaint but was not granted by the court;**
- 3. There is no allegation that the apology and retraction published within seven days as directed in the judgment was no so done with 'widest possible circulation similar to the publication the plaintiff complained about' in the tenor and terms of the judgment and extracted decree;**
- 4. The application makes repeated reference to 'similar prominence' yet no such directive was issued by the court neither has the court been formally moved to review/vary the terms of the judgment to include the aspect of 'similar prominence' the plaintiff sought but was not granted by the court;**

5. No evidence has been presented to show either connivance, neglect or otherwise of the designations sought to be committed for contempt;

6. The claim for alleged contempt is time barred with regard to the provision of Section 34 of the Contempt of Court Act, 2016 the deponent confirms on oath that the said alleged violation occurred on 26th August, 2016.

4. The application was argued by way of written submissions which I have considered.

5. The application is expressed to be brought under Section 4 and 29 of the Contempt of Court Act; Section 63 (c) of the Civil Procedure Act; Order 40 rules 2 and 3 of the Civil Procedure Rules; Section 1A, 1B and 3A Civil Procedure Act and the inherent powers of the court. It has been submitted by the counsel for the Defendant that the claim of the alleged contempt is time barred by virtue of Section 34 of the Contempt of Court Act, 2016 which provides for such proceedings to be brought within six months. It was further submitted that the Plaintiff's side cannot now purport to shift and submit on the basis of the Judicature Act. Although the High Court nullified the contempt of Court Act 2016 (See **Kenya Human Right Commission v Attorney General [2018] eKLR** and the Plaintiff has reflected inapplicable law in the application, it is clear that the Plaintiff seeks the committal of the Defendant's Chief Executive Officer and Chairman of the Board of Directors to prison for six months. The Defendant has not shown any prejudice that may be suffered as a consequence of the wrong provisions of the law being reflected in the application.

6. The Defendant is a corporate body. An order of committal can therefore be made against the Directors and Officers of the corporation. To that extent, this court is in agreement with the submissions by the Plaintiff's counsel who relied on **Halbury's Laws of England Vol 22, 5th Edition** paragraph 65 which states as follows on the subject:

"A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation. A director or other officer who is aware of the terms of such a judgment or order (or of an undertaking given by the corporation) may be committed for contempt of court if he wilfully fails to take adequate and continuing steps to ensure compliance, notwithstanding that he has not actively participated in the breach. Further, the court may give leave for the issue of a writ of sequestration against the property of the corporation or of any of its directors or officers; the corporation itself cannot be committed, but it can be fined."

7. The Defendant was aware of the Judgment of the court. The Defendant's Advocate was present when the judgment was delivered and indeed the Defendant went ahead and published the apology that is the subject of these proceedings.

8. as stated by the Court of appeal in case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**

"The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the Wambora case (supra) affirmed the application of these requirements.

... On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved."

9. On whether the Defendant is in contempt of court, the pertinent part of the judgment dated 17th August, 2016 at paragraph No. 170 reads as follows:

"... I make an order that the defendant, The Standard Ltd do make a full and unqualified apology and make amends and withdrawal on the statements made and published by the Defendants Daily Newspaper THE STANDARD, against the plaintiff and that such apology, amends and withdrawal be given the widest possible circulation similar to the one given to the publication the plaintiff complained about..."

10. The apology was to be given the widest possible circulation similar to the defamatory publication. The Plaintiff's complaint is that the apology was small in print and size and therefore violated the court order as not many readers were drawn to its attention. The Plaintiff's contention is that the apology ought to be of similar prominence as the article the subject of the suit.

11. I have seen the apology complained of. The same is in small print in a small space at the bottom left corner of the front page. The defamatory publication which was the subject of the suit was much bigger, in bigger print and was accompanied by a photograph and occupied almost the entire front page of the newspaper. However, the judgment herein did not go into the details of the size of the apology to be published nor the size of the print thereof. The judgment referred to **"widest possible circulation similar to the one given to the publication"** The words **'of similar prominence'** did not appear in the judgment. Circulation is different from prominence. In any event, the apology consists of less number of words and therefore could not be equal in size and prominence with the article the subject of the suit.

12. Contempt of Court is a serious offence. The standard of proof is beyond reasonable doubt. It was observed in the case of **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others [2015] eKLR** as follows:

"I reiterate that contempt proceedings are of a criminal nature and involve, if proved, loss of liberty, the applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like in the case of any

other ordinary matter like service of summons to enter appearance or hearing notice upon a party, where, even if service was regular, the courts have found that ex parte proceedings or judgment made in default could still be set aside on terms in the discretion of the court”

13. In the case at hand, I find there is no proof of contempt of court. Consequently, I dismiss the application. Taking into account the circumstances of the matters in issue herein, each party to bear own costs.

Dated, signed and delivered at Nairobi this 4th day of Dec., 2019

B. THURANIRA JADEN

JUDGE