



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 33 OF 2015**

**NAIROBI AVIATION COLLEGE LIMITED.....PLAINTIFF/APPLICANT**

**- V E R S U S -**

**NATION MEDIA GROUP LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1.) Nairobi Aviation College Ltd, the plaintiff/applicant took out the motion dated 6<sup>th</sup> February 2015 whereof it sought for the following orders:

***1. That WILFRED KIBORO, LINUS GITAHI, DENIS ALUANGA, RICHARD DOWEND, STEPHEN GITAGUMA, LEE HUEBNER, YASMINJETHA, FRANCIS OKOMO OKELLO, ANWAR POONAWALLA, GERARD WILKINSON, OLIVE MUGENDA, SIMON KAGUGUBE, ZUHURA URO, JAMES KINYUA, JAMES MONTGOMERY, LINUS KAIKAI AND DENIS OKARI, the Directors editor of Nation Television and employee respectively of the respondent herein be committed to prison for such period of time as this honourable court may deem fit.***

***2. This honourable court do issue an order of sequestration, attachment and sale of the properties of NATION MEDIA GROUP LIMITED, the respondent herein.***

***3. THAT this honourable court be pleased to grant further orders and/or directions as it deems fit and expedient in the circumstances.***

***4. THAT the costs of this application be borne by the defendant/respondent.***

2) The motion is supported by the affidavit of Onsembe Machoka. When served with the motion, Nation Media Group Ltd, the defendant/respondent filed the replying affidavit of Sekou Odongo Owino to oppose the application. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival written submissions. It is the submission of the plaintiff that the defendant advertised an intention to air on 1<sup>st</sup> February 2015 on its television station an **expose and or investigation** entitled “**certificates of doom**”. The plaintiff stated that it obtained an order issued by Justice Eric Ogola on 30.1.2015 restraining the defendant by itself, its servants, agents, nominees or persons claiming any right of interest under or through them, from airing the expose as advertised pending the hearing interpartes of the motion on 4.2.2015. It is the submission of the plaintiff that the order was extended with a notice of penal consequences and served upon the defendant at its registered place of business and also served the same upon its editor through electronic mail. The plaintiff averred that, in total breach of the aforesaid order, the defendant proceeded to air out the expose and or investigation on 1<sup>st</sup> February 2015. The court further extended the interim order issued on 30.1.2015 pending the filing and hearing of the contempt application. It is said that in flagrant disobedience of the subsequent orders the defendant continued to air the expose and or investigation on 4<sup>th</sup> and 5<sup>th</sup> February 2015 and have since then refused to comply with the orders. This court was therefore beseeched to protect its authority and dignity from ridicule and disrepute by punishing the defendant as prayed herein.

4) The defendant on the other hand denied knowledge of the orders issued on 30<sup>th</sup> January 2015. It is admitted that the motion dated 30.1.2015 plus the supporting affidavit, the plaint, the verifying affidavit list of witnesses and documents were sent to one Sekou Odongo Owino by electronic mail on 2<sup>nd</sup> February 2015. The defendant then promptly instructed its advocates namely Archer & Wilcock Advocates to attend court on 4<sup>th</sup> February 2015. The defendant averred that at that stage it was unaware of the existence of a court order. It is on 4<sup>th</sup> February 2015 that the defendant was informed by M/s Janmohamed of Archer & Wilcock Advocates that a court order had been issued on 30.1.2015 restraining the defendant from broadcasting the expose and the investigation known as “certificates of doom.” The Defendant denied that ‘Ruth’ the person who is allegedly said to have received the order on behalf of the defendant was a member of staff of the defendant in the mail office. It is said that the defendant is aware that there is a person known by the name ‘Ruth’ who is employed by Foresight Innovation Co. Ltd, a company which provides cleaning services to the building housing the defendant. The persons named as respondents i.e **Wilfred kiboro, Linus Gitahi, Denis Aluanga, Richard Dowder, Stephen Gitaguma, Lee Huebner, Yasmin Jetha, Franis Okomo Okello. Anwar Poona Walla, Gerald Wilkinson Olive Mugenda, Simon Kagugube, Zuhura Muro, James Kinyua, James Montgomery, Linus Kaikai and Denis Okari** all stated that they only came to know about the existence of the court order on 4<sup>th</sup> February 2015. It is submitted by the defendant that upon becoming aware of the court order issued on 4.2.2015, the broadcast was removed from the defendant’s website on the same date.

5) Having considered the parallel positions taken by the parties, I think the main issue which must be considered in determining the motion is service whether or not the defendant was served with the court order issued on 30<sup>th</sup> January 2015. A court order is a very vital document and which time is of essence. In this case the order was intended to restrain the defendant from broadcasting what it called an **expose and or an investigative report** on 1st February 2015. The general principle is that in the context of contempt, it is necessary to establish personal service of orders concerning which disobedience is alleged. It would appear there was no personal service effected upon the persons named as respondents in the application. It is also apparent that the defendants and those named herein only came to know about the existence of the court orders on 4<sup>th</sup> February 2015 through the defendant’s advocate who was seised with the matter. In my humble understanding, the defendant and those named herein as respondents came to know of the order after the offensive broadcast had already been aired. From the affidavit of Sekou Odongo Owino, it is apparent that up until 4.2.2015 he had no knowledge of the said order. In fact the plaintiff has admitted that the order was left in the mail office to a person by name ‘Ruth’. There is affidavit averment that the aforesaid person is employed by a company that provides cleaning services to the defendant. There is also an averment that the order was served upon Linus Kaikai through email. It is the averment of Sekou Odongo Owino that the alleged email used was the wrong email address. In short there is doubt whether proper service was effected. The law in cases of contempt demands a high degree of proof of service in order to sustain an application for contempt. In the absence of proof of proper service, it cannot be said that the order issued on 30.1.2017 was flagrantly disobeyed.

6) In the end, the motion is found to be without merit. It is dismissed in its entirety with each party bearing its own costs.

Dated, Signed and Delivered in open court this 10<sup>th</sup> day of February, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant