REPUBLIC OF KENYA

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<u>IN THE HIGH COURT OF KENYA AT NAIROBI</u>

<u>CIVIL SUIT NO. 159 OF 2016</u>

1. **BOB COLLYMORE**
2. **MICHAEL JOSEPH…………………..……..PLAINTIFFS**

VERSUS

CYPRIAN NYAKUNDI……………………….DEFENDANT

<u>R U L I N G</u>

1. The Plaintiffs filed this suit seeking damages for defamation. By a notice of motion dated 17th June, 2016 the Plaintiffs sought injunction against the Defendant restraining him from publishing or causing to be published either by his agents, servants or himself in any of his blogs www.cnyakundi.com and http:/www.kenyalivefeed.com or in any other blog or media platform any statements defamatory or otherwise of or concerning the Plaintiffs.

2. This court issued interim orders pending the hearing and determination of that application on 18th July, 2016. The Plaintiffs have now filed a notice of motion dated 3rd August, 2016 seeking the following orders:

i. That this court do find hold and declare that the Defendant is in contempt of the court for disobeying the court orders made on 18th July, 2016.

ii. That the court does order that the Defendant be committed to civil jail for such period of time that the court may deem fit and or attachment of his properties for disobeying the court orders made on 18th July, 2016.

3. The motion is pegged on the grounds on the body of the motion and the supporting affidavit of the 1st Defendant. He stated that despite the order of 18th July, 2016, the Defendant published a defamatory article in his blog www.cnyakundi.com on 1st August, 2016 an article titled *"Cheapstakes: CEO of Leding Telco Bribed Editors with 5k and a Powerbank"* concerning him. That the Defendant has failed to apologize and withdraw the defamatory statements and the article. That as a consequence thereof the 1st Plaintiff has suffered substantial damage to his reputation. That despite the existence of the orders there is likelihood that the Defendant will continue publishing defamatory articles with a view of disparaging and ruining the Plaintiffs' reputation.

4. In response to the motion the Defendant filed a preliminary objection on the ground that the motion does not comply with the requisite steps for contempt proceedings as set out in part 81 of the Civil Procedure Amendment Rules No. 2 Rules 2012 that replaced order 52 of the Rules of the Supreme Court

of England in its entirety. That no order of committal or other orders can be made on the foot of the said contempt application against the Defendant either as sought or at all since:

> i. The order alleged to have been breached has never been served upon the person sought to be committed, whether personally as required.
>
> ii. The contempt proceedings have not been served on the person sought to be committed whether personally as required or at all.
>
> iii. The order obtained herein by the Plaintiff and sent to the Defendant's counsel did not have a notice of penal consequences endorsed thereon.

5. The Defendant further filed a replying affidavit on 13th September, 2016. The affidavit was partly a reiteration of the grounds in the preliminary objection. He contended that the annexure by the 1st Plaintiff in his supporting affidavit "BC-1 and 2" be expunged from the record since he has offended the provisions of Evidence Act. He stated that he published an article in the internet that featured a story on corruption surrounding the media industry in Kenya. That he did not mention the Plaintiffs herein at any point in the said publication and covering and reporting the same was not done in malice to discredit and or cast aspersions to the 1st Plaintiff's credibility and reputation as alleged. That after correspondence between the Plaintiffs' advocates and his, he immediately amended the said publication as much as the same was not done in malice to discredit the 1st Plaintiff's reputation. That he understands the facts in issue are part of the court proceedings and gave an undertaking to keep off the matter so as not to hold this court in contempt.

6. I have considered the submissions of the parties and the dispositions.I would first want to deal with the Defendant's contention that the motion herein has been brought under the wrong provisions of the law. The motion here was brought under section 63 of the Civil Procedure Act and Order 40 rule 3 (1) of the Civil Procedure Rules. The procedure for institution of contempt proceedings is set out in Section 5 of the *Judicature Act* Cap 8 Laws of Kenya. That section provides as follows:-

> ***"(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."***

7. The law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege v. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognized that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the ***Judicature Act***.

8. It has been said time without number that whenever a court order is made such an order is binding and whoever has difficulty has the opening to come to court to seek an explanation rather than defy it. See

> **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 where Ibrahim J as he then was stated** as follows:-
>
>> ***"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, 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".

9. The Court of Appeal confirmed this position in **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** where the Court expressed itself as follows:

> ***"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question.That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realization of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An exparte order by the court is a valid order like any other and to obey orders of the court is to obey orders made both exparte and inter partes since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make ex parte orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an exparte order, since such an order stands open to be set aside by simple application, before the very same court… Where a party considers an*** *ex parte* ***order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made*** *ex parte* ***and this argument will not avail either the first or the second defendant".***

10. The Defendant contends that the court order was not served upon him personally. On the issue of service I am guided by the Court of Appeal finding in Shimmers Plaza Limited v. National Bank of Kenya Limited (2015) eKLR where the court stated as follows:

> ***"(1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been <u>present</u> when the judgment or order was given or made; or was <u>notified</u> of its terms by <u>telephone</u>,<u>email or otherwise</u>. 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.

We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect.

In that respect, this case can be distinguished from Justus Kariuki Mate & Another vs Hon. Martin Wambora (Wambora case) supra cited by learned counsel for the applicant.

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. This is in line with the dispensations covered under 81.8 (1) (supra).

Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:-

"...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"

This position has been affirmed by this Court in several other cases including the Wambora case(supra).

It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. This standard has not changed since the old celebrated case of Ex parte Langley 1879, 13

Ch D. 110 (C.A), where Thesiger L.J stated as follows. at p. 119:

> *"…the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."*

What then amounts to "notice"?

Black's Law Dictionary, 9th Ed defines notice as follows:-

"A person has notice of a fact or condition if that person-Has actual knowledge of it;Has received information about it; Has reason to know about it; Knows about a related fact;Is considered as having been able to ascertain it by checking an official filing or recording."

Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case

such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.

This is the position in other jurisdictions within and outside the commonwealth.

In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in <u>Bhatnager v. Canada (Minister of Employment and Immigration),</u> [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held

that:-

"In my opinion, <u>a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn</u>. In the case of Minister's of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister." (Emphasis by underline)

The Court went on to state that;

"On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt....<u>Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved.</u>(See Avery v. Andrews(1882) 51LJ Ch. 414) (Emphasis by underline)"

11. In this case, the interim orders were made in the presence of the Defendant's advocates and therefore suffices as service. Although the Defendant contends that he did not mention the 1st Plaintiff in the article, it is clear that the article has nexus to the 1st Plaintiff in relation to the matter before court. He therefore ought to have kept of commenting in the media. He further ought to have sought clarification from the court if he found any difficulty with the order as was found in the **Econet Wireless Kenya Ltd**(supra). In the circumstances he is found to be in contempt.

12. The court shall mention the matter on 19th January, 2017 when the Defendant shall be required to attend court for mitigation.

Dated, signed and delivered at Nairobi **this 1st day of December, 2016.**

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L NJUGUNA

JUDGE