



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 512 OF 2011

ABDALLA ALI TAIB. 1ST PLAINTIFF

TAIB ALI TAIB. 2ND PLAINTIFF

MOHAMED ALI TAIB. 3RD PLAINTIFF

OMAR MUSALLAM. 4TH PLAINTIFF

VERSUS

RABINDER KAUR AHLUWALIA. DEFENDANT

RULING

The application before the court is the Notice of Motion dated 10th January, 2012 filed by the Plaintiff's on 18th January, 2012. The prayers in it which are presently relevant include: -

- a. **That an Order be given compelling internet Corporation for assigned names and numbers (ICANN), any relevant Government authorities and or bodies with governing, regulatory or oversight powers, to close and/or put a stop to the aforementioned websites that shall be contravening the orders of this court.**
- b. **That to ensure that the orders of this court dated 25th November, 2011 and extensions thereto are enforced both in their letter and spirit until this suit is heard and finally determined the Defendant/Respondent do immediately ensure that the offending websites on the worldwide web, are immediately and would without exception, shut down and all materials and contents relating to this court and the Plaintiffs/Applicants herein, published and or posted on the internet or published or posted anywhere else be immediately removed and shut down in accordance with Courts Orders of 25th November, 2011 and the extensions thereto of 7TH, 8TH and 20th December, 2011 and to the satisfaction of this Honourable Court.**
- c. **That the Defendant/Respondent herein, one Rabinder Kaur Ahluwalia, be cited for contempt of this court and be committed to civil jail for 6 months for being in flagrant and contemptuous breach of the Honourable Court's Orders of the 25th day of November, 2011 issued by the court (Lady Kaplana Rawal, J) and as subsequently extended on the 7th December, 2011, 8th December, 2011 and 20th December, 2011.**
- d. **Costs.**

The application is based on the grounds on the face of the application. The Plaintiff's case is simply based on the fact that after this court made the order of 25th November 2011 prohibiting the Defendant, other agents and servants from again or further publishing same, similar or other related publications in or on any forum reachable by the members of the public, she ignored the orders and through the same portal or newly created ones, continued to publish similar material which were injurious to the Plaintiffs and contrary and in defiance of the said court orders. Hence the request for further injunctive orders to cover other forums not earlier covered and prayers for committal to civil jail of the Defendant as a result of disobedience to and defiance of the said court orders already committed.

The application is strenuously opposed upon various grounds both substantive and technical. The Respondents main technical ground is that she was not personally served with the application for contempt and the court orders as well as Penal Notice relevant to the service in question and that she was not personally in court to hear the orders pronounced. She secondly, averred that she was not served personally with the affidavit that had supported application for leave to file the contempt proceedings. Third ground in this series is that the Plaintiff did not serve the Attorney General with the application for leave to file contempt proceedings or was not exempted from doing so in view of the fact that such proceedings are supposed to be filed through his office.

On the side of substantive grounds, the Defendant denied disobeying or defying the said court orders directly or through any other forums.

Both sides filed their written submissions which I have carefully studied together with materials filed by both sides in support of their cases.

This court's power to deal with contempt of court proceedings is provided for under **Section 5 of the Judicature Act, Cap 8 of the Laws of Kenya and Order 40 Rule 3 of the Civil Procedure Rules**. The said Section 5(1) provides: -

“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 in High Court of Justice in England, and that power shall extend to upholding the authority and dignity of the subordinate courts.”

The procedure of committal for civil contempt of court, was inter alia stated in **Mwangi Wang'ondu Vs Nairobi City Commission in Civil Appeal No. 95 of 1988 (unreported)** thus: -

“... The procedure for committal for civil contempt in England where an order of sequestration is sought to set out under the Rules of the Supreme Court Order 45 and 46 in Halsburys Laws of England, Vol. 9 (4th Edition) under the heading: -

“Contempt of Court”

“Briefly the effect of these provisions is that as a general rule, no order of court requiring a person to do or restrain from doing any act, may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order must be endorsed with a notice informing the person on whom the order is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”

Although contempt for disobedience of an injunction under Order 40 Rule 3 of the Civil Procedure Rules, 2010, is specifically provided for, the procedure for punishment still remains Order 52 of the Rules of the Supreme Court of England subject only to any amendments or changes that may have been brought into place in respect thereof. This means there that the law governing the proceeding of contempt of court in Kenya is the current law governing contempt in England.

In England, there was enacted the ***Contempt of Court Act of 1981***. There also was enacted the ***Civil Procedure (Amendment No. 2) Rules, 2012***. The latter replaced Order 52 of the Supreme Court Rules as we always knew it.

Interpreting Section 5 of the Kenya's Judicature Act, therefore, the Court of Appeal in **JUSTUS KARIUKI MATE & ANOTHER VS HON. MARTIN NYAGA WAMBORA & ANOTHER**, Civil Appeal no. 24 of 2014 stated as follows: -

“It is imperative in considering this issue to take into account the applicable law and the governing principles in contempt proceedings. As correctly pointed out by this Court in Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others – Civil Application No. 233 of 2007, the statutory basis of contempt of court in so far as Court of Appeal and High Court are concerned is Section 5 of the Judicature Act and Section 63 (c) of the Civil Procedure Act.. Based on the foregoing, the applicable law in contempt proceedings in Kenya is the law applicable in High Court of Justice in England at the time the application for contempt was filed.”

Furthermore in the cited case of **Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others** (supra) the Court of appeal had also stated as follows: -

“... Recently on 1st October, 2012, the Civil Procedure (amendment No. 2) Rules, 2012 came into force and Part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety.”

The Court of Appeal in the immediately above cited case then went ahead to clarify that the cited Part 81 provides for four different natures or forms of Contempt of Court i.e.

- i. Committal for “breach of a judgment, order or undertaking to do or abstain from doing an act” provided for under Rule 81.4.
- ii. Committal for “interference with the due administration of justice” (applicable only in criminal proceedings) provided for under Rule 81.11.
- iii. Committal for contempt “in the face of the court”, provided for under Rule 81.16.
- iv. Committal for “making false statement of truth or disclosure statement.” provided for under Rule 81.17.

Clearly, then the Contempt of Court alleged in this case in my view falls under category one above being an allegation for **breach of judgment, order or undertaking to do or abstain from doing an act**. As the Court of Appeal found in the above cited **Christine Wangari Gachege Case** this category of contempt of court has been assigned an outlined procedure.

According to Rule 81.9 of the said Part 81 a judgment or order to do or not to do an act, may not be enforced in contempt proceedings unless there is prominently displayed, in the front of the copy of the judgment or order served, a warning to the person required to do or not do the act in question. Further, that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. The rules also require that the court order and penal notice must be served simultaneously before the end of the period prescribed for the doing of the act.

Although Rule 81.6 requires a personal service, the latter can be dispensed with by the court under Rule 81.8. Dispensation of personal service occurs if the court is reasonably satisfied that the person had notice of the judgment or order because he was present when the judgment or order was given, or when he was properly or reasonably notified of the terms of the judgment or order by telephone, email or otherwise

where “**otherwise**” appears to include reasonable alternative method of service ordered by court at the given or known address or an alternative place or address. It is also noted that such dispensation of service will only apply to court judgment or order requiring a person not to do an act, i.e. a prohibitory order. The notice of the order is satisfied if the person or his agent be said or proven to have either been present when the judgment or order was given or made or was notified of its terms by telephone, email or otherwise.

The Appeal Court concluded as well that “**otherwise**” would mean any other action that can be proved to have facilitated the person to come into knowledge of the terms of the judgment or order. Where a person is accordingly represented by an advocate in such matter, the knowledge of the advocate to court who attended court to take judgment or order is presumed to be the knowledge of his client and the latter would bear an evidential burden in relation to *willfulness and mala fides* disobedience. The Court of Appeal applied this English Rule in Kenya in **Wambora Case** although that is not the first time that happened.

In **Basil Criticos Vs Attorney-General and 8 Others [2012] eKLR**, Lenaola J had stated thus: -

“... the law had 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.”

What is required therefore, as I understand it, is that the court should satisfy itself or “**beyond any shadow of doubt**” as the Court of Appeal put it, that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the judgment or order of court forbidding him from doing the act. This is a course that is likely to involve deprivation of a citizen’s liberty or basic rights and accordingly the court dispensing with personal service must be satisfied beyond the shadow of doubt that the person had notice of the Order forbidding him from doing the act but nevertheless went ahead and disobeyed it.

Each case will, therefore, be considered upon its circumstances and the burden for proof that the Respondent had notice within the above principle, should be on the applicant asserting such notice and he should prove the knowledge of notice beyond any show of doubt. In the case of an advocate, there is an irrefutable assumption to the effect that the advocate who appeared in court on a party’s instructions is under a legal imperative obligation to report back to his client of what transpired in court. To this end a Canadian court in **BHATNAGER VS CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION [1990] 2 S.C.R. 217 at 226** stated thus: -

“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... 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.”

Turning now to the case before me; it is not denied and there is evidence on record to support it, that the process-server served the relevant documents including the penal notice upon the Respondent’s Advocates Hassan Bulle & Company. His attempt to serve the Respondent at the Respondent’s house in company of police officers was not so successful. It was alleged that the Respondent refused to open the door to the process-servers to enter and effect personal service. As a result the process-server pushed service documents through a space below the door without establishing the identity of the person who was inside the house although it would be natural and logical to humanly assume, that it was the Respondent since the residency was said to be hers.

I have carefully perused the affidavits of service and other adduced evidence of the process-server, Raphael M Kilonzi. Clearly the evidence does not prove personal service upon the Respondent herein, **Rabinder Kaur Ahluwalia**. As hereinabove stated, there is evidence that service was done upon the Respondent’s advocates Hassan Bulle & Company and neither the Respondent nor the Advocates

themselves deny that fact. There is credible evidence in the affidavits of the Applicant as well, that the Respondent herself was personally in court when the orders were given and that Kaplana Rawal, J (as she then was) took it up herself, to warn the Respondent of the consequences of disobeying the court order.

The Respondents position however, is that even if she was in court and was warned not to disobey the order now in question, that would not be enough in contempt of court proceedings. Her advocate insisted that notwithstanding such presence in court, she nevertheless had in addition to be served with the order and notice personally in order to prove mala fides on her part.

Taking into account the development of the law of service of such matters however, this court concludes that the Respondent was in court when the order was made forbidding her from further publication of the defamatory matters. Her presence in court and the warning given by the court gave her enough notice and knowledge of the prohibition orders by the court in respect to further publications.

However, even if she did not attend court, I find that the service of the order with the notice which was pushed below the door into the Respondent's house, was adequate notice of the contents of the order and the notice. In this respect there was also sufficient evidence of quotations made by the Respondent in the later publications which quotations must have come from the rulings of Court which were pushed under the door by the Process-Server. There is no way the Respondent would quote from the Ruling of Court unless she had in hand a copy of the same. The court in the absence of any other logical explanation from the Respondent, concluded that she was quoting from the copies of the Ruling and Order pushed into her house by the process-server.

The court in the alternative has on record sufficient evidence and the same was as earlier stated, not denied that the process-server properly served the Order and the relevant notice upon the Respondent's advocate. As held in various cases herein above quoted, proper service upon a client's advocate is presumed by the court to be service upon the Respondent. In this case in particular, neither the Respondent nor the Advocates Messers Hassan Bulle and Company denied service upon them. Indeed their argument was that the service which was done on them for the Respondent was not sufficient. They accordingly, quoted the finding in the case of **KARIUKI & 2 OTHERS VS MINISTER OF GENDER, SPORTS, CULTURE AND SOCIAL SERVICES [2004] IKLR, 588**. However, as already explained, that law is not any more good law in Kenya in respect of these matters. The Respondent in her submissions also averred that the court cannot find a contempt of court in proceedings brought under an application which may have been filed without first and foremost, obtaining leave of court to file it. However, as declared in **Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others**, earlier cited, leave of the court before institution of an application for Contempt of Court is no longer necessary under the new Civil Procedure Rules of England (2012) which now fully apply in Kenya

The conclusion this court comes to therefore, is that the Respondent had been properly served through her advocates and personally and had acquired full knowledge of the acts that the court had forbidden her to do. She however, deviously and through various media, went ahead to publish the material the court had forbidden her to publish, thus blatantly disobeying the court order in question. The Applicant in this application proved beyond a shadow of doubt that the Respondent acted deliberately and in contempt of the orders of court. I am satisfied that she is guilty of contempt as claimed by the Applicants and I hereby convict her of the charge of contempt of court orders.

A glance at circumstances under which the Respondent/Defendant persistently but deviously tried to express herself out to the world may not be fully understood by this court in the background of her having lost her son. However, I cannot do better than quote the Court of Appeal once more in **Shimmers Plaza Limited Vs National Bank of Kenya Limited** in Civil Appeal No. 33 of 012 at page 18. The court stated: -

“It cannot be gain-said that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good Order and the due administration of justice.”

The above citation clearly went further to quote **Hadkison Vs Hadkinson [1952]All ER 567** as follows: -

“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 even void...”

The above citation clearly means that where a party gets sufficient knowledge of an order, whether that order is null or valid, regular or irregular, such person cannot be allowed to disobey it. Such person cannot be allowed by law to himself become judge as to whether or not an order was null or valid or whether it was regular or irregular. He should not himself determine such a question. His obligation is to obey the order and apply to the court to declare the order null or void for the purpose to discharge it. Until the order is so discharged, it binds every person to whom it was directed and must be complied with. That is the only way in which the rule of law and good order as well as the authority and dignity and integrity of courts can be upheld at all times. To that end, Government Institutions, State Officers, Banks and all the sundry are required by law to comply with court orders.

It therefore saddens the court to observe the highly worrying trend in this country in which court orders are treated casually and with high degree of contempt mainly by very senior persons in government as well as private institutions. Such persons mistakenly think that they are above the law. However, they should realize that it is the rule of law and good order under which peace and co-existence of different interests including theirs, are protected and sustained.

Turning again to this case before me, I in the final result make the following orders: -

ORDERS

- 1. An order is hereby given, compelling Internet Corporation in charge of assigned names and numbers (ICANN), any relevant government Authorities and/or bodies with governing, regulatory or oversight powers, to close and/or put a stop to the aforementioned websites that shall be contravening the order of this court.***
- 2. The Defendant/Respondent herein is hereby ordered to ensure that the offending websites on the Worldwide Web in respect of which Respondent holds responsibility, are immediately and without exception, shut down and all materials and contents relating to this suit and to the Plaintiff's herein, published and/or posted on internet or published or posted elsewhere else, are immediately removed and shut down in accordance with Court Orders of 25th November, 2011 and the extensions thereto of 7th, 8th and 20th December, 2011 and to the satisfaction of this court.***
- 3. The Defendant/Respondent, Rabinder Kaur Ahluwalia, cited for contempt of court herein, is hereby found guilty of the alleged contempt of court and henceforth stands liable to be committed to civil jail for a period to be determined by this court or in the alternative, to be fined or be sequestrated as the court will deem fair and just after hearing her mitigation.***
- 4. The costs of these proceedings shall be borne by the Respondent/Defendant and shall be agreed upon or taxed.***

Dated and delivered at Nairobi this 5th day of May, 2015.

D A ONYANCHA

JUDGE