



Nation Media Group Limited & another v Nyabuti (Civil Appeal 113 of 2019) [2023] KECA 876 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 876 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 113 OF 2019
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA
JULY 7, 2023**

BETWEEN

NATION MEDIA GROUP LIMITED 1ST APPELLANT

DAVID HEBLING 2ND APPELLANT

AND

PETER NYABUTI RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Njuguna, J.) dated 22nd September, 2017 IN HCCC NO. 431 OF 2015)

JUDGMENT

1. This is an appeal against the ruling of Njuguna, J. delivered on September 22, 2017.
2. A brief background to the appeal is that Peter Nyabuti, the respondent herein, the then plaintiff in a suit filed against the Nation Media Group Limited and David Herbling, the 1st and 2nd appellants herein, the then 1st and 2nd defendants. The gist of the respondent’s complaint was that on December 8, 2015, the 1st and 2nd appellant published defamatory words against him in an article entitled “How a Kenyan Engineered Tanzania’s Big Loan Scandal”
3. Before the suit was heard and determined, the respondent filed a notice of motion application dated December 14, 2015 seeking an order of injunction to bar the appellants from “...further publishing ...” any article, words, materials or remarks against the appellant in relation to the alleged “Tanzanian Big Loan Scandal”. The specific orders sought were:

“(1) ...

2. Pending the hearing and determination of this application interpartes, there be an order of temporary injunction, restraining the Defendants, their agents,



employees, servants or any other person claiming through them from further publishing any article, words, material or remarks against, of and concerning the Plaintiff in relation to the alleged "Tanzanian Big loan Scandal"

3. Pending the hearing and determination of this suit, there be an order of temporary injunction, restraining the Defendant's, their agents, employees, servants or any other person claiming through them from further publishing any article, words, material or remarks against, of and concerning the Plaintiff in relation to the alleged "Tanzanian Big loan Scandal"
4. The notice of motion of December 14, 2015 was determined *vide* a ruling delivered on December 23, 2023. The Court rendered itself thus:

"In the premises aforesaid, the application dated December 14, 2015 is hereby allowed in terms of prayer 3. Costs shall be in the cause."

5. In an application dated June 21, 2016, the respondent sought to have the Directors of the 1st and 2nd appellants to be committed to civil jail for contempt of court for allegedly disobeying the court orders issued on December 23, 2015. The grounds on the face of the motion were that:

(1) ...

(2) ...

3. This Honourable Court on the 23rd day of December 2015 issued an order of temporary injunction restraining the defendants, their agents, employees, servants, or any other person claiming through them from further publishing any article, words, material or remarks against, of and concerning the Plaintiff in relation to the alleged "Tanzanian Big Loan Scandal"
 4. The order was extracted by the plaintiff/ applicant's Advocates, who then endorsed a notice of penal consequences prominently displayed on the said order thereon and served the same upon the respondents at their registered place of business.
 5. The respondents deliberately disobeyed the orders of this court issued on December 23, 2015 and continues to carry on the story through their internet portal and have refused, neglected and/or otherwise failed to comply with the same.
 6. The respondents have continued posting the defamatory articles on the websites of both the business daily in Kenya and Citizen in Tanzania both which are publications of the 1st respondent."
6. In a ruling dated September 22, 2017, Njuguna, J found the appellants "... guilty of contempt ..." and fined "... each of them Kshs 200,000.00 for contempt and in default to serve three months in jail. The fine to be paid within 14 days failing which a warrant of arrest to be issued." It is the ruling of September 22, 2017 that provoked the instant appeal. In a memorandum of appeal dated March 29, 2019, the



appellants raised 9 grounds of appeal which were condensed into three main grounds in the appellant's written submissions dated January 20, 2020 as follows:

- i. The learned judge erred in law and in fact in finding that the order was broadly worded to cover even the directors of the first defendant and erred in reviewing the ruling delivered on the 22nd of September 2017 and held the appellants guilty of contempt of court without ensuring personal service of the application and/or service of the order on the directors of the first appellant.
- ii. The court erred in law and in fact in finding that there was an error apparent on the face of the record in the way the court fashioned the ruling delivered on the 22nd of September 2017 when that was not the case and there was no error apparent on the record.
- iii. The Learned Judge erred in law and in fact in holding that the publication was made in total disregard of the court order and in disobedience to this honourable court when this was not the case. The Learned Judge erred in law and in fact in citing the appellants for an order that is non-existent and the learned judge erred in law and in fact by basing order of contempt on extraneous considerations and factors.”

7. On July 5, 2022, the appeal came up for hearing before us. Miss Janmohammed, learned senior counsel appeared for the appellants whilst learned counsel, Mr Waudo appeared for the respondent.
8. In arguing the appeal, Miss Janmohammed highlighted the appellant's written submissions dated 20th January, 2020. On ground 1, she urged us to find that the judge erred in finding that the appellants were in contempt of court in the absence of personal service of the order upon them, service of the order having been effected upon the legal officer of the Nation Media Group and not upon the appellants herein. In support of the proposition for personal service, reliance was placed on the decision of *Woburn Estate Limited -vs- Margaret Bashforth* [2016] eKLR.
9. The judge was further faulted for finding the appellants to be in contempt of the court orders yet the orders issued on December 23, 2015 did not include the pulling down of the online publication of the alleged defamatory article. It was contended that no further publication was carried out by the appellants and that any publication thereof was before the grant of the order of injunction issued on December 23, 2015.
10. In opposing the appeal, Mr. Waudo relied and highlighted the respondent's submissions filed on 30th June, 2022. In placing reliance on the decision of *Justus Kariuki Mate & another -vs- Martin Nyaga Wambora & Another* [2014] eKLR, it was contended that service of the order may be dispensed with if the court is satisfied that an alleged contemnor was present when the order was given or if the contemnor was notified of the terms of the order by “... telephone, email or otherwise”; that the knowledge of the orders of December 23, 2015 on the part of the appellants can be inferred from the fact that their advocate as the Legal Officer of the Nation Media Group was served with the order; that on October 25th, 2016, the appellants through their lawyers filed grounds of objection in opposition to the motion of June 21, 2016, claiming to have complied with the court orders of December 23, 2015, hence they must have had knowledge of the injunctive orders issued on December 23, 2015; that failure to pull down from its website the alleged defamatory article amounted to continued publication and finally, that the Directors of the 1st appellant are its agents, and hence covered by the order of December 23, 2015 which barred “...agents, employees, servants and any other person claiming through them .”



11. We have considered the record, the rival oral and written submissions, the authorities cited and the law. The appeal before us is a first appeal. The position as regards a first appeal is as was stated in *Selle v Associated Motor Boat Co of Kenya & others* [1968] EA 123 wherein it was held.

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. There are two main issues for determination in this appeal. Firstly, whether personal service is required before one can be cited for contempt. Secondly whether the appellants flouted the court order. In our view, the order granted by the court was that of a restraining nature, restraining the appellants from further publication of the offensive article. It is common ground that in the ruling of December 23, 2015, the court allowed prayer 3 of the respondent’s notice of motion of December 14, 2015. Prayer 3 thereof was that:

“(3) That pending the hearing and determination of this suit, there be an order of temporary injunction, restraining the Defendants, their agents, employees, servants or any other person claiming through them from further republishing (emphasis ours) any article, words, material or remarks against, of and concerning the Plaintiff in relation to the alleged “Tanzanian Big Loan Scandal.”

13. The issue for our determination therefore is whether there was “further publication” or “republishing” of the alleged offensive article. The applicants maintain that there was no further publication and the alleged offending publication continued to appear in sites where they had no control. The respondent did not contest the appellant’s assertion that they had not carried out any further publication by way of fresh publication after December 23, 2015. If this be the case and bearing in mind that there was no specific order directing the appellants to pull down the alleged offending publication and there being no evidence of further publication, we think the court erred in coming to the conclusion that the appellants were guilty of contempt.

14. Having come to the above conclusion, we do not consider it necessary to address the issue of whether there was service of the order upon the appellants.

15. The upshot of the above is that we allow the appeal and set aside the orders of contempt issued on September 22, 2017 and dismiss the respondent’s application dated June 21, 2016; the fine of Kshs 400,000.00 paid by the appellants be refunded to them and costs of this appeal is awarded to the appellants.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL



F. SICHALE

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

