



**Nation Media Group Limited & another v Nyabuti (Civil Appeal  
114 of 2019) [2023] KECA 877 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 877 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 114 OF 2019  
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA  
JULY 7, 2023**

**BETWEEN**

**NATION MEDIA GROUP LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DAVID HEBLING ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETER NYABUTI ..... RESPONDENT**

*(An appeal from the ruling of the High Court of Kenya at Nairobi  
(L. Njuguna, J) dated 25th October, 2018 In HCCC No. 431 of 2015)*

**JUDGMENT**

1. The appellants, Nation Media Group Limited and David Herbling have filed this appeal against Peter Nyabuti, the respondent herein in respect of the ruling delivered on October 25, 2018.
2. A brief background to this appeal is that the respondent filed a suit alleging defamation by the 1<sup>st</sup> and 2<sup>nd</sup> appellants. During the pendency of the suit, the respondent sought and obtained an injunctive relief barring the appellants from “further publishing” the alleged defamatory remarks. Thereafter, the respondent filed a notice of motion dated June 21, 2016 seeking to have the appellants and others cited for contempt. In a ruling of September 22, 2017, Njuguna, J found the appellants (and not the others) guilty of contempt and fined each of the appellants Kshs 200,000.00 in default to serve 3 months in jail. The respondent herein was dissatisfied with the said ruling and in a motion dated October 2, 2017, sought to have a “review and/or variation” of the ruling of July 22, 2017 so as to have the ruling of July 22, 2017 applied to the other directors.
3. In its ruling of October 25, 2018, the court varied/reviewed its ruling of September 22, 2017, the effect of which was to find the seventeen (17) directors of the 1<sup>st</sup> appellant in contempt of court. It is this



ruling that provoked the instant appeal vide a memorandum of appeal dated March 29, 2019, listing 9 grounds of appeal which we shall advert to in our determination of the appeal.

4. On July 5, 2022, the appeal came before us for hearing. Miss Janmohamed, learned senior counsel appeared for the appellants whilst learned counsel, Mr Waudu appeared for the respondent. Miss Janmohamed highlighted the appellants' submissions dated January 20, 2020 and although the memorandum of appeal contained 9 grounds of appeal, these were collapsed into 3 main grounds, to wit that:
  - 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 holding the appellants guilty of contempt of court without taking into account that the appellants were not parties to the suit.
  - 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 knowledge of the order suffices to prove service and that the appellants herein were in blatant contempt of the orders issued on the 23rd of December 2015. Therefore, the publication was made in total disregard of the court order and in disobedience to this honourable court when this was not 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.”
5. It was urged that the learned judge erred in finding that the order of September 22, 2017 was broadly worded to cover the directors of the first appellant and in holding the appellants guilty of contempt. Further, that there was no personal service of the application and /or order on the appellants, the court order having been served upon the Legal Officer of Nation Media Group. Reliance was placed on this Court's decision of *Ochino & Another v Okombo & 4 others* [1989] KLR for the proposition that personal service of orders is necessary before one is found to be guilty of contempt. Further, that the notice must indicate the penal consequences for non-compliance.
6. The court was faulted for finding that there was an error apparent on the face of the record when there was no such error. By the review, the appellants were condemned unheard, having not been asked to defend themselves as none of them had been served with the order of September 22, 2017.
7. We were urged to find that there was no publication after the issuance of the order of December 23, 2015.
8. The judge was further faulted for finding the appellants guilty of contempt of court as no further publication of the alleged offending article was made after December 23, 2015 and that the articles complained of are dated December 15, December 8, 2015 before the issuance of the order of injunction. Further, that there was no order directed to the appellants to pull down the offending article from its website.
9. The respondent opposed the appeal vide his submissions dated December 12, 2020. He submitted that the 1<sup>st</sup> appellant being a company acts through its directors and that the said directors are agents of the 1<sup>st</sup> appellant; that the appellants were the “...directing mind and will of the company ....” Further, that



the law has changed to the extent whereby personal service of the order is no longer a requirement. In support of this proposition, reliance was placed on the decision of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2014] eKLR where it was held that it is sufficient if a party was present when the order was given or secondly by being notified of its terms by telephone, email or otherwise and that an advocate who is present in court is taken to have informed his client of the order.

10. For purposes of this appeal, the respondent contended that the said order was served upon the 1<sup>st</sup> appellant's Legal Officer; that on October 25, 2016, the appellants' counsel on record filed grounds of objection in response to the respondent's application dated June 21, 2016 seeking to have the 1<sup>st</sup> appellant's directors cited for contempt; that the appellants cannot purport to seek clarification of the order as the law behooves them to obey it until it is discharged and that failure to pull down the offensive material was tantamount to continued publication.
11. The appeal before us is a first appeal. Our mandate in a first appeal is as set out in *Selle v Associated Motor Boat Co. of Kenya & others* [1968] EA 123 wherein, it was stated:

“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. It is common ground that on December 15, 2015, the respondent filed suit against Nation Media Group Limited and David Herbling, the then 1<sup>st</sup> and 2<sup>nd</sup> defendants. He sought the following prayers.

- “(a) A Declaration that the Nation Media Group Limited and David Herbling jointly and severally, defamed Mr Peter Nyabuti;
- (b) An order of mandatory injunction compelling the Nation Media Group Limited and David Herbling jointly and severally to within two days of the judgement hereof or such period as directed by the Court, publish an apology to Mr Peter Nyabuti in the same media where the defendants published the defamatory articles that the plaintiff complains of herein, unequivocally retracting and revoking the defamatory articles and in a manner as prominent as the offending defamatory articles;
- (c) An order of permanent injunction restraining Nation Media Group Limited And David Herbling their agents, employees or servants from further publication of the defamatory articles that the plaintiff complains of herein or any other defamatory article, words, material or remarks against, of and concerning Mr Peter Nyabuti in relation to the loan Scandal in Tanzania...”

13. Before the suit was listed for hearing, the respondent filed a notice of motion dated December 14, 2015. In the main, the respondent sought:

- “3. 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 publishing any article, words, material or remarks against, of and concerning the plaintiff in relation to the alleged “Tanzanian Big loan Scandal”.

14. In a ruling of December 23, 2015, Njuguna, J allowed the respondent’s motion in terms of prayer 3 as above. Thereafter, the respondent filed another application dated June 21, 2016. One of the prayers was that:

“That Joe Muganda, Tom Mshindi, Stephen Gitagama, Gideon Aswani, Gabriel Chege, James Kinyua, Elizabeth Kyengo, Japhet Mucheke, Michael Walekwa, Michael Ngugi, Philip Velese, Agnes Asimwe-konde, Anthony Craig Glencross, David Kiambi, Francis Majige Nanai, Linus Kaikai, rose Lutta and David HerblinG, the Directors of the 1st Respondent and the 2nd Respondent respectively be committed to a civil jail for a term of six months or for such period of time that this Honourable Court may deem fit for contempt of court having deliberately disobeyed orders of this court issued on 23rd December 2015.”

15. The appellants raised grounds of objection to the motion of June 21, 2016. The appellants in their notice of objection contended that:

- “1. The plaintiff has failed to show this Honorable Court the alleged contempt by the defendants herein.
2. That the defendants herein are not in blatant contempt of the order of this Honorable Court, as the orders that were issued on 23rd December 2016 did not include pulling down of the online publications concerning the plaintiff / Applicant.
3. That the defendants have duly complied with the order issued on 23rd December 2016 and have ceased from further publication of any article, words, material or remarks against, of concerning the plaintiff in relation to the alleged “Tanzanian Big Loan Scandal”
4. That the defendants cannot be cited for contempt for an order that is non-existent.”

16. In the ruling of 22nd September, 2017, the court found “the defendants” guilty of contempt and fined each one of them Kshs 200,000.00 to be paid within 14 days in default to serve 3 months in jail.

17. As the ruling of September 22, 2017 found only “the defendants” guilty of contempt, the respondent filed another motion dated October 2, 2017. The main prayer was:

“That the Honourable Court be pleased to review and/ or vary the Ruling and Orders of Lady Justice Njuguna delivered on 22nd September 2017 which found the defendants guilty of contempt of the court order to apply to Joe Muganda, Tom Mshindi, Stephen Gitagama, Gideon Aswani, Gabriel Chege, James Kinyua, Elizabeth Kyengo, Japhet Mucheke, Michael Walekwa, Michael Ngugi, Philip Velese, Agnes Asimwe-konde, Anthony Craig Glencross, David Kiambi, Francis Majige Nanai, Linus Kaikai, Rose Lutta being the Directors of the 1st Defendant/Respondent.”



18. In its ruling of October 25, 2018, the court granted the prayer sought on the basis that:
- “In the circumstances foregoing, I find that there was an error apparent on the face of the record in the way the court fashioned the ruling delivered on September 22, 2017 and that, is a good ground to warrant a review of the said orders. The applicant in his application dated the June 21, 2016 was very specific on the orders that he was seeking against the directors but the court by an honest mistake – fashioned the orders –to apply only to the 1<sup>st</sup> defendant and not the directors”.
19. The appellants “... being dissatisfied with the whole of the decision delivered herein at Nairobi on the October 25, 2018 ...” filed the instant appeal.
20. We have summarized the appellants’ and the respondent’s submissions as outlined above. It is important to point out that this appeal (Civil Appeal No 114 of 2019) and Civil Appeal No 115 of 2019 are all challenging the orders of Njuguna, J issued on October 25, 2018. Suffice also to state that the prayer in this Appeal (Civil Appeal No 114 of 2019) faulting the order of review issued on October 25, 2018 is also a prayer in Civil Appeal No 115 of 2019.
21. As we have come to the conclusion that the order of review of October 25, 2018 in Civil Appeal No 115 of 2019 is for setting aside, we do not wish to rehash the reasons for our findings in Civil Appeal No 115 of 2019 in the instant appeal, suffice to state that our finding in Civil Appeal No 115 of 2019, shall apply in this appeal (Civil Appeal No 114 of 2019) *mutatis mutandis*.
22. The issue of whether there was a further publication after December 23, 2015 is a common issue in this Appeal and in Civil Appeal No 113 of 2019 and our findings therein on this issue shall apply *mutatis mutandis* in this appeal.
23. However, we wish to reiterate that in the substantive suit filed by the respondent, he sought in part:
- “(c) An order of permanent injunction restraining Nation Media Group Limited and David Herbling their agents, employees or servants from further publication (emphasis ours) of the defamatory articles that the plaintiff complains of herein or any other defamatory article, words, material or remarks against, of and concerning Mr Peter Nyabuti in relation to the loan Scandal in Tanzania;...”
24. The above prayer is repeated in the motion seeking an injunctive relief. In the motion, the respondent craved for:
- “3. 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 publishing (emphasis ours) any article, words, material or remarks against, of and concerning the plaintiff in relation to the alleged “Tanzanian Big loan Scandal”.
25. In our view, the order of December 23, 2015 was a temporary order of injunction against further “publication”. There was no specific order directing that the offending article published on December 15, 2015 be pulled down.
26. Simply put, there was no evidence that the appellants did further publish the alleged defamatory remarks after the court issued the injunctive order. The upshot of the above is that we set aside the



orders of review issued on the October 25, 2018 and the respondent's application dated October 2, 2017 is dismissed with costs. Costs of this appeal is to be borne by the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> 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**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

