



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 431 OF 2015

PETER NYABUTI.....PLAINTIFF/APPLICANT

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT/RESPONDENT

DAVID HERBLING.....2ND DEFENDANT/RESPONDENT

RULING

The plaintiff/Applicant has moved this court by way of a Notice of Motion dated the 2nd day of October 2017 under Sections 1A, 1B, 3, 3A,80 and 99 and Order 45 Rules 1 and 2 of the Civil Procedure Rules seeking orders that;

“(2) 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.

(3) THAT the Honourable court do grant any other order that it may deem fit and just under the circumstances.

(4) That cost of this application be borne by the respondent”

The application is premised on the grounds set out on the body of the application and its supported by the affidavit sworn by Peter Nyabuti, the plaintiff herein sworn on 2nd October, 2017.

The grounds in support of the application are that; on the 21st day of June, 2016 the applicant instituted contempt of court proceedings against the 1st defendant and its directors who are named in paragraph 2 of the supporting affidavit. The court heard the application and delivered a ruling on the 22nd September 2017 and found the defendants guilty of contempt and fined the defendants Kshs.200,000 each for contempt and in default to serve three months in jail. The court further ordered that the fine to be paid within 14 days.

The applicant avers that the ruling and the consequential orders only addressed the defendants without expressly citing the directors of the 1st defendant yet in law, they are separate and distinct persons.

The plaintiff avers that he is apprehensive that the defendants will exploit this uncertainty to avoid strict compliance with the court order. He has urged the court to review the orders so that the orders granted apply to the directors of the first defendant so as to

protect his interest.

The defendants filed grounds of opposition on 27th November, 2017. They have opposed the application on the following grounds;

- (1) The plaintiff has failed to show the court the alleged error apparent on the record.
- (2) The defendants have already complied with the court order issued on the 22nd September, 2017.
- (3) There is no sufficient reason for the orders sought to issue.
- (4) The application has been brought in bad faith and it's an abuse of the court process.
- (5) The application has no merits.

The applicant has sought a review of the order of the court issued on the 22nd September 2017.

Review is provided for under Order 45 Rule 1 of the Civil Procedure Rules which provides;

45(i) Any person considering himself aggrieved –

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or an account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

The foregoing provisions are based on section 80 of the Civil Procedure Act Cap. 21 Laws of Kenya.

An applicant who seeks review needs to satisfy the court the following;

- (a) There is new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time the decree or the order was made.
- (b) There is some mistake or error apparent on the face of the record.
- (c) Or for any other sufficient reason.

The applicant seeks to review the orders made on 22nd September 2017 on the ground that there was an error on the face of the record in that, in that ruling, the court found the two defendants in contempt of court and not the directors of the first defendant.

The respondents have submitted that the application does not meet the threshold for grant of orders for review and should be dismissed with costs to the defendant in that the applicant has not annexed the ruling or order sought to be reviewed. The respondent has relied on the case of **Emkus Company Limited Vs. Charels Asikowa Okolo (2014) eKLR** where the court held that;

“It is the duty of a party who wishes to appeal against or apply for review of a decree or order to move the court to draw up and issue a formal decree”

The judge went on to say that

“In the present application the applicant not only failed to specify which ruling he was seeking to review but also failed to annex an extract order from which he seeks review. This should not be wished away. The applicants must be clear what they want.....”

In my view and considering the reasoning by the Judge in the above case the applicant failed to annex the order/ruling and failed to specify which ruling he was seeking to review. In our case, the Applicant has specified the ruling he is seeking to review and anybody looking at the application will be clear on that. The ruling sought to be reviewed is on record and in the interest of justice and pursuant to Article 159(2) (d) of the Constitution, it would not be fair for the court to dismiss the application on that ground only. I do appreciate that it is good practice to annex the order and/or the ruling but in this era of substantive justice as opposed to procedural justice, I decline to dismiss the application on that ground.

The court has perused the application dated the 21st June, 2016 that gave rise to the ruling that is complained of. Prayer 2 of that application seeks orders 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 Kande, Antony Craig Glencross, David Kiambi, Francis Majige Nanai, Linus Kaikai, Rose Lutta and David Herbling the directors of the 1st Respondent and the 2nd Respondent be committed to civil jail for a term of six months or such a period of time that this court may deem fit for contempt of court for having disobeyed court orders issued on the 23rd December, 2015”

The court has perused the said order. The application dated the 14th December, 2016 was granted in terms of prayers 1 and 2. It is important for this court to set out the exact wording of prayer 2 of that application:

“pending the hearing and determination of this application inter partes, 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 and concerning the plaintiff in relation to the alleged “Tanzanian Big Loan Scandal”

The court notes that the order was broadly worded to cover even the directors of the first defendant. The application dated 21st June, 2016 also sought orders against the directors and the applicant went ahead and listed them by their names. It has not been denied that any of them is a director of the 1st defendant. Though a limited liability company is a legal person in law, the day to day running of the companies is undertaken by the directors and in cases of contempt of court orders directed against the company, the directors are under legal duty to ensure compliance of the same by the company.

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 22nd September, 2017 and that, is a good ground to warrant a review of the said orders. The applicant in his application dated the 21st June, 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 1st defendant and not the directors.

In the end, the said orders are reviewed in the following terms;

(a) The court also finds the following directors, JOE MUGANDA, TOM MSHINDI, STEPHEN GITAGAMA, GIDEON ASWANI, GABRIEL CHEGE, JAMES KINYUA, ELIZABETH KYENGO, JAPHET MUCHEKE, MICHAEL WALEKWA, MICHAEL NGUGI, PHILIP VELESE, AGNES ASIIMWE-KONDE, ANTHONY CRAIG GLENCROSS, DAVID KIAMBI, FRANCIS MAJIGE NANAI, LINUS KAIKAI, ROSE LUTTA of the first defendant guilty of contempt of court and fine each of them Kshs.200,000 for the said contempt of court and in default to serve three months in jail. The fine to be paid within 15 days failing which warrants of arrest to be issued against each of them.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **25th** day of **October, 2018**

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Plaintiff**

..... **For the Defendant**



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