REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 499 OF 2013

NATION MEDIA GROUP LIMITED ……..PETITIONER/APPLICANT

VERSUS

KAMLESH MANSUKHLAL DAMJI PATTNI ……....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT NAIROBI …….. 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ……3RD RESPONDENT

RULING

1. As this Court observed on the 14th of November 2013 when the parties first appeared before it, the application before this Court dated 9th September 2013 brings to the fore two important but in the circumstances of this case conflicting concerns. The first relates to the freedom of expression and of the media which the applicant asserts is under threat and which it seeks to protect. The second issue relates to the rule of law and obedience to orders of the Court which the applicant is alleged to have breached by disobeying orders issued by the 2nd respondent.

2. When the matter came up for hearing on 25th November 2013, Mr. Kalove indicated that he had filed a Notice of Preliminary Objection to the application which he sought to argue first. Mr. Imende for the applicant contended that he had not seen the Notice of Preliminary Objection and that it had not been served on the applicant. I therefore directed the parties to deal with the issues raised in the Notice of Preliminary Objection in the course of their respective submissions for and against the orders sought in the application.

The Application

3. The application dated 10th September 2013 is supported by the affidavit of **Sekou Owino**, the applicant's Legal Counsel, sworn on 10th September 2013 in support of the petition. Prayer 1 and 2 thereof were spent at the time of the hearing of the application. At prayer 3 of the application the applicant prays that a conservatory order be issued staying all further proceedings before the 2nd respondent in **CMCC No 6929 of 2012, Kamlesh Mansukhlal Damji Pattni vs Nation Media Group Limited & 3 Others** pending the hearing and determination of this petition. The applicant also prays for the costs of the application.

4. The application is premised on the grounds, among others, that the effect of the 2nd respondent's order against the applicant was to unjustifiably fetter it's freedom of expression, and the order was therefore unconstitutional; further, that the 2nd respondent's orders were a blatant contravention of the applicant's freedoms and independence of the media; and that this Court has supervisory jurisdiction over the 2nd respondent and the jurisdiction to determine whether the 2nd respondent's orders are inconsistent with or in contravention of the constitution.

5. At the hearing of the application, the parties agreed that the sole issue for determination by the Court is whether or not this court should stay the proceedings in CMCC 6929 of 2012 pending the hearing and determination of this petition on account of constitutional questions raised in respect of the order made by the 2nd respondent on 28th January 2013 which are sought to be enforced in those proceedings through contempt of court proceedings.

The Applicant's Submissions

6. Mr. Imende, Counsel for the applicant, made submissions divided in two limbs. The first related to the test for grant of conservatory orders, namely whether a prima facie case with a probability of success had been made out, and if the orders sought were not granted, whether the petitioner will suffer prejudice. The applicant submits that it has met the two sets above, and so the Court should grant the conservatory orders that it seeks.

7. Mr. Imende submitted that the applicant was impugning the order issued by the 2nd respondent on the 28th of January 2013 to the extent that it violates or threatens to violate the applicant's fundamental rights and freedoms. While contending that the applicant has complied with the order of the Court, Counsel submitted that as a media house, the applicant

had certain rights with regard to informing the public about matters that are of public interest, and which the public has a legitimate interest to receive.

8. Counsel submitted further that the 1st respondent had obtained injunctive orders whose scope and effect was to infringe the fundamental rights of the applicant under Articles 33 and 34 of the Constitution; that the orders stop the applicant from making or uttering any publication with regard to the 1st respondent without his prior written clarification; and the effect of this would be that if the applicant was intent on publishing anything that mentions the 1st respondent, it had to call the respondent for a clarification; and if the 1st respondent was either not available, does not respond or does not do so in writing, the applicant can never publish anything about him without being in breach of the court order.

9. Counsel submitted therefore that the order of the 2nd respondent amounted to censorship; that it controls the content and the manner of publication by the applicant and infringes on the right of the applicant to inform the public was disproportional to the effect intended to be achieved; and was therefore in breach of Article 24 of the Constitution.

10. Counsel conceded that in effect, the applicant was dissatisfied with the order of the Court. He contended, however, that a party dissatisfied with an order issued by a subordinate court or proceedings before that court has a right of review before that court, appeal to the High Court, or, depending on the nature of the proceedings before the subordinate court, to a right to file a constitutional reference before the Constitutional Division of the High Court which could intervene in accordance with the provisions of Articles 23 and 165(3)(d)(ii) and (vi). While further conceding that the applicant had filed an appeal against the order of the subordinate court, Mr. Imende was of the view that the scope of the appellate jurisdiction of the High Court is circumscribed by the Civil Procedure Act as one cannot, in the appeal, originate a cause of action to vindicate violation of fundamental rights.

11. The second limb of the applicant's submissions related to the prejudice likely to be suffered if the orders sought were not granted. Mr. Imende argued that there are contempt of court proceedings, which are quasi-judicial in nature, pending before the subordinate court and coming up for hearing on 28th November 2013. He contended that there is a real danger of the second respondent taking adverse action against the applicant and its officers; that the affidavit and submissions made by or on behalf of the 2nd respondent made it clear that only one order will result from the application before the court, namely that the applicant is in

contempt; and the applicant's fear was very real. He alleged that the 2nd respondent's mind was made up with regard to the conduct of the applicant and the likelihood of the applicant getting a fair hearing were remote. He therefore asked that the court issues conservatory orders to stop the proceedings pending the hearing of the petition.

12. Mr. Imende relied on several authorities, among them the decision of the Supreme Court of Uganda in **Obbo & Another vs AG (2004) IEA 265** on the scope of the freedom of expression and acceptable limitations in a democratic society to urge the Court to grant the orders that the applicant was seeking.

The 1st Respondent's Submissions

13. The 1st respondent has filed an affidavit sworn on 11th November 2013, a Notice of Preliminary Objection dated 13th November 2013, and written submissions in opposition to the application.

14. The gist of the 1st respondent's opposition to the application is captured in the Notice of Preliminary Objection. It is that the Court lacks jurisdiction to deal with this matter as the applicant has already filed an appeal against the orders of the subordinate court; that the proceedings now before this Court are in breach of section 6 and 7 of the Civil Procedure Act as they have led to two courts of concurrent jurisdiction being seized of the same matter, and that they are an abuse of the court process.

15. Counsel for the 1st respondent, Mr. Kalove, submitted that the applicant had not demonstrated that it has a prima facie case, and that the applicant was seeking orders in the wrong place. As the applicant was aggrieved by the decision of the lower court and had filed an appeal, **Civil Appeal No. 109 of 2013** filed on 20th February 2013, it had no option but to pursue the appeal for whatever other orders he may be seeking.

16. Mr. Kalove argued that as matters now stand, two High Court judges were seized of the matter; that the consequences of having the same matter before two courts of concurrent jurisdiction would be total chaos as the courts can reach conflicting decisions.

17. According to the 1st respondent, the applicant has never moved the 2nd respondent for an order of stay pending appeal, and neither has it moved the court seized of the appeal for an order of stay; that there was nothing either in the conduct or the orders of the 2nd respondent that were unconstitutional; and that the application pending before the 2nd respondent was a normal application for a party to show cause why it should not be committed to civil jail for contempt of the Court's orders. Mr. Kalove relied on the decision of the Court in **Nairobi Law Monthly vs Kengen & Others High Court Petition No. 278 of 2011** for the proposition that the rights enjoyed by a media house are not to be accorded a special status but are subject to the rights of others.

The 2nd and 3rd Respondents' Submissions

18. Mr. Mohamed, Counsel for the 2nd and 3rd respondents, took the position that the present application and indeed the entire petition was an abuse of the court process and should be dismissed. He relied on the Grounds of Opposition dated 14th of November 2013, the replying affidavit sworn on 11th November 2013 by Hon. Charles Obulutsa, and written submissions filed on behalf of the 2nd and 3rd respondents.

19. In his response to submissions by Mr. Imende that the 2nd respondent had made up its mind with regard to the application for contempt pending before it, Mr. Mohamed submitted that the contents of the affidavit sworn by Hon. Obulutsa were based on the court record and did not contain any of the deponent's opinion.

20. He submitted further that a party who seeks court protection must unconditionally obey court orders, and it was immaterial that such orders are unreasonable or absurd; that a litigant could not be permitted at will to disobey a court order; and that the right forum for challenging the order of a court was the court that had issued the orders by way of review or to a higher court on appeal. Counsel further argued that as the applicant had filed High Court Civil Appeal No. 109 of 2013, and since Article 165 gives the High Court unlimited jurisdiction, any judge of the High Court has jurisdiction to determine any constitutional matter or question. In his view therefore, having two matters dealing with the same issue before two courts of concurrent jurisdiction is an abuse of the court process and will lead to conflicting decisions that will lead justice into disrepute as it will be difficult for any party to follow any decision of the two courts if they conflict.

Determination

21. I need to make two observations at the outset. First, the parties have, in their respective submissions, made various arguments with respect to the rights enjoyed by the applicant and the permissible limitations thereto in a free and democratic society. The 1st respondent has also expounded at some length on the matters that precipitated the filing of the matter pending before the 2nd respondent which he alleges were defamatory. While these submissions may have some relevance at the hearing of this petition, they do not fall for consideration or determination in the application now before me.

22. The second observation that I wish to make relates to the nature and status of the 2nd respondent. The 2nd respondent is a Court in which is vested judicial authority by Article 159 of the Constitution which provides that:

> ***159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

23. In exercising its judicial authority, therefore, it does so as mandated by the Constitution and in accordance with the wishes of the people of Kenya. It cannot therefore be disputed that the orders of the 2nd respondent, as of all courts established under the Constitution, must be obeyed unless set aside or varied.

24. Further, under Article 23 (2), the Constitution gives Parliament the responsibility to enact legislation to vest jurisdiction in subordinate courts such as the 2nd respondent to hear and determine applications alleging violation of fundamental rights and freedoms:

> ***(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.'***

25. The parties are agreed that the issue for determination in this application is whether the proceedings in CMCC 6929 of 2012 pending before the 2nd respondent should be stayed pending the hearing and determination of this petition. In the application that has precipitated

this petition, the 1st respondent seeks orders to punish the applicant and its officers for disobedience of orders made by the 2nd respondent on 28th January 2013. The substance of the applicant's case, as is evident from the orders sought in the petition, is that the orders made by the 2nd respondent are unconstitutional. The underlying corollary, which the applicant denies, is that since the orders are unconstitutional, they should not be obeyed, and were not obeyed.

26. In determining the issue identified by the parties therefore, the court must ask itself what jurisdiction it is granted by the Constitution with regard to orders issued by a Court of competent jurisdiction which a party is dissatisfied with and is alleged to have disobeyed.

27. It is indeed correct, as argued by the applicant, that the High Court is given jurisdiction to supervise subordinate courts under the provisions of Article 165 of the Constitution. The question is whether such jurisdiction extends to, as it were, looking over the subordinate court's shoulder to see how it is conducting its matters. I would agree with the view expressed by my brother, Justice Majanja in **Pauline Cherono Kones & Another v. The Chief Magistrate's Court & Another High Court Petition Number 254 of 2013 (unreported)**, relied on by the 2nd and 3rd respondents, where he observed as follows:

> ***"Although this Court has wide jurisdiction under Article 165(6) and (7) of the Constitution, this jurisdiction is not intended to take away the ordinary jurisdiction of the subordinate courts or supplant it. The subordinate courts are entitled to make certain decisions which if there is an error, the normal appellate procedure will apply."***

28. In the present case, the 2nd respondent, after hearing both parties, made orders which were displeasing to the applicant. The applicant does not allege procedural impropriety on the part of the 2nd respondent or any breach of the rules of natural justice. It is concerned about the substance and merits of the order, and the effect thereof.

29. Counsel for the applicant submitted that the applicant obeyed the orders that it impugns in this petition, but there is nonetheless an application in which it is required to show cause why it should not be punished for contempt of the said orders. At this stage, it is not possible to say what the outcome of that application is going to be. However, the applicant contends that from the affidavit of the Presiding Magistrate, the outcome of the application is pre-determined.

30. I have read the affidavit sworn by Hon. Obulutsa, and this conclusion is debatable. Nonetheless, two issues arise with regard to the options open to the applicant in the event that the situation is as it perceives it. The first was alluded to by Counsel for the 1st respondent. If indeed the applicant takes the view that there is bias against it on the part of the 2nd respondent, then it is open to it to apply for the judicial officer to recuse himself. Secondly, the applicant has the option of awaiting the outcome of the application and, should the outcome be unfavourable and it is dissatisfied with it, seek the intervention of the respective courts set out in the Constitution by way of appeal.

31. Counsel for the applicant argues that the applicant has the option of seeking review or stay from the subordinate court, of appealing to the High Court, and of contemporaneously seeking orders from a court in this Division of the High Court. It must be emphasised, as it has been emphasised in numerous cases before, that this Division is simply a division of the High Court. It does not have powers superior to those exercised by other Divisions of the High Court. See in this regard the decision of the Court of Appeal in **Peter Nganga Muiruri -v- Credit Bank Limited & 2 Others Court of Appeal Civil Appeal No. 203 of 2006** and of the High Court in **Robert Mwangi & Others v. Shepherd Catering & Others High Court Petition No. 84 of 2012; Philip Kipchirchir Moi -v- Attorney General & Another Petition No. 65 of 2012.** Consequently, any power that a Court in this division has to deal with constitutional issues is the same power that another division of the High Court which is seized of the applicant's appeal has. If, therefore, the orders of the subordinate court are unconstitutional in their effect, the court seized of the appeal has the same power as this Court to so pronounce.

32. Secondly, the applicant wishes to have this Court declare the orders of the lower court unconstitutional. Mr. Imende submits on its behalf that the situation in this case is different from say, the situation in the case of **Robert Mwangi & Others v. Shepherd Catering & Others High Court Petition No. 84 of 2012**. His reasoning is that in that case, the orders in question had been issued by a High Court, unlike in the present case where they were issued by a subordinate court. In my view, the basic principle is the same. If another Division of the High Court issues an order which a party considers unconstitutional, the party's options would be to seek a review from that Court, or appeal to the Court of Appeal. It cannot come to the Constitutional Division seeking a declaration of unconstitutionality from that court.

33. Similarly, a party dissatisfied with the ***substance or merits*** of an order of a subordinate court, but is not alleging procedural impropriety, cannot seek declarations of unconstitutionality from this Court. Its option lies in review or appeal. I would agree with the

sentiments expressed by the Privy Council in the case of **Maharaj v. Attorney General of Trinidad & Tobago (1979)** 385, at page 399, where it observed as follows:

> ***In the first place, no human right or fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice.***

34. It is on record that the applicant has already lodged an appeal to the High Court against the orders of the subordinate court. The High Court sitting as an appellate court is vested with jurisdiction to deal with the substance and merits of the subordinate court's order, and to make a finding that the order appealed from has the effect of violating a party's constitutional rights.

35. I end where I started at the beginning of this ruling. The application before me raises critical questions related to the freedom of the media and the rule of law. The rule of law requires that orders of the court be obeyed, and if a party is not able to obey them, appeal against them or apply to the court that issued the orders for review. It cannot serve the interests of justice, advancement of the rule of law, or protection of human rights, including the rights of parties such as the applicant, if a litigant can choose when to obey orders of the Court, and which orders to obey. If there is disobedience of Court orders, the Court that issued such orders must be at liberty to deal with alleged disobedience in the normal course of its work. To hold otherwise and to stop a subordinate court from dealing with alleged disobedience of its orders would hobble the administration of justice and weaken the rule of law, which would in turn jeopardise all the rights that are enshrined in the Constitution.

36. For the above reasons, I am unable to grant the orders sought by the applicant. The application dated 10th September 2013 is therefore dismissed. Costs shall await the outcome of the petition.

37. I should, however, observe in closing that the nature of this application was such that the Court was obliged to deal with issues that substantially go to the substantive petition. The petitioner may therefore wish to consider whether it still wishes to proceed with the hearing of the petition.

Dated, Delivered and Signed at Nairobi this 27th day of November 2013

MUMBI NGUGI

JUDGE

Mr. Imende instructed by the firm of Mohammed Muigai Advocates for the Applicant

Mr. Kalove instructed by the firm of Kalove & Co. Advocates for the 1st Respondent

Mr. Mohamed, Litigation Counsel, instructed by the State Law Office for the 2nd and 3rd Respondents.