Kimeto & Associates Advocates & 3 others v KCB Bank Kenya Limited & 8 others; West Kenya Sugar Company Limited (Interested Party) (Insolvency Petition E004 of 2019) [2023] KEHC 17606 (KLR) (Commercial and Tax) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 17606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY PETITION E004 OF 2019

DO CHEPKWONY, J

APRIL 27, 2023

BETWEEN

KIMETO & ASSOCIATES ADVOCATES ..... APPLICANT

AND

VARTOX RESOURCES INC ..... 1ST CREDITOR

KHAMINWA & KHAMINWA ADVOCATES ..... 2ND CREDITOR

WEKESA & SIMIYU, ADVOCATES ..... 3RD CREDITOR

AND

KCB BANK KENYA LIMITED ..... 1ST RESPONDENT

MUMIAS SUGAR COMPANY LIMITED (IN RECEIVERSHIP & ADMINISTRATION) ..... 2ND RESPONDENT

PONANGIPALLI VENKATA RAMANA RAO ..... 3RD RESPONDENT

SARRAI GROUP LIMITED ..... 4TH RESPONDENT

AND

WEST KENYA SUGAR COMPANY LIMITED ..... INTERESTED PARTY

AND

SARBJIT SINGH RAI ..... 1ST CONTEMNOR

RAKESH KUMAR BVATS ..... 2ND CONTEMNOR

STEPHEN KIHUMBA ..... 3RD CONTEMNOR

WESLEY GICHABA, ADVOCATE ..... 4TH CONTEMNOR

AND

WEST KENYA SUGAR COMPANY LIMITED ..... INTERESTED PARTY

RULING

1. This ruling determines two applications by the Petitioner/Applicant dated 5th August, 2022 and 20th November, 2022, which will be addressed and determined sequentially, beginning with the one dated 5th August, 2022.

2. There is a similar application dated 22nd July, 2022 in which the Applicant Gakwamba Farmers Co-operative is seeking a similar order of the empanelment of a bench of uneven number of Judges being not less than three to hear and determine the matter, among others. It had been directed that the application be canvassed jointly with that filed by the Petitioner dated 20th November, 2022. However, it has been noted that the Applicant thereof, Gakwamba Farmers Co-operative Society intends to be joined but has not been granted leave to join the proceedings herein and therefore the court will only proceed to determine the Petitioners' application dated 20th November, 2022, and like the other applications pending herein, the application is held in abeyance pending the determination of the two applications singled out herein.

3. The application dated 5th August, 2022 is a Notice of Motion brought under Section 39 of the High Court Organization and Administration Act, 2015, Section 5 of the *Judicature Act*, Rule 39 of the High Court (Organization and Administration) (General) Rules, 2016, the Inherent Jurisdiction of the Court and all other enabling provisions of the law. It seeks for the following prayers:-

    a. Spent;

    b. That an order be issued to the 1st to 5th Contemnors Sarrai Group Limited, Sarbjit Singh Rai, Rakesh Bvats, Stephen Kihumba and Wesley Gichaba, Advocate to show cause why they should not be punished for contempt of court for willfully disobeying the orders of this court issued on Thursday 28th July, 2022;

    c. That an order be issued citing the 1st to 5th Contemnors Sarrai Group Limited, Sarbjit Singh Rai, Rakesh Bvats, Stephen Kihumba and Wesley Gichaba, Advocate for contempt of this court's order issued on 28th July, 2022;

    d. That an order be issued committing to civil jail for a period of six (6) months the 2nd to 5th Contemnors Sarbjit Singh Rai, Rakesh Bvats, Stephen Kihumba and Wesley Gichaba, Advocate for being in contempt of court by willfully disobeying the orders of this court issued on 28th July, 2022;

    e. That an order be issued against Sarrai Group Limited to pay a fine of Kenya Shillings One Hundred Thousand as a penalty for being in contempt of court by willfully disobeying the orders of this court issued on 28th July, 2022;

    f. That any other orders this court deems fit and just to grant.

g. That the costs of the application to be borne by Sarrai Group Limited, Sarbjit Singh Rai, Rakesh Bvats, Stephen Kihumba and Wesley Gichaba.

4. The grounds upon which the application is premised as advanced by the Petitioner on its face and in the affidavits of Jackline Chepkemoi Kimeto as well as in the submissions filed by the Petitioner in support thereof is that on 28th July, 2022, this court while differently constituted (presided over by Hon. Justice Okwany) issued orders preserving the assets of Mumias Sugar Company Limited (In administration) and more specifically, directing Sarrai Group Limited to stop all operations of the machinery and other assets of Mumias and return the assets it had removed from the premises of the said company. The 1st to 4th Contemnors are said to be officers of Sarrai Group Ltd who were personally served with the court orders but chose to defy them by progressing with works and operations of the machines in Mumias Sugar Company Ltd.

5. The 5th Contemnor on the other hand, is the advocate on record for Sarrai Group Ltd and he is faulted for having counselled the Directors and Officers of Sarrai Group Ltd including the 2nd to 4th Contemnors, vide a letter dated 28th July, 2022 to ignore the court orders alleging that there were alternative orders of the Court of Appeal which were protecting them. It is stated that the learned counsel, (the 5th Contemnor herein) also went on to outrightly represent to media houses including Newspaper Publishers that his client, Sarrai Group Ltd would not oblige with the said court orders.

6. To demonstrate establish that indeed the contemnors defied the court orders, the Petitioner submitted that Sarrai Group Ltd resumed operations at the Mumias Sugar Company Ltd to normalcy as confirmed by employees of the later and in recent occurrence of events, an employee had passed away in the course of employment. The 2nd to 4th Contemnors, being the Directors and or shareholders and or officers of the 1st Contemnor are said to have flagged off tractors for ferrying cane and continue to oversee the 1st Contemnor's activities notwithstanding the said court orders. The Petitioner further annexed a letter dated 28th July, 2022 wherein the learned counsel allegedly advised his clients to defy the court orders and a Newspaper article of the Business Daily dated 29th July, 2022 whose contents are believed to be direct dispositions of the 5th Contemnor stating that his clients would not abide with the court orders. The Petitioner contends that she got in touch with the author of the article, one Sam Kiplangat who confirmed that indeed the facts thereof were sent to the Media House by the 5th Contemnor.

7. The Petitioner maintains that the court orders which were clear and unambiguous were issued to prevent Sarrai Group Ltd from continuing operations of machinery at Mumias Sugar Company Ltd, (the 3rd Respondent herein) which had been placed under administration. That the said orders were served upon the Contemnors through their WhatsApp Numbers, Emails addressed and personally upon the Sarrai Group Ltd personnel including the legal officer and Directors. An affidavit of Service was annexed to support the allegations that service was well effected. In any event, the Petitioner argues that the Contemnors were made aware of the court's decision which was delivered in presence of their counsel, the 5th Contemnor, who then notified them of the decision. Further, the Petitioner adds that the decision was widely published in Social Media and made known not only to the Contemnors, but also the general public.

8. On the other hand, the Interested Party filed a Notice of Preliminary Objection dated 15th August, 2022 faulting the manner in which the contempt proceedings have invoked this court's jurisdiction. According to the Interested Party, the mandatory requisite steps for instituting contempt proceedings have not been followed. This is because, firstly, by virtue of Section 3(1)(c) of the *Judicature Act*, the prevailing Law of Contempt in England also applies in Kenya and in that respect, the England

Contempt of Court Act of 1981 applies. Part 81 thereof lays the procedure which the Petitioner/ Applicant ought to have invoked instead of relying on repealed Sections of the law. More specifically, that the Petitioner has sought to rely on Section 5 of the *Judicature Act* which had previously been repealed by Section 38 of the Kenyan *Contempt of Court Act* although the said *Contempt of Court Act* Laws of Kenya was eventually declared unconstitutional. Secondly, the Interested Party has further added that under the England *Contempt of Court Act*, Order 52 Rule 2 of the Rules of Supreme Court, leave has to be sought to institute contempt proceedings but in the present case, leave was never sought.

9. Therefore, according to the Interested Party, by virtue of Section 20 of the *Interpretation and General Provisions Act*, a repealed law cannot be revived except by another law. In other words, where a repealed law is subsequently declared unconstitutional by a court of law, the recourse is not to revert to the earlier law, but it is by the Parliament enacting another law. Thus were this court to seek to rely on the repealed Section 5 of the *Judicature Act* as invited by the Petitioner, then the court would be usurping the mandate of the Parliament. For those reasons, the Interested Party submits that the court's jurisdiction was not properly invoked hence the court cannot proceed to determine the contempt application without jurisdiction.

10. The alleged contemnors on their part opposed the application by a Notice of Preliminary Objection dated 18th August, 2022 in which they have raised pure points of law. They have argued that there was no contempt to warrant issuance of the orders sought. In response to 1st and 2nd Creditors' contempt application, it is argued that the orders issued on 14th April, 2022 were stayed by a Court of Appeal order dated 6th June, 2022 and subsequent orders issued by the superior court on 23rd September, 2022. As regards the orders issued on 28th July, 2022, it is contented that those orders did not address the order of 25th April, 2022 which was already in place. Further to that, it is their contention that the orders were not clear and specific enough so as to be enforceable. For instance, it is submitted that the orders precluded stealing and vandalizing of the machines as well as ceasing operations of machines hence the ambiguity is brought along since a stolen or vandalized machine cannot be operated.

11. Further, in the Notice of Preliminary Objection dated 18th August, 2022, the alleged Contemnors have faulted the contempt application on grounds that the letter dated 28th July, 2022 was privileged information which is protected under Section 134 of the *Evidence Act* and cannot be relied on for purposes of contempt proceedings. That the privilege can only be breached if the communication between the advocate and the client furthers an illegal purpose or where the privilege is used to commit a crime. It was further argued that the letter was an illegally obtained document and ought to be expunged from the record as the courts in similar cases including the cases of Jackline Chepkemoi Kimeto -vs- Shah Grewal Kaka & 3 Others [2019] eKLR and Susan Kariuki Diakonie Katastrophenhilfe [2016] eKLR, have held.

12. The alleged Contemnors further submitted that the Newspaper cuttings have no probative value, and the court was referred to the case of Karanja Muliri & 51 Others -vs- District Commissioner Kiambu [1995]eKLR, where the Court in negating evidence contained in a Newspaper cutting held that "it may not be possible to ascertain the correctness in the reporting". All in all, it is the contemnor's submissions that the Plaintiff was unable to prove the cause of contempt as pleaded.

13. The 1st and 2nd Creditor filed submissions in support of the contempt application which had at first been consolidated with their joint contempt application dated 26th July, 2022. I have also read through the submissions and highlights made by respective counsel before me for consideration in the determination of the contempt application.

Analysis And Determination of the contempt Application

14. Having laid out and taken into account the parties' respective perspectives on the matter, I am of the humble opinion that the following issues do arise for determination:-

    a. Whether the court's jurisdiction has been properly invoked.

    b. Whether the Petitioner/Applicant has made a case for contempt of court to warrant grant of the orders being sought.

15. On whether the court's jurisdiction has been properly invoked, the arguments that have been canvassed in its support are two-fold; the first being that the Petitioner invoked Section 5 of the *Judicature Act* which had been repealed by Section 38 of the *Contempt of Court Act* hence inviting the court to rely on repealed law would be against Section 20 of the *Interpretation and General Provisions Act* as well as *the Constitution* 2010 and the Rule of law. It has thus been argued that the court lacks the jurisdiction to proceed with an application anchored on repealed Sections of law. Secondly, it has been argued that the proper procedure was not followed in the instant application, especially the Petitioners' failure to seek leave before filing the application and failure to file an Application Notice. In this regard, it is argued that the court lacks jurisdiction to entertain an application which is unprocedurally before the court.

16. In my understanding, the first trend of argument invites this Court to conclude that after the *Contempt of Court Act* was declared unconstitutional, there remained a lacuna in respect of the procedure for enforcement of court orders as was initially provided for under Section 5 of the *Judicature Act*. Therefore, the only remedy would be through Parliament re-enacting another law for enforcement of court orders. However, this Court is of contrary view. It is the responsibility of the court to ensure maintenance of the Rule of law. So that, in the event there appears to be a lacuna with respect to enforcement of remedies provided for in either an Act of Parliament or Constitution, in exercise of its inherent jurisdiction granted under Section 3A of the *Civil Procedure Act*, the court is obliged to adopt such procedure as would effectually give meaningful relief to the party aggrieved.

17. It then follows that the contempt application cannot be dismissed for being anchored under Section 5 of the *Judicature Act* which had previously been repealed by Section 38 of the *Contempt of Court Act* of 2016. In the circumstances, the court is obliged to revert to the provisions which were applicable before the enactment of the *Contempt of Court Act*. Since the *Contempt of Court Act* has been declared unconstitutional, the effect is anything that was undertaken under the Act is null and void ab initio and therefore Section 5 of the *Judicature Act* still stands. Such has been the finding in a number of decisions including the Court of Appeal's decision in the case of Christine Wangari Gachege –vs- Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case, the Superior Court found that the English law on committal for Contempt of Court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of Judgment, order or undertakings, was applied by virtue of Section 5(1) of the *Judicature Act*

    which provided that:-

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

The Superior Court went on to state:-

> " this Section was repealed by Section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal Section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under Section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in Contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules."

18. Similarly, in the case of JAS Kumenda & Another –vs- Govenor County Government of Kisii & 5 Others [2019]eKLR, the Court observed thus:-

> " ...the invalidation of the *Contempt of Court Act* No.46 of 2016 for being unconstitutional does not render the contempt proceedings commenced against the Respondents herein null and void. The proceedings can be properly proceeded with as if they were initiated under Section 5(1) of the *Judicature Act* Cap 8 Laws of Kenya."

19. In the case of Henry Musemate Murwa –vs- Francis Owino, Principal Secretary, Ministry of Public Service, Youth and Gender Affairs & Another [2021]eKLR, the Court stated as follows:-

> " ...I do not agree with the Respondent. Having been declared unconstitutional, all the provisions of the *Contempt of Court Act*, including the repeal of Section 5 of the *Judicature Act*, became a nullity. It is as if the *Contempt of Court Act* was never enacted. This means that Section 5 of the *Judicature Act* was reinstated following the nullification of the *Contempt of Court Act*."

20. The same position was taken by the Court in the case of Republic –vs- Kajiado County & 2 Others Ex-parte Kilimanjaro Safari Club Limited, which this Court agrees with where it was stated:–

> " This section was repealed by Section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal Section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under Section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in Contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules."

21. This court agrees and associates itself with the above decisions and reiterates that since the *Contempt of Court Act* of 2016 was declared unconstitutional, Section 5 of the *Judicature Act*, which has not been repealed, and therefore continues to apply. Having concluded as aforesaid, I find the Notice of Preliminary Objection filed by the Interested Party is without merit and the same fails.

22. On the other hand, the intended Contemnors have challenged the application for having been brought without due regard to the laid down legal procedure. More specifically, that leave to initiate the contempt proceedings had not been obtained. I do not wish to reinvent the wheel on the foregoing subject and accordingly adopt the finding by the Court of Appeal in the case of Christine Wangari

Gachege –vs- Elizabeth Wanjiru Evans (Supra), where it was held that leave is not required to bring a contempt application where there is a complaint of breach of a court order like in the instant case.

23. In the present case, the complaint is on disobedience of this Court's orders dated 28th July, 2022, whose service and or knowledge thereof was not disputed. In the circumstances, it is my finding that the Petitioner/Applicant did not require leave to commence these contempt proceedings.

24. The Intended Contemnors further submitted that the application was faulty for failure to file an Application Notice as is required under the England *Contempt of Court Act*. In this Court's view, the decision in the case of Clerk Nairobi City County Assembly -vs- Speaker, Nairobi City County Assembly & Another; Orange Democratic Party & 4 Others (Interested Parties) [2019]eKLR, suffices. In this cases, the Court held that:-

> " An application notice is defined under Rule 23.1 of the said English Civil Procedure Rules as a document in which the applicant states his intention to seek a court order. In view of the description given under part 81.10(3) above, an Application Notice in England is the equivalent of Notice of Motion in Kenya. Under both Civil Procedure Rules, 2010 and the Employment and Labour Relations Court (Procedure) Rules, 2016, the recognized form of applying any order is basically a Notice of Motion, which may be supported by an affidavit or affidavits if evidence is required to support it. Other forms like Chamber Summons are only used where there is a specific provision like application for leave to apply for Judicial Review Orders under Order 53 of the Civil Procedure Rules. The same position obtains in the Court of Appeal and Supreme Court whenever a person intends to move the court for any orders".

25. Since an Application Notice is equivalent to a Notice of Motion, the contempt application in itself suffices to communicate the Petitioner/Applicant's intentions to seek the court orders. The Application Notice was therefore not necessary in the circumstances of this case. That challenge also fails.

26. The next issue for determination is whether the Applicant has made a case for Contempt of Court for the orders sought to issue. The procedure for instituting Contempt of Court proceedings is provided for under Section 5 of the *Judicature Act*. The said Section provides as follows:-

> " (1) 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 by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."

27. Accordingly, the law governing Contempt of Court proceedings is the English Law applicable in England at the time the alleged contempt is committed. The Court of Appeal in the case of Woburn Estate Limited -vs- Margaret Bashforth [2016]eKLR, stated as follows in regard to the jurisdiction of the court in Contempt of Court proceedings:-

> " The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from Section 5 (1) of the *Judicature Act* that vests the High Court the power, like those of the High Court of Justice of England to punish any party who violates its orders, the court, by virtue of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at

all times. See Refrigeration and Kitchen Utensils Ltd –vs- Gulabchand Popriatial Shah & Another Civil application No.39 of 1990, where it was observed."

28. Part 81 on Applications and Proceedings in Relation to Contempt of Court provides for four different forms of violations as follows:-

> Rules 81.4 relates to committal for "breach of a Judgment, order or undertaking to do or abstain from doing an act."
>
> Rule 81.11- Committal for "interference with the due administration of justice" (applicable only in criminal proceedings
>
> Rule 81.16- Committal for Contempt "in the face of the
>
> court"), and
>
> Rule 81.17- Committal for "making false statement of truth or disclosure statement."

29. The application at hand is within the violations under Rule 81.4, which is on breach Judgment, order or undertaking. It is envisaged that the application must fully set out the grounds upon which the contempt application is made and must identify each alleged act of contempt separately and numerically, and be supported by affidavit(s) containing all the evidence relied upon. However, it is an established principle of law that in order to succeed in Civil Contempt Proceedings, the Applicant has to prove the following three (3) requirements, namely:-

a. The terms of the order were clear and unambiguous and were binding on the Defendant;

b. Knowledge of these terms by the Respondent; and,

c. Failure of the Respondent to comply with the terms of the Order.

Upon proof of these requirements, the presence of willfulness and bad faith on the part of the Respondent would normally be inferred.

30. In this case, the Petitioner avers that the court issued orders dated 28th July, 2022 especially order No.(3) thereof directing Sarrai Group Limited, its agents, employees, servants, subsidiaries or other affiliates including Mumias Sugar (2021) Limited and Rai Cement Limited to cease any and all activities including the operation of machinery, dismantling, vandalism of machinery, removal of assets or any other activity of whatever nature stored and situated within the premises of Mumias Sugar Company Limited (In Administration), pending the hearing and determination of this Application.

31. A plain reading of the said order reveals no ambiguities. It clearly ordered for the cessation of any activities by Sarrai Group Limited, its agents, employees, Servants, Subsidiaries or other affiliates including Mumias Sugar (2021) Limited and Rai Cement Limited, including the operation of machinery, dismantling, vandalism of machinery, removal of assets or any other activity of whatever nature stored and situated within the premises of Mumias Sugar Company Limited (In Administration) pending the hearing and determination of an Application dated 22nd July, 2022. The order was served upon Sarrai Group Limited, its officers and agents including the 2nd to 4th Contemnors as demonstrated by the Affidavits of Service annexed by the Petition or on her Supporting Affidavit indicating that the orders were personally served upon Sarrai Group Limited and its servants including the 2nd to 4th Contemnors. In any event, I find the contemnors have not challenged service of the orders issued on 28th July, 2022.

32. Rule 81.8. of the England Civil Procedure (Amendment No.2) Rules 2012 provides that, where a Judgment or order requiring a person not to do an act, the court may dispense with the service of a copy of the Judgment or order in accordance with Rule 81.5 to 81.7 if it is satisfied that the person has had notice of it; by being present when the Judgment or order was given or made; or by being notified of its terms by telephone, emails or otherwise. The test is therefore an objective one as it is based on satisfaction of the court that the Defendant had knowledge of or proper notice of the terms of the order.

33. While assessing the facts of this case on a scale of establishing whether the Sarrai Group Ltd and its agents and servants including the 2nd to 4th Contemnors had knowledge of or proper notice of the terms of the order dated and issued on 28th July, 2022, this Court is persuaded that the test has been satisfied as there are Affidavits of Service notifying the contemnors of the terms of the order through their telephones numbers and emails on record. And even then, the orders were also delivered in the presence of Sarrai Group Ltd's counsel and it suffices to add that the 1st to 4th Contemnors were made aware of the orders through their advocate, Mr. Wesley Gichaba, the 5th Contemnor who was present in court when the said orders were granted and they sought for the same to be stayed.

34. On whether the Contemnors deliberately disobeyed and or failed to comply with the said orders, the Petitioners submitted that the indeed Sarrai Group Ltd has resumed the activities in Mumias Sugar Company Ltd, (under administration) premises. That the said Company has resumed operations of machines belonging to Mumias Sugar Company Ltd and indeed resuscitated all activities of Mumias notwithstanding the order of court directing cessation by Sarrai Group Ltd of all its activities in Mumias Sugar Company Ltd Premises. The Petitioner has annexed photostats, video clips and conversations confirming that Sarrai Group Ltd has indeed continued to carry out its activities at Mumias Sugar Company Ltd and has been operating the machines in Mumias Sugar Company Ltd premises. The active operation by Sarrai Group Ltd at the premises and of the machinery at Mumias Sugar Company Ltd has been overseen by its Director, agents and servants including the 2nd to 4th Contemnors. In this Court's view, these ongoing activities are in blatant disregard of the orders of this Court issued on 28th July, 2022 and against the Rule of Law. And without any reason and justification advanced by the cited Contemnors, it is clear that they are in deliberate and intentional violation of the orders of this Court which amounts to a violation of this court's dignity, repute or authority.

35. The 1st to 4th Contemnors through their advocate submitted that the orders of 28th July, 2022 were so vague as to be enforceable. In so arguing, the learned counsel stated that an order cannot stop the machines from being operated if the same are stolen or vandalized. That if a machine is stolen or vandalized, then it cannot be operated. The contemnors also faulted the order for failing to address and or take into account the orders issued on 25th April, 2022 which were already in place. As such, it is argued that the order was unenforceable.

36. However, this Court is of different view, in that, a party who knows of an order of the court, whether null and void, or regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the litigants, and or their solicitors, can by themselves determine an order to be null or valid (void) or regular or irregular so as to either obey or disobey it. As long as there is a court order in existence, the same must be obeyed and or complied with. It is not open for a party to deliberate on whether a court order is regular or irregular and or null and void and choose whether to obey it or not. If a party(ies) and or their solicitor finds a court order irregular or null and void, they cannot take it upon themselves to determine such question. It is implored that in such circumstances, parties and or their counsel approach court by application or otherwise for interpretation of the order so as to clear the ambiguity/vagueness to enable the same to be complied with or discharged.

37. In the instant case, if the Contemnors and their counsel felt that the order of 28th July, 2023 was vague and unenforceable, they ought to have taken the liberty as provided for in law to seek for a remedy in having the same interpreted by the court to ensure compliance or enforceability. To this extend, I am satisfied that by taking it upon themselves to declare that the order of 28th July, 2022 was vague and unenforceable and continuing with the acts the court had stopped them from carrying out, the 2nd – 4th Contemnors are found to have wilfully disregarded the said court order.

38. As regards the 5th Contemnor, it is alleged that vide a letter dated 28th July, 2022, he advised his clients, the 1st to 4th Contemnors, to disregard the court orders on the ground that there were orders from the superior court protecting them. I have considered the arguments submitted by either party on this issue and I am inclined to agree with the contemnor's submissions. The role of an advocate or counsel is to represent his or her client in a court of law, offer legal advice or opinion where the client requires and defend his/her client. It is this Court's view that the letter dated 28th July, 2022 was legal advice from an advocate to his client(s). The Advocate-client relationship enjoys one of the oldest privileges for confidential communications whereby an advocate owes a client a duty of confidentiality as a rule and any advice, information or documents shared between them in relation to the representation cannot be disclosed to a third party. (See Section 134 of the *Evidence Act* which provides for privilege of Advocates and the Advocates Code of Ethics and Conduct). This is basically aimed at enhancing trust, openness and confidence between a client and his/her advocate, and more importantly in the legal profession. That is why it is protected by the law, regulatory authorities, fellow professionals and the advocate himself/herself as a professional. This privilege is breached, hence waived, if it is shown that the communication between an advocate and client has been used to further an illegal purpose or where the advocate that the client used the privilege to commit a crime (See case of Mohammed Salim Balala & Another –vs- Tor Allan Safaris Ltd [2015]eKLR, and reiterated in the case of DPP –vs- Tom Ojienda T/A Prof. Ojienda & Associates Advocates & 3 Others by the same court).

39. It is worth-noting that the letter dated 28th July, 2022 was from the 5th Contemnor as an advocate to his clients, and the same is not copied or addressed to the Petitioners and or their counsel. The Petitioners have not stated how they got hold of the said letter, hence this Court is left no choice but to arrive at the unrebuttable presumption that the letter is an unlawfully obtained document which cannot be used for purposes of establishing contempt as against the 5th Contemnor as the evidence adduced therefrom does not meet the threshold of breach of privilege protection of an advocate-client relationship.

40. Similarly, for the Newspaper article adduced herein to establish contempt as against the 5th Contemnor, it is clear that the author was someone different from the alleged 5th Contemnor and nothing has been exhibited to confirm whether what the 5th Defendant did or said is what was reported therein. With such uncertainity, this Court is not persuaded that the wilful disregard of the court order has been established on part of the 5th Contemnor by virtue of the contents of this article.

41. In the upshot, this court finds:-

    a. The 1st to 4th Contemnors are guilty of disobeying this Court's orders dated 28th July, 2022 and subsequently are held in contempt thereof, with the following orders issuing:-

        i. That Sarrai Group Ltd do pay a fine of Kenya Shillings One Hundred Thousand as a penalty for being in Contempt of Court by wilfully disobeying the orders of this court issued on 28th July, 2022 and forthwith pudge its contempt within fifteen (15) days from the date hereof.

ii. That Sarbjit Singh Rai, Rakesh Bvats, and Stephen Kihumba be and are hereby directed to appear in person before the Presiding Judge of Milimani Commercial and Tax Division on 18th May, 2023 to show cause why they should not be committed to Jail for six (6) months.

iii. Costs of the Application to be borne by Sarrai Group Ltd.

b. The Applicant's application against the 5th Contemnor is found to be without merit and is hereby dismissed.

42. The second application dated 20th November, 2022 by the Petitioner seeks to have the court to certify that the Petitions herein, being Nos IP.E004 and IP.E007, both of 2019 as being of substantial public interest raising weighty and complex questions of law and forthwith refer the Petitions to Her Ladyship, The Chief Justice to empanel a bench of an uneven number of Judges being not less than three (3) to hear and determine the matter, pursuant to Article 165 (4) of *the Constitution*.

43. The application is premised on the grounds set out in the Affidavit of Jackline Chepkemoi Kimeto dated 20th November, 2022 in which it is stated that on 19th November, 2021, the court placed the 3rd Respondent herein, Mumias Sugar Company Ltd under administration, on which day it certified that the matter was of great public interest. It is stated that this was also done in the ruling of 14th April, 2022. It is the Applicant's contention that there have been attempts of interference with court supervised administration of 3rd Respondent by vested interests including politicians and sugar barons, which to some extent has resulted into direct threats and intimidation of individual Judges that have presided over the proceedings herein and the Creditors and parties to the proceedings. The Applicant avers that the Petitioners have raised weighty and complex questions of law with regard to the interpretation and application of the provisions of the *Insolvency Act*, No.18 of 2015 and its particular conflict with individual Creditor rights under the repealed *Companies Act*, CAP 486 of Laws of Kenya. The Applicant also avers that the weighty and complex question of law raised in the Petitions concern the rights of insecured Creditor vis-à-vis the rights of the secured Creditor with an intention of clogging the equity of redemption by encumbering the distressed company's assets in perpetuity, and the interpretation of Section 474(1) of the *Insolvency Act*. No.18 of 2015 as read with Regulation 96 of the Insolvency Regulations, 2016, the validity of void transactions undertaken by secured Creditors and their agents in disposal of distressed company assets contrary to Sections 430 and 431 of the *Insolvency Act*, 2015, violation of the "In Duplum Rule" under Section 44A(1) of the *Banking Act*, No.9 of 2006, Section 44(6) on the retroactive nature of Section 44(a) and Section 52(3) of the *Banking Act* that prohibits unconscionable dealings by tenders in an Insolvency as well as dispositions of assets, contrary to Sections 50, 57 and 52 all of the *Land Act*, No.3 of 2012, the application of the principles of equity and social justice under Article 10 of *the Constitution* and the regulation of Insolvency Practitioners in Kenya and consequences of that misconduct. I have not come across any substantive response to this prayer, either by affidavit or submissions.

Analysis and Determination

44. I have considered the written and oral submissions with regard to the question of empanelment of a bench of an uneven number of Judges to hear and determine the Petitions by the Honourable Chief Justice.

45. This is guided by the provision of Article 165(4) of *the Constitution* which provides for the court's discretion in referring a matter to the Chief Justice for empanelment of a bench of Judges, and it states that:-

1. There is established the High Court, which—

a. shall consist of the number of judges prescribed by an Act of Parliament; and

b. shall be organised and administered in the manner prescribed by an Act of Parliament.

2. There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

3. Subject to clause (5), the High Court shall have—

a. unlimited original jurisdiction in criminal and civil matters;

b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and,

iv. a question relating to conflict of laws under Article 191; and

e. any other jurisdiction, original or appellate, conferred on it by legislation

4. Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice. (Emphasis is mine).

46. The general rule in these sort of matters was laid down by the Court of Appeal in the case of Peter Nganga Muiruri –vs- Credit Bank Limited & Another, Civil Appeal No.203 of 2006 in which it held that:-

> " any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question and any other substantive question of law within the jurisdiction of the High Court."

47. Therefore, the decision on whether or not to certify a matter as raising a substantive question of law is an exercise of judicial discretion as opposed to a right. However, in exercise of discretion, the courts are required to exercise the power judicially and judiciously and 'not on caprice, whims, likes or dislikes'.

48. As has been held by this Court before, the decision on whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. It should also be remembered that notwithstanding the provisions of Article 165(4), of *the Constitution*, the decision of a three Judge bench is of equal force to that of a single Judge exercising the same jurisdiction.

49. I also refer to the decision in the case of Vadag Establishment –vs- Y A Shretta & Another, Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No.559 of 2011, where this Court held:-

> " It is also my considered view that a High Court whether constituted by one Judge or more than one Judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more Judges, their precedential value is the same."

50. However, in ascertaining whether a matter should be referred to Chief Justice pursuant to Article 165 (4) of *the Constitution* for empanelment of a bench of Judges, the court should be guided by among other considerations, inter alia: -

a. Whether a right or fundamental freedom in the Bill of

Rights has been denied, violated, infringed or threatened;

or,

b. That it involves a question respecting the interpretation of *the Constitution* and under this is included;

i. the question of whether any law is inconsistent with or in contravention of *the Constitution*;

ii. the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191.

51. Thus, the mere fact that the parties are of the view that a matter falls under Article 165(4) does not necessarily bind a Court in issuing the said certification. The Court must go further and satisfy itself that the issue also raises a substantive question of law.

52. In the case of Community Advocacy Awareness Trust & Others –vs-The Attorney General & Others, High Court Petition No.243 of 2011, the Court noted that:-

> " *The Constitution* of Kenya does not define, 'substantial
>
> question of law.' It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."

53. Further, in the case of Chunilal V. Mehta –vs- Century Spinning and Manufacturing Co. AIR 1962 SC 1314, it was held that:-

> " a substantial question of law is one which is of general public importance, or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is
>
> palpably absurd, the question would not be a substantial."

54. This court agrees with the above persuasive decision which set out the test for determining whether a matter raises as substantial question of law as being:-

a. whether, directly or indirectly, it affects substantial rights of the parties; or

b. whether the question is of general public importance; or

c. whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court; or

d. the issue is not free from difficulty, or

e. it calls for a discussion for alternative view.

55. In this court's view, none of the substantial questions of law as set out in the case of Chunilal V. Mehta (supra) seem to be present in this case. The issue of threats, intimidation and interference of Judges, Creditors and parties in these proceedings by politicians and sugar barons is an issue free of difficulty which can be handled by an individual Judge depending on the evidence and circumstances of each case, hence cannot pass for substantial question of law.

56. The same applies to the issue of the law concerning the rights of unsecured and secured Creditors, interpretation of the law concerning the validity of void transactions, the In Duplum Rule under Section 44 A(1) of the *Banking Act*, the application of principles of Equity and justice under Article 10 of *the Constitution* and all other laws concerning the Insolvency proceedings which have been dealt with and restated severally by the courts in our jurisdiction while applying the same principles surrounding

the controversy in this matter, and cannot be said to be substantial question of law as defined in the Chunilal V. Mehta case.

57. Applying the above principles in consideration of whether the instant matter raises "a substantial question of law" for the purposes of Article 165(4) of *the Constitution*, I find that it is the Applicants case that in the matter there have been various attempts to interfere with the court supervised administration of the 3rd Respondent Company by various vested interests by Politicians and sugar barons including direct threats, intimidation and interference of individual Judges who have presided over the proceedings herein and the creditors and parties to these proceedings, weighty and complex questions of law concerning the interpretation and application of the provisions of law with regard to Insolvency proceedings, the rights of unsecured and secured creditors and principles of equity and social justice.

58. Therefore, in this Court's view, no substantive issue in law has been raised and neither has there been an issue touching on the rights of the parties herein that cannot be determined by a single Judge raised to warrant the empanelment of a bench of Judges by the Honourable, Chief Justice as envisioned under Article 165(4) of *the Constitution* and hence the application dated 222nd November, 2022 fails and is hereby dismissed.

59. Each party to bear its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...27TH ... DAY OF ... APRIL,... 2023.

D.O CHEPKWONY

JUDGE

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