REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 97 OF 2018

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE NATIONAL TRANSPORT AND SAFETY AUTHORITY.....1ST RESPONDENT

THE MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

RULING

1. The application dated 13th May, 2019 by the Petitioner, OKiya Omtatah Okoiti, is brought pursuant to Articles 1, 2, 3, 10, 47 (1) and 159 (1) of the Constitution, Section 5 of the Judicature Act, and, all other enabling provisions of the law.

2. The Petitioner's application seeks for orders:

a. THAT this Honourable Court be pleased to certify this application as extremely urgent and hear it *ex-parte* at the first instance;

b. THAT pending the hearing and determination of this application, the Honourable Court be pleased to suspend, with immediate effect, the implementation of both the 1st Respondent's documents titled 'Driving Schools Re-Validation Form' and 'Important Public Notice', subtitled, 'Revalidation of Driving Schools'.

c. THAT after hearing the application the Honourable Court be pleased to quash the 1st Respondent's Driving Schools Re-Validation Form and the Important Public Notice.

d. THAT this Honourable Court be pleased to order the respondents to comply fully with its Decree.

e. THAT this Honourable be pleased to deny the 1st respondent audience until it purges the contempt.

f. THAT this Honourable Court be pleased to cite one MR. FRANCIS MEJA, the Director General of the 1st respondent herein for contempt of the Decree made by this Honourable Court on 19th November 2018 and issued on 28th November 2018, and consequently punish him according to the law.

g. THAT the costs of this application be provided for.

3. The application is based on the grounds that it was extremely urgent as it sought to arrest the impending revocation, at the close of business on 14th May, 2019, of licenses for driving schools which will not have complied with the 'Driving School Re-Validation Form'; that the 1st Respondent, National Transport and Safety Authority ('NTSA') was in disobedience of the final decree made herein on 19th November, 2019 and issued on the 28th November, 2018 quashing the impugned curriculum; that the 1st Respondent is in deliberate contempt of Court as it continues to enforce the 'Driving Schools Re-Validation Form' which is a slightly modified version of the 'Driving Schools Vetting Form' which the Court and National Assembly quashed.

4. The Petitioner avers that the 1st Respondent's refusal to obey the Court's decree in its entirety is having a devastating impact on many driving schools across the country, and therefore it is reasonable and practical for this Court to certify the application as urgent and to hear and determine it on priority.

5. The 2nd Respondent, the Ministry of Transport, Infrastructure, Housing and Urban Development, did not participate in the application.

6. The 1st Respondent filed submissions dated 16th September, 2019 in response to and in opposition to the application. It is the 1st Respondent's submission that this Court is *functus officio* and is therefore restrained from issuing any further orders as prayed in the Petitioner's application. The 1st Respondent asserts that this Court became *functus officio* upon hearing and determining the petition and issuing a decree. It is contended that the Petitioner must clearly demonstrate to this Court that the application falls within the exceptions to the doctrine of *functus officio*.

7. It is further the 1st Respondent's case that the Petitioner seeks to have the judgment entered on 19th November, 2018 and the decree issued on 28th November, 2018 altered so as to add an order which was neither prayed for nor made by the learned Judge.

8. The 1st Respondent contends that none of the exceptions to the rule on *functus officio* apply in the application before this Court. Reliance is placed on the decision of the Supreme Court in **Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others (2013) eKLR**; and the Court of Appeal decision in **Telkom Kenya Limited v John Ochanda (Suing on his behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR**.

9. As to whether it is contemptuous of the decree of this Court, the 1st Respondent submits that the Petitioner is not entitled to the orders sought in the application as the notice the 1st Respondent issued was to inform the public of its intention to re-validate all driving schools and assess compliance with the Traffic (Driving Schools) Rules 1971, contrary to the allegation in the application that the compliance would be assessed pursuant to the quashed Traffic (Driving Schools and Instructor) Rules, 2014.

10. The 1st Respondent claims that the 'Re-Validation Form' is necessary for it to discharge its mandate under the **Traffic (Driving Schools) Rules, 1971.** It is asserted that the 1971 Rules were drafted, made and gazetted within the confines of the law and with consultation of relevant authorities and adequate participation of the key stakeholders and the public. The 1st Respondent therefore denies the allegation that the rules are unlawful.

11. It is further submitted that the 1st Respondent has been in strict adherence to the orders made and the decree issued on 28th November, 2018 by this Court, and has at no time attempted to apply the quashed Traffic (Driving Schools and Instructor) Rules 2014 (2017). It is urged that the allegation by the Petitioner is unfounded both in law and in fact. Further, that the Petitioner has not led any evidence in support of the allegations in the application.

12. The Court is urged to find the Petitioner's application to be erroneous, untenable in law, unmeritous, a misapprehension of the law, and an abuse of the court process. It is prayed that the application be dismissed.

13. The Petitioner filed submissions dated 3rd September, 2019 in support of his application. On the question as to whether the Court is functus officio, the Petitioner submits that a Court cannot be *functus officio* where it is asked to enforce its orders or decree. Reliance is placed on Section 34 of the Civil Procedure Act and the decision in **Leisure Lodges Limited v Japhet S. Asige & another [2018] eKLR.**

14. As to whether this Court has jurisdiction to punish for contempt, the Petitioner submits that the Court has jurisdiction to hear applications relating to contempt of court orders. He relies on the holdings in **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR**; and **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd 1989 KLR 1** ; as well as Articles 165(3) of the Constitution as read with sections 5 and 39(2)(g) of the High Court (Organisation and Administration) Act, 2015.

15. On the issue of knowledge, the Petitioner submits that by virtue of the fact that the 1st Respondent was served with the decree, the respondents were fully aware and had sufficient notice of the decision of this Court. It is therefore urged that the 1st Respondent is in contempt of Court because it was served and had sufficient notice of the decree but chose to contemptuously ignore it. This is buttressed by the decisions in **Basil Criticos v Attorney General [2015] eKLR; Justus Kariuki Mate v Martin Nyaga Wambora [2014] eKLR; Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR; Fredrick Okolla Ojwang v Orange Democratic Movement & Another [2017] eKLR;** and**, James Gitau Mwara v Attorney General [2015] eKLR.**

16. It is submitted that the respondents are under an obligation to obey the decree in issue. This is supported by the decisions in **Teachers Service Commission v Kenya National Union of Teachers & 2 others [2013] eKLR; Canadian Metal Company Ltd v Canadian Broadcasting Corporation (No. 2) [1975] 48 DLR (3rd) 641, 669; Fred Matiangi v Miguna Miguna (Criminal Application No 1 of 2018);** and**, Teachers Service Commission v Kenya National Union of Teachers [2013] eKLR** on the obligation to obey court orders.

17. The Petitioner contends that the Court ought to find that the 1st Respondent is in contempt of Court and its CEO should be punished accordingly. The Court is urged to consider the factors for determining a contempt of court application as set out in **Ringera & 2 others v Muite & 10 others, Nairobi HC Civil Suit No. 1330; Sarah Wanjiru v Jacinter Wanjiru Nguti [2014] eKLR; Kristen Carla Burchell v Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005;** and, **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR.**

18. The Petitioner claims that the 1st Respondent has full knowledge of the decree/orders but it deliberately did not comply with the decree/orders as required when it decided to continue to implement the annulled and voided Traffic (Driving Schools and Instructor) Rules

2014 (2017).

19. The Court is urged to exercise its jurisdiction as conferred upon it by Articles 162(2)(b) and 165(5) of the Constitution, Section 5 of the Judicature Act (Cap. 8 of the Laws of Kenya), and sections 5 and 39(2)(g) of the High Court (Organisation and Administration) Act, 2015, to punish the respondents for the offence of contempt of court.

20. It is submitted that the 1st Respondent's decision to continue implementing the voided/annulled Traffic (Driving Schools and Instructor) Rules 2014 (2017) in defiance of this Court's decree undermined this Court's authority and the rule of law, and impeded the administration of justice.

21. The Petitioner submits that he has established the standard of proof in contempt of court cases as determined in the holdings in **Re Bramblevale Limited [1970] Ch. 128; R v Wangari Maathi & others 53 of 1981; Jean Claude Adzalla v Jackline Wanjiru Muiruri & another [2017] eKLR; Gatharia K. Mutikika v Baharini Farm Ltd; Kasembeli Sanane v Manhu Muli alias Frederick Saname & 4 others [2013] eKLR;** and, **Sanjay Kumar v State of Bihar CRL No 9967 of 2011.**

22. The Petitioner submits that the 1st Respondent must be punished for contempt by being condemned to pay fines and its executives committed to jail as provided for in the Contempt of Court Act 1981 (Cap. 49 the Laws of the United Kingdom).

23. On the issue of costs, the Petitioner relies on the determination in **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** in support of the proposition that where a private party is successful in constitutional litigation against the State they should have costs paid by the State, and if unsuccessful each party should bear their own costs. Further reliance is placed on the decision in **Biowatch Case cited as CCT 80/2008 or 2009 ZA CC 14.**

24. I have carefully considered the arguments brought before me by the parties herein. The first issue is whether this Court is *functus officio* and therefore lacks jurisdiction to determine the instant application.

25. The Supreme Court in the case **Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** discussed the concept of *functus officio* as follows:

"[18] We, therefore, have to consider the concept of *"functus officio,"* as understood in law. Daniel Malan Pretorius, in *"The Origins of* the functus officio *Doctrine, with Specific Reference to its Application in Administrative Law,"* (2005) 122 SALJ 832, has thus explicated this concept:

'*The functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of *finality*. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only *once* in relation to *the same matter*.… The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) *final and conclusive*. Such a decision cannot be revoked or varied by the decision-maker.'

[19] This principle has been aptly summarized further in *Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550*:

'*A court is functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus, when its judgment or order has been perfected.* The purpose of the doctrine is to provide *finality.* Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available' ".

26. **I wish to also rely on the holding of the Court of Appeal in Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** where it was held that:

"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

'The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1.Where there had been a slip in drawing it up, and,

2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186'"

27. The Court of Appeal went on to express itself as follows:

"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

'A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.'"

28. From the foregoing, it is clear that a court becomes *functus officio* once it has performed all its duties in a case, usually by rendering a final decision. As per the decision of the Court of Appeal in **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**, the doctrine does not allow "**a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."**

29. Prayers (b) and (c) of the application before this Court clearly offends the principle of *functus officio* as they seek a re-engagement of the Court with its earlier decision. By seeking a suspension of the 1st Respondent's documents titled 'Driving Schools Re-Validation Form' and 'Important Public Notice', subtitled 'Revalidation of Driving Schools' and asking for the quashing of 'Driving Schools Re-Validation Form' and the 'Important Public Notice', the Petitioner is seeking fresh orders in a matter that has long been determined. He is asking the Court to resuscitate a jurisdiction that it no longer has. The 2nd Respondent is indeed right in invoking the doctrine of *functus officio* and I am in agreement that the identified prayers cannot be entertained by this Court.

30. Nevertheless, the Petitioner also seek that the 1st Respondent and its Chief Executive Officer be found guilty and punished for contempt. So long as the Petitioner is seeking to enforce the judgement and the decree of this Court, he is entitled to approach the Court for the necessary orders. It does not require citation of any decided case to hold that a court of law has jurisdiction over a matter until the decree is fully satisfied. A decree-holder is free to engage the court for assistance in the execution of the decree. One of the methods for executing a decree is through the commencement of contempt of court proceedings. The Petitioner's application can therefore not be declared *functus officio* in so far as it seeks to enforce the judgement and the decree of the Court.

31. The second question is whether the 1st Respondent is contemptuous of the decree issued on 28th November, 2018. According to the decree, this Court quashed the "**yet to be gazetted The Traffic (Driving Schools and Instructors) Rules 2014 (2017)"** and prohibited the 1st and 2nd respondents from implementing it "**in any way whatsoever or howsoever"** as well as the documents developed thereunder being;

i. Curriculum for Training, Testing and Licensing Driver Examiners;

ii. Curriculum for Training, Testing and Licensing Driving Instructors;

iii. Curriculum for Training, Testing and Licensing of Drivers;

iv. Curriculum for Licensing and Operation of Driving Schools;

v. The Driving Schools Vetting Form;

vi. The Public Service Vehicle Operator Vetting Form;

vii. Driver Test Schedule for March, 2015 (Theory);

viii. Public Notice Vetting of Driving Schools;

ix. Public Notice Vetting of Public Service Vehicle Operators, and

x. Proposed Draft Regulations for Licensing and Operation of Driving Schools.

32. The Petitioner has founded his allegation of contempt on the contention that the 1st Respondent continues to enforce the quashed curriculum in its documents, including on its web portal; and that the 1st Respondent is enforcing the 'Driving Schools Re-Validation Form' which is a slightly modified version of the 'Driving Schools Vetting Form' which this Court had quashed.

33. It is important to note that in **Okiya Omtatah Okoiti v National Transport & Safety Authority & another [2020] eKLR** the Petitioner raised the question of the validity of the 'Driving School Re-validation Form' and the re-validation exercise as a whole. In that case, J. A. Makau in quashing the 'Driving School Re-validation Form' held that:

"35. Having considered the rival submission and evidence from parties' affidavits and grounds of opposition, I find that the 1st Respondent undertook the revalidation exercise of driving schools under the Traffic (Driving Schools, Driving Instructor and Driving Licences) Rules 2018 and not the Traffic (Driving Schools) Rules, 1971. The 1st Respondent therefore closed the

332 driving schools using the void 2018 Rules and not the 1971 Rules."

34. It is clear from the cited paragraph that the Court found that the impugned forms and re-validation exercise were not founded upon the 1971 Rules but based on the voided 2018 Rules. The Court's judgement was rendered on 29th October, 2020 and orders invalidating the re-validation process were granted in that judgement. The Petitioner has not demonstrated that the 1st Respondent violated the orders and decree issued in this case. He is attempting to enforce a decision in another case.

35. There is nothing that this Court can do towards executing the judgment and orders issued on 29th October, 2020 in **Okiya Omtatah Okoiti v National Transport & Safety Authority & another [2020] eKLR**. The Petitioner has approached the wrong Court as the judgment of this Court in this matter did not touch upon the issue of the re-validation process. Therefore, the Petitioner has not established any contempt of court in this matter.

36. In summary, the Petitioner's application dated 13th May, 2019 is found to be without merit. The same is dismissed with the parties being directed to meet their own costs of the proceedings.

Dated, signed and delivered virtually in Nairobi this 25th of February, 2021.

W. Korir,

Judge of the High Court