**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

***(Coram: A. C. Mrima, J.)***

**PETITION NO. 520 OF 2017**

**JIMI WANJIGI.....1ST PETITIONER**

**IRENE NZISA WANJIGI.....2ND PETITIONER**

**-VS-**

**INSPRCTOR GENERAL OF POLICE.....1ST RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT**

**THE ATTORNEY GENERAL.....4TH RESPONDENT**

**RULING NO. 1:**

**Introduction and Background**:

1. Before me is an application by way of a Notice of Motion. It is dated 7th September, 2020. The application is taken out by the Petitioners.

2. The application is brought under Section 5 of the Judicature Act, Rule 39 of the High Court (Organization and Administration) (General) Rules, 2016, Sections 1A, 1B, 3A of the Civil Procedure Act and Order 53 Rule 4 of the Civil Procedure Rules. The application seeks the following orders: -

> 1. That this application be certified urgent and be heard ex-parte in the first instance.
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> 2. That the Honourable court do issue summons to Mr. George Maingi Kinoti, 3rd Respondent to attend to and appear before the Honourable Court on a date to be determined, to show cause why he should not be committed to jail or penalized for contempt of court.
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> 3. That the 3rd Respondent, Mr. George Maingi Kinoti be committed to jail for six months; or penalized on such terms as the Honourable Court may determine, for contempt of court for having deliberately disobeyed orders of this court issued on the 21st June, 2019.
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> 4. That in the alternate to Prayer 3 above, the 3rd Respondent, Mr. George Maingi Kinoti be committed to jail for a **SUSPENDED SENTENCE** of six months to take effect at such a time after he vacates office as the Director of Criminal Investigations for contempt of court for having deliberately disobeyed orders of this court issued on the 21st June, 2019.
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> 5. That any other or further orders of the court guard towards protecting the dignity and authority of the court.

3. The application is supported by two Affidavits sworn by Jimi Richard Wanjigi on 7th September, 2020 and on 26th October, 2020

respectively. The Petitioners also filed written submissions erroneously dated 26th October, 2019.

4. The Respondents oppose the application. They jointly rely on the Replying Affidavit sworn by one No. 236730 Insp. Maxwell Otieno on behalf of the 1st, 2nd and 3rd Respondents on 26th October, 2020. The Respondents filed written submissions dated 11th November, 2020 and a List of Authorities, as well.

**Issues for Determination:**

5. From my reading of the Court documents filed and consideration of the submissions of the Parties, I have identified the following two main issues for determination: -

i. The competency of the application;

ii. Whether the application ought to be allowed;

6. I will deal with the issues in *seriatim*.

**The competency of the application:**

7. The Respondents contend that the application is a non-starter since it is based on repealed provisions of the law. It is submitted that Section 5 of the Judicature Act stands repealed by Section 38 of the Contempt of Court Act. It is further submitted that the entire Contempt of Court Act was itself declared unconstitutional. As such, there is no provision within which the application could be sustained and it ought to be struck out.

8. Counsel for the 1st, 2nd and 3rd Respondents submits that a Court cannot rely on a repealed provision of the law. The decision in ***Paul Posh Aborwa vs. IEBC & 2 Others (2014) eKLR*** is referred to in support of the proposition that Section 20 of the Interpretations and General Provisions Act, Cap. 2 of the Laws of Kenya does not automatically revive a provision of a statute declared unconstitutional, but only another law.

9. The 4th Respondent supports the above submissions.

10. The Petitioner is opposed to the proposition made by the Respondents. He submits that whereas the Contempt of Court Act was declared unconstitutional, the provisions of the Judicature Act became operational such that there is no lacuna in the law on contempt of Court. The Petitioner relied on **Samwel Mweru & Others vs. National Land Commission & 2 Others (2020) eKLR** in support of the position.

11. It is a fact that the entire Contempt of Court Act, No. 46 of 2016 was declared unconstitutional *on 9th November 2018 in* **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR** *for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.*

12. It is instructive to note that Section 38 of the nullified Contempt of Court Act had repealed Section 5 of the Judicature Act, Section 39 of the same Act repealed section 36 of The High Court (Organization and Administration) Act while Section 40 repealed Section 35 of The Court of Appeal (Organization and Administration) Act. The question now begging an answer is whether after the Contempt of Court Act was declared unconstitutional, the sections of the law it had repealed still stand repealed.

13. According to the Respondents, the answer to that question is in the negative courtesy of Section 20 of the Interpretations and General Provisions Act.

14. The provision states as follows: -

> 20. Repealed written law not revived:
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> Where a written law repealing in whole or in part a former written law is itself repealed, that last repeal shall not revive the written law or provisions before repealed unless words are added reviving the written law or provisions.

15. Section 20 deals with instances where a statute or a legislation is repealed. Usually, a statute or a legislation is repealed by the enactment of another statute or legislation or an instrument. That is why Section 20 uses the words ***'unless words are added reviving the written law or provisions'.*** Such words are to be added into the last repealing statute or instrument.

**16. The Contempt of Court Act was not repealed** *in* ***Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR.*** **Instead, the Court declared the Contempt of Court Act unconstitutional. To the extent that the Contempt of Court Act was not repealed but was instead declared unconstitutional by a Court of Law, I find and hold that, the provisions of Section 20 of the** Interpretations and General Provisions Act do not apply in the circumstances of this case. I say so because the duty to enact, amend and repeal laws is the preserve of the Parliament. If a Court decision is to take the place of Parliament, then the doctrine of separation of powers will be trampled upon. Once a statute has been declared unconstitutional by a Court of Law, it is for the Parliament to enact another statute. It is that other statute which may make provisions repealing any earlier statute.

**17. Having said so, in my view,** upon the declaration of the unconstitutionality of the Contempt of Court Act **by the Court, the law**

**governing contempt of Court in Kenya reverted to the position before the enactment of the** Contempt of Court Act.

18. It is on the basis of the foregoing that I agree with the Court's analysis in ***Samwel Mweru & Others vs. National Land Commission & 2 Others (2020) eKLR*** on whether after the Contempt of Court Act was nullified, the sections of the law it had nullified still stand repealed. I, however, note that the Court in that case, unlike in this case, did not expressly deal with Section 20 of the Interpretations and General Provisions Act.

19. The Court in ***Samwel Mweru's*** case (supra) invoked the inherent powers of the Court to avoid a lacuna in the law. The Court stated in part: -

> 17. Courts derive their power from the Constitution and the statutes that regulate them. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Citing I H Jacob *Current Legal Problems,* Freedman C J M adopted the following definition of 'inherent jurisdiction'[13]
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> > ". . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them…"
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> 18. Jerold Taitz succinctly describes the inherent jurisdiction of the high court as follows in his book The Inherent Jurisdiction of the Supreme Court (1985) pp 8-9:
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> > ". . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."
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> 19. The inherent jurisdiction of the high court has long been acknowledged and applied by our courts.[14] However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In this regard in *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd****[15]*** the court stated that:-
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> > "While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute" . . .."
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> 20. I am aware of a recent High Court ruling rendered in *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited*[16] in which the court held as follows:-
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> > "Section 39 (2) (g) of the Act enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. However, the rules to regulate the commencing and prosecuting of contempt of court applications under the Act are yet to be made. The law that previously applied in this regard was the Contempt of Court Act of 2016, until the decision of the High Court (J. Chacha Mwita) made on 9th November 2018 in ***Kenya Human Rights Commission v Attorney General & Another, [2018] e KLR.*** The said decision declared the Contempt of Court Act of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.

I am in the circumstances obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders**.** *It was in this respect observed in* ***Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008,*** that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law. In addition, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act *was restated by the Court of Appeal in* ***Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR***. In that case the 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."**

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."

20. Resulting from the above, I find and hold that, the Petitioners' application is properly brought under *Section 5 of the Judicature Act, Rule 39 of the High Court (Organization and Administration) (General) Rules, 2016, Sections 1A, 1B, 3A of the Civil Procedure Act* and Order 53 Rule 4 of the Civil Procedure Rules.

21. I will now deal with the next issue.

**(b) <u>Whether the application ought to be allowed:</u>**

22. The Petitioners urged this Court to allow the application. They submit that the Court delivered a judgment on 21st June, 2019. In that judgment the Respondents were ordered to *inter alia* return to the 1st Petitioner all the firearms and ammunition taken from the Petitioners' residence in Nairobi.

23. A decree was issued and served upon the Respondents. There was no compliance. The Petitioners has since then been following up the matter with the Respondents in vain. All efforts to satisfy the decree have been unsuccessful.

24. The Petitioners contend that they have patiently exercised all due diligence, but no signs of satisfaction of the decree have been forthcoming. They opted to file the application.

25. In urging this Court to allow the application, the Petitioners contend that the 3rd Respondent is fully aware of the decree of Court. The Petitioners are at a loss in view of the blatant refusal to comply with the Court decree yet the judgment of the Court was not appealed against neither is there any order staying the decree.

26. Relying on the ***Samwel Mweru's*** case (supra) the Petitioners' submit that Section 5 of the Judicature Act and Rule 39 of the High Court (Organization and Administration) General Rules, 2016 empower the Court to punish for contempt of Court. They further submit that the application is not opposed by the 3rd Respondent since Insp. Maxwell Otieno who swore the Replying Affidavit did not exhibit authority to do so on behalf of the 3rd Respondent and is not the one cited for contempt. He is, therefore, a stranger to the matter. The Petitioners also submit that the Respondents are attempting to re-open the matter as all the issues raised in the Replying Affidavit were dealt with in the judgment. It is pointed out that even the letter dated 30th January, 2019 was quashed by the Court.

27. It is further submitted that public interest demand that the law and Court orders be obeyed.

28. Responding to the application, the Respondents relied on the Replying Affidavit sworn by Insp. Maxwell Otieno on 26th October, 2020 together with the filed submissions.

29. The Respondents posit that they are unable to comply with the Court decree on security grounds and in public interest. They contend that the firearms in issue are highly sophisticated and high precision non-civilian firearms. It is also contended that the Firearm Certificate for those firearms was revoked and the Petitioners duly informed. Since the revocation, the Petitioners have not pursued the procedure set out under Section 23 of the Firearms Act. There is, as well, no appeal against the decision to revocation of the firearm licence.

30. As early as 1952, Courts have held that the duty to obey the law by all individuals and institutions is cardinal in the maintainance of the rule of law and due administration of justice. In ***Hadkinson vs. Hadkinson (1952) ALL ER 567***, the Court stated as follows:-

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until it is discharged. The uncomprising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C. said in <u>Chuck vs. Cremer (1) (1 Coop. temp. Cott 342:</u>
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> A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ..... It would be most dangerous to hold that the suitors, or their slicitors, could themselves judge whether an order was null or valid, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.

31. Closer home, the Court of Appeal in ***Refrigeration and Kitchen Utensils Ltd vs. Gulabchard Popartal Shah & Another, Civil Application No. 39 of 1990 (unreported)*** stated that:

> ....it is essential for the maintenance of the rule of law and good order that the authority and dignity of our Courts is upheld at all times.

32. In ***TSC vs. KNUT & 2 others (2013) eKLR,*** the Court observed as follows:-

> 38. The reason why Courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the Court or even the personal ego of the Presiding Judge. Neither is it about placating the applicant who moves the Court by taking out contempt proceedings. It is about

preseving and safeguarding the rule of law.

33. There is a long line of decisions upholding the above position including **Shah & Another t/a Lento Agencies vs. National Industrial Credit Bank Ltd (2005) 1 KLR 300, Mulika vs. Baharini Farm Ltd. (1985) KLR 227** among others.

34. This Court has already dealt with the competency of the application. The obtaining procedure in contempt proceedings is hence the one provided for in Section 5 of the Judicature Act. (See the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 others (Civil Application No. 233 of 2007** *(unreported).*

35. Section 5 of the Judicature Act 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.
>
> (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in exercise of the original Criminal jurisdiction of the High Court.

36. Given the fact that the law in England has variuosly changed over time, a Court has to ascertain the applicable law in the High Court of Justice in England at the time the application for contempt was filed. In this case, the aplication was filed on 7th September, 2020.

37. This requirement was emphasised by the Court of Appeal in ***The Matter of an application by Garbaresh Singh & Sons Ltd – Misc. Civil Case No. 50 of 1983*** where the Court expressed itself as follows:-

> The second aspect concerns the words of Section 5- "for the time being", which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made.

38. Further the Court of Appeal in **Christine Wangari case** *(supra)* stated as follows: -

> Following the implementation of the famous Lord Woolf's Access to Justice Report, 1996', the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety .....

39. Under the Order 52 of the Rules of the Supreme Court of England, an Applicant in contempt application was under a mandatory duty to give notice to the Government Officer of such contempt application prior to filing of the said application and to seek leave of the Court to institute contempt of court proceedings. However, in 2012 the law in England changed and it is no longer necessary to serve the notice upon the Government Officer or to seek the leave of the Court prior to filing of such an application.

40. In this case, the application for contempt was filed in September, 2020. Therefore, the Petitioners were not under any obligation to mandatorily serve a notice to the Government Officer (the equivalent being the Attorney General) and to seek the leave of the Court.

41. Contempt of Court proceedings are usually quasi–criminal proceedings in nature because the liberty of a party is usually at stake. The standard is therefore higher as so provided for in Section 5(2) of the Judicature Act where a conviction arising out of such proceedings is appellable as if it were a conviction entered into in the normal exercise of original criminal jurisdcition in the High Court. For this reason it is imperative that the law regulating the contempt proceedings must be properly and fully complied with otherwise it may result to miscariage of justice on the part of the alleged contemnor.

42. One of the cardinal requirements in contempt proceedings is service. In this case, it is the service of the decree. The issue of service of the decree is not contested by the Respondents in this matter. It is a fact, and as so admitted, that the Respondents are well aware of the decree.

43. In response to why the Respondents are not about to comply with the decree of the Court, the Respondents rely on two grounds. The first one is that it is not in public interest to release the firearms as they pose a danger to public security and, two, that the requisite Firearm Certificate was revoked.

44. The Petitioners have posited that all the issues raised by the Respondents in opposition to the application were dealt with by the Court in its judgemnt. The position is not opposed by the Respondents.

45. In the judgment, the Court partly held as follows: -

> ***56.*** **The Respondents' main contention as can be deciphered from their response is that the firearms are dangerous. That would not make sense either given that the firearms certificates were issued by the same people who now contend that the same firearms they licensed are dangerous.**
>
> **61. Once a firearm certificate has been issued the police have no mandate to confisctae the holder's firearm without lawful cause. I find and hold that the Resppondents'ion of confiscating legally held firearms without reasonable cause was unreasonable and illegal.**

46. Insp. Maxwell Otieno in his affidavit stated as follows: -

> 9. THAT the first petitioner had been directed to surrender the said firearms inclusive of all ammunition by 1st February, 2018 but he failed to do so but instead rushed to court and filed a constitutional petition.

47. It is, therefore, a fact that the recall of the firearms by the Respondents was done before this Petition was filed. Infact, it is the recall of the firearms that prompted the filing of the Petition. The issue of the recall of the firearms was hence aptly dealt with in the judgment.

48. The judgment was rendered on 21st June, 2019. The Respondents timeously filed a Notice of Appeal. It is evenly dated. Since the lodging of the Notice of Appeal in June 2019, the Respondents have neither sought for nor obtained an order staying the judgment and the decree of the Court. That is over one and a half years ago. Counsel for the Respondents did not address this Court on why no stay of execution has ever been sought since. It is suprising that even after the Respondents were served with the application way back in September, 2020 still no action towards seeking an order of stay was taken.

49. It is, therefore, clear that the Respondents are not likely to comply with the judgemnt and decree of this Court. It is also clear that the Respondents are not intent in seeking any stay orders pending the outcome of the appeal.

50. The above analysis, therefore, yields that there is no single plausible reason why the judgment and the decree herein cannot be satisfied by the Respondents.

51. The 26th President of the United States of America, one Theodore Roosevelt, once said: -

> **No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.**

52. The Court of Appeal in ***Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR*** stated as follows: -

> **The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across.**

54. I believe that this Court has, as well, said enough to send the message across.

54. In this case, I hereby find the 3rd Respondent herein, the Director of Criminal Investigations, in contempt of the Court judgment delivered on 21st June, 2019 and the resultant decree.

55. In the premises, the following orders do hereby issue: -

> **a. The Director of Criminal Investigations shall within 30 days of service of this order comply with the judgment of this Court delivered on 21st June, 2019 and the resultant decree;**
>
> **b. This matter shall be fixed for a Mention on 25/03/2021 with a view to ascertain compliance and/or for further others of the Court.**

Orders accordingly.

**DELIVERED, DATED** and **SIGNED** at **NAIROBI** this **11th day of February 2021**

**A. C. MRIMA**

**JUDGE**

**Ruling virtually delivered in the presence of:**

**Mr. Willis Otieno,** Counsel for the Petitioners/Applicants.

**Miss. Nyauncho,** Counsel for the 1st, 2nd and 3rd Respondents.

**Miss. Mwangi,** Counsel for the 4th Respondent.

**Elizabeth** – Court Assistant