



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 640 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

AND

EQUITY BANK LIMITED.....1ST INTERESTED PARTY

CO-OPERATIVE BANK LIMITED.....2ND INTERESTED PARTY

CENTRAL BANK OF KENYA.....3RD INTERESTED PARTY

EX PARTE APPLICANT: NAIROBI CITY GOVERNMENT

RULING

1. This ruling is on the ex parte Applicant's Notice of Motion dated 1st November 2019, seeking the following substantive orders:

a) THAT leave be granted to the firm of Miller & Co. Advocates to come on record for the Ex Parte Applicant herein in place of M/s Prof. Tom Ojienda & Associates and that the attached Notice of Change of Advocates be deemed to be properly on record upon payment of the requisite court filing fees.

b) THAT the Honourable Court do find that PATRICK NGUGI NJOROGE and JAMES GITHII MBURU , being the Governor of the 3rd Interested Party herein Central Bank of Kenya and the Commissioner General of the Respondent Kenya Revenue Authority herein respectively are in contempt of court for disobedience of the orders of this Court issued by Hon. D.S Majanja dated 27th February, 2019.

c) THAT upon grant of prayers 1 and 2 above, this Honourable Court do impose a fine and or a penalty of Kshs. 10,000,000.00 (Kenya Shillings Ten Million) each against PATRICK NGUGI NJOROGE and JAMES GITHII MBURU and in default of payment of such fine to direct the attachments of all moveable and immovable assets of the Respondent and the 3rd Interested Party including land and buildings be attached and sold in execution of this order satisfy the penalty for contempt.

d) THAT upon grant of prayers 1 and 2 above, this Honourable Court do issue an order that the above mentioned PATRICK NGUGI NJOROGE and JAMES GITHII MBURU be committed to civil jail for a period of 6 months and to cease holding public office.

e) THAT the Court do issue an order that the above mentioned PATRICK NGUGI NJOROGE and JAMES GITHII MBURU do purge their contempt WITHIN 24 HOURS of the date hereof by remitting back the funds (which is salary for Nairobi County employees) recovered from Nairobi County Recurrent Account in line with the Agency Notices dated 12th April, 2019 issued by the Respondent.

f) THAT pending inter partes hearing of this application, the Officer Commanding Station, Central Police Station or such officer as may be designated in the Kenya Police or Kenya Police Administration be ordered to ensure the compliance with the orders of this Court issued by Hon. D.S Majanja dated 27th February, 2019.

g) THAT pending the hearing and determination of the suit Officer Commanding Station, Central Police Station or such officer as may be designated in the Kenya Police or Kenya Police Administration be ordered to ensure compliance with the orders of this Court issued by Hon. D.S Majanja dated 27th February, 201

h) Any other or further relief that this Honourable Court may deem fit to grant.

i) Costs of this application.

2. The application is supported by the grounds set out in the application together with the Supporting Affidavit Halkano Waqo, the Chief Officer Finance of even date. This Court (Mativo J.) granted prayer (a) of the Notice of Motion application on 20th November 2019, and after having been granted leave to come on record, the firm of Miller & Company Advocates thereafter urged the outstanding prayers on behalf of the *ex parte* Applicant.

3. The *ex parte* Applicant averred that it is a County Government established pursuant to Article 176 of the Constitution, and plays a key and crucial role and function to the residents of Nairobi, and provides crucial services and functions as assigned to county governments under Part 2 of the Fourth Schedule of the Constitution of Kenya, 2010. In addition, that the *ex parte* Applicant also has the responsibility and obligation to pay its huge workforce inherited from both the Local Authority and the National Government, and in compliance with Article 207 of the Constitution and section 109 of the Public Finance Management Act, 2012, the *ex parte* Applicant maintains a County Exchequer Account at the Central Bank of Kenya, the 3rd Interested Party herein, in which all the County Revenue Fund is kept. Further, that money cannot be withdrawn from this account unless the Controller of Budget has approved the withdrawal as mandatory required under Article 207(3) of the Constitution.

4. It was further the *ex parte* Applicant's averment that it also maintains accounts in Equity Bank and Co-operative Bank (the 1st and 2nd Interested Parties herein), where the money approved by the Controller of Budget from the County Exchequer Account is paid into and subsequently spent on intended purposes. Therefore, that the money released into these accounts is usually planned and budgeted for prior to its release, and that it is on this basis that the *ex parte* Applicant filed a Notice of Motion application dated 9th January, 2017 which was allowed by a ruling dated 27th February, 2019. The said ruling suspended an Agency Notice dated 6th December, 2016 issued by the Respondent to the 1st to 4th Interested Parties in respect of monies and/or accounts held by the said Interested Parties on behalf of the *ex parte* Applicant. Further, that the Respondent was prohibited from issuing any other or further agency notice(s) to the 1st to 4th Interested Parties in respect of monies and/or accounts held on behalf of the *ex parte* Applicant.

5. However, that despite the existence and knowledge of the said ruling dated 27th February, 2019, the Respondent purported to issue an Agency Notice dated 12th April, 2019 to the 1st and 2nd Interested Parties under section 42 of the Tax Procedure Act of 2015, demanding payment of Kshs. 4,490,214,629.00 as tax due by the *ex parte* Applicant to it. Furthermore, that the Respondent went ahead and enforced the Agency Notices dated 12th April, 2019 by withdrawing the Nairobi County Recurrent Expenditure Account, thereby frustrating the *ex parte* Applicant's recurrent expenditure. It was the *ex parte* Applicant's contention that the enforcement of the Agency Notice was an outright act of disobedience and disregard of the ruling of 27th February 2019.

6. The *ex parte* Applicant further contended that the illegal enforcement is a knowingly calculated economic sabotage and blackmail by the Respondent to cow the *ex parte* Applicant to give into the Respondent's outrageous uneconomically sustainable demands. As a result, that the *ex parte* Applicant's operations have been completely paralyzed as it has no monies for its recurrent expenditure. It was also contended that the enforcement of the Agency Notice dated 12th April, 2019 was marred with illegalities as it was done in outright violation of section 207(3) of the Public Finance Management Act, as the County Exchequer Account was withdrawn without the approval of the Controller of Budget; the money sought by the Respondent is not a charge against the Revenue Fund that is provided for by any Act of Parliament or by any legislation of the county contrary to Article 207(2)(a) of the Constitution, neither was it authorized by appropriation by legislation of the county contrary to Article 207(2)(b) of the Constitution.

7. Consequently, that unless the application is allowed as prayed, the employees of the *ex parte* Applicant are going to be subjected to untold turmoil as they will not receive their monthly salaries, and that the *ex parte* Applicant further risks having the employees down their tools for lack of pay for work done and being subjected to several legal suits for violation of employees' rights through no fault of its own. In conclusion, it was contended that the *ex parte* Applicant will be unable to meet any of its recurrent expenditures and service delivery, and the capital city of Nairobi will come to a complete standstill.

The Responses

8. In response to the application, the Respondent filed a Replying Affidavit sworn by James Githii Mburu on 10th February, 2020. He averred that he is the Commissioner General and Chief Executive Officer of the Respondent appointed on 6th June, 2019 by the Cabinet Secretary for National Treasury and Planning via Gazette Notice No. 4857. It was also his averment that the contempt application dated 1st November, 2019 is grounded on the orders issued on 27th February, 2019 in Judicial Review No. 640 of 2016 as consolidated with Judicial Review No. 246 of 2017. He contended that the case was premised on the argument that the Respondent cannot issue Agency Notices against the *ex parte* Applicant's account as this was not permitted by the Constitution under Article 207 and Section 109 of the Public Funds Management Act. It was further his contention that on 27th February, 2019, Hon. D. S. Majanja J allowed the application and issued judicial review orders of Certiorari quashing the Agency Notices dated 6th December, 2016 and 27th March, 2017 respectively.

9. That following the judgment, the Respondent engaged the *ex parte* Applicant with a view of finding a resolution on how the outstanding tax liability of Kshs. 4,776,560,914/- could be settled, and that the engagement culminated into a Tax Dispute Settlement signed on 19th September, 2019, whereupon the *ex parte* Applicant subsequently reneged on the terms of the Tax Settlement Agreement. It was his contention that the enforcement action with regard to the taxes has been undertaken as provided under the Tax Settlement Agreement between the parties, the Agency Notice of 12th April, 2019 have been overtaken by events. He further added that since his assumption of office, he has reviewed the dispute between the two parties and given instructions that the Agency Notice dated 12th April, 2019 be withdrawn as they serve no purpose. Accordingly, he urged that having withdrawn the Agency Notice dated 12th April, 2019, the alleged contempt has since been purged and he cannot therefore be held in contempt on an action that he did not sanction having become Commissioner General after the event.

10. The 3rd Interested Party on their part filed Replying Affidavits sworn on 19th November, 2019 and on 4th June, 2020 respectively by Kennedy Kaunda Abuga, its Director in charge of legal services, and Patrick Njoroge, its Governor. On his part, Mr. Abuga averred that the Central Bank of Kenya is a public institution established under Article 231 of the Constitution of Kenya and is responsible for *inter alia*, formulating monetary policy to achieve and maintain price stability and issuing currency and it is also the adviser to, fiscal agent of, and the banker for the Government of Kenya, providing oversight of payment, clearing and settlement systems. Further, that the *ex parte* Applicant's County Revenue Fund as provided under Article 207 of the Constitution and section 109 of the Public Finance Management Act is currently held by the Central Bank of Kenya in an account known as the "County Exchequer Account."

11. According to Mr. Abuga, the *ex parte* Applicant avers that the Respondent issued Agency Notices dated 12th April, 2019 to the 1st and 2nd Interested Parties, and there is no Agency Notice that is stated, alleged or even exhibited to have been issued to the 3rd Interested Party. Therefore, that it is mischievous and frivolous for the *ex parte* Applicant to purport to seek contempt of court orders against the 3rd Interested Party and its Governor. Mr. Abuga noted that Central Bank of Kenya is not engaged, or party to the dispute between the *ex parte* Applicant and the Respondent, and or involved in the issuance, suspension, revocation and or renewal of agency notices, and is therefore not a party to any disputes as between the *ex parte* Applicant and the Respondent. It was further his averment that the Central Bank of Kenya receives Agency Notices relating to unpaid dues from Counties, Ministries, Departments and Agencies that are in breach of their tax obligations with the Respondent pursuant to the express and unequivocal provisions of the Tax Procedures Act, and that it is obligated to comply with the Agency Notices to achieve compliance with the Tax Procedures Act, as failure to do so would attract criminal sanctions.

12. Mr. Abuga averred that the foregoing notwithstanding, the *ex parte* Applicant on 19th September, 2019, executed a Tax Dispute Settlement Agreement with the Respondent acknowledging its tax indebtedness to the tune of Kshs. 4,490,214,629/, and that pursuant to the said Agreement, Kshs. 1,000,000,000/- payable immediately upon execution of the agreement was remitted to the Respondent. Consequently, that the *ex parte* Applicant is estopped from reneging on the express terms of the Tax Dispute Settlement Agreement, entered into by its authorized officers. Furthermore, that pursuant to section 42(10) of the Tax Procedures Act No. 29 of 2015, a payment made by an agent to the Commissioner in accordance with a notice issued under section 42, is treated as having been made on behalf of the tax payer and shall discharge an agent of any liability to the taxpayer or any other person. Accordingly, the amount of Kshs. 1,000,000,000/- remitted to the Respondent on account of tax owed by the *ex parte* Applicant, is a payment made on behalf of the taxpayer and the Central Bank of Kenya is discharged of any liability to the *ex parte* Applicant or any other person.

13. On his part, Mr. Njoroge reiterated the averments made by Mr. Abuga, save to add that the role of the Governor is provided for under section 13 of the Central Bank of Kenya Act and regarding legal proceedings or cases filed in court in which Central Bank of Kenya is a party, he has delegated the responsibility to appear in court and to swear affidavits to Mr. Kennedy Abuga, the Central Bank of Kenya's General Counsel. He also added that while numerous Agency Notices are routinely received and handled by Central Bank of Kenya's Banking and Payment Services Department, they are never brought to his attention and therefore he was not aware of the purported Agency Notice of 12th April, 2019. He maintained that neither Central Bank of Kenya nor himself are involved in the issuance, suspension, revocation and or renewal of Agency Notices, and cannot therefore be held accountable for the same.

14. He further noted that over and above the fact that he is not in his personal capacity a party to the suit, no orders were granted against Central Bank of Kenya or himself in the ruling by Majanja J. delivered on 27th February 2019, and it is apparent from the orders alleged to have been contravened, that they do not prohibit him or the Central Bank of Kenya from undertaking any actions, or direct either the Central Bank of Kenya or himself to undertake any action whatsoever. Be that as it may, he averred that in the year 2019, Central Bank of Kenya received two Agency Notices from the Respondent dated 10th September, 2019 and 23rd October, 2019 respectively both totaling to Kshs. 1,000,000,000/- each in favour of Nairobi County Government. That pursuant to the Tax Dispute Settlement Agreement dated 19th September, 2019, the Agency Notice dated 10th September, 2019 was processed on 8th October, 2019 and the Agency Notice dated 23rd October, 2019 was processed on 8th November, 2019 and payments remitted from Nairobi County Recurrent Account No. 1000171502. He therefore urged the court to find that the allegations against himself as being in contempt are unwarranted and without merit.

The Determination

15. Miller & Company Advocates, the advocates on record for the *ex parte* Applicant filed written submissions dated 28th September, 2020. On the issue whether the acts of the Respondent and the 3rd Interested Party were reminiscent of contempt of court, counsel submitted that the court decided that the Agency Notices issued by the Respondent to the *ex parte* Applicant's County Revenue Fund, otherwise known as the County Exchequer Account, in execution, circumvented the proper procedure on release of public funds and that the Respondent, by issuing such Agency Notices, acted irregularly, illegally and further jeopardized the country's funds, as the amount for which the Agency Notices were issued was surplus of the money held in the account and the order served thereto.

16. To buttress his argument, counsel cited the case of **Christine Wangari Gachege Civil Case No. 456 of 2011** where the Court of Appeal held that leave now called "permission" is not required where committal proceedings relate to a breach of a judgment, order or undertaking. Further, that in order to succeed in civil contempt proceedings, the *ex parte* Applicant has to prove that the terms of the orders alleged to have been disobeyed, knowledge of these terms by the Respondent and failure by the Respondent to comply with the terms of the order.

Counsel argued that the alleged contemnors proceeded to issue further Agency Notices dated 12th April, 2019 in contrast to a valid court order prohibiting the very act they occasioned. It was submitted that this act was contemptuous and sanctionable under section 5 of the Judicature Act thereby causing anarchy in the functioning of the County. Indeed, counsel submitted that the Respondent could not competently purport to act in a manner ignorant to a duly issued and served court order.

17. To that end, counsel cited the case of **Morris and Others vs Crown Office (1970)** where Denning LJ emphasized that of all places where law and order must be maintained, it is here in these courts. On the issue whether there was harm or effect on the subject matter as a direct result of the actions, counsel cited the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR** where the Court of Appeal held that court orders must be obeyed and parties against whom such orders are made cannot be allowed to trash them with impunity. Accordingly, counsel submitted that the Respondent and the 3rd Interested Party were unable to give grounds for their conduct in light of the court orders issued on 27th February, 2019, and urged that their application be allowed with costs.

18. The Respondent on their part filed written submissions dated 1st December, 2020 filed by its Advocate, G.O. Ochieng. On the issue whether the Respondent's action was a deliberate disobedience of the order of 27th February 2019, counsel submitted that it was the Respondent's honest belief that the orders related to the County Revenue Funds, and not any other accounts, hence the Agency Notice dated 21st April 2019 was as against Recurrent accounts. Furthermore, it was argued that nothing has been brought to show intentional disobedience of the orders, and it has been demonstrated that the 2nd alleged contemnor upon being appointed has taken tremendous steps to ensure that the tax issue relating between the parties are amicably solved.

19. Counsel also submitted that they are also conscious of the standard of proof in contempt matters as was established in the case of **Mutitika vs Baharini Farm Limited (1985) KLR 229 at 234**, where the Court of Appeal held that the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly beyond reasonable doubt. Further, that no evidence has been placed to show that the actions of the Respondent were intended to intentionally demean the court, hence the *ex parte* Applicant has failed to meet the threshold of proof in a contempt application. Counsel also cited the Supreme Court decision in **Republic vs Ahmad Abolfathi Mohamed & Another (2018) eKLR** for the proposition.

20. On the issue whether this court can hold the Respondent in contempt even after it has purged the action which is the subject of the contempt, and whether the 2nd alleged contemnor can be cited for actions which took place before his appointment, counsel submitted that contempt is personal and it has to be shown that the alleged contemnor has willfully and deliberately violated the court order for him to be held in contempt. To buttress his argument, counsel cited the case of **Republic vs Principal Secretary, Ministry of Defence ex-parte George Kariuki Waithaka (2019) eKLR** where the court cited with approval the English House of Lords decision in **Heatons Transport (St. Helens) Ltd vs Transport and General Workers Union (1973) AC 15** where it was held that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the orders.

21. Counsel went on to argue that in the present case, the action being complained of has since been remedied by the withdrawal of the Agency Notices and to that end, counsel cited the case of **Republic vs County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) (2018) eKLR** where the court held that an alleged contemnor must show what steps he or she has taken in order to ensure that the decision was complied with. Counsel also relied on the case of **John Kenneth Mugambi vs City Council of Nairobi, (2009) eKLR** where the court faced with similar circumstances noted that the cited officers had behaved differently towards the orders by taking no steps towards compliance with the same. However, he argued that in the present case, the alleged 2nd contemnor has taken responsible steps in ensuring that the agency notice complained of are lifted.

22. Accordingly, counsel argued that there was no willful disobedience by the 2nd alleged contemnor and the Respondent, the agency notices complained of have since been withdrawn, the tax dispute between the parties has already been fully settled and lastly, no justification for the payment of Kenya Shillings ten million was presented.

23. Murgor & Murgor Advocates, the advocates for the 3rd Interested Party filed written submissions dated 23rd October, 2020. Counsel submitted that the issue for determination is whether, in the circumstances of this case, the test laid out in **Samuel M. N. Mweru & Others vs National Land Commission & 2 Others (2020) eKLR** has been met. On the issue whether the order by Majanja J was directed against Mr. Patrick Njoroge or the Central Bank of Kenya, counsel submitted that the prohibitory orders issued therein were against issuance of Agency Notices by Kenya Revenue Authority and not in any manner against the Central Bank of Kenya or its Governor. Further, that the *ex parte* Applicant has failed to provide evidence or particulars of the breach of the said orders by either the Governor or Central Bank of Kenya. Be that as it may, it was submitted that Central Bank of Kenya is obligated to comply with agency notices and in all instances where agency notices are issued, its conduct in such instances are in good faith, and seeks to achieve compliance with the Tax Procedures Act, as failure to do so would attract criminal sanction.

24. The counsel submitted that pursuant to the Tax Dispute Settlement Agreement dated 19th September, 2019, the Kshs. 1,000,000,000 (One Billion) payable immediately upon execution was remitted to the Respondent on account of tax owed by the *ex parte* Applicant, which Applicant is estopped from reneging on the express terms of the Tax Dispute Settlement Agreement. Counsel reiterated that pursuant to section 42(10) of the Tax Procedures Act, the payments were made for and on behalf of the *ex parte* Applicant and Central Bank of Kenya in these circumstances is considered an agent of the *ex parte* Applicant, which is as such estopped from denying the action of its agent. Therefore, that in light of the circumstances set out hereinabove, the payment made to the Respondent on behalf of the *ex parte* Applicant was reasonable and made in good faith.

25. I have considered the arguments made by the parties, and the two main issues for determination in this application are whether the alleged contemnors disobeyed the orders issued herein on 27th February, 2019, and if so, what penalties should be imposed upon them. As observed by this Court in **Republic vs Kajado County & 2 Others ex parte Kilimanjaro Safari Club Limited, (2019) eKLR**, the rules on the procedure in contempt of court applications under the High Court (Organization and Administration) Act are yet to be made by the Chief Justice under **section 39 (2) (g) of the Act**, and that the law that previously applied in this regard, namely the Contempt of Court Act

of 2016, was declared invalid by the decision in Kenya Human Rights Commission vs Attorney General & Another, [2018] eKLR.

26. In the circumstances, this Court is obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court's orders. 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. The Court of Appeal found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which is applied by virtue of the provisions of the Judicature Act.

27. Rule 81.8 of the English Civil Procedure Rules in this regard provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served. Various Kenyan judicial decisions have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1, and Ochino & Another v Okombo & 4 others (1989) KLR 165 in this respect.

28. It has also been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in Kenya Tea Growers Association vs Francis Atwoli & Others, Nairobi High Court Constitutional Petition No 64 of 2010, Husson v Husson, (1962) 3 All E.R. 1056, Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497, and Davy International Ltd vs Tazzyman (1997) 1 WLR 1256.

29. In the present application, the *ex parte* Applicant has not pleaded nor annexed any evidence that the alleged contemnors were personally served with the ruling or orders given herein on 27th February, 2019. This is particularly relevant in light of the averments by the 2nd alleged contemnor, John Githii Mburu, that he was appointed to office on 6th June 2016, after the said orders were given. The 1st alleged contemnor, Patrick Njoroge, also averred that he was not personally sued in the suit, was not aware of the agency notices issued in this matter. These averments were not disputed by the *ex parte* Applicant.

30. In addition, even if it were deemed that the alleged contemnor was aware of the Court's orders arising from subsequent events, the *ex parte* Applicant did not dispute that it entered into a settlement agreement with the Respondent on the same subject matter of the orders alleged to have been disobeyed by the alleged contemnors. Evidence of the said agreement was brought by the alleged contemnors. The orders issued herein on 27th February 2019 that are alleged to have been disobeyed quashed agency notices dated 6th December 2016 and 27th March 2017 issued by the Respondent against the *ex parte* Applicant, and prohibited the Respondent from issuing agency notices to the 1st to 4th Interested Parties and to the Principal Secretary of the National Secretary in respect of funds due and payable, or monies held by them on behalf of the *ex parte* Applicant.

31. However, on 19th September 2019, the *ex parte* Applicant and Respondent entered into a settlement agreement, which specifically acknowledged the proceedings herein, and clause 6.2.1. provided that the *ex parte* Applicant would make payment of Kshs 1,000,000,000. (one Billion) immediately upon execution of the said agreement, and that the Respondent had issued an agency notice for the said amount with the 3rd Interested Party in this regard. The question that needs to be answered therefore, is whether the alleged contemnors are culpable for disobeying the orders of 27th February 2019 in the circumstances.

32. The mental element required for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order as held by the English House of Lords in Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15. The Supreme Court of Kenya also made the following observations as regards proof of contempt of court in Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR:

“ [28] It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

33. The *ex parte* Applicant did not dispute that the acts alleged to constitute contempt by the alleged contemnors were with regard to steps taken to effect payment of the monies it owed pursuant to the settlement agreement dated 19th September 2019, which had the effect for all intents and purposes of varying the orders of 27th February 2019, and with the *ex parte* Applicant's express consent. It is a settled legal principle on culpability for contempt of court are that no person will be held guilty of contempt for breaking an order, unless the terms of the order are themselves clear and unambiguous as held in Iberian Trust Ltd vs Founders Trust and Investment Co. Ltd (1932) 2 KB 913. Furthermore, if the court is to punish anyone for not carrying out its order, the order must in unambiguous terms direct what is to be done. It was held in Radkin-Jones vs Trustee of the Property of the Bankrupt, (1965) 109 Sol. Jo. 334 that an order should be clear in its terms,

and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain its precise obligation.

34. Therefore, while the order alleged to have been disobeyed was clear as to its terms on 27th February 2019 when it was given, its effect and import was no longer clear after 19th September 2019, when the *ex parte* Applicant acquiesced to a variation of the terms of the said order, and more so on 1st November 2019 when the *ex parte* Applicant lodged the instant application.

The Disposition

35. I accordingly find that the *ex parte* Applicant has not proved to the required standard that the alleged contemnors, namely Patrick Ngugi Njoroge and James Githii Mburu are culpable of disobeying the orders granted herein on 27th February 2019, as the terms, nature and effect of the said orders are ambiguous, arising from the subsequent settlement agreement dated 19th September 2019 entered between the *ex parte* Applicant and Respondent herein.

36. The *ex parte* Applicant's Notice of Motion dated 1st November 2019 is therefore found not to have merit and is hereby dismissed with no order as to costs.

37. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021

A. NDUNG'U

JUDGE