**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 123 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**NAIROBI CITY COUNTY & ANOTHER.....RESPONDENTS**

**AND**

**KENYA REVENUE AUTHORITY.....INTERESTED PARTY**

**AND**

**PROF. TOM OJIENDA & ASSOCIATES.....EX PARTE APPLICANT**

**RULING**

**Introduction**

1. The factual chronology of the events which triggered the application dated **20th** December 2018 is essentially common cause or undisputed. It is uncontested that on **5th** July 2016 the applicant's Advocate/ Client Bill of Costs was taxed in the sum of **Ksh. 75,000,000/=** in Judicial Review Application Number **274** of 2014 and a Certificate of Costs issued for the said sum. It is common ground that applicant successfully applied for entry of judgment as per the Certificate of Costs. There is no dispute that on **2nd** October 2017 a writ of *mandamus* was issued compelling the first Respondent to pay to the applicant the said sum plus interests. It is common ground that the Respondents have not paid the said sum.

2. Aggrieved by the failure to pay, the applicant filed the instant application seeking the following orders:-

*i. Spent.*

*ii. **That** this honourable court be pleased to find the County Secretary, Nairobi City County Paulina Kahinga and the Chief Officer, Finance. County Treasurer, Nairobi City County, Winfred Wangui Gathangu in contempt of the court order dated 2nd October 2027 compelling them to pay the applicant the decretal sum of Ksh. 75,000,000/= together with interest of 9% from 30th January 2017.*

*iii. **That** the said County Secretary, Nairobi City County Pauline Kahinga and the Chief Officer, Finance/County Treasurer Nairobi City County Winfred Wangui Gathangu be committed to prison for a term not exceeding **6** months.*

*iv. Spent.*

*v. **That** this honorable court be pleased to direct the County Secretary City County, Pauline Kahinga and the Chief Officer, Finance/County Treasurer, Nairobi City County Winfred Wangui Gathangu to pay the decretal sums of Kshs 75,000,000/= with interest at the rate of 9% from 30th January 2017 directly to the account provided by the Interested Party and the said sums to be applied towards any present , past and or future tax obligations that may be determined as payable to the interested party by Prof. Tom Ojienda & Associates.*

**The grounds**

3. Essentially, the application stands on two grounds. One that the Respondents have refused to pay the said sum in contempt of a court order. Two, the applicant is a tax payer and he prays that the judgment sum be paid directly to the Interested Party to be applied towards his present and or future tax obligations.

**Respondents' grounds of opposition**

4. The Respondents filed grounds of opposition dated **26th** March 2019 stating that the application is pre-mature, misconceived, lacking merits, an abuse of court process, and that the applicant has not complied with the provisions of section **21** of the Government Proceedings Act.[1]

5. They also state that they were not served with the Ruling and Reasons for Taxation and Certificate of Taxation and Decree issued on **14th** March 2016. Further, they state that no demand for payment was made contrary to section **21 (3)** of the Government Proceedings Act.[2] Additionally, they stated that committal proceedings should not to issue against non-parties to the case. Also, they state that the application lacks merits. Lastly, they blamed financial constraints for their failure to pay.

**The Interested Party's grounds of opposition**

6. The Interested Party filed grounds of opposition dated **25th** November 2019 stating that the prayer that the decretal sum be applied towards the applicant's tax obligation is without merit and goes against the tenets of taxation. It also stated that the request to transfer a tax obligation cannot stand in law, and that such an order is tantamount to the applicant appointing a tax agent himself, that such an order may be unenforceable.

**The applicant's advocates' submissions**

7. The applicant's counsel cited *Teachers Service Commission v Kenya National Union of Teachers & 2 others*[3] for the proposition that the reason courts punish for contempt is to safeguard the rule of law a fundamental tenet in the administration of justice. He urged this court not be seen to be making orders in vain. He placed reliance on *Republic v County Chief Officer, Finance & Economic Planning Nairobi City County Ex parte Stanley Muturi*[4] which found the Chief Finance Officer of the County to be in contempt for failing to settle a decretal amount.

8. It was his submission that financial constraints cited by the Respondents cannot be a ground for avoiding responsibility to pay and cited *Njenga Mwangi Wachira & Partners v County Secretary, City County of Nairobi.*[5]

9. On the argument that personal service was not effected, he argued that at all material times the Respondents were aware of the court order because they were represented in the court proceedings. To buttress his argument, he cited *Basil Criticos v Attorney General & 8 others*[6] and *Republic v Kenya Revenue Authority & 4 others ex parte Nairobi City County Government*[7] for the holding that knowledge of a court order supersedes personal service.

**The Respondent's advocates' submissions**

10. Citing *Teachers Service Commission v Kenya National Union of Teachers & 2 others*,[8] counsel argued that proof of service is at the epitome of a trial in contempt proceedings. He submitted that the applicant has not demonstrated that he complied with section **21 (2)** of the Government Proceedings Act,[9] and that there is no proof that the Ruling and Reasons for Taxation, Certificate of Costs and Decree were served upon the Respondent.

11. Additionally, he submitted that there is no evidence that the applicant demanded the payment and argued that the applicant did not discharge the burden of prove as provided under section **109** of the *Evidence Act*.[10]To buttress his argument, he cited *Republic v Nairobi City County Government ex parte Ndiara Enterprises Limited*.[11] He also argued that contempt has not been proved to the required standard as stated in *Mutilika v Baharini Farm Limited*.[12] He also placed reliance on *Ochino & another v Okombo & others*[13] which underscored the requirement for personal service and cited absence of a return of service to prove that service was effected.

12. Additionally, counsel cited *Siemer v Stiassyny SC*[14] for the proposition that it is necessary to prove that the defendant knew that he was breaching the order. He placed further reliance on *Molly Wambui Kiragu v Governor, Nairobi City County & another*[15] for the proposition that an applicant must demonstrate willful disobedience of a court order. He also argued that committal proceedings ought not to be issued against a person who was not a party to the suit giving rise to the decree.

13. Citing sections **103 (1)** and **(3)** of the *Public Finance Management Act*[16] and section **44 (1) (3)** of the County Governments Act,[17] he argued that County Committee Members have a duty to pay out funds after the requisite budgetary approval by the County Committee Members. He also relied on *Wachira Nderitu, Ngugi & Co Advocates v The Town Clerk, City Council of Nairobi*[18] in support of his argument that the County Government has limited resources.

14. He dismissed the plea to make the payments to the Interested Party as premature maintaining that the applicant must surmount the first challenge, namely, contempt. He also argued that section **42** of the Tax Procedures Act[19] provides a procedure whereby the Commissioner may direct payments to be taken from a party who owes the tax payer and argued that the said procedure was not followed.

**The Interested Party's Advocates' submissions**

15. Counsel for the Interested Party argued that the prayer that the money be remitted to the Interested Party amounts to appointing the Interested Party as a Debt Collector which is absurd and goes against the tenets of taxation and the Interested Party's mandate under the revenue statues. She cited JR No. **640** of 2016 to support her argument that enforcing such an order will be next to impossible and added that the applicant's inability to enforce court orders against the Respondent is evident from the history of this case.

16. She faulted the applicant's reliance on section **42** of the Tax Procedures Act[20] arguing that the Interested Party only invokes the said section in the event of non-compliance. It was her submission that by invoking the said section, the applicant seems to suggest that he plans to default in his tax obligations and relied on *Krystalline Salt Limited v Kenya Revenue Authority.*[21] She added that it is the Interested Party who decides when to invoke its powers under section **42** of the Act and submitted that the applicant is asking this court to transfer his tax obligations, which is not envisaged by the Tax statutes. Lastly, she argued that such a prayer if granted can cause uncertainty.

**Determination**

17. On **9th** November 2018, barely one and a half months before the instant application was filed, the High Court in *Kenya Human Rights Commission v Attorney General & another*[22] nullified the Contempt of Court Act.[23] The instant application is expressed under the provisions of Order **40** Rules **1, 2, 3**, Order **51** of the Civil Procedure Rules, 2010, Sections **1A, 1B, 3A** of the Civil Procedure Act[24] and section **42** of the Tax Procedures Act[25]

18. Sections **38, 39** and **40** of the nullified Contempt of Court Act[26] had repealed section **5** of the Judicature Act,[27] section **36** of The High Court (Organization and Administration) Act[28] and section **35** of The Court of Appeal (Organization and Administration) Act[29]respectively. The question I wish to address is whether after the act was nullified, the above sections of the law it had nullified stand repealed.

19. 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. Freedman C J M adopted the following definition of 'inherent jurisdiction'[30]

> *". . . 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…"*

20. In his book The Inherent Jurisdiction of the Supreme Court (1985) pp 8-9, Jerold Taitz succinctly describes the inherent jurisdiction of the high court as follows

> *". . .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."*

21. The inherent jurisdiction of the high court has long been acknowledged and applied by our courts.[31] 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*[32] the court stated that:-

> *"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". . . ."*

22. Recently, the High Court in *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited*[33] held as follows:-

> *"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.*
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> *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."*

23. I am in agreement with the above reasoning that since the act that repealed section **5** of the Judicature Act[34] has been declared unconstitutional, the effect is that section **5** of the Judicature Act[35] still stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section **5** of the Judicature Act[36] which 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.*

24. Discussing the procedure for instituting Contempt proceedings in Kenya, the High Court in the *John Mugo Gachuki vs New Nyamakima Co. Ltd*[37]observed as follows:-

*"It is unfortunate that nearly 50 years after independence our procedure, with respect to punishment for contempt in our Court is referable to the procedure in High Court of Justice in England. It is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency of enacting our own law relating to such an important aspect of the Rule of Law. That being the position, ours is not to enact the law but to interpret the law as enacted."*

25. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section **5** of the Judicature Act[38] imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought. This duty was noted by Platt J and Porter J *in the matter of an application by Gurbaresh Singh &Sons Ltd*[39] 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. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981of England is the prevailing law and that the procedure is still that set out in order **52** of the Supreme Court Rules."(Emphasis supplied)*

26. The Court of Appeal in *Christine Wangari Chege v Elizabeth Wanjiru Evans & Others*[40] observed as follows:-

*"Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act,[41] the Act in the cited Section **5** simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.*

*The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order **52** Rules **1** to **4** of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.*

*Order **52** RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:-*

*i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.*

*ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.*

*iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.*

*iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within **8** days after the refusal by the Judge.*

*v. When leave has been granted, the substantive application by a motion would be made to a divisional court.*

*vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.*

*vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.*

27. The learned Judges[42] in the above case correctly pointed out that the rules applicable in the United Kingdom have been applied in Kenya with uneven degree of consistency and cited several examples.[43] The only consistency in the decided cases is that leave was a requirement. However, 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 Rules, 1999. On 1.10.2012, the Civil Procedure (Amendment No.2) Rules, 2012 came into force and Part **81** thereof effectively replaced Order 52 RSC in its entirety. Part **81** (Applications and Proceedings in Relation to Contempt of Court) provides different procedure for four different forms of violations.

***Rules 81.4** relates to committal for "breach of a judgement, 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."*

28. An application under Rule **81.4** (breach of judgement, order or undertaking) now referred to as *"application notice"* (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

29. In *Christine Wangari Gacheche**[44]*** the Court of Appeal correctly pointed out that leave, now called *"permission"* is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. After evaluating the above Rules, the Court of Appeal concluded *"we find that on the basis of the new Civil Procedure Rules (of England) contained in the Second Supplement to the 2012 White Book, no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court's order..."*

30. The jurisdiction relating contempt of court proceedings, as decided cases suggest is rather problematic.[45] It appears that Kenyan courts have to continuously and perpetually check upon the current law in force in England and apply it in exercise of this jurisdiction. This is both the substantive and procedural law applicable in England as at the time the contempt is committed.[46] However, since the Act was nullified by the High Court, (which decision to my knowledge has not been reviewed or overturned on appeal), it is high time Parliament raises to the occasion, and enacts a comprehensive substantive and procedural law to govern contempt matters. It is correct to opine that a court without contempt power is not a court.[47] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.”[48]

31. I now address the legal competence of the application, namely, failure to comply with section **21** of the Government Proceedings Act[49] one of the grounds of opposition raised by the Respondent. This warrants a close examination of the provisions of section **21** and Order **29** Rule **(2)** & **(4)** of the Civil Procedure Rules, 2010. Section **21** of the Government Proceedings Act[50] provides as follows:-

***21. Satisfaction of orders against the Government***

*(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.*

*(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.*

*(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:*

*Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.*

*(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.*

*(5) This section shall, with necessary modifications, apply to any civil proceedings by or* ***against a county government,*** *or in any proceedings in connection with any arbirtation in which a county government is a party.*

32. The above section has been the subject of interpretation by our superior courts in numerous cases. In *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* ***[51]*** the High Court stated:-

*"In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon…." [Emphasis mine].*

33. Order **29** Rule **3** of the Civil Procedure Rules, 2010 provides for the application for a certificate under section **21** of the Government Proceedings Act[52] in the following words:-

*"Any application for a certificate under section 21 of the Government Proceedings Act (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of form Nos. 22 and 23 of Appendix A with such variation as circumstances may require."*

34. As correctly observed in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* (supra), the Certificate of Order against the Government is not only a requirement but it is also a condition precedent to the satisfaction or enforcement of decrees issued against the Government. Section **21** of the Government Proceedings Act[53] provides that the Certificate of Order against the Government should be issued by the court after the expiry of **21** days from the date of entry of the judgment. Once the Certificate of Order against the Government is served, section **21(3)** imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereto.

35. The applicant did not annex the Certificate of Order against the Government in the affidavit in support of the application. Long after the issue was raised in the Respondent grounds and submissions filed, a Certificate of Order against the Government dated **14th** November 2019 was sneaked into the court file without leave or affidavit to introduce it. This cannot cure the omission. There is no evidence that it was served upon the Respondents as required by the above section. In fact, the applicant's argument all along was that the Respondents were represented in court, hence they were aware of the judgment. That may be so, but it does not relieve the applicant from the obligation to comply with the said provision. The omission to obtain and serve the Certificate of Order against the Government as dictated by the above provisions renders this application pre-mature, legally frail and unsustainable. The Respondents cannot be compelled to pay the decretal sum before the pre-requisites are met. My reading of section is that it is peremptory for the Certificate of Order against the Government to be served before an enforcement action can be sustained. What emerges from the above jurisprudence and section **21** is that the instant application is fatally incompetent, hence fit for dismissal.

36. The other ground upon which the plea for contempt collapses is that it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. An essential element in the application before me is compliance with section **21** discussed above. The failure to comply with the aid section deprives the application an essential requirement which disentitles the applicant the plea sought.

37. The other ground is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; *and this high public purpose should be pursued only in the absence of reasonable doubt*. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. *The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.*

38. The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Such a detention will constitute a breach of the constitutional right to liberty unless both the coercive purposes are valid, the procedures followed are fair and the steps laid down by the law are adhered to. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness[54]and compliance with the provisions of the law.

39. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.[55] Applying the principles discussed herein above to the facts of this case, I am not persuaded that the applicant has established any grounds to merit contempt orders.

40. Having arrived at the above conclusion, I find no reason to address prayer **(v)** of the application which seeks an order that the money be paid directly to the Interested Party. This is because having dismissed the application on the above grounds, prayer **(v)** cannot stand. Even if my findings were different, I would still decline the said prayer. *First,* it is evident that the applicant is cleverly trying to transfer his tax obligations to the Respondents. *Second,* such a transfer is alien under the tax laws. It is not supported by the law, not even section **42** the applicant purports to invoke. *Third,* a reading of section **42** leaves me with no doubt that it confers powers to the Commissioner to collect money owing to a tax payer. It does not confer power to the tax payer to transfer his tax obligations nor does the section empower this court to transfer a tax payer's tax obligation to another person.

41. *Fourth,* Parliament did not leave it open for the Commissioner to invoke the said section at his pleasure. Parliament laid down tests. For example, the Commissioner is required to have reasonable grounds to believe that the taxpayer will not pay the tax by the due date for the payment of the tax. Even then, subsection **(2)** provides an elaborate procedure to be followed. The procedure requires the Commissioner to issue a notice in writing requiring a person (referred to as the "an agent")— **(a)** who owes or may subsequently owe money to the taxpayer; **(b)** who holds or may subsequently hold money, for or on account of, the taxpayer; **(c)** who holds or may subsequently hold money on account of some other person for payment to the taxpayer; or **(d)** who has authority from some other person to pay money to the taxpayer, to pay the amount specified in the notice to the Commissioner, being an amount that shall not exceed the amount of the unpaid tax or the amount of tax that the Commissioner believes will not be paid by the taxpayer by the due date. The order sought if allowed, will offend the requirements of this section and create a fertile ground for a legal challenge since the requirement of a Notice is expressly provided for to avoid arbitrariness of high handedness. It is a democratic way of limiting exercise of power to enable the agent or the tax payer to challenge the decision. A court order will, if granted close the door for such a notice. Its binding nature may complicate the matters should the agent have grounds to challenge the decision.

42. Lastly, such an order if granted will offend subsections **(2)** to **(13)** of the said section. A court of law cannot knowingly issue an order that will offend express provisions of a statute or an order that will lead to an absurdity. It should be remembered that judges make law in their judicial pronouncements and they are obligated not to make judge made law whose interpretation could lead to absurdity.

43. These principles are not new. A court must at all costs avoid making judge made law whose construction may:- (a) produce an absurd result; **(b)** unworkable or impracticable result ; **(c)** anomalous or illogical result, and **(d)** an artificial result. The principles of the law laid down by courts should serve public interest. The court as an independent arbiter of the law and the Constitution has fidelity to the statutes and the Constitution and has to be guided by the letter and spirit of the statute and the Constitution. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

44. A good example of an unworkable or impractical result is in the event of the transferred debt turning out to be a bad debt. The possibility of transferring a bad debt is real. The applicant obtained a Certificate of Costs which was not paid. He obtained a writ of *Mandamus* but the payment has not been made. He has a Certificate of Order against the Government which has not been honoured. Lastly, he is now seeking contempt orders. Despite all these steps, the applicant is yet to be paid. Already the Respondents are citing serious financial constraints. If the order transferring the debt is made, the Interested Party will have a paper judgment. The court will have opened a window for a tax payer to evade its obligations and create an absurd situation whereby the Interested Party will lose revenue.

45. The term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense.[56] Such an order, properly viewed may not pass the tests for the said values. Based on those values, courts reject certain outcomes as unacceptable, thereby rejecting issuing orders when they would result in those outcomes. Those values represented by the term absurd accordingly act as a pervasive check on exercise of judicial powers and discretion, and are rooted in the rule of law.[57] The absurd result principle is both a surrogate for, and a representative of, rule of law values. The term rule of law has been used to mean a variety of things. Two common components, however, are: **(1)** the predictability of the law, which enables people to rely on it in ordering their affairs, and to plan their conduct with some confidence and security;[58]and **(2)** the coherence of the legal system as a whole (that is, that one standard of law will not contradict another).

46. Flowing from my analysis and conclusions herein above, the upshot is that the applicant's application dated **20th**December 2018 is unmerited. I hereby dismiss the said application with costs to the Respondents and the Interested Party.

Orders accordingly.

**Signed, Dated and Delivered at Nairobi this 18th day of June 2020.**

**John M. Mativo**

**Judge**

**Ruling delivered electronically via e-mail**

**John M. Mativo**

**Judge**

**18th June 2020**

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[1]Cap 40, Laws of Kenya.

[2] Ibid.

[3] Petition No. 23 of 2013.

[4] {2017} e KLR.

[5] {2018} e KLR.

[6] {2012} e KLR.

[7] {2017} e KLR.

[8] {2013} e KLR.

[9] Cap 40, Laws of Kenya.

[10] Cap 80, Laws of Kenya.

[11] {2017} e KLR.

[12] {1985} KLR 229, 234.

[13] Civil Appeal No. 36 of 1989.

[14]{2011} NZSC 63.

[15]{2018} e KLR.

[16] Act no. 18 of 2012.

[17] Act No. 17 of 2012.

[18] Miscellaneous Application No. 354 of 2012.

[19] Act No. 29 of 2015.

[20] Act No. 29 of 2015.

[21] {2019} e KLR.

[22] {2018} eKLR.

[23] Act No. 46 of 2016.

[24] Cap 21, Laws of Kenya.

[25] Act No. 29 of 2015.

[26] Act No. 46 of 2016.

[27] Ibid.

[28] Act No. 27 of 2015.

[29] Act No. 28 of 2015.

[30] *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, Current Legal Problems (1970) p 51.

[31] *Ritchie v Andrews* (1881-1882) 2 EDL 254; Conolly v Ferguson 1909 TS 195.

[32] 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

[33] J.R. No. 390 of 2014.

[34] Cap 8, Laws of Kenya.

[35] Ibid.

[36] Ibid

[37] Civil Case No. 456 of 2011.

[38] Cap 8, Laws of Kenya.

[39] Misc Civil  Case No. 50 of 1983

[40] Civil Application  No. 233 of 2007, {2014}eKLR

[41] Supra

[42] Kihara JA, Maraga JA & Ouko JA

[43] See John Mugo Gachuki vs New Nyamakima Co. Ltd, HCC No. 456 of 2011, Republic vs County Council of Nakuru, ex parte Edward Alera t/a Genesis Reliable Equipment HC JR N. 74 of 2010, National Bank of Kenya Ltd vs County Council of Olekejuado & 2 Others HC Civil Misc (JR) 5 of 2012

[44] Supra note 5.

[45] See Peter Gacheru Ng'ang'a, " Contempt of Court by Public Officers in Kenya, Enforcing Orders and the Constitution's Promise", A thesis submitted at the  University of Nairobi in partial fulfillment of the Degree of Master of Laws., 2014

[46] See *Slim & Another vs Ngala* {2012} 2KLR 658; *Awadh v Marumbu* {2013} 1KLR 454.

[47] Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337, 342 (1998).

[48] Ronald Goldfarb, *The History of the Contempt Power*, 1 WASH. U. L. Q. 1, 2 (1961).

[49] Cap 40, Laws of Kenya.

[50] Ibid.

[51] {2012} e KLR.

[52] Cap 40, Laws of Kenya.

[53] Ibid.

[54]In *De Lange vs Smuts* **[1998] ZACC 6**; **1998 (3) SA 785** (CC) para 147.

**[55]** ***Fakie NO v CCII Systems (Pty) Ltd*** **(653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).**

[56] Ibid

[57] Ibid.

[58] See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Cm. L. REv. 1175 (1989) (explaining that predictability is important factor in rule of law)