REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO.2 OF 2019

IN THE MATTER OF: ARTICLES 22 & 258 OF

THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 10,

27, 47, 73 & 232 OF THE CONSTITUTION OF THE REPUBLIC OF ENYA

AND.,

IN THE MATTER OF PROVISIONS OF THE PHARMACY AND

POISONS ACT AND THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF: AN APPLICATION BY MR. WAMBUA MAITHYA FOR

ORDERS OF COMMITTAL FOR CONTEMPT OF COURT ORDERS AND JUDGMENT

AGAINST

DR. FRED MOIN SIYOI; DR. JACKSON KIOKO; DR. ROGERS ATEBE; DR. MARY N. KISINGU;

DR. BEATRICE AMUGUNE; DR. ALFRED RUGENDO BIRICHI AND MR. ABDI OMAR JUMA

BETWEEN

WAMBUA MAITHYA.....APPLICANT/PETITIONER

=VERSUS=

PHARMACY AND POISONS BOARD.....RESPONDENT

AND

PHARMACEUTICAL SOCIETY OF KENYA.....1ST INTERESTED PARTY

DR. PIUS WANJALA.....2ND INTERESTED PARTY

DR. KAMAMIA WA MURICHU.....3RD INTERESTED PARTY

RULING

1. On 26th September, 2019, after hearing this petition, I found that the process of recruitment of the Registrar/CEO of the Pharmacy and Poisons Board failed to meet the constitutional threshold. I then proceeded to issue the following orders:

> **1) An order of certiorari is hereby issued removing into this court and quashing the Respondent's decision contained in the daily Newspapers of 25th January, 2019 of advertisement for the vacant position of Registrar/CEO of the Pharmacy and Poisons Board; and any other consequent attendant process or decision including final appointment of Registrar/CEO of the Pharmacy and Poisons Board.**
>
> **2) The costs of this petition are awarded to the Petitioner and 2nd Interested Party.**

2. The Petitioner then filed an application dated 18th October, 2019 in which he sought the following orders:

> **1) THAT the Court be pleased to certify this Application as extremely urgent;**
>
> **2) THAT with the leave of court the Application be served on Respondents' Advocate.**
>
> **3) THAT Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma have singularly and jointly disobeyed and/or willfully disregarded the Orders and Judgment of this Court made and delivered on the 26th September, 2019.**
>
> **4) THAT Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma be arrested and committed to civil jail for a period of six (6 months) or such other period as the Court may determine for the contemptuous disobedience of the Orders and Judgment of this Court made and delivered on the 26th September, 2019.**
>
> **5) A Declaration that any official/executive activity undertaken by Dr. Fred Moin Siyoi or any other officer while Dr. Fred Moin Siyoi is in the office of the Registrar/CEO of and at the Respondent, including any expenditure is unlawful and Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma will singularly and jointly be held responsible for the said unlawful undertaking/activity.**
>
> **6) A Declaration that Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma have singularly and jointly violated Articles 10 and 73 of the Constitution by failing to adhere to the rule of law in the sense that they have singularly and jointly brazenly disobeyed the orders and Judgment of this Court made and delivered on the 26th September, 2019.**
>
> **7) THAT costs be provided for.**

3. The application was supported by an affidavit sworn by the Petitioner on 18th October, 2019.

4. According to the Petitioner, though the Respondent's Advocate on record, **Mr. Kipkoskey** of Gumbo Advocates was present during the delivery of the Judgement, on the afternoon of 27th September, 2019, **Dr. Pius Wanjala**, an advocate of High Court of Kenya who is the 2nd interested party in person, effected personal service of the said Judgement, Court Orders and Penal Notice upon **Dr. Fred Moin Siyoi, Registrar of Pharmacy and Poisons Board** through **Mr. Gideon Kibet**, a legal officer of the Respondent in the presence of **Dr. Fred Moin Siyoi** who even unleashed the Administration Police and private Security Guards upon **Dr. Pius Wanjala** for serving court orders to remove him from office but his staff including the said **Mr. Gideon Kibet** saved **Dr. Pius Wanjala** from the wrath of the Administration Police and private Security Guards.

5. It was averred that in spite of having been so represented in court during the delivery of the Judgment and service of the Court Order and Penal Notice aforesaid, the said **Dr. Fred Moin Siyoi**; **Dr. Jackson Kioko**; **Dr. Rogers Atebe**; **Dr. Mary N. Kisingu**; **Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi** and **Mr. Abdi Omar Juma** have to date retained **Dr. Fred Moin Siyoi** as the Registrar/CEO of the Pharmacy and Poisons Board. It was deposed that the being in office to date of **Dr. Fred Moin Siyoi** as Registrar/CEO of the Respondent, obviously with the authorization of the Board of Respondent, and having the knowledge of the said Court Orders, has with arrogance and impunity considered the same illegal and proceeded to issue letters which are signed by him as Registrar/CEO of the Pharmacy and Poisons Board and which letters invited stakeholders to a meeting for launching Human Resource guidelines at the Pharmacy and Poisons Board when he is supposed to have vacated office of the Registrar/CEO.

6. The deponent disclosed that he was aware out of his knowledge that in an Application by the Respondent dated 16th October, 2019 for Review of the foregoing Judgment, the Respondent itself confirms that to date **Dr. Fred Moin Siyoi** is still occupying its office of Registrar/CEO as deposed by **Dr. Jackson Kioko** on 16th October, 2019, at paragraph 9, as thus;

> ***That the professionals comprising the Respondent/Applicant Board, are not in office full time, and therefore, the day to day***

running and operations of the Board are in the hands of the <u>Chief Executive officer who is in office but not functional due to the existing Judgment of 26th September, 2019.</u>

7. It was therefore averred that **Dr. Fred Moin Siyoi**; **Dr. Jackson Kioko**; **Dr. Rogers Atebe**; **Dr. Mary N. Kisingu**; **Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi** and **Mr. Abdi Omar Juma** being Senior Government officers and members of the Board of Management of the Respondent, knew, noticed or ought to have known or noticed the effect and purport of the Judgment and Orders of this Honourable Court of 26th September, 2019.

8. It was further contended that in further aggravation of their contempt, the Contemnors in collusion with **Dr. Fred Moin Siyoi** fashioned a creative Notice of dismissal letter to **Dr. Fred Moin Siyoi** Ref. No. PPB/GEN/CHR/VOLI/10/19-20 dated 4th October, 2019 deceitfully without any reference to the foregoing Judgment, Decree, Direction and Orders of this court; so as to pass as an unlawful/unfair notice of dismissal and which notice was titled **NOTICE OF INTENTION TO TERMINATE ENPLOYMENT**, and read thus;

The above and your employment contract refers.

Following recent developments, the facts of which I made you aware of in our recent meetings, I wish to inform you that the Board has decided to terminate your employment with effect from 14th October, 2019. As a result of the above note therefore to prepare a handing over report so as to be ready on the said date. We wish you well in your future endeavors.

9. According to the deponent, in the above letter/Notice, the material fact that **Dr. Fred Moin Siyoi** is to vacate office by dint of the foregoing Judgment, Decree, Direction and Orders of the high court is deliberately concealed by the Contemnors; the letter/Notice is mischievous since while the Contemnors and **Dr. Fred Moin Siyoi** knew that it is the decision of this court which nullified the process of appointment and final appointment of **Dr. Fred Moin Siyoi,** the Contemnors purported to have made the decision of termination of **Dr. Fred Moin Siyoi's** appointment **suo moto.**

10. According to the deponent, on the 9th October, 2019, the day before the execution of the judgment became effective, **Dr. Fred Moin Siyoi** feigned ignorance and moved the Employment and Labour Relations Court; ELRC Petition No. 186 of 2019, purporting to challenge the foregoing irregular Notice/Letter with the intention to irregularly obtain Orders from that court to shield himself from the effect or execution of the foregoing Judgment, Decree, Direction and Orders of this Court. Consequently, the Employment and Labour Relations Court, genuinely relying on the misleadingly craftily innovated content of the said Notice/Letter and without the knowledge and benefit of the content and or copy of the Judgment, Decree, Direction and Orders of this Court, innocently issued Temporal Conservatory Orders that are now construed by the contemnors to stay the execution of the Judgment, Decree, Direction and Orders of this Court and indeed **Dr. Fred Moin Siyoi** is now still in office in contravention of the said Judgment and orders; to contemnors, courtesy of the said Temporal Conservatory Orders from the Employment and Labour Relations Court.

11. It was pointed out that the Contemnors are well aware that Stay of the execution of the Orders to the Judgment, Decree, Direction and Orders of this court lies in the Court of Appeal and or review by this honourable court itself: Indeed, the foregoing notwithstanding, the contemnors have lodged an Appeal/Application No. 485 of 2019 in the court of Appeal as well as a Review application to this court dated 16th October, 2019. He disclosed that he had applied in the said ELRC Petition No. 186 of 2019 to have the erroneous orders and Application/Petition set aside/struck out.

12. To confirm that the said **Dr. Fred Moin Siyoi** was still in office as the Registrar/CEO of the Respondent it was deposed that **Ms. Naomi Kiarie**, an advocate of the high court and who is representing him for Kinyanjui Njuguna in the above ELRC Petition No. 186 of 2019; on 18th October, 2019 found **Dr. Fred Moin Siyoi** in office while she had gone to serve on the Respondent court papers in that matter and she did serve upon him.

13. According to the petitioner, **Dr. Edith Wakori** and **Dr. Kisa Juma Ngeiywa** though members of the Board of the Respondent; are excluded from being cited for contempt because they did not attend the meetings that have decide to disobey the subject Judgment/Orders and are usually not invited in meetings that pass irregular decisions including the one that coined the irregular notice of intention to terminate with the intention to irregularly obtain conservatory Orders from the Employment and Labour Relations court.

14. It was disclosed that **Dr. Fred Moin Siyoi** swore in the above matter that upon his appointment as Registrar/CEO, he resigned and or took early retirement as civil Servant, he on 17th October, 2019 appeared before the *ad hoc* Committee of the Senate in the capacity of the Registrar/CEO of the Respondent to answer to the queries as such, which is further confirmation that he is still in office. According to the Petitioner, **Dr. Fred Moin Siyoi** has been the acting Registrar/CEO of the Respondent since March, 2017 until his doomed appointment on 28th February, 2019 as Registrar/CEO and thus he has been in charge of the affairs of the Respondent during the proceedings that led to the Judgment that was delivered on 26th September, 2019. He was thus the one who hired, issued instructions and received briefings and advice on the matter on behalf of the Respondent to and from the Advocates who were/are in conduct of the foregoing proceedings.

15. Accordingly, **Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma** have disobeyed this Honourable Court's Orders, obstructed the course of justice and lowered the dignity and authority of this Honourable Court and its Officers. It is therefore necessary, just and fair and in order to redeem the integrity of this Honourable Court and to restore the rule of law in this Country to summon and bring personally before this Honourable Court, **Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma** for purposes of committal for contempt of Court and for such other or further punishment and Orders as the Court may consider appropriate. In his view, in spite of having been duly served with the said Judgment, Decree/order and notice of penal consequences, the Respondent/contemnors have failed, and/or refused to comply with the Court order duly issued by this Honourable Court and that the blatant refusal to obey a valid court order is in contempt of court. To him, the Contemnors/Respondent's actions are offences against administration of justice and the application made is in the interest of justice.

16. The application was supported by the 2nd interested party while the Respondent and the cited contemnors never filed any responses.

Determination

17. I have considered the application, the affidavits both in support of and in opposition to the application.

18. This Court is aware that in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR**, **Mwita, J** declared that the entire ***Contempt of Court Act*** No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and encroaches upon the independence of the Judiciary. I respectfully agree with that decision. I gather support for this position from **the Supreme Court of India's holding in Bar Association vs. Union of India & Another [1998] 4 SCC 409** where the court dealt with constitutional powers vested in it under Article 129 read with Article 142(2) of the Constitution of India and those of the High Court under Article 215 of the Constitution to punish for contempt and remarked that no act of Parliament can take away the inherent jurisdiction of the Court of record to punish for contempt. The court expressed itself as follows:

> ***"Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts, though such a legislation may serve as a guide for the determination of the nature of punishment which this court may impose in the case of established contempt."***

19. **The same court once again observed in Sudhakar Prasad vs. Government of Andhara Pradesh & Others [2001] SCC 516,** that the powers of contempt are inherent in nature and the provisions of the Constitution only recognize the said pre-existing situation and that the provisions of the ***Contempt of Courts Act, 1971***, are in addition to and not in derogation of Articles 129 and 215 of the Constitution and that the provisions ***of Contempt of Courts Act*** cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the two Articles. In my view the objective of the ***Contempt of Court Act*** was to sanitise contemptuous actions of state officers by making it frustrating and difficult to find them guilty of contempt and even then giving them a slap in the wrist literally where they are found in contempt. I therefore agree with the lamentations of **Sellers, LJ** in **Attorney General vs. Harris** (1961) 1 QB 74 **Sellers LJ** that:

> **"it cannot, in my opinion, be anything other than public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it... courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. And in doing so, courts are not only giving effect to the rights of the successful litigant but also more importantly, by acting as guardians of the constitution, asserting their authority in the public interest." (Nthabiseng Pheko vs. Ekurhuleni Metropolitan Municipality & Another** CCT 19/11(75/2015)**)** (supra)**."**

20. It was on that note that **Kriegler, J** that opined that:

> **"In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State." (S v Mamobolo** [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (para 16).

21. **Mahomed CJ**, on his part explained that:

> **"..Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem with which the Judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity."** ("The Role of the Judiciary in a Constitutional State - Address at the First Orientation Course for New Judges" (1998) 115 SALJ 111 at 112).

22. Accordingly, this application will be determined without reference to the provisions of that Act.

23. In the absence of the said legislation, we must revert to the position that prevailed pre-its enactment. Before the enactment of the Contempt of Court Act which deleted section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya, the first port of call with respect to the procedure for institution contempt of Court proceedings in this country was and therefore is section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya. That section provides:

> ***(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 the exercise of the ordinary original criminal jurisdiction of the High Court.***

24. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the ***Judicature Act***.

25. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf's** "***Access to Justice Report, 1996***", the ***Rules of the Supreme Court*** of England are being replaced with the ***Civil Procedure Rules, 1999*** and pursuant thereto the Court of Appeal in the above decision recognised that 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*** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is nolonger required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.

26. In my considered view, Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

> **"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. 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 that order is discharged. The uncompromising 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 void".**

27. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. 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 solicitors, 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 existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court… Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant".**

28. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

29. In **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR,** the Court of Appeal was categorical that**:**

> **'…We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America 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''. 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 best owed 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…'**

30. A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under theConstitution. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law.

31. **Musinga, J** in **Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 "A" of 2004** was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement. Contemnors, the learned Judge held, undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute.

32. I further associate myself with the decision of **Mabeya, J** in **Africa Management Communication International Limited vs. Joseph Mathenge Mugo & Another [2013] eKLR** in which he expressed himself as follows:

> **"As early as 1778, Chief Justice McKean of the United States, when dealing with a case of a party in Civil litigation who refused to answer interrogatories is noted to have stated:-**
>
> **"Since however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case." (The History of contempt of Court (1927) P 47).**
>
> **In Johnson Vs Grant (1923) SC 789 at 790 Clyde L J noted:-**
>
> **"The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged." (Emphasis mine).**
>
> **Closer home, in the case of TEACHERS SERVICE COMMISSION v KENYA NATIONAL UNION OF TEACHERS & 2 others [2013] eKLR Ndolo J observed that:-**
>
> **"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 preserving and safeguarding the rule of law."**
>
> **I am of the same persuasion. The reason why power is vested in courts to punish for contempt of court is but to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice McKean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise."**

33. **Nkabinde, J,** in **Nthabiseng Pheko vs. Ekurhuleni Metropolitan Municipality & Another** CCT 19/11(75/2015), quite appropriately observed that:-

> **"The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts**

orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

34. In **Canadian Metal Co. Ltd vs. Canadian Broadcasting Corp (N0.2)** [1975] 48 D.LR (30), the court rationalised the power to punish for contempt by stating that:

"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn… if the remedies that the courts grant to correct… wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society."

35. A similarly view was expressed in **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458, where** it was held that:

"It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors."

36. In **Carey vs. Laiken [2015] SCC 17** it was held that:

"Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect."

37. According to **James Francis Oswald**, ***Oswald's Contempt of Court: Committal, Attachment, and Arrest upon Civil Process*** (Butterworth & Company, 1910, p. 9:

"punishing through contempt of court is the means by which courts sanction non-compliance with its orders, judgments and decrees, and a court of justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community. Without such protection, courts of justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible".

38. According to the editors of ***Borrie and Lowe's Law of Contempt*** 2nd ed. 1983:

"The rules embodied in the law of contempt of court are intended to uphold the effective administration of justice. As Lord Simon said in A-G v Times Newspapers Ltd they are the means by which the law vindicates the public interest in the due administration of justice. The law does not exist, as the phrase 'contempt of court' might misleadingly suggest, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of the parties or litigants…Contempt of court plays a key role in protecting the administration of justice. It is an impotent adjunct to the criminal process and provides the final sanction in the civil process."

39. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013**:

"The reason why courts will punish for contempt of court 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 of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

40. As indicated hereinabove, the application was not opposed. The general rule is that where a party is seeking committal to civil jail against the other party on the grounds that the order delivered by the court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must have a Penal Notice appended to it. See **Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708.**

41. However, where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, this Court cannot turn a blind eye to the same. As was held in **Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227:**

"It is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt… The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has

attempted to set the order of the court at naught."

42. I therefore associate myself with **Lenaola, J** in **Basil Criticos vs. Attorney General & 4 Others [2012] eKLR**, **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** that:

> **"…the law has changed and so as it stands today, knowledge supersedes personal service and for good reason…where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."**

43. This position was adopted by **Musinga, J** in **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** and **Kimaru, J** in **Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR**. In the former case the learned Judge expressed himself as follows:

> **"Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court."**

44. This is akin to the position taken by **Akiwumi, J** (as he then was) in **Kenya Tourist Development Corporation vs. Kenya National Capital Corporation Limited & Another Nairobi HCCC No. 6776 of 1992** when he expressed himself as follows:

> **"An injunction in prohibitory form operates from the time it is pronounced, not from the date when the order is drawn up and completed. Consequently the party against whom it is made will be guilty of contempt if he commits a breach of the injunction after he has received notice of it, even though the order has not been drawn up...Where an order requires a person to abstain from doing an act, it may be enforced, notwithstanding that service, of a duly endorsed copy of the order has not been served, if the Court is satisfied that pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order is made or being notified of the terms of the order whether by telephone, telegram or otherwise...It is of high importance that orders of the Court should be obeyed. Wilful disobedience to an order of the Court is punishable as a contempt of court and such disobedience may properly be described as being illegal...Those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."**

45. As stated in ***Halsbury's Laws of England***, 4th Edn. Vol. 5 para 65:

> **"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise."**

46. In this case the Respondents were represented at the time when the order was made. It is therefore presumed that they were aware of the order as the advocate was their agent and ought to have notified them of the same. There is no affidavit from the advocate that they derelict their duty of updating the Respondents of the Court proceedings of that day. If the Respondents proceeded to ignore the order under the pretext that they were not served by the order, this Court will not countenance such impunity.

47. In **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR**, the Court of Appeal held that:

> **"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him/her to report back to the client all that transpired in court that has a bearing on the client's case.**
>
> **This is the position in other jurisdictions within and outside the commonwealth. In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in Bhatnager v. Canada (Minister of Employment and Immigration), [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that: -**
>
> **"In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Minister's of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister." (Emphasis by underline)**

The Court went on to state that;

"On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt....Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved.(See Avery v. Andrews(1882) 51LJ Ch. 414) (Emphasis by underline)

In United States v. Revie 834 F.2d 1198, 1203 (5th Cir. 1987) the court held that the defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order."

48. The Court of Appeal proceeded to hold that:

"On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra)…Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings… This standard has not changed since the old celebrated case of *Ex parte Langley 1879, 13Ch D. 110 (C.A)*, where Thesiger L.J stated as follows. at p. 119:

"...the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made" And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."

49. In **Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 6 Others [2014] eKLR**, a three judge bench of **Ong'udi, Githua J** and **Olao JJ,** held as follows:

"270. We are alive to the 5th and 6th Respondents submissions that a finding on disobedience of court orders cannot be made unless there is evidence of personal service. For this proposition Mr. Njenga relied on the holding by Lenaola J in the case of Kariuki & 2 Others v Minister for Gender, Sports, Culture and Social Services & 2 Others (Supra) where he expressed himself in the following terms;

"....But in our law, service is higher than knowledge and since the service here was frustrated....I shall hold in accordance with the existing law that there was no service"

271. In our view, that was the law then, which has since changed. The law as it stands today is that knowledge supersedes personal service. In support of our position, we cite the case of Kenya Tea Growers Association v Francis Atwoli & 5 Others Petition No. 64 of 2010 where Lenaola J opined as follows;

"In the case before me, I am more than satisfied that even at the higher level beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the court order had stopped it. He went further to interpret it as made without jurisdiction and that only the workers court (Industrial Court) had Jurisdiction to determine the matter. He did not do so once but on a number of occasions as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding"

272. Further in Basil Criticos v Attorney General & 8 Others (2012) e KLR while referring to the above quote in Kenya Tea Growers Association Case (Supra), the Lenaola J stated as follows in regard to service of court orders;

"The point above is that where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it".

273. We are in agreement with the Learned Judge. If a party can prove that there was knowledge of court orders then in our view that would be sufficient to form a basis for the finding of contempt of court orders. That being the case, we now pause to answer the question whether the 5th and 6th Respondents had knowledge of Court orders as at 28th January 2014when the motion for removal of the 1st Petitioner was deliberated upon."

50. The said position was affirmed by the Court of Appeal in **Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 6 Others 2014] eKLR** when it stated as follows:

"The trial court was correct in holding that the law as then was in contempt of court had since changed; the law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings."

51. A party who is aware of the existence of a court howsoever cannot therefore be permitted to hide behind the issue of lack of personal service to evade punishment for their unlawful actions. As was held in **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR**:

> **"Unfortunately what we have now is persons both ordinary mortals and persons in authority treating Court orders with unbridled contempt with blatant impunity. Was the respondent one such person? Unfortunately the answer to this question is in the affirmative. The order was made in presence of counsel for the respondent who as stated earlier must be presumed to have informed the respondent of the same. He went ahead and transferred the property before the due date of the judgment seemingly impatient to have this matter concluded once and for all. He acted in clear contempt of this Court. Government institutions, State officers, banks, and all and sundry are enjoined by law to comply with Court orders. We must deprecate in the strongest terms possible the worrying trend in this country where court orders are treated with tremendous contempt by persons and institutions which think wrongly of course, that they are above the law. We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America 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''.***
>
> **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."**

52. In my view orders court orders must be obeyed and even where the order is not, in the understanding of a person to whom it is directed, as was held in **Republic vs. The Kenya School of Law & Another Miscellaneous Application No. 58 of 2014**:

> **"Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification."**

53. In other words, vagueness or lack of clarity in an order, does not entitle a party to disregard it. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.

54. In this case however, the contempt proceedings have been taken against **Dr. Fred Moin Siyoi**; **Dr. Jackson Kioko**; **Dr. Rogers Atebe**; **Dr. Mary N. Kisingu**; **Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi** and **Mr. Abdi Omar Juma** in their capacity as Senior Government officer and members of the Board of Management of the Respondent. That these people being officers or Board members of the Respondent were bound by the orders of the Court cannot be in doubt. That they were constructively aware of the decision cannot also be doubted more so as they have not responded to the application. Their lack of response also proves that the factual averments of the Petitioner are correct.

55. Therefore, the only issue for determination is whether the said averments meet the threshold of contempt of court. I associate myself with the position in **Re Bramblevale (1970) 1 Ch. 128** as cited in **Re Estate of Pius Kingoo Muthwa (Deceased) [2019] eKLR,** that:

> ***"Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved."***

56. Therefore, not only should the facts constituting contempt be proved but it must be demonstrated that those acts do constitute actual contempt. I have set out the orders which I granted in the petition. The petitioner however seems, erroneously so in my respectful view, to hold the position that this Court further directed that the Respondents to commence the process of the Recruitment of the Registrar/CEO of the Pharmacy and Poisons Board afresh in compliance with the law. There was no such order and for good reason. The Court does not direct public bodies to exercise powers conferred upon them unless the said bodies are by law under an obligation to do so. In my view once the impugned decision is quashed the next course of action is left to the authority concerned which course is of course expected to be lawful. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court of Appeal expressed itself as follows:

> **"The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court's consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law…Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari,* prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable."**

57. This Court having removed into this court and quashed the Respondent's decision contained in the daily Newspapers of 25th January, 2019 of advertisement for the vacant position of Registrar/CEO of the Pharmacy and Poisons Board; and any other consequent attendant process or decision including final appointment of Registrar/CEO of the Pharmacy and Poisons Board, it follows that the *status quo ante* the said decision prevailed. Before the said decision was made, it was the position that **Dr. Fred Moin Siyoi** was the acting CEO of the Pharmacy and Poisons Board. After the decision of this Court it would follow that unless his appointment in the said acting position was revoked, he reverted to the same status. Whether or not his acting was unlawful, is another matter altogether since that issue was not determined by this Court. In this application it has not been contended that **Dr. Fred Moin Siyoi** undertook any powers which could only be undertaken by him as a confirmed CEO and not as an acting CEO. In other words, strictly speaking, if **Dr. Fred Moin Siyoi** reverted to his position as the acting CEO of the Pharmacy and Poisons Board and undertook the duties which he was empowered to undertake as such, he cannot be found to have been in contempt of the orders of this Court. Similarly, the cited persons would not be in contempt.

58. Consequently, I find that the Petitioner has not met the threshold prescribed in contempt of court matters. In the premises the application dated 18th October, 2019 fails and is dismissed but with no order as to costs.

59. It is so ordered.

Read, signed and delivered in open Court at Machakos this

17th day of June, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kiarie for Mr Kinyanjui for the Petitioner and the 2nd Interested Party

Mr Malenya with Mr Kubai for the Respondent

CA Geoffrey