REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 222 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL & ANOTHER .....RESPONDENT

AND

MIKE MAINA KAMAU.....*EX PARTE* APPLICANT

RULING

Introduction

1. For a proper appreciation, analysis, evaluation and determination of the issues presented in this application, a brief exposition of the chequered history of this case is useful.

2. The applicant sued the Hon. Attorney General in ELC Case No. **1303** of 2014, *Mike Kamau v The Attorney General*for compensation for illegal demolition of his house on **L.R. No. 15045/4.**On **29th** November 2011 he obtained ajudgmentfor **Ksh. 711,588,204/=** plus interests at court rates from the date of the judgment till payment in full and costs of the suit.

3. His Party and Party Bill of Costs was taxed in the sum of **Ksh. 12,259,342.73.** A Certificate of Taxation was issued on **1st** July 2019. On **2nd**July 2019 he obtained a Certificate of Order against the Government for**Ksh. 447,277,351.90** inclusive of the decretal sum and interests thereon from **29th**November 2017 to **2nd** July 2019. On **3rd**July 2019, he obtained a Certificate of Order for Costs against the Government for**Ksh. 12,259,342.73**.

4. The Attorney General was served on **11th**July 2019 with the Certificate of Order against the Government and the Certificate of Order for Costs against the Government anddemanded payment for the sums of **Kshs. 847,277,35**1/= and **Kshs. 12,259,342.73** respectively totalling to **Ksh. 859,536,694.63** within seven days from the said date. No payment was made.

5. Aggrievedby the refusal to pay, the applicant pursuant to this court's leave granted on **19th**July 2019, filed a Notice of Motion dated **18th**July 2019 seeking*Mandamus* to compel the Respondents herein to pay him the sum of **Ksh. 847,277,351.90** plusinterests thereon at the rate of 12% per annum. He alsosought *Mandamus*to compel themto pay him the sum of **Kshs. 12,259,342.73** together with interests in terms of the Certificate of Order for Costs against the Government issued on **3rd** July 2019. He also prayed forcosts of the application.

6. The application was predicated on alleged breach of Article **47** of the Constitution and section **7 (2) (j)** of the Fair Administrative Action Act[1]and right to legitimate expectation.He blamed the Attorney General for failing todischarge his duty under the Government Proceedings Act[2] thus depriving him the right to enjoy the fruits of his judgment.

7. The crux of the Respondent's opposition to the application was that they had appealed against the judgment vide Nairobi Civil Appeal Number **553** of 2019 and that the orders if granted would prejudice their appeal. The Respondents also stated that the application was incompetent, frivolous and an abuse of court process.

8. In a judgment dated on **8th**April 2020, this court ordered that:-

> *a. An order of **Mandamus** be and is hereby issued compelling the Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development and or the Attorney General to pay to the applicant the sum of **Kshs. 847,277,351.90** with interests*

*thereon at the rate of **12%** per annum in terms of the Certificate of Order Against the Government issued on 2nd July 2019.*

*b. An order of **Mandamus** be and is hereby issued compelling the Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development and/or the Attorney General to pay to the applicant the sum of **Ksh. 12,259,342.73** together with interest in terms of the Certificate of Order for Costs against the Government issued on 3rd July 2019.*

*c. **That** the Respondents do pay the applicant the costs of this suit plus interests thereon from date of taxation.*

The instant application

9. Vide an application dated **2nd**June 2020, the applicant seeks the following orders:-

i. Spent.

*ii. Leave be granted to the applicant to execute the decree of this court issued on **8th**April 2020 before taxation.*

iii. This honourable court be pleased to find that the Respondent herein, The Attorney General and the Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development are in contempt of court for disobeying and or wilfully disregarding the orders and directions given herein on 8th April 2020.

iv. Accordingly, leave be granted for committal to civil jail for a period of six months The Attorney General and the Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development and that they be additionally required to pay a fine of such amount as may be ordered by this honourable court for the said contempt.

*v. Sequestration and/or attachment do issue for the properties of **The Attorney General** and **The Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development, State Department of Infrastructure**, and the same be attached for the amount to be determined pending the purging of their contempt of this Honourable Court in disobeying and/or wilfully disregarding the Orders and Directions given herein on 8th April 2020.*

vi. The Honourable Court be pleased to issue such other or further or consequential orders as may seem just and expedient.

vii. The costs of and occasioned by the contempt of Court proceedings herein be met by the Respondents and in default thereof execution to issue forthwith.

Grounds relied upon

10. The application is premised on the orders of *Mandamus* issued on **8th**April 2020 compelling the Respondents to pay the decretal sums. The complaint is that despite beingserved with the said order and acknowledging service on **30th** April 2020, inblatant breach of and disobedience to the said order, the Respondents have failed to pay.

11. The applicant deposes that the decretal sum was budgeted for and part of it remitted to the Attorney General for onward payment but the Attorney General has neglected/ declined to pay the said sum without any cause whatsoever. He accuses the 2nd Respondent forfailing to ensure the said order is complied with. He states that the said sum was budgeted for in the previous financial year, hence there is a high risk that it shall be returned to treasury at the end of this financial year i.e **30th** June 2020 (now past) due to the failure by the State Department to utilize the funds in settling the claim.

12. The applicant contents that unless the court order is varied, the Respondents have no authority whatsoever to take the law into their hands and overrule the court order on account of their convenience. Additionally, he states that in view of the blatant acts of impunity on the part of the Respondents and disobedience of the court orders, this matter requires prompt court intervention to promote justice,fairness, courts dignity and the administration of justice.

13. He states unless thecourt intervenes, there is a real risk and likelihood that the dignity, honour and authority of this court will bebrought into disrepute. He also states that contempt of court involves promoting the rule of law, respect of due process and public confidence in the administration of justice. He states thathe has no other means of enforcing the said orders.

Respondent's grounds of opposition

14. In their grounds of opposition dated **3rd**July 2020, the Respondents stated that:- (i)the application offends Order **29**Rule **(2)(b)** of the Civil Procedure Rules, 2010; (ii) that the Honourable Attorney-General is not the Ministry's accounting officer, hence the order cannot issue against him; (iii) that the application is frivolous vexatious and an abuse of court Process;(iv) that the application is premature as there is a pending appeal against the original judgment in the Court of Appeal being Civil Appeal No.**553/2019** which is ready for hearing.

Respondent's Replying affidavit

15. Prof. Arch. Paul M. Mariga swore an undated Replying affidavit in opposition to the application deposing that: - (i) the Respondents have appealed to Court of Appeal being Civil Appeal Number **553** of 2019 which appeal has high chance of success; (ii) that the Respondents

have applied for stay videcivil application number **109** of 2020 in the Court of Appeal; (iii) that there is a pending application in the Court of Appeal for extension of time for filing the appeal; (iv) that the Contempt of Court Act[3] was declared unconstitutional by the High Court and because the Judicature Act[4] had been repealed (sic), the court cannot issue the orders sought on the basis of a law which has already been declared unconstitutional.

The applicant's further affidavit

16. The applicant swore a further affidavit dated **2nd** July 2020 deposing that he was aware that the 1st Respondent filed *Civil Application No. **148** of 2020: Attorney General v Mike Maina Kamau i*n the Court of Appeal seeking extension of time to file a Record of Appeal out of time but vide a letter dated **29.06.2020**, the Attorney General withdrew the said application on the eve of the hearing. He averred that following the withdrawal of the application for extension of time, there is nothing pending in the court of appeal since the Record of Appeal was filed out of time and without leave of court.

17. He averred that on **6th**March 2019, the 1st Respondent wrote to his advocates requesting for a meeting to discuss settling the dispute and during the meeting, his representatives confirmed that the Ministry had disbursed money to the Office of the Attorney General,but the Attorney General sought to negotiate the decretal sum downwards, which proposal he declined. He averred that on **11th**October 2019, the 1st Respondent wrote again inviting his advocates for a meeting to discuss settlement and during the meeting on **14th** October 2019, the 1st Respondent's representatives again made the settlement conditional to accepting a lesser sum, a proposal the applicant again rejected.

18. He deposed that during the meetings with the Ministry, they were informed that following the delivery of the Judgment in *ELC Case No. **1303** of 2014: Mike Maina Kamau v Attorney General,* the Office of the Attorney General wrote a letter dated **23.01.2018**to the Ministry of Transport advising the Ministry to settle the decretal sum because their appeal against the said Judgment had very little chance of success.He deposed that the sum of **Kshs. 285,500,000/=** was remitted to the Solicitor General's Account at Central Bank of Kenya on **13.12.2018**as the first instalment for settling the decretal sum and the Ministry then allocated the balance in 2019 which it still holds. He deposed that the money has remained unpaid for close to **2** years without sufficient cause and without any order for stay.

Determination

19. *First*, I will address the plea for leave to execute the decree before ascertaining costs.

20. Mr. Oduol, the applicant's counsel submitted thatthe circumstances of this case are very unique because the decretal sum was budgeted for by the Ministry and allocated in the years 2018 and 2019 including provision for interest. In his further affidavit, the applicant deposed that part of the decretal sum was forwarded to the office of the Attorney General who instead of paying commenced negotiations aimed at persuading the applicant to accept a lessor sum. He submitted that the money is lying idle and there is a high chance that the money shall be returned to treasury.Mr. Oduol submitted that the rationale behind section **94** of the Civil Procedure Act[5]was well explained in *Mercedes Sanchez Rau Tussel v Samken Limited & 2 Others**[6]***thus:-

> *"The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs...aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review ... no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone the pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment..."*

21. He urged the court grants leave to the applicant to execute before taxation of the costs in order to secure the decretal sum which if returned to treasury will take a long to be budgeted for and allocated again.

22. Mr. Motari, the Respondent's counsel did not address this issue at all.

23. Section **94** of the Civil Procedure Act[7] provide that :-

> ***94. Execution of decree of High Court before costs ascertained***
>
> *Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may beexecuted as soon as the amount of the costs shall be ascertained by taxation.*

24. Section **94** of the Civil Procedure Act[8] has been the subject of judicial construction in various decisions by our superior courts. The courts have held that before execution proceeds before ascertainment of costs the leave of the court must be granted. The grant or refusal to grant the leave is a matter of judicial discretion and ought to be as a result of an application either orally at the passing of the decree or thereafter formally. (SeeShah J *Muniafu v Ndwiga**[9]***). This position was reiterated in *Bamburi Portland Cement Co. Ltd v Hussein**[10]**thus:-

> *"Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the*

Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court."

25. In *Lakeland Motors Ltd v Sembi*,***[11]*** the Court of Appeal observed that:-

> *"The exercise of judicial discretion by the superior court under Section **94** of the Act necessarily required that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation.*
>
> *This, we think, is the spirit of the observation of Shah J.A, with which we agree in Bamburi Portland Cement Co. Ltd Vs Abdulhussein (1995) LLR 2519 (CAK) in regard to the application of Section 94 of the Act."*

26. The mischief sought to be addressed by section **94** of the Civil Procedure Act[12]is to protect a judgment debtor from suffering multiple executions, one in respect of the principal sum and the other for the costs after ascertainment in respect of the same suit. This reasoning found favour in*Erad Suppliers & General Contractors v NCPB****[13]*** in the following words:-

> *"In my view, the necessity for leave to be obtained where a party intends to execute before taxation is to obviate situations where a judgment debtor is likely to be confronted with two sets of execution proceedings. In respect of the same decree i.e. for the principal sum and for costs. This is a recognition of the fact that in a civil action the main aim is compensation and the process should not be turned into a punitive voyage. Therefore where there are no costs to be paid or where a party entitled to costs has abandoned or waived the same, in my view, Section 94 of the Civil Procedure Act does not apply. If the Respondent was not aware that the claimant was not keen on the said costs now it is aware and that would render that ground unnecessary."*

27. So far as the question of executability of a decree is concerned, the Civil Procedure Act[14] and the Rules contain elaborate and exhaustive provisions for dealing with it in all aspects. The Act and the rules contain elaborate provisions which take care of different situations providing effective remedies not only to judgmentdebtors and decree-holders but also to objectors, as the case may be. I am persuaded that the applicant has demonstrated unique and compelling grounds for the court to allow execution of the decree before taxation.

28. I now turn to the second issue, namely whether the applicant's application is incompetent as argued by the respondents' counsel.

29. Mr. Oduol, the applicant's counsel submitted that the application is brought under Section **5** of the Judicature Act.[15]He argued that the procedure existing before the enactment of the *Contempt of Court Act****[16]*** was restated by the Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others****[17]***to be under Rule **81.4** of the *English Civil Procedure Rules*, which deals with breach of judgment, order or undertaking. He submitted that the English law on committal for contempt of court was applied by virtue of section **5(1)** of the Judicature Act.[18]

30. Mr. Motari, the Respondent's counsel took a diametrically opposed position. His sustained assault on the application wasfounded on several fronts. *First,* he argued that this court lacks jurisdiction to hear and determine the application.His argument a I understand it was that, *"upon repeal of the judicature Act by the Contempt of Court Act 2016, the court cannot enter into the arena of the legislature and make laws for that which does not exist."* He argued that doing so will cause conflict of the doctrine of separation of powers and hence create a conflict between the arms of the government. He maintained that where a suit is filed in a court which lacks jurisdiction to hear and determine it, that suit will be a nullity. He relied on ***Motor Vessel 'Lilian S' v Caltex Oil (K) Ltd***[19]**in support of his argument.**

31. Mr. Motari argued that "the Jurisdiction of this court is provided for under the Constitution and by applicable statute and that in the present application the applicant has not invoked any known jurisdiction of the court to hear and determine the application..." He argued that the*Contempt of Court Act*which consolidated all statutory provisions that empowered this court to hear and determine applications for contempt of court was declared unconstitutional thus divesting this court the jurisdiction to punish for contempt.Heargued that there is no substantive law providing for what constitutes contempt of court, the procedure to be followed, power of/and which court can punish for contempt of court or prescribing the penalty for contempt of court.He relied on *Republic v Deputy Commissioner for Labour & 2 others Ex-Parte Kevin Ashley & 2 others,****[20]****Republic v The Principal Magistrate's Court at Githunguri Ex- Parte James Kahuha Thuo****[21]***and *Henry O. Edwin v Republic****[22]***for the proposition that a person cannot be charged for an offence that is not defined in law. He argued that since the Act was declared unconstitutional, there is no law that defines what constitutes Contempt of Court in Kenya and we cannot revert to the common law because the provisions of the Judicature Act that incorporated common law were similarly repealed. He argued that the penalty for contempt of court is not prescribed under any statute and the procedure to be followed is also not provided.

32. Mr. Motari submitted that the applicant neither sought nor obtained leave to institute contempt of court proceedings. As a consequence, he argued that the application is bad in law for non-compliance with the dictates of procedural propriety that is designed to protect the Constitutional rights of alleged contemnors.He relied on *Akber Abdullah Kassam Esmail v Equip Agencies Ltd & 4 others****[23]*** for the holding that the power to punish for contempt has never been about protecting judges' feelings, egos or dignity, but to prevent undue interference with the administration of justice.[24] He placed further reliance on *Johnson v Grant****[25]***which held that "the law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants.

33. Additionally, citing ***Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)****[26]***which explained the principle of *funcus officio* he argued that since the court declared the Contempt of Court Act unconstitutional, this court cannot purport to alter the learned judge's decision as this would be tantamount to an appeal. He argued that once a court becomes *functus officio,* the only orders it can grant are review orders which are an exception to the *functus officio* doctrine. (Citing ***Jersey Evening Post Ltd v Al Thani****[27]*cited in ***Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others****[28]*****).**

34. Mr. Motari also argued that this case is *re judicata* citing ***Bernard Mugo Ndegwa v James Nderitu Githae and 2 others.***[29] He also relied on ***Henderson v Henderson***[30]**which dealt with *res judicata*.**

35. **Mr. Motari's arguments on the issue under consideration is legally frail, unsustainable, lacks basis in law and collapses not on one but on several grounds as demonstrated shortly.**

36. It is true that on **9th** November 2018, the High Court in *Kenya Human Rights Commission v Attorney General & another*[31]nullified the Contempt of Court Act.[32] The said decision did not repeal the Judicature Act[33]as wrongfully argued by a Mr. Motari. On the contrary, section **38** of the nullified Acthad repealed section **5** of the Judicature Act,[34] the section the instant application is premised on. Section **39** of the same act repealed section **36** of The High Court (Organization and Administration) Act,[35] while section **40** repealed section **35** of The Court of Appeal (Organization and Administration) Act.[36] The question Mr. Monari avoided is whether after the act was nullified, the above sections of the law it had nullified still stood repealed.

37. It is basic law that courts derive their power from the Constitution and the statutes that regulate them. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Citing I H Jacob *Current Legal Problems,* Freedman C J M adopted the following definition of 'inherent jurisdiction'[37]

> *". . . 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…"*

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

> *". . .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."*

39. The inherent jurisdiction of the high court has long been acknowledged and applied by our courts.[38] However, a court's inherent power to regulate its own process is not unlimited. It does notextend 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*[39] 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". . . ."*

40. Recently the High Court in *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited*[40] 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.*

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."

41. I find myself in agreement with the above reasoning that the effect of the nullification of the act is that section **5** of the Judicature Act[41] still stands. Mr. Motari's argument that following the nullification of the Act there is no law governing contempt of court collapses.

42. Next I will examine the procedure for instituting contempt of court proceedings. Mr. Motari's argument on this issue contradicted his earlier argument that there is no law governing contempt proceeding since the Act was nullified. In a departure from the above argument, he argued that the applicant never applied for leave to commence contempt proceedings, hence, the application is incompetent.

43. Section **5** of the Judicature Act[42] 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.

44. In the *John Mugo Gachuki v New Nyamakima Co. Ltd**[43]* it was held:-

"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."

45. 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[44] 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*[45] as follows:-

46. The Court of Appeal In *Christine Wangari Chege v Elizabeth Wanjiru Evans & Others*[46] went through the procedure of commencing contempt proceedings in England in detail and pointed out that an application under Rule **81.4** (breach of judgement, order or undertaking) now referred to as *"application notice"* is the relevant one. The Court of Appeal pointed out that leave, now called *"permission"*is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. The above being the law, I find that it was not necessary for the applicant to seek leave before filing this application, hence this application is properly before the court. Mr. Motari's argument on this issue collapses.

47. The other argument advanced by Mr. Motari is that since the *Contempt of Court Act* was nullified by the court, in absence of the governing law, this court lacks jurisdiction to entertain the instant application. The said argument lacks legal basis. I have already held that the Act had only repealed section 5 of the Act not the whole Act as Mr. Motari incorrectly argued. Further, after the Act was nullified, the section it had repealed remained in force.

48. The other ground upon which Mr. Motari's argument collapses is thatacourt 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]

49. The other curious but legally frail argument propounded by Mr. Motari is that this court is *functus officio* and that this application is *res judicata.* The basis of this argument, as I understood it is that the High Court had in the above cited case declared the Contempt of Court Act. Before me is not the question of the constitutional validity of the Contempt of Court Act, determined in the said case hence, the doctrine of *res judicata* or *functus officio* cannot apply. *Functus officio* dictates that, generally, a judge has no authority to amend his or her own final order; while the doctrine of *res judicata* provides that a matter finally determined cannot be revisited. The rationale for both doctrines being, the public interest in bringing litigation to finality. The foregoing extinguishes Mr. Motari's argument. I say no more.

50. I now address the issue whether the Respondents are in contempt of the orders of this court. Mr. Oduol submitted that this court issued the orders of *Mandamus* on **8th**April 2020 and the Decree thereof was served upon the Respondents on **30th**April 2020. He submitted that theRespondents have wilfully disobeyed the said order despite the budgetary allocation lying idle in their accounts. Mr. Oduol relied on *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka**[49]*in which the court held that: -

"From a plain reading of the said sub-section, a government official is only exempt from personal liability for a government debt that is due from the government, but does not provide that a government official has immunity from obeying court orders as to the payment of a government debt, nor excuse such disobedience.

51. I accordingly find that that as the Respondent was aware of the orders issued by the court on 13th July 2016, and has not shown any steps taken to satisfy the decretal sum due to the Applicant as compelled in the said orders, he is culpable of disobeying the same and for contempt of court."

51. Mr. Oduol submitted that the Ministry budgeted for the money, allocated it and sent part of it to the 1st Respondent to settle of the decretal sum. He argued that the entire decretal sum including the provision for interest has been allocated and there is no reason for the Respondents to hold onto the money. He submitted that the order of *Mandamus* was served upon the Respondents on **30.04.2020** but they

have wilfully disobeyed it despite holding the budgetary allocation for the decretal sum.He placed reliance on *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another**[50]***which held: -

> "*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*".

52. **On his part, Mr. Motari relied on** *Mbuya Kinyoria v Nyansiongo Tea Factory & another**[51]***and argued that mere knowledge of the existence of the order is not enough where the consequences of breach are drastic and criminal in nature. He argued that personal service of the order particularly upon the person who is likely to be affected by its consequences is absolutely necessary. He relied on *Macharia Waiguru & another v John Njenga & 7 others**[52]***which held that the burden of proving that a particular court order exists or that a party is aware of the existence of the court order and has disobeyed it is on the applicants, not the respondents.He argued that the standard of proof in contempt of court proceedings which are quasi-criminal in nature is much higher than proof on a balance of probabilities, and almost, but not exactly beyond reasonable doubt (Citing ***Mutitika v Baharini Farm Ltd***[53]).

53. Additionally he placed reliance ***Johana Nyokwoyo Buti v Walter Rasugu Omariba & Others***[54]**and** *Bitange Ndemo v Director of Public Prosecutions & 4 Others**[55]***in support of**the proposition that a declaration or declaratory judgement is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. He** also cited *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others**[56]***and *Richard Nchapi Leiyegu v IEBC & 2 others**[57]***which held that the right to be heard embodies the right of audience which is jealously guarded by the court. (Also *cited Rose Detho -v- Ratilal Autombiles & 6 Others, Civil Application No. 304 of 2006 (171/2006UR**)***).Further, Mr. Motari cited *J M K v M W M & another**[58]***and *Onyango vAttorney* General[59]and *Mbaki & others v Macharia & another**[60]*** both of which underscored the need to observe natural justice and the right to be heard.To further buttress his argument, Mr. Motari relied on *Raila Odinga v IEBC & 3 others**[61]**Britestone Pte Ltd vs Smith & Associates Far East Ltd*which held that the burden of prove lies on the Petitioner.Lastly, Mr. Motari cited Lord Denning M.R, in *Re Bramble Vale Ltd**[62]***that"*A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved to use the time-honoured phrase; it must be proved beyond reasonable doubt.*"

54. It is an established position that if courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts has to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the Rule of Law and a civilized life in the society. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside courts which tend to undermine their authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.

55. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is 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.[63]

56. 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 civilized societies from those applying the law of the jungle. 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 contemnors.[64]The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.[65]

57. A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. It is a crime to unlawfully and intentionally disobey a court order.[66] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.[67] The offence has in general terms received a constitutional 'stamp of approval,'[68] since the Rule of Law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'[69]

58. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed '*deliberately* and *mala fides*.'[70] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.[71] Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).[72]

59. These requirements – that is the refusal to obey should be both *wilful* and *mala fides*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.[73] Honest belief that non-compliance is justified or proper is incompatible with that intent.The Constitutional Court of South Africa[74]discussing the importance to the Rule of Law nd compliance with court orders stated:-

> *"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."*

60. To succeed in the instant application, the applicant must prove[75] ***(i)*** *the terms of the order*, ***(ii)*** *Knowledge of the terms by the Respondent*, ***(iii).*** *Failure by the Respondent to comply with the terms of the order*. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.[76] A comprehensive exposition ofelements of civil contempt is discussed in *Contempt in Modern New Zealand*[77] as follows:-

> *"… The applicant must prove to the required standard …that:-*
>
> *(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*
>
> *(b) the defendant had knowledge of or proper notice of the terms of the order;*
>
> *(c) the defendant has acted in breach of the terms of the order; and*
>
> *(d) the defendant's conduct was deliberate.*

61. The facts of this are graphically clear. TheRespondents were represented in the civil case which gave rise to the original judgment. They were represented and participated in the application for *Mandamus.*Curiously, the Respondent's cited the same grounds of opposition in the instant application as they did in the application for *Mandamus*. The core ground cited is the alleged pendency of an appeal against the original judgment. In addition to been represented and actively participating in the three cases, there is uncontroverted evidence that the orders were served. The Office of the Attorney General invited the applicant's advocate for a meeting where instead of paying, the Attorney General sought to negotiate to pay a lessor amount, a proposal which was declined. There is evidence that the Ministry forwarded part of the decretal amount to the Attorney General but the Attorney General has refused to pay. The Office of the Attorney General advised the Ministry in writing that their appeal had no chance of success. To me the above facts satisfy all theabove tests which constitute wilful disobedience of a court order, a worrying conduct, coming as it does from the office of the Hon. Attorney General, the Government's Principal legal adviser.

62. The Honourable Attorney General filed grounds of opposition and the Replying affidavit dated **3rd** July 2020 sworn by Prof. Arch. Paul M. Mariga.One of the grounds cited in both documents is that the Respondents have appealed to Court of Appeal being Civil Appeal Number **553** of 2019. They claimed the appeal has high chance of success. To an innocent bystander, such a ground sounds attractive and appealing. But, sadly, that is how far it goes. On record is a letter dated **29th** June 2020, barely four day earlier signed by Mr. Motari Matunda, Senior State Counsel, the same counsel who appeared in the instant application. The letter is addressed to the Deputy Registrar, Court of Appeal Division withdrawing their application seeking to extent time for filing their appeal.Evidently, the alleged appeal was filed out of time and without leave. The withdrawal of the application for stay leaves the competency of the alleged appeal legally frail and in limpo. But more worrying is the fact this is the appeal being used to fight the instant application, and, it is the same appeal that was unsuccessfully mounted to oppose the application for*Mandamus*.

63. The above conduct and the out rightly misleading information manifests utmost bad faith on the part of the Respondents, which is one of the tests for proving wilful disobedience of a court order.I am persuaded that the applicant has demonstrated that the Respondents willfully failed, refused and or neglected to obey the court order. It is relevant to point out that the same Principle Secretary namely *Prof. Arch. Paul M. Maringa*whoswore the Replying Affidavit in the application for *Mandamus* is the same person who swore the Replying Affidavit in opposition to the instant application. He is fully aware of the facts of this case and in particular the decree and the orders of Mandamus. To suggest that he was not aware of the court orders is an insult to decorum, logic and justice.

64. 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 his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, it is importantly, acting as a guardian of the public interest.[78]

65. The question that warrants an answer is whether the first Respondent is the right party to be cited for contempt in this case. The honorable Attorney General is not the accounting Officer of the Attorney General' Office. He represents the national Government in court as provided under Article **156(4) (b)** of the Constitution. It is not clear why the applicant did not name the accounting Officer in the Attorney General's Office. I do not think the Hon. Attorney General I the right party to be cited for contempt in the circumstances of this case. However, the second Respondent is the accounting Officer of the Ministry. He has been properly named. Willful breach of the court order on his part has been proved, hence the order against him are well, deserved.

66. As Mr. Oduol correctly argued, the withdrawal of the application for extension of time notwithstanding, the mere fact that an appeal is filed does not entitle the Respondents to a stay of execution. (See Order **42** Rule **6** of the Civil Procedure Rules, 2010 and *Republic v Attorney General & another ex parte James Alfred Koroso*[79] cited by Mr. Oduol).

67. As I observed in the judgment dated **8th** April 2020, the law is that an appeal shall not operate as a stay of execution or of proceedings

under the decision appealed from unless the court so orders. It is a known principle of law that an appeal of a judgment by the unsuccessful litigant does not prevent the successful party executing the judgment immediately. Ideally, the unsuccessful party should apply for a stay of execution after judgment is delivered from the court issuing the decree and if unsuccessful from the court to which the appeal is preferred.

68. Lastly I address the applicant's prayer for sequestration. Both parties did not address this prayer. However, the failure not withstanding I will spare some ink and paper to address it.

69. Order **29** Rule **2 (2)** of the Civil Procedure Rules provides that no order against the Government may be made under –(a) Order **14**, rule **4** (impounding documents); (b) Order **22** (Execution of decrees and orders); (c) Order **23** (Attachment of debts); (d) Order **40** (Injunctions); (e) Order **41** (Appointment of receiver).In addition, Order **29** Rule **4(1)** of the Civil Procedure Rules provides that no order for the attachment of debts under Order **23** or for the appointment of a receiver under Order **41** shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the government.

70. Theapplicant cited sections **63**of the Civil Procedure Act.[80] Section **63** provides for supplemental proceedings in the following words:-

> *In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—*
>
> *a. issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;*
>
> *b. direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;*
>
> *c. grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;*
>
> *d. appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;*
>
> *e. make such other interlocutory orders as may appear to the court to be just and convenient.*

71. The above section has nothing to do with sequestration proceedings.Theword"sequestration"isderivedfromtheLatin*sequestrare*whichmeans"toplace in safekeeping" and it was first attested to in the 1510s as "to seize by authority and to confiscate."[81] "Sequestration," is defined as theact of taking temporary possession of someone's propertyuntil they have paid money that is owed or obeyed a court order.[82]In law, sequestration is the act of removing, separating, or seizing anything from the possession of its owner under process of law for the benefit of creditors or the state.[83]

72. The Law Dictionary defines it as a writ authorizing the taking into the custody of the law of the real and personal estate (or rents, issues, and profits) of a defendant who is in contempt, and holding the same until he shall comply.[84] A sequestration order is a formal declaration that a debtor is insolvent. The order is granted either at the instance of the debtor himself (voluntary surrender) or at the instance of one or more of the debtor's creditors (compulsory sequestration).

73. The main purpose of a sequestration order is to score the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors. Executing against the property of a debtor who is in insolvent circumstances inevitably results in one or a few creditors being paid, and the rest receiving little or nothing at all. The legal machinery which comes into operation on sequestration is designed to ensure that whatever assets the debtor has are liquidated and distributed among all his creditors in accordance with a predetermined (and fair) order of preference.

74. The law proceeds from the premise that, once an order of sequestration is granted, a *concursus creditorum* (a "coming together of the creditors") is established, and that the interests of creditors as a group enjoy preference over the interests of individual creditors. The debtor is divested of his estate, and may not burden it with any further debts. A creditor's right to recover his claim in full by judicial proceedings is replaced by his right, on proving a claim against the insolvent estate, to share with all other proved creditors in the proceeds of the estate assets.

75. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once, the rights of the general body of creditors have to be taken into consideration. A single creditor can thereafter enter into no transaction with regard to estate matters to the prejudice of the general body. The claim of each creditor must be dealt with, as it existed at the issue of the order.The chief effects of a sequestration order are to divest the insolvent of all his assets and to deprive the insolvent of full contractual capacity. Other consequences include criminal liability on the part of the insolvent acts committed both before and during sequestration. The insolvent may also obtain relief from the effects of certain legal proceedings.

76. The foregoing paragraphs explain with sufficient detail the nature, scope, effect and legal basis for the order of sequestration. I am unable to fit the circumstances of this case within the ambit of the order of sequestration eloquently explained above. This case does not involve an insolvent Judgment Debtor or creditor. The plea for an order of sequestration is declined.

Disposition

77. In view of my analysis and conclusions enumerated herein above, I find tha tthe applicant has established sound grounds for the court to grant prayers **(2)** & **(3)** of the application.The upshot is that the Notice of Motion dated **2nd** June 2020 succeeds to the extent herein above discussed. Flowing from the said findings, I grant the following orders:-

*a. Leave be granted and is hereby granted to the applicant to execute the decree of this court issued on **8th**April 2020 before taxation of costs.*

*b. **That** the Principal Secretary,Ministry of Transport, Infrastructure, Housing & Urban Development, Prof. Arch. Paul M. Maringa is in contempt of this court's orders issued on**8th** April 2020.*

*c. **That**the Principal Secretary,Ministry of Transport, Infrastructure, Housing & Urban Development is directed to comply with the court judgment/orders issued on **8th** April 2020 within **90** days from the date of this order, in default, a **Notice to Show Cause** directed against the Principal Secretary,Ministry of Transport, Infrastructure, Housing & Urban Development shall be issued forthwith for thePrincipal Secretary,Ministry of Transport, Infrastructure, Housing & Urban Development to show cause why he should not be committed to civil jail for a period not exceeding **6** months or for such other period this court may deem just and expedient.*

*d. **That** the Respondent shall pay the cost of this application to the applicant.*

Dated, Signed and Deliveredvia e-mail at Nairobi this 18thday of August, 2020

John M. Mativo

Judge

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[1] Act No. 4 of 2015.

[2] Cap 40, Laws of Kenya.

[3] Act No. 46 of 2016.

[4] Cap 8, Laws of Kenya.

[5] Cap 21, Laws of Kenya.

[6]{2002} e KLR**.**

[7] Cap 21, Laws of Kenya.

[8] Cap 21, Laws of Kenya.

[9]*{990} LLR **5529.***

[10]*{1995} LLR 1870 (CAK).*

[11]*(1998) LLR 682.*

[12] Cap 21, Laws of Kenya.

[13] {2012} **e KLR.**

[14] Cap 21, Laws of Kenya.

[15] Cap 8, Laws of Kenya.

[16] Act No. 46 of 2016.

[17]{2014} e KLR.

[18] Cap 8, Law of Kenya.

[19]**{1989} KLR**.

[20]{2016} e KLR.

[21]Misc. Civil Application No 491 of 2004; {2005} e KLR.

[22]{2005} e KLR.

[23]{2014} e KLR.

[24] Citing Bowen, L.J., in *HEllmore v Smith, (2) (1886)*,L. R. 35 C. D. 455.

[25]*Lord President Clyde's 1923 SC 789 at 790.*

[26]**{2014} e KLR.**

[27]**{2002} JLR 542 at 550.**

[28]**{2013} eKLR.**

[29]**{2010} e KLR.**

[30]**{1843} 67 ER 313.**

[31]{2018} eKLR.

[32] Act No. 46 of 2016.

[33]Cap 8, Laws of Kenya.

[34]Cap 8, Laws of Kenya.

[35] Act No. 27 of 2015.

[36] Act No. 28 of 2015.

[37]*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.

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

[39] 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

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

[41] Ibid.

[42]Ibid

[43] Civil Case No. 456 of 2011.

[44]Cap 8, Laws of Kenya.

[45]Misc Civil Case No. 50 of 1983

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

[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]{2019} e KLR .

[50]{2005} 1 KLR 828.

[51]{2015} e KLR.

[52]{2014} e KLR.

[53]{1985} KLR 229 234.

[54]Civil Appeal No. 182 of 2006.

[55]{2016} e KLR.

[56][2016] e KLR.

[57]Civil Appeal No. 18 of 2013.

[58]{2015} e KLR.

[59]{1986-1989} EA 456.

[60]{2005} 2 EA 206.

[61]Supreme Court of Kenya Election Petition No 5 OF 2013.

[62]{1069} 3ALLER 1062.

[63] See ***Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another*** **[2005] 1 KLR 828*Ibrahim, J***(as he then was)

[64] See ***Awadh vs. Marumbu*** **(No 2) No. 53 of 2004 [2004] KLR 458,**

[65] See **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431**

[66]S v Beyers 1968 (3) SA 70 (A).

[67]Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) page 166: 'Contempt of court … may be adequately defined as an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated.' Cf *Attorney-General v Crockett* 1911 TPD 893 925-6 per Bristowe J: 'Probably in the last resort all cases of contempt, whether consisting of disobedience to a decree of the Court or of the publication of matter tending to prejudice the hearing of a pending suit or of disrespectful conduct or insulting attacks, are to be referred to the necessity for protecting the fount of justice in maintaining the efficiency of the courts and enforcing the supremacy of the law.'

[68]*S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC) para 14, per Kriegler J, on behalf of the court (where contempt of court in the form of scandalising the court was in issue).

[69]Per Sachs J in *Coetzee v Government of the Republic of South Africa* **[1995] ZACC 7**; **1995 (4) SA 631** (CC) para 61, quoted and endorsed by the court in *Mamabolo* (above). In *Coetzee*, statutory procedures for committal of non-paying judgment debtors to prison for up to 90 days – which the statute classified as contempt of court – were held unconstitutional.

[70]*Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* **[1996] ZASCA 21**; **1996 (3) SA 355** (A) 367H-I; Jayiya v Member of the Executive Council for Welfare, Eastern Cape **2004 (2) SA 602**(SCA) paras 18 and 19.

[71]Consolidated Fish (Pty) Ltd v Zive **1968 (2) SA 517** (C) 524D, applied in Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 691C.

[72]Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 692E-G per Botha J, rejecting the contrary view on this point expressed Consolidated Fish v Zive (above). This court referred to Botha J's approach with seeming approval in Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc **[1996] ZASCA 21**; **1996 (3) SA 355** (A) 368C-D.

[73]See the formulation in *S v Beyers* **1968 (3) SA 70** (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 ('Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it') and CR Snyman *Strafreg* (4ed, 1999) page 329 ('Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike hoedanigheid, of van 'n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitstlag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding').

[74]*Burchell v. Burchell*, Case No364/2005

[75] See the High Court of South Africa In the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005

[76]Ibid, at page 4

[77]Available at *ip36.publications.lawcom.govt.nz*

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

[79]{2013} e KLR.

[80] Cap 21, Laws of Kenya.

[81]Douglas Harper *Online Etymology Dictionary* (2014).

[82]https://dictionary.cambridge.org/dictionary/english/sequestration

[83]*Encyclopædia Britannica* (11th ed.). 1911.

[84]Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.