



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 11 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 165(3), 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 24, 25, 27, 33, 35, 37, 43, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)
PRACTICE AND PROCEDURE RULES 2013**

BETWEEN

GIDEON OMARE.....PETITIONER

VERSUS

MACHAKOS UNIVERSITY.....RESPONDENT

RULING

1. On 22nd July, 2019, this court issued the following orders:

1) A declaration that the Respondent's Regulations 10(2)(d) to the extent that it unreservedly outlaws picketing, 11(6)(c) to the extent that it does not allow for legal representation and 11(7)(b) to the extent that it does not allow for a hearing; of *Rules and Regulations Governing the Conduct and Discipline of Students of the University* unjustifiably limit the Petitioner's rights under the Constitution and are therefore unconstitutional, null and void.

2) A declaration that the suspension and expulsion of the Petitioner from the Respondent University was null and void ab initio for having violated the Petitioner's constitutional rights under the Constitution.

3) An order do issue compelling the Respondent to re-admit the Petitioner to join the University's Bachelor of Education year III.

2. The Petitioner has now moved this court by way of an application dated 16th September, 2019 in which he seeks the following orders:

(1) THAT this Application be certified urgent and heard *ex parte* and service be dispensed with at the first instance.

(2) THAT this Honourable Court be pleased to find the Vice Chancellor of the Respondent in contempt of the orders issued by the High Court of Kenya at Machakos on 21st August, 2019.

(3) THAT this Honourable Court be pleased to commit the Vice-Chancellor of the Respondent to civil jail for a period of six months for being in contempt of court.

(4) THAT this Honourable Court be pleased to issue any further punitive orders in respect of the said contempt and disobedience by the Respondent through its Vice-Chancellor as may be necessary geared towards meeting the ends of justice and towards protecting the dignity and authority of this Honourable Court.

(5) THAT this Honourable Court orders the Respondent to produce the academic examination question papers, examination booklets and transcripts to confirm my compliance.

(6) THAT the costs of the Application be borne by the Respondent.

3. According to the Petitioner, subsequent to the issuance of the said orders, the same were extracted and served upon the Respondent herein who through its agents acknowledged receipt by stamping the said orders on the face. He averred that between the 2nd and 12th day of September 2019, he made several attempts to avail himself for re-admission but the university administration completely declined to comply with the court orders. According to the petitioner:

a.) THAT on the 2nd day of September he went to the university to find out whether he could be re-admitted back to the university's third year but was referred by the university Deputy Registrar (ASA) **Dr. Mailu** to the university's lawyer Ann Kiusya and company advocate to tell him the next cause of the action.

b.) THAT on the 3rd day of September 2019, he went to Ann Kiusya Company advocate offices and I met Counsel **Mary Kamau** who told him that she had already communicated to the University of what he supposed to do.

c.) THAT On 4th September 2019, he went with his relative to the university and the Deputy Vice Chancellor (Prof. Agalo) declined to see them but through her secretary he was referred back to the same lawyer prompting the Petitioner to complain vide a letter dated 4th of September 2019, to the University Vice Chancellor.

d.) THAT the following day on 5th day of September 2019, at about 11.00 AM, he received a phone call from the dean, school of education **Prof. Muola** informing him that he was directed that the petitioner is supposed to be in class and that the petitioner should tell him the units he did when the court granted him interim orders on 2nd April 2018.

e.) THAT on 9th September 2019, the petitioner proceeded to his faculty (school of education) and met the dean, **Prof. Muola** whom upon request printed and handed to him a copy of his 2nd year provisional results.

f.) THAT on 10th September 2019, at about 11:00 AM, he received a phone call from **Mr. Kombo** (the Director Security Services) informing him that upon consulting the Deputy Vice Chancellor (ASA) **Prof Agalo**, she told him to tell the petitioner that the University's Appeal must be heard and determined at the appellate court, and that the petitioner remained expelled and that if he wanted to communicate to the university, he should do it through the university lawyer.

g.) THAT on 11th September 2019, at about 9:48 am, the petitioner received a phone call from Anne Kiusya & Adv co. the university lawyer, informing him to go to their offices and pick up a letter. He proceeded to the said offices and upon reaching met Counsel **Mary Kamau** who handed to him a letter dated 10th of September 2019, informing him that he should stop calling at the university offices or lawyer's office since the university will be convening the senate to discuss his matter.

h.) THAT on 12th the petitioner received a call from the university, upon reaching was given a letter dated 11th September 2019 by **Prof. Okemwa Ondari** (Deputy Registrar Academic and Student Affairs) informing him that the university had discontinued his studies forthwith on grounds that he had failed in all the units taken in 2nd semester in academic year 2018/2019.

4. According to the Petitioner, he did not sit for all the examinations for the 3rd academic year because of his suspension/expulsion from the university. He further averred that he did not attend a single lecture/lesson for academic year 2018/2019 for reasons that he had been expelled from the university and was only allowed to sit for examinations following the orders of this court dated 2nd day of April 2019, and as far as he is concerned, the exams that were administered to him were for 2nd semester of the academic year 2018/2019. He deposed that the said examinations did not include the Continuous Assessment Tests (CATs) for that 2nd semester since he was not allowed to access the university premises or attend lectures/lessons and despite writing a letter dated 26th April 2019, addressed to the university on CAT exams, the same has not elicited any response. It was the Petitioner's case that since he did not attain 2/3 class attendance following his suspension and expulsion from the university, he is not cleaving to go to the next year of study (4th year) but could like to be re-admitted back in 3rd year.

5. It was therefore the Petitioner's case that the Respondent completely refused and/or denied him the opportunity to continue with his studies at the institution despite being aware of the orders of this Court. In his view, the contemptuous, unlawful and illegal conduct by the Respondent is still ongoing despite his numerous attempts to go back to the institution for studies and are in violation of the Orders of this Honourable Court. He asserted that the aforesaid conduct by the Respondent through the Vice-Chancellor amounts to contempt and wanton disobedience of the said Orders of this Honourable Court and appropriate punishment ought to be meted out to him/her.

6. In support of his case the Petitioner relied on the case of **Miguna Miguna vs. Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR** and submitted that there is solid and clear evidence before this

Honourable Court that the Vice-Chancellor of the Respondent disobeyed clear orders of this Honourable Court and must be punished for it. According to the petitioner, he has met all the pre-requisite conditions necessary for me to be re-admitted back to the university to finalize the remainder of his degree programme from 3rd year as it is evident that he had passed his 2nd academic year and was accordingly recommended to proceed to 3rd year degree programme.

7. According to the Petitioner, he was deeply disappointed when the university decided to abruptly discontinue his studies on the pretext that he had not met the threshold for 3rd year 2nd semester examinations.

8. In response to the application, the Respondent stated that it has remained fully compliant to the orders of this court since the inception of the petition herein, duly acknowledges the authority and dignity of this Court and is committed to uphold the rule of law. According to the Respondent, the Petitioner herein voluntarily joined the University, read, understood and committed himself to be bound by the University's Rules and Regulations by signing the letter of acceptance of offer to join the Respondent University on 24th August, 2016.

9. While recognising that this Court issued orders on 21st August, 2019 *inter alia* that the Petitioner herein continues with his studies subject to meeting conditions, it was averred that for the Respondent to allow the petitioner to continue with his studies as ordered by this Court, the petitioner had to comply with the University's Rules and Regulations that provides for conditions and registration requirements that students have to adhere to in order to continue with their studies. According to the Respondent, the University Regulations explicitly provide that every student shall register for every semester by paying the registration fee and such registration is only considered complete after the student fulfils financial obligations and other registration requirements including passing of examinations for the previous semester. In this case it was averred that the Petitioner has failed to meet the requirement that all his fees must be paid in that he has an outstanding fees balance of Kenyan Shillings Fifteen Thousand Four Hundred and Fifty. Apart from that the University statutes are clear that a student must attend 2/3 of the lectures for a unit in a semester and sit for Continuous Examinations Tests(CATs) that contribute to 30% of the Examinations while Final examinations shall contribute to 70%, a condition which the Petitioner failed to adhere to.

10. It was deposed that the Respondent allowed the Petitioner to sit for his April examinations in full compliance of the said orders which examinations were marked and graded and released to the other students but the Petitioner's results were withheld pursuant to the orders of this Court. However, the Petitioner failed all the units taken in second semester in the 2018/2019 Academic year. Pursuant to the court orders issued on 21st August, 2019, a senate meeting was convened on 11th September, 2019 to discuss *inter alia* compliance by the Petitioner and it was resolved that he be discontinued in his studies for want of compliance with the University Regulations. According to the Respondent, Schedule VI. Clause 18.4 Rule 1 of the Machakos University Statute state that a student who fails in all units in any one semester shall be discontinued and based on the foregoing the Respondent was issued with a discontinuation letter.

11. Based on legal advice, the Respondent averred that since he who comes to equity must come with clean hands and must also do equity, the conduct of the Petitioner herein betray him in that he has failed to fulfil his obligations before insisting on his alleged rights. The Respondent asserted that the University Rules and Regulations apply uniformly to all students and the Petitioner quest for special treatment cannot hold.

12. It was the Respondent's position that when the Petitioner herein was expelled from the Respondent University, he was a student in third year and that it has never been a subject of these proceedings that he be re-admitted back to third year and hence his contention to be admitted back to third year is vehemently opposed. The Respondent averred that the contents of the supporting affidavit are full of falsehoods though the Respondent acknowledged that the Petitioner's transcript for his second year has never been in dispute in these proceedings.

13. It was the Respondent's position that the prayer seeking to compel the Respondent to produce academic examination question papers, examination booklets and transcripts is made in bad faith and is evidence of the Petitioner's contempt of the authority of this court as it contrary to the very same orders dated 16th August, 2019 that the Petitioner seeks to enforce herein particularly order 4 where the court ordered that the Respondent continue to withhold the results, which orders have not been vacated.

14. It was therefore contended that contempt of court allegations, being quasi-criminal in nature, the Petitioner has failed to prove the said allegations to the required standard or at all against the Respondent and that the Petitioner herein by his conduct continues to demean and undermine the authority of the Respondent referring to the top management of the Respondent as Zombies, using the proceedings herein to incite students that they need not comply with the University Regulations hence stripping the Respondent herein of the moral authority to punish for disciplinary cases.

15. The Respondent's case therefore was that the present application is an abuse of legal process calculated to embarrass the Respondent and cause tension within the Respondent's precincts and undermine the confidence and influence the University Regulations and Administration have over the student body and it prayed that the same be dismissed with costs to the Respondent.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.

17. The law on contempt in this country is now well settled. Court orders are not made in vain and are meant to be complied with and 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”.

18. 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.

19. 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 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.”

20. 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. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

21. Similarly, in Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458, 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.”

22. 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.”

23. It was therefore appreciated by Ojwang, J (as he then was) in B vs. Attorney General [2004] 1 KLR 431 that:

“The Court does not, and ought not to 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.”

24. In Miguna Miguna vs. Fred Matiang’i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR this Court expressed the following views:

“In my view obedience of Court orders is one of the tenets of the rule of law and contempt of Court would not be countenanced in a constitutional democracy such as ours where the rule of law is expressly stated in Article 10 to be one of the values and principles of governance that supremely bind all State organs, State officers, public officers and all persons whenever any of them, *inter alia*, enacts, applies or interprets any law or makes or implements public policy decisions...I must send a strong message to those who are intent in disobeying Court orders that such conduct will not be tolerated no matter the status of the contemnors in the society. When persons in authority themselves set out to disobey Court orders with impunity they must remember that they are sending wrong signals to ordinary Kenyans that it is proper to disobey Court orders with impunity which is a recipe for chaos. Such conduct must therefore be nipped in the bud as soon as it is detected. In my view contempt of Court is such a grotesque monster that the courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation. As was held by the Court of Appeal in Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, 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. Therefore it is my view and I so hold that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions. It is therefore my view and I so hold that the Courts are not only empowered to commit for contempt but are under a Constitutional obligation to uphold the rule of law and in doing so to commit for contempt if the conduct of parties invite such course.”

25. 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 the Constitution. 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. Musinga, J (as he then was) 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. The Judge was however of the view that that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

26. However, it must be noted that the contempt of court is an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. The mere fact, therefore, that a party offended by disobedience of a Court order has floated his idea on what should be done to the contemnor, does not tie the court’s hands as to that mode of punishment although the Court may well take into account the suggested mode of punishment in appropriate cases.

27. It is therefore my view and I so hold that the Courts are not only empowered to commit for contempt but are under a Constitutional obligation to uphold the rule of law and in doing so to commit for contempt if the conduct of parties invite such course.

28. It is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done and that which is breached. The application must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity in the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore, generally the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. See Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002, Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708 and Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.

29. 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, the 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.”

30. 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.”

31. This position was adopted by **Musinga, J** in **Republic vs. Minister of Medical Services** (supra) 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.”

32. 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.”

33. 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.

34. Therefore, the law now is that once a party knows about the existence of a Court order, he cannot be heard to claim that he was not served therewith since knowledge supersedes service. It is however upon the applicant to adduce evidence showing that the alleged contemnor actually or constructively knew of the order. Constructive knowledge may be inferred where the person alleged to have been in contempt of the Court order was an alter ego or proxy of the person upon whom actual service was effected. Once the applicant shows that service was actually effected on a person who is reasonably expected to have brought the existence of the Court order to the notice of the contemnor, it is my view that the onus shifts onto the alleged contemnor to show that the existence of the order was not brought to his attention.

35. In this case, this court directed that the Petitioner be permitted to sit for his exams during the pendency of the petition but that his results be withheld pending the determination of. The Respondent contends that it allowed the Petitioner to sit for his April examinations in full compliance of the said orders which examinations were marked and graded and released to the other students but the Petitioner's results were withheld pursuant to the orders of this Court. However, the Petitioner failed all the units taken in second semester in the 2018/2019 Academic year. Pursuant to the court orders issued on 21st August, 2019, a senate meeting was convened on 11th September, 2019 to discuss *inter alia* compliance by the Petitioner and it was resolved that he be discontinued in his studies for want of compliance with Schedule VI. Clause 18.4 Rule 1 of the Machakos University Statute which state that a student who fails in all units in any one semester shall be discontinued and based on the foregoing the Respondent was issued with a discontinuation letter.

36. The Petitioner on the other hand contends that he did not sit for all the examinations for the 3rd academic year because of his suspension/expulsion from the university. He further averred that he did not attend a single lecture/lesson for academic year 2018/2019 for reasons that he had been expelled from the university and was only allowed to sit for examinations following the orders of this court dated 2nd day of April 2019, and as far as he is concerned, the exams that were administered to him were for 2nd semester of the academic year 2018/2019.

37. It is clear that the decision to discontinue the Petitioner on the ground of his failure to meet the academic requirements was not the subject of this petition. That decision was made post this petition. Accordingly, it cannot be properly be relied upon as a ground for finding the Respondents in contempt unless it is proved that the decision was made to circumvent compliance with this Court's decision. Where a party against whom an order has been made takes steps meant to deliberately frustrate the court order and it is proved to the satisfaction of the court that that is the intention, the court will not readily entertain allegations that a new cause of action has arisen that removes the dispute outside the original petition. As this Court held in **Republic vs. Kenya School of Law & 2 Others Ex parte Juliet Wanjiru**

Njoroge & 5 Others [2015] eKLR:

“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...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...this Court cannot turn a blind eye to the same.”

38. Had I been satisfied that the decision to discontinue the Petitioner was informed by the intention to evade the effect of the court order, I would not have hesitated to find the Respondent and its officer in contempt of court. The mere fact that the Petitioner brags about the outcome of this petition is not a ground to disobey a court order. As was held in **Mary Anne Njuguna vs. Joseph Njuguna Ngae Civil Application No. Nai. 195 of 1997:**

“A judge is not concerned with what litigants may brag or boast as he is only concerned with dispensing justice according to law, and any boasts made by litigants ought not to perturb or even bother a Judge.”

39. However, where an educational institution is acting within its powers as properly conferred under a lawful instrument the court would be loath to interfere. That is my understanding of the case of **Daniel Nyongesa and Others vs Egerton University College CA No. 90 of 1989** in which the Court (Nyarangi JA) stated:

“Courts are very loathe to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decision has been made without fairly and justly hearing the person concerned or the other side...”

40. The Court however emphasised that:

“...it is the duty of the courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people. Whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character.”

41. The same position was adopted by Lenaola, J (as he then was) in **Ouma Christopher Odongo vs. Kenyatta University [2016] eKLR** where the learned judge cited with approval the decision in the case of **Arthur Kaindi Nzioka vs. Kenyatta University Misc. Appl. No.316 of 2007** that:

“When it comes to such matters of discipline it is up to those institutions/clubs to ensure that they strictly follow procedure that is laid down in their respective statutes... if such institutions want the court to keep off interfering with the management of their institutions, they have to comply with and adhere to all procedure laid down in their respective statutes to avoid courts intervention... in the circumstances, considering the respondent’s total failure to comply with procedure relating to discipline, this court cannot just sit back throw its hand up and say that it is powerless to say anything to uphold the applicants rights.”

42. Having considered the issues raised before me, in light of the allegations and counter-allegations made regarding the conduct of both the petitioner and the respondent, this court cannot, on the basis of cold-print affidavits find that the petitioner’s allegations of contempt have been proved to the required standards. 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.”

43. Accordingly, it is my view and I hold that while nothing bars the Petitioner from challenging the decision to discontinue him if the same falls foul of Article 47 of the Constitution as read together with the provisions of the ***Fair Administrative Action Act*** or any other legal provision, the applicant’s application dated 16th September, 2019 does not meet the threshold of the standard expected in contempt proceedings. The said application fails and is hereby dismissed with no order as to costs.

44. It is so ordered.

Read, signed and delivered in open Court at Machakos this 24th day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

The Petitioner present in person’

Miss Kamau for the Respondent

