



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISC. APPLICATION NO. 165 OF 2013

REPUBLIC.....APPLICANT

-VERSUS-

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING
AND URBAN DEVELOPMENT.....RESPONDENT**

TOM NDECHE

PETER SHISIA MAYEENDE.....INTERESTED PARTIES

EX PARTE:

KENYATTA PETER, JOHN KEEN DEMESI,

OCHWACHO OJANGO AND EVANS EMASIT.....APPLICANTS

AND

CHARLES SIKUKU,

DIRECTOR OF SLUM UPGRADING,

MINISTRY OF TRANSPORT,

INFRASTRUCTURE, HOUSING AND

URBAN DEVELOPMENT.....1ST RESPONDENT/CONTEMNOR

ARCH. AIDAH N. MUNANO

THE PRINCIPAL SECRETARY,

MINISTRY OF TRANSPORT,

INFRASTRUCTURE, HOUSING AND

RULING

Introduction

1. By an application dated 3rd August, 2017, the ex parte applicants herein seek the following orders:
 - a. **This application be certified urgent.**
 - b. **Notice to Show Cause to issue to the 1st and 2nd Respondents/Contemnors to state why they should not be committed to civil jail for disobedience of the orders of this Court issued on 27th November, 2014.**
 - c. **The 1st and 2nd Respondents/Contemnors be committed to civil jail and detained in prison for such period as the Honourable Court will deem fit, or both fine and imprisonment for contempt of the Honourable court's orders issued on 27th November, 2014.**
 - d. **Such further or other consequential orders as the Honourable Court may deem just.**
 - e. **Costs of and occasioned by these proceedings to be borne by the 1st and 2nd Respondents/Contemnors.**

Applicants' Case

2. On 27th November, 2014, I delivered a judgement in this cause in which I found that the Respondent had not satisfied me that the intended action by the Respondents in evicting the applicants complied with the UN guidelines on evictions. I was similarly of the view that the rights of the applicants to adequate housing were threatened with violation and that the intended action threatened to violate the applicants' rights to adequate housing.

3. Consequently, I proceeded to issue the following orders:

1) Certiorari removing into this Honourable court the Respondent's directive dated 14th November, 2012 and 29th April, 2013 to evict the ex parte applicants and any other consequential orders emanating therefrom and the same are hereby quashed.

2) Prohibition against the Permanent Secretary Ministry of Housing his Officers, servants, agents or assignees from implementing or executing the order of demolishing, evicting, damaging or interference with the applicants' business, homes, structures and properties located within Kibera Soweto East Zone slums or act in any other way that will prejudice their safe, quiet enjoyment of the same pending further orders of this Court.

3) Pursuant to Article 23 of the Constitution which does not limit the remedies this Court is empowered to grant in such cases, I direct that within 30 days of this Judgment, a meeting shall be convened by the Respondent with the Applicants, where a programme of eviction of the Applicants shall be designed taking into account the following factors:

i) that at the time of eviction, neutral observers should be allowed access to the suit properties to ensure compliance with international human rights principles.

ii) that there must be a mandatory presence of Governmental officials and security officers.

iii) that there must be compliance with the right to human dignity, life and security of the evictees.

iv) that the evictions must not take at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.

v) that no one is subjected to indiscriminate attacks.

4) The Report of the progress shall be filed in this Court within 60 days from the date of this Judgement.

5) Liberty to apply granted.

6) As this was substantially a representative Cause, there will be no order as to costs.

4. By a Notice of Motion dated 23rd August, 2016, the ex parte applicants herein moved this Court seeking the following orders:

1. That the matter be certified urgent and the same do proceed ex parte in the first instance prayers 1, 2, 3, 4 herein be granted ex parte and the court do order that personal service of this application and court orders extracted be personally affected on the respondents for their answer.

2. That pending the hearing and determination of this application inter partes the respondents their servants, agent and cohort be restrained from mobilizing funds, enlisting and soliciting members of the public into Soweto East Zone A Market Stalls project apart from the verified and enumerated 345 beneficiaries as annexed in the supporting affidavit PK3.

3. That the respondents their agents servants and cohorts be restrained from further acts of violence, hooliganisms, Eviction and destroying the 1st ex parte applicants property being Victory Hope Community Centre, Kibera, and such process of eviction be halted until the court is satisfied that the orders of 27/11/2014 have been fully complied with or until further court orders and directions.

4. That court summons be issued forthwith for the 1st and 2nd respondent to appear personally in court to explain non-compliance of orders of court given on 27/11/2014 and do a comprehensive progress report as ordered by the court in its judgment

5. That a mandatory injunction do issue against respondent, his servants, agents and in particulars the director of slum upgrading and his cohorts be restrained from collecting funds and enlisting and soliciting members of the public apart from the numerated 345 beneficiaries as annexed in the supporting affidavit PK3 from the benefiting from Soweto East Zone A Market Stalls Project.

6. That comprehensive report of the loss incurred by Victory Hope Community Centre Kibera in the demolition carried out on the night of 20/8/2016 and 22/8/2016 be done and filed in court by a Professional Registered Valuer, (whose valuation costs shall be borne by the respondents jointly and severally) such assessed damages and loss be borne individually and personal liability and responsibility by the 2nd respondent, alternatively the 1st respondent do bear vicarious liability of the said loss and the same be paid forthwith.

7. That the 2nd respondent be enjoined in the application to personally answer contempt of court charges against him and be committed to a civil jail for a maximum term of six (6) months and/or his moveable property be attached or fined and punished appropriately for

contempt as the honourable court shall deem fit to achieve the ends of justice for disobeying orders and judgment of court dated 27/11/2014.

8. That consequent to order 7 above the 2nd respondent be declared by the court to have breached Article 10 of the Constitution by being in contempt of court orders and therefore unfit to hold public office and recommendation of adverse sanctions be meted against him by the 1st respondent including termination from office and a report of such action be filed in court.

9. That the 1st respondent do bear consequential loss suffered by the beneficiaries businesses due to the inexcusable delay of resettlement of the project and the quantum of such loss be assessed and filed in court for appropriate orders of compensation.

10. That the respondents be declared to have violated the applicants right to property as enshrined in Article 40 of the Constitution, the right to a fair administrative action as enshrined to in Article 47, and the affected children's right to education in Article 43(f) and contempt of court orders issued on 27/11/2014 due to the said illegal demolitions and destruction of the schools property and equipment and compensation be ordered for breaching the said rights

11. That cost of this application be provided for.

5. After hearing the application, on 16th day of March 2017, I found that the prayers relating to contempt could not be issued due to procedural non-compliance. I however ordered the Principal Secretary, Ministry of Land & Urban Development, to within 60 days from the date of service of the said decision prepare and file a comprehensive status report in respect of the resettlement process herein.

Applicants' Case

6. In this application, the applicants contend that on 19th December, 2014 they held the second joint meeting with the Respondents to deliberate on how best the Court's orders could be adhered to. To this end, they resolved that two level Committees be formed; the Main Committee led by the then Principal Secretary Ministry of Housing, **Mariam El Maawy** and a Technical Committee, an extract from the Main Committee to oversee the implementation of the orders.

7. It was averred that the main Committee was to comprise members from the Government, the Applicants and observers as follows:

a) from Government:

- i) Mrs. Mariam El Maawy – PS;**
- ii) Mr. Charles Sikuku - Director SUD;**
- iii) Pauline Mbote D. Director SUD;**
- iv) Ann Syombua - Legal Officer SUD;**
- v) Mutua Mutisya;**
- vi) Hesbone Kayesi - Assistant County Commissioner;**
- vii) Eng. Christopher Ndegwa;**
- viii) Thomas Nyamwaro;**

- ix) Mary Ndungu;
- x) Gabriel Muli;
- xi) Joan Mwaaura;
- xii) Nobert Barasa;
- xiii) Patrick Adira; and
- xiv) Patrick Bucha.

b) from the community:

- i) Evans Khakame;
- ii) John Keen Demesi;
- iii) Peter Kenyatta;
- iv) Evans Emasit;
- v) Douglas Namale;
- vi) Ochwacho Ojango;
- vii) Leah Wambui;
- viii) Lydiah Imali Hamisi;
- ix) David Kanyithia;
- x) Charles Mureithi; and
- xi) Rev. Moses Godia.

c) Observers:

- i) Marlon Konchellah.

8. According to the applicants, the extract Technical Committee was to comprise members as follows:

a) from Government:

- i) Gabriel Mbusya Muli – Secretary;
- ii) Pauline Mbote;
- iii) Ann Syombua - Legal Representative;
- iv) Hesbon Kayesi;
- v) Thomas Nyamwaro;
- vi) Mutua Mutisya (later incorporated); and

vii) Evans Kurgat (later incorporated).

b) from the community:

i) Evans Khakame (Chairperson);

ii) John Keen Demesi;

iii) Peter Kenyatta;

iv) Ochwacho Ojango;

v) Leah Wambui (later incorporated);

vi) Lydia Imali Amisi (later incorporated).; and

vii) Jason Okemwa – Legal Representative.

c) Observers:

i) Marlon Konchellah; and

ii) Umande Trust - (to forward name).

9. It was disclosed that the committee was chaired by our **Mr. Evans Khakame** whereas a representative from the ministry was to be the secretary. It was also agreed that the committee would meet regularly on scheduled dates, deliberate extensively and compile a report for the Court's perusal and consideration to aid it in closing the matter. It was further agreed that henceforth, all the deliberations be minuted and signed for authenticity of records, transparency and accountability purposes.

10. According to the Applicants, in a bid to comply with the orders of the Court, the Technical Committee met severally as mandated and explored on how best the orders of the Court could be complied with and one of the considerations was that there be a meeting with the affected persons at Kibera Soweto East Zone A site to enable the committee come up with a raft of recommendations towards compiling its report. Thus on 23rd January, 2015 the committee met the applicants at Kibera Soweto East Zone A site whereupon a consensus was reached that after completion of construction of the stalls, the applicant's be resettled subject to providing proof of enumeration cards duly signed by the 1st Respondent/Contemnor. It was also confirmed that 342 applicants had been enumerated. On 8th April, 2015 the 1st Respondent/Contemnor wrote to the members of the Main Committee inviting them to a scheduled meeting of 14th April, 2015 at 10.00 am at Ardhi House, 12th floor boardroom; and that the agenda for the said meeting was for the Technical Committee to brief the Main Committee on their progress on Court issues, enumeration, relocation and resettlement of residents occupying areas earmarked for construction of market stalls.

11. It was revealed that on the material 14th April, 2015 the Technical Committee met as requested by the 1st Respondent/Contemnor whereupon the Technical Committee's aforementioned recommendations/report of 23rd January, 2015 were wholly adopted. The applicants however contended that the 1st Respondent/Contemnor has concealed this status report and failed and/or refused to annex the same to his impugned report herein. It was contended that contrary to the agreement and the orders of the Court, the 1st Respondent/Contemnor, **Charles Sikuku**, who is the Director of Slum Upgrading took upon himself and prepared the report without involving the Main Committee and the Technical Committee to address the issue at hand. In the applicants' view, the purported minutes are neither signed nor confirmed as agreed and they are strangers to the said minutes accompanying the report. They accused the Respondents for having falsified and classified records to achieve their extraneous purposes as follows, amongst others:

i) The composition of the Technical Committee as appears at pages 2 and 3 is untrue. The same utterly contradict minutes of 15/01/2015 and Min. 10/15/01/2015;

ii) The minutes of 19th December, 2014 as annexed to the impugned report is falsified and contradictory; whereas it states at Min. 3/19/12/2015 paragraph 3 thereof that members were informed that two schools in the site had been given alternative relocation sites, the same minutes state at Min. 4/19/12/2014 Paragraph 2 thereof that relocation of the two schools had been done and where possible government to support;

iii) the 1st Respondent/Contemnor has always incorrectly maintained in his various affidavits that one of the Applicants, Victory Hope Children Centre, had refused to leave the site, at a meeting of 19th December, 2014 it was established that 15th January, 2015 it was indeed established that site identification for Victory Hope Children Home was still on course. (please refer to minutes of 15/01/2015 , Min. 9/15/01/2015- Paragraph 3;

12. It was the applicants' case that the 1st Respondent/Contemnor has always falsified minutes to mislead and achieve his ulterior motives; in purported minutes of 10th February, 2015 annexed to his Replying Affidavit of 16th September, 2016, it is contradictorily indicated therein that one **Hesbon Kayesi** was both present and absent with apology at the same time. It was alleged that the purported recommendations at paragraph 8 titled "*Market Stalls Resettlement/Allocation Programme*" at page 5 of the 1st Respondent/Contemnor's impugned report herein are the 1st Respondent/Contemnor's figments of imaginations and were neither discussed nor agreed upon.

13. According to the applicants whereas the said report made reference to Kibera Soweto East Zone 'A' Cooperative Society, that entity is not a party to these proceedings and is being ingeniously sneaked into the report by the Respondents/Contemnors having failed in its application to be enjoined in the proceedings as an interested party vide the Court's decision on 14th October, 2016 as aforesaid. The applicants asserted that none of them are members of the said Soweto East "A" housing Co-operative Society Ltd and there is no reason why they should be compelled to pay deposits to the Respondents through the Soweto East "A" housing Co-operative Society Ltd whose mandate ended with the housing estate but not the market stalls as at the time of enumeration as confirmed by the PS there was no data and that is why a proper process was to start afresh.

14. The 1st Respondent/Contemnor was accused of being one of the owners of the said Soweto East "A" housing Co-operative Society Ltd and had upon completion of the housing scheme ensured that his close relatives benefitted from the same. To the applicants, the Respondents/Contemnors who are hell-bent on illegally evicting them at all costs and contrary to the orders of the court have incorporated the said Soweto East "A" housing Co-operative Society Ltd to enable them allocate the market stalls to strangers and not the Applicants. Further, the Respondents/Contemnors have contemptuously and in bad faith alluded to non-existent "2005 master register" and which was not the subject of these proceedings.

15. It was therefore the applicants' case that the Respondents/Contemnors have contemptuously doctored the report and the minutes to enable them only consider members of the said Soweto East "A" housing Co-operative Society Ltd. This, to them, is a further plan and a scam by the 1st Respondent/Contemnor together with other cartels in the Ministry to defeat justice on the poor slum dwellers who were enumerated in 2015 and moved out voluntarily from the land to give room for construction of the market stalls.

16. The applicants averred that contrary to the 1st Respondent/Contemnor's incorrect contentions at 7.2 of page 5 of the report that the space is still occupied by Victory Hope Community Centre, one of the Applicants herein, the Division Officer, Laini Saba was instructed by the Ministry to find an alternative location for Soweto Baptist School, another Applicant herein, and the said Victory Hope Community Centre which was not done thereby grounding the activities of Victory Hope Community Centre. Instead in flagrant disobedience of the court orders, on 23rd March, 2016 the 1st Respondent/Contemnor sent

hired goons who invaded Victory Hope Community Centre, stole items to wit, books, kitchen utensils, electronics, house belongings to staff members living within the compound and demolished the structures thereon, thus the perimeter wall, and the classrooms which matter was reported at Capitol Hill Police Station which was recorded under OB NO 24/3/5/2016.

17. It was the applicants' case that it is not in doubt that the Respondents/Contemnors had knowledge of the existence of the orders, and what they were expected to do in compliance thereof but knowingly, blatantly, flagrantly and wilfully disobeyed the Court Orders. It was therefore contended that having had notice of the orders as acknowledged in the report, there is/was no good reason by the Respondents/Contemnors could not to abide by the directions of the Honourable court as ordered.

18. It was submitted on behalf of the applicant that being served with a Notice to Show Cause issued by the Honourable court on 28th September, 2017, the 1st Respondent/Contemnor filed his Replying Affidavit sworn on 24th October, 2017 purporting to respond on his own behalf and on behalf of the 2nd Respondent/Contemnor yet the 2nd Respondent/Contemnor has chosen not to formally respond to the application hence the application is not opposed by the 2nd Respondent/Contemnor and as such she has not to date stated why she should not be committed to civil jail for disobedience of the orders of the Honourable court. It was submitted that it not contested that the Respondents/Contemnors were served with the Honourable court's orders and that they had knowledge of the said orders. Despite that they knowingly, blatantly, flagrantly and wilfully disobeyed the Court Orders.

19. According to the applicants, the Respondents/Contemnors wilfully disobeyed the foregoing orders by forceful eviction of the Applicants (wilful failure to comply with the orders of the court); and falsification of report (contempt in the face of the court).

20. As regards the former, it was submitted that to protect the rights/dignity of the rights of the Applicants, the Court ordered, inter alia, that at the time of eviction, neutral observers should be allowed access to the suit properties to ensure compliance with international human rights principles; there must be a mandatory presence of Governmental officials and security officers; there must be compliance with the right to human dignity, life and security of the evictees; the evictions must not place take at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays and that no one is subjected to indiscriminate attacks.

21. However, in flagrant disobedience of the court orders, on 23rd March, 2016 the 1st Respondent/Contemnor sent hired goons who invaded Victory Hope Community Centre, stole items to wit, books, kitchen utensils, electronics, house belongings to staff members living within the compound and demolished the structures thereon, thus the perimeter wall, and the classrooms and the matter was reported the matter at Capitol Hill Police Station which was recorded under OB NO 24/3/5/2016. This is not disputed by the Respondents/Contemnors in their Replying Affidavit sworn on 24th October, 2017 by Charles Sikuku.

22. It was submitted that in granting the orders, the Honourable court enjoined the Respondents/Contemnors to strictly follow the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)* while dealing with the Applicants. Sadly, the Respondents/Contemnors wilfully chose not to do so but launched indiscriminate attacks on the Applicants.

23. As regards the falsification of report, the applicants reiterated the averments in the supporting affidavit and submitted that that orders stem from the Applicants' genuine concerns and the need of the Honourable court to enforce socio-economic rights. The applicants lamented that to date the Respondents/Contemnors do not have an alternative mode of accommodation but instead the impugned Report maliciously seeks to give away the stalls to other strangers who have neither occupied the site before nor enumerated in accordance with the law.

24. By giving an order prohibiting the Respondents/Contemnors from implementing or executing the order of demolishing, evicting, damaging or interference with the applicants' business, homes, structures and properties located within Kibera Soweto East Zone slums or acting in any other way that would prejudice their safe, quiet enjoyment of the same pending further orders of this Court, it was submitted that the implication of the order is that the Honourable court would be giving further orders based on a filed report. The Respondents/Contemnors have however purported to illegally evict the Applicants permanently and award the stalls to third parties in gross violation of the orders of the court. This is utterly reprehensible and should not be allowed to continue undeterred.

25. It was submitted that the Respondents/Contemnors have now come up with a list of purported "successful applicants" for enumeration different from the one captured in the impugned Report filed in court and that it is now evident that the impugned Report was used by the Respondents/Contemnors as a mere tool to appease the Court but not for substantive compliance. It was revealed that apart from an accompanying Cabinet Memorandum dated January, 2016, the impugned Report dated April 2017 neither indicates who compiled it nor signed.

26. It was therefore submitted that the Respondents/Contemnors do not take these proceedings seriously; the impugned Report filed in court on 15th June, 2015 is materially different from the alluded Report accompanying the 1st Respondent/Contemnor's Affidavit in the exhibit marked "CS2" thereof and that the contempt is continuing since the Respondents/Contemnors have not purged contempt and deserve no mercy from the Honourable court.

27. It was contended that there are exceptional circumstances owing to the peculiarity of this case that warrant an order requiring the Respondents/Contemnors to purge contempt by truly complying with the Honourable court's orders and filing a detailed and authentic report to guide the court in giving further orders.

28. In support of their case the applicants relied on **Godfrey Njeru -versus- Republic, Criminal Appeal No. 20 of 1993**, cited with approval in **Image Apparels Ltd -versus- Freight In Time Limited [2008] eKLR**, **Johnson -versus- Grant, 1923 SC 789**, cited with approval in **Trust Bank Ltd (in liquidation) -versus- Shanzu Villas Ltd & 3 Others [2004] eKLR**.

29. To the applicants, the Respondents intent is to undermine and defeat the enforcement of the orders. If allowed to continue, these actions and/or conducts will render the enforcement of the Honourable court's orders futile. The applicants relied on **Hadkinson -versus- Hadkinson [1952] 2 All ER 567**, **Regine Butt vs. Haroon Butt & Another [2016] eKLR** and **Republic vs. Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR** and submitted 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.

30. It was the applicants' case that the Respondents/Contemnors have acted as if there were no proceedings, no judgment and orders stipulating how the parties deal henceforth. The impugned Report is akin to the decisions of the Respondents that were eventually quashed by the Court and that the conduct of the Respondents/Contemnors is contemptuous of court and court process, and has put the authority and dignity of the Honourable court to ridicule. If left to continue, it was submitted that the orders of the Honourable court shall be brought into ridicule and rendered worthless/academic unless the court moves with speed to uphold its integrity and ensure that the Defendants/Respondents do not continue acting with impunity undeterred.

31. The Court was therefore urged to intervene by granting the orders sought to assert its authority and protect its dignity and the sanctity of its processes, and to restore public confidence.

Respondents' Case

32. The application was however opposed by the Respondents.

33. According to them, contempt proceedings in relation to the above order could only issue if the precipitant actions were taken by the Government to evict the applicants in breach of the order which is not the case.

34. It was averred that pursuant to the orders of the court dated 27th November, 2014, the then Ministry of Land, Housing and Urban Development constituted a committee to *inter alia* formulate appropriate programs for eviction of the residents, including the Applicants herein while taking into account the following factors;

- i. *that at the time of eviction, neutral observers should be allowed access to the premises to ensure compliance with international human rights principles.*
- ii. *that there must be a mandatory presence of Government officials and security officers.*
- iii. *that there must be compliance with the right to human dignity, life and security of the evictees.*
- iv. *that the evictions must not take place at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.*
- v. *that no one is subjected to indiscriminate attacks.*

35. It was deposed that the committee upon extensive stakeholder engagement and deliberations and based on a consideration of relevant factors made the following resolutions:

- i. Once the remaining construction works are complete, the respondents will give notice to the *bona fide* beneficiaries of the upgrading programme to pick the application forms.
- ii. The said application forms will be returned within a stipulated time frame.
- iii. The application forms will be analyzed and evaluated using criteria to be set by the joint committee.
- iv. The Applicants who qualify will be the ones considered for the allocation of the stalls through a balloting process.
- v. Letters of offer will be issued to the successful applicants on the site during normal hours.
- vi. The sale price will be as approved in the Cabinet Memorandum on sale of redevelopment houses and market stalls at Kibera Soweto East Zone 'A' dated January, 2016.
- vii. The Government will then write to Kibera Soweto East Zone 'A' Cooperative Society to remit the 10% deposit for all the successful applicants into the designated bank account within a specified period of time.
- viii. The successful applicants will then be issued with keys to the market stalls and will be expected to make monthly payments towards clearance of the balance of the purchase price.

36. It was the Respondent's case that the report is a true reflection of the deliberations of the stakeholders including the Applicants herein and therefore based on the advise by the State Counsel on record the Applicants cannot be heard to resile from the contents thereof having actively participated in the committee both in person and through their representatives.

37. The Respondent averred that pursuant to the court order given on 27th November, 2014 by this Court, the Government has already complied fully with the said court order since the Government together with the concerned beneficiaries developed a programme of eviction taking into account factors as stated

above that resulted in the voluntary vacation of the subject site by all the affected persons except for the Applicants who are still in occupation of a section of the site in breach of the same order. According to the Respondent, although the Applicants are alleging that the minutes in the status report submitted by the Respondents are false, the Applicants contradict themselves by acknowledging and confirming that they were present in the first joint meeting which was held on 19th December 2014. In case where minutes depict a typographical error it cannot always be construed as mischievous since human beings are prone to making genuine errors at times.

38. It was averred that despite some sets of minutes not being signed, the confirmation of previous minutes was done during subsequent meetings, and further the Applicants cannot specifically point out issues discussed and agreed to have been materially changed in their falsification allegations. In the Respondent's view, the allegation by the Applicants that the development of the Market Stalls is an independent project from the upgrading programme comprising development of the houses and other infrastructure is not true and that the Applicants are attempting to take control of a project whose true beneficiaries were enumerated way back in the year 2005/2006. According to the Respondent, the project of upgrading Kibera Soweto East Zone 'A' started in 2005 with the enumeration exercise before relocation of residents in 2009 and the commencement of the construction work in 2012. The comprehensive upgrading project which involved construction of houses, market stalls, social amenities and related infrastructure are in one contract. The construction of the market stalls fell behind schedule due to the actions of the Applicants together with others who have so far voluntarily vacated the site. However, the Applicants are stubbornly refusing to vacate the land required for the project.

39. The Respondent therefore averred that it is erroneous for the Applicants to allege that the development of the market stalls is a new distinct project from the one of upgrading houses and other infrastructural works and that there is no data on the intended beneficiaries. To the contrary, it is one and the same project and the beneficiaries are known. It was disclosed that the mention of the Kibera Soweto East Zone 'A' Housing Cooperative in the report was to inform the Court of the final process of the allocation of the Market Stalls as was the case for the houses as this forms part of the Kibera Soweto East Zone 'A' upgrading programme.

40. The Respondent averred that the Applicants are deliberately concealing the truth by stating that none of the 342 persons enumerated from the subject site are members of Kibera Soweto East Housing Cooperative Society. Indeed more than 70 people enumerated are *bona fide* members of Kibera Soweto East Zone 'A' Housing Cooperative Society and further 47 people of those enumerated, including **John Keen Demesi** and **Evans Emasit**, are members of Kibera Soweto East Zone 'A' Housing Cooperative and were allocated houses at the completed Housing Estate. It is therefore erroneous for the Applicant to treat the Market Stalls as a distinct project from the upgrading programme.

41. According to the Respondent, the Applicants have not demonstrated how the Respondents have failed to implement the court order. In fact it is the Applicants who are in contravention of the court order. At no time did the court give reprieve to those occupying the said site not to vacate it or not to be evicted. None of the 342 named in this petition, with the exception of the Applicants, went back to court to complain of any infringements on their rights by the Respondents. The Respondents averred that they are many community members who are aggrieved by the non-compliance of the Applicants to vacate the site for the stalls to be completed and for them to take possession.

42. The Respondent's view was that the Applicants are relentlessly pursuing their personal interests at the expense of the public good and attempting to defeat the course of justice through their many frivolous allegations and applications in this court.

43. It was therefore the Respondent's position that the contempt proceedings herein are an abuse of process of this court as the same is not only premised on the deliberate falsehoods but it a clear attempt by the Applicants, especially the 1st Applicant, **Kenyatta Peter**, who is not a beneficiary of the ongoing project to take over the project to the detriment of the beneficiary. According to the Respondent, **Kenyatta Peter** is an employee of a beneficiary and a member of Soweto East Zone "A" Housing Cooperative Society, **Mr. Victor Adams Omondi**, who has even benefited from the project after being

allocated a house in the completed part of the project. This member and his employee, **Kenyatta Peter**, has however refused to remove Victory Hope Centre to allow completion of the Market Stalls and related amenities.

44. It was therefore contended that the Applicants' actions are frivolous and vexatious and intended to derail/defeat the whole project and thus this court should issue orders compelling the Applicants to vacate the site as they are infringing with the rights of others. The entire project is projected to benefit and uplift the livelihoods of over 4,000 people and it is not fair that their welfare is jeopardized by the selfish interests of one or two individuals.

45. The Respondents reiterated that they are not in contempt of court and have at all material times acted in good faith and in obedience of court orders.

46. It was submitted on behalf of the Respondent that the Notice of Motion dated 3rd August, 2017 seeking orders for committal to jail of the 1st and 2nd Respondents is not only incompetent and lacking in merit but is also an abuse of the process of this court and is for dismissal. According to the Respondent, this suit (JR. No. 165 of 2013) was filed by the Applicants through the firm of M/s Okemwa & Company Advocates. This is the firm of Advocates, who represented the Applicants up to the date of delivery of judgement on 27th November, 2014. The firm of Abdullahi & Associates was never on record for the Applicants until the time of filing the instant application for contempt.

47. It was therefore submitted that under Order 9 Rule 9 of the **Civil Procedure Rules**, the Applicants required leave or an order of the court to effect a change of advocates yet this had not been done, with the consequence that the motion under consideration has been filed by a firm of advocates which is not properly on record. The motion is therefore invalid and should be struck out or expunged from the record.

48. According to the Respondent, it is trite law that before an applicant can move a court to punish any person for alleged contempt, the party seeking such orders must first do the following:-

- a) Extract the order in question and the extracted order must contain a penal notice.
- b) The extracted order which is alleged to have been breached or disobeyed must have been served on the person sought to be punished for contempt personally.
- c) Upon proof of the above requirements, the applicant must then prove that the order which was extracted and served upon the respondent personally was disobeyed. See case of **Duncan Manuel Murigi –vs- Railways Corporation**.

49. In the instant case, it was submitted that there is no evidence that the order resulting from this court's judgement delivered on 27th November, 2014 was extracted and served upon the cited Respondents, **Charles Shikuku** and **Aidah Munano**, the Director of Housing and the Principal Secretary, Ministry of Transport, Infrastructure and Urban Development respectively. In the absence of evidence relating to extraction of the order and personal service, it is even unnecessary for this court to scrutinize the minute details of the case so as to come to a finding as to whether the order was disobeyed or not. The application has to be dismissed for non compliance with a mandatory requirement of law.

50. To the Respondent, even if the application is considered on merit, it must still fail since the Applicants have merely filed the contempt application in their bid to continue resisting compliance with the court judgement of 27th November, 2014 which required all residents of the land occupied by the employer of Peter Kenyatta, (1st Applicant), the other Applicants and the rest of the population to give room by vacating the land, in an orderly manner, to pave way for slum upgrading programme. The Applicants are clearly trying to use the judgment in question to hijack a noble government project meant to benefit thousands of slum dwellers for their own personal gain. This position comes out clearly when one reads the affidavits filed in support of the contempt application and the responses filed by the Respondents,

through the 1st Respondent, and also the response filed by **Tom Ndeche**, one of the Interested Parties.

51. It was submitted that apart from making a false and unsupported allegation that “*on 23rd March, 2016 the 1st Respondent/Contemnor sent hired goons who invaded Victory Hope Community Centre, stole items to wit, books, kitchen utensils, electronics, house belongings to staff members living within the compound and demolished structures thereon, thus the perimeter wall, and the classrooms*”, the Applicants do not state in their application why and how they linked the so called hired goons to the 1st Respondent. The Applicants do not also say why the goons were never arrested if indeed they made a report to the police.

52. It was submitted that critically however is the failure by the Applicants to inform the court why they have failed to comply with the judgement of the court dated 27th November, 2014 requiring them and all the other affected persons to vacate the area in question to give room for the completion of the slum upgrading project which has been ongoing in the area. By their application, it is clear that 3 years down the line, the Applicants are still refusing to comply with the court order which they themselves are asking this court to enforce, albeit in a selfish manner.

53. It was the Respondent’s case that the Applicants are liars. They claim that they represent 342 persons who are alleged not members of Kibera Soweto East Zone “A” Cooperative Society (the Sacco) yet the Respondents have availed evidence to demonstrate that very many of the persons they say are not members of the Sacco are actually members. They also claim, without proof, that the stalls they are now seeking to unlawfully take over do not form part of the slum upgrade relating to the housing units and this allegation is also false. The Respondents and the Interested Parties have explained that the stalls and the housing units form part of the same slum upgrade and in this regard, a number of people the Applicants claim to be their members are actually beneficiaries of the housing units who have already been allocated houses. In fact, the owner of Victory Hope Centre, the School which is alleged to have been destroyed by goons, is a beneficiary of the housing units and he had already been allocated a house.

54. It was the Respondent’s case that this application is an abuse of this court process since, though the judgment given on 27th November, 2014 gave parties liberty to apply, the Applicants have been filing numerous applications in this court whose main objectives are to vex and harass the concerned government officials. Their ultimate aim is to hijack a very noble and well thought out government project which is meant to benefit the people of Kibera slums for their selfish/personal gains at the expense of the true beneficiaries of the project. This court must put a stop to this.

55. According to the Respondents, the Applicants, who are just 3 individuals, have put them through a lot of difficulties hence the slum upgrade in the specific area of Kibera Soweto East Zone “A” is behind schedule and the government is incurring penalties because of delays experienced by the contractor on site because of the refusal by the Applicants and the owner of Victory Hope Centre to vacate the land they occupy to allow the project to run to completion smoothly. Yet the same parties who have refused to comply with the court judgement dated 27th November, 2014 are now back to court asking the court to punish Respondents for alleged contempt. To the Respondent there can be no better example of what an abuse of court process means.

56. It was the Respondent’s submissions that this suit and the judgment given on 27th November, 2014 did not determine who the true beneficiaries of the slum upgrade were. In his view, the Applicants are seeking assistance of this court to exclusively, with their chosen few, which included their spouses, children, relatives and friends, to take over the stalls which are being constructed by the government as part of the slum upgrading programme. There is a committee in place whose mandate is to determine the true beneficiaries of the project at every stage and this court should not allow itself to be dragged into the issue of who is or is not a true beneficiary of the project.

57. It was submitted that the alleged contempt is therefore a smokescreen being used by the Applicants in an attempt to scare the Respondents and to enable the Applicants take control of a government project. This court should reject this attempt.

58. The Court was therefore urged to dismiss the application dated 3rd August, 2017 with costs.

Interested Party's Case

59. On the part of the interested parties it was averred that the Respondents/Contemnors and the Applicants have also been in contempt of court on diverse dates; 10th July 2015, 13th July 2015 and 23rd July 2016 including but not limited to:

- a. Calling for the eviction of the residents of Kibera Soweto Zone A which is against the Court Orders obtained by the ex parte applicants in December 2015.
- b. Fencing and demarcating properties within Kibera Slums Soweto Zone A without proper cause and or instruction and in clear case of contempt of Court Orders.
- c. Forming a committee, without informing the more than 600 families for whom the application in court was based, which embarked on distributing threatening notices on the families in the evening and night hours contrary to the court order.
- d. Enlisting its members in the intended list of beneficiaries to the exclusion of genuine beneficiaries of the Soweto Market Stalls Zone A.
- e. Destroying property belonging to the interested parties and other residents of the Kibera Soweto Zone A.

60. According to the interested party, whereas the Applicants may have a genuine claim in alleging that the Respondents/Contemnors have acted in Contempt of Court Orders issued on 27th November 2014, they have however not come to this Honourable Court with clean hands and have acted in bad faith and malice and unreasonably caused damage to the interested party's property which has not been compensated and the properties of other beneficiaries that they claim to represent despite demand notices being issued to inform them to desist from doing so.

61. The interested disclosed that whereas the ex parte applicants claimed that none of the 342 applicants are members of the Kibera Soweto East Zone "A" Cooperative Society **John Keen Demisi** Reg No. 0255/14 House No. B1 -24, **Victor Adams Omonde** Reg No. 103/07 House No. B1 -56 and **Evans Emasit** Reg No. 0069/07 House No. C2 -41 are some of the members, It was averred that **Victor Adams** is a director of the Victory School of which **Mr. Peter Kenyatta**, who has sworn the affidavit in support of the ex parte applicants' application, is a manager and as such this is contrary to the applicants' claim that none of the 342 members applicants are members of the said Kibera Soweto East Zone "A" Cooperative Society.

62. It was alleged that the enumeration and intended resettlement of the beneficiaries of Soweto Zone 'A' stall project has been marked by allegations of bribery and inclusion of underserving members to the list of beneficiaries occasioned by the applicants'. The said discrepancies are listed as follows:

- i. Some of the beneficiaries of the stalls have been granted two (2) stalls in the project. (No. 104 and 105 were tenants to one structure.)
- ii. One of the exparte applicants, **John Keen Demisi** has enlisted all his family members and friends as beneficiaries of the stalls (No. 38, 40 and 88)
- iii. One of the Schools, Victory Hope Academy, linked with the Applicants has listed its personnel as beneficiaries (No. 275-281)
- iv. The ex parte applicants are demanding stalls through groups that did not have any property or office in the area:

- a. Neighbourhood Self Group No. 340
 - b. United Highrise Community based Organization No. 341
 - c. Little Steps Women Group No. 342
- v. The beneficiaries were never consulted in relation to the aforesaid enumeration list as alleged and the applicants are put to strict proof thereof.

63. In the interested party's view, the discrepancies highlighted clearly show that the Applicants' claim that the Respondents/Contemnors herein have incorporated the Soweto East 'A' Housing Co-operative Society to enable them allocate the market stalls to strangers and not the Applicants is premised upon fraud and misrepresentation by the Applicants. Accordingly the applicants were accused of having misled this Honourable Court by claiming that the residents moved out voluntarily while in fact the Applicants collaborated with goons to forcefully evict residents and demolished their shelters. To the interested parties, the ex parte Applicants only seek to enforce the Court Orders in their favour, particularly Victory Hope Primary School, to the exclusion of all the families represented in the suit and that the ex parte Applicants are jointly liable with the Respondents/Contemnors for the damages on his and other beneficiaries' property following their destruction and demolition.

64. The interested party therefore urged the Court to intervene and find the ex parte Applicants and the Respondents/Contemnors in contempt of this Honourable Court's Orders given on the 27th of November 2014 and upon a satisfactory purge of this contempt, this Honourable Court orders the Respondents/Contemnors to commence a fresh, credible and transparent relocation program in compliance with the lawful Orders of this Court.

65. Based on various authorities the interested party submitted that both the Respondents/Contemnors and the ex-parte Applicants' conducts are contemptuous of this Honourable Court.

Determination

66. I have considered the application, the affidavit both in support of and in opposition to the application.

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

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

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

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person

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

69. In Central Bank of Kenya & Another vs. Ratalal 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.

70. 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.”

71. 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.”

72. In Republic vs. The Kenya School of Law & Another **Miscellaneous Application No. 58 of 2014**, this Court stated:

“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.”

73. In this case I wish to remind the public in general and the executive in particular of the views expressed by **Lenaola, J**, in Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others **[2004] 1 KLR 588** which views I associate myself with that:

“The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more “muscle” in certain matters where their decisions have been questioned, in court! Courts unlike politically minded minister are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws...Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which Courts are set up.”

74. The matter cannot be better expressed than in the words of **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.”

75. In Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors **JR No. 2 of 2014** this Court sent a warning in the following terms:

“Where such dishonourable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity. Our Constitution

is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law...Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings they ought to secure proper legal advice from the Government's Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute."

76. As was held by **Musinga, J** (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**, if we show disrespect to the supreme law of the land, casual observance or breach with impunity by the Government or its servants and fail to punish or penalise those who violate important provisions we, as the temple of justice, will be encouraging such violation. Court orders I must emphasise are not subject to interpretation of the executive. Only Court's of law issuing the orders or Courts of higher jurisdiction are empowered to interpret Court orders.

77. I also agree with the opinion in **Johnson -versus- Grant, 1923 SC 789**, cited with approval in **Trust Bank Ltd (in liquidation) -versus- Shanzu Villas Ltd & 3 Others [2004] eKLR** that:

"...The law does not exist to protect the personal dignity of the Judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged."

78. 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** 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.

79. 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.

80. 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. 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 statutory provisions this Court cannot turn a blind eye to the same.

81. Having dealt with the general principles this case the Respondents have raised the issue that since the contemnors were not served they cannot be committed for contempt. It was however not contended that the Respondents were not aware of the Court order. The current legal position on personal service was however restated by **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.”

82. This position was adopted by **Musinga, J** (as he then was) in **Republic vs. Minister of Medical Services** 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.”

83. As stated in *Halsbury's Laws of England*, 4thEdn. 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.”

84. I will therefore not entertain the contention that the Court cannot commit a proved contemnor simply because there was no personal service as long as the Respondent had express or constructive knowledge of the existence of the Court order.

85. The applicant's application for contempt is however hinged on two grounds. The first ground is that the Respondent violated the court order by sending hired goons who invaded Victory Hope Community Centre, stole items to wit, books, kitchen utensils, electronics, house belongings to staff members living within the compound and demolished the structures thereon, such as the perimeter wall and the classrooms which matter was reported at Capitol Hill Police Station which was recorded under OB NO 24/3/5/2016.

86. 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.

87. In this case I am unable to find that the said actions were instigated at the instance of the Respondents. The applicants have not contended that the invaders were agents of the Respondents. The applicants ought to have disclosed material on the basis of which this Court could find a nexus between the said invaders and the Respondent. This crucial link is however missing in the facts disclosed in this case. Contempt of Court proceedings being quasi-criminal in nature, the evidence connecting the Respondent to the acts in question ought to be watertight and a person cannot be put to a peril of losing his liberty based on assumptions and speculations.

88. This ground therefore fails.

89. The other ground was that the Respondents falsified the progress report which this Court directed. The applicants pointed out a number of instances that made them opine that the said report was falsified and classified to achieve extraneous purposes and to mislead and achieve ulterior motives.

90. In order for me to find that the report was falsified, this Court would have to interrogate the documentation filed herein as well as what took place during the deliberations in question. With due respect such a determination cannot be arrived at based on cold-print affidavits. I however agree and this is admitted by the Respondent that the said report contains errors and that some of the minutes were unsigned.

91. However the material placed before me does not meet the threshold for committal for contempt.

92. Having said that, I must however put the Respondents on notice that in carrying out their mandate they must strictly adhere to the dictates of Article 10 of the Constitution. In implementing the policy in question they must ensure that their actions are transparent and accountable and must pass the test of good governance. To paraphrase this Court's decision in **Robert N. Gakuru and others –versus- The Governor, Kiambu County and Others, Petition Number 532 of 2013 Consolidated with Petition Numbers 12, 35, 36, 42 and 72 of 2014**, the programme was meant to uplift the lives of those for whom it was meant thus fulfilling the constitutional obligation placed on the State by Article 43(3) of ensuring that the right to accessible and adequate housing and reasonable standards of sanitation is attained. That right in my view does not simply require a roof over one's head but a decent housing that ensures that the right to one's dignity under Article 28 becomes a reality. This was the position of the South African Constitutional Court in **Government of the Republic of South Africa and Others vs. Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169** where it was held *inter alia* that:

“The concept of minimum core obligation was developed by the committee to describe the minimum expected of a state in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a “minimum essential level” that must be satisfied by the states parties. The committee developed this concept based on “extensive experience gained by [it]...over a period of more than a decade of examining States parties’ reports.” The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the Covenant. The committee has also used the general comment “as a means of developing a common understanding of the norms by establishing a prescriptive definition.”¹Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law...Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be

ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test... All levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms, and all state action in relation to housing falls to be assessed against the requirements of section 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.”

93. Therefore the programme ought not to be turned into an avenue for rewarding friends, relatives, cronies, supporters and court jesters. Where it is satisfactorily proved to this Court that the said programme is being implemented in violation of the said principles this Court will not hesitate to intervene and to bring the Respondents’ actions back on track. The project in question must not be turned into a cash cow for the few or turned into an avenue for lining people’s pockets with ill-gotten money at the expense of the genuinely deserving Kenyans for whom it was mooted and who have had to bear the brunt of its implementation.

94. On the other hand the applicants must co-operate with the Respondents for the success of the programme so that they may realise the fruits thereof. They should not unduly place road blocks at each and every stage of its implementation but ought to only come to Court for necessary directions which are geared towards the success thereof. That was the reason this Court left the window open when it gave the parties the liberty to apply. It was not meant to obstruct the implementation thereof but to fulfil it.

95. Having said that the matter before me is not seeking further directions but contempt orders. I have found that based on the material before me I cannot find the Respondents guilty of contempt.

96. In the premises I decline to grant the orders sought herein. There however will be no orders as to costs.

97. It is so ordered.

Dated at Nairobi this 25th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Midenga for the ex parte applicants

Miss Ochieng for Mr Ojienda for the interested party

CAOoko