REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 56 OF 2016

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA SECTIONS 8 AND 9

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 47 AND 49

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

CABINET SECRETARY, MINISTRY OF EDUCATION.....RESPONDENT

AND

THE ATTORNEY GENERAL.....….....….INTERESTED PARTY

EXPARTE: THADAYO OBANDA

RULING

Introduction

1. On 3rd March, 2017, this Court issued the following orders:

1. An order of Certiorari removing into this Court for the purposes of being quashed the decision of the respondent dated 16th January, 2016 and communicated through the Daily Nation Newspaper to purportedly reconstituting the governing council of the University of Nairobi which decision is hereby quashed.

2. An order of Certiorari removing into this Court for the purposes of being quashed the decision of the respondent dated 16th December, 2015 preventing the governing council of the University of Nairobi from discharging its statutory mandate which decision is hereby quashed.

3. An order of Prohibition directed at the respondent prohibiting him from unlawfully interfering or in way whatsoever meddling with the composition of the governing council of the University of Nairobi.

4. An order of Prohibition directed at the respondent prohibiting him from unlawfully interfering or in way whatsoever meddling in the composition of the management of the University of Nairobi.

5. Half the costs of this application are be awarded to the ex parte applicant.

2. By a Notice of Motion dated 27th July, 2017, the *ex parte* applicant herein, **Thadayo Obanda,** has now moved this Court seeking the following orders:

1. That the Notice of Motion application be certified as urgent and service be dispensed with at the first instance.

2. That this court be pleased to order the respondent herein to appear before this court to show cause why contempt of court proceedings should not be commenced against him.

3. That the costs of this application be borne by the respondent.

***Ex Parte* Applicants' Case**

3. According to the applicant, on 3rd March 2017, this court issued orders quashing the respondent's decision to reconstitute the governing council of the University of Nairobi as well as an order prohibiting the respondent from unlawfully interfering with the composition of the council and the management of the University of Nairobi. However, the respondent nonetheless went ahead and declared vacancies in the governing council of University of Nairobi, notwithstanding the court orders, particularly for the positions of the chairperson and members of the governing council of University of Nairobi by way of advertisement of the above positions thereby inviting applications from the public for the aforementioned positions.

4. It was further averred that on the 10th March 2017, the respondent caused the successful applicants to be gazetted and subsequently appointed as Chairperson and members of the council of the University of Nairobi and revoked appointments of three members of the existing council.

5. To the applicant, such actions fly in the face of this court's orders as the respondent has wilfully disobeyed this court's judgment and decree by purporting to reconstitute the governing council of the University of Nairobi.

6. It was disclosed that the respondent, being dissatisfied with this court's judgment, went ahead to file a notice appeal on 16th March 2017 but has to this date failed to file its appeal at the Court of Appeal. To the applicant, a notice of appeal does stay and/or discharge this court's judgment and any party seeking for stay ought to make a formal application either before this court or from the court of appeal.

7. It was therefore the applicant's contention that the actions of the respondent, a state officer, are therefore in bad faith, accentuated by malice, in connivance and in total disregard and/or neglect of this court's judgment and based on legal advice he believed that it is an obligation of every person to whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged even where one believes it to be irregular or void. To the applicant, no person, be it a state officer or an ordinary citizen is above the law, and it is therefore in the interest of justice, and in the spirit of the Constitution and the rule of law that the respondent be ordered to appear before this court to show cause why contempt of court proceedings cannot be commenced against him.

Respondents' Case

8. The application was opposed by the Respondent.

9. According to the Respondent, the Cabinet Secretary, Ministry of Education, he was compelled through

an order of *mandamus*, in the **Joseph Mberia Mutuura & Another vs. Cabinet secretary Ministry of Education, Science and Technology & 2 Others (2104) KLR**, to commence the reconstitution of the council of Jomo Kenyatta University of Agriculture and Technology (JKUAT) in line with the provisions of section 36(1)(d).

10. It was the Respondent's case based on legal advice that: As to whether the order in the ***Joseph Mberia Mutuura Case*** applied to all public universities, the matter was settled in the decision by **Nduma Nderi, J** in the case of Petition No 23 of 2016 when the Judge declared that: "*The decision in Petition No. 33 of 2013 - Joseph Mberia Mutuura & Another vs. Cabinet Secretary for Education and another spells the legal position clearly on this matter and the same has not been set aside by the Court of Appeal. Accordingly, any university council that is in existence and its term has not expired, is subject to reconstitution in terms of the new constitutional dispensation. It is only a council that was constituted before the 2010 constitution took effect that may survive the effect of the decision in Joseph Mberia Mutuura case*".

11. It was the Respondent's position that the now expired Council of the University of Nairobi was appointed on 31st July 2013 vide Gazette Notice no 11529 published in Vol. CXV No. 115 dated August, 8th 2013, for a period of four (4) years and that the decision in Petition No. 23 of 2016 was rendered on March 2nd, 2017 and that the decision in JR. 56 of 2016 rendered a day after on March 3rd 2017.

12. According to the Respondent, upon taking over as the Cabinet Secretary for Education in mid-December 2015, **Dr. Fred Matiang'i**, faced with numerous litigations against the University Councils as a result of the determination in the ***Joseph Mberia Mutuura Case*** and informed by the decision in Petition No 23 of 2016, decided to place a public advertisement on the in February, 2017 declaring vacancies in the University of Nairobi Council among others. It was disclosed that of all public universities whose councils were reconstituted through the open and competitive process as directed by the Court, University of Nairobi's Council is the only one which is a subject of litigation.

13. It was disclosed that on 10th March 2017 the Respondent appointed six (6) persons to serve as members of the University of Nairobi Council in full compliance with the decision in Petition No.23 of 2016 which had declared the University of Nairobi Council as having been irregularly appointed. In making his appointment, it was averred the Respondent the Cabinet Secretary forgot to revoke the terms of the three members ((**Dr. Sanjay Advani**, **Pascalia Koske** and **Lucy Kiyiapi**) whose term had "not" expired and were to expire on 31st July 2017, hence the council ended up with 12 members instead of nine members. In view of the foregoing, on 5th April 2017, the Cabinet Secretary issued another Gazette Notice No. 3236 published on 7th April 2017, reappointing the six members (In GN 3236) and revoked the appointment of the three (**Dr. Sanjay Advani**, **Pascalia Koske** and **Lucy Kiyiapi**). Therefore, the gazette notice No2334 which forms the basis of JR. No. 131/2017 stands withdrawn.

14. It was averred that unknown to Cabinet Secretary, while he was implementing the Court's directive issued in Petition 23 of 2016, there was another Court order in JR. No.56 of 2016 issued on March 3rd, 2017 affecting his ability to act in accordance with the provisions of section 36(1). In the Respondent's view, the Cabinet Secretary continues to run the risk, including contempt proceedings, of conflicting decisions from courts of similar ranking (but of different divisions) that handled these matters regarding the University of Nairobi Council.

15. It was disclosed that the Cabinet Secretary proceeded on the basis of **Justice Nduma's** determination which came earlier to the Respondent's attention other than the judgement in JR No. 56 of 2016 which came in later.

16. In the Respondent's view, the Cabinet Secretary's action was further strengthened by the decision in Petition No. 68 of 2016 - **Elgeyo Marakwet Civil Society Organization Network vs. the Ministry of Education and 2 Others**, where this Court made the following determination: " from the foregoing discourse, I find that the actions of the 1st and 2nd respondent to advertise the positions of members of council of Jomo Kenyatta University of Agriculture and Technology were not irregular, unprocedural and

unconstitutional. I further find that section 36(1) of the universities Act is neither inconsistent with the constitution nor un-constitutional".

17. Based on legal advise from the Attorney General, the Respondent believed that the Respondent acted within the law in making the appointments of the six council members to the University of Nairobi Council for reasons that:

I. He acted in obedience to the court orders issued in Petition No 33 of 2013, No 23 of 2016 and No 68 of 2016.

II. That the cabinet Secretary's conduct does not in any way undermine the rule of law and the dignity of this court and does not in any way, erode public confidence in the administration of justice. If anything, the orders given in No 56 of 2016 conflict with the earlier orders and the Cabinet Secretary is at a loss as to which orders to obey.

III. That the court order in JR No 184 of 2017, JR 131 of 2017 and JR No. 56 of 2016 ought to be read together with the court orders in Petition no. 33 of 2013, Petition No. 23 of 2016 and Petition No 68 of 2016.

18. The Court was urged to take note of the fact that the University of Nairobi has no operational Council since March 2017 when the court ruled in Petition No 23 of 2016 and that the continued absence of an operational Council at the University of Nairobi is a high risk to the affairs of the institution which could grind to a halt. It was disclosed that the last three members of the University of Nairobi Council whose terms had been protected by the various and contradicting Court orders, expired on 31st July, 2017 and that they have since acknowledged that with an 11 page Contemptuous letter to the Cabinet Secretary, dated 26th July 2017.

19. To the Respondent, the effects of the non-implementation of gazette notice number 7609 and 7610 dated 31st July 2017 and published on 7th August, 2017 exposes the University of Nairobi to greater risks than the harm the applicant could suffer if the new council is in place. Further, the effect of staying the implementation of gazette notice no. 7609 and 7610 exposes the university to audit, and accountability queries. In the absence of a functioning council, the academic programs of the university, financial obligations and statutory reports cannot be produced and approved as per the requirements of the ***State Corporations Act***, and the ***Universities Act***.

20. It was therefore the Respondent's position that the Applicant's Notice of Motion, verifying affidavit and Statement dated 27th of July 2017, are baseless, misconceived and devoid of any merit and that the orders sought should not be granted since the actions of the Cabinet Secretary/Respondent were in good faith, not accentuated by malice nor in disregard or connivance and/or neglect the Court order.

21. Based on legal advice from the Attorney General the Respondent while appreciating that it is the obligation of every person to whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged, contended that in this case, the Cabinet Secretary is faced with two contradictory orders, he is at a loss at to which order he should obey, much as he continued with the reconstitution of the councils to forestall further litigation.

Determination

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

23. 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".**

24. 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".

25. In this case, it is clear that the Respondents are aware of the orders of this Court given on 3rd March, 2017. Accordingly the issue of service does not fall for determination in these proceedings.

26. However, the Respondent's case is that in light of the orders issued in other related matters in particular Petition 23 of 2016, he had no option but to obey the said order. In other words, it was the Respondent's case that he chose which amongst the said orders, which in his view, were conflicting, to obey.

27. In my view the Respondent, if he was of the view that there were conflicting Court decisions ought to have moved the Court for appropriate orders including review. Alternatively he could have, as he did, filed a notice of intention to appeal, and sought an order staying this Court's decision instead of choosing to simply disregard this Court's decision. In other words members of the executive arm of the Government have no prerogative to decide which Court orders they will obey and which ones they will not. Where there is a conflict in Court orders it is only the Courts that can resolve such conflicts.

28. 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."**

29. 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."**

30. I similarly agree with the decision in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013** that:

> **"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 on 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."

31. 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."

32. In **Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors JR No. 2 0f 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."

33. 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.

34. 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. This Court having made a decision which decision has not been stayed, to contend that the decision cannot be implemented in light of the existence of other alleged decisions is in my view the highest height of invincibility coming from a State Officer such as the Respondent. This Court in its earlier judgement having noted that the Attorney General had given his legal opinion to the Respondent advising him not to interfere with the running of Universities, expressed itself as hereunder:

"In this case the Court was informed vide submissions that upon the Attorney General giving his opinion in the matter, the CS beat a hasty retreat and rescinded the letter dated 16th December, 2015. If this indeed happened it would be a move in the right direction as this was the position taken by Nyamu, J (as he then was) in Midland Finance & Securities Globetel Inc vs. Attorney General and Another [2008] KLR 650 in which the Learned Judge cited with approval the decision Bank of Uganda vs. Banco Arabe Espanol [2007] EA 333 that:

'The opinion of the Attorney General as authenticated by his own hand and signature regarding the laws…and their effect or binding nature or any agreement contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents…It is improper and untenable for the Government…or any other public institution or body in which the Government…has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interest of 3rd

parties. As a country we must have and maintain an acceptable measure or standard of public morality and the Attorney General should be held to his bargain, both on the ground of public morality and on the principle of good faith (*pacta sunt servanda*).'

It is therefore highly advisable for public servants and government and institutions to seek the legal opinion of the Attorney General in areas where they are not sure of their action or propose action and abide by the same in order to avoid rushing in decision which may well turn out to be reckless and unlawful hence subject the tax payer to unnecessary costs. In this case however there was no affidavit and therefore the communication purportedly rescinding the impugned decision was not properly placed before the Court."

35. 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 supreme that 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.

36. In **Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478,** it was held that:

"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong…or which infringes a man's liberty…must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."

37. Emukule, J in **Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] eKLR** eloquently expressed himself at para 140 that:

"The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action.

38. In **Liverside vs. Anderson [1942] AC 206 at 244**, **Lord Atkin** held that:

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law."

39. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is properly exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

13. Professor Sir William Wade in his authoritative work, ***Administrative Law***, 8th Edition at page 708 states that:

> **"The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."**

40. It is in fact decreed in Article 4(2) of the Constitution that our Republic is a multi-party democratic State founded on the said national values and principles of governance. It therefore follows that to disregard the said principles is to disrespect the very foundation upon which our Republic is built.

41. As was held by **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010**:

> **"The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under bill of rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers."**

42. To paraphrase the Judge, recent events in this country has evinced a clear indication that some people in the executive arm of this country have not tried to understand and appreciate the provisions of the Constitution of Kenya, 2010. It also shows yester years' impunity is still thriving in that arm of the Government.

43. 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.

44. 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.

45. Having so said, in this case it is clear that either the Respondent did not read this Court's judgement or failed to understand the same. In its judgement this Court cited section 6(2) of the ***State Corporations Act*** which provides for the circumstances for cessation of office holding and found that in the absence of any factual averments controverting the averments by the applicant, there was no evidence that conditions had arisen that justified the reconstitution of the University Council. The Court therefore did not hold that the 1st Respondent had no powers generally to reconstitute the Council but that the conditions had not arisen to warrant his exercise of such powers.

46. In **Elgeyo Marakwet Civil Society Organization Network vs. the Ministry of Education and 2 Others** (supra), the Court was called upon to deal with the question whether the actions of the 1st and 2nd Respondents in advertising the positions of the members of Jomo Kenyatta University of Agriculture and

Technology were irregular, unprocedural and unconstitutional. In its determination the Court found that that action was neither irregular, unprocedural nor unconstitutional.

47. It is therefore clear that the two decisions can neither be said to have been contradictory, nor do they contradict the decision of **Nduma Nderi, J** in **Joseph Mberia Mutuura & Another vs. Cabinet Secretary for Education and Another** (supra).

48. Therefore for this Court to find that the actions of the Respondents subsequent to the delivery of the judgement herein were in contempt of Court the Court must necessarily find that the conditions prevailing as at the time the actions alleged to be in contempt of Court were committed were the same as the conditions prevailing at the time of the delivery of the judgement. If the conditions were the same, the mere fact that the 1st Respondent's action constituted a new cause of action would not absolve him from being subjected to contempt of Court proceedings. In my view a person who takes an action either during the pendency of legal proceedings or thereafter with a view to craftily avoiding or dodging the legal consequences of such proceedings cannot escape the Court's censure.

49. However as a general rule, there is no bar to an authority who, upon realising that its actions are unlawful correcting the same during the pendency of the legal proceedings.

50. When all is said and done, the Court will only punish for contempt if satisfied that the terms of the order are clear and unambiguous and that the respondent has a proper notice of the terms and the breach of the order has been proved to the required standards. In this case I do not have sufficient material on the basis of which I can find that the conditions prevailing as at the time the actions alleged to be in contempt of Court were committed were the same as the conditions prevailing at the time of the delivery of the judgement. I therefore am unable to find that the Respondent's action subsequent to the judgement was taken in contempt of the decision of this Court.

51. In the premises this application fails and is dismissed but with no order as to costs.

52. It is so ordered

Dated at Nairobi this 22nd day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chimau for the Respondents

CA Ooko