REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 51 OF 2018

BETWEEN

MIGUNA MIGUNA…….....…….....……PETITIONER

VERSUS

DR. FRED MATIANG'I, CABINET SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT.....….1ST RESPONDENT

RTD MAJOR, GORDON KIHALANGWA

DIRECTOR OF IMMIGRATION….....……2ND RESPONDENT

JOSEPH BOINETT, INSPECTOR GENERAL OF

POLICE NATIONAL POLICE.....3RD RESPONDENT

GEORGE KINOTI,

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

SAID KIPROTICH, OFFICER IN-CHARGE THE FLYING SQUAD KENYA POLICE SERVICE OCPD….....…..……..…….5TH RESPONDENT

JOMO KENYATTA INTERNATIONAL AIRPORT.....….6TH RESPONDENT

HON. ATTORNEY GENERAL….....….....….....7TH RESPONDENT

AND

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS….....….....……....1ST INTERESTED PARTY

LAW SOCIETY OF KENYA….....…….2ND INTERESTED PARTY

RULING

1. On 27th March, 2018, **Aburili, J** directed that the Petitioner herein, **Miguna Miguna** be forthwith released to appear before this Court today for the mention of this matter.

2. That order was not complied with by the Respondents who acknowledged that they were duly served and were aware of the Court order.

3. When this matter came before me this morning I found as a fact that the Respondents had failed to comply with the said order and directed that the order be complied with before 2.30pm and that the 1st, 2nd and 3rd Respondents appear before me at that time.

4. In the morning when the matter was called out **Mr Mutinda** appeared for the Respondents. However in the afternoon **Mr Mutinda** was nolonger appearing and in his place were **Mr Odhiambo** and **Mr Munene**. **Mr Odhiambo** informed the Court that the said respondents were attending the pass out parade for the GSU the Recruits School and they were unable to get in touch with them. There was however no explanation as to why the petitioner had not been released.

5. It is therefore clear that there is completely no reason why the orders of this Court have not been complied with. This Court has afforded the 1st to 3rd Respondents an opportunity to show why they cannot be held in contempt but they have deciding to go into hiding instead.

6. Article 10 of the Constitution of Kenya provides as hereunder:

> ***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***
>
> ***(a) applies or interprets this Constitution;***
>
> ***(b) enacts, applies or interprets any law; or***
>
> ***(c) makes or implements public policy decisions.***
>
> ***(2) The national values and principles of governance include—***
>
> ***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
>
> ***(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
>
> ***(c) good governance, integrity, transparency and accountability; and***
>
> ***(d) sustainable development.***

7. In my view obedience of Court orders is one of the tenets of the rule of law and contempt of Court would not be countenanced in a constitutional democracy such as ours where the rule of law is expressly stated in Article 10 to be one of the values and principles of governance that supremely bind all State organs, State officers, public officers and all persons whenever any of them, *inter alia*, enacts, applies or interprets any law or makes or implements public policy decisions.

8. **I**n **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."

9. **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."**

10. 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."**

11. 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.

12. **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."**

13. 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.

14. 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.

15. 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."**

16. 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."**

17. 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."**

18. 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."**

19. 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 and that some members of the executive are behaving as if they are law unto themselves and that the positions they occupy are their birth rights. They must know that the said positions are courtesy of the Constitution which they must bow to however powerful they are. I agree fully with the position in **Jones vs. Clinton 36F. Supp. 2nd 1118; 199 US dist. LEXIS 4515**.

20. 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.

21. 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.

22. In this case it is clear that the Courts have been left baby-sitting its orders while those to whom the orders are directed are carrying on their business unperturbed. That state of affairs cannot be permitted to continue. Those who chose to disobey Court orders must be made to answer for their actions or inactions.

23. This Court's powers are derived from Article 1(3)(c) and 159(1) of the Constitution. Quite apart from the ***Contempt of Court Act***, this Court as the temple of justice must uphold the letter and spirit of the Constitution and must superintend its orders to ensure that the same are obeyed. Its supervisory jurisdiction is not conferred under that Act. Instead in ensuring that the judicial powers and the sovereignty of the people is upheld the Court must draw from its inherent powers. In **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65** it was appreciated that the Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court's inherent power lies in the nature of the High Court as a Superior Court of judicature.

24. That the Court retains a residual power in nolonger in dispute. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself *inter alia* as follows:

> **"It is therefore accepted that the court retains…a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."**

25. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 Of 2005** held:

> **"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."**

26. It is clear that unless compelled to do so the Respondents do not intend to obey the orders of this

Court under any circumstances but will instead continue doing so as long as no action is taken against them.

27. I have stated before that it is time those who deliberately violate the Constitution despite being directed by the Courts took responsibility for their actions. This Court has had occasion to deal with the same issue in Judicial Review Case No. 2 of 2014 - **Kenya Country Bus Owners' Association & Others vs. Cabinet Secretary for Transport & Infrastructure & Others**, a matter which similarly involved a member of the Cabinet, the then Cabinet Secretary for Transport & Infrastructure, **Eng. Michael S M Kamau,** in which the Court expressed itself as hereunder:

> **"It is trite that in order to safeguard and preserve the dignity and authority of the Court, the Court has powers to make any necessary orders which in my view include an order that a particular public or state officer whose conduct the Court finds reprehensible pays the Costs of litigation. Such decision, however, is an exception to the general rule and the jurisdiction to do so is not to be invoked lightly. It is only to be made where the Court is convinced that the action taken by that officer was taken with impunity in disregard of the consequences… Where the action was taken as a result of a *bona fide* mistake or error of judgement on the part of the officer, it is my view that he ought not to be held personally liable. However where from the circumstances it is clear to the Court that the officer took the particular action not caring whether it was wrong or not or for malicious or other extraneous purposes or where the officer deliberately decides not to disclose to the Court facts material to the issue before the Court either with a view to discrediting the legal process or in a manner amounting to playing lottery with the judicial process, the public ought not to be burdened by the consequences of such misadventures. This is reflected in Article 201(d) of the Constitution which provides that one of the principles guiding all aspects of public finance in the Republic is that public money shall be used in a prudent and responsible way… In my view the people of the Republic of Kenya by adopting and enacting to themselves and their future generations the Constitution and in particular the values and principles of governance in Article 10 wanted to change the way in which all State organs, State officers, public officers and all persons are to conduct themselves while applying and interpreting the Constitution, enacting, applying and interpreting any law and making and implementing any public policy decisions. By specifically enacting that in doing so the principle of accountability must be taken into account, in my view the people of Kenya intended to do away with the culture of impunity. Accordingly with the Constitution came the advent of transparency and accountability so that persons entrusted with decision-making powers must be transparent in, accountable and answerable for their actions personally without subjecting the people to the vagaries of their irresponsible actions which cause loss to the people of Kenya. It is not for nothing that it is therefore provided in Article 73(2) of the Constitution that the guiding principles of leadership and integrity include selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties and accountability to the public for decisions and actions. As was pronounced by the Supreme Court in Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR:**
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> > **'No State agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of ideosyncrasy or sheer might, to a scheme of progressive, accountable institutional interplays…The Constitution of 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed, constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens. The Supreme Court has a restorative role,**

in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.'

To penalise the public for such action would be to cultivate and abet the culture of impunity on the part of the public officers. Similarly where a public officer takes an action which is clearly meant to demean or bring judicial process into disrepute he ought to personally shoulder the consequences since such action cannot be said to have been taken on behalf of the public from whom the judiciary derives its mandate."

28. The tax-payers of this country ought not to be unduly burdened by being compelled to shoulder the consequences of people whose actions contravene the Constitution, the social contract between the governors and the governed, and expect the people, the principals of the governors on whose behalf the governors exercise sovereign power, to pay for the governors' sins. That there are cases where public officers may be held personally liable was appreciated by **Kasango, J** in **Daneva Company Limited vs. Kenya National Highways Authority [2014] eKLR.**

29. I am guided in my finding by the decision in **President of the Republic of South Africa vs. Office of the Public Protector and Others (Economic Freedom Fighters and Others Intervening) (79808/16) [2017] ZAGPPHC 748; [2018] 1 All SA 576 (GP)** (13 December 2017) where the North Gauteng High Court, Pretoria while penalizing the then South African Head of State, **Jacob Zuma** expressed itself as hereunder:

[47] My view is that in this case a simple punitive costs order is not appropriate. I say this because that would make the tax payer liable for the costs. This is a case where this Court would be justified in finding that this is an unwarranted instance for the tax payer to carry that burden. The conduct of the President, and the context of the litigation he initiated, requires a sterner rebuke. There is not the slightest doubt that, properly considered, the background of the matter and the circumstances of the litigation show that the President had no acceptable basis in law and in fact to have persisted with this litigation. In fact, the President's conduct amounts to an attempt to stymie the fulfilment of a constitutional obligation by the Office of the Public Protector.

[48] In *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* 2013 (5) SA 24 (SCA) para 64 the SCA specifically discussed the personal liability of public officials for legal costs. It said:

'In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the Board, cannot conclusively be said to constitute contempt of court. However that does not excuse their behaviour. The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude whilst acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the Board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs it is time for courts to seriously consider holding officials who behave in the high-minded manner described above, personally liable for costs incurred.' (Emphasis added).

[49] The finding made regarding the issues considered and discussed on this aspect can only result in one conclusion, that the President persisted with litigation and forced the intervening parties to incur costs in circumstances when this should and could have been avoided as well as delaying the release of the report. In so doing he clearly acted in flagrant disregard for the constitutional duties of the Public Protector. What is also aggravating is the fact that the President's application was based on self-created urgency. Simply put, the

President had become aware some six (6) months before his abortive application that the Public Protector was in possession of complaints implicating him *in* serious misconduct and he did nothing when he was invited for comment… [54]. if that conduct falls outside the confines of the Constitution, more particularly Chapter 5 thereof, we fail to see how such conduct can be regarded as conduct of the Head of State acting in his official capacity.

[55] In the final analysis the President's overall conduct leaves me one option but to find that he must be held personally liable for all the costs that were occasioned from 14 October 2016, when Fourie stated that the previous Public Protector had finalised the investigation and signed the report. The President compounded matters when he persisted with the litigation, based on a supposed typing error, after initially conceding that the report be released if indeed the Public Protector had finalised the investigation and signed the report.

30. This is not the only matter in which the same President was penalised in costs. A similar order was made by the South African Supreme Court of Appeal in **Jacob Gedleyihleksia Zuma vs. Democratic Alliance and Others [2017] ZASCA 146[2017] 4 All SA 726**.

31. This Court is well aware of the provisions of section 21(4) of the ***Government Proceedings Act***, Cap 40 Laws of Kenya, which provides that:

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any

Government department, or any officer of the Government as such, of any money or costs.

32. However the preamble to the ***Government Proceedings Act*** provides that it is:

An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters. [Emphasis added].

33. It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as judicial review proceedings and matters relating to the interpretation of the Constitution which fall under their own class. In other words they are proceedings *sui generis*. This was the position adopted by **Ringera J** (as he then was) in **Wellamondi vs. The Chairman, Electoral Commission of Kenya [2002] 1 KLR 286**,where he explained the legal position to be as follows:

"I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction sui generis."

34. See also **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995** and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

35. That the was position applies with equal force to matters seeking interpretation or application of the Constitution was appreciated by a three judge bench of this Court in **The Council of Governors and Others vs. The Senate and Others Petition No. 381 of 2014** (as consolidated with Petition no 430 of 2014) where the Court expressed itself as hereunder:

"It must be observed, first, that the present matter is not a civil matter relating to *"the affairs or property of government"* in the manner contemplated under the provisions of the Government Proceedings Act. The petition before us seeks the interpretation of the question whether an Act of Parliament is unconstitutional for violating the Constitution. It is brought under the provisions of Article 165 and 258 of the Constitution which grant the Court the jurisdiction to interpret whether an Act of Parliament is inconsistent with or otherwise in contravention of the Constitution. It cannot therefore be deemed to be *"civil proceedings"* as contemplated in the Government Proceedings Act. In our view, the provisions of section 12 of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution."

36. The rationale for this position to be found in **Masefield Trading (K) Limited vs. Rushmore Company Limited and Another [2007] 2 EA 288**, where it was held that:

"The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of government, which contains rules about the Government of the country…The Constitution is the supreme law of the land and the Constitution and the rules made thereunder do not provide for serving the notices that are required to be issued to the Attorney General prior to filing suits or applications in which there are allegations of breach of constitutional provisions. Once a party alleges violation of their fundamental rights, the court will hear them and the requirement of notices to the Attorney General like in civil cases does not arise."

37. Similarly, in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** it was held:

"The respondents have contended that this matter is time barred under the Limitation of Actions Act cap 22. However the Act does not apply to judicial review which is *sui generis*. "Suit" as defined in s 2 of the Civil Procedure Act means "all civil proceedings commenced in any manner, prescribed" "Action" under the Interpretation and General Provisions Act cap 2 means "all civil proceedings in a Court and includes any suit as defined in s 2 of the Civil Procedure Act." Since the actions set out in Part II of the Limitation of Actions Act cap 22 of the Laws of Kenya must have the same meaning as set out above, the Act has no application to judicial review matters and constitutional matters."

See also **Kibunja vs. Attorney General & 12 Others (No. 2) [2002] 2KLR 6.**

38. It is therefore clear that there is nothing barring the Court in appropriate cases from holding an officer of the Government individually liable where the conduct of that officer give rise to circumstances under which it would be unjust and oppressive to subject the public to either pay the money decreed or the costs arising therefrom or both. In other words there is no immunity from impunity. This is what I would call the lifting of the veil of the executive inscrutability and inoculation. For as **Theodore Roosevelt**, the 26th President of the United States of America once said:

"No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour''.

39. **Lord Denning's** similarly made it clear in **Gouriet vs. Union of Post Office Workers and Others (1977) CA** that:

"Be you ever so high, the law is above you."

40. It was therefore held in **President of the Republic of South Africa vs. Office of the Public Protector and Others (Economic Freedom Fighters and Others Intervening)** (supra) at paragraphs 45 and 46 that:

"[45] This demonstrates that the other unavoidable finding one must make is that the President was grossly remiss in ignoring all indications from 14 October 2015 that the previous Public Protector had finalised her investigation and signed the report. Whatever one may say about Fourie's statements in his affidavit of 14 October, the indications were clear from that day that the door had been firmly shut by the previous Public Protector. The recordal in the order of that day only emphasised the finality of that part of the previous Public Protector's investigation. A reasonable litigant would have realised this and aborted the application then and there.

[46] The President's persistence with the litigation; in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality, clearly amounts to objectionable conduct by a litigant and amounts to clear abuse of the judicial process. An abuse of the judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are naturally forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable basis to mulct the culpable litigant with a punitive costs order."

41. I am aware that this is not the first time the 1st Respondent is being penalised to make payment personally by this Court. That was the position in **Miscellaneous Civil Application No. 506 of 2017.**

42. Having considered the issues raised herein, it is my view and I hold that quite apart from the contempt of court proceedings, this Court must ensure that its orders are complied with. The matter before me is nolonger a dispute between the parties but has now reached the level where the judicial powers are on trial and the dignity of the Court is being questioned. This Court cannot just fold its arms while the Respondents continue to cat-walk on its orders.

43. In the premises I now make the following orders:

1. The 1st, 2nd and 3rd Respondents have by their conduct been contemptuous of the orders of this Court and are convicted accordingly.

2. The said Respondent to personally appear before this Court tomorrow at 10.00 am for sentencing and further orders. In default of their appearance the Court will proceed to mete out appropriate sentences their absence notwithstanding.

3. It is hereby directed that the Petitioner is not under any circumstances to be removed from the jurisdiction of this Court. Instead the Petitioner is to be unconditionally released forthwith to appear before this Court tomorrow at 10.00a.m. This order binds not only the Respondents but also the officers under then in whose custody the Petitioner has been placed.

4. The petitioner's lawyers are to be granted access to the petitioner.

5. It is however directed that unless the Petitioner is released forthwith, the said Respondents will not be granted the right of audience by this Court tomorrow.

44. It is so ordered.

Dated at Nairobi this 28th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of: