REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 441 OF 2016

In the matter of the Enforcement of Fundamental Rights and Freedoms of the individual under Articles 2,3,19,20,22, 23,27,47,48 and 50 of the Constitution of the Republic of Kenya 2010

and

In the matter of contravention of Rights and Fundamental Freedoms under Articles 27,47 and 50 of the Constitution of Kenya, 2010

and

In the matter of Kenya School of Law Act No.26 of 2012, Laws of Kenya

and

In the matter of the Fair Administrative Action Act No.4 of 2015, Laws of Kenya

and

In the matter of the unconstitutional decision by Director/Chief executive and Secretary, Kenya School of Law Board on expulsion of the Petitioner contained in a letter dated 1st December 2011

and

In the matter of an application by the applicant for an order of Committal to Civil Jail for Contempt of Court

and

In the matter of Director/Chief Executive & Secretary, Kenya School of Law Board and the Chief Executive /Secretary, Council of Legal Education

BETWEEN

Migiro Chadwick Kerama Mathius...…….....Petitioner

versus

Kenya School of Law.....1st Respondent

Director/Chief Executive Kenya School of Law.....2nd Respondent

Council of Legal Education.....3rd Respondent

The Honourable Attorney General.....4th Respondent

RULING

Introduction

1. *The background relevant to the determination of the application under consideration as far as I discern it from record is that on **10th** February 2017* the Petitioner applied for admission to the Kenya School of Law for the Advocates Training Programme in the year 2008. He received a letter stating that he was not qualified hence he was required to sit and pass a proficiency law examination. He applied for the proficiency examination, but when he went to sit for the examination he was informed that he was excluded on account of his **"A"** level certificate. Subsequently, he was admitted for the academic year 2009/2010. In November 2009 he sat for the bar examinations and passed only six units out of nine. Upon re-sitting the examinations, he was successful in one out of the three. He attempted again but failed in one.

2. He averred that in September 2011, he received a call from the Kenya School of Law claiming that he presented a forged receipt to register for the re-sit examinations. He denied the said allegations via e-mail. He averred that on **17th** July 2013, he made payment to the Kenya School of Law for the re-sit examination. He averred that on **11th** December 2013, he went to clear with the school but he was not issued with compliance certificate. Later, he stated he was given a letter expelling him from the school.

3. He avers that his appeal against the expulsion was dismissed without being accorded the right to be heard. He challenged the expulsion in this Petition on grounds *inter alia* that he was never invited to appear before the student Disciplinary committee, and that there was no record that his appeal was determined.

4. The first Respondent response was that it was discovered that the receipt the Petitioner presented belonged to another student, that he was invited to appear before the Student Disciplinary Committee on **29th** November, 2011 on a charge of suspected forgery of an official receipt, and that the Student Disciplinary Committee found him guilty of presenting forged receipts culminating in his expulsion from institution. His appeal was unsuccessful, hence, his registration to undertake re-sit examinations was inadvertent as he was no longer a student.

5. In a judgment rendered on **10th** February 2017, G. V. Odunga J. found that the decision rejecting or dismissing the Petitioners appeal was tainted with procedural irregularity. He quashed it and directed that the first and second Respondents herein to within **30 days** of service of the order to hear and determine the petitioners appeal in accordance with the law and to make a determination thereof.

Application for contempt.

6. By an application dated **12th** July 2017,the Petitioner moved this court seeking orders that:-

a. Spent

b. Spent

c. That this Honorable Court be pleased to order P.L.O. Lumumba the Director/ Chief Executive & Secretary, Kenya School of Law Board and the Chief Executive/Secretary, Council of Legal Education be committed to Civil jail for disobedience of the order of 10 February 2017 by the Hon. Justice G.V. Odunga suiting in the High Court o Kenya at Nairobi, in Petition No. 441 of 2016.

d. Spent.

e. That P.L..Lumumba the Director/Chief Executive & Secretary, Kenya School of Law and the Chief Executive/Secretary, Council of Legal Education do pay costs of this application personally.

7. The crux of the application is that the orders in question were served upon the Director/Chief Executive & Secretary, Kenya School of Law and the Chief Executive/Secretary, Council of Legal Education on behalf of the Respondents and that they acknowledged the same, and that they have ignored the said order.

Replying Affidavit

8. **Fredrick Muhia**, the Academic Manager of the first Respondent swore the Replying Affidavit filed on **4th** December 2017. He avers *inter alia* that he is aware of the orders in question, and that despite the orders having been issued by the Registrar of this Court on **22nd** February 2017, the Petitioner served it upon the Respondent on **4th** May 2017, and that by the time the order was served, there was no proper Board of the first Respondent to hear the appeal as terms of the Board members had lapsed on **6th** February 2017.

9. Further, he avers that, upon constitution of the Board, the Petitioner was invited to appear before the Board on **20th** July 2017 to prosecute his appeal, he appeared in the company of his advocate but failed to prosecute his Appeal, and that the Board was ready to hear the appeal the next Board meeting which was scheduled for April 2017, now past.

Petitioner's supplementary Affidavit

10. In his supplementary Affidavit filed on **12th** March 2018,the Petitioner/Applicant in response to the Replying Affidavit states that the appeal could not have been heard even if the order was served earlier since there was no Board in place and argues that the Respondents never applied for extension of the time.

Submissions

11. Despite the hearing date having been taken in court by consent, counsel for the first, second and third Respondents did not attend hearing. Further, the Honorable Attorney General was excused by the Court from participating in the application on grounds the orders sought do not affect the Hon. Attorney General.

12. Counsel for the Petitioner adopted the grounds in support of the application and the supporting Affidavit and urged the court to allow the prayers sought in the application. Counsel also submitted that the Respondents Replying Affidavit is not admissible on grounds that it is not sworn before a commissioner for oaths.

Determination

13. Whereas the plea by the Petitioners Advocate that I disregard the Replying Affidavit by the Academic Registrar of the first Respondent on grounds that it was not sworn before a Commissioner for Oaths looks appealing, it cannot escape the courts attention that the Petitioner never applied to have the said affidavit struck off upon being served with the same. Instead, he responded to it by way of the Supplementary Affidavit referred to above in which he admitted serving the court order late and argued that even if it was served earlier, it would not have made a difference either way, because there was no Board in place to hear the appeal. He also blames the Respondents for not applying for extension of time to comply. Ignoring, disregarding or striking out the said affidavit would in effect leave the Petitioners supplementary Affidavit hanging in the air. In any event, it is the court that drew the attention of the Petitioners' Advocates' to the fact that the said Affidavit was not commissioned.

14. Conduct of judicial proceedings is now entrenched in the constitution. Article **159 (2) (d)** provides that in exercising judicial authority, the courts and tribunals shall be guided by the principles enumerated therein among them— **(*d*)** *justice shall be administered without undue regard to procedural technicalities.* Whereas this court cannot condone an un commissioned affidavit, on the other hand, disregarding a Replying Affidavit which has already elicited a response from the Petitioner and allow the Response to remain will not serve the interests of justice. Further, the Petitioner having comprehensive responded to the contents of the Affidavit, it cannot be said that he will suffer any prejudice if the Affidavit is allowed to stand nor did counsel allege any prejudice at all. I therefore decline the invitation to disregard the contents of the said affidavit.

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

16. It is essential for the maintenance of the rule of law and order that the authority and the dignity of Courts is upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.[1]

17. 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 civilized societies from those applying the law of the jungle. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.[2] The Court does not, and ought not be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.[3]

18. A Court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. 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 realize 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.

19. It is a crime unlawfully and intentionally to disobey a court order.[4] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.[5] The offence has in general terms received a constitutional 'stamp of approval',[6] since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'[7]

20. In the hands of a private party, the application for committal for contempt is a peculiar amalgam,[8] for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

21. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*.'[9] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.[10] Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).[11]

22. These requirements – that is the refusal to obey should be both wilful and *mala fides*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.[12] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa,***[13]*** underlined the importance to the rule of law, of compliance with court orders in the

following terms:-

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

23. The High Court of South Africa[14] held that in order to succeed in civil contempt proceedings, the applicant has to prove ***(i)*** *the terms of the order*, ***(ii)*** *Knowledge of these terms by the Respondent*, ***(iii).*** *Failure by the Respondent to comply with the terms of the order.* Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.[15]

24. Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand****[16]*** have authoritatively stated as follows:-

> *"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-*
>
> *(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*
>
> *(b) the defendant had knowledge of or proper notice of the terms of the order;*
>
> *(c) the defendant has acted in breach of the terms of the order; and*
>
> *(d) the defendant's conduct was deliberate.*

25. On the face our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.

26. Two principals emerge. The *first* is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. The *second* reason is coherence:- it is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted: in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for rule of law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt.

27. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.'

28. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and *mala fide*, all the requisites of the offence will have been established. And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one'**:-**

> *'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'****[17]***

29. It is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.[18]

30. Applying the above principles to the facts of this case, I am not persuaded that *P.L.O. Lumumba the Director/ Chief Executive & Secretary, Kenya School of Law Board and the Chief Executive/Secretary, Council of Legal Education* willfully failed, refused and or neglected to obey the court order. *First*, it is admitted that the Petitioner served the order **90** days after it was issued. The Petitioners explanation for the late service is that even if he served, the Board was not in place, hence, the orders could not have been complied with in any event. Acknowledging the absence of the Board, which cannot be blamed on the alleged contemnors, he blames them for not applying to extent the orders when it is him who served late.

31. *Second,* upon being served, the first Respondent wrote to the Petitioner the letter dated **3rd** July 2017 also annexed to the applicants application inviting him to appear before the Kenya School of Law Board on **20th** July 2017 at **11.45** am. Curiously, this application was

filed on **12th** July 2017 in what appears to be a well calculated move to defeat the notice to attend before the Board on **20th** July 2017 and interestingly prayer two of the application under consideration sought an injunction to stop the said meeting.

32. One wonders how the first and second Respondents were supposed to proceed with the proceedings against which the Petitioner sought injunctive orders after he was served with the letter requiring him to attend and at the same time in the same application seeks to commit the first and second Respondent to prison for contempt for disobeying the court order which he is stopping them from complying with in the same application. This is total dishonesty and misuse of judicial process. The application is totally ill conceived, misguided and made in bad faith.

33. Put differently, the application seeks two diametrically opposed court orders. One prayer seeks to stop the first and second Respondents from complying with the court order. The other prayer is the opposite. It seeks to commit the first and second Respondents' for allegedly disobeying the same order. Such a great contrast leaves the court worried as to the purpose and intention of the applicant.

34. Clearly, with the above facts and conduct on the part of the application, it cannot be said by any stretch of imagination that the first Respondent and second Respondents or any of the Respondents willfully defied the court order.

35. The conclusion becomes irresistible that this application is misconceived, has no merits and is one for dismissal. Accordingly, I dismiss it. Since the Respondents did not attend court, I make no orders as to costs

Orders accordingly. Right of appeal.

Signed, Dated and Delivered at Nairobi this **19th** day of **April** 2018

John M. Mativo

Judge

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

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

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

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

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

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

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

[8] JRL Milton 'Defining Contempt of Court' **(1968) 85 *SALJ* 387:** 'The concept of contempt of court is one which bristles with curiosities and anomalies. Of the various examples which may be chosen to illustrate this point perhaps the most striking is that of the classification of contempts of court into civil contempt (or contempt in procedure) and criminal contempt.'

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

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

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

[12] See the formulation in *S v Beyers* **1968 (3) SA 70** (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 ('Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial

body, or interfering in the administration of justice in a matter pending before it') and CR Snyman *Strafreg* (4ed, 1999) page 329 ('Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike hoedanigheid, of van 'n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitstlag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding').

[13]Burchell v. Burchell, Case No 364/2005

[14] In the case of Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005

[15] Ibid, at page 4

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

[17]In De Lange vs Smuts **[1998] ZACC 6**; **1998 (3) SA 785** (CC) para 147.

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