REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 640 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL

REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 21(1), 22(1)(2) & (4)23, 25 (c), 27 (1), 40(1) & (3), 41(1) & (2), 43, 47(1) & (2), 50(2), 176 & 207 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN T HE MATTER OF THE INCOME TAX ACT, CAP 470 LAWS OF KENYA

AND

IN THE MATTER OF THE VALUE ADDED TAX ACT, 2013

AND

IN THE MATTER OF THE TAX PROCEDURES ACT, NO. 29 of 2015

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

BETWEEN

REPUBLIC……..…….....…..……APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY.....RESPONDENT

AND

EQUITY BANK LIMITED ….....……1ST INTERESTED PARTY

CO-OPERATIVE BANK LIMITED.....……2ND INTERESTED PARTY

CENTRAL BANK OF KENYA ……...……3RD INTERESTED PARTY

WEBTRIBE LIMITED ……...…..……4TH INTERESTED PARTY

EX PARTE: NAIROBI CITY COUNTY GOVERNMENT

RULING

Introduction

1. By a Notice of Motion dated 12th May, 2017, applicant herein, **Nairobi City County Government,** seeks the following orders:

1) That this Application be certified as urgent and service be dispensed with in the first instance;

2) That the Honorable Court do find that Patrick Ngugi Njoroge, John Njiriani, James Githii Mburu, J.W Nasieku and L.K Kipsanai senior management officials of the 3rd Interested Party herein; Central Bank of Kenya and the Respondent herein; Kenya Revenue Authority are in contempt of court for disobedience of the orders of this Court issued on 19th December 2016.

3) That upon grant of prayers 1 and 2 above, this honourable court do impose a fine and or a penalty of Kshs.10,000,000.00 (Kenya Shillings Ten Million) each against Patrick Ngugi Njoroge, John Njiriani, James Githii Mburu, J.W Nasieku and L.K Kipsanai and in default of payment of such fine to direct the attachment of all movable and immovable assets of the Respondent and the 3rd Interested Party including land and buildings be attached and sold in execution of this order to satisfy the penalty for contempt.

4) That upon grant of prayers 1 and 2 above, this Honourable Court do issue an order that the above mentioned Patrick Ngugi Njoroge, John Njiriani, James Githii Mburu, J.W Nasieku and L.K Kipsanai be committed to civil jail for a period of 6 months and to cease holding public office.

5) That the Court do issue an order that the above mentioned Patrick Ngugi Njoroge, John Njiriani, James Githii Mburu, J.W Nasieku and L.K Kipsanai do purge their contempt WITHIN 24 HOURS of the date hereof by remitting back the Kshs 1,017,393,208.00 (which is salary for Nairobi County employees) recovered from Nairobi County Recurrent Account and credited to the Domestic Taxes Income Tax Payee Account No 1000009877 in line with the Agency Notice dated 13th April 2017 issued by the Respondent.

6) That pending *interpartes* hearing of this application the Officer Commanding Station Central Police station or such officer as may be designated in the Kenya Police or Kenya Police Administration be ordered to ensure the compliance with the orders issued on 19th December 2016.

7) That pending the hearing and determination of the suit Officer Commanding Station Central Police Station or such officer as may be designated in the Kenya Police or Kenya Police Administration be ordered to ensure compliance with the orders issued on 19th December 2016.

8) Any other or further relief that this Honourable Court may deem fit to grant.

9) Costs of this application.

2. According to the applicant, it is a County Government established pursuant to article 76 of the Constitution and plays very key and crucial public role and functions to the residents of Nairobi including but not limited to garbage collection, street lighting, water and sanitation, provision of health care services and other crucial services and functions as assigned to county governments under part 2 of the fourth schedule of the Constitution of Kenya, 2010. It also has the responsibility and obligation to pay its huge workforce inherited from both the Local Authority and the National Government and pays a monthly salary of about Kshs 1,104,148,533.55 to its' employees.

3. The applicant referred to Article 207 of the Constitution which provides that:

(1) There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the Revenue Fund of a county government only—

(a) as a charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the county; or

(b) as authorised by an appropriation by legislation of the county.

(3) Money shall not be withdrawn from a Revenue Fund unless the Controller of Budget has approved the withdrawal.

(4) An Act of Parliament may—

(a) make further provision for the withdrawal of funds from a county Revenue Fund; and

(b) provide for the establishment of other funds by counties and the management of those funds.

4. It was averred that pursuant to Article 207(4)(a) of the Constitution, Parliament in its wisdom enacted the ***Public Finance Management Act***, 2012 which at section 109 thereof provides:

(1) There is established, for each county a County Revenue Fund in accordance with Article 207 of the Constitution.

(2) The County Treasury for each county government shall ensure that all money raised or received by or on behalf of the county government is paid into the County Revenue Fund, except money that—

(a) is excluded from payment into that Fund because of a provision of this Act or another Act of Parliament, and is payable into another county public fund established for a specific purpose;

(b) may, in accordance with other legislation, this Act or County legislation, be retained by the county government entity which received it for the purposes of defraying its expenses; or

(c) is reasonably excluded by an Act of Parliament as provided in Article 207 of the Constitution.

(3) The County Treasury shall administer the County Revenue Fund and ensure that the county government complies with the provisions of Article 207 of the Constitution.

(4) The County Treasury shall—

> ***(a) arrange for the County Revenue Fund to be kept in the Central Bank of Kenya or a bank approved by the County Executive Committee member responsible for finance and shall be kept in an account to be known as the "County Exchequer Account; and***
>
> ***(b) ensure that all money authorised to be paid by the county government or any of its entities for a public purpose is paid from that account without undue delay.***

(5) The County Treasury shall ensure that at no time is the County Exchequer Account overdrawn.

(6) The County Treasury shall obtain the written approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of—

> ***(a) an Act of the county assembly that appropriates money for a public purpose;***
>
> ***(b) an Act of Parliament or county legislation that imposes a charge on that Fund; or***
>
> ***(c) this Act in accordance with sections 134 and 135.***

(7) The approval of the Controller of Budget to withdraw money from the County Revenue Fund, together with written instructions from the County Treasury requesting for the withdrawal, is sufficient authority for the approved bank where the County Exchequer Account is held to pay amounts from this account in accordance with the approval and the instructions.

(8) Any unutilized balances in the County Revenue Fund shall not lapse at the end of the financial year but shall be retained for the purposes for which it was established.

(9) Financial reports shall be submitted to the Commission on Revenue Allocation with a copy to the Controller of Budget.

5. According to the applicant, in compliance with Article 207 of the Constitution and section 109 of the ***Public Finance Management Act, 2012***, the applicant maintains the County Exchequer Account in the Central Bank of Kenya (the 3rd Interested Party herein) to which all the County Revenue Fund is kept. Money cannot therefore be withdrawn from these account unless the Controller of Budget has approved the withdrawal as mandatory required under Article 207(3) of the constitution. It was disclosed that the Applicant also maintains accounts in Equity Bank and Co-operative Banks (the 1st and 2nd Interested Parties herein), where money approved by the controller of budget from the county exchequer account is paid in to and subsequently spent on intended purposes. Therefore, money released into these accounts is usually planned and budgeted for prior to its release.

6. According to the applicant pursuant to an application filed herein, this Court on 21st day of December 2016 allowed the Application in the following terms:

a.THAT leave be and is hereby granted to the Applicant to apply for judicial review order of CERTIORARI to remove into this Honourable Court and quash the agency notices dated 6th December, 2016 issued by the respondent to the 1st to 4th Interested Parties in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the applicant.

b.THAT leave be and is hereby granted to the Applicant to apply for judicial review order of PROHIBITION to remove into this Honourable Court and prohibit the Respondent from issuing

any other or further agency notice(s) to the 1st to 4th Interested Parties in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the applicant.

c.THAT a temporary order be and is hereby issued suspending the agency notices dated 6th December, 2016 issued by the respondent to the 1st to 4th Interested Parties in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the applicant until the hearing and determination of the Motion or further orders of the court.

d.THAT the Leave so granted do operate as a stay of issuance of any other or further agency notice(s) to the 1st to 4th Interested Parties by the respondent in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the applicant until the hearing and determination of the Motion or further orders of the court……"

e.THAT costs of and incidental to the application be provided for.

7. According to the applicant, the said order categorically suspended the Agency Notices dated 6th December, 2016 issued by the respondent to the 1st to 4th Interested Parties in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the applicant and stayed the issuance of any other or further agency notice(s) to the 1st to 4th Interested Parties by the respondent in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the applicant. The said order was served on all the parties herein on the 22nd day of December 2016 and an Affidavit of Service to that effect filed in court**.**

8. It was averred that despite the existence, knowledge, service and receipt of the Court Order dated 19th December 2016, on 13th April 2017 the Respondent purported to issue an Agency dated 13th April, 2017 to the 3rd Interested Party under section 42 of the ***Tax Procedure Act, 2015*** demanding payment of Kshs. 1, 017,393,208.00 as tax due by the applicant to it. Despite the applicant vide its letter dated 20th April 2017 to the Respondent forewarning it of the outright act of contempt by its' officers through the issuance of the Notice dated 13th April 2017 no response thereto was received and the Applicant consequently issued the Respondent with a Contempt Notice as per section 30 of the ***Contempt of Court Act.***

9. It was averred that meanwhile, on 26th April 2017, in accordance with the provisions of the ***Public Finance Management Act 2012***, section 109(6) and section (2) of the ***County Appropriation Act 2016***, the Principal Finance Officer of the Applicant **Mr. Luke M. Gatimu** requested the Office of the Controller of Budget for the Grant of Credit on Exchequer Account of **Kshs. 1,093,000,000.00** from the County Revenue Account to the County Recurrent Account being part of recurrent expenditure for the period ending June 2017. Pursuant thereto, on 28th April 2017 the Controller of Budget **Mrs. Agnes Odhiambo** authorized the above requisition and granted credit to the County Treasury on account of the County Recurrent Exchequer Account of **Kshs 1,093,000,000.00** to the County Recurrent Operational Account for the services of the year ending 30th June 2017. To the County's shock, dismay and consternation, on 3rd May 2017 it received a letter from the 3rd interested party with the heading: "**AGENCY NOTICE ON NAIROBI COUNTY-KSHS 1,017,393,208.00"** which merely informed the Applicant that the Respondent had recovered **Kshs 1,017,393,208.00** from Nairobi County Recurrent Account and credited the same to the Domestic Taxes Income Tax Payee Account No 1000009877 in line with the Agency Notice dated 13th April 2017 issued by the Respondent.

10. According to the applicant, the enforcement of this Agency Notice dated 13th April 2017 was an outright act of disobedience and disregard of the court order dated 19th December 2016 as the order in clear and certain terms categorically suspended the Agency Notices dated 6th December, 2016 issued by the respondent to the 1st to 4th Interested Parties in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the applicant and stayed of issuance of any other or further agency notice(s) to the 1st to 4th Interested Parties by the respondent in respect of monies and/or accounts held by

the 1st to 4th Interested Parties on behalf of the applicant. To the applicant, the illegal enforcement therein is but a knowingly well calculated economic sabotage and blackmail of the Applicant by the Respondent to cow the Applicant to give in into the Respondent's outrageous uneconomically sustainable demands.

11. As a result, the Applicant averred that its operations have been completely paralyzed as it has no monies for its expenditures. More importantly, the funds herein that were illegally transferred to the Respondent's Account were solely meant to cater for the due salaries of the employees who are in the Applicant's payroll as per the letters dated 26th April 2017 and 28th April 2017.

12. It was the applicant's case that the said transfer was marred with illegalities as:

a. It was done in utter and outright disregard and disobedience of the Court Order dated 19th December 2016.

b. It was done in an outright violation of section 207(3) of the ***Public Finance Management Act*** as the County Exchequer Account was withdrawn without the approval of the Controller of Budget.

c. The money sought by the respondent from the county revenue fund is not a charge against the Revenue Fund that is provided for by any Act of Parliament or by any legislation of the county contrary to Article 207 (2) (a) of the Constitution.

d. The money sought to be obtained by the Respondent from the County Revenue Fund was not authorised by an appropriation by legislation of the county contrary to Article 207 (2) (b) of the Constitution.

13. The applicant averred that there is a lot of apprehension, unrest and tension in the Nairobi City Hall as the employees have not received their monthly salaries to date. It is therefore imperative that the Respondent be compelled to release the monies that were transferred to it by the 3rd interested party in violation of the order dated 19th December 2016 and the ***Public Finance Management Act*** to enable the Applicant meet its recurrent expenditures.

14. To the applicant, it is unreasonable and against public interest for the Respondent to have monies meant for the salaries of the citizens of the Republic of Kenya working for the Applicant transferred to itself with no regard whatsoever to their plight and the plight of their respective families as a mere show of might.

15. The applicant averred that unless the Application was allowed as prayed the employees of the Applicant were going to be subjected to untold turmoil as they would not receive their monthly salaries with the extremely high cost of living at play. The Applicant further risked having these employees down their tools for lack of pay for work done. More critically, the Applicant risked being subjected to several legal suits for violation of employees' rights through no fault of its own. The Applicant would further be unable to meet any of its recurrent expenditures and service delivery within the capital city of the Republic of Kenya will come to a complete standstill.

16. It was the applicant's case that its operations would be crippled and essential services offered by the Applicant including but not limited to garbage collection, street lighting, water and sanitation, provision of health care services and other crucial services and functions as assigned to county governments under Part 2 of the Fourth Schedule of the Constitution of Kenya, 2010 would be compromised to the detriment of the general public.

Respondent's Case

17. The application was opposed by the Respondent.

18. According to the Respondent, it is an Agency of the Government established under the ***Kenya***

Revenue Authority Act, Cap 469 Laws of Kenya and under section 5 (1) of the Act, it is charged with the responsibility of collection and receipt of all government revenue. Further, under section 5(2) with respect to the performance of its function under subsection (1), it is mandated to administer and enforce all provisions of the written laws as set out in Part 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

19. The Respondent averred that Article 209 of the Constitution of Kenya 2010 mandates the national government to impose *inter alia* income tax under the ***Income Tax Act***, Cap. 470 Laws of Kenya and the Value Added Tax, under the ***Value Added Tax Act, 2013***. It was averred that under section 37 as read together with section 38 of the ***Income Tax Act***, the Applicant herein is obligated to deduct from the emoluments of its employees Pay As You Earn (hereinafter referred to as **'PAYE'**)and account for tax thereon in such manner and remit the same as is provided under the said Act and that pursuant sub sections 2 and 5 of section 37 to the ***Income Tax Act***, if an employer paying emoluments fails to deduct, or having deducted fails to remit and/or account for the tax deducted thereon, then the Commissioner is entitled to recover from such an employer. Further the provisions of the of the Income Tax Act relating to the charging of interest, collection and recovery of the taxes shall apply to the employer as if the tax due and payable by the employer. To the Respondent, PAYE is a tax of the employee to whom the emoluments are being paid and the employer merely acts as an agent of the Respondent for the purposes of collection and accounting of the same. Accordingly, the Applicant, being a County Government is bound by the provisions of section 37 of the ***Income Tax Act*** pursuant to the provisions of section 38 of the same Act as read together with Rules 10, 11 and 12 of the ***Income Tax Act (PAYE) Rules*** made pursuant to the provisions of section 130 of the ***Income Tax Act***.

20. It was averred that in blatant breach of section 37 and section 38 of the *Income Tax Act* as read together with Paragraph 10 of the ***Income Tax Act (PAYE) Rules***, the Applicant herein having deducted PAYE from the emoluments of its employees failed, and continues to fail in remitting to the Commissioner PAYE in respect of its employees as required under the ***Income Tax Act***. It was averred that the ex-parte Applicant has not, and does not in the instant pleadings deny the fact that it deducted PAYE from the emoluments of its employees but has failed to remit the same to the Respondent in compliance with the provisions of the *Income Tax Act* and the Rules made thereunder.

21. As a result of the failure to remit the taxes as required under the provisions of the ***Income Tax Act***, the Respondent, after due notice to the ex-parte Applicant, invoked the enforcement and recovery measures against the ex-parte Applicant as provided for under section 42 of the ***Tax Procedures Act***, 2015 for the recovery of the tax debt.

22. To the Respondent, section 25A of the ***Value Added Tax Act*** No. 35 of 2013 obligates among others, Government Ministries, Departments and agencies (to which the Applicant is one) on purchasing taxable supplies, to withhold six percent (6%) of the taxable value at the time of paying for the supplies and remit the same directly to the Respondent. However, in blatant breach of section 25a of the **VAT Act, 2013** the ex-parte Applicant failed (during the period prior to the subject of these proceedings) and continues to fail (during the period subsequent to the Court order of 19th December 2016) to remit to the Respondent any VAT in respect of taxable supplies provided to it. Therefore having failed to remit the VAT as required under section 25A of the ***Value Added Tax Act***, 2013 the Respondent, after due notice to the ex-parte Applicant, invoked the enforcement and recovery measures against the ex-parte Applicant as provided for under section 42 of the ***Tax Procedures Act, 2015*** to recover the tax debt.

23. The applicant further averred that section 35 of the ***Income Tax Act***, Cap 470 Laws of Kenya as read together with Section 10 of the same Act places an obligation on the payer to withhold tax (withholding tax – hereinafter referred to as 'WHT') and remit the same to the Respondent. Section 35(6) of ***Income Tax Act*** provides that where a person fails to deduct this tax or having deducted fails to remit the same to the Commissioner on or before the twentieth day following the month in which the deduction was made or ought to have been made, commits an offence and shall, among others, become personally liable for the said tax. The Respondent reiterated that WHT under the ***Income Tax Act*** is a tax of the payee (the person who receives payment for the services offered) and the payer (the person who makes payment for the services received), in this case, the Applicant herein, only acts as an agent of the Commissioner for

the purposes collection and accounting for the said tax. Therefore the Applicant herein having deducted WHT in accordance with section 35 of the ***Income Tax Act*** failed to remit the tax to the Commissioner as is required by section 35(1)(e) and is therefore liable for the same pursuant to the provisions of section 35(6). Further, the ex-parte Applicant having failed to remit the WHT as required under section 35 ***Income Tax Act***, the Respondent, after due notice to the ex-parte Applicant, invoked the enforcement and recovery measures against the ex-parte Applicant as provided for under section 42 of the ***Tax Procedures Act***, 2015 for the recovery of the tax debt. As a result of the ex-parte Applicant's failure to comply with the provisions of section 35 of the ***Income Tax Act*** regarding WHT; section 37 of the ***Income Tax Act*** relating to PAYE and section 25A relating to VAT, the *ex-parte* Applicant for the tax period April 2013 to December 2015 owed the government a tax debt amounting to a total of Kenya Shillings Four Billion Seven Hundred and Seventy Six Million, Five Hundred and Sixty Thousand, Nine Hundred and Fourteen (Kshs. 4,776,560,914).

243. It was averred that from the ex-parte Applicant's tax information with the Respondent, for the tax debt amounting to Kshs. 909,566,231.00 for the periods prior to April 2013, the ex-parte Applicant herein applied for the abandonment of the taxes under section 123 of the ***Income Tax Act*** and the Respondent has vide its letter of August 2015 forwarded to the Cabinet Secretary, Treasury the ex-parte Applicant's request for abandonment and the same is pending consideration.

25. The Respondent also averred that on various occasions between the years 2014 to December 2016, the Respondent had written letters to the Applicant reminding it of the outstanding taxes of Kshs. 4,776,560,914 for the periods April 2013 to December 2015 and the ex-parte Applicant vide its letters of 19th October 2015, 21st October 2015, 26th January 2016, 24th February 2016, 6th April 2016, 29th April 2016, 29th September 2016, offered a payment plan to liquidate Kshs. 4,776,560,914 for the periods April 2013 to December 2015, a request which the Respondent accepted. Consequent to Applicant's actions of failing to honour its own pledges on liquidating the tax debt, the Respondent, in the exercise of its statutory powers under the relevant provisions of the tax law, issued Agency notices dated 6th December 2016, to various institutions namely Equity Bank, Co-operative Bank Limited, Webtribe Limited and Central Bank of Kenya demanding payment of the Kshs. 4,776,560,914**.**00 for the periods April 2013 to December 2015. Subsequent to the issuance of the said Agency Notices of 6th December 2016, the ex-parte Applicant, through a visit by their **Dr. Robert Ayisi**, the County Secretary and vide their letters of 9th and 13th December 2016, pleaded with the Respondent to lift the Agency Notices, and further promised to liquidate the tax debt, a promise which the Respondent again acceded to.

26. It was averred that according to the Applicant's letter of 9th December 2016, the ex-parte Applicant promised to make payments as follows;-

i. To pay Kshs. 50 Million immediately.

ii. To pay Kshs. 200 Million within the month of December 2016.

iii. To pay 500 Million during the month of January 2017.

iv. To pay another 500 Million within the month of February 2017.

27. Accordingly, the Respondent acceded to the Applicant's aforesaid request and lifted the Agency Notices of 6th December 2016 on 9th December 2016. It was averred that the ex-parte Applicant even went further and issued the Respondent with a commitment letter dated 13th December 2016 which was signed by **Gregory S. Mwakanongo,** the same person who has sworn the supporting affidavit for the Notice of Motion by the ex-parte Applicant in the **Nairobi JR. No. 640 of 2016: Nairobi City County – Vs – Kenya Revenue Authority & Others** and the instant application.

28. The Respondent lamented that despite the fact that the Agency Notices of 6th December 2016 had been lifted by the Respondent on the ex-parte Applicant request, the ex-parte Applicant still on 19th December 2016 proceeded and filed proceedings in the **Nairobi JR. No. 640 of 2016: Nairobi City**

County – Vs – Kenya Revenue Authority & Others seeking among others, to quash the Agency Notices of 6th December 2016. On the same date of filing the Application, the ex-parte Applicant, without disclosing to Court that the disputed taxes had in fact been expressly admitted as due and payable, obtained leave of this Court to commence judicial review proceedings in the **Nairobi JR. No. 640 of 2016: Nairobi City County – vs – Kenya Revenue Authority & Others**. Apart from obtaining leave, the leave so granted was also to operate as a stay of issuance of any other or further agency notice(s) to the 1st to 4th Interested Parties in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the Applicant until the hearing and determination of the Notice of Motion or further Orders of the Court.

29. t was erred that on 19th January 2017, the Respondent filed a Notice of Motion Application before this Honourable Court seeking to set aside the Orders of 19th December 2016 on the basis that the orders were obtained deceptively, the ex-parte Applicant having failed to disclose to the Honourable Court that they had expressly admitted the taxes as due and payable, a fact which was material for the court in considering the application for leave and stay. According to the Respondent, the other ground for the Respondent's said application of 19th January 2017 was also that the order as granted by the Court was unclear, omnibus in nature and therefore had the effect of effectively stopping the Respondent from undertaking its statutory mandate. It was averred that when the matter came up in Court on 13th March 2017, the Respondent sought to have its application seeking to set aside the orders of 19th December 2016 be heard first but the Honourable Court directed that the same be heard together with the main judicial review application on 23rd May 2017.

30. According to the Respondent, it duly complied, and continues to comply with the aforesaid Court directions and the order of 19th December 2016 and that it has never sought in any way to recover the tax debt of Kshs. 4,776,560,914 for the periods April 2013 to December 2015 which was the subject of the Agency Notices of 6th December 2016, which were being challenged under the **Nairobi JR. No. 640 of 2016: Nairobi City County – vs. – Kenya Revenue Authority & Others.**

31. However, from the ex-parte Applicant's tax records with the Respondent during the period October 2016 to March 2017, the ex-parte Applicant incurred a further tax liability of Kshs. 1,017,393,208.00 by failing to deduct and remit to the Respondent PAYE, VAT and WHT as required under the applicable tax statutes**.** Further the ex-parte Applicant still failed to honour their tax obligation for this period **(October 2016 to March 2017)** and the Respondent exercised its statutory powers under section 42 of the ***Tax Procedures Act***, 2015 by issuing an Agency Notice on 13th April 2017 to the Managing Director, Central Bank of Kenya in respect tax liability of Kshs. 1,017,393,208.00 for the tax period, October 2016 to March 2017 which was not the subject of the **Nairobi JR. No. 640 of 2016: Nairobi City County vs. Kenya Revenue Authority & Others.**

32. It was averred that since obtaining the Court Order of 19th December 2017, the ex-parte Applicant has failed and/or declined to remit any PAYE, WHT and VAT as required and the respective tax statutes. This is despite the fact that the ex-parte Applicant has in fact deducted and retained PAYE from the emoluments of its employees and other third parties as the case may be, for the respective months.

33. To the Respondent, the failure by the ex-parte Applicant to comply with the express statutory requirements undermines the rule of law and against public policy that should not be protected under the guise of a court order. In the Respondent's view, the Agency Notice of 13th April 2017 to the Governor, Central Bank of Kenya was for a different amount and related to a tax period subsequent to the period in dispute under JR. No. 640 of 2016, and therefore not covered by the Court Order of 19th December 2016. To the Respondent, the Court did not, and could not, in the Order of 19th December 2016 shield the ex-parte Applicant from complying with the provisions of the applicable statutes relating to PAYE, VAT and WHT in respect of subsequent tax obligations. Further, the Court did not, and could not in the Court Order of 19th December 2016 stop the Respondent from administering the provisions of the applicable tax statutes, including taking of enforcement and recovery measures against the ex-parte Applicant in respect of any taxes which became due and/or accrued from the ex-parte Applicant in the subsequent tax periods.

34. In the Respondent's view, to the extent that the Respondent's Agency Notice of 13th April 2017 was for the collection of outstanding taxes for the periods subsequent to that which the Order in the **Nairobi JR. No. 640 of 2016: Nairobi City County – Vs. – Kenya Revenue Authority & Others** relate, the Respondent could not be in any way be contemptuous of the Court Order of 19th December 2016.

35. The Respondent further contended that an Agency Notice issued by the Respondent under section 42 of the ***Tax Procedures Act, 2015*** is not in any way contrary to the Provisions of Articles 207 of the Constitution of Kenya, 2010 as alleged or at all since section 42 of the ***Tax Procedures Act, 2015*** is self-regulating in the sense that where a person who has been served with an Agency Notice is unable to comply due to reasons of lack of money held by them on account of or owing the taxpayer, then the person to whom the Agency Notice has been issued is at liberty to notify the Commissioner of the inability to comply. Where a person has notified the Commissioner (the Respondent herein) under section 42(6) of the ***Tax Procedure Act, 2015*** of its inability to comply with the Agency Notice, if the Commissioner is satisfied with the explanation, the Commissioner will accept the notification and cancel or amend the notice accordingly. In the circumstances, an Agency Notice is only to be complied by the person to whom it has been issued if and when funds held for, or on account of the taxpayer is available to the person who owes the taxes. Therefore the allegation by the ex-parte Applicant that the Agency Notice was meant to withdraw funds from its accounts is therefore untenable.

36. It was therefore asserted that the ex-parte Applicant is the author of its own misfortune, having failed to comply with the express provisions of the tax laws.

37. The Respondent averred that the instant application is bad in law and incurably defective for having been commenced by undated Notice of Motion accompanied by an undated Supporting Affidavit. Further the instant application does not lie and therefore incompetent the ex-parte Applicant having failed to demonstrate personal service of the Court order of 19th December 2016 on, **John Njiraini** and **James Githii Mburu.** To the Respondent, this application is incompetent and an abuse of the Court process the ex-parte Applicant having failed to clearly demonstrate in its application what the proposed contemnors, to wit, **James Githii Mburu** and **John Njiaraini** have individually done, or failed to do in relation to the Court Order of 19th December 2016 which makes them liable for the instant contempt proceedings.

38. It was averred that **John Njiaraini** and **James Githii**, the proposed contemnors, did not know the existence of the Court Order of 19th December 2016 and that no one had in anyway brought to their knowledge, the issuance of the said court order against the Respondent. Accordingly, the proposed contemnors cannot in law be cited for contempt on the strength of the Court Order of 19th December 2017 since the same did not have any penal notice clearly endorsed on it.

39. In the Respondent's view the prayers sought in this application cannot be granted since the ex-parte Applicant has failed to prove beyond reasonable doubt that the proposed contemnors had proper notice of the terms of the Court Order of 19th December 2016. Further, the ex-parte Applicant has failed to prove beyond reasonable doubt that the proposed contemnors had deliberately breached the Court Order of 19th December 2016 despite having the notice of the court order.

40. In the Respondent's contention, the instant application cannot succeed since the Court order of 19th December 2016 upon which it is based is omnibus in nature and therefore ambiguous and unclear. In addition, the instant application is premature and hopelessly incompetent for having failed to comply with the provisions of section 30 of the ***Contempt of Court Act, 2016***.

41. It was contended that subsequent to the Kshs. 1,017,393,208.00 having been collected by the Respondent via its Agency Notice of 13th April 2017, the National Treasury for which the Respondent is an agent, has already advanced to the ex-parte Applicant herein a sum of Kshs. 1.021 Billion to meet its financial obligations and commitments including payment of staff salary. Furthermore, the Respondent's action of issuing the Agency Notice of 13th April 2017 is backed by the law and therefore not contrary to the court order in JR Application No. 640 of 2016 and therefore not contemptuous as alleged.

42. The Respondent therefore prayed that not only the instant application be struck out, but that the main Judicial Review Application dated 19th December 2016**,** on which this application is predicated be struck out as well for being a nullity.

3rd Interested Party's Case.

43. The 3rd interested party, the Central Bank of Kenya (hereinafter referred to as "the CBK") opposed the application.

44. According to the CBK, it is a public institution established under Article 231 of the Constitution of Kenya, 2010 and is responsible for *inter alia* formulating monetary policy to achieve and maintain price stability and issuing currency. It is the adviser to and fiscal agent of and the banker for the government of Kenya; providing oversight of payment, clearing and settlement systems. It averred that the ex parte applicant's County Revenue Fund as provided under Article 207 of the Constitution and Section 109 of the ***Public Finance Management Act*** is currently held by the bank in an account known as the County exchequer Account.

45. The CBK disclosed that on 6th December, 2016, it did receive an agency notice dated the same day from the respondent amounting to Kshs 4,776,560,914 for payment pursuant to section 42 of the ***Tax Procedure Act, 2015*** as tax due by the Applicant in terms of PAYE and Withholding Tax. Subsequently on 16th December, 2016 the Manager, Debt Enforcement, Account Management and Refunds Division of KRA advised CBK to treat the said Agency Notice seeking payment of Kshs 4,776,560,914/= as suspended. However, on 13th April, 2017, the manager, Debt Enforcement, Account Management and Refunds Division of KRA sent a fresh Agency Notice to CBK copied to the Governor, Nairobi County seeking payment of Kshs 1,017,393,208/=. The said notice was received in CBK on 19th April, 2017 and there being no adequate funds in the Nairobi City County Recurrent and Development Accounts at the time, the CBK could not effect payment on the Agency notice. On 3/5/2017 following receipt of funds in the subject account and pursuant to section 42 of the ***Tax Procedures Act***, CBK effected payment on the fresh agency notice and duly advised KRA of the same vide a letter dated 3/5/2017.

46. According to CBK, it always receives agency notices relating to unpaid dues from Counties, Ministries, Departments and agencies that are in breach of their tax obligations with KRA; given the express, and unequivocal provisions of the ***Tax Procedures Act***, it is CBK's expectation that, KRA has conducted due diligence and adequately satisfied itself that the tax is indeed due and the tax payer has failed to remit the same.

47. According to CBK, based on the position taken by the Respondent, the orders do not apply to the agency notice issued on 13/4/2017. It was its case that if the amount was not due, had been inadvertently or erroneously claimed, or recovery was for whatever reason prohibited, KRA would have withdrawn the agency notice on 13/4/2017. In any event, the letter dated 20/4/2017 addressed to the Manager Debt Enforcement, Accounts Management and Refunds Division of KRA neither makes a reference, nor complains against the Agency Notice issued by the Respondent to the 3rd Interested Party, and only refers to the Agency Notice issued to Co-operative Bank Limited.

48. According to CBK, there being no order barring CBK from complying with the agency notice dated 13/4/2017 and the said agency notice not having been rescinded by KRA, the CBK's conduct in the matter at all times sought to achieve compliance with the ***Tax Procedures Act***, as failure to do so would attract criminal sanctions.

49. It was averred that the order was served upon the legal department of the CBK but the matter was not escalated to the CBK governor and no penal notice was served with the order. However CBK maintained that its role is to be a banker providing banking services; tasked to hold the monies and allow the respondent to receive deposits and make payments, and carry out transactions with the County Exchequer Account. However, the CBK maintained that it was not engaged, and or involved in the issuance, suspension, revocation and or renewal of agency notices, and is therefore not a party to any disputes as

between the Applicant and the respondent.

Determinations

50. Before dealing with the issues raised in this applicant, it is important to revisit the current position with respect to contempt of Court. Parliament vide Act No. 46 of 2016 enacted the ***Contempt of Court Act***, 2016 which was assented to on 23rd December, 2016 and commenced on 13th January, 2017.

51. According to the said Act contempt includes civil contempt means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court. It is therefore clear that the wilful disobedience of a judgement, decree or order properly constitutes contempt of Court. Section 30 of the said Act provides that:

> ***(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.***
>
> ***(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.***
>
> ***(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.***
>
> ***If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.***
>
> ***(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.***
>
> ***(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.***

52. It is therefore clear that before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice period proceed to commence contempt of court proceedings against the concerned accounting officer. In my view the thirty days' period is meant to enable the Attorney General to give legal advice to the entity concerned and thus avoid the necessity of contempt proceedings. Where however the entity believes that contempt of court proceedings ought not to be commenced, the entity is required to within the said period show cause, in my view preferably by way of an affidavit why the said proceedings ought not to be commenced. The Court will then determine whether cause has been shown or not based on the material before it. Without the rules of procedure having been promulgated it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard ex parte since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned.

53. Where no cause is shown and the contempt of court proceedings are commenced, the Court can however only find that officer guilty of contempt upon satisfactory proof that the said contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of the accounting officer. Such officer will then be liable to a fine not exceeding two hundred thousand shillings.

54. With respect to the contempt of court proceedings subsequent to the issuance of the notice to show cause, section 7(3) of the said Act provides that:

> ***"…any proceedings to try an offence of contempt of court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution."***

55. It follows that the rules of natural justice ought to be adhered to in respect of the proceedings subsequent to the notice to show cause. In this respect it is expected that the application seeking orders to commit for contempt ought to be served personally upon the person sought to be committed. Section 37 of the Act empowers the Chief Justice to make rules for the better carrying out of the purposes of the Act. Before the enactment of the Act, section 5 of the ***Judicature Act*** imported the procedure for contempt of court followed by the High Court of Justice in England. Whereas the said section was deleted by section 38 of the Act, the rules contemplated by section 37 have not yet been promulgated. In my view, in the absence of the rules of procedure the lacuna must be filled by the invocation of section 24 of the ***Interpretation and General Provisions Act*** which provides that:

> ***Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.***

56. The procedure existing before the enactment of the ***Contempt of Court Act*** was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court found that under Rule 81.4 of the ***Civil Procedure (Amendment No. 2) Rules***, 2012, which deals with breach of judgement, order or undertaking, the application for contempt is made in the proceedings in which the judgement or order was made or undertaking given by what is referred to as "application notice" which application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. In that case, the Court of Appeal held that leave or permission is nolonger required in such proceedings. In our case however, section 30(5) c0mplicates the procedure by stating that the contemnor, in case of a State organ, government department, ministry or corporation ***may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.***

57. In my view, to require an applicant to apply for leave to impose a sentence after the Court has been satisfied that a contempt of court has been committed by a State organ, government department, ministry or corporation would negate the provisions of Article 159(2)(d) of the Constitution. It is therefore my view that an applicant for contempt may perfectly apply for leave to fine the contemnor in the same application seeking that the Court finds the Respondent to be in contempt. To that extent the leave would only be with respect to mitigating factors and the sentence to be meted.

58. It is therefore my view that the procedure described by the Court of Appeal ought to be adopted with necessary modifications. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008,** Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law hence there cannot be a gap in the application of the rule of law. Therefore where there is a lacuna with respect to enforcement

of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst&Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

59.59. It has been recognised that the law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238**. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."

60. It is therefore clear that the law must adapt to the changing social conditions and where unlawful interference with a citizen's rights gives rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it since it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

61. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement. Accordingly the Courts should uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals is practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".

62. I have considered the application and the material on record.

63. According to ***Black's Law Dictionary***, 9th Edition at page 360:

"Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

64. In ***Halsbury's Laws of England*, 4th Edition Volume 9 at paragraph 52** it is stated:

"It is a civil contempt of court to refuse or neglect to do an act required by a Judgment or order of the court within the time specified in the judgment or order…A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation."

65. Similarly, in **Hadkinson vs. Hadkinson (1952) 2 All ER 56**, the judges of the Court of Appeal of England unanimously held that:

"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 unless and until it 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."

66. In ***The Law of Contempt,*** **Butterworths (1996) Pages 555 – 569** by **Nigel Lowe and Brenda Sufrin** it is stated that:

"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."

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

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

68. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**.

69. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

70. Similarly, in **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458,** it was held that:

"It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors."

71. In this case the Respondents have raised the issue that since the contemnors were not served they cannot be committed for contempt. The current legal position on personal service was restated by **Lenaola, J** (as he then was) in **Basil Criticos vs. Attorney General & 4 Others [2012] eKLR**, **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** that:

"…the law has changed and so as it stands today, knowledge supersedes personal service and for good reason…where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."

72. This position was adopted by **Musinga, J** (as he then was) in **Republic vs. Minister of Medical Services** and **Kimaru, J** in **Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR**. In the former case the learned Judge expressed himself as follows:

> **"Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court."**

73. As stated in ***Halsbury's Laws of England***, 4th Edn. Vol. 5 para 65:

> **"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise."**

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

75. In this case one of the orders that was issued by the Court was in the following terms:

> ***THAT the Leave so granted do operate as a stay of issuance of any other or further agency notice(s) to the 1st to 4th Interested Parties by the respondent in respect of monies and/or accounts held by the 1st to 4th Interested Parties on behalf of the applicant until the hearing and determination of the Motion or further orders of the court.***

76. The Respondent however argued that the order as granted by the Court was unclear, omnibus in nature and therefore had the effect of effectively stopping the Respondent from undertaking its statutory mandate. It was averred that when the matter came up in Court on 13th March 2017, the Respondent sought to have its application seeking to set aside the orders of 19th December 2016 be heard first but the Court directed that the same be heard together with the main judicial review application on 23rd May 2017.

77. However as this Court held in **Republic vs. Kenya School of Law & 2 Others Ex parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR:**

> **"Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification…Where it has been brought to the Court's**

attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres…this Court cannot turn a blind eye to the same."

78. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013**:

"The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

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

"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

80. 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 realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law. **Musinga, J** (as he then was) in **Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 "A" of 2004** was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement. Contemnors, the learned Judge held, undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute.

81. However, it must be noted that the contempt of court is an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. Therefore whereas the Court is entitled to take into account the fact that a proved contempt has been purged in deciding what punishment if any to mete, purging a committed contempt does not relieve a party from the consequences of a contemptuous act. This is so because in contempt of court proceedings as opposed to execution proceedings, the dispute is nolonger just between the parties before the Court, but the matter moves to higher pedestal as the dignity of the Court is now brought into question by acts of impunity committed by the contemnor.

82. 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.

83. However, where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, the Court cannot turn a blind eye to the same. As was held in **Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227:**

> **"It is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt… The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught."**

84. In this case it is clear that the Respondent was aware of the orders of this Court otherwise it would not have made attempts to have them set aside. It however decided to adopt legal ingenuity in order to evade the same. This Court cannot countenance such an action.

85. Therefore pursuant to section 30 of the ***Contempt of Court Act*** I find that no cause has been shown by the Respondent why contempt of court proceedings cannot be commenced against its offices. In the premises the applicant is hereby granted the liberty to proceed against the Respondent in terms of the said section. I however exonerate the 3rd interested party from any wrongdoing in this saga.

86. In the meantime and pursuant to the decision in **Hadkinson vs. Hadkinson** (supra) unless and until the Respondent purges its contempt, it will not be granted a right of audience before this Court.

87. The costs of this application are awarded to the ex parte applicant to be borne by the Respondent.

88. Orders accordingly.

Dated at Nairobi this 25th day of July, 2017

G V ODUNGA

JUDGE

Mr Makokha for the applicant

Mr Ado for the Respondent

Mr Ngugi for Mrs Mwangi for the 1st interested party

Mr Walukwe for Miss Weru for the 2nd interested party

Mr Murgor with Mr Ouma for the 3rd interested party

CA Mwangi