



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.92 OF 2015

BETWEEN

**SALOME NYAMBURA KANG'ETHE T/A SHALOM ENTERPRISES &
13 OTHERS.....PETITIONERS/APPLICANTS**

VERSUS

NAIROBI CITY COUNTY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

WILLIAM KANGOGO & 6 OTHERS.....ALLEGED CONTEMNORS

RULING

Introduction

1. The Applicants in the present Application are adults who carry out business in the Nairobi Central Business District, while the alleged contemnors are male adults employed by the Nairobi County Government as employees thereof.
2. The Petitioners/Applicants filed the present Petition on 12th March 2015 together with an Application under a certificate of urgency seeking orders that:

“1) This Application be certified as urgent and the same be heard exparte in the first instance.

2. ***Pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to issue conservatory orders against the 1st Respondent, its servants, employees, agents and/or directorate of city inspectorate or such other persons, or entity, restraining them from harassing, intimidating, arresting or in any manner whatsoever interfering with the running of the Petitioners' lawfully licenced businesses including disrupting of the business and confiscation of their stock in trade.***
3. ***Pending the hearing and determination of this Petition inter partes, this Honourable Court be***

pleased to issue conservatory orders against the 1st Respondent, its servants, employees, agents and/or directorate of city inspectorate or such other persons, or entity restraining them from harassing, intimidating, arresting or in any manner whatsoever interfering with the running of the Petitioners' lawfully licenced businesses including disrupting of the business and confiscation of their stock in trade.

4. ***The cost of this Application be provided for.***”

3. The grounds on which the Petition and Application were based included: that the Petitioners, as licenced businessmen and women, are legally entitled to operate their businesses within the Central Business District in Nairobi without harassment and unlawful arrests by the Nairobi City County Inspectorate Department; that the Nairobi City County Inspectorate Department officials on 2nd and 4th March 2015 unlawfully arrested and harassed them; that the Nairobi City County Inspectorate Department employees on 2nd and 4th March 2015 unlawfully and without any justifiable cause or authority confiscated their trading stock and failed to return the confiscated goods leading to loss thereof; that the Nairobi City County Inspectorate Department employees, with the aim of disrupting the Petitioners' businesses, arbitrarily and without any justifiable reason routinely arrest the Petitioners and bring up defective charges against them thus subjecting them to financial loss, physical and psychological suffering; and that the 1st Respondent's actions through its agents, servants and/or employees, of constantly and continuously arresting, charging and harassing the Petitioners, is disrupting and interfering with their businesses and intimidating their customers in contravention of national values and principles of good governance, rule of law, equity, human dignity, human rights and integrity.
4. The hearing of the Petition was set for 17th March 2015 on which the day the 1st Respondent and 2nd Respondent appeared but the Petitioners and their Counsel failed to appear. The Respondents were then directed to file their responses to the Petition for hearing on 24th March 2015.
5. However, on 18th March 2015, the Petitioners filed an urgent Application seeking orders that the conservatory orders they had prayed for (in prayer 2 of their original Notice of Motion) be granted. This Court, on 19th March 2015, having read the Application and noting that although the Application had been served on the Respondents, there had been no objection raised thereto, granted the prayer for Conservatory Orders restraining ***“the 1st Respondent, its servants, employees, agents and/or Directorate of City Inspectorate or such other persons, or entity from harassing, intimidating, arresting or in any way interfering with the running of the Petitioners' lawfully licenced businesses, pending hearing of the Application on 24th March 2015.”***
6. The Orders were extended on 27th March 2015 to 8th July 2015, the date on which the main Petition was set down for hearing.
7. On 10th June 2015, the Petitioners, pending the hearing of the Petition, filed a Notice of Motion Application dated 9th June 2015 under a Certificate of Urgency seeking orders in the following terms:

“1) That this Application be certified as urgent and the same be heard ex parte.

2. ***That this Honourable Court be pleased to issue an order enjoining the 1st – 7th alleged contemnors as parties to this Application for purposes of contempt of Court proceedings.***
3. ***That an order of committal be made against WILLIAM KANGOGO, STEPHEN WAWERU NJOGU, PATRICK MISIGO, CHARLES AOKO, JAIRUS BASWETI, LOCHENIA IGHOT and AKASS ABAN hereinto prison for such a period as this Honourable Court may deem fit and just in that the WILLIAM KANGOGO, STEPHEN WAWERU NJOGU, PATRICK MISIGO,***

CHARLES AOKO, JAIRUS BASWETI, LOCHENIA IGHOT and AKASS ABAN have disobeyed the order made herein by this Honourable Court, under Hon. Justice Lenaola on 19th March 2015. (sic)

4. ***That this Honourable Court be pleased to order the immediate release of any stock in trade belonging to the 1st, 2nd, 3rd and 13th Petitioners and any other Petitioner.***
5. ***That the costs of this Application be provided for.***
8. The Application was premised on grounds *inter alia* that: the said Nairobi City County employees, despite having been lawfully served with the Court Order granted on 19th March 2015 blatantly disobeyed the said Order and arrested, harassed, intimidated the Petitioners, confiscated their trading stock and interfered with their lawful business; and that the alleged contemnors are therefore in contempt of the Court Order.

Submissions for the Applicants

9. The Applicants' case is premised on facts set out in the Supporting Affidavit of Damaris Kinyanjui dated 9th June 2015, their Statement of Facts dated 9th June 2015 and their Submissions dated 24th August 2015.
10. Their main contention is that the alleged contemnors, being employees of the Nairobi County, have disobeyed the Court Order issued on 19th March 2015 and extended on 27th March 2015. They have, in addition disobeyed the Court's authority and dignity and are therefore in contempt of Court.
11. They also accuse the alleged contemnors of disobeying Orders granted by Hon. Lady Justice Ngugi in **Petition No.175 of 2015** where she had held that the Petitioners in that case, also business persons, would be allowed to trade freely and that the subject Petition would be mentioned before this Court with a view to consolidating it with the present Petition.
12. To confirm that their contempt proceedings are properly before the Court, the Applicants rely on **Section 5 (1) of the Judicature Act, Cap 8 Laws of Kenya**. They also rely on the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans [2014] eKLR** in which it was determined that leave is no longer required prior to instituting contempt proceedings.
13. The Applicants define contempt of Court in accordance with **Halsbury's Laws of England 4th Edition Pg 33 Para 52** and the **Black's Law Dictionary 7th Edition at Pg 313** underlining that contempt involves failure to do an act or comply with a Court Order as required by or ordered by a Judge within a specific time, and is punishable by *inter alia* confining the contemnor until he or she complies with the Court Order.
14. They further rely on the case of **Ringera and 2 others vs Muite and 10 others Nairobi, HC Civil Suit No. 1330 of 1991**, in which the Judges noted the salient features of contempt of Court.
15. The Applicants' case in the above context is that the Respondents were aware of the Court Order that was issued as it was served upon the Advocate for the Respondents on 19th March 2015. They add that the alleged contemnors are agents/officers/employees of the Respondent and should have accordingly been informed about the Order.
16. According to them, the actions of contempt by the Respondent and the alleged contemnors included the confiscation of the Petitioners' trading stock and unlawful interference with the lawful business of the Petitioners. They assert that several incidents of harassment and arrests were undertaken between 3rd March 2015 and 5th June 2015, including:

- The confiscation of Samuel Maina Mburu's trading stock with a value of Kenya Shillings three hundred thousand on 5th May 2015
- The confiscation of Beatrice Wamuyu Waithaka's trading stock with a value of Kenya Shillings ten thousand on 5th May 2015
- The confiscation of Damaris Wanjiru Kinyanjui's trading stock with a value of Kenya Shillings fifty thousand on 5th May 2015
- The arrest and arraignment in Court of Elizabeth Rahab Maina on 2nd June 2015
- The arrest and arraignment in Court of Tabitha Wanjiku on an unclear date
- The arrest and arraignment in Court of Esther Njeri Kariuki on 5th June 2015
- The arrest and arraignment in Court of Julius Wanyiri Mburu on 5th June 2015

17.They further assert that after Petitioners Tabitha Wanjiku (the accused person in **City Hall Nairobi Case No.7446 of 2015**) and Elizabeth Rahab Maina (the accused person in **City Hall Nairobi Case No.7439 of 2015**) were arrested, they were later acquitted on the basis of the subsistence of the Conservatory Orders of 19th March 2015 and that this, in itself constitutes another basis for the officers knowing that the Court Order of 19th March 2015 existed.

18.Further, the Applicants refer to the case of **Basil Criticos vs Attorney General & 8 others [2012] eKLR** where this Court held that:

“where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary.”

19.They indicate that the Advocates for the Respondents, the firm of M/s. W. S. Ogola Advocates, was served with the Order on 19th March 2015 and that in any case even if this is denied, the alleged contemnors knew of the Court Order as the Applicants whom they arrested were acquitted on account of the existence of the Order as above stated.

20.They also state that in view of the arrests and harassments that continued to occur, the Advocate for the Petitioner wrote to the Advocate for the Respondents on 8th May 2015, informing him of the incidents against Beatrice Wamuyu Waithaka and Samuel Maina Mburu and requesting a return of the trading stock that were confiscated. He further wrote to the said Advocate on 27th May 2015 informing him of the confiscation of Damaris Wanjiru Kinyanjui's stock and requesting a return of the same. He received no response and no stocks were ever returned. Accordingly, they assert that the alleged contemnors will continue to disobey the Court's Order unless punished for their actions.

21.The Applicants in response to the alleged contemnors' assertions however deny that they had purported to forge the Orders of the Court and confirm that the forgeries had been the work of individual parties that were no longer party to the proceedings as they had withdrawn therefrom.

22.They conclude by reiterating that the Nairobi City County officials were served with the Order of the Court and have blatantly disobeyed the same by continuing to harass and intimidate the Applicants. That the alleged contemnors are therefore in contempt of the Court's Order of 19th March 2015 and should be punished accordingly as prayed in the present Application.

Submissions for the Respondent

23.The Respondent has in no way (written or otherwise) contested the facts alleged and evidence provided by the Applicants in support of their position in this matter. I also see no response therefrom on the record of this Court although I note that the law firm of M/s. W.S. Ogola Advocates appeared for the Respondent in the Petition.

Submissions for the Alleged Contemnors

24. In opposing the Application, the alleged contemnors rely on the Replying Affidavit of Mr. William Kangogo dated 30th June 2015 and their written submissions dated 25th September 2015. Notably, Mr. William Kangogo depones that he swears his affidavit on behalf of all the alleged contemnors except Mr. Lochenia Ighot who is unknown to him.
25. The alleged contemnors argue that these contempt proceedings are not properly before the Court, as the Applicants did not seek leave of Court before filing the same in accordance with **Section 5** of the **Judicature Act**. In this respect, they emphasise, that a cardinal rule of procedure has been breached.
26. They further argue that the Applicants, having embarked on a massive abuse of the Court process, falsified and altered the Conservatory Orders by scanning them, converting them to Word documents, altering their contents and including names of persons whom the Court did not intend to be beneficiaries of the said Orders.
27. They offer specific examples of the above argument, specifying that the Order of 19th March 2015, was extracted to include 14 Petitioners when the Petition only had 11 Petitioners and that the Orders of 22nd April 2015 and 7th May 2015 were altered to insert the new alleged Petitioners.
28. They add that the Applicants also forged their business licences, (for example with one licence indicating 2 different locations for the business), used licences without licence numbers and are now using these licences to mislead the Court in the present Petition. They state that these actions by the Applicants are undermining the integrity of the Court and fair administration of justice. Particularly, they define the Orders alleged to have been breached as riddles of intricate web of falsifications and forgeries. Consequently, they assert, they could not establish which Court Orders were real or not and that forged Court Orders cannot form the basis of contempt proceedings.
29. The alleged contemnors also contend that they did not have knowledge of the main Petition to which they were not party nor did they receive any pleadings therein as they were only enjoined in the matter on 27th March 2015. They add that they did not even have an Advocate present at the proceedings to inform them of the Orders of the Court and in this regard, they assert that they were not served with the resultant Order of 19th March 2015 and that it was also not brought to their attention. Accordingly, they add, Orders cannot lie as against persons who were not parties to a suit as this would be in breach of the right to fair hearing.
30. They further assert that there was no personal service of the Orders upon them and note that the Applicants have not brought forth evidence of personal or substituted service on them. They also note that the process server did not indicate which office or officer in the Nairobi City County was served with the order and that they only knew of the contempt proceedings through a newspaper advertisement, the Applicants having failed to bring the same to their attention prior to that advertisement.
31. They further state that in order to find contempt, the Applicants have to demonstrate not only personal service of the Order but also that the Order was ignored, both elements beyond reasonable doubt.
32. They also argue that the persons who are mentioned in the Application as alleged contemnors are not mentioned as the arrestors in the charge sheets drawn up at arrest, and that in any case, the persons arrested were arrested for reasons other than those stated in the Court Order.
33. They conclude by restating that the Application, by reasons of being incompetently before Court and requiring them to be held in contempt of an Order that was not addressed to them, should be struck out with costs as it is frivolous, unmerited and an abuse of the Court process.

Determination

34. This being an application for the Court to find the alleged contemnors in contempt of Court, I will consider the elements that collectively constitute contempt of Court and determine if the Applicants have made their case for the same, sufficiently.
35. Firstly, however, I will determine whether the matter is properly before this Court because it is the alleged contemnors' contention that these contempt proceedings are not properly before this Court, as the Applicants did not seek leave from the Court before instituting the same. They therefore pray that the Court should dismiss the Application forthwith. The Applicants however state that there is no need to seek leave to institute contempt proceedings, and that these proceedings are therefore properly before this Court.
36. In that regard, **Section 5 (1)** of the **Judicature Act, Cap 8** of the Laws of Kenya, which empowers the High Court to punish contempt of Court provides thus:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.”

37. The above provision makes reference to the powers of the High Court Justice in England and it is therefore necessary to determine the powers of the High Court in England with regard to punishing contempt of Court in order to ascertain the powers of the High Court of Kenya to punish the same.
38. In that context, the above provision is to be read with **Part 81** and specifically **Section 81.4** of the **Civil Procedure Rules of England, 2012** which provides that in contempt proceedings for breach of Court Orders, an application is to be made within the proceedings in which the impugned order was made, setting out the grounds on which the committal is requested and supported by an affidavit containing the evidence relied upon. No leave of Court is thereby required.
39. Further the Court of Appeal, in the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 others [2014] eKLR** considered the statutory basis for contempt and held that leave is not required where committal proceedings relate to a breach of a judgment, order or undertaking before the same Court
40. Furthermore, in **Kenya Country Bus Owners' Association & 8 Others vs Cabinet Secretary for Transport & 5 Others, Judicial Review Case No.2 of 2014**, Odunga J stated as follows concerning these provisions:

“... a reading of Section 5 of the Judicature Act together with Part 81 of the Civil Procedure Rules of England makes it clear that Section 81.4 applies to contempt of court proceedings both in the High Court and the Court of Appeal.”

41. The learned Judge's point was that leave under these provisions is not required and bearing in mind the above holdings to which I acquiesce, I find that for the current Application, which concerns the disobedience of an Order issued by this Court, there is no requirement to apply for leave and these contempt proceedings are therefore properly before me.
42. I now proceed to deliberate on the merits of the contempt application before me and I note in that regard that in the case of **Ringera and 2 others vs Muite and 10 others HCC at Nairobi, Civil Suit No.1330 of 1991**, the Court explained the elements of contempt of Court by stating that -

“the contemnor must be aware of the existence of the Court Order, there must be an existing Court Order capable of being disobeyed and breach thereof must be proved.”

43. In agreement with the above holding and I will now break down each of the elements thereof and

examine the evidence before me with respect thereto.

i. **Whether there was an Order from Court**

44. The Applicants assert that there was a Court Order issued while the alleged contemnors, although not referring to the Order directly, address themselves to what they contend are adulterated versions of the Order issued by this Court. I shall address myself more substantially to the latter at a later stage, but for now I confine myself to the existence or otherwise of an Order from this Court.

45. On this issue, there can be no doubt that on 19th March 2015, this Court sitting as the duty Court for purposes of examining matters brought in the Constitutional and Human Rights Division under Certificate of Urgency, issued Conservatory Orders in terms of Prayer 2 of the Applicants' Notice of Motion Application dated 18th March 2015.

46. The Order was in the following terms:

“That pending the hearing of the Application dated 12th March 2015 inter parties, a conservatory Order be and is hereby issued against the 1st Respondent, its servants, employees, agents and/or directorate of city inspectorate or such other persons, or entity restraining them from harassing, intimidating, arresting or in any manner whatsoever from interfering with the running of the Petitioners' lawfully licenced businesses including disrupting of the business and confiscation of their stock in trade, pending hearing on 24th March 2015.”

47. The order speaks for itself and I therefore find that there was indeed a valid Court Order issued by this Court and the next question is whether it was capable of being obeyed.

ii. **Whether the Court's Order dated 19th March 2015 was clear and unambiguous**

48. In my view a Court Order would be defined as being clear and unambiguous, firstly, if the words in it are easily understandable and secondly, if read as a whole, it is instructive as to: the exact person to whom it is addressed; the precise action forbidden/prescribed; and the accurate interval during which it is valid. It is only in this form that a Court Order would be enforceable.

49. In that regard, the impugned Order of 19th March 2015 contained words that were uncomplicated and could therefore be understood. It also indicated:

- The exact persons to whom it was addressed – **“the 1st Respondent, its servants, employees, agents and/or Directorate of City Inspectorate or such other persons, or entity.”**
- The precise action forbidden – **“harassing, intimidating, arresting or in any manner whatsoever from interfering with the running of the Petitioners' lawfully licenced businesses including disrupting of the business and confiscation of their stock in trade.”**
- The accurate interval during which it applies – **“pending the hearing of the Application dated 12th March”, on “24th March 2015.”**

50. Contingent on the foregoing, I resolve that the Court Order of 19th March 2015 was clear and unambiguous and was therefore enforceable.

iii. **Whether the Order of 19th March 2015 was served upon the Respondents or whether the Respondents were aware of the Order**

51. The Applicants have averred that the Order of 19th March 2015 was served on the Nairobi City

County Advocate on two occasions after which he ought to have informed the alleged contemnors thereof. The alleged contemnors on the other hand contend that no Order was served upon them and that their absence from the proceedings guaranteed that they did not know about it.

52. On personal service and knowledge of Court Orders, case law has provided guidance. In the Court of Appeal decision of **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (CA 24/2014) Nyeri**, Visram, Koome and Odek JJA held thus:

“On the other hand, however, this Court has slowly and gradually moved from the position that service of the Order along with the Penal Notice must be personally served on a person before contempt can be proved.”

53. Relatedly, this Court in the case of **Basil Criticos vs The Attorney General and 8 Others [2012] eKLR** held thus on service and knowledge of Orders:

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary.”

54. Karanja, Mwela and Mwilu JJA also distinctly echoed the above position in the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR**.

55. I am duly guided and I reiterate the same view save to add that strict requirements of personal service and penal notices, as technicalities, only serve to create an avenue through which enforcement of Orders would, at best, be difficult to achieve or at the worst, be unreasonably obstructed. These strict requirements therefore fly in the face of the **Constitution of Kenya, 2010** which provides for prompt access to justice and the dispensation of justice without undue regard to procedural technicalities in **Article 48** and **Article 159 (2)**, respectively.

56. With apposite regard to the facts before me, I first consider knowledge of the Order, as the element that supersedes service. I note that despite denying knowledge of the Order, the alleged contemnors inadvertently or otherwise address themselves thereto. By the words in their own affidavit, the alleged contemnors state: **“the Petitioners, once they obtained the first Court Order...”**. Moreover, and in the same affidavit, they address themselves to the content of the Order stating **“a condition in the Order that the Petitioners were to operate within their area of licences...”**. They extensively refer to the Order being tampered with and offer examples of the same. I determine that it would not be possible to discuss timelines related to an Order, the content of an Order and the illegitimate state thereof without knowing of the Order itself. By their own admission, therefore, it is evident that the alleged contemnors had knowledge of the court Order from the time it was obtained and also had knowledge of the content of the Court Order and I so find.

57. Having found that the alleged contemnors knew about the Order, I need not look into personal service as it is in this case rendered unnecessary.

iv. **Whether the alleged contemnors disobeyed the Order of 19th March 2015 and whether, therefore, they are in contempt of Court**

58. The alleged contemnors have argued that they did not flout the Order of 19th March 2015 as they did not know about them to be able to disobey them. In controverting the same, the Applicants have offered that several of them, who were arrested by the alleged contemnors between 3rd March 2015 and 5th June 2015 were later released on account of the existence of the Conservatory Orders.

59. I have said that the alleged contemnors knew of the Court Orders and it is therefore important to

understand the gravity of the reason why Court orders must be obeyed. Lord Donaldson MR in the case of **Johnson vs Walton (1990) 1 FLR350** rendered himself thus on that issue:

“It cannot be too clearly stated that, when an injunctive Order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place.”

60. I fully associate myself with this holding, save only to add that the principle would apply not only to Injunctive Orders above but also to other Court Orders. This position has been confirmed in other case law and that is why Romer, L.J. in **Hadkinson vs Hadkinson, (1952) ALL ER 567** stated that:

“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 even void.”

61. Further to the above, the Courts have defined contempt of Court in direct terms and for example in **Stewart Robertson vs Her Majesty’s Advocate, 2007 Hcac63**, Lord Justice Clerk held thus:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

62. The **Black’s Law Dictionary (9th Edition)** defines it in similar terms as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

63. In applying the above holdings on the importance of obeying the orders of any Court, the definition of contempt, and also following my determination that the alleged contemnors had knowledge of the Orders, it is accurate that any actions in form of arrests, harassment or seizing of the Applicants’ trading stocks, undertaken after the order was granted would amount to contempt of Court on the part of those at whom the 19th March 2015 Court Order was directed.

64. Having reflected on the matter and examined the charge sheets produced as evidence before this Court, it is clear that Applicants Elizabeth Rahab Maina, Tabitha Wanjiku, Esther Njeri Kariuki and Julius Wanyiri Mburu were indeed arrested as claimed on this matter. I also note that the Applicants allege that the alleged contemnors carried out the arrests, but offer no evidence to support these allegations. In the same token, the Applicants allege that the alleged contemnors confiscated the trading stock of Applicants Samuel Maina Mburu, Beatrice Wamuyu Waithaka and Damaris Wanjiru Kinyanjui. There is no additional evidence offered to corroborate these allegations either. The alleged contemnors have in response drawn the Court’s attention to the fact that none of the charge sheets drawn up following the arrests mention any of them as the arrestors and also claim that some of them were not even on duty on the day that the arrests were undertaken.

65. Taking the facts as placed before me into account, I find that even if I can steadily conclude, and I so do, that the arrests indeed took place, I have no evidence before me upon which I can rely to conclude that the exact persons who undertook these arrests are indeed the alleged contemnors named in these proceedings. The same applies to the confiscation of trading stock, so that even if I came to a conclusion that the illegal confiscation indeed took place, it would be remiss of me to hold the alleged contemnors responsible for the same as no evidence has been provided before me to a standard that would support any such holding. This Court appreciates some detail offered by the Applicants, for example in specifying the Nairobi City County car that was used by the alleged

contemnors during arrests but other details such as the exact names of all the alleged contemnors involved in each arrest or confiscation incident and proof of the same remains wanting.

66. Before I proceed and address the burden of proof further in the interests of determining other allegations brought before this Court in this matter, I note that the alleged contemnors assert that the Court Order in issue was forged as justification that it was incapable of being complied with and they also indicate that the Applicants were arrested for other reasons than those stated in the Order.

67. In addressing that contention, I must state emphatically, that disagreeing with or doubting the authenticity of a Court Order does not constitute a satisfactory reason not to obey the same. On this subject, Mabeya J, in **Africa Management Communication International Limited vs Joseph Mathenge Mugo & another** [2013] eKLR held thus:

“To my mind therefore, a party must comply with an Order whatever he thinks of such an Order. What is important is that such a party has knowledge of the terms of the Order. To my mind, if the Defendants were unsatisfied with the Order of 13th June, 2013, they should have attempted to get rid of the same through the proper course that is, either by setting it aside or through appeal.”

68. More prescriptively, Lord Cottenham, L.C., in **Chuck vs Cremer (1)** (1 Coop. temp.Cott 342) held thus:

“A party, who knows of an Order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an Order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an Order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

69. On the same subject, this Court in **Kenya Tea Growers Association vs Francis Atwoli and 5 Others** [2012] eKLR opined:

“I need not cite authority for the proposition that it is of high importance that Orders of the courts should be obeyed. Willful disobedience of an Order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

70. Addressing my mind therefore to the facts, before me, in that context, I resolve that if the alleged contemnors were unsatisfied with the Order of 19th March 2015, they should have approached the Court and applied to have the Order varied or set aside appropriately. In the same vein, if they were doubtful about the authenticity of the Order, their remedy lay in approaching the Court to call the Court's attention to the alleged forgeries and/or seek to ascertain the exact content of the Order.

71. On the assertion that there are arrest warrants that have been issued for some of the Applicants, I note, that is not a matter for this Court to settle in these proceedings but one that would be suitably settled by the Courts that the relevant Applicants will be required to attend.

72. Turning back to the matter at hand, and regarding the finding that the alleged contemnors are guilty of contempt of Court for disobeying Court Orders, Mabeya J, in the case of **Africa Management Communication International Limited vs Joseph Mathenge Mugo & another** [2013] eKLR held:

“ a person may be sent to prison thereby lose his or her liberty for that offence. For that reason, it is very important that such a person is shown to have had notice of the Order and had the opportunity to obey the same but failed to do so.”

73. **Further, elaborating on the standard of proof required to find contempt of Court, in Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (supra) Nyeri** it was stated thus;

“It is important however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the Order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.

The Court was of the same opinion in Shimmers Plaza Ltd vs NBK (supra).

74. In light of the above holdings, the question that emerges is, in the proceedings before me, have the Applicants established deliberate disobedience of the 19th March 2015 Order of the Court *beyond reasonable doubt*?

75. Taking the principle enunciated above into account and applying them to the facts before me in the present Application, I determine that despite establishing that there was a clear Order issued by this Court and that the alleged contemnors knew about the Order, the Applicants have not demonstrated to this Court, beyond reasonable doubt, that the contemptuous acts alleged were undertaken by the **very persons** named as alleged contemnors in these proceedings. In that regard, it is a matter of common notoriety that the Nairobi City County employs several persons in its Inspectorate Department, most of whom undertake arrests and confiscations as the alleged contemnors do, in the ordinary course of their work. Yet there is no evidence provided in the matter before me to confirm the identities of the alleged contemnors with respect to the contemptuous acts.

76. In this matter, only upon a consideration of credible evidence as to the identity of the alleged contemnors, would the Court be able to proceed to determine if the contempt of Court **by the alleged contemnors** has been proved beyond reasonable doubt. With the said evidence lacking, I reiterate that taking the facts as placed before me into account, I cannot correctly find that the alleged contemnors named in these proceedings, beyond reasonable doubt, are in contempt of Court for having disobeyed the Order issued on 19th March 2015.

77. Since the main reason for the above finding applies to him, this finding duly applies to Mr. Lochenia Ighot who, although named as an alleged contemnor, was not represented along with the other alleged contemnors and did not offer a response to the allegations made against him.

78. Having disposed of this matter, I would like to conclude by reiterating the seriousness of contempt of Court. I could not express it more clearly than Mabeya J in **Africa Management Communication International Limited vs Joseph Mathenge Mugo & another [2013] eKLR**, when he held:

“It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an Order from Court must be certain that the Order will be obeyed by those to whom it is directed. As such, the obedience of a court Order is fundamental to the administration of justice and rule of law.”

79. That is also why the Supreme Court of Kenya in **Board of Governors Moi High School Kabarak vs Malcolm Bell & Another, (Supreme Court Petitions Nos.6 & 7 of 2013)** pronounced itself on the power to punish for contempt, defining it as a power of the Court **“to safeguard itself against contemptuous or disruptive intrusion from elsewhere”**, and adding that

“without that power, protection of citizens’ rights and freedoms would be virtually impossible. Courts of law would be reduced to futile institutions spewing forth Orders in vain.”

80.I adopt the same reasoning and turning back to the Application before me, I see no reason to grant any of the Orders of contempt of Court and I have said why.

81.On the prayer that the Applicants’ trading stock be released to them, it is not possible to make such an Order, noting my findings above. I say so because such an order is consequential upon the alleged contemnors being found to have been the ones who carted away that stock. In any event, such an action borders on criminality and contempt proceedings are not the best to address such a matter unless it is obvious that an alleged contemnor acted criminally beyond his act of contempt.

Disposition

82.For the above reasons, I find no merit in the Application dated 9th June 2015 and it is hereby dismissed.

83.Each party shall bear its own costs.

84.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Ilako for 1st Respondent

Mr. Kamunaja for 2nd Respondent

No appearance for Petitioner

Order

Ruling duly read. Mention on 6/5/2016 for directions. Notice to issue.

ISAAC LENAOLA

JUDGE