



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL PETITION NO. 65 OF 2011**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM OF INDIVIDUALS UNDER ARTICLES 23(3) AND 165(3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 40, 62(2) AND 63 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLES 1,2,3,6,7,8,9 AND 17 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS(UNDHR)**

**BETWEEN**

**KASSIM ALI KAMA (suing on his own behalf and on behalf of 610 residents of Mabatini, Nyumbasita, Vidzini, Gonjora, Fahamuni and Kigwede area- Msambweni-Kwale county)  
 .....PETITIONERS**

**AND**

- KWALE INTERNATIONAL SUGAR COMPANY.....1<sup>ST</sup> RESPONDENT**
- COUNTY COUNCIL OF KWALE.....2<sup>ND</sup> RESPONDENT**
- DISTRICT LAND REGISTRAR - KWALE.....3<sup>RD</sup> RESPONDENT**
- THE SENIOR REGISTRAR OF TITLES.....4<sup>TH</sup> RESPONDENT**
- THE COMMISSIONER OF LANDS.....5<sup>TH</sup> RESPONDENT**
- TREASURY OF KENYA.....6<sup>TH</sup> RESPONDENT**
- THE PERMANENT SECRETARY MIN. OF AGRICULTURE.....7<sup>TH</sup> RESPONDENT**
- THE PROVINCIAL ADMINISTRATION.....8<sup>TH</sup> RESPONDENT**
- THE HON. ATTORNEY GENERAL.....9<sup>TH</sup> RESPONDENT**

## RULING

[1]. The petitioners filed an application dated 19<sup>th</sup> August 2014 seeking enforcement of the Orders of the Okwengu, J. (as she then was) made on 26<sup>th</sup> June 2011 that pending the hearing and determination of the application the court grants **a conservatory order restraining the 1<sup>st</sup> respondent by itself, servant and agents or any other person acting on its own authority from entering encroaching, alienating and evicting the petitioner/applicant from parcels of land known as L.R 5004/30/R and in particular the areas of Vidziani, Nyumba Sita, Mabatini, Gonjora, Fahamuni and Kigwende.**

[2]. It was contended that the said orders were made in the presence of the 1<sup>st</sup> respondent's advocates and were served upon the 1<sup>st</sup> respondent on 28<sup>th</sup> October 2011 together with a Penal Notice. It was urged that the terms of the orders were clear and unambiguous but the 1<sup>st</sup> respondent through its directors, servants, employees and agents blatantly and contemptuously failed to comply with the said orders.

[3]. The petitioners complain that by its acts, the 1<sup>st</sup> respondent has in disobedience of the court's conservatory order changed the character of the suit premises by removing all vegetation on the property. The Petitioners therefore sought by its Application Notice dated 28<sup>th</sup> July 2014 punishment of the 1<sup>st</sup> respondent's director for contempt of court by specific Orders that:

**a. The first respondent's Director Harshil Kotecha of Kwale International Sugar Company be committed to prison for a maximum period of six (6) months for contempt of the order issued on 27<sup>th</sup> October 2011.**

**b. The First Respondent's Director Harshil Kotecha [of] Kwale Sugar Company do pay a fine to be imposed by this honourable court to commensurate with the gravity of the contempt shown to its lawful court order.**

**c. The costs of this contempt proceedings be borne by the first respondent's Director Harshil Kotecha [of] Kwale International Sugar Company Limited.**

[4]. In support of the application, the Petitioners filed on 19<sup>th</sup> August 2014 an affidavit sworn by Kassim Ali Kama sworn on 28<sup>th</sup> July 2014 set out in full as follows:

**"Affidavit of Kassim Ali Kama dated 28<sup>th</sup> July, 2014**

*I, Kassim Ali Kama of Msambweni and a resident of Gonjora within the Kwale County in the Republic of Kenya do hereby make oath and state as follows:*

*1. **That** I am one of the Petitioners herein and have authority to appear at and plead on my behalf and on behalf of 601 other Petitioners [and] duly conversant with issues in controversy, hence competent and duly authorized to swear this Affidavit.*

*2. **That** I am aware that a Ruling was delivered on 26<sup>th</sup> October, 2011 by Honourable Lady Justice Hannah M. Okwengu (High Court of Kenya Judge as she was then) a true Photostat copy of which is annexed herein.*

*3. **That** the said Ruling was precipitated by the Petitioner's application under a certificate of Urgency by way of a Notice of Motion dated 25<sup>th</sup> October, 2011 supported by my affidavit sworn on 25<sup>th</sup> October, 2011 wherein I sought various injunctive orders against the plaintiff.*

*4. **That** the 1<sup>st</sup> respondent Kwale International Sugar Company Limited through Harshil Kotecha despite being served in the year 2011 has sworn a Replying Affidavit on 19<sup>th</sup> February, 2014, wherein he described himself as "the director of the 1<sup>st</sup> respondent company" as well as the*

*“purchaser of land directly from government of Kenya” and sought to respond to the issues raised in my Affidavit aforesaid.*

**5. That** the Honourable Court after perusing my affidavit on record then and the submissions by Counsel by the for the Petitioners delivered the Ruling of 26<sup>th</sup> October, 2011 and made an order in the following terms;

*a. That this application is certified urgent and service thereof is dispensed with at the first instance.*

*b. That pending hearing and determination of this application inter-partes this court do and hereby grant a conservatory order restraining the 1<sup>st</sup> respondent Kwale International Sugar Company Limited by itself, servants and Agents for any other person acting on its own authority from entering, encroaching, alienating and evicting the petitioner/ applicant from a parcel of land known as L.R.NO. 5004/30/R and in particular he following area Vidziani, Nyumba sita, Mabatini, Gonjora, Fahamuni and Kingwede area.*

*c. The application be heard inter-partes on the 2<sup>nd</sup> November, 2011.*

**6. That** the said Ruling was delivered and the said orders made in the presence of Japheth Chidzipha, counsel for the Petitioners and served upon the respondents including the 1<sup>st</sup> respondent.

**7. That** I am informed by my advocate on record Christine Kipsang that the 1<sup>st</sup> respondent Kwale International Sugar Company Limited has been failing to take steps to reply to the petition for a considerable period of time which information I verily to be true and correct as follows:-

*a. An email sent to Rachier & Amollo Advocates on 26<sup>th</sup> March, 2014 from Christine Kipsang & Co. Advocates informing them of the breach of the court orders.*

*b. A letter dated 26<sup>th</sup> November, 2012, inviting Rachier & Amollo Advocates inviting them to come and fix a date at the Civil Registry.*

*c. A letter attaching a hearing notice dated 25<sup>th</sup> July, 2013 sent to Rachier & Amollo advocates.*

*d. A letter attaching an invitation letter for fixing date on 7<sup>th</sup> November, 2013 sent to Rachier & Amollo Advocates.*

*e. A hearing notice dated 24<sup>th</sup> September, 2013 served upon Rachier & Amollo advocates.*

*f. A hearing notice of application dated 25<sup>th</sup> October, 2011 on the 6<sup>th</sup> March, 2014 sent to Rachier & Amollo Advocates.*

*g. A mention notice of application 31<sup>st</sup> July, 2014 sent to Rachier & Amollo Advocates.*

*h. An affidavit of service to proof service of hearing notice dated 28<sup>th</sup> July, 2014 sent to Rachier & Amollo advocates.*

*i. An affidavit of service to proof service of a mention notice dated 31<sup>st</sup> July, 2014 sent to Rachier & Amollo Advocates.*

**8. That** the character of the suit premises which was a trust land in the name of the Petitioners has now been changed. The first Respondent Kwale International Sugar Company Limited have also

completely changed the character of the suit premises by removing burning all the matures trees and then burned them as charcoal and then carried some as logs to their offices and sold them which is clear wanton destruction of the environment.

9. **That** I state all mature fruits trees at the suit premises are still being cut down and felled down by the 1<sup>st</sup> Respondent at Mabatini, Vidziani, Gonjora, Fahamuni and Kingwede area and Nyumba sita contrary to the court orders by the 1<sup>st</sup> respondent directors worked agents thus reducing the petitioners to paupers and causing lack of farming land grazing land and any area to do any economical use.

10. **That** in this affidavit we have annexed copies of photographs showing the continued destruction on the said land, trees being cut down, land being used for other purpose by the 1<sup>st</sup> respondent contrary to the purposes aimed by the Petitioners hence leaving them in situation of despair and hopelessness.

11. A letter dated 22<sup>nd</sup> November (sic) enclosing a draft order was sent to the plaintiff's advocates.

12. An email sent to Rachier & Amollo advocates on 26<sup>th</sup> March, 2014 from Christine Kipsang & Co. advocates informing them of the breach of the court orders.

13. I annex herewith Photostat copies of documents referred to in this affidavit and in support of my averments all in a bundle marked as annexure MTM paginated 13 to 72.

a. Ruling delivered by Honourable Lady Justice Hannah Okwengu on 27<sup>th</sup> October, 2011.

b. A letter dated 26<sup>th</sup> November, 2012, inviting Rachier & Amollo Advocates inviting them to come and fix a date at the civil registry.

c. A letter attaching a hearing notice dated 25<sup>th</sup> July, 2013 sent to Rachier & Amollo advocates.

d. A letter attaching an invitation letter for fixing date on 7<sup>th</sup> November, 2013 sent to Rachier & Amollo Advocates.

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h. An affidavit of service to proof service of hearing notice dated 28<sup>th</sup> July, 2014 sent to Rachier & Amollo Advocates.

i. An affidavit of service to proof service of a mention notice dated 31<sup>st</sup> July, 2014 sent to Rachier & Amollo Advocates.

j. Affidavit of service of Michael M'bwana sworn on 2<sup>nd</sup> November, 2011.

k. The photographs are marked MTM 36 to 72 showing the felling of tress uprooting of mature crops, tractors harrowing and planting of sugarcane, loss of economic means crops fishing and daily cultural living space of the petitioners and uproar by the petitioners and address by the local leaders.

*l. That I swear this affidavit from facts within my own knowledge and belief verily believing the same to be true and correct, save where otherwise stated sources whereof have been disclosed.*

**SWORN** by the said **KASSIM ALI KAMA**

at **MOMBASA** this 28<sup>th</sup> day of July 2014

Before me

Commissioner for Oaths”

[5]. In response to the application was a replying affidavit sworn by Harshil Kotecha as the Director of the 1<sup>st</sup> respondent on 25<sup>th</sup> September 2014 setting it out its primary defence to the application for committal for contempt of court at paragraphs 24-34 of the replying Affidavit as follows:

*“24. **THAT** from the Applicant’s application, I am made to understand that there is an order dated the 27<sup>th</sup> of October, 2011 by Hon. Lady Justice Hannah Okwengu ordering among others that:*

***i. Pending hearing and determination of this application interpartes this court do and hereby grant a conservatory order restraining the 1<sup>st</sup> Respondent by itself, servants, agents and any other person acting on its own authority from entering, encroaching, alienating and evicting the petitioner applicant from a parcel of land known as LR No. 5004/30/R and in particular the following areas Vidziani, Nyumba SITA, Mabatini, Gonjora, Fahamuni and Kingwede.***

*25. **THAT** the origin of the said order is said to have been a Notice of motion application by the Petitioners dated 25<sup>th</sup> October, 2011 which I believe is in the court’s record.*

*26. **THAT** whereas the applicant alleges that there is the aforementioned order in place; the same has never been served upon the 1<sup>st</sup> Respondent as required by law and the 1<sup>st</sup> Respondent contends that he has no knowledge of its existence.*

*27. **THAT** the affidavit of service annexed to the applicant’s as proof of service of the said order upon the 1<sup>st</sup> Respondent, confirms on the face of it (Paragraph 7) that the same was served upon Ramisi Kwale International Sugar Company and not the 1<sup>st</sup> Respondent herein.*

*28. **THAT** in any event, paragraph 10 of the return of service does not specify the court order that was served upon the 1<sup>st</sup> Respondent and thus the Honourable Court is not to assume that the same order served is the one being referred to herein as the order served was not annexed in the return of service.*

*29. **THAT** I am advised by my advocates on record, advise I verily believe to be true that the 1<sup>st</sup> Respondent is not in contempt of any court orders as alleged by the applicant in his application or at all and is in fact a stranger to the photos annexed by the Applicant. The photos taken are of a place unidentifiable by the 1<sup>st</sup> Respondent and the actions alleged therein are not by the 1<sup>st</sup> Respondent or his servants.*

*30. **THAT** in any event, I am further advised that the alleged photos as adduced by the Applicant herein do not prove or show that the alleged orders have been disobeyed if at all. In fact the same show of existing structures but does in any manner or for prove or evidence any alienation, encroaching and/or eviction of the applicants.*

*31. **THAT** The 1<sup>ST</sup> Respondent is a stranger to the parcel of land No. 5004/30/R and contends that*

it owns the parcel known as land LR Reference Number 27742 and not the one mentioned by the Applicants.

32. **THAT** the burden of proof on contempt proceedings should be that beyond reasonable doubt, and the proof annexed by the applicants is not satisfactory to lay the basis of these contempt proceedings as against the 1<sup>st</sup> Respondent.

33. **THAT** proceedings against the 1<sup>st</sup> respondent is misconceived as the application before the Honourable Court does not disclose any reasonable cause of action against the 1<sup>st</sup> Respondent.

34. **THAT** in any event the entire proceedings are a nullity as the application before court is incompetent and incurably defective for want of compliance with mandatory provisions of law.”  
(sic)

[6]. Counsel for the parties – Mrs. Kipsang for the petitioners and Ms. Amina for the 1<sup>st</sup> respondent made submissions on the application for contempt and ruling was reserved. Counsel for the other respondents – Ms. Jadi for the 2<sup>nd</sup> Respondent and Mr. Ngari for the 3-9 Respondents did not participate in the application for contempt opting to file responses to the main petition.

[7]. The following decisions of precedent or persuasive value were cited:

**Christine Wangari Gachege v. Elizabeth Wanjiru Evans and 11 Ors.** (2014) eKLR where the Court of Appeal held that the procedure for applications for committal for contempt of court pursuant to section 5 of the Judicature Act cap 8 Laws of Kenya must be in accordance with Part 81 of the Civil Procedure Rules of England and Wales following the 2012 amendment replacing Order 52 of the Rules of the Supreme Court.

**Mutitika v. Baharini Farm Limited** (1985) KLR 229, 234 where the Court of Appeal held that “**the standard of proof in contempt proceedings must be higher than proof on balance of probabilities, almost but not exactly, beyond reasonable doubt...the standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, criminal cases. It is not safe to extent the latter standard to an offence which can be said to be quasi-criminal in nature.**”

**John Mugo Gachuki v. New Nyamakima Co. Ltd** (2012) eKLR where Odunga, J. held that where a party alleges that a notice was not served, there is no way the respondent can prove service save by way of a replying affidavit thus removing the objection from the realm of a preliminary objection.

**Kariuki & 2 Others v. Minister for Gender, Sports, Culture & Social Services & 2 Others** (2004) eKLR, where Lenaola, J. in quoting the principle in *Hadkinson vs Hadkinson* [1952] All ER 567 held that court orders must be obeyed whether one agrees with them or not; that if one does not agree with an order, and then he ought to move the court to discharge the same and that to blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which courts are set up. In that matter the learned Judge held that the then minister Hon. Najib Balala was not in contempt of court since there was no personal service on him even though service was frustrated by the minister’s bodyguards.

**Rodgers Muema Nzioka & 2 Others v. Tiomin Kenya Limited** (2001) eKLR where Hayanga, J. held that the plaintiffs in the case were not in contempt and went to put the principle governing contempt of court vis-à-vis the administration of justice in the following words:-

**“The guiding principle is that the rules of contempt are not because judges should be protected, but so that justice should not be interfered with. In the case of Attorney General –vs- Times Newspaper Ltd. [1991] 2 WLR 994 (H.L.), the House of Lords said:-**

**“Contempt of court is based not on any exaggerated notion of the dignity of individuals, be**

***they judges, witnesses or others but on the duty of preventing any attempt to interfere with the administration of justice.”***

## **ISSUES**

[8]. From the pleadings, affidavits and submissions before the court on the Application Notice for committal for contempt of Court dated 28<sup>th</sup> July 2014, the following issues arise for determination:

- a. What is the correct standard of proof for contempt of court cases;
- b. Whether there was personal service of the order of the court;
- c. Whether the 1<sup>st</sup> respondent was aware of the order of the court; and
- d. Whether the 1<sup>st</sup> respondent was guilty of contempt of court.

9. The Preliminary Objection based on Order 2 rule 16 and Order 51 of the Civil Procedure Rules was not urged in the submissions before the Court and the court is unable to formulate an issue on it. Moreover, the Court file copy of the Application Notice is duly signed by the applicant's counsel, which is apparently consistent with the provisions of Order 2 rule 16 of the Civil Procedure Rules which provides as follows:

*“16. Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person.”*

## **DETERMINATION**

### ***Burden of Proof in contempt of Court***

[10]. The court agrees that because of its quasi-criminal and penal consequences, the standard of proof in contempt cases is high - as rendered by the Court of Appeal in ***Mutitika*** case, supra, ‘*higher than proof on balance of probabilities, almost but not exactly, beyond reasonable doubt*’. However, in practical terms this only means, as explained by the House of Lords in ***H (Minors), Re (1996) A.C 563*** when considering the standard of proof in fraud cases, that more cogent evidence will be required to prove the matter than in an ordinary civil proceeding where a preponderance of evidence will suffice. Lord Nicholls explained:

*“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case, **that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.** Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.*

**Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighting the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be evidence that it did occur before, on the balance of probability, its occurrence will be established.”**

[11]. Taking deliberate disobedience of court orders with its penal consequences as less likely than negligence, for example, there is need to prove by stronger evidence that it occurred, hence the reference to a standard ***higher than proof on balance of probabilities but not as high as beyond reason able doubt.***

***Whether there was personal service of the order of the court***

[12]. Relying on the decisions of ***Mutitika*** and ***Re H (Minors)***, the court adopts a standard of proof on a balance of probabilities above mere preponderance of evidence and although not rising to the criminal standard of beyond reasonable doubt requires strong credible evidence to prove the commission of acts constituting contempt of court.

[13]. Under Part 81 of the Civil Procedure Rules of England and Wales, an application for Committal for 'breach of a judgment, order or undertaking to do or abstain from doing an act' is provided for under rule 81.4 (1) (b) and (3), which, as material, provide for committal of a director or other officer of a company for disobedience of a court order by the company, as follows:

***“81.4 (1) If a person –***

***(b) disobeys a judgment or order not to do an act, then, subject to the Debtors Acts 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.***

***(3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.***

[14]. The order of court is required to be served as follows

***“Requirement for service of a copy of the judgment or order and time for service***

***81.5 (1) Unless the court dispenses with service under rule 81.8, a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question....”***

[15]. The Order or Judgment must be served personally in terms of Rule 81.6 which provides as follows:

***“Method of service – copies of judgments or orders***

***81.6 Subject to rules 81.7 and 81.8, copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act must be served personally.”***

***Service of Orders in Kenya***

[16]. In accordance with Order 48 rule 2 of the Civil Procedure Rules of Kenya, service of orders is required to coincide with the procedure for service of summons, as follows:

***“2. All orders, notices and documents required by these Rules to be given to or served on any person shall, save where other provision is made, be served in the manner provided for the service of summons.”***

[17]. Under Order 5 rule 3 of the Civil Procedure Rules service upon a corporation such as the 1<sup>st</sup> respondent company should be effected as follows:

***“3. Subject to any other written law, where the suit is against a corporation the summons may be served—***

**(a) on the secretary, director or other principal officer of the corporation; or**

*(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a)—*

*(i) by leaving it at the registered office of the corporation;*

*(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or*

*(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or*

*(iv) by sending it by registered post to the last known postal address of the corporation.”*

[18]. In the present case, the affidavit of service does not indicate personal service upon the 1<sup>st</sup> respondent in accordance with the provisions for service under Order 5 of the Civil Procedure Rules. In proof of service of the Court Order of 26<sup>th</sup> October 2011, one Michael Thoya M’Bwana, describing himself as a Process Server swore an affidavit of serve on of 2<sup>nd</sup> November 2011, that he had been instructed by the firm of J. C Chidzipha & Co. Advocates for the petitioners to effect service of certificate of Urgency dated 25<sup>th</sup> October 2011 enclosed thereto with Notice of Motion, the Petitioner’s supporting affidavit, authority note, statement, list of witness document and a court order’ with instructions to serve on the respondents.

[19]. With regard to service upon the 1<sup>st</sup> respondent, the process server indicates at paragraphs 7 – 10 of the affidavit of service that –

*7. That at 4.30pm I proceeded to Ramisi Kwale International Sugar Company where upon arrival I met the accountant clerk Mr. George who has authority to accept court document for and on behalf of their company.*

*8. That he accepted Service by retaining a duplicate each document, but declined to neither sign nor put their official stamp.*

*9. That at 4.45pm I was taken to Mr. Bizii house at Msambweni by Mr Abdalla being one of the Administration Officer and upon arrival I was introduced to him by Mr Abdalla [one of the petitioners] where then I identified myself and the purpose of my visit and he accepted service.*

*10. I tendered to him the document in duplicate and required his signature. He signed and retained a duplicate.” (sic)*

The copy of the order served upon the respondents is not attached to indicate its content and upon whom it was served and by whom it was acknowledged.

[20]. There was no service on the Secretary or a Director of the 1<sup>st</sup> Respondent and in the Affidavit of Service, the persons allegedly served with the petition, application and order of the court are not described accurately by full name and official positions in the 1<sup>st</sup> respondent for the court to be able to determine whether they qualified as **‘other principal officer of the corporation’**.

[21]. Accordingly, the court does not find that there was personal service on the 1<sup>st</sup> respondent.

***Whether the 1<sup>st</sup> respondent was aware of the order of the court***

[22]. However, the requirement for personal service of a court order or judgment may be waived by the

court under rule 81.8 where -

***“Dispensation with personal service***

**81.8**

***(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –***

***(a) by being present when the judgment or order was given or made; or***

***(b) by being notified of its terms by telephone, email or otherwise.***

***(2) In the case of any judgment or order the court may –***

***(a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or***

***(b) make an order in respect of service by an alternative method or at an alternative place.”***

[23]. Could the court dispense with personal service in this case in accordance with Rule 81.8 of the English Civil Procedure Rules? Indeed first principles on the object of the law of contempt would appear to require that where the respondent is otherwise aware of the court order, despite want of personal service upon him, he should, consistently with the principle of the Rule of Law, obey the court order and, if aggrieved, seek its discharge, review or setting aside by the Court or by a higher court.

[24]. The Kenya Court of Appeal has emphasised the respect for the rule of law by compliance with court orders in a recent decision (of 22<sup>nd</sup> April 2016) ***A.B & another v. R.B*** [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA) as follows:

***“[O]ur entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened. The Constitutional Court of South Africa, in **Burchell v. Burchell Case No 364/2005** underlined the importance to the rule of law, of compliance with court orders in the following terms:***

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

[25]. I would, respectfully, agree with this judicial policy: it would be a subversion of justice were the court to permit escape from the duty to obey court orders by reason only that the order was not personally served on the person sought to be committed for contempt, if it can be shown that the person was otherwise aware of the court order. There must be a duty to obey a court order by every person who becomes aware of it although not formally served. This must be the consequence of the demands of the Rule of Law which can only be maintained where there is obedience of court determinations.

***History of the matter***

[26]. Although there was no evidence of personal service, the 1<sup>st</sup> respondent and its self-professed director, Mr. Harsil Kotecha were clearly aware of the court orders as early as 10<sup>th</sup> November 2011, when

the 1<sup>st</sup> respondent filed an application under certificate of urgency by their counsel Mr. Jotham Okome Orwa for orders inter alia ‘that the ex parte order of injunction herein granted on the 26<sup>th</sup> October 2011 by Hon Justice Hannah Okwengu be discharged.’

[27]. From the affidavit of the said director in support of the application for discharging the ex parte interim order, it is clear that he was aware of the court order and understood its specific effect as he deponed, in material parts, at Paragraphs 1 - 6 of Affidavit of Harsil Kotecha sworn on 10<sup>th</sup> November 2011, as follows:

1. ***THAT*** I am a Director of the defendant/applicant company Kwale International Sugar Company Limited duly authorized to swear this affidavit.
2. ***THAT*** the Hon Justice Hannah Okwengu Honourable Court granted an ex parte order of injunction on the 26<sup>th</sup> October 2011 restraining the applicant whether by themselves, their servants, agents, employees and or any other person acting on its own authority from entering, encroaching, alienating and evicting the petitioners from the suit property.
3. ***THAT*** the Government of the Republic of Kenya through the Permanent Secretary to the Treasury of Kenya is the Proprietor and Grantee respectively of all that property known as LR No. 27742 (hereinafter referred to as “the suit property”).
4. ***THAT*** I am advised by the Applicants advocates on record whose advice I verily believe to be true and sound that there are important matters and/or evidence which were not brought to the attention of the court but which would have materially altered the decision of the court if they had been considered which matters and/or evidence include the following:
  - i. ***THAT*** the Government of the Republic of Kenya through the Permanent Secretary to the Treasury of Kenya is the Proprietor and Grantee respectively of all that property known as LR No 27742 (hereinafter referred to as “the suit property”)
  - ii. ***THAT*** the applicant herein is the bona fide proprietor of all that property known as Land Reference Number 27742 (hereinafter referred to as the suit property) after the Government of the Republic of Kenya through the Permanent Secretary to the Treasury of Kenya, as the grantee and proprietor of the suit property, granted the applicant a leasehold interest over the said suit property pursuant to a 99 year lease which commenced on 01/06/2007 (hereinafter referred to as ‘the said lease’). Annexed hereto and marked ‘HK-1’ is a copy of the said lease.
  - iii. ***THAT*** the purpose for which the lease was entered into was for the undertaking sugarcane farming or installing of a sugar processing mill or undertaking other auxiliary activities related to sugarcane farming.
  - iv. ***THAT*** in order to achieve its obligations under the said lease the applicants have made investments to the tune of US\$ 196,630,000 (approximately Kshs.19,663,000,000.00/= [Kenya shillings Nineteen Billion Six Hundred and Sixty Three Million]) (annexed hereto and marked ‘HK-2’ is a copy of the summary of investment cost of the said project)
  - v. ***THAT*** the said lease provides for the payment by the applicant to the Government of Kenya, through the Permanent Secretary to the Treasury, an annual rent amount to Kshs3,006,000/= payable in advance each year in advance on the 1<sup>st</sup> day of June each year.
  - vi. ***THAT*** further to the foregoing, the applicants have employed more than 3800 permanent employees and or labourers as well as a further more than 3,800 casual employees who earn their daily bread from the project being undertaken in the suit property.

5. ***THAT as a consequence of the said order of injunction the development of the sugar plantation and sugar milling on the suit property and all the auxiliary matters therein are almost grinding to a halt and Applicant is apprehensive that it is in imminent danger of breaching the provisions of the said [lease] which might result into the following serious and grave repercussions:-***

*i The termination of the said lease by the Government for the non-payment of the annual rent amounting to Kshs.3,006,000/= since the suit property lies idle as the applicant can no longer develop the sugar-plantation and engage in the milling of sugar.*

*ii The thousands of employees and or labourers employed by the Applicant will be rendered jobless which will shatter the lives of thousands of their dependants.*

*iii The heavy investments worth billions of shillings poured into the project by the Applicant will go down the drain which will deprive the Government and the Kwale County Council direct revenue in terms of taxes, land rates, rents e.t.c that it pays the said authorities.*

*iv The Applicant faces the real likelihood and imminent danger of facing a litany of legal suits as a result breaching the contractual obligations it entered into with various parties which included financiers, suppliers, employees, servants and or agents among others based on the said lease.*

6. ***THAT further to the foregoing the petitioners have on the strength of the said ex parte order of injunction have proceeded to construct permanent structures on the applicants property which actions frustrates the Applicant's Constitutional right to own property as enshrined under Article 62 of the Constitution and its economic and social rights as enshrined in the Universal Declaration of Human Rights.***

[28]. Upon hearing counsel for the parties – Mr. Chidzipha for the petitioners and Mr. Waswa holding brief for M/s Rachier & Amollo & Co Advocates for the 1<sup>st</sup> Respondent as to which of the two applications [the petitioners' and 1<sup>st</sup> respondent's applications for injunction and for discharge of the ex parte interim order, respectively dated 25<sup>th</sup> October 2011 and 10<sup>th</sup> November 2011] should be heard first, the Court, Okwengu, J. (as she then was) on 29<sup>th</sup> November 2011 directed that the main application for injunction dated 25<sup>th</sup> October 2011 upon which she had granted an interim injunction on the 26<sup>th</sup> October 2011 be heard first, in the following words:

***“Upon hearing counsel and perusing the two applications and the court record I direct that the Notice of Motion dated 25/10/2011 be heard first. This is because the interim Orders which Notice of Motion date 10/11/2011 seeks to set aside will be spent once the Notice of Motion dated 25/10/2011 is disposed of. The respondent will be at liberty to take up the issue of costs if need be, after the court disposes of the Notice of Motion dated 25/10/2011.”***

[29]. Further, I observe that from the time of filing of its application dated 10<sup>th</sup> November 2011 for discharge of the interim injunction by Okwengu J., the 1<sup>st</sup> respondent was on every subsequent occasions – on 10/11/2011, 23/11/2011, 28/11/2011, 29/11/2011, 6/12/2011, 15/12/2011, 17/2/2012, 10/2/2014, 6/3/2014, 19/3/2014, 2/7/2014, 31/7/2014, and on 13/11/14 - represented by Counsel before the court including taking a preliminary objection to the entire suit on an issue of jurisdiction of the court, which objection was dismissed by Kasango, J. on 29<sup>th</sup> March 2012. Directions were later given on 19<sup>th</sup> March 2014 with consent of the parties for the hearing of the petition itself on the basis of ***viva voce*** evidence.

[30]. The 1<sup>st</sup> respondent has since 10/11/2011 when the 1<sup>st</sup> respondent filed a Motion to discharge the court order of 26<sup>th</sup> October 2011, and over numerous court appearances by its counsel been aware of the court order restraining it ***'by itself, servants, agents and any other person acting on its own authority from entering, encroaching, alienating and evicting the petitioner applicant from a parcel of land known as LR. No. 5004/30/R and in particular the following area Vidziani, Nyumba Sita, Mabatani, Gonjora,***

*Fahamuni and Kingwede.* The pretensions by the Director who swore the affidavit of 25<sup>th</sup> September 2014 that he had, at the time of replying affidavit to the application for contempt, just learnt of the order of court of 2011, are empty and unconvincing in view of the application to discharge the order made on 10/11/2011 which was supported by his previous affidavit as shown above.

[31]. Accordingly, the court finds that the 1<sup>st</sup> respondent and its director Harsil Kotecha, the deponent of the affidavits filed on its behalf herein were, despite want of proof of personal service thereof, aware of the court order of 26<sup>th</sup> October 2016.

***Whether the 1<sup>st</sup> respondent was guilty of contempt of court***

[32]. When the matter came up for mention on 31/7/2014 for purposes of fixing a hearing date for the petition, Counsel for the Petitioners brought to the attention of the court the matter of acts of contempt by the 1<sup>st</sup> respondent in proceedings for the day recorded as follows:

*“31/7/2014*

*Coram – E. M. Muriithi*

*Court clerk – Beatrice*

*Mrs Kipsang for the petitioners*

*Miss Kirui for the 1<sup>st</sup> respondent*

*Mr. Eredi for Mr. Ngari for the 3-9 Respondents*

*N/A for the 2<sup>nd</sup> Respondent*

***Mrs. Kipsang:***

*I have received threats on the matter. There has been arrests of 86 persons and charged with trespass on the land. I pray that the Managers be summoned to the Court. We pray for a mention date to confirm that we have filed an application for contempt. I request for mention within 2 weeks.*

***Miss Kirui:***

*I pray for a hearing date and the petitioner can move for contempt in the meantime.*

***Mr. Eredi:***

*The matter should be fixed for hearing. The application for contempt should be formally made. I pray that the matter be fixed for hearing.*

***Court:***

- 1. Hearing of the Petition set for 5/11/2014.*
- 2. In the meantime counsel for the Petitioners may move the court for contempt of court.*
- 3. Interim order extended.*

***E.M. Muriithi***

[33]. Photographs date-stamped 27<sup>th</sup> July 2014 are attached show occupation by persons presumably the applicants, and are consistent with the complaint by counsel of 31<sup>st</sup> July 2014.

***Breach of the interim injunction***

[34]. Some of pictures attached are date-stamped 24<sup>th</sup> February 2014 and others 7<sup>th</sup> July 2014, the former showing the land with mango and coconut and other trees, grass pasture and evidence of maize crop and shanty settlements of the applicants, and the latter showing wanton felling of the trees and ploughing of the grass land leaving the applicants’ settlements as tiny islands ringed by the ploughed land with no pastures for their cattle shown in the photographs standing by the side of the houses.

[35]. The supporting affidavit to the application for contempt of court puts the action of the 1<sup>st</sup> respondent as follows:

*“That in this affidavit we have annexed copies of photographs showing the continued destruction on the said land, trees being cut down, land being used for other purpose by the 1<sup>st</sup> respondent contrary to the purposes aimed by the Petitioners hence leaving them in situation of despair and hopelessness.....The photographs are marked MTM 36 to 72 showing the felling of tress uprooting of mature crops, tractors harrowing and planting of sugarcane, loss of economic means crops fishing and daily cultural living space of the petitioners and uproar by the petitioners and address by the local leaders.”*

[36]. In 2011, the deponent of the 1<sup>st</sup> respondent’s affidavits in the suit stated that the petitioners had encroached on the land that it had leased and had by the ex parte injunction obstructed its development of mega-project for production of sugar making it necessary for the 1<sup>st</sup> respondent to seek the intervention of the court by way of discharging the said court order. In 2014, when the petitioners attach photographs showing their occupation of the land and recent destruction of trees, pasture and vegetation surrounding the petitioners’ settlements, the 1<sup>st</sup> respondent’s director now suggests that the land in the pictures may not be the suit land, and that, even if it were so, the pictures do not disclose any interference, eviction or alienation as prohibited by the court order.

[37]. To begin with the photographs clearly show the felling of trees and destruction of vegetation cover and grass with the homesteads and livestock animals marooned in islands of settlement surrounded by ploughed land devoid of any tress or grass pastures. While not showing the eviction or alienation of the suit parcel of land, the destruction of trees and pasture has interfered with the petitioners’ use of the land for their livestock and arable farming as well as affected the petitioners’ livelihoods. In felling the trees and cutting the pasture grass, there was clear entering and encroaching.

[38]. Furthermore, I consider that there is no reason why the petitioners would attach photographs of the land purporting it to be the suit land when in fact it were some other land. The contention that the 1<sup>st</sup> respondent is a stranger to parcel of land ‘**LR No. 5004/30/R**’ is without merit. The order was made to affect the parcel of land described by the petitioners as ‘**LR No. 5004/30/R**’ and the order was extracted as follows:

***“Pending hearing and determination of this application interpartes this court do and hereby grant a conservatory order restraining the 1<sup>st</sup> Respondent by itself, servants, agents and any other person acting on its own authority from entering, encroaching, alienating and evicting the petitioner applicant from a parcel of land known as LR No. 5004/30/R and in particular the following areas Vidziani, Nyumba SITA, Mabatini, Gonjora, Fahamuni and Kingwede.”***

[39]. At the time the order was issued the 1<sup>st</sup> respondent did not question the land reference description of the parcel of land as such. In the affidavit supporting its application for the discharge of the order sworn

by the director on 10<sup>th</sup> November 2011, set out above, it was accepted that the parcel of land which the 1<sup>st</sup> respondent claimed a lessee's interest and which he described as 'all that property known as LR No. 27742' was the same parcel of land affected by the conservatory order of 26<sup>th</sup> October 2011. Hence the application for discharge of the order on the ground set out in the supporting affidavit that -

"4. ii That the applicant herein is the bona fide proprietor of **all that property known as Land Reference Number 27742 (hereinafter referred to as the suit property)** after the Government of the Republic of Kenya through the Permanent Secretary to the Treasury of Kenya, as the grantee and proprietor of the suit property, granted the applicant a leasehold interest over the said suit property pursuant to a 99 year lease which commenced on 01/06/2007 (hereinafter referred to as 'the said lease')....

**5. THAT as a consequence of the said order of injunction the development of the sugar plantation and sugar milling on the suit property and all the auxiliary matters therein are almost grinding to a halt and Applicant is apprehensive that it is in imminent danger of breaching the provisions of the said [lease]...."**

[40]. How then can the deponent deny that the land reference given by the petitioners refers to the suit property in which the 1<sup>st</sup> respondent claims lease ownership; the suit land whether known as '**LR No. 5004/30/R**' as described by the petitioners or as 'all that property known as LR No. 27742' as described by the 1<sup>st</sup> respondent is the same parcel of land upon which the petitioners have settled and on which the court made conservatory orders as set out above.

[41]. The Petitioners' claim in the petition, and the interim order it obtained therein, is for the named areas of the suit land, which the Director deponent of the affidavits filed on behalf of the 1<sup>st</sup> respondent has acknowledged to obstruct its development of the suit land which it claims a lessee's interest. It is the 1<sup>st</sup> respondent who sought to develop the land and grow sugar, a project which it claimed the petitioners had obstructed. It is the 1<sup>st</sup> respondent who would seek to develop the land and grow its sugar, and the non-removal of the petitioners from the portion of the land on which their houses was an obvious attempt to work the land it claimed to have leased from the Government and the same time observe the court order by not encroaching and evicting the petitioners from the suit land. Hence the submission in the replying affidavit paragraph 30, as follows:

"30. **THAT** in any event, I am further advised that the alleged photos as adduced by the Applicant herein do not prove or show that the alleged orders have been disobeyed if at all. In fact the same show of existing structures but does [not] in any manner [offer proof] or evidence any alienation, encroaching and/or eviction of the applicants."

[42]. It matters not the cost in terms of the 1<sup>st</sup> respondent's development program as set out in the affidavit supporting the discharge of the ex parte order; the 1<sup>st</sup> respondent could not use self-help to remove the petitioners or destroy their environment from which they eke a living in subsistence farming and grazing pasture in order to compel or cajole them into moving out of the dispute lands in search of other suitable settlements. Due process of the court required that order be discharged or set aside by Courts.

[43]. That is the specific effect of the cardinal principle of **Hadkinson v Hadkinson**, supra. As I held in **Kivuwatt Limited & Anor. v. The Commissioner KRA Customs Service Department**, Mombasa HCCC No. 117 of 2013,

"There is no choice in law as to obey or not to obey a court order. This has long been the position of the law as observed by Romer LJ in **Hadkinson v. Hadkinson** (1952) 2 ALL E.R 567at 569 -

**'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. LORD COTTENHAM, L.C., said in *Chuck v. Cremer* (1846) 1 Coop temp Cott 338 at 342, 47 ER 884 at 885):

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

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise.”

[44]. For the above reasons, I am persuaded that the 1<sup>st</sup> respondent did breach the terms of the order of court made on 26<sup>th</sup> October 2011 of which it was well aware, and it, consequently, was guilty of contempt of Court.

## **CONCLUSION**

### ***Final determination of the dispute between the parties***

[45]. I consider that the interests of the parties is that the matter be finally determined as they had by the consent of 19<sup>th</sup> March 2014 agreed. The question of ownership of the suit parcel of land, and the petitioners' and the 1<sup>st</sup> respondent's interest therein, is yet to be determined, and these proceedings must not be used as a forum as sought by the 1<sup>st</sup> respondent to make any finding on its ownership. The issue of contempt of court does not depend on the ownership of the suit parcel of land. It is immaterial that the 1<sup>st</sup> respondent considers itself the registered owner of a lease from the Government and the petitioners as trespassers. It only matters whether or not the 1<sup>st</sup> respondent breached an order for the court which had been served upon it or of which was otherwise aware, before such an order was successfully challenged and discharged, set aside, reviewed or altered by the court that made the order or a higher court.

[46]. The court determines that the 1<sup>st</sup> respondent was, by its actions of July 2014 whereby it felled trees and ploughed portions of the suit parcel of land occupied and used by the petitioners, in breach of the order of the court of 26<sup>th</sup> October 2011 having been aware of the said order from at least the 10<sup>th</sup> November 2011 when it filed an application to discharge the said court order.

### ***The remedies for contempt of court***

[47]. The committal order sought against the company would be executed against its director in terms of rule 81. 3 of the English Civil Procedure Rules. To impose a further punishment by way of a fine, as prayed by the petitioners in their Application Notice is to expose the 1<sup>st</sup> respondent to double jeopardy by imposing a twin punishment – committal to jail and a fine - for the same act of contempt of court. There has been only one contempt of court by the 1<sup>st</sup> respondent: its director, the subject of the first prayer for committal, is not a party to the suit in his personal capacity. An order for committal is made against a director of a corporation as the human hand of the company who is capable of being committed to jail.

[48]. However, the rules for enforcement of court orders under the Civil Procedure Rules of England and Wales relate only to procedure and the powers of the court are expressly saved in rule 81.2 as follows:

**“SAVING FOR OTHER POWERS**

**81.2**

***(1) This Part is concerned only with procedure and does not itself confer upon the court the power to make an order for –***

***(a) committal;***

***(b) sequestration; or***

***(c) the imposition of a fine in respect of contempt of court.***

***(2) Nothing in this Part affects the power of the court to make an order requiring a person –***

***(a) guilty of contempt of court; or***

***(b) punishable by virtue of any enactment as if that person had been guilty of contempt of the High Court,***

***to pay a fine or to give security for good behaviour.***

***(3) Nothing in this Part affects any statutory or inherent power of the court to make a committal order of its own initiative against a person guilty of contempt of court.”***

[49]. The committal of the 1<sup>st</sup> respondent’s director may well affect the operations of the 1<sup>st</sup> respondent and I consider that the 1<sup>st</sup> respondent’s contempt may adequately be punished by the payment of a fine by the 1<sup>st</sup> respondent in the conventional sum of Kenya Shillings Five Hundred Thousand (Ksh.500,000/-). In default of payment of the said fine of Ksh.500,000/- within 7 days of the Order, the 1<sup>st</sup> respondent’s director Harsil Kotecha shall be arrested and committed to jail for six months for contempt of court in disobeying the order of the Court made on 26<sup>th</sup> October 2011.

**ORDERS**

[50]. Orders accordingly.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF JUNE, 2016.**

.....

**JUDGE**

**In the presence of: -**

M/s. Kipsang for the Petitioners

No appearance for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent

Mr. Ngare for the 3<sup>rd</sup> – 9<sup>th</sup> Respondents

Mr. Silas Kaunda Court Assistant.