REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION NO.58 OF 2014

IN THE MATTER OF: AN APPLICATION BY THE EX-APPLICANTS FOR AN ORDER OF COMMITTAL

TO CIVIL JAIL FOR CONTEMPT OF COURT.

AND

IN THE MATTER OF: THE DIRECTOR/CHIEF EXECUTIVE & SECRETARY, KENYA SCHOOL OF LAW BOARD AND THE CHIEF EXECUTIVE/SECRETARY, COUNCIL OF LEGAL EDUCATION.

REPUBLIC.....APPLICANT

VERSUS

THE KENYA SCHOOL OF LAW.....1st RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION.....INTERESTED PARTY

EX-PARTE: JULIET WANJIRU NJOROGE, VINCENT OMONDI OWUOR, SOLOMON WACHIRA NGARI, ANTHONY EREGAE ELAINI, ELIZABETH NANJENDO WERE AND KEVIN AKONYA.

RULING

Introduction

1. By a Notice of Motion dated 2nd July, 2014, the *ex parte* applicant herein seek the following orders:

1. **THAT this Honourable Court be pleased to certify this Application urgent, service of the**

application notice to the 1st Respondent and Interested Party be dispensed with and the same be heard *Ex-Parte* in the first instance.

2. <u>THAT</u> this Honourable Court be pleased to order the Director/Chief Executive & Secretary, Kenya School of Law Board and the Chief Executive/Secretary, Council of Legal Education be committed to civil jail for contempt for disobedience of the orders issued on 4.4.2014 by Hon. Justice G.V. Odunga, sitting in the High Court of Kenya at Nairobi, in Judicial Review Miscellaneous Application No. 58 of 2014.

3. <u>THAT</u> the Director/Chief Executive & Secretary, Kenya School of Law Board and the Chief Executive/Secretary, Council of Legal Education do pay costs of this Application personally.

***<u>Ex Parte</u>* <u>Applicant's Case</u>**

2. The application was supported by a supporting affidavit sworn by **Juliet Wanjiru Njoroge**, the 1st applicant herein on 2nd July, 2014.

3. According to the deponent, she is a *bona fide* student of the 1st Respondent herein together with her co-*ex parte* applicants for the Advocates Training Programme for the Academic Year 2014/2015, by virtue of holding admission letter therefrom and a beneficiary of a Court order issued by this Court quashing the decision to revoke her admission.

4. She deposed that the said judgment, while quashing the 1st Respondent's decision in this matter, this Court held that;-

"…The Applicants were no longer students of the university but were students of the school provisionally or otherwise. In my view by the said admission they had acquired some rights and were therefore entitled to be treated fairly…"

5. It was deposed that by the same Judgement, this Court on sitting in the High Court of Kenya at Nairobi issued an Order of Certiorari, quashing the decision of the 1st Respondent revoking her admission to the school and those of her Co-*ex parte* Applicants in Judicial Review Miscellaneous Application No. 58 of 2014.

6. It was averred by the deponent that she was informed by her Advocates on record which information she knew to be true that the aforesaid court order with a notice of penal consequences indorsed thereto, was served on 7th April, 2014 personally upon the Director/Chief Executive & Secretary, Kenya School of Law Board, **Prof. P.L.O. Lumumba**, (hereinafter referred to as "the Director of the School") for and on behalf of the 1st Respondent, with whom they had a discussion over the matter immediately thereafter, service was also effected upon the Interested Party on that the same day.

7. She further averred that on 7th April, 2014 after service of the said Court Order, they wrote to the Director of the School and the same copied to the Chief Executive/Secretary, Council of Legal Education, (hereinafter referred to as "the Secretary of the Council") seeking to regularize the position of the *ex parte* Applicants at the school before close of business on 9th April, 2014 which letter was responded to on 15th April, 2014 by the Director of the School that he was not compelled to admit the *ex parte* Applicants to the school on ground that the order of *mandamus* was not granted by the Court hence he was no obligated to allow the *ex parte* Applicants at the school to pursue the Advocates Training Programme for the academic year 2014/2015 and further he was seeking guidance from their Advocates on record and the Secretary of the Council.

8. It was averred that on 24th April, 2014, the applicants' advocates wrote to the Director of the School, the Secretary to the Council and the Respondents Advocates, **Ochieng' Onyango Kibet & Ohaga**

clarifying the position in the judgment in the matter and the intended action and the reply by the Director of the school dated 30th April, 2014 failed to address the issues raised. Further to that on 19th April, 2014 the applicants' Advocates on record further wrote to the Director of the School and the Secretary of the Council seeking a clarification as to when they intended to allow the *ex parte* Applicants commence classes at the school only to get a rude response premised on the ground that Judicial Review Miscellaneous Application No. 58 of 2014 is still pending in Court. To this reaction, the applicants' advocates on 29th May, 2014 wrote to the 1st Respondent's Advocates, **Ochieng' Onyango Kibet & Ohaga**, to inquire on which aspects of the matter was still pending in court, which letter elicited no response, prompting the filing of this current application for committal to civil jail.

9. It was averred that since the service of the said court order, the *ex parte* Applicants have tried without success to access aforesaid institution of learning being, **The Kenya School of Law** due to the ignorance, neglect, failure and in disobedient of the order aforesaid on the part of the Director of the School and the Secretary of the Council who have continued to bar the *ex parte* Applicants from lawfully attending classes as *bona fide* students of the school and use their offices to frustrate the *ex parte* Applicants efforts of undertaking their Advocate Training Programme for the academic year 2014/2015 for no apparent reason.

10. On 11th September, 2014, the same deponent swore a further affidavit in which she deposed that neither the 1st Respondent nor the Interested Party has the mandate to accredit or suspend accreditation of any foreign institution offering a degree in Bachelor of Laws and as such there is no law in Kenya that grants them the powers to do so hence the contents of Paragraphs 6 and 7 of the Replying Affidavits are premised on imagination and intended to hoodwink the Honourable Court from upholding its dignity.

11. According to the deponent, the averments contained in her supporting affidavit were not been controverted at all and in the circumstances the Application for committal to civil jail was unopposed and should be allowed as such.

1st Respondent's Case

12. In opposition to the application, the 1st Respondent filed a replying affidavit sworn by **Prof. P L O Lumumba**, the Director and Chief Executive Officer of the 1st Respondent on 2nd September, 2014 in which he confirmed that he was aware of the judgement made herein on 2nd April, 2014 quashing the Respondents' decision annulling the admission of the *ex parte* applicants to the Advocates Training Programme (hereinafter referred to as the Programme) at the Kenya School of Law (hereinafter referred to as the School). He however deposed that the Court declined to grant an order of mandamus as sought to compel the registration of the *ex parte* applicants to the Programme.

13. According to him the reason for the grant of the said orders was the failure to give the applicants a hearing before the decision to revoke their admission was made. However while they were preparing to hear the applicants, they were served with proceedings in Nairobi High Court Judicial Review Miscellaneous Civil Application No. 115 of 2014 between the **Republic vs. The Kenya School of Law and Council of Legal Education ex parte Uganda Pentecostal University** in which application the University sought an order of certiorari against the Respondents' decision to suspend the accreditation of the University.

14. It was therefore deposed that the intended hearing of the applicants was kept in abeyance pending the hearing of the said case. He reiterated that there was no order of the Court directed to the 1st Respondent directing the admission of the *ex parte* applicants to the Programme. He was therefore of the view that there was no order of this Court which the 1st Respondent was in contempt of.

15. In his view the application was grossly misconceived and an abuse of the court process.

16. According to the deponent, while the 1st Respondent is prepared to exercise its discretion with regard

to the *ex parte* applicants, such exercise is at all times to be with deference to Statute and Regulations that govern the process.

2nd Respondent's Case

17. On behalf of the 2nd Respondent, a replying affidavit was filed sworn by **Prof. W Kulundu Bitonye**, the Secretary to the 2nd Respondent on 2nd September, 2014 which was a "copy paste" or a replica of the affidavit sworn on behalf of the 1st Respondent.

Determinations

18. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.

19. It is important to reiterate the current procedure for an application for contempt in circumstances such as in this case.

20. The first port of call with respect to the procedure for institution contempt of Court proceedings in this country is section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya. That section provides:

> ***(1) 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.***
>
> ***(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.***

21. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the ***Judicature Act***.

24. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf's** "***Access to Justice Report, 1996***", the ***Rules of the Supreme Court*** of England are being replaced with the ***Civil Procedure Rules, 1999*** and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the ***Civil Procedure (Amendment No. 2) Rules***, 2012, came into force and Part 81 thereof effectively replaced Order 52 of the ***Rules of the Supreme Court*** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is nolonger required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.

23. In my considered view, Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come

back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

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

24. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. 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…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court… Where a party considers an *ex parte* order to cause him undue**

hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* **and this argument will not avail either the first or the second defendant".**

25. In this case, it is clear that both Respondents are aware of the orders of this Court given on 4th April, 2014. Accordingly the issue of service does not fall for determination in these proceedings.

26. However, the Respondent's case is that this Court did not grant an order of mandamus hence they were not obliged to admit the *ex parte* applicants. With due respect I am surprised at the interpretation of the judgement adopted by the deponents of the replying affidavits who are eminent Professors of law in this Country and who are in charge of the Kenya School of Law an institution of higher learning tasked with the training of lawyers in this Country and the Council of Legal Education an entity charged with preparing guidelines for the conduct of such training.

27. By the time the applicants came to this Court, they had already been admitted at the School and this is the reason why the Court expressed itself as follows:

"…The Applicants were no longer students of the university but were students of the school provisionally or otherwise. In my view by the said admission they had acquired some rights and were therefore entitled to be treated fairly…"

28. Had the applicants not been admitted to the School there would have been no reason to revoke their admission thereat.

29. Therefore the effect of quashing the decision revoking the *ex parte* applicants' admission to the School was that the status ante the impugned decision was restored with the effect that the *ex parte* applicants were restored to their positions before the said decision and that status was that they were students at the school. Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification.

30. When the Court gave orders it was well aware of the statutory duties of the Respondent which in the Court's view cannot be used as an excuse to deny citizens of their right to a hearing. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

" The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...*There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice*...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at....It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio.*"

31. Where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of statutory provisions this Court cannot turn a blind eye to the same. This Court having made a decision which decision has not been stayed, to contend that the decision cannot be implemented of the alleged statutory provisions is in my view the highest height of invincibility coming from persons in charge of institutions tasked with the training of lawyers in the country.

32. This Court having pronounced itself on the matter it borders on contempt of Court for such submissions to even be contemplated. Fundamental rights and freedom which are expressly laid out in our constitution such as the right to a hearing must never be given casual observance or breached with impunity by the Government or its servants. If we show disrespect to the supreme law of the land and fail to punish or penalise those who violate important provisions we will be encouraging such violation. As was held by **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010**:

> **"The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under bill of rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers."**

33. I must send a strong message to those who are intent in disobeying Court orders that such conduct will not be tolerated no matter the status of the contemnors in the society. When persons in authority themselves set out to disobey Court orders with impunity they must remember that they are sending wrong signals to ordinary Kenyans that it is proper to disobey Court orders with impunity which is a recipe for chaos. Such conduct must therefore be nipped in the bud as soon as it is detected. In my view contempt of Court is such a grotesque monster that the courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation. As was held by the Court of Appeal in **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

34. Therefore it is my view and I so hold that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions.

35. Therefore in order to maintain the rule of law and in order that the authority and the dignity of our Courts are upheld at all times and to stamp the authority of this Court and ensure the values and principles of governance enshrined in Article 10 of the Constitution are adhered to, I hereby direct the 1st Respondent's Director and the 2nd Respondent's Secretary to personally appear before this Court to explain why appropriate sanctions ought not to be taken against them in light of their disapproving conduct.

Dated at Nairobi this 21st day of January, 2015

G V ODUNGA

JUDGE

In the presence of:

Mr Nzaku for the ex parte applicants

Cc Patricia