



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC PETITION NO. 37 OF 2017**

ADRIAN KAMOTHO NJENGA.....PETITIONER/APPLICANT

VERSUS

THE COUNCIL OF GOVERNERS.....1<sup>ST</sup> RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> RESPONDENT

KENYA RURAL ROAD AUTHORITY.....3<sup>RD</sup> RESPONDENT

KENYA URBAN ROAD AUTHORITY.....4<sup>TH</sup> RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT,

HOUSING AND URBAN DEVELOPMENT.....5<sup>TH</sup> RESPONDENT/CONTEMNER

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated 25<sup>th</sup> November 2020, the Petitioner/Applicant has sought for the following Orders;

(i) .....*Spent.*

(ii) *The Respondents be and are hereby cited and adjudged guilty for Contempt of Court for contravening the Judgment, orders and decree of the Honourable court issued on the 16<sup>th</sup> January 2020.*

(iii) *An Order of Committal be and is hereby issued committing the Respondents herein to Kamiti Maximus Prison for a period of twelve months.*

(iv) *This Honourable Court be pleased to further impose a fine of Kshs. 20, 000, 000/= only upon each and every Respondent herein.*

(v) *Costs of and incidental to this Application be provided for.*

(vi) *The Honourable court be pleased to grant such further and/or other reliefs as may be just and expedient.*

2. The subject Application is premised on the grounds that are contained on the face thereof and same is further supported by the Affidavit of the Petitioner/Applicant sworn on the 25<sup>th</sup> November 2020, and to which the Petitioner has attached 4 annextures.

3. Upon being served with the subject Application, the 5<sup>th</sup> Respondent filed a Replying Affidavit sworn on the 9<sup>th</sup> February 2021, as well as grounds of opposition, the latter which are undated.

**DEPOSITION BY THE PARTIES**

4. Vide supporting Affidavit sworn on the 25<sup>th</sup> November 2020, the Deponent has averred as hereunder;

5. On the **16<sup>th</sup> of January 2020**, this Honourable Court issued rendered a judgment and decreed as follows;

***“The 1<sup>st</sup> Respondent id directed to constitute a committee under Section 20 of the Intergovernmental Relations Act which will liaise with the 2<sup>nd</sup> to 4<sup>th</sup> Respondent through the Ministry in charge of Transport for the formulation and implementation of the Policy for the provisions of Toilets and other Sanitation Facility along the Kenyan Road Network to give effect to Articles 42 and 43 on the Right to a clean and healthy environment with reasonable standards of sanitation”***

6. Further, the Deponent has averred that upon the rendition of the said judgment, same extracted the order and resultant decree of the court, which was thereafter served upon the 1<sup>st</sup> to 3<sup>rd</sup> Respondents on the **23<sup>rd</sup> February 2020**, and on the 4<sup>th</sup> Respondent on the **25<sup>th</sup> February 2020**.

7. It is further averred that the judgment, order and decree were similarly served upon the 5<sup>th</sup> Respondent on the **24<sup>th</sup> February 2020**. For clarity, the has annexed a copy of a letter forwarding the judgment, order and decree to the 5<sup>th</sup> Respondent.

8. On the other hand, the Deponent has further averred that on the **2<sup>nd</sup> September 2020**, the 5<sup>th</sup> Respondent was served with a notice of intention to commence contempt proceedings for breaching and/or violating the terms of the judgment and decree of this court.

9. Besides, the Deponent has further averred that same took out and served the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, with notices of intention to commence contempt proceedings. For clarity, it is stated that the said offices were served with the said notices on the **11<sup>th</sup> November 2020**, **6<sup>th</sup> November 2020**, **11<sup>th</sup> November 2020** and on the **12<sup>th</sup> November 2020**, respectively.

10. It is further averred that despite service of the order and decree of the court, which contained the terms of the judgment as well as service of the notices of intention to commence contempt proceedings, the Respondent have failed, neglected and/or otherwise refused to comply with and/or adhere to the terms of the decree.

11. Further, the Deponent has averred that to date the Respondents herein have refused to formulate policy for the provision of toilets and other sanitation facility along the Kenyan road network to give effect to **Articles 42 and 43 of the Constitution 2010**, on the right to a clean and healthy environment with reasonable standards of sanitation, as was ordered by this court.

12. Based on the foregoing, the Deponent has averred that unless the Honourable court steps in and cites the Respondents for contempt, it is apparent that the Respondents shall continue to disobey and/or disregard the terms of the judgment of the court.

#### **RESPONSE BY THE 5<sup>TH</sup> RESPONDENT**

13. Vide Replying Affidavit sworn by one professor Paul M. Maringa, namely the Principal Secretary in the Ministry of Transport, Infrastructure, Housing, Urban developments and Public works, the 5<sup>th</sup> Respondent has stated as hereunder;

14. First and foremost, that the 5<sup>th</sup> Respondent has the mandate to develop and formulate policies and regulations which govern public transport industry inter-alia road, rail, marine and air transport.

15. On the other hand, it has also been averred that the 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> Respondents herein are state corporations of transport, infrastructure, housing, urban developments and public works. However, that same are implementing agencies for policies made under the executive and handed down through the parent ministry.

16. Based on the foregoing, it has been averred that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents do not, therefore, participate in the formulation of policies and therefore same cannot be expected to indulge and/or engage in the formulation of policies which is exclusively the work of the executive.

17. Be that as it may, it has been averred that the 5<sup>th</sup> Respondent herein, commenced the process of developing guidelines in **2014** after a study was carried out on road safety and health study by Northern Corridor Transit and Transport Authority.

18. Further, it is averred that the 5<sup>th</sup> Respondent's office also formed a task force on the establishment of roadside stations along the Northern Corridor on the **10<sup>th</sup> August 2015** and that the said task force drew members from various albeit different government offices.

19. Besides, it is averred that the task force, which was appointed by the 5<sup>th</sup> Respondent proceeded to and developed draft guidelines that received comments from various agencies and that the said task force also held various meetings with various stakeholders, with a view to developing guidelines on roadside stations. For clarity, it was averred that the various meetings and guidelines were aimed at formulating and thereafter implementing the policy towards actualizing the import and tenor of **Article 42 and 43 of the Constitution 2010**.

20. On the other hand, it has been averred that Kenya is a member of the Northern Corridor Transit and Transport, whose membership includes, Uganda, Republic of Congo, Rwanda and South Sudan, and for purposes of implementing any road network guidelines same must be circulated to all the members and thereafter same must be deliberated upon before implementation can be actualized.

21. Finally, the Deponent has averred that the draft guidelines, which were circulated to the member of the Northern Corridor Transit and Transport, are currently in the process of adoption, in accordance with the provisions of the Statutory Instruments Act, No. 23 of 2013. In this regard, ones same are duly adopted, same shall be operationalized.

22. Other than the Replying Affidavit, sworn on the 9<sup>th</sup> February 2021, the 5<sup>th</sup> Respondent has also filed grounds of opposition, which is undated, but which essentially buttresses the averments contained in the Replying Affidavit.

23. Perhaps to add, the 5<sup>th</sup> Respondent has contended that the contempt proceedings herein are merely meant to embarrass him, given that the 5<sup>th</sup> Respondent was never a party to the subject Petition. In this regard, the 5<sup>th</sup> Respondent avers that the contempt proceedings amount to him being condemned unheard.

### **SUBMISSIONS BY THE PARTIES**

24. The subject Application initially came up for hearing on the 31<sup>st</sup> January 2022, whereupon counsel for the Petitioner applied to have the Application for contempt withdrawn as against the 1<sup>st</sup> to 4<sup>th</sup> Respondent.

25. Pursuant to the Application and/or request, details in terms of the preceding paragraph, the court proceeded to and marked the Application as withdrawn as against the 1<sup>st</sup> to 4<sup>th</sup> Respondent.

26. Following the withdrawal of the contempt Application as against the 1<sup>st</sup> to 4<sup>th</sup> Respondent, the court ordered and/or directed that the Petitioner does extract the court order and serve same upon the 5<sup>th</sup> Respondent, so as to bring it to the attention of the 5<sup>th</sup> Respondent that the contempt proceedings shall only be against the 5<sup>th</sup> Respondent.

27. On the 7<sup>th</sup> March 2022, the contempt Application came up for hearing, essentially between the Petitioner and the 5<sup>th</sup> Respondent only. In this regard, the court ordered and/or directed that the Application be canvassed by way of oral submissions.

28. Pursuant to the foregoing directions, counsel for the Petitioner adopted the grounds at the foot of the Application and also reiterated the contents of the supporting Affidavit sworn on the 25<sup>th</sup> November 2020, together with the annexures thereto.

29. Further, the Petitioner submitted that even though the 5<sup>th</sup> Respondent was not a party to the Petition, part of the judgment of the court was directed to the 5<sup>th</sup> Respondent and hence the 5<sup>th</sup> Respondent was obliged to comply with and/or adhere with the terms of the judgment.

30. Secondly, it was submitted that after the judgment was rendered, a copy of the judgment, the order and decree, were duly served on the 5<sup>th</sup> Respondent and hence the 5<sup>th</sup> Respondent was aware and/or knowledgeable of the terms of the judgment.

31. Nevertheless, it was submitted that despite being aware of the terms of the judgment and the consequential decree, the 5<sup>th</sup> Respondent has failed, neglected and/or refused to comply with and/or abide by the terms of the judgment.

32. In the premises, it was therefore submitted that the conduct of the 5<sup>th</sup> Respondent amounts to and/or constitutes contempt of court and therefore deserving of punishment.

33. On his part, counsel for the 5<sup>th</sup> Respondent submitted that the 5<sup>th</sup> Respondent was never a party to the proceedings. In this regard, it was contended that having not been a party to the proceedings, same cannot, therefore, be subject to contempt proceedings.

34. Secondly, counsel for the 5<sup>th</sup> Respondent has submitted that the gist of the judgment of the court was directed to the 1<sup>st</sup> Respondent to constitute a working committee, which was to liaise with the 2<sup>nd</sup> to 4<sup>th</sup> Respondent, albeit through the 5<sup>th</sup> Respondent.

35. In the premises, counsel for the 5<sup>th</sup> Respondent submitted that the primary role and/or responsibilities, towards the implementation of the judgment of the court, rested with the 1<sup>st</sup> Respondent and not otherwise.

36. Thirdly, counsel for the 5<sup>th</sup> Respondent submitted that having withdrawn the contempt Application as against the 1<sup>st</sup> to 4<sup>th</sup> Respondent, the foundation of the contempt proceedings, stood destroyed, and hence there is no basis upon which same can subsist against the 5<sup>th</sup> Respondent.

37. Fourthly, counsel for the 5<sup>th</sup> Respondent has submitted that even if the foundation of the contempt proceedings had not been destroyed and/or affected by the withdrawal of the Application against the 1<sup>st</sup> to 4<sup>th</sup> Respondent, it was still imperative to observe that the implementation of the judgment was not time-bound.

38. Lastly, counsel for the 5<sup>th</sup> Respondent submitted that even though the 5<sup>th</sup> Respondent was not a party to the Petition, the 5<sup>th</sup> Respondent by virtue of his statutory mandate, has commenced the process of formulation of guidelines and/or policies, which have been circulated to various stakeholders, for purposes of attracting their input and contribution.

39. For clarity, it has been submitted that such actions, were commenced even before the filing of the Petition and same are still ongoing and the implementation would soon commence.

## **ISSUES FOR DETERMINATION**

40. Having reviewed the Notice of Motion Application herein, together with the Supporting Affidavit, the Replying Affidavit thereto and the grounds of opposition and having similarly considered the oral submission that were made by the parties, the following issues are germane for determination;

- a. *Whether the person described as the 5<sup>th</sup> Respondent is truly a party to the subject proceedings and if not whether same can be subjected to contempt proceedings.*
- b. *Whether the judgment of the court was time bound and if not whether a party to the suit can create and/or ascribe timelines for implementation of the judgment of the court.*
- c. *Whether the contempt proceedings can be maintained as against the 5<sup>th</sup> Respondent after the withdrawal of same against the 1<sup>st</sup> to 4<sup>th</sup> Respondent.*
- d. *Whether the 5<sup>th</sup> Respondent has indeed disobeyed and/or disregarded the judgment of the court and is thus guilty of contempt.*

## **ANALYSIS AND DETERMINATION**

### **ISSUE NUMBER 1**

**Whether the person described as the 5<sup>th</sup> Respondent is truly a party to the subject proceedings and if not whether same can be subjected to contempt proceedings.**

41. From the Petition which was filed herein, it is apparent and/or evident that there were only 4 Respondents, who were sued and/or impleaded by the Petitioner.

42. It is also evident that during the entire course of proceedings, up to and including the rendition of the judgment of the court, no Application was made by and/or at the instance of the Petitioner to amend the Petition.

43. Nevertheless, in the course of rendition of the judgment, the Honourable court (differently constituted) proceeded to and included Clause 40 of the judgment which was attributed and/or otherwise directed to the Cabinet Secretary Ministry of Transport, Infrastructure, Housing, Urban Developments and Public Works, whereby same was ordered to constitute and chair the working group which was to include representatives of all the Respondents to formulate the Policy for the provisions of Toilets and other sanitation facilities on the county's road network to give effect of a right to clean and healthy environment on the roads

44. However, even though a clause was contained in the judgment and which was directed to the concerned Cabinet Secretary, it is important to note that the inclusion of such a clause, does not amount to joinder of a party to the Petition and the Proceedings.

45. It is also important to note that if there was need to join the Cabinet Secretary, a deliberate effort ought to have been made and when such effort was made, the Cabinet Secretary would have been afforded an opportunity to bring forth before the court documents in his/her defense.

46. Be that as it may, no such Application was made and therefore Cabinet Secretary, was never constituted as a party to the subject proceedings and not having been so constituted as a party, same cannot therefore be cited and/or punished, without having been afforded an opportunity to be heard in respect of the subject matter.

47. In my humble view, if the Cabinet Secretary had been impleaded and/or joined in the Petition, same would have brought the court to speed on (*sic*) the efforts that have been taken, including the various guidelines that have been formulated and circulated, towards the realization of the right to clean and healthy environment.

48. Nevertheless, to proceed and cite the Cabinet Secretary, when same was neither a party to the suit nor was afforded an opportunity to be heard, shall be tantamount to condemning the Cabinet Secretary, without being heard, contrary to and in violation of the rules of natural justice.

49. Further, I am of the humble view shall amount to breaching and/or violating the provisions of **Article 50(1) of the Constitution 2010**, which provides as hereunder;

#### ***Fair hearing.***

*1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

50. As pertains to the importance of the right to be heard and the doctrine of the rule of law, it is important to recall and reiterate the decision in the case of **David Oloo Onyango v Attorney-General [1987] eKLR**, where the Court of Appeal similarly considered the place and importance of the doctrine of the rule of law and observed that it is a violation of the dictates of the natural justice for one to be condemned unheard.

51. On the other hand the centrality of the rule of natural law and the aspect thereof that requires that a party be heard beforehand, was also underscored by the learned author in the Halsbury's Laws of England Fourth Edition Vol. 1 at paragraph 74 as follows:

***“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations.”***

52. Notwithstanding the fact that the Cabinet Secretary was not a party to the Petition, same has however been brought on board vide the Application for contempt. But what is perplexing is that even in the subject Application, there is no relief and/or prayer that same be joined to the subject proceedings before same can be cited and punished.

53. In my humble view, the Application to cite and punish the person deemed to be the 5<sup>th</sup> Respondent, prior to same being joined into the proceedings, renders the entire Application fatally incompetent and/or misconceived.

54. Before I conclude my deliberations as pertains to the first issue herein, it is worthy to observe that a similar situation where contempt proceedings were being taken against a person who had neither be joined in the matter was considered in the case of Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR, where the court observed as hereunder;

***In the instant Appeal, the appellant was never a party to the first respondent's suit against the second and third respondents in which the ex parte order of 18<sup>th</sup> December, 1992 was made by the superior court quite clearly in defiance of Order XXXIX rule 3(1) of the Rules. Subsequent inter partes hearing on 11<sup>th</sup> January, 1993 of the first respondent's Chamber Summons referred to earlier in this judgment was without any reference to the appellant whose interests after 18<sup>th</sup> December, 1992 would be affected by the first respondent's litigation against the second and third respondents. Hence, the order of the superior court dated 15<sup>th</sup> January, 1993 that the public auction of the property known as L.R. ELDORET MUNICIPALITY/BLOCK 4/69 together with the improvements thereon including the business carried thereon under the name of ELDORET SIRIKWA HOTEL LIMITED was illegal, invalid and of no effect and the confirmation of the certainly irregular ex parte injunction order of 18<sup>th</sup> December, 1992 which was to continue until the determination of the substantive suit was, as it affected the interests of and without the appellant being given an opportunity to be heard, clearly in breach of the rules of natural justice and attracts ex debito justitiae the right to have it set aside.***

## **ISSUE NUMBER 2**

**Whether the judgment of the court was time-bound and if not whether a party to the suit can create and/or ascribe timelines for implementation of the judgment of the court.**

55. Though the Honourable court issued directions and/or gave declarations pertaining to the constitution of a committee under Section 20 of the Intergovernmental Relation Act, which was to liaise with the 2<sup>nd</sup> to 4<sup>th</sup> Respondent through the Ministry in charge of Transport, it must be noted that the Honourable court did not prescribe and/or stipulated the timeline within which the directions and/or orders were to be complied with.

56. On the other hand, I have noted that after the rendition and/or delivery of the judgment of the court, the Petitioner herein, duly extracted a decree and caused same to be served on all the Respondents, including the 5<sup>th</sup> Respondent herein.

57. Besides it is also worthy to point out that the Petitioner also extracted and issued notices to commence contempt proceedings against the Respondents and in respect of which same assigned and/or alluded to timelines within which the terms of the judgment were to be implemented.

58. However, what is critical and essential is whether the decision of the court had prescribed and/or circumscribed the timeline of the carrying out and/or undertaking of the act and/or activities alluded to.

59. On the other hand, the other question that needs to be addressed is whether a party to litigation, can unilaterally in any correspond and/or notices after the judgment, (*sic*) to alter the terms of judgment by inscribing a timeline therein.

60. In my humble view, given that the judgment of the Honourable court did not indicate the timeline within which the formulation and implementation of the policies towards realization of the rights to clean and healthy environment were to be carried out, then it behoved counsel for the Petitioner to return back to the court and ask the court to assign the timeline.

61. Notwithstanding the foregoing, the Petitioner herein did not deem it fit to approach the court and was content to set own timelines, vide the correspondence and the notices.

62. Having set and/or prescribed the timeline in the correspondence and notices, can the court now use such unilaterally set timelines, to hold any of the Respondents, to be guilty of contempt, in my humble view, the answer is in the negative. For clarity, a party and/or litigant can

only be guilty of contempt for failing to act, comply with and/or adhere to a court order within the timeline set by the court and not by the core litigant, in the manner that the Petitioner seeks to do.

63. In short, the absence of timeline to the judgment in question, would also negate a positive finding that any of the Respondents, let alone the 5<sup>th</sup> Respondent, has been guilty of disobedience of the terms of the judgment of the court.

### **ISSUE NUMBER 3**

#### **Whether the contempt proceedings can be maintained as against the 5<sup>th</sup> Respondent after the withdrawal of same against the 1<sup>st</sup> to 4<sup>th</sup> Respondent.**

64. From the onset, it is imperative to note that the Petitioner herein sued and/or impleaded the 1<sup>st</sup> to 4<sup>th</sup> Respondent and thereafter proceeded to and successfully prosecuted the Petition against same.

65. Subsequently, the Petitioner thereafter extracted an explicit court decree, whose terms were clear and unequivocal. For clarity, the terms and tenor of the decree were as hereunder;

***“the 1<sup>st</sup> Respondent id directed to constitute a committee under Section 20 of the Intergovernmental Relations Act which will liaise with the 2<sup>nd</sup> to 4<sup>th</sup> Respondent through the Ministry in charge of Transport for the formulation and implementation of the Policy for the provisions of Toilets and other Sanitation Facility along the Kenyan Road Network to give effect to Articles 42 and 43 on the Right to a clean and healthy environment with reasonable standards of sanitation”***

66. My reading of the terms and tenor of the decree that was extracted, signed, sealed and served on the Respondents, is to the effect that it was the 1<sup>st</sup> Respondent who was directed to constitute a committee under a specific section of the intergovernmental relations act, and which committee was to liaise with the 2<sup>nd</sup> to 4<sup>th</sup> Respondent through the Minister in charge of Transport.

67. Clearly, the Minister in charge of Transport was to facilitate and/or better still provide a forum for the liaison between the committee established by the 1<sup>st</sup> Respondent and the 1<sup>st</sup> to 4<sup>th</sup> Respondent.

68. To the extent that the 1<sup>st</sup> Respondent herein, had a primary role and/or mandate to play in the operationalization of the judgment, it was/important upon the Petitioner to show that indeed the 1<sup>st</sup> Respondent had acted in the manner directed and that it is the 5<sup>th</sup> Respondent that had failed to facilitate the liaison.

69. Other than the foregoing, the judgment and decision of the court, the burden of the formulation and implementation of the policy towards the realization of the right to clean and healthy environment, at the door step at the 1<sup>st</sup> to 4<sup>th</sup> Respondent and not otherwise.

70. To the extent, that the 1<sup>st</sup> to 4<sup>th</sup> Respondent had a primary role to play in the realization and/or implementation of the terms of the judgment of the court, the withdrawal of the contempt proceedings against same, essentially destroys the crux and/or fulcrum of the contempt proceedings.

71. In my humble view, once the contempt proceedings are withdrawn against the direct parties to the suit and who bore the primary responsibilities thereto, then same cannot legally be sustained against the 5<sup>th</sup> Respondent, who was never a party to the proceedings.

72. In a nutshell, I find and hold that the withdrawal of the contempt proceedings against the 1<sup>st</sup> to 4<sup>th</sup> Respondent, who are the only parties to the suit, rendered the remainder of the claim against the 5<sup>th</sup> Respondent redundant.

### **ISSUE NUMBER 4**

#### **Whether the 5<sup>th</sup> Respondent has indeed disobeyed and/or disregarded the judgment of the court and is thus guilty of contempt.**

73. Despite the fact that the 5<sup>th</sup> Respondent was not a party to the subject Petition and therefore was neither afforded an opportunity to submit and/or present before the court documents articulating the processes that had been undertaken, same has otherwise supplied to court various guidelines, whose import, is meant to actualize the right to clean and healthy environment.

74. Suffice it to observe, that the 5<sup>th</sup> Respondent has pointed out that same constituted a task force which incorporated various members drawn from different government offices and thereafter the task force, commence the process of receiving contributions from various stake holders.

75. It has also been pointed out that following various meetings and receipt of memorandum from various stakeholders, the taskforce proceeded to and prepared guidelines, towards the formulation of policies relating to the construction of toilets and sanitation facilities along the Kenyan road networks.

76. Besides, it has also been averred that the formulation of the policies and the implementation thereof would also require participation of the countries who are members of the Northern Corridor Transit and Transport, and in this regard, the guidelines have been circulated to the members of Norther and Transit Transport for deliberation and further action.

77. On the other hand, it was also pointed out that the draft guidelines, toward the policies relating to the implementation of the right to clean and healthy environment along the Kenyan road network are currently in the process of adoption in accordance with the provisions of the Statutory Instruments Act, and that soon same shall be role out and be acted upon.

78. In short, the 5<sup>th</sup> Respondent has outlined and/or enumerated the various efforts that his office has undertaken, towards the process of formulating the requisite policies to operationalize and implement the right to clean and healthy environment along the Kenyan road network.

79. In the premises, the 5<sup>th</sup> Respondent has pointed out that even before the judgment of the court, same was already in action and that the action has continued and remains in progress to date.

80. Suffice it to say, that the contents of the Replying Affidavit, which was sworn by the Principal Secretary in the designated ministry, was neither challenged and/or controverted at all.

81. To the best of my recollection, counsel for the Petitioner contended that to the extent that the activities alluded to and/or enumerated were in respect to the period before the judgment, then same were irrelevant and inconsequential.

82. To my mind, that response, is mistaken and out of place. The critical question, is the formulation of the relevant policy and/or guidelines, towards the realization of the right to clean and healthy environment and it is the policy that the 5<sup>th</sup> Respondent is alluding to.

83. In my humble view, even though the 5<sup>th</sup> Respondent was not a party to the subject proceedings and was thus not availed an opportunity to show case what had hitherto been done, it is worthy to note that substantial efforts are being put in place the right to clean to clean and healthy environment.

84. In the circumstances, can it be said that the 5<sup>th</sup> Respondent is guilty of disobedience and disregard of lawful court orders, despite the concerted efforts that have been displayed vide the Replying Affidavit.

85. Certainly, an objective finding would point to the direction of efforts being made to comply with the provisions of Articles 42 and 43 of the Constitution 2010, as well as the terms of the judgment of the court.

86. In short, I am not persuaded that the 5<sup>th</sup> Respondent is guilty of contempt to warrant citation and punishment, either in the manner sought or at all.

87. Suffice it to note, that contempt of court proceedings is a serious issue and a person is likely to be denied and/or deprived of his liberty. Consequently, before one can be cited and punished for contempt, the applicant must prove the incident of contempt to the requisite standard, namely the intermediate standards.

88. In support of the foregoing observation, I am inclined to adopt and reiterate the decision in the case **Mutitika v Baharini Farm Ltd[1985] eKLR**, where the Court of Appeal observed as hereunder;

***Re Breamblevale Ltd [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063***, had this to say,

*“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt”.*

*With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.*

**“We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved”**

89. In short, the contempt proceedings herein have not been proven to the requisite standards and consequently the citation applied for cannot issue.

#### **FINAL DISPOSTION**

90. To cite and punish for contempt, it is required that the Applicant establish his/her case to a standard of proof above the balance of probabilities.

91. However, in respect of the subject matter, there are several factors, that militates against the subject Application, inter-alia the fact that the Application has been mounted against a person who has neither been impleaded nor made a party to the proceedings.

92. Based on the foregoing, the Notice of Motion Application dated the 25<sup>th</sup> November 2020, is not only misconceived but same is legally

untenable.

93. In the premises, the subject Application be and is hereby Dismissed with no orders as to costs, given that the subject matter relates to and/or concerns public interest litigation.

94. Notwithstanding the foregoing, it is worthy to observe that the terms of the judgment that was rendered by this court differently constituted, remain alive, vibrant and operative. Consequently, the judgment herein is in the nature of structural inter-dates or better still a continuing mandamus.

95. Given that the 5<sup>th</sup> Respondent or the person so described as such, has since filed a Replying Affidavit indicating the formulation of guidelines and the efforts being made to effectuate the rights to clean and healthy environment along the Kenya road network, it is therefore appropriate to now demand from the Cabinet Secretary of the Ministry of Transport, Infrastructure, Housing, Urban Developments and Public Works, to report back to the court on the status of the policy formulation and implementation.

96. Based on the foregoing, I now direct that the matter shall be mentioned within the next six (6) months and in particular on the **3<sup>rd</sup> October 2022**, to confirm to court the extent of progress that shall have been achieved as pertains to the constructions of the toilets and reasonable sanitation facilities on the Kenyan Road Network towards the realization of the Right to Clean and Healthy Environment along the Kenyan Road Network.

97. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>th</sup> DAY OF MARCH 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula Court Assistant**

**No Appearance for the Petitioner**

**No Appearance for the 1<sup>st</sup> Respondent**

**No Appearance for the 2<sup>nd</sup> Respondent**

**No Appearance for the 4<sup>th</sup> Respondent**

**Mr. Motari for the 5<sup>th</sup> Respondent**