REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 2 OF 2014

IN THE MATTER OF AN APPLICATION

FOR JUDICIAL REVIEW ORDERS OF PROHIBITION & CERTIORARI

AND

IN THE MATTER OF LEGAL NOTICE NO. 219 OF 2013

(THE NATIONAL TRANSPORT AND SAFETY AUTHORITY (OPERATION OF PUBLIC SERVICE VEHICLES) REGULATIONS, 2013)

AND

IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT, (ACT NO. 33 OF 2012)

AND

IN THE MATTER OF THE NOTICE OF DECEMBER 25TH, 2013 IN *THE DAILY NATION* NEWSPAPER OF DECEMBER 27TH, 2013

AND

IN THE MATTER OF THE TRAFFIC CAP 403, LAWS OF KENYA

AND

IN THE MATTER OF A JUDICIAL REVIEW APPLICATION BY:

KENYA COUNTRY BUS OWNERS' ASSOCIATION

(THROUGH PAUL G. MUTHUMBI – CHAIRMAN,

SAMUEL NJUGUNA – SECRETARY,

JOSEPH KIMIRI – TREASURER)…….1ST APPLICANT MBUKINYA BUS

SERVICE (KENYA) LTD…….....…….2ND APPLICANT

CROWN BUS SERVICE LTD…...…….…….…3RD APPLICANT

KAMPALA COACHS LTD…….....……...…..…….4TH APPLICANT

TRATICOM ENTERPRISES LTD….....…..…….5TH APPLICANT

UGWE BUS SERVICES LTD……...…..…….6TH APPLICANT

TRISHA COLLECTIONS LTD….....…….7TH APPLICANT

PANTHER TRAVELS LTD….....…..…….8TH APPLICANT

NENO COURIER SERVICES LTD…….....…..….9TH APPLICANT

VERSUS

CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE…...…
1ST RESPONDENT

PRINCIPAL SECRETARY -

STATE DEPARTMENT OF TRANSPORT……...……..2ND RESPONDENT

THE NATIONAL TRANSPORT

& SAFETY AUTHORITY….....….3RD RESPONDENT

THE INSPECTOR GENERAL OF THE POLICE..…..…4TH RESPONDENT

THE TRAFFIC COMMANDANT……...…….5TH RESPONDENT

THE HONORABLE ATTORNEY GENERAL..…..…….6TH RESPONDENT

RULING

1. By a Notice of Motion dated 20th March, 2014, the applicants herein seek the following orders:

1. **THAT this Motion be certified urgent and heard ex parte as by law envisaged, and as expeditiously as possible, owing to its demonstrated urgency.**
2. **THAT this Court do forthwith vary and vacate the last part of its order No. 2 made on March 14th 2014 in these proceedings suspending the invalidity of Legal Notice No 219 of 2013 for 60 days, as Legal Notice 219 of 2013 is nolonger in existence. The remaining part of order No. 2 of this Court made on March 2014 be upheld.**
3. **THAT this Court do vary and vacate the last part of its order No. 6 to truncate the period of 60 days to table the stated evidence of Legal Notice 219 of 2013 compliance with section 11 of the Statutory Instruments Act No. 33 of 2012.**
4. **THAT in the exercise of the Court's inherent power and in protecting the proper**

administration of Justice this Court do stay any implementation of Legal Notice No. 24 o4 2014 titled "THE NATIONAL TRANSPORT AND SAFETY AUTHORITY (OPERATIIONS OF PUBLIC SERVICE VEHICLES) REGULATIONS, LEGAL NOTICE 23 of 2014" published on 11th March 2014 in the Kenya Gazette Supplement No. 11 of 11th March 2014 until further orders of the Court or as the Court may direct.

5. **THAT the costs of this application and the Judicial Review proceedings herein be to the ex parte applicants in any event.**

Applicants' Case

2. The application was supported by affidavits sworn by **Paul G. Muthumbi**, the Chairman of the 2nd Applicant on 20th March, 2014 and 25th March, 2014.
3. According to the deponent, this Court issued a Judgment in these proceedings in which liberty to seek any necessary consequential orders and directed Respondents do avail before the Court evidence that the provisions of Section 11 of the ***Statutory Instruments Act***, No.33 of 2012 requiring that the Regulations be laid before Parliament were complied with within the stipulated period.
4. According to him, there had never at any time been compliance with Section 11 of the ***Statutory Instruments Act*** in respect of the impugned Legal Notice No.219 of 2013 and indeed, by Legal Notice No.23 of 2014, the 1st Respondent expressly revoked Legal Notice No.219 of 2013 hence there is nothing to enforce.
5. It was deposed that the nature of the applicants' business is that they have taken out loans and asset –financing facilities and cannot continue to suffer financial losses on account of unconstitutional and draconian regulations which the 1st Respondent had refused, neglected and altogether remained adamant he will not table before Parliament, hence rendering the said Regulation in Legal Notice 219 of 2013 illegal, null and void, and therefore unavailable for enforcement.
6. In his view, this court was deliberately misled by the 1st Respondent now calling for the issuance of final orders in their favour. To him, Article 93 of the Constitution of Kenya defines Parliament as constitutive of the National Assembly and the Senate and both Houses having resumed normal session on February, 11th 2014, it was incumbent upon the 1st Respondent Cabinet Secretary to table before both Houses his Legal Notice No.219 of 2013 latest on February 19th 2014 (at least 7 days after the resumption of both Houses of Parliament in session). However on making inquiries no response was received hence presumptively, there has never been such compliance.
7. It was deposed that this Court found of a truth that the applicants' TLB licenses issued to the Ex Parte Applicants could not be unlawfully revoked via these Regulations in Legal Notice 219 of 2013 whose legality is now in issue and they stand aggrieved by the oppressive, arbitrary, illegal and utterly unconstitutional decision of the 1st 2nd and 3rd Respondents herein, especially the 1st respondent in respect of the impugned instruments herein averred, whose actions have deprived the commuters/passengers using our buses their right to move freely within the Republic, and in exercise of their Constitutionally held Freedom of Movement. It was averred that the 1st Respondent is clearly intent on defeating the course and the administration of justice in publishing Legal Notice No.23 of 2014 in very similar terms to Legal Notice No.219 of 2013 without any consultations as it is certainly not the same Legal Notice the applicants were asked to comment about yet their buses are still being forced to truncate their trips in the most horrendous circumstance due the ban on travel beyond 6 pm imposed in the illegal Legal Notice 219 of 2013, yet this Legal Notice has been revoked as of March, 11th 2014. The applicants contend that they cannot have the same TLB licenses (some valid until end of 2014) allowing them to travel during the day and night, and the same TLB licenses (valid as they are, and having been issued with time tables the predecessor of the 4th Respondent knew gave them night travel time tables being stopped from benefiting for night travel despite having employed more than 2 drivers for any bus in order to insure the passenger safety.
8. It was averred that the 1st Respondent has not engaged the applicants at all in reviewing the lawful exercise of these rights, and hence he cannot rely on illegal Legal Notice 219 of 2013 which are

now void by operation of the law, let alone the fact that the said Legal Notice 219 of 2013 stood revoked as at March 11th 2014.

9. The applicants therefore urged the Court to find and hold that Legal Notice 219 of 2013 having never been laid before both Houses of Parliament in accordance with Section 11 of the ***Statutory Instruments Act*** and within the time (7days of publication) therein specified, the said Regulations are void and unenforceable.
10. Though the 1st Respondent has gone out in the mass media alleging that there is "no night-ban travel," he knows very well the draconian and arbitrary enforcement of the Regulations in Legal Notice 219 of 2013 has the effect of a night travel ban yet the night travel meets the demands of commuting passengers within Kenya and East Africa since they actually pay for it. Such being the case, commuters and users of such PSV vehicles irrefutably avail themselves of the services without compulsion. It was averred that to date, there is no scientific or other data which irrefutably demonstrates that PSV night travel for the applicants' buses is dangerous or inimical to general public or other road users, or that it is the primary or sole cause of accidents on our roads so as to justify the impugned decision.
11. According to him, the 1st Respondent purported to lay his Legal Notice No. 23 of 2014 before the National Assembly by his unsigned letter dated 17th March, 2014 and based on legal advice whenever such subsidiary legislation is tabled before the House, it stands referred to the relevant committee and until it is approved for enforcement, it cannot be enforced. Similarly, Standing Order No. 210 for the National Assembly and Standing Order No. 211 for the Senate are both unequivocally clear that such subsidiary legislation has to be approved with the concurrence of both Houses and therefore until that happens, it cannot be enforced.
12. The deponent deposed that he was shocked to see the 1st Respondent had on March 11 2014 revoked Legal Notice 219 of 2013 yet he was fully aware of the nature of these proceedings before the Court implicating in very specific terms the nature and content of Legal Notice 219 of 2013 and that it was not open to him then to act in the manner that he did by purporting to curtail, and revoke this Legal Notice on March 10th 2014 as he did, 3 days prior to the delivery of this Court's judgment on March, 14th 2014. To him, the said action was motivated by an intent to obstruct justice, and the timing was clearly intended to frustrate this Court's finding on the illegality of Legal Notice 219 of 2013 the applicants complained of. According to him, but for these proceedings, the 1st Respondent had every intention to enforce the illegal Notice 219 of 2013 against them. Since he published the impugned Legal Notice on December, 17th 2013, the 1st Respondent had led the entire Kenyan Nation to believe that he was enforcing this specific Legal Notice 219 of 2013 to further "passenger safety" in banning night travel but has since turned to allege that he never had such "night ban" directive but whichever he elects to interpret the effect of his impugned Regulations, the effect is that the applicants' buses cannot travel at night yet not a single regulation or rule subsists to block them from enjoying the full and effectual application of their TLB licenses lawfully issued to them.
13. The 1st Respondent having expressly admitted that Legal Notice No.219 of 2013 is revoked, necessarily paves way for the grant of the applicants' proceedings and the Orders sought and since the Court cannot act in vain, it is expedient that the Prohibition Orders sought be granted. The deponent deposed that it is not proper or lawful for the 1st Respondent to play the cat and mouse games with the Court he had engaged in and in the manner he had done, in a most opaque and hidden manner to now incept Legal Notice No.23 of 2014 seeking to mock this Court. He added that the applicants had sought the protection of the law and it would be unjust to shunt their cause as they suffer huge and monumental economic losses on account of Cabinet Secretary's failure to comply with the law and that this is impunity that this Court cannot and should not append its stamp of approval to. Consequently, the Court ought to grant the Motion dated March 20th 2014 and also the Judicial Review Notice of Motion orders they sought in these proceedings in the exercise of their liberty to apply.
14. In support of the applicants case the applicants filed written submissions pursuant to the directions given by this Court.

Respondents' Case

15. In Response to the application grounds of opposition were filed on behalf of the 3rd Respondent on 10th April 2014 to the affect that as the 60 days had not lapsed the application was premature; that the application is an abuse of the Court process and lacks merit; that the Court lacks the jurisdiction to grant the orders sought herein in light of the provisions of section 8(3) of the Law Reform Act; that there is an application pending similar orders; that the 1st Respondent has the power to make the Regulations it made; that the orders sought are vague, ambiguous and incapable of discernment; that as the Legal Notice No. 23 of 2014 is not the subject of this application no orders can be granted in respect thereof and the Court ought not to allow the applicants to litigate the same in different proceedings; that the Respondents have not breached the applicants' constitutional rights and that since there is a legitimate remedy available the applicants must not be allowed to abuse the process of the Court.
16. On behalf of the 6th Respondent it was contended inter alia that under Order 8(3) of the Law Reform Act the order is final and no return is allowed; that as the Court gave express timelines for undertaking specific acts the present application has been made before the expiry of the said time; that that the orders of review sought herein are contrary to the statutory jurisdiction of the Court; that that the application is premised on new causes of action which cannot be the basis of the review sought; that *lis pendens* doctrine is inapplicable to these proceedings and that that there is a procedure available which meets the circumstances of this application which the applicants ought to have resorted to.
17. Despite the Court having directed the parties to file submissions the Respondents did not file any.

Determinations

18. I have considered the application, the supporting as well as opposing documents on record.
19. It is now clear beyond paradventure that while the judgement herein was pending delivery on 14th March 2014, the 1st Respondent on 11th March, 2014 revoked LN No. 219 of 2013 and reproduced the same as LN No. 23 of 2014. It is clear from the affidavits filed in Judicial Review Application no. 124 of 2014 that the reason for this action was the realisation that Legal Notice No. 219 of 2013 was null and void having not been tabled before Parliament as mandated under section 11 of the ***Statutory Instruments Act***.
20. This Court in its Judgement delivered herein found that the failure to table the subject Regulations before Parliament pursuant to the said legal provisions rendered the same null and void. It follows that the said Regulations having not complied with the mandatory provisions of the law were as properly recognised by the Respondents in Judicial Review No. 124 of 2014 were rendered null and void by operation of law. There is therefore no point in waiting for the lapse of the grace period of 60 days granted herein. The parties were given liberty to apply in the event that there were changes in circumstances warranting further orders of the Court. In my view the revocation of Legal Notice No. 219 of 2013 are circumstances which warranted the making of the instant application. Where a Court gives the party "liberty to apply" it means that the Court still retains general superintendence of the matter and that the order is a preliminary order pending further action. In that event the partes are at liberty to apply to the court for any directions necessary to give effect to the order. Such application is not an application for review in the strict sense of the word but is meant to ensure compliance with the earlier orders. The Court would for example retain the jurisdiction to extend the time for compliance with the earlier orders if it became necessary or even to discharge the same. See **Re: Leisure Lodges Limited Nairobi (Milimani) HCCC No. 28 of 1996**.
21. In any case a Court of law always retains residual powers to implement its orders. To contend that the Court has no power to give orders whose effect would be to implement the decision given by the Court is in my view misconceived. As was held **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005**:

"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural

law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

22. One of the instances in which the court exercises its residual inherent power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.
23. I therefore have no hesitation in now declaring the said Regulations made pursuant to Legal Notice No. 219 of 2013 null and void and the same are hereby quashed.
24. Having done so the question that next follows is not whether the applicants are entitled to costs but who should bear the applicants' costs.
25. In this case throughout the proceedings, up to and even after the judgement no word was whispered to this Court that the Legal Notice No. 219 of 2013 had been revoked three days before judgement on 11th March, 2014. In fact immediately after the delivery of the judgement counsel sought a clarification as to the fate of the said Legal Notice and this Court gave a clarification based on the fact that the said Legal Notice was still in force. Under sections 55 and 56 of the ***Advocates Act, Cap 16*** Laws of Kenya, every advocate and every person otherwise entitled to act as an advocate is an officer of the Court and is subject to the jurisdiction thereof hence the Chief Justice or any of the judges of the Court is empowered to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge. Had this Court been seised of evidence that the Counsel for the Respondents were aware before, at the time of or immediately after the delivery of the judgement that Legal Notice No. 219 of 2013 had been revoked three days before the judgement and deliberately kept that information from the Court the Court would have not hesitated to call upon them to show cause why appropriate disciplinary action could not to be taken against them. I however do not have evidence to that effect and I will say no more on the matter.
26. While there was nothing inherently wrong in revoking LN no. 219 of 2013 upon realising the same was unlawful, it is my considered view that to keep a studious silence and to lull this Court and the country into a false sense of security that the said LN no. 219 of 2013 was still in force was with due respect highly dishonest on the part of the 1st Respondent. Under Article 10(1) of the Constitution all State organs, State officers, public officers and all persons are bound by the national values and principles of governance enumerated thereunder whenever they apply or interpret the Constitution, enact, apply or interpret the law or make or implement public policy decisions. Under Article 10(2) thereof the said national values and principles of governance include integrity, transparency and accountability. Under Article 153(4)(a) of the Constitution Cabinet Secretaries are enjoined to act in accordance with the Constitution.
27. As was rightly held by the Queens Bench Division of the High Court of Justice in Northern Ireland in **In the matter of an Application by Brenda Downes for Judicial Review [2006] NIQB 77** at para 21 while citing **Quark Fishing Limited vs. Secretary of State for Foreign Affairs [2002] EWCA 149 para 50**:

"The duty of good faith and candour lying in a party in relation to both the bringing and defending of a judicial review application is well established. The duty imposed on public duties

and not least on central government is a very high one. That this should be so is obvious. Citizens seeking to investigate or challenge governmental decision-making start off at a serious disadvantage in that frequently they are left to speculate as to how a decision was reached. As had been said, the Executive holds the cards. If the Executive were free to cover up or withhold material or present it in a partial or partisan way the citizen's proper recourse to the court and his right to a fair hearing would be frustrated. Such a practice would engender cynicism and lack of trust in the organs of the State and be deeply damaging of the democratic process, based as it is upon trust between the governed and the government....A breach of the duty of candour and the failure by the Executive to give a true and comprehensive account strikes at the heart of a central tenet of public law that the court as the guardian of the legal rights of the citizen should be able to rely on the integrity of the executive arm of the government to accurately, fairly and dispassionately explain its decision and actions."

28. In recognising the obligation on the part of the Government to be open and candid the South African Constitutional Court expressed itself as follows in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC):**

    "The Court is thus left in darkness as to the very issue that lies at the heart of the dispute it is called upon to resolve. In this respect the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as section 165(4) of the Constitution requires. In the present matter the courts should not find themselves disempowered by lack of information from making a determination..... As this case demonstrates, far from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness."

29. In my view a person who deliberately either by commission or omission misleads the Court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonesty in my view is an act which is antithesis to transparency and vice versa. In my view the law enjoined the 1st Respondent through his legal advisers to bring to the attention of this Court the fact that the LN No. 219 of 2013 was nolonger in existence so as to avoid the wastage of precious but scarce judicial time.
30. It is further my view that where a party knows that a matter is pending before a Court of law and the party proceeds to take an action whose effect is to remove the rag from the feet of the Court as it were such an action may well be construed as having been calculated to steal a match on both the Court and the parties. Good practice would in my view dictate that the party moves the Court for recording of appropriate orders so as not create the impression that the action is meant to circumvent the judicial process. Otherwise the Court may view such action as being contemptuous and an affront to judicial process. Judicial process ought not to be misused by parties in order to achieve collateral ends. As was held by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare& 2 Others Nairobi (Milimani) HCCC No. 363 of 2009**:

    "This [striking out on ground of abuse of the court process] is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for

some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

31. As was held by this Court in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**:

"Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya….Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit….."

32. Where in my view a person mischievously sets out on a course meant to obstruct the course of justice by rendering the outcome of a matter pending in Court illusory such action cannot be said to have been taken in a manner compatible with the principle of service to the people of Kenya. A person who sets out on such a perilous and off tangent voyage does so at his own risk and when along the way he finds that his path is fraught with calamitous consequences, he ought not to offload such consequences onto the shoulders of the people of the Republic of Kenya. To understand the esteem with which the people of this Republic hold justice one only needs to refer to the words of our National Anthem that justice be our shield and defender. Therefore it is my view that anyone who demeans the justice system in this country offends the people of the Republic of Kenya from whom the executive derives its authority and legitimacy and such actions ought not to be visited upon the taxpayers since to do so would amount to penalising the public twice for no wrongdoing on its part. In my view it is high time the blame for deliberately wrongful actions not intended to benefit the public were placed on the doorsteps of the officers concerned.
33. This Court is well aware of the provisions of section 21(4) of the ***Government Proceedings Act*** Cap 40 Laws of Kenya which provides:

Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.

34. However the preamble to Cap 40 provides that it is "*An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters*". It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. With respect to judicial review proceedings, it has been held time without a number that such proceedings are neither criminal nor civil. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 4.**
35. That this Court has inherent jurisdiction to prevent abuse of its process is not in doubt. Although it was contended that this Court under Section 8(3) of the ***Law Reform Act*** can only grant the orders stated thereat, in my view that provision deals with substantive orders. The orders enumerated

therein are only three yet it is not in doubt that the Court is empowered to make an order as to costs and it is now old hat and needs no repeating that the decision to award costs and from where is an exercise of discretion.

36. It is moreover recognised that the court has inherent powers to make such orders as may be necessary for the ends of justice. Inherent power, it must be stressed is not donated by Section 3A of the ***Civil Procedure Act***. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the ***Civil Procedure Act*** is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

37. Dealing the same powers it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

38. Similarly, in **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself *inter alia* as follows:

"It is....accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

39. I have considered the actions of the 1st respondent herein and I am of the view that this is a proper case in which the 1st Respondent ought to be called upon to show cause why the costs of this application ought not be placed squarely on his shoulders rather than the tax payers of this country who are already reeling under the weight harsh economic times. The principle of accountability mandates that State and public officers be prepared to face the consequences of their actions when such actions are manifestly taken with impunity and *mala fides*. It is only when such officers are personally made to take the responsibility for their actions that the rule of law shall be upheld. The Courts in my view have a duty and a responsibility to ensure that the public does not suffer at the expense of actions or inactions of officers deliberately designed to bring judicial process into disrepute and turn Courts of law into circuses. To blatantly and brazenly disregard legal processes or to turn them into a mockery in the execution of executive authority is in my view an affront to the rule of law, an assault on the Constitution and constitutionalism and a recipe for chaos and anarchy. Courts of this country will not sit back and watch as the country slowly slides into lawlessness by way of scurrilous disparagement of its processes and decisions. Whereas public and State Officers have a duty to protect the public they have no right and authority to do so unlawfully. The protection of the public must be done in accordance with the law as laid down in the Constitution and the existing legislation.

40. In exercising its judicial authority, this Court is enjoined by Article 159(2)(e) of the Constitution to be guided by *inter alia* the need to protect and promote the purpose and principles of the Constitution and one such principles is good governance. Good governance in my view dictates that the public ought not to unduly shoulder the burdens of persons whose actions are themselves contrary to their expectations.

41. Therefore in order to maintain the dignity of this court as the temple of justice as well as in compliance with the rules of natural justice the order that commends itself to me is that the 1st Respondent be and is hereby called upon to show cause why the costs of this application cannot be borne by him personally. This action is not intended to send shivers down the spines of State and public officers but to ensure that the national values and principles of governance as engraved in the Constitution are upheld and adhered to at all times.

42. As a parting shot, from the actions of the recent past it is clear that the words of **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** still ring true. To paraphrase the learned Judge, *prima facie* the allegations contained in this

application are a serious indictment on the executive whether it is adhering to the letter and spirit of the Constitution. This application is a clear indication that some members of the executive in this country have not tried to understand and appreciate the provision of this new Constitution and shows yester years impunity are still thriving in our executive arm of the government.

Dated at Nairobi this 14th day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the applicants

Mr Agwara for the 3rd Respondent