



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 6 of 2010

MIKE MAINA KAMAU ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

THE PERMANENT SECRETARY, MINISTRY OF ROADS ..... 2<sup>ND</sup> RESPONDENT

KENYA URBAN ROADS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY ..... 4<sup>TH</sup> RESPONDENT

AND IN THE MATTER OF AN APPLICATION

FOR COMMITTAL FOR CONTEMPT OF COURT AGAINST

HON. FRANKLIN BETT ..... 1<sup>ST</sup> ALLEGED CONTEMNOR

MR FRANCIS NGANG'A ..... 2<sup>ND</sup> ALLEGED CONTEMNOR

ENG. JOSEPH N. NKADAYO ..... 3<sup>RD</sup> ALLEGED CONTEMNOR

RULING

Introduction and background

1. This decision is one concerning contempt of court and it is unfortunate that such a matter has taken over two years to finalise but this has been due to various factors beyond the control of the parties and the Court.

2. The Notice of Motion dated 26<sup>th</sup> July 2010 is brought by the petitioner seeking committal for contempt of court by disobedience of the orders of made on 13<sup>th</sup> July 2010 by Honourable Justice Gacheche under the provisions of **section 5** of the *Judicature Act (Chapter 8 of the Laws of Kenya)*, **Order 52** of the *Rules of the Supreme Court of England*, **Order 50 rule 1** of the *Civil Procedure Rules* and the inherent powers of the Court. The petitioner prays that that Honourable Franklin Bett, the Minister for Roads (“Hon. Bett”), Mr David Ng’ang’a of the Ministry of Roads (“Mr Ng’ang’a”) and Engineer Joseph N. Nkadayo, Director General of the Kenya Urban Roads Authority (“Eng. Nkadayo”) be committed to jail and their property be sequestered.

3. To put some context in the matter, the petitioner moved the Court by way a Petition dated 12<sup>th</sup> July 2010 in which he sought several reliefs to protect his property **Land Reference No. 15045/4 (IR 116128) original number 15040/2-3 situated in Spring Valley Estate, Nairobi** (“the suit property”) from demolition by the respondents. On the suit property, the petitioner had constructed a palatial eight bedroomed bungalow with ancillary facilities like a gym, sauna, swimming pool and barbeque area. The petitioner’s case is that in July 2010 officers from the Ministry of Roads visited the suit property and marked the walls and buildings thereon for demolition. It was claimed that the suit property was situated on a road reserve designated for the expansion of the road commonly referred to the Northern Bypass. The petitioner claimed that his fundamental right to the protection of property guaranteed under **sections 70 and 75** of the former Constitution were infringed as he was the indefeasible owner of the suit property by the marking for demolition of the property for demolition was without any justification.

4. Simultaneously, with the petition, the petitioner filed a chamber summons application seeking conservatory orders to restrain the respondents from interfering with the suit property. On 13<sup>th</sup> July 2010, the petitioner’s advocate appeared before the High Court *ex-parte* and Honourable Lady Justice Gacheche granted the following order, *“That pending the hearing and determination of the Application, a conservatory order relief order be and is hereby issued prohibiting the Respondents either by themselves, organs, agents, servants or employees from in any way interfering with the property known as Land Reference No. 15045/4 (IR 116128) original number 15040/2-3 situated in Spring Valley Estate, Nairobi.”*

5. The petitioner states that the Court orders together with a Penal Notice was served on Hon. Bett, Mr Ng’ang’a and Eng. Nkadayo and each of them in defiance of or in willful disregard of the said orders and in the company of other officials in the Ministry of Roads and the Kenya Police proceeded to demolish or order and direct the demolition of the suit property on 14<sup>th</sup> July 2010.

### **The Application for Contempt**

6. Pursuant to leave granted by the Court on 22<sup>nd</sup> July 2010, the petitioner lodged the Notice of Motion dated 26<sup>th</sup> July 2010. The grounds of the alleged breach and contempt are set out on the face of the Notice of Motion and may be summarized as follows;

(a) On the morning of 14<sup>th</sup> July 2010 after the order was issued by Justice Gacheche, the petitioner’s advocate, Mr John Maina Mburu effected personal service of the said Order and Penal Notice upon Hon. Bett, Mr Ngang’a and Eng. Nkadayo and simultaneously notified each and all of them of the effect and terms thereof at the property in the presence and full glare of the petitioner’s employee, a Mr Kennedy Wainaina Ngenga, the media and the curious general public.

(b) Despite having been served, the three alleged contemnors allegedly directed, supervised and ordered, in the company of other officials of the Ministry of Roads and the Kenya Police, the demolition of the petitioner’s property contrary to the Court orders.

(c) In fact, the Hon. Bett, having knowledge of the Court orders, with arrogance and impunity termed the same illegal and proceeded to direct the other contemnors and officers to go ahead with the demolition which took place in the full glare of the media and general public while he addressed one press conference after another.

(d) Meanwhile, contemporaneously with service upon the aforesaid contemnors, the petitioner’s advocates on 14<sup>th</sup> July 2010 had served the said Order and Penal Notice upon the Attorney General, the Permanent Secretary, Ministry of Roads and the Director General, Kenya National Highways Authority in their respective Offices.

(e) Consequently the alleged contemnors being government officers and officials knew, noticed or ought to have known or noticed the effect and purport of the orders of the Court.

(f) Nevertheless, in further aggravation of his contempt, Hon Bett while addressing the media during the demolition of the petitioner's property uttered words that are disparaging, scandalous, scurrilous, disrespectful and contemptuous of the Court thereby bringing the integrity of the Court into unwarranted disrepute.

7. The application is supported by the statutory statement filed on 21<sup>st</sup> July 2010 and the affidavits of Mike Maina Kamau, the petitioner, John Maina Mburu and Kennedy Wainana Ngenga all sworn on 21<sup>st</sup> July 2010.

### **The Proceedings**

8. The hearing was commenced before the Honourable Lady Justice Gacheche but I took over the trial of the matter upon her transfer to another station.

9. In response to the motion seeking committal, Hon. Bett filed a Replying Affidavit sworn on 4<sup>th</sup> November 2010 and Eng. Nkadayo filed an affidavit sworn on 18<sup>th</sup> October 2010 and Mr Ng'ang'a's affidavit is sworn on 7<sup>th</sup> December 2012. In summary, they all denied that they had committed any acts of contempt as alleged or at all. More particularly, they all denied service of the Court orders and Notice of Penal Consequences.

10. In view of the denial of service, the petitioner then moved the Court for orders seeking to cross-examine Hon. Bett and Eng. Nkadayo on their replying affidavits. The petitioner also stated the two alleged contemnors had misrepresented facts, withheld facts or deliberately sought to mislead the court. The petitioner also applied for leave to rely on raw video footage taken by journalists present at the site on the morning of 14<sup>th</sup> July 2010 as part of the cross-examination. The respondents opposed the application and after hearing the application, Justice Gacheche by a ruling dated 14<sup>th</sup> December 2010, allowed the alleged contemnors, Hon. Bett and Eng. Nkadayo, to be cross-examined on their affidavits and for the petitioner to rely on the raw video footage. The learned Judge noted that, "*In my humble opinion, there is need to establish, service as well as knowledge of the order and the substance of the dispute should be investigated and decided on merit. This can only be achieved by cross-examining the two on their replying affidavits.*"

11. Hon. Bett also moved the Court to cross examine Mr John Mburu, the petitioner's advocate who effected service, and Kennedy Wainaina Ngenga ("Mr Ngenga"), the head of security of Muthithi Investments Company Limited and an associate of the petitioner who was present at the suit premises on the material date. After hearing the application, Justice Gacheche dismissed the application by a ruling dated 15<sup>th</sup> March 2011.

12. The hearing of the matter commenced on 15<sup>th</sup> March 2011 with Hon. Bett taking the stand to be cross-examined. When counsel for the petitioner attempted to put the raw video footage to him, his counsel objected on the ground that there the footage did not have an authentication certificate and that the makers ought to produce its. The learned Judge ordered that the makers of the footage appear in court to produce the order and summons were issued to cameramen from various media houses to appear in court.

13. When the matter came up for hearing on 16<sup>th</sup> March 2011, the petitioner had filed an authentication certificate. Counsel for Eng. Nkadayo objected to the certificate. After hearing the parties, the Judge ruled that the authentication certificate issued in accordance with the **sections 106A and B** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** was valid unless proven otherwise. The Judge also held that any issues concerning the video footage could be raised either during the submissions or after viewing and that the parties were at liberty to call any counter evidence.

### **Analysis and Determination**

14. After hearing the matter, the parties filed written submissions and highlighted them and this

ruling was reserved.

15. The following matters are not in dispute; that the court issued an order restraining interference with the suit property, that the three alleged contemnors were at the suit property at the time the buildings on the suit property were being demolished and that the buildings on the suit property were actually demolished. I think that the central issue for determination in this matter is whether the alleged contemnors were served with the Court order and Notice of Penal Consequences or whether they had knowledge of the Court order and if so, whether they willfully disobeyed the Court order.

16. The law and practice concerning contempt of court has been settled in this country (see *Isaac Wanjohi and Another v Rosalind Macharia Nairobi HCCC No. 450 of 1995 (Unreported)* per Bosire J., and *Wildlife Lodges Limited v County Council of Narok and Another Nairobi HCCC No. 1248 of 2003 (Unreported)* per Ojwang Ag J). By virtue of section 5(2) of the *Judicature Act*, the law applicable is to be found in the *England Supreme Court Practice Rules. Order 52 Rule 3(1)* of the *Supreme Court Practice Rules* makes it mandatory for the contemnor to be served and failure to do so renders the application defective. The explanation notes on the said rule provides, “No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if, the order is directed to a group of persons or a corporation, some appropriate member has been personally served. Furthermore the prosecutor must give each person sought to be committed the fullest notice that an application is being made for his committal by inserting his name in the Notice of Motion and serving personally upon him a copy of the notice and of the affidavit in support showing what is alleged against him...” (Emphasis mine)

17. *Halsbury’s Laws of England Volume 9, 4<sup>th</sup> Edition* at page 37 which deals with the necessity of personal service in the contempt of court proceedings and states as follows, “As a general rule no order of the court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. In case of an order requiring a person to do an act the copy must be so served before the expiration of the time within which he was required to do the act.” (Emphasis mine]

18. In *Re Bramblevale Ltd [1970] CH 128,137*, Lord Denning MR observed that, “*Contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved ..... It is not proved by showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.*” It is for this reason that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt as it is not safe to extend the latter standard to an offence which is quasi-criminal in nature. In *Mutitika v Baharini Farm Limited (1985) KLR 229, 234* the Court of Appeal stated, “[T]he standard of proof in contempt proceedings must be higher than proof on balance of probabilities, almost but not exactly, beyond reasonable doubt.... The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, criminal cases. It is not safe to extend the latter standard to an offence which can be said to be quasi-criminal in nature.” The Court added, “Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt .....”

19. The petitioner’s case is that service of the order issued by Hon. Justice Gacheche was effected on the three alleged contemnors by his advocate, John Maina Mburu. In the affidavit of service sworn on 20<sup>th</sup> July 2010 and filed in court on 21<sup>st</sup> July 2010, Mr Mburu states, at the material parts, as follows;

[4] That on 14<sup>th</sup> July 2010 at 8.30 am I collected the signed and sealed court order and made ten copies of the same, gave copies to my process server Don Carlos Mwalimu Muthoka for service upon the Honourable Attorney General, the first respondent and another three copies to Mr Francis Munyororo Advocate for service on the Permanent Secretary, Ministry of Road, Kenya Urban Roads Authority and Kenya National Highways Authority.

[5] That immediately, I took a taxi to spring Valley with the remaining copies to serve the Court order and Penal Notice on the Ministry of Roads Officials who I had been informed by Kennedy Wainaina Ngenga through telephone were already at the site threatening to demolish my client’s property.

[6] That I arrived at the subject property Land Reference Number 15045/4 at Spring Valley at 9.15 am

[7] That upon arrival, I entered the property through the main gate and I found Honourable Franklin Bett, Minister of Roads who was well known to be, being a cabinet Minister in the Kenya Government standing outside the house in the company of about twenty (20) people.

[8] That I approached him, greeted him and introduced myself as an Advocate of the High Court of Kenya and served him with the Interim Conservatory Order was granted by the Honourable Court stopping any adverse action on the Petitioner's property known as Land Reference Number 15045/4 (IR No. 116128) Original Number 15045/2-3) situated in Spring Valley Estate Order.

[9] That Honourable Franklin Bett, Minister of Roads refused to accept service and remarked that not even a Court order would stop the demolition. He also stated that he would not allow people to sue the law to stop demolition.

[10] That Honourable Franklin Bett, Minister of Roads proceeded to direct an official who was standing next to him who I later identified as Mr David Nganga of the Ministry of Roads to proceed with the demolition.

[11] That Mr Ngang'a was dressed in a brown jacket and I rushed to him and served him with the Interim Conservatory Order issued by the Honourable Court stopping any adverse action on the petitioner's property known as Land Reference Number 15045/4 (IR No. 116128) Original Number 15045/2-3) situated in Spring Valley Estate Order.

[12] That the said Mr. Ng'ang'a acknowledged service of the Court order but refused to sign the same.

[13] That I also served the Interim Conservatory order issued by the Honourable Court stopping any adverse action on the petitioner's property known as Land Reference Number 15045/4 (IR No. 116128) Original Number 15045/2-3) situated in Spring Valley Estate on one Engineer Joseph Nkadayo who was pointed out to me by a Kennedy Wainaina Ngenga. (Emphasis mine)

20. Despite the fact that Hon. Lady Justice Gacheche has dismissed an application for the cross-examination of John Mburu, the parties agreed that he could be cross examined on the affidavit of service and he was duly cross-examined.

21. Hon. Bett has opposed the application for committal on the basis of his affidavit sworn on 5<sup>th</sup> November 2010 where he states, at the material part, as follows;

[13] THAT on 14<sup>th</sup> July 2010 at 8.00 am I proceeded with officers from my Ministry to the site to oversee the ongoing construction of the road and removals of encroaching features and structures. I was at that time unaware of any or any court order(s) that had issues from this Honourable Court.

[14] THAT it was after the Petitioner's encroaching house had been brought down (or at least substantially so, as it was no longer standing) when an individual purporting to be an advocate of the Petitioner approached me informing me that he had served my office with stay orders from court a while ago that he had copies of the same with him at the time.

[15] THAT having no way of ascertaining the genuineness, correctness and/or authenticity of what this stranger had or was saying, I promised him that I would liaise with my Office's Registry the office of the Hon. Attorney General from when I learnt, and which information I verily believe to be true;

(a) THAT when the house's demolition commenced at around 8.30 a.m no Court order has been received at or served upon either my office or the Hon Attorney General's.

(b) THAT Court Orders were only served after 10.00 a.m. at the Ministry's Registry and the office of the Hon. Attorney General by which time the house had been brought aground.

(c) THAT I was never personally served with court orders before we undertook the assignment.

22. Eng. Nkadayo denied service and in his replying affidavit sworn on 18<sup>th</sup> October 2010 he deponed as follows;

*[10] THAT, accordingly I went to the suit property on the 14<sup>th</sup> July 2010. By the time I arrived at the suit property, demolition had already commenced.*

*[11] THAT I confirm that by the time demolition commenced, I had not been served and was not aware of the existence of the Court order stopping the demolition. In any event since I was not in charge of the demolition, service of the order upon me would in any case have been ineffective to stop the demolition.*

*[12] THAT I reiterate that I had no knowledge of the existence of the Court order. It is therefore not true that Mr Mburu personally served me with the Court Order or penal notice before the demolition commenced as alleged or at all. I cannot therefore be said to be in contempt of an order I was not aware of. I reiterate that I do not know the said Mr. Mburu.*

23. Mr Ng'ang'a also denied service of the Court order and by the Replying Affidavit sworn on 7<sup>th</sup> December 2011, he stated;

*[12] THAT I categorically deny knowledge or service of the Court Order either before the demolitions or on the material day or at all as alleged by Advocate John in his affidavit in support of the Contempt Motion.*

24. Hon. Bett and Eng. Nkadayo were cross-examined on their depositions. Mr Ng'ang'a was not cross-examined. Apart from the affidavits of service and oral testimony, the petitioner case was supported by a DVD recording of the events of the material day. The DVD was produced in evidence by the petitioner and in accordance to the direction given by Justice Gacheche, counsel for Eng. Nkadayo elected to contest its authenticity and in this respect, he applied for and I granted an order for the DVD to be released to him for examination by the Department of Film Services, Ministry of Information. Accordingly, a report dated 26<sup>th</sup> January 2012 prepared by Evans Mogusu, an Assistant Director of Film Services at the Ministry, was produced. The report concluded that the team assembled to examine the DVD was not able to ascertain the authenticity of the video footage presented. The team concluded that although the footage seemed to portray a sequence of events, it was unable to ascertain that the sequence of events presented in the footage is as recorded on site.

25. Before I proceed to consider the evidence, I think it is proper to put the DVD recording in context. I viewed the entire recording and in light of the entire evidence, it reflects an accurate depiction of events of the day. Of course, the recording, being one obtained from a journalist recording the event, was never intended to be used in court to prove service. It was probably intended to provide material for the day's news and it is possible that the cameraman was motivated to take what was of interest to him and not necessarily what was important to the petitioner or the Court.

26. The petitioner's position is that the video footage, was not real time evidence of service but merely evidence to show that the allegations contained by the alleged contemnors were false and that the affidavits of service clearly demonstrate service. I take the position that once it is conceded that the video footage is evidence of the facts contained therein; the Court is entitled to examine it and weigh its contents against what is set out in the affidavits and oral testimony and come to a determination of the version of events taking into account the whole evidence.

27. The DVD footage is about 21 minutes long from the time the Hon. Bett and his entourage arrived upto the time he states he left. My assessment of the footage is that it is not a continuous recording of the entire events of the day but of separate mini-events of interest to the person recording. It appears the person recording moves from one mini-event to another. I think the value of the footage is to be gained by weighing its contents against the entire evidence presented. If I may use a latin phrase, the

evidence recorded by the DVD is part of the *res gestae* of the events of 14<sup>th</sup> July 2010 and particularly whether there was service. It is in this light that I will consider the footage contained in the DVD. The only issue is what weight I should attach to the footage.

28. As regards the report of prepared by the Department of Film Services, I do not consider it helpful in my analysis. The report confirms that the footage is an actual recording of events. The instances of superimposition or double picture occurrence are said to occur past the 20minute mark and are not germane to the specific inquiry. In view of what I have stated about the entire evidence, I now turn to the events of 14<sup>th</sup> July 2010 as set out in the video footage. The video footage, I find and hold, captures in full, at least the period Mr Mburu arrived and when he is said to have effected service on the alleged contemnors. On 8<sup>th</sup> December 2011, I ordered the parties to agree on a transcript of the portion of statements by Mr Mburu, unfortunately the parties did not comply with the order nevertheless I heard what was stated and I will refer to the statements where they are clear.

29. The video footage commences with Hon. Bett accompanied by Eng. Nkadayo and other government officials arriving at the premises. When they arrived on the premises, the caterpillars had not yet gained access to the property and a large crowd consisting of members of the public and the press had formed to witness the event. Hon. Bett and Eng. Nkadayo arrived on the suit premises before Mr Mburu.

30. At about the 7<sup>th</sup> minute of the footage, as Mr Mburu was walking towards Hon. Bett, someone can be heard saying, "*Lawyer amekuja na makaratasi.*" Mr Mburu then introduced himself to the Minister. By the time Mr Mburu arrived, the demolition of the gate and the perimeter wall had began. Mr Mburu proceeded to speak to Hon. Bett but what he said is not clear but an officer, in a light blue jacket standing behind the Hon. Bett, is seen telling Mr Mburu to go to the PS (the Permanent Secretary) while Hon. Bett walks away. At this point Mr Mburu is left holding the court orders he was supposed to serve. During this brief period, Eng. Nkadayo and Mr Ng'ang'a, who Mr Mburu identified as wearing a brown jacket, can be seen standing adjacent to Hon. Bett. While Hon. Bett walks away, Mr Mburu, court papers in hand, is left surrounded by members of the press and public present. At about 7.46, Mr Mburu turns to address the press and states, "*I have served everyone with a court order.*" Thereafter at about 7.53, when speaking to the press he states, "*I have to serve them first, please allow me to serve them first. Just allow me to serve them with a court order .... If you kindly allow me to serve them with the court order ..... so that if they defy ....I think the Minister is running away. My name is John Mburu Advocate.....*" At this point the footage shows the gate still being demolished and Mr Mburu walking away. The Minister was remained on the suit property and the demolition of the building still continued.

31. I think the evidence of the DVD speaks for itself and as Mr Mburu testified, it is "*real time recording.*" Hon. Bett, on his part did not deny the events contained in the footage. The DVD footage is an actual representation of what happened on 14<sup>th</sup> July 2012. In determining whether service was effected on the alleged contemnors, I have given due weight to Mr Mburu's own statements bearing in mind that he is an advocate of the High Court.

32. Mr Mburu made two contradictory statements. The first indicating that he had effected service on everyone and the other stating that he needed to effect service as he addressed the press. Why would Mr Mburu, inform the press that he needed to serve the court order if indeed he had served it? The answer, I think it to be found in the incomplete expression, "*so that if they defy ....*" As an Advocate, Mr Mburu knew that without service, the alleged contemnors could not be held liable for contempt and that is why he knew he had to effect service. It is also why he informed the press of this intention to do so. This would seem to negative any service of process on the alleged contemnors.

33. My review of the video footage of the events surrounding the service of the alleged contemnors is also inconsistent with the paragraphs [9] to [13] of the affidavit of service sworn by Mr Mburu, which I have set out at paragraph 20 above and which I have emphasised. Contrary to what is stated in the affidavit, the video footage shows that after Mr Mburu attempted service on the Hon. Bett and he walked away, Mr Mburu proceeded to address the press. At this point, Hon. Bett did not instruct Mr Ngang'a to proceed with demolition as stated in paragraph [11] of the affidavit of service. Mr Mburu, did not, as he

claimed, effect or attempt to effect service upon Eng. Nkadayo and Mr Ng'ang'a despite the fact that the two were right next to Hon. Bett.

34. The version of events contained in the video footage is also inconsistent with the version of events set out in the supporting affidavit of Mr Ngenga sworn on 21<sup>st</sup> July 2010. He states what transpired after Hon. Bett purported to decline service as follows;

*[21] That Mr John Mburu, Advocate moved and presented the Court Order to Mr David Nganga of Ministry of Roads and to Mr Joseph Nkadayo who I pointed out to him as the Director General of Kenya Urban Roads Authority.*

*[22] That thereafter, the Minister ordered his Ministry to proceed with the demolition. (Emphasis mine)*

35. The video version of events is also inconsistent with Mr Mburu's testimony in chief, he stated that, "By the time I spoke to the press, I had served Hon. Bett, Eng. Nkadayo and Mr Ngang'a." This is inconsistent with the evidence contained in the video footage which shows once Hon. Bett began to walk away and the person in the blue jacket had told him to go to the PS, Mr Mburu turned and began talking to the press. He did not effect service upon Eng Nkadayo and Mr Ng'ang'a who were right there in that short interval. Since Mr Mburu had not effected service as alleged in the affidavit of service and as deposed by Mr Ngenga, it is not difficult to see why he informed the press that he should be allowed to effect service so that if the order was defied, contempt proceedings could be instituted.

36. This inconsistency between the affidavit of service and the clear evidence presented by the video footage lead me to conclude that the petitioner has not established personal service upon the alleged contemnors to the requisite standard. Accordingly, I adopt the sentiments of Justice Lenaola in ***Kariuki and Others v Minister for Gender, Sports, Culture and Social Services and Others*** [2004] 1 KLR 588, 595 where he observed, "But in our law, service is higher than knowledge and since service here was frustrated by the Minister's bodyguards, I shall firmly hold in accord with existing law that there was no service. Without personal service there cannot be contempt ..."

37. Hon. Bett is also accused of making disparaging, scandalous, scurrilous statements which are disrespectful and contemptuous of this Court thereby bringing the integrity of the Court into unwarranted disrepute. I viewed the entire video footage and Hon. Bett addressed the press, at several instances, on matters concerning the subject matter. It must be remembered a charge of contempt is quasi-criminal and as Cross J stated in the case of ***Re B (FA) an infant*** [1965] Ch 1112, 1178-8, "Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison and rules have been laid down to ensure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations."

38. Where contempt consists of words uttered or statements made, I think the full content of the statements said to be derogatory ought to be set out to enable the accused person defend himself. The Court must also be given an opportunity assess those statement and determine whether the Court should stamp its authority. The Court must also take into account the freedom of expression protected by the Constitution and the right of every citizen to criticize the judiciary. The line between contempt of court on one hand and legitimate criticism and free expression on the other cannot be drawn unless the words or statements alleged to be disparaging or contemptuous are set out with clarity and the alleged contemnor is allowed to defend himself and the Court is allowed to reach its own conclusion.

### **Disposition**

39. In summary and in respect of the application against the alleged contemnors, Hon. Franklin Bett, Mr David Ng'ang'a and Engineer Joseph Nkadayo, I find that the petitioner has not established service of the orders upon them to the requisite standard.

40. As regards the allegation that Hon. Franklin Bett made disparaging and contemptuous statements, I find and hold that the alleged words and statements have not been established with sufficient

clarity to enable the court embark on an inquiry to determine his culpability.

41. In the circumstances, I dismiss the Notice of Motion dated 26<sup>th</sup> July 2010 and discharge Hon. Franklin Bett, Mr David Ng'ang'a and Engineer Joseph Nkadayo from these proceedings.

42. As this matter filed within an application to enforce fundamental rights and freedoms, I make no order as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 17<sup>th</sup> day of December 2012.

**D.S.MAJANJA**

**JUDGE**

Mr Ochieng' Oduol with him Mr Mburu and Mr Munyororo instructed by John Mburu and Company Advocates for the petitioner

Mr E. Bitta, Principal State Counsel, instructed by the State Law Office for the 1<sup>st</sup> and 2<sup>nd</sup> respondent and Mr D. Ng'ang'a.

Mr K. Karori instructed by Iseme, Kamau and Maema Advocates for the 3<sup>rd</sup> respondent and Engineer J. Nkadayo.

Mr S. Adere instructed by Adere and Company for Honourable F. Bett.