



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**Civil Case 664 of 2005**

**KALYASOI FARMERS CO-OPERATIVE SOCIETY .....1ST PLAINTIFF/APPLICANT**

**SAMWEL KIPKEMOI LANGAT.....2ND PLAINTIFF/APPLICANT**

**JONATHAN KIPKORIR BORE.....3RD PLAINTIFF/APPLICANT**

**NICHOLAS KIMETO.....4TH PLAINTIFF/APPLICANT**

**FRANCIS KIMUTAI MARITIM.....5TH PLAINTIFF/APPLICANT**

**STANLEY KIBET KIRINYET.....6TH PLAINTIFF/APPLICANT**

**JOSEPH KIPKOSKE KILELE.....7TH PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY COUNCIL OF NAROK..... DEFENDANT/RESPONDENT**

**RULING**

**A. BACKGROUND: 2ND JUNE 2005 INTERIM ORDER ISSUED IN FAVOUR OF THE PLAINTIFFS**

In the background to the application which is the subject of this ruling is a suit by the seven applicants, dated and filed on 2nd June, 2005. The plaintiffs are described in the plaint as duly registered owners of specified properties situate in Narok South, in the Narok area of the Rift Valley Province of Kenya. Their suit is in respect of trespasses to their proprietary rights, alleged to have been committed on or about 31st May, 2005 by a local authority, the County Council of Narok. The plaintiffs subsequently applied by Chamber Summons dated and filed on 2nd June, 2005 and, by certificate of urgency, appeared before Ransley, J on that same day. They were seeking prayers necessitated by injuries to them, which they averred were being committed by those who had trespassed upon their lands and properties in Narok South, aforementioned. The learned Judge, on that occasion, heard the applicants and saw it fit to issue an order ex parte, in the following terms:

**“THAT the defendant/respondent, by themselves, their servants, agents including the District Commissioner, Narok and the OCPD Narok, or otherwise howsoever be and are hereby restrained from harassing, intimidating, threatening, provoking, inciting, detaining, arresting, trespassing into, demolishing and burning the plaintiffs’ properties in Narok South, Narok formerly known as Enkaroni and Enekishomi Group Ranches, or in any other manner whatsoever interfering with the plaintiffs/applicants, their agents or servants pending the hearing and determination of this application.”**

**B. CLAIM OF DISREGARD OF INJUNCTIVE ORDERS BY THE DEFENDANT**

The order made by Mr. Justice Ransley on 2nd June, 2005 is the basis of the contempt-of-Court application which is the subject of this ruling.

## **1. The Application, the Prayers and Depositions**

The plaintiffs moved this Court by Notice of Motion dated and filed on 10th June, 2005 and brought under Order XXXIX, rules 1, 2A(2), 3 and 4 of the Civil Procedure Rules; sections 3 and 3A of the Civil Procedure Act (Cap.21); and section 120 of the Evidence Act (Cap.80). The application was brought under certificate of urgency in which the gravamen was set out as follows:

(i) that, “the defendant, with the help and connivance of the District Commissioner for Narok, and the [Officer Commanding the Police Division] OCPD, Narok has been harassing, intimidating, threatening, provoking, inciting, detaining, arresting, trespassing into, demolishing and burning the plaintiffs’ properties in Narok South, Narok formerly known as Enkaroni and Enekishomi Group Ranches and otherwise interfering with the plaintiffs/applicants, their agents, servants”;

(ii) that, “on the 2nd of June, 2005 this Honourable Court granted an Order restraining the defendant by itself, servants, agents including the District Commissioner, Narok and the OCPD, Narok from harassing, intimidating, threatening, provoking, inciting, detaining, arresting, trespassing into, demolishing or burning the plaintiff’s properties in Enekishomi group ranches or in any other manner whatsoever interfering with the plaintiffs/applicants, their agents or servants pending the hearing and determination of the plaintiffs’ application dated and filed in Court on 2nd June, 2005”;

(iii) that, “despite being served with the order of this Honourable Court made on 2nd June, 2005 the defendant by itself, servants, agents including the District Commissioner, Narok and the OCPD, Narok has failed, refused and/or neglected to obey the orders of this Court and has continued with the aforesaid unlawful acts against the plaintiffs/applicants”;

(iv) that, “the [defendants/respondents] intend, unless restrained by this Honourable Court, to continue interfering with the [plaintiffs/applicants’] quiet and peaceable enjoyment of their property situated in Narok South, Narok, formerly known as Enkaroni and Enekishomi Group Ranches and interfering with the [plaintiffs/applicants’] free and unhindered use and access to the said property”

(v) that, “the actions of the defendant County Council in conjunction with the District Commissioner, Narok and the OCPD, Narok are calculated, high-handed acts of contempt of Court, and are prompted by malice and ill-will, and designed to deprive the plaintiffs of their right to their properties comprised in Title Number

CISMARA/OLOLULUNGA/10463;

CIS-MARA/OLOLULUNGA/111831;

CIS-MARA/ILMOTIOK/3747;

CIS-MARA/OLOLULUNGA/10130;

CIS-MARA/OLOLULUNGA/6942; and

CIS-MARA/OLOLULUNGA/6940”;

(vi) that, “the defendant’s actions have outraged and thrown into disrepute the whole process of administration of justice in this country and consequently this application seeks to enforce the Honourable Court’s authority and should be heard as a matter of urgency.”

The Notice of Motion carried the prayer that the Court be pleased to issue an order that the actions of the

defendant above-described, since 3rd June, 2005, are in contempt of the order of the High Court made by Mr. Justice Ransley on 2nd June, 2005 and consequently, that all such actions are null and void. The applicants further prayed that the Court do make any order it may deem fit, to restore its authority as against the County Council of Narok which was in contempt of Court.

The application was founded on the grounds summarised in the certificate of urgency, and carried supporting evidence in the depositions of the plaintiffs and others. The chairman of the 1st plaintiff co-operative society, Wilson Kipkurui Langat swore a supporting affidavit on 10th June, 2005 in which he avers that he was competent to depone on behalf of the 1st plaintiff, and had also been authorised to make depositions on behalf of the 2nd, 3rd, 4th, 5th, 6th and 7th plaintiffs/applicants.

The deponent avers that the plaintiffs are the duly registered owners of the suit properties already described by their land reference numbers. He believes to be true the information received from his advocates, that the High Court's order of 2nd June, 2005 had been served on the defendant on 3rd June, 2005. The deponent further believed to be true the information from his advocate, that despite being served with the Court's order made on 2nd June, 2005 the defendant, by itself, its servants and agents — including the District Commissioner, Narok and the OCPD, Narok — has failed, refused and/or neglected to obey the orders of the Court and has continued with its unlawful acts against the applicants. The deponent avers that although the affidavit of service shows that the defendant had through its officers, refused to acknowledge service of the Court orders, the fact of these orders having been issued has been publicised in the print media on a daily basis, yet the defendant and its agents have continued to engage in the very same courses of action which had been restrained by the Court. The deponent annexed to his affidavit copies of the Daily Nation of 10th June, 2005, page 6; The Standard of 4th June, 2005; The Standard of 8th June, 2005; The Standard of 10th June, 2005. It is deponed that the defendant, unless restrained by the Court, intends to continue interfering with the applicants' quiet and peaceful enjoyment of the suit properties. The deponent avers that the defendant has no known proprietary interest in the plaintiff's property.

To the foregoing depositions, Stanislas Nyagaka Ondimu, the County Clerk of Narok County Council, swore a replying affidavit on 17th June, 2005. He states that he had been authorised by the defendant local authority to swear the affidavit. He begins by deponing that he has read and understood the content of the several documents filed by the plaintiffs, namely — (i) the Notice of Motion dated 10th June, 2005; (ii) the supporting affidavit sworn by Wilson Kipkurui Langat on 10th June, 2005; (iii) the plaintiffs' certificate of urgency dated 10th June, 2005.

Stanislas Nyagaka Ondimu deposes that the High Court's order issued on 2nd June, 2005 only came to his attention on 9th June, 2005 when he returned to his office after his visits on official duty, to Nairobi and Nakuru. He depones that when he received the Court order, it was in a sealed envelope which had been left with his secretary. He avers that he has no authority over the actions of the Narok District Commissioner or the OCPD, Narok who both take instructions from the Office of the President.

He reiterates that neither the Narok District Commissioner nor the OCPD, Narok is a servant or agent of the defendant. Although the deponent denies that he is the principal of other persons mentioned in the Court order which is the basis of these proceedings, namely the District Commissioner and the OCPD in Narok, he goes on to depone that he has received information from the said District Commissioner which he believes to be correct, "that the plaintiffs may be part of a group of illegal squatters who were evicted from the Maasai Mau Forest Trust Land prior to the commencement of this suit by a contingent of General Service Unit Officers deployed in Narok by the Office of the President." On the basis of that belief, the deponent avers:

"it is therefore false for the plaintiffs to allege that the defendant has refused to comply with the Court order issued on 2nd June, 2005." The deponent clearly acknowledges that there have been evictions in the Narok area, of persons in occupation, but attributes the entire responsibility elsewhere. He avers: "I have perused various newspaper articles which refer to the decision to evict illegal squatters from the Mau Forest as having been made by the Cabinet." In his depositions, the deponent does not confine himself to fact, but makes reference to "illegal squatters", which I will take to mean that the defendant is

apprehensive of certain occupants of land in the Narok area, and the defendant regards or treats them as “illegal squatters.”

Once again, the deponent does not consistently provide factual evidence, but records his perception on matters for legal inference; he says: “the ex parte orders issued by this Honourable Court were obtained by deceit and wilful concealment of a fundamental fact.” He makes depositions on the said “fundamental fact”; but he ends up making only inferences that may have a bearing on questions of law. He says:

(i) “The essence of the order is to restrain the District Commissioner, Narok and the OCPD from evicting the plaintiffs. As the plaintiffs are aware that no injunction can issue against the Government in view of section 16 of the Government Proceedings Act, the defendant is named as a defendant merely as a ploy to obtain the ex parte orders.”

(ii) “The District Commissioner, Narok and [the] OCPD are not the agents and/or servants of the defendant. Such pleading does bring into ridicule the statutory provisions and divisions of duties in the public service.”

(iii) “The defendant as a local authority cannot and is not authorised to defend the actions taken by the Cabinet and/or other organs of Government. The defendant is wrongly enjoined in this suit.”

The deponent continues to depone argumentatively, and quite in departure from the evidentiary quality of affidavits, as required by Order XVIII of the Civil Procedure Act. He states: “I am advised by the defendant’s counsel on record and verily believe [the advice] to be true that this Honourable Court in its inherent jurisdiction is empowered to ensure that its process is not misused. It is a misuse of the process for the contempt application to be made in that —

(a) the ex parte order is in direct violation of section 16 of the Government Proceedings Act and to that extent, I am advised by the plaintiff’s counsel and verily believe the [advice] to be true that the order ought to be discharged and vacated;

(b) the motion is based [on the false premise] that service was effected upon me on 3rd June, 2005.”

The affidavit continues as an argument. It is stated (para.9): “The continuance of the ex parte order has been interpreted as an authorization for all and sundry to invade the Mau Forest which [will] cause an ecological disaster. I therefore pray that the order be discharged.” The deponent then makes a general claim about the integrity of property titles issued by the Government, through the registration process in the Lands Office (p.10): “...there are numerous title certificates which are in circulation and which are fake and/or obtained irregularly. In addition, there are certificates of title which the Ndung’u Commission of Inquiry adjudged should be cancelled since public land had been illegally allotted.”

He does not say whether, as a fact, the suit lands are affected by such irregular registration of titles; he does not say where he obtained his information from; he does not depone to having received counsel, to the effect that land titles issued by the Government’s Lands Office can be cancelled because of recommendations in a Commission of Inquiry report; he argues, but does not set out evidentiary material.

Without stating his source of information, the deponent avers: “..the persons who were evicted from Mau Forest by the Central Government were persons who had illegally invaded the forest. The forest is trust land and no alienation of the forest could have been legally made by the guise of issuance of a title certificate.” That statement as well as all the other ones made in the affidavit, are concluded with the words: “...what is deponed herein is true to my knowledge...”

Five days after the replying affidavit of Stanislas Nyagaka Ondimu was filed, the 3rd plaintiff, Jonathan Kipkorir Bore swore and filed a further supporting affidavit, dated 22nd June, 2005. He avers that he has been authorized by the 1st, 2nd, 4th, 5th, 6th and 7th plaintiffs to swear the affidavit on their behalf as well, and that the same is in addition to the affidavit of Wilson Kipkurui Langat sworn on 10th June, 2005. The deponent avers that he has read the replying affidavit of Stanislas Nyagaka Ondimu sworn on

17th July, 2005 and is responding to the same.

Jonathan Kipkorir Bore depones that he had accompanied Ms. Juliet Maritim, an advocate of the High Court, on 3rd June, 2005 when she served the Court order and other Court documents at the County Council offices at Narok. The deponent avers that he was present “when the Clerk’s secretary declined to acknowledge receipt of the said documents saying she has no authority.” He further deposes: “...I witnessed [visually] when Ms. Juliet Maritim handed over the aforesaid documents and there was no ... envelope as alleged. I saw the Clerk’s secretary receive documents and they were not enclosed in an envelope.”

The deponent avers: “..throughout the period following the service of the aforesaid documents including the Court order on the County Council of Narok, I have witnessed the Council’s motor vehicles registration numbers KAH 097Y and KAR 150L ferrying Council rangers to the plaintiff’s properties wherein [they] carried out extensive destruction and burning of houses. I have also identified Moses Barkire Kuyoni and William Ndoiga amongst others carrying out the exercise and they are both employees of the County Council.”

The 3rd plaintiff, Jonathan Kipkorir Bore avers that it is not true that it is the Government carrying out the damage complained of by the plaintiffs: “Apart from the Administration Police Officers attached to the District Commissioner’s office, who have been accompanying the [Narok] County Council rangers, there is no Government officer involved in the on-going destruction of private property.” The deponent avers that on 20th June, 2005 when the defendant was in the course of destroying the plaintiff’s properties, the said Administration Police Officers informed a Councillor of the Narok County Council, David Sulunye (who has himself sworn an affidavit), in the presence of the deponent, that “their role is merely to maintain security.”

The deponent avers that he has read the affidavits of two Councillors of the County Council of Narok, David Lekuta Sulunye and Joseph Rotich Tesoi and he believes their depositions to be true: that the two are privy to information emanating from the defendant Council; it is the Council which is carrying out the evictions complained of. Several affidavits were filed supporting the averments in the further affidavit of Jonathan Kipkorir Bore. David Lekuta Sulunye, a Councillor of the Melelo Ward of Narok South, swore an affidavit on 22nd June, 2005 in which he avers that the evictions which form the plaintiffs’ gravamen, have been discussed at the defendant Council in his presence, and he is “aware that Mr. Stanislas Ondimu has been co-ordinating the said evictions and that both the Council vehicles and its employees are involved in the said evictions.”

He avers that on 20th June, 2005 he “spoke to [an] Administration Police officer at Sierra Leone where the house of Mr. William Cheruiyot was being burnt, [and he] informed me that [the] role [of the Administration Police] was merely to ensure there was no confrontation.” Yet another Councillor, Joseph Rotich Tesoi swore an affidavit on 22nd June, 2005 supporting the averments in the 3rd plaintiff’s affidavit of even date. He deposes that he, Joseph Rotich Tesoi, is a Councillor in the Sogoo Ward of Narok. He depones: “I have personally been present at the Council when the issue of evictions was discussed. I am also aware that Mr. Stanislas Ondimu has been co-ordinating the said evictions, and that both the Council vehicles KAH 097Y and KAR 150L, [and] its employees namely Moses Barkine Kuyoni and William Ndoiga are involved in the said evictions.”

The deponent avers that, on 20th June, 2005 he “witnessed [the] Administration Police at Sierra Leone standing by passively as the rangers of the County Council burned and destroyed the house of Mr. William Cheruiyot, amongst others.” The said William Kiprotich Cheruiyot, on 22nd June, 2005 swore yet another supporting affidavit to the 3rd plaintiff’s further affidavit of even date. He depones that he is a member of Kalyaso Farmers Co-operative Society (1st plaintiff). He avers that on 3rd June, 2005 at about 7.00 a.m. he collected from the firm of M/s. Katwa & Co. Advocates Court documents in respect of the suit herein, with instructions to deliver the same to Ms. Juliet Maritim, an advocate based at Narok. On the same day at about 10.00 a.m. he arrived at the office of Ms. Juliet Maritim and handed to her the said Court documents.

The deponent explained to Ms. Maritim the urgency of the documents, and the fact that there was a Court order to be served upon the County Council of Narok, to stop that Council from carrying out planned evictions of the plaintiffs from their properties. Even as the deponent spoke to Ms. Juliet Maritim, the 3rd plaintiff joined them and he, the 3rd plaintiff, later accompanied Ms. Maritim to the offices of the County Council of Narok. Stanislas Nyagaka Ondimu, the County Clerk of the defendant County Council swore a further replying affidavit on 24th June, 2005 in answer to the affidavits for the plaintiffs filed on 22nd June, 2005.

Stanislas Nyagaka Ondimu depones that the defendant County Council has 40 rangers whom it employs. He avers that the said rangers are deployed — (i) to provide office security and to man a radio control room (6 of them); (ii) to man the road barriers and exits from the “trust land forest” (20 of them); (iii) to provide patrol service inside the forest (8 of them); (iv) to provide security in markets (4 of them). He depones that “the defendant has never made any resolution and/or decision to evict the persons who illegally entered the trust land.” He depones that both rangers cited in the affidavits sworn for the plaintiffs as having participated in the impugned evictions and destructions to property, Moses Barkine Kuyoni and Wiliam Ndoiga, are indeed employees of the defendant; and that the two vehicles mentioned in connection with the injuries and destructions, namely registration numbers KAH 097Y and KAR 150L, are the property of the defendant. But, he further depones, he “neither authorized the rangers to carry out the evictions nor [deployed] the vehicles for that exercise.”

The deponent avers that David Lekuta Sulunye who is an elected Councillor on the defendant Council, had been Chairman of Enagishoni Group Ranch, the acreage of which had increased from the original 2000 acres to 9,748 acres thanks to an encroachment on Trust Land. The deponent once again, takes leave of his task of deponing on facts, and makes a statement of legal implications, that “the titles issued in respect [of] the Trust Land were illegally issued since the Trust Land was not set apart as required by law.” He does not state his source for such a statement, and does not indicate how the Government’s Lands Office could be faulted in this manner. He does not state that any Court of law had declared the titles in question illegal. 2. The Defendant’s Objections on Jurisdiction When the plaintiffs’ Notice of Motion of 10th June, 2005 came up before me for hearing on 14th June, 2005 learned counsel for the defendant, Mr. Ngatia raised a preliminary objection.

He was seeking to have the order of 2nd June, 2005 itself vacated forthwith, because, as he submitted, it had been made without jurisdiction. This was strange, of course, because there was absolutely no question that the said order had, indeed, been made, that it was on the record, that it determined, at least for the time being, the relation between the parties. Counsel’s contention, without any doubt, was intended to undercut the plaintiffs’ claim that the Court’s order was being treated with contempt, and that the Court should re-assert its authority, uphold its own order, and punish acts of contempt.

However, learned counsel attempted to validate this somewhat puzzling forensic strategy on the basis that there was indeed a jurisdictional question to be resolved at the threshold. So he called in aid the Court of Appeal decision in *Owners of the Motor Vessel “Lilian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1, in which it was held that: “A question [of] jurisdiction may be raised by a party or by a Court on its own motion [and] must be decided forthwith on the evidence before the Court.” (p.2). For the plaintiffs, learned counsel Mr. Kemboy submitted that there was no place for the issue sought to be canvassed by the defendant’s counsel; for the first obligation resting upon the defendant, was to obey the Court order on record, and that order could not be challenged before first obeying.

This principle was clear from the decision in *Hadkinson v. Hadkinson* [1952] 2 ALLER. 567; the rule is thus stated by Romer, L.J. (p.569): “It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged.” Mr. Kemboy submitted that it was not open to parties to decide on their own the validity of a Court order. He cited my decision in *Wildlife Lodges Ltd v. County Council of Narok & Another*, HCCC No. 1248 of 2003, in which I did state that “consistent obedience to Court orders is required, and parties should not take it upon themselves to decide on their own which Court orders are to be obeyed and which ones overlooked...”

He submitted that the preliminary objection could not be heard, because it was filed when the Notice of Motion carrying the contempt application was already on record: and a contemnor cannot be heard unless first he has purged his contempt. Therefore the charge of contempt must be heard in priority. I resolved this preliminary question in a ruling as follows: “Competing for a hearing this afternoon are: (a) the plaintiff’s Notice of Motion which seeks to invoke the Court’s contempt jurisdiction, and (b) the defendant’s notice of preliminary objection, which seeks to terminate the plaintiff’s application in limine – on grounds of jurisdiction.

“Counsel for the plaintiffs admit that the substantive application was only served [this morning]; and even though the Duty Judge has directed that the same be heard without delay and in priority over other applications, I have to apply my discretion to the question whether there is now a full preparedness for a fair hearing of the contempt application. “It is common cause that the defendant has not made the required responses to the contempt application. I think the defendant has not had enough time.

“But there is a question of principle: What is to have priority hearing — the contempt application, or the challenge to the Court’s jurisdiction? “Now the challenge to jurisdiction, which is the basis of the defendant’s notice of preliminary objection, is a challenge to the orders which had been made [of 2nd June, 2005], and in respect of which the defendant is said to have been in contempt. “The law may be stated. The authority and dignity of the Court, and the binding nature of its orders, is a primary and elemental constitutional question. Anyone who even seeks the upholding of his or her rights under the fundamental rights of the Constitution, must first accept that it is the High Court that will deliver those rights, by its interpretation of the Constitution. “Therefore, the very first principle of the constitutional law governing dispute settlement, is recognition of the binding authority of the orders of the High Court. All other questions may be considered, but only afterwards. “And therefore, as a matter of law, the moment Mr. Justice Ransley made his orders and the same were set out on the record, *ex facie* those orders had to be obeyed.

“The question whether the learned Judge might have lacked jurisdiction, is one that comes only after a detailed inquiry and after the taking of certain steps in litigation. “Therefore, I have to say that learned counsel Mr. Kemboy is right. The first application to be heard must be the one that relates to the authority of the Court — that is, the Notice of Motion of 10th June, 2005.

“After that application has been heard, then the defendant can come before the Court, if it is not in contempt, to make any other application or to move the Court for any purpose, even that of hearing a preliminary objection.” Following my ruling on 14th June, 2005 the defendant, on 17th June, 2005 appeared before the Duty Judge by Notice of Motion of 16th June, 2005 brought under certificate of urgency. The defendant was seeking leave to appeal against my ruling. This matter came up before me on 20th June, 2005 for directions. Following the submissions of counsel I made a ruling as follows:

“On 14th June, 2005 I had given directions that as between a preliminary objection by the defendant, and a Notice of Motion by the plaintiffs, it was the Notice of Motion to be accorded first hearing before the Court was moved by any party for any purpose whatsoever. “By the orders which I made on 14th June, 2005 the ...plaintiffs’ Notice of Motion ...is scheduled for hearing on 22nd June, 2005. “Learned counsel for the defendants has come today by Notice of Motion dated 16th June, 2005. He says he could, on 14th June, 2005 have informally applied for leave to appeal...but he did not. So by Notice of Motion of 16th June, 2005 he is taking abundant caution and seeking leave to appeal against the order of 14th June, 2005.

“...[It] is clearly stated in [the ruling of 14th June, 2005] that this Court is not able to discharge its constitutional mandate unless parties strictly obey its orders — whether such orders be wrong or right; and when they are wrong, a dissatisfied party is required to obey in the period during which he is appealing. “The effect of the defendant’s Notice of Motion of 16th June, 2005 is to seek to challenge the above, well-established principle of law, in the Court of Appeal. “Since I must, in this Court, uphold that constitutional principle, I will restate here that the directions I gave regarding the hearing of the plaintiff’s Notice of Motion on 22nd June, 2005 remain in place.

“However, I am hereby granting the defendant leave to appeal against that order. But the implementation

of the order shall take place in the meantime.” The defendant was able, by 22nd June, 2005 to have its application heard by the Court of Appeal. The defendant had asked that the Court of Appeal do “order that all further proceedings in Nairobi High Court Civil Case No.664 of 2004 and all orders made therein on 14th June, 2005 be stayed pending determination of the intended appeal.” The Court of Appeal decision was as follows:

“We have heard submissions from the learned counsel appearing for the parties herein. It is our view that the intended appeal is arguable but we do not think the same would be rendered nugatory if this application was refused. The parties have the opportunity to raise all the issues relating to jurisdiction during the hearing of the contempt application. We would point out that it would be quite appropriate for the learned Judge to hear the arguments on jurisdiction while dealing with the contempt application.” 3. Attorney-General Seeks Representation

The Deputy Solicitor-General, Ms. Kimani appeared on 22nd June, 2005 to inform the Court that she had instructions from the District Commissioner, Narok and the OCPD, Narok to represent them in the proceedings — for the reason that the orders of 2nd June, 2005 had imposed inhibitions on the two officers, in addition to the defendant. While stating that she had not been served with the pleadings and so could not address the Court effectively, Ms. Kimani went on to submit that s.16(2) of the Government Proceedings Act (Cap.40) provides that no injunction is to issue against the Government. She requested to be supplied with the pleadings and undertook to file her notice of appointment.

Learned counsel, Mr. Ngatia, while acknowledging that the Court of Appeal had ruled that the defendant’s objections be taken in the course of the hearing of the plaintiffs’ Notice of Motion, still maintained that his client’s position be heard first. Mr. Kemboi for the plaintiffs, expressed concern that even as the defendant made a case in Court for leave to appeal on 20th June, 2005 an appeal had already, on 17th June, 2005 been lodged, and that this had implications in terms of bona fides shown before the Court. On the record, one gets the impression that there was common cause that the Notice of Motion be heard without delay, and that the application by the Deputy Solicitor-General could cause further delay.

Learned counsel Mr. Kemboi submitted that the Attorney-General’s office had no right to be heard, because by Order L, rule 16 a party who wishes to be heard in opposition to any application must file a replying affidavit or grounds of opposition; and since the Court order of 2nd June, 2005 retraining the defendant had expressly included the DC, Narok and the OCPD, Narok if they wished to be heard they would have filed replies before 14th June, 2005. Learned counsel perceived the belated attempt at representation by the DC, Narok and the OCPD, Narok as an attempt to obstruct the contempt proceedings. Again it became necessary for me to make a ruling on the issues raised. My ruling was as follows: “On both the 14th and the 20th of June, 2005 this Court has had to deal with the question whether or not the Notice of Motion by the applicants is to be heard in priority over other matters. “A clear and firm position has been taken by the Court, that as a general rule, when there are competing applications, and one of them is in relation to the Court’s contempt jurisdiction, it is the contempt application that takes priority. It is because the Court as the constitutional organ responsible for dispute settlement, cannot perform its constitutional role unless its orders are obeyed.

“When this matter last came up before me, I gave leave to the defendants to appeal on that basic principle of law. “The Court of Appeal today, 22nd June, 2005 upheld my ruling and gave the go-ahead for these proceedings to continue. “However, the Court of Appeal ruled that in the presentation of the contempt case, this Court should also deal with the question of jurisdiction which is being raised by the defendants.

“Today learned counsel Mr. Ngatia, for the defendant, urges that even as I hear both matters, the first place within the hearing today should go to his jurisdictional point. “My decision is that, as I give effect to the direction of the Court of Appeal, I will want the broad nature of the contempt case to be laid on the table first, and thereafter counsel for the defendants will be able to raise his jurisdictional point. “Another question before me today is whether learned counsel representing the Attorney-General’s Office, Ms. Muthoni Kimani, may address the Court. She comes in to represent the DC, Narok and the OCPD, Narok who, as I understand, were subject to the Court’s orders but had put in no reply to the plaintiff’s Notice of Motion.

“I do not accept Ms. Kimani’s request that hearing can wait while she is still being served with papers, since the DC and the OCPD, I understand, had been served nearly three weeks ago but did not respond. “Considering the public-interest element in this matter, I will allow Ms. Kimani to be in Court and she may address the Court but only on points of law. She will immediately hereafter give notices to come on record officially, and in that capacity she will be able to make such applications on behalf of her clients as may be necessary.”

This ruling, which was rendered strictly within the ambit of my constitutional role and on the basis of my conscientious discharge of duty, apparently displeased learned counsel Mr. Ngatia, whose remarks were definitely unbecoming; and this will merit at least a caution. I may note here that the opportunity for representation sought in the name of the Attorney-General and granted by the Court, has to my knowledge, not been taken. C. THE CONTEMPT APPLICATION: SUBMISSIONS FOR THE APPLICANTS 1. Issues of Service, and Issues of Fact

Learned counsel, Mr. Kemboy, presented the several affidavits supporting the plaintiffs’ application. He submitted that the application was brought under Order XXXIX and was in respect of the Court order issued on 2nd June, 2005. That order restrained the defendant from interfering with the quiet and peaceful enjoyment by the plaintiffs of their lands. The Court’s order, counsel stated, was served on the defendant on 3rd June, 2005. It was deposed in the affidavit of Juliet Maritim, an advocate, that she duly served the Court’s orders upon the defendant on 3rd June, 2005. When Ms. Maritim received the Court documents (including the Court’s order) on 3rd June, 2005 she proceeded to the County Clerk’s office, where she met the County Clerk’s secretary. Ms. Juliet Maritim explained the purpose of her visit, and asked to be allowed to serve the Court documents aforementioned.

The County Clerk’s secretary responded that the County Clerk, Mr. Stanislas Ondimu, was not in the office, and had left her with no instructions to acknowledge receipt of such Court documents. Ms. Maritim had checked if the Deputy Clerk was in office, but he was absent. So Ms. Maritim left the Court documents with the County Clerk’s secretary. Ms. Maritim requested acknowledgement as soon as Mr. Stanislas Ondimu returned to the office. Ms. Maritim also effected service of copies of the same documents upon the DC Narok and the OCPD, Narok. In her affidavit of service, Ms. Maritim averred that she had duly effected service of the Court documents aforementioned.

Learned counsel, Mr. Kemboy urged the Court to take notice of the media publicity which had been given to the Court order of 2nd June, 2005 and the fact that in The East African Standard of 4th June, 2005 there had been an article headed “Council Barred on Evictions.” The article referred to the order made by Ransley, J on 2nd June, 2005 and reported that the High Court had restrained the County Council of Narok from evicting Group Ranch members (who included the plaintiffs). The said order was to remain in place, only subject to inter partes hearing which Ransley, J had set down for 14th June, 2005. Mr. Kemboy submitted that the fact of the Court order in question, was a matter in the public domain, and in respect of which the defendant herein could not claim to have been ignorant.

Reviewing the evidence for the defendant, Mr. Kemboy submitted that this did not deny the fact of the said order of 2nd June, 2005 being in the public domain; the County Clerk of the defendant “doesn’t say he never saw it.” After service, counsel submitted, the defendant disobeyed the Court order, and continued to interfere with the plaintiffs’ use and enjoyment of their properties. Learned counsel drew the Court’s attention to several Press reports, annexed to the supporting affidavits, which showed persistent disturbances to the plaintiffs’ occupation and enjoyment of their lands, wrought by the defendant even after service of the Court order. Counsel noted from the affidavit of Jonathan K. Bore, the 3rd plaintiff, that even after the Court’s order of 2nd June, 2005 was extended and so remained in force, the defendant continued to disobey. For evidence of this disobedience, counsel relied on the further affidavit of Jonathan K. Bore and on its annexures, one of these being the Daily Nation of 19th June, 2005 in which the editorial page expressed concern about apparent disrespect for Court orders by the defendant. The same Press-source annexures also showed instances of arson, destruction and eviction, at the suit lands in reference herein, since the Court order of 2nd June, 2005 was issued. Learned counsel stated that such disturbance to the plaintiffs had persisted, notwithstanding that the defendant had been duly served with a valid Court order endorsed with a penal notice.

Mr. Kemboy questioned the truthfulness of the affidavits tendered for the defendant, especially the claim therein that “the defendant knows nothing about those evictions.” He also contested the truthfulness of the averment in Stanislas Nyagaka Ondimu’s affidavit, that he was entirely ignorant of the plight of the plaintiffs, and that he had only learnt from the DC, Narok that the evictions affecting the plaintiffs were the work of “the Government”. This averment could not be true because, when some in Government had let fall words to the effect that they would cancel title deeds in respect of lands in the Narok area, their signals had promptly been challenged within the judicial process; and insofar as the issues involved had not been determined by the Courts of law, it was impermissible and untenable in law, that Government’s name could be associated with evictions of the plaintiffs.

Reference here was being made to Miscellaneous Civil Cause No. 313 of 2005, a Judicial Review application, *Nayieyie Olole Sirma & 6 Others v. The Minister for Lands & The Hon. Attorney-General* (which was annexed to Bore’s affidavit). That matter came up before Mr. Justice Makhandia on 2nd March, 2005. The learned Judge made the following orders: “1. THAT leave be and is hereby granted to the applicants to apply for an Order of Certiorari to remove into the High Court and quash the decision of the 1st respondent announced on or about 14th February, 2005 at Keekorok Lodge in the Maasai Mara Game Reserve and published on 15th February, 2005 in the print media cancelling over 10,000 title deeds and in particular the titles of the applicants.

“2. THAT leave be and is hereby granted to the applicants to apply for an Order of Prohibition, prohibiting the respondents from cancelling the applicants’ title deeds, evicting, trespassing, or otherwise interfering with the applicant’s quiet occupation and enjoyment of their registered parcels of land.

“3. THAT the grant of leave to apply for Orders of Certiorari and Prohibition do hereby operate as a stay of the decision of the 1st respondent announced on or about 14th February, 2005 and published in the print media on 15th February, 2005 until the hearing and determination of the Judicial Review proceedings or until further orders of the Court.”

Given the stay which the High Court had thus imposed against the threatened action by the Lands Minister, it was not conceivable, learned counsel submitted, that the Narok County Clerk could invoke the name of the Government in relation to violations of the Court order of 2nd June, 2005; and therefore the defendant must be judged alone, as the party duly served with a prohibitory Court order on 3rd June, 2006 but had ignored the same and continued to disturb and to evict the plaintiffs from their properties in the Narok area.

Learned counsel, Mr. Kemboy submitted that the plaintiffs had properly identified the rangers from the County Council of Narok, as well as the specific motor vehicles of that Council who, and which had been specially deployed in the disruption of the plaintiffs’ occupancy and enjoyment of their own registered properties, in breach of the Court order of 2nd June, 2005; and the defendant had not denied that Moses Berkinde Kuyoni and William Ndoiga were their rangers, nor that the motor vehicle registration numbers KAH 097Y and KAR 150L were indeed their assets. Mr. Kemboy submitted that there was no answer to the plaintiffs’ depositions that the defendant had played a role in the impugned evictions and destructions to property, and this being in clear disregard of the Court order of 2nd June, 2005 there was a case for citing the defendant for contempt of Court.

## 2. Issues of Law

Mr. Kemboy submitted that any eviction in disobedience to a Court order is an eviction contrary to law, and is illegal and not to be countenanced by the Courts. The locus classicus on this point is the Court of Appeal decision in *Gusii Mwalimu Investment Co. Ltd. & 2 Others v. Mwalimu Hotel Kisii Ltd*, Civil Appeal No. 160 of 1995 in which the question was the proper method which a landlord may employ to obtain possession from a tenant whose tenancy had clearly come to an end. The following words in the judgement of Shah, J.A. may be quoted:

“A Court of law cannot allow such a state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession, the landlord has to obtain an order of a competent Court or a statutory tribunal [granting the right of] possession.” My understanding of counsel’s argument, in this regard, is that a party who has attained possession in the first place and holding the

indicia of legality, is to be protected in status quo, and the law dictates that the one who seeks to change that status quo, has only one of two options: (i) to gain possession through the consent of the occupier; or (ii) to move the Court to order the occupier to surrender possession to the applicant. Such a person will be adjudged to have acted unlawfully if he resorted to any other method of obtaining possession.

The analogy in learned counsel's submission here, as I perceive it, is that the plaintiffs herein, bearing as they do the indicia of legality to the suit lands, were protected by law, and their occupation and ownership could only be challenged by making an appropriate application before the Court. That, in my opinion, is a valid argument, though I would qualify it to the extent that the primary law-making body under the Constitution, namely Parliament, could also — subject to the protections for private property in s.75 of the Constitution itself — enact legislation affecting the status of the suit lands; in which case such legislation will govern any actions affecting property rights in those lands. Learned counsel devoted his submissions to the law relating to contempt of Court, and to the relevant authorities.

In *Hadkinson v. Hadkinson* [1952] 2 ALLER 567, Romer, L.J. stated (p.569) the basic principle which has been applied in this country, and the validity of which in Kenya has not been challenged: "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void..."

It is a strict rule and, in Kenya, it will serve to safeguard the constitutional authority of the Judicial Branch, in the resolution of disputes and in the interpretation and application of the law. A Court order is an ultimate expression of the judicial mandate; it is binding from the start upon those it affects, subject only to a subsequent determination of an appellate Court, or a subsequent law enacted by Parliament. This is the vital principle underlying the law of contempt. The moment a person is adjudged to be in contempt, the range of issues which that person can speak on before the Court becomes highly limited; that person cannot begin to speak in Court except for the purpose of purging his contempt, or for the purpose of canvassing an appeal. This is clearly pronounced upon by Romer, L.J. in *Hadkinson v. Hadkinson* (p.570):

"Is this case, then, an exception from the general rule which would debar the mother, as a person in contempt, from being heard by the Courts whose order she has disobeyed? One of such exceptions is that a person can apply for the purpose of purging his contempt, and another is that he can appeal with a view to setting aside the order on which his alleged contempt is founded... A person against whom contempt is alleged will also, of course, be heard in support of a submission that, having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it, or that, having regard to all the circumstances, he ought not to be treated as being in contempt."

Mr. Kemboy submitted, I think quite correctly, that when a Court makes an order, it may well turn out that the same is null and void; but until it is set aside, there rests upon those affected an unqualified obligation to obey. Learned counsel cited the statement of Lord Cottenham, L.C. in *Chuck v. Cremer* (1846), 1 Coop. temp. Cott. 205, set out in *Hadkinson v. Hadkinson* (at p.569):

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid — whether it was regular or irregular...[The] course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed." In my opinion Mr. Kemboy is right when he urges that the claim by the defendant that the order made by Ransley, J on 2nd June, 2005 was irregular or issued without jurisdiction, "falls flat on its face." Learned counsel states the law correctly in my view: "[The defendant] could not determine that question."

On 13th June, 2005 the defendant had filed grounds of opposition to the plaintiffs' application, asserting that the Court's contempt jurisdiction had not been correctly invoked; that the plaintiffs' suit was founded on collateral purposes; that the suit did not comply with section 13A of the Government Proceedings Act

(Cap.40); that the suit was defective for non-joinder of necessary parties; that the suit was defective because it was seeking to stop a statutory body [County Council of Narok] from exercising its duties.

Mr. Kemboy relied on the High Court's decision in *Isaac J. Wanjohi & Another v. Rosaline Macharia*, HCCC No. 450 of 1995 as establishing that there are two ways of invoking the Court's contempt jurisdiction. In the decision of Bosire, J (as he then was) in that case, if an applicant relies on the Judicature Act (Cap.8), s.5 then leave must be sought for such application, and in that case Order 52 of Supreme Court of England Practice Rules would apply. But, in the alternative, an applicant may proceed via Order XXXIX, rule 2A(2) of the Civil Procedure Rules; and in that case there is no need to seek leave. I find this a convincing position to take, as Order XXXIX is a self-contained Kenyan rule made within the framework of the Civil Procedure Act (Cap.21), and its requirement is imperative and direct, and carries no reference to English legislation or subsidiary legislation.

Learned counsel restated the plain fact that the suit has been lodged against one party, the defendant; and he questioned the propriety of the defendant's objection — that since the Court's order of 2nd June, 2005 had also been directed at the DC, Narok and the OCPD, Narok then ipso facto the suit is a suit against the Government, and that accordingly the suit is incompetent for non-compliance with ss.13A and 16 of the Government Proceedings Act (Cap.40). In the words of counsel: "This suit is first and foremost against the County Council of Narok. That County Council is established under the Local Government Act (Cap.265), which by its section 28, confers upon the local authority the competence to sue and be sued; and therefore, the County Council of Narok is not subject to the Government Proceedings Act."

Mr. Kemboy noted that the defendant in its evidence has claimed that the entire geographical area within which the suit lands fall, is Trust Land vested in the defendant within the Terms of the Constitution of Kenya, the Trust Land Act (Cap.288) and the Land Adjudication Act (Cap.284); but this is not the case, as the plaintiffs claim absolute ownership, by virtue of the Registered Land Act (Cap.300), ss.27 and 28. Learned counsel noted that the defendant had not in any document of evidence or pleadings said that the suit lands "belong to the Government." There was, therefore, no basis upon which the defendant when faced with the claim of disobedience to Court orders made in favour of the plaintiffs, could properly invoke the name of the Government, or urge the applicability of the Government Proceedings Act (Cap.40). In the words of learned counsel: "The Government has no role in relation to Trust Land, nor in relation to private property. To sue the Government in a matter such as this which only concerns the defendant and the plaintiffs herein, would be wrong, as no remedy would be available [against] the Government." Learned counsel submitted that this was not a fit case for enjoining the Government in the suit — although such joinder would be considered if the Government formally intervened and sought to effect a compulsory acquisition, by virtue of powers provided for in statute law. So far, counsel urged, the plaintiffs had made no prayers against the Government, and the suit was confined to the parties named herein. Counsel submitted that the only reference to aspects of Government so far, in the plaintiff's application, is for the purpose of obtaining restraint against the DC, Narok and the OCPD, Narok who have law-and-order functions at the district level. The purpose of specifically mentioning the DC and the OCPD, counsel submitted, has been to forestall possible mischief, if the defendant would accept that the two officers can proceed as if they are executing the request of the County Council of Narok.

Mr. Kemboy submitted that it did emerge from the affidavit of the County Clerk of the County Council of Narok, that he has been engaged in acts calculated to defeat the property titles of the plaintiffs. **D. WERE THE COURT'S ORDERS VALID? WAS THE CONTEMPT APPLICATION PROPERLY DRAWN? WAS SERVICE EFFECTED? — SUBMISSIONS FOR THE DEFENDANT**

Learned counsel, Mr. Ngatia contested the contempt application for making reference to a plurality of gravamens and to a certain specific date of alleged occurrence — 31st May, 2005. He named the gravamens as intimidation, provocation, arrest, detention, demolition, etc and contended that the orders which are the subject of the contempt application, must have been in respect of each and all of those gravamens individually, and that if that was not so, then the order was defective. He also submitted that the evidence carried by the several affidavits sworn on behalf of the plaintiff, did not show that there had been any disobedience to the Court order of 2nd June, 2005 by the defendant.

Mr. Ngatia submitted that there was under the law a certain burden of substantiation which had not been discharged, resting on the plaintiffs who were alleging that the defendant had been in contempt of Court. For this proposition he drew an analogy between Order XXXIX, rule 2A(2) and the applicable law in India, which is contained in Order 39 rule 2A and is the subject of commentary in Mulla's *The Code of Civil Procedure*, 16th ed., at pp. 3764 – 65:

“A person alleged to have committed a breach of injunction cannot be detained for such breach, without giving him a clear idea and notice as to the precise act done by him in breach. Proceedings under O.39, r. 2A are quasi-criminal, as the contemnor stands to be imprisoned as [a] consequence thereof. It is, therefore, necessary that he must have a clear idea and notice, as in a criminal case, as to what he has to meet so that he could adduce evidence accordingly.” Counsel's purpose in invoking the foregoing passage in Mulla was to advance the argument that a Court order, such as the one issued by Mr. Justice Ransley on 2nd June, 2005 could not be issued on suspicion, and that on this ground, it stood to be challenged. It remained unclear, however, why counsel thought the said order was issued on suspicion.

Indeed, counsel's reasoning would have appeared to be a challenge to the well-established rule that the High Court may, in a proper case and taking into account the material placed before it by an applicant, lawfully issue *ex parte* orders which once so issued, must be obeyed until they have been vacated. Counsel did not, with respect, place any evidence or material before me to show that Ransley, J had been acting on mere suspicion and thus had no basis for exercising his discretion to grant the order of 2nd June, 2005. Mr. Ngatia had laid the basis of his attack on the order of 2nd June, 2005 by contending that this order made reference to so many gravamens that the defendant was not being properly notified whether the prohibition was in respect of a provocation, an arrest, a demolition, an intimidation etc. He asked: “On what precise dates did such actions take place? Were the [impugned] acts of 31st May, 2005 the same as later acts?” He then posed: “There are some ten different grievances, ten different acts. Which one is the defendant being called upon to answer to?” This line of argument was based on the holdings of an Indian case, urged as a persuasive authority — *Raghuvir Harischandra Salgaonkar v. Smt. Saraswati Pundalik Salgaonkar* [1984] 71 All India Reporter 284, at pp.286 – 287:

“At the outset it must be stated that the order passed by the learned trial Judge on 9th December 1981 does not clearly indicate as to, for what act of disobedience the applicant was being punished. It is not clear whether he was being punished for covering the front and rear portions of the house with palm leaves or tiles despite the temporary injunction granted on 10th April, 1980 or whether he was being punished for extending this roof further, after inspection on 26th July, 1980.

It seems that the applicant was not given a clear idea as to what was the act for which action was being taken against him under Order 39, rule 2A... We, therefore, find that at the threshold the proceeding taken by the trial Judge against the applicant suffers from this material irregularity... The result, therefore, is that [the] revision application is allowed and the orders passed by the Courts below are hereby set aside and the applicant is discharged.”

The principle in the above judgement, which in my opinion, so far as it goes is a meritorious one, was now urged as the basis for resolving the disputed issues before the Court. The merits of such a submission stands to be assessed further on; but at this stage I would state that the peculiar facts of different cases will be all-important. For learned counsel, that was the turning point in the defendant's case, and, where in *Raghuvir Harischandra* the applicant succeeded on merits but could not also win costs, it was now urged that the County Council of Narok should win both on merits and on costs. And counsel proceeded, on that footing, to cite the Court of Appeal decision, *Gatharia K. Mutitika & Two Others v. Baharini Farm Ltd. (now called Nakuru House Development Co. Ltd.)* (1982 – 88) 1 KAR 863 as assuring the merits of the defendant's case (p.868):

“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 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 [an] offence which can be said to be quasi-criminal in nature...”

Mr. Ngatia submitted that the plaintiffs had provided no evidence in the terms set out in the Mutitika case, and consequently there was no basis for finding the defendant to have been guilty of contempt of Court. About this submission, I felt concerned by the fact that, whereas it could only be determined on evidence, even affidavit evidence, whether or not sufficient proof of contempt had indeed been made, learned counsel was not focussing his argument on the factual material set out in the plaintiffs' affidavits; he was predicating his conclusion and submission only on principles of law derived from analogies between the laws of Kenya and those of some other countries. Such a line of submission, I was concerned, could tend to constrain judicial decision-making in the direction of bare concepts, however progressive they may be, which were not linked to the reality of the dispute as it emerges from evidence.

Mr. Ngatia then argued that, insofar as the plaintiffs by their application were seeking final orders on the contempt question, their affidavits were not a proper basis for the issuance of such orders — because the affidavits were “based on belief, and the sources of belief were not disclosed.” However, my review of the depositions shows the evidence for the plaintiffs to be so detailed, that it would not be right to typify them as no more than an expression of belief. The evidence is that, the plaintiffs had been subjected to infringement upon their proprietary rights by the defendant; that on 2nd June, 2005 Ransley J granted them an order restraining the defendant; that the defendant ignored those orders, and that they suffered and are suffering, as a result. I think the contention that such evidence is belief and belief alone, is not a valid one.

But learned counsel went on to urge that evidence of belief was merely hearsay, and that to be able to adduce such evidence, the plaintiffs ought to have sought leave of the Court. Counsel drew the Court's attention to the English case, *Rossage v. Rossage & Others* [1960] 1 ALLER 600, in which the point in issue was affidavits and the inclusion therein of hearsay. The Court there remarked (p.601): “Those affidavits contain material which is relevant, but contain also a great deal of material which is irrelevant — pure hearsay evidence which the Court cannot take into account in the form in which it stands.

The proportion of that material to the relevant material is so high that if this matter is to be disposed of... it is clearly right that the whole of those affidavits should be removed from the file...” The applicability of the *Rossage* case in these proceedings was, in my view and on the facts of the case, questionable. The plaintiffs' evidence should have been met with the defendant's evidence. Besides, counsel had undertaken no structured analysis of the plaintiffs' affidavits, or shown which specific elements were meritorious and which ones were hearsay. The Court was not, certainly, placed in a position in which it could order that any particular element in any supporting affidavit be excised, for being hearsay. Mr. Ngatia submitted that “the evidence in relation to contempt emanates from the advocate on record — so it is hearsay.” I would not accept this submission, because contempt of Court is a legal concept and I would not expect lay persons to make reliable statements upon it; what I expect them to do is to provide the facts on the ground — whether they are registered the owners of some property; whether they have peace and quiet in their enjoyment of that property; whether the defendant has intruded upon them as they exercise their property rights; whether they have been arrested as they rest at their abode; whether someone has burnt down their dwelling; whether the defendant has evicted or caused them to be evicted, etc.

This is the kind of evidence which abounds in the several supporting affidavits; and this is the evidence I would expect learned counsel for the defendant to seek to meet; but he did not do so. Instead learned counsel contested the points of law in respect of which, I would say quite properly, counsel for the plaintiffs had advised their clients, and the plaintiff-deponents had admitted as much. It is, therefore, an invalid foundation upon which Mr. Ngatia was impeaching the evidence tendered for the plaintiffs. But learned counsel further built on that foundation by invoking in aid the High Court decision, *Kisya Investments Ltd & Another v. Kenya Finance Corporation Ltd & Others*, HCCC No. 3504 of 1993. The passage in that decision relied on by counsel reads as follows:

“The applicant's counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge, information and belief. It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit.” The relevance of the foregoing passage to the instant application is not obvious since the affidavits, on the facts, have indeed been sworn by the parties themselves, and where they received counsel (on legal matters) from their advocate they indicated so.

Quite clearly, the Kisya case was cited entirely out of turn. Learned counsel's submission that the supporting affidavits be expunged, therefore, is an improper submission. For the same reason, the High Court's decision in *Hardial Singh Hunjan & Another v. Glad AK Finance Ltd & Another*, HCCC No. 1595 of 2001, also relating to the admission of affidavit evidence and was relied on by learned counsel, is, in my view, of little relevance in this application.

Learned counsel, Mr. Ngatia next challenged the order in which the plaintiffs affidavits had been filed, the fact that they were not all filed together with the application. I have already reviewed the content of the said affidavits, and, in my view, collectively they set out the full range of evidence to support the application now before me. Had the defendant had any evidence to depone in reply to the averments in the plaintiffs' affidavits, it is to be assumed that no obstacle would have lain in their way. I take the decision, therefore, that the application now before me is to be determined on the statements on the face of the application including the grounds, the depositions and replies thereto, and the submissions of counsel — for which there has been an unlimited opportunity.

Mr. Ngatia questioned the veracity of the averments in the supporting affidavits, that the defendant's motor vehicles registration numbers KAH 097Y and KAR 150L were involved in the transportation of the defendant's rangers to evict the plaintiffs and destroy their properties; and that some of the said rangers involved in the operations were Moses Barkine Kuyoni and William Ndoiga. Such questions are being raised by seeking a precise account by date, time, and like details, on the unfolding of the destructive acts in question. The defendant had made no direct response to the averments regarding the two vehicles, the two rangers and even other rangers — apart from invoking the formal mode of deployment of the rangers, in the normal schedule of work.

Service of the Court's order is a subject in respect of which Mr. Ngatia devoted much time and energy. He questioned the truthfulness of the affidavit of service by Juliet Maritim, dated and filed on 10th June, 2005. Counsel's contention, unlike the averments in several affidavits on the mode of service upon the defendant by Ms. Juliet Maritim — averments which gave the picture of all propriety in effecting service — gave a negative construction in these words: "She left the pleadings with a secretary, for the secretary to serve on her boss. That is a contemptuous approach to the work of a process-server. The 3rd of June, 2005 is the date the advocate went to serve, and there had been no previous effort.

Only one effort was made, and the documents were left with the secretary to serve." From the basis of counsel's construction of the facts relating to service, he now proceeded to argue a principle on service, which he submitted, had been violated by the advocate who effected service, and consequently this Court should hold that no service in law was effected; and so the defendant be deemed to have remained entirely ignorant of the Court order of 2nd June, 2005; and consequently no contempt of Court had been committed.

The service principle urged by counsel was identified in the Court of Appeal decision, *Filimona Afwandi Yalwala v. Ronald Indumuli & Another* Civil Appeal No. 69 of 1987. The relevant passages are found in the judgement of Nyarangi, J.A.: "The Court process server simply must in general make more than one attempt before he can be heard to say that it was not practicable to carry out personal service." And again the learned Judge of Appeal stated: "Applying the test thus propounded, service on any adult member of the family who is residing with the defendant under Order V, rule 12 is valid only where there is reasonable ground to believe that the defendant cannot be found. A quick, single hurried visit to the defendant's home in his absence would not reasonably justify a conclusion that he cannot be found. There must be information given to the process server after careful inquiry that [the] defendant will be away from his home area for so long that service would be too late.

Process servers must be slow to conclude that a defendant cannot be found for service on him except where, notwithstanding several attempts by the process server to meet the defendant, it has not been possible to meet him." The same principle is expressed in the judgement of Masime, J.A.: "In view of the fact that this is a departure from the mandatory mode of service it is incumbent upon the process server to make a real effort before resorting to this alternative service. The return of service made to the Court is clear that the process server just made one trip to the village and, not finding the appellant, served his son.

The return is silent on what enquiries if any, the process server made and from whom ... That would be tantamount to permitting the process server to delegate his duty to the adult member of the defendant's family." The judgement of Gicheru, JA (as he then was) is in the same terms: "In the circumstances obtaining in this appeal, no inquiry was carried out by the process server to establish that the appellant could not be found. Indeed, the process server made no more than one attempt to effect service on the appellant. Service upon the appellant's adult son who was residing with him was therefore not adequate service. It was invalid.

Mr. Ngatia, relying on the Yalwala case, submitted that service as effected by Ms. Juliet Maritim upon the secretary to the County Clerk, Narok was ineffective service, especially because the secretary had not acknowledged the same and had said she had no authority to acknowledge service. Learned counsel urged: "In law it should be held that there was no valid service; and therefore no contempt proceedings would be sustainable, for want of knowledge." On the question whether the impugned disruptions of the plaintiffs' enjoyment of their property could be said to be in the public domain and so knowledge is to be imputed to the defendant, learned counsel submitted: "The law does not obligate any defendant to buy any of the newspapers in the daily Press. Service must be in accordance with the law."

Mr. Ngatia contested the relevance to the instant matter of the English case, *Hadkinson v. Hadkinson* [1952] 2 ALLER 567; and his reasoning was that the aspects of that decision relied on by counsel for the plaintiffs were obiter dicta, not ratio decidendi. I have doubts, with respect, about the validity of such an argument; for whether or not the passages invoked by the plaintiffs' counsel were part of the ratio decidendi, in Kenya they can only be persuasive authority; and authority is persuasive in this Court's decision-making if it is imbued with the principles of law guiding Courts in Kenya, and if its jurisprudential design is acceptable, as aiding the Judge to articulate a fundamental point of law. I have already stated that the authority of the Court under Kenya's Constitution is consistently to be upheld; and the first instrument in the discharge of that task is the law of contempt, the essence of which was long ago expressed in English jurisprudence, as is exemplified by *Hadkinson v. Hadkinson*.

Although it is clear from the records that Mr. Ngatia is the advocate representing the defendant/respondent, he did devote part of his submission to the status of the DC, Narok and the OCPD, Narok in the observance of the Court order of 2nd June, 2005. He cited the English case, *R. v. Weisz and Another ex parte Hector MacDonald Ltd* [1951] 2 ALLER, to support his contention that since "the Government" was involved, thanks to the status of the DC, Narok and the OCPD, Narok, the High Court was debarred by s.16 of the Government Proceedings Act (Cap.40) "from issuing orders of injunction against the Government."

He argued that "the Court must not grant injunction against any officer of the Government." If that be so, then, can't the Court grant orders of injunction against the defendant, County Council of Narok? This question was not squarely faced by learned counsel, and I would consider that he implicitly acknowledged that it would be entirely proper in law for this Court to issue orders of injunction against the County Council of Narok. Indeed, that may be stated as the correct position in law, as the legal rights of numerous people would be denied if all the legion local councils in this land were to be held to be not subject to orders of injunction, notwithstanding the many matters within their mandate, in respect of which the citizen is entitled to sue, in enforcement of claims under the law.

It is apparent to me that learned counsel would not dispute the foregoing as a valid statement of the law; for he proceeded to seek cover for the defendant on the basis of his own construction of facts, and his own inferences: that the burden of the instant case is against Government officers, "disguised as a case against a local authority." Counsel called in aid a paragraph in *R. v. Weisz*, as a basis for the analogy that what is now before the Court is a feigned claim against the defendant (p.411): "To attempt ... to deceive the Court by disguising the true nature of the claim is a contempt. It is putting forward what the old cases called a feigned issue, that is to say, not the true, but a fictitious cause of action."

So, as far as Mr. Ngatia is concerned, contempt is being committed by the plaintiffs, not by the defendant. In his words: "It is a contempt of Court if one wants an injunction against a DC but goes against a local authority." This is the reason, learned counsel submitted, why this Court should have stopped the

plaintiffs' application at the threshold. Of course, such an argument comes too late and it clearly does not lie in learned counsel's mouth to raise it. When his client had endeavoured to stop the proceedings in this Court in limine, the Court of Appeal had ruled, on 22nd June, 2005: "We do not think [the defendant's appeal] would be rendered nugatory if this application was refused." I will hold, on this point, that there is but one contempt application before this Court; it is by the plaintiffs who have brought evidence for the purpose of establishing the basis of their claim.

There is no such application from the defendant, and no evidence has been placed before the Court to provide a basis for the defendant making a contempt-based claim, as against the plaintiffs. Mr. Ngatia continued to go by the supposition that the order issued by the Court on 2nd June, 2005 was a nullity. So he cited the English case, *Craig v. Kanseen* [1943] 1 ALLER 108 and quoted a passage in the judgement of Lord Greene, M.R. (p.113): "These cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside." Although, clearly, no factual foundation is laid which leads to that inference and to the authority cited, Mr. Ngatia urged that the Court's order of 2nd June, 2005 be set aside. In making this plea, counsel was still citing the provision of s.16 of the Government Proceedings Act (Cap.40); but as I have held herein, that Act has no application to the County Council of Narok. It follows, with due respect, and in my opinion, that the case *Craig v. Kanseen* has been invoked in vain. In his wide-ranging submissions Mr. Ngatia returned to the question of service of the Court order which is the basis of the contempt application. To further enhance his contention that the plaintiffs had rendered ineffective service of the Court order of 2nd June, 2005 and so had no basis for alleging contempt of the order, counsel cited the Court of Appeal decision in *Loise Margaret Waweru v. Stephen Njuguna Githuri*, Civil Appeal No. 198 of 1998. Service in that case was effected upon the houseboy of the defendant who said he had authority to receive the same. This mode of service became an issue on appeal, and the Court remarked as follows:

"Peter Wainaina Mwaura, a Court process server, in his affidavit of service sworn on 18th May, 1998 stated that on 24th July, 1998 he served a copy of the order and penal notice on the appellant by leaving it with a young man who came to the gate when he went to the appellant's house at Sunrise Estate, Nairobi. According to Mwaura, the young man introduced himself to him as the appellant's houseboy and told him that he was authorized by the appellant to receive any message on her behalf. The application for committal was not served on the appellant herself but on Gichuki Kingara & Co. Advocates, the advocates on record for the appellant..."

There is no evidence on record to prove that the person who received the documents from Wainaina claiming to be her servant was duly authorised by the appellant to accept service on her behalf. But whatever may be the position, service on the houseboy did not constitute personal service on the appellant." This example, I believe, is of the same broad character as that given by the *Filimona Afwandi Yalwala* case (Civil Appeal No. 69 of 1987): both relate to private persons living as individuals in their homes, and the Court of Appeal has held that all efforts must be made by process servers to ensure that such persons are, where practicable, served personally. Mr. Ngatia's submission was that even in a public institution, service upon the defendant cannot be effected upon junior officials such as secretaries or typists. Learned counsel did not attempt to draw any distinction between service upon the private individual in his or her home, on the one hand, and service upon an agent of a public institution or officer, on the other hand.

He then urged that the issue of service should dispose of the application, and in favour of the defendant. Mr. Ngatia submitted that under Order I, rule 10 the Court, acting *suo motu* could order the joinder of an additional party to the proceedings; and he urged that there was a necessary party to be enjoined, namely the Government, through the Attorney-General. This submission, quite clearly, is spawned by the argument earlier raised by learned counsel, that the plaintiffs' application was a feigned application which ought correctly to have been only against the Government. I do not believe, however, as I have earlier stated, that there is any justification for such a contention, in view of all the facts in the depositions placed before the Court.

**E. WAS THERE A LAWFUL COURT ORDER WHICH WAS DISOBEYED BY THE DEFENDANT?  
— THE PLAINTIFFS' REJOINDER** Learned counsel, Mr. Kemboy analysed the defendant's case as

resting on four pillars — (i) that the Court order of 2nd June, 2005 had not been served; (ii) that the plaintiffs' suit ought to be against the Government and not against the defendant; (iii) that the Court's order lacked precision; and (iv) that the Court's order incorporated far too many complaints, and so it was not possible to comply with it. (a) Service of the order Counsel submitted that there was on record the affidavit of an advocate, Ms. Juliet Maritim, sworn on 10th June, 2005 and it carried averments on the mode in which the Court order of 2nd June, 2005 had been served.

There was no dispute that the said service was effected, since the defendant's responses to the plaintiffs' Notice of Motion had proceeded on the basis that service had indeed been effected, and nowhere in the replying affidavit had it been denied that service took place. All that the officer of the defendant claimed was that he had only stumbled upon the Court documents, and that this was not exactly on 3rd June, 2005. Mr. Kemboy urged: "[It] becomes clear that denial of service has no basis. It is an attempt to confuse the issues before the Court."

Learned counsel submitted that a plea of "no service" must be made in good faith. For a party to successfully plead lack of service, his conduct must have been guided by good faith. An item in the affidavits, and in particular in the annexures to the affidavit of Joseph Kipkoske Kilele sworn on 17th June, 2005 are excerpts from the daily newspapers. From the East African Standard of 16th and 17th June, 2005 detailed reports are given of the happenings in Mau Narok where the suit lands are located, and of the sufferings being sustained by land-owners who were the subject of eviction. In The People Daily of 17th June, 2005 it had been reported that the defendant's rangers had taken an active part in pulling down built-up structures at the suit lands. On or about the dates covered by the daily newspapers, counsel submitted, the defendant continued to ignore the Court order of 2nd June, 2005.

Since the defendant did not change its course of conduct, notwithstanding the notoriety which the said Court order had gained in the media, it followed, counsel submitted, that good faith was lacking in the "no-service" claim of the defendant. Learned counsel categorised the contempt in contemplation as indirect contempt, which is defined in Black's Law Dictionary 8th edition (p.337): "indirect contempt. Contempt that is committed outside of Court, as when a party disobeys a Court order. Indirect contempt is punishable only after proper notice to the contemnor and a hearing." Black's Law Dictionary defines a category of such notice known as "implied notice" (p.1090):

"Implied notice. Notice that is inferred from facts that a person had a means of knowing and that is thus imputed to that person; actual notice of facts or circumstances that, if properly followed up, would have led to a knowledge of the particular fact in question."

The County Clerk of the County Council of Narok, Mr. Stanislas Nyagaka Ondimu, counsel submitted, had sworn several affidavits in which he attributed illegality to the occupancy of the suit lands by the plaintiffs; and he extols the process of their eviction. In this way, it was submitted, the defendant had deliberately associated itself with the very acts that ran contrary to the Court order of 2nd June, 2005. In these circumstances the County Clerk had placed himself in the position in which he was in disobedience of a Court order. His liability in this regard could be appreciated from the principles set out in the English case, *Husson v. Husson* [1962] 3 ALLER 1056 (Lyell, J):

"...a distinction is to be drawn between mandatory and prohibitory injunctions. An order requiring a person to do an act must be served on him. If it is not served, committal proceedings for breach of the order do not lie. If, however, the order is to restrain the doing of an act, the person restrained may be committed for breach of it if he in fact has notice of it, either by his presence in Court where it is made, or by being served with it, or notified of it by telegram or in any other way."

On the basis of this principle, Mr. Kemboy submitted that the County Clerk of the defendant did indeed have notice of the Court order of 2nd June, 2005 — and thus the defendant could not escape liability on grounds of lack of service. In the words of learned counsel: "Even if he [the County Clerk] is to be believed — that he was not served — he could not disobey the order after knowing of its existence." Besides, for the defendant to make a successful plea that it wasn't served, it must show that it never received the notice; and that it had no way of knowing of the order.

While learned counsel Mr. Ngatia had submitted that the County Clerk of the defendant had been under no obligation to buy or read the daily newspapers covering the social disruptions that afflicted Narok, Mr. Kemboy observed that the chief officer of the defendant had made no deposition that he did not read the daily newspapers on 4th June, 2005 or that the Court order was not brought to his attention; and indeed, quite contrary to the submissions of his advocate, the County Clerk had stated in his affidavit of 17th July (para.6) that he had perused the newspaper reports regarding the Narok evictions. From the content of the replying affidavits by Mr. Stanislas Nyagaka Ondimu, learned counsel drew the inferences that: the defendant was served with the Court orders; the defendant proceeded as it did on the basis that the suit lands were Trust Lands and so were under the defendant's control; and that consequently the plaintiffs were trespassers.

(b) If service of Court order was effected, was this invalid service? Mr. Kemboy submitted that the line of decisions canvassed for the defendant as showing that the service as effected was invalid, was inapplicable. For the defendant is a corporate body under s.28 of the Local Government Act (Cap. 265). The applicable rules are those set out under Order V, rules 2(a) and (b): where a suit is against a corporation, service is to be effected through the Corporation's secretary, or by leaving papers at the registered office of the corporation, or posting to the registered office. On the basis of the process server's affidavit (Juliet Maritim), it could hardly be doubted that proper service had been effected.

She went into the office of the Chief Executive of the defendant (the County Clerk) and of the Deputy County Clerk; and she then left the documents with the County Clerk's office and secretary. A substantial part of the case for the defendant, as argued by learned counsel Mr. Ngatia, learned counsel Mr. Kemboy submitted, was guided by fallacious reasoning. Mr. Kemboy noted that the order which is the basis of these proceedings was an ex parte order and was properly issued under Order XXXIX, rule 3(3) of the Civil Procedure Rules. Such an order was required to be served within three days. It was issued by Ransley, J on 2nd June, 2005 and was duly served on 3rd June, 2005. Several attempts had been made to serve, but in the end service was effected by leaving the Court documents in the office of the defendant's Chief Executive Officer.

Learned counsel submitted that the several early attempts at service made by Ms. Juliet Maritim had not succeeded, but this was not in any way fatal, as the defendant has not in its affidavits stated anywhere that its senior officers had been available to be served, in the period between 3rd and 6th June 2005; nor is it stated where all the senior officers were, during that period — they could well have been evading service! Learned counsel submitted that, even were it to be held that the Court order of 2nd June, 2005 was not regularly served, this by itself would not excuse disobedience to such order; and therefore the plea of invalid service will not avail the defendant. Learned counsel cited the case, *Abu Chiaba Mohamed v. Mohamed Bwana Bakari*, Civil Appeal No. 238 of 2003 in which the manner of service such as that adopted by the plaintiffs, would in any event, probably have been considered to have been reasonable. In the words of Omolo, J.A.: “..if personal service which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to. Otherwise why would the Court have expected to be given the reason or reasons why personal service was not effected?” (c) Is it true that the Court order was ambiguous? Mr. Kemboy submitted that for the defendant to rely on such a claim, it would have to demonstrate that the order was so ambiguous that it would justify several contradictory courses of action. Now this happens to be the very question that came up before me in *Wildlife Lodges Ltd v. County Council of Narok & Another*, HCCC No. 1248 of 2003.

The following passage in the ruling will shed light on the pertinent questions: “Counsel argued that what was stayed by the learned Judge [who had issued ex parte orders] was dealing with the title to the suit property, and that such a notion would not make it clear whether sale, or transfer or leasing were incorporated within the stay orders. “The practical purpose of this particular argument did not emerge entirely clearly; as a reasonable and ordinary understanding of the stay orders made by [Nyamu, J] would be that the status quo was to remain intact; the title-holders would not begin to sell off the land and to transfer title, nor would they begin to lease the land to a new tenant, nor would they engage in an eviction exercise against the current tenants, nor would they lodge new entries in the relevant land register, nor would they in any way disturb the current state of occupancy of the suit lands.

I would take this to be what the learned Judge would have meant, and did mean. In any case it is not apparent that the defendants had appeared [to be] confused as to the reasonable meaning that could be attached to the learned Judge's stay orders. Had there been any misapprehension in the minds of the defendants, then the expectation of them is that they would have made an application to the Court..." In the present case, Mr. Kemboy submitted, there was not a single averment from the defendant, that the scope of the order of 2nd June, 2005 was so confusing that it could not be complied with. Although the order did refer to as many as ten categories of acts, and restrained the same, this, I would hold, by no means made the order confusing. Counsel doubted, I think, plausibly, that this perceived impediment to compliance, by the defendant, was conceived in good faith.

(d) Is it the case, that the inhibited courses of conduct were attributable to Government, rather than the defendant? Learned counsel contested the claim that only "Government" was involved in acts of lawlessness, when the defendant was the very entity that was seen to be directly involved — through its rangers and through its motor vehicles. And, even supposing the Government were to have anything to do with the acts of lawlessness injurious to the plaintiffs, would this excuse the defendant's illegalities? Whereas the Government Proceedings Act (Cap. 40) restricted the issuance of injunctions against Government, the Court order of 2nd June, 2005 was directed at the defendant and any other person. "Any other person", counsel submitted, would be anyone who might appear as agent of the defendant — be it the Police or anyone else.

Counsel went further to argue that it was a fallacy to exalt the juridical notion that, thanks to s.16 of the Government Proceedings Act (Cap.40), the Court cannot restrain Government; and that consequently, the Court cannot restrain the defendant in its impugned courses of action, in the instant case. Counsel was of the view that it would be appropriate, indeed, for the Court to assess s.16 of the Government Proceedings Act, given the possible range of interpretations, in terms of its constitutionality. This may be a point that the Court should advert to in the course of time, since there are, I believe, a number of quite well-based decisions that have been handed down by the Courts, imposing injunctive orders against Government officials. Already, in the Ugandan case, *Osotraco Ltd. v. Attorney-General* [2003] 2EA 655 it has been held (Egonda-Ntende, J):

"Section 15 of the Government Proceedings Act (Chapter 69) prohibiting issuance of an order of injunction and eviction against the Government was not in conformity with the letter and spirit of the Constitution of Uganda and had to be construed with such modifications, adaptations, qualifications and exceptions as was necessary to bring it into line with the Constitution..." In *Royal Media v. Commissioner of Customs and Excise* [2002] 2 E.A. 576 Rawal, J had held that (p.577):

"The Court has been given the power to make any order which is appropriate under the Constitution. To uphold provisions of Acts of Parliament which bar the Court [from issuing] appropriate interlocutory orders would be an affront to the provisions of the Constitution, the rule of law, due process and powers of the Court to check and restrain abuse of Court process."

Mr. Kemboy argued that the possible association of the defendant herein with "Government" in the impugned courses of conduct, ought not to be held to provide cover for the defendant, in the name of s.16 of the Government Proceedings Act (Cap.40). Learned counsel urged: "Where a statute grants to one party powers of immunity, the remedy awarded by the Court should exclude the prospect of impunity." He urged that a litigant who acts in breach of a Court order must take responsibility for its own conduct, notwithstanding that it may have been assisted by another party who may be partaking of some immunity. He urged that in deciding this point, the Court may draw analogy with the recognised position in law, that a contemnor may be identified as such and punished, even where he is not a party in any proceedings. Mr. Kemboy urged that the nature of the plaintiffs' interests as registered landowners who were wrongfully being dispossessed, provided the legal foundation for a strict enforcement of the injunctive order which the defendant had disobeyed. To buttress this fundamental argument, learned counsel cited the Court of Appeal decision in *Jaj Super Power Cash and Carry Ltd v. Nairobi City Council & Two Others*, Civil Appeal No. 111 of 2002: "It would be a violent affront to our land tenure systems, with all their perceived imperfections, unless there is a lawful challenge to an existing title or a policy change by Parliament, to uphold the rights of a temporary allottee of land or a trespasser, over those of a registered proprietor.

This Court has recognised and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong-doer cannot keep what he has taken because he can pay for it...” F. FURTHER ANALYSIS The plaintiffs’ Notice of Motion of 10th June, 2005 and its prayers, the evidence adduced on both sides, the submissions on both fact and law, have been set out in detail and substantially analysed. From the analysis already undertaken, I think the merits of the application as I have assessed them, have already begun to emerge. This further analysis will now conclusively determine the outlines of my decision, and on that basis I will render the final ruling of the Court, further on. As a basis of my decision, I will first set out here the crucial fact-scenarios and inferences that must serve as the foundation of my decision — (i) It is not seriously controverted that the seven plaintiffs have been registered by the Lands Office in the Government establishment, as the owners of the suit lands, namely: L.R. No. CIS-MARA/OLOLULUNGA/10463; CIS-MARA/OLOLULUNGA/111831; CISMARA/ILMOTIOK/3747; CIS-MARA/OLOLULUNGA/10130; CISMARA/ OLOLULUNGA/6942; and CIS-MARA/OLOLULUNGA/6940.

(ii) The Court, in the application of the law and in the protection of the fundamental rights of the individual, will take the property rights so described as the Court finds them, and will assume their validity at the beginning. (iii) As the validity of such registered property rights is a matter of law, only by lawful process, and by the institutions duly empowered under the Constitution, may any change be brought about in the relevant ownership structures.

(iv) Sometime in May, 2005 the plaintiffs were among land-owners and occupiers in the Enkaroni and Enenkishomi Group Ranches in Narok South, upon whom were inflicted acts of destruction of property, arson, eviction and other harmful disruptions to their quiet enjoyment of property which had been registered in their names. (v) The plaintiffs had moved the High Court, under a certificate of urgency, to grant them protective order, in the form of injunction against their tormentors, pending the hearing of a suit for orderly dispute settlement by the normal process of trial. The motions of the plaintiff were filed in a professional and civil manner, as provided by law, and in a spirit consistent with pacific traditions of conflict resolution; so, prima facie the position of the plaintiffs stood to be accorded protection by this country’s Courts of law. (vi) On 2nd June, 2005 the plaintiffs appeared before Mr. Justice Ransley who, in exercise of the powers of the High Court, granted them an ex parte order pending the inter partes resolution of the prayers carried in their Chamber Summons application, within the framework of their main suit filed by plaint on 2nd June, 2006. (vii) Ransley, J granted interim relief, to protect the plaintiffs in the short term against harassments, intimidations, threats, provocations, incitements, arrests, detentions, trespasses, demolitions and arson such as might be wrought by the County Council of Narok — the defendant.

(viii) In these proceedings the plaintiffs have moved the Court by Notice of Motion, complaining that the High Court’s order of 2nd June, 2005 has been disobeyed by the defendant, who has continued to inflict damage and mayhem upon the plaintiffs, in their peaceful enjoyment of their property rights, in the suit lands aforementioned. (ix) The foundation of the plaintiff’s application is affidavit evidence, in which they make numbers of averments and, most remarkably, they depose that the defendant has employed its rangers and its motor vehicles in the demolition of the suit properties, in their eviction, and in harassing them and interfering with their rights to enjoy their registered property interests.

(x) The defendant has no real answer to those charges. The defendant’s Chief Officer refers to the plaintiffs as illegal squatters on Trust Land in the custody of the defendant, and leaves no doubts that it, the defendant, has been highly instrumental in disrupting the peaceful enjoyment by the plaintiffs of their properties. (xi) While being silent, or distinctly laconic, on its exact role in the demolition of the plaintiff’s properties, and in the interference with and denial of the Plaintiffs’ property rights in the suit lands, the defendant repeatedly presumes to attribute blame to “the Government”.

(xii) The Plaintiffs have not sued the Government, as they see the defendant, which is a local authority, as the author of the interferences with their property rights over lands registered in their names. (xiii) The only perceived connection between the impugned activities of the defendant, and “Government” is that two officers of the Government, namely the District Commissioner, and the Officer Commanding the

Police Division, are based at Narok; and the defendant persistently seeks to implicate them in the violations of the Plaintiffs' property rights which have continued well after the injunctive order of the High Court was made on 2nd June, 2005.

(xiv) The plaintiffs have been of the view that, if it would be the case that the DC, Narok and the OCPD, Narok are involved in the infringements upon the plaintiffs' property rights, then they must be acting as agents of the defendant who is the main perpetrator of the disturbances in the suit lands. (xv) Notwithstanding the denials by the defendant, it is clear that the County Council of Narok was on 3rd June, 2005 duly served with the Court's injunctive order of 2nd June, 2005. (xvi) The plaintiffs have moved the Court to cite the defendant for contempt of Court, and to mete out the requisite punishment, so as to restore the authority and dignity of the Court in the performance of its constitutional role. (xvii) The plaintiffs' application has been contested by the defendant who contends that the Court order of 2nd June, 2005 was not properly served and so was invalid, and it ought to be assumed that the defendant is entirely ignorant of the lawless activities that have continued to disrupt the enjoyment by the plaintiffs of their property rights in the suit lands.

(xviii) Upon considering the evidence on record, and the lengthy submissions of counsel, I have come to the conclusion that the injunctive order of 2nd June, 2005 was lawful and proper in every respect, and that it was duly served upon the County Council of Narok, as required under Order V, rule 2 (a) and (b); and I am also in agreement with counsel for the 1st – 3rd plaintiffs, that the gravamen of the plaintiffs is so much in the public domain that it is within the knowledge of the defendant; I, besides, take judicial notice of the very widespread media coverage of the disturbances at the suit lands, which must have laid all the pertinent information before the defendant.

(xix) The defendant contested the validity of the Court order of 2nd June, 2005 on the ground that it enjoined forbearance from a large range of activities — harassments, intimidations, threats, provocations, incitements, detentions, arrests, trespasses, demolitions — and so there is vagueness; the defendant would not know whether it is to desist from provocations, or trespasses, or demolitions, etc. I hold this to be a purely theoretical contention which is unrelated to goals of justice; for each and all of the named activities have one common thread, disruption of the plaintiffs' property rights. There will be no confusion; the defendant has been ordered to observe the law, and in particular the law which protects the plaintiffs' right to own and enjoy their private property.

(xx) The defendant has striven to deflect the brunt of responsibility for the injuries to the plaintiffs, and has sought to attribute responsibility to "Government". I would hold that it is impermissible in law for the defendant to ensconce itself in any perceived immunities of the Government that might be implied because of the presence of the DC, Narok and the OCPD, Narok. Of course, the High Court's order was also aimed at such officials if they happened to be involved in the disruption of the plaintiffs' enjoyment of their property rights. At this moment no application has been made against the two Government officers; but there is an application against the defendant, which must carry its burdens alone.

(xxi) Respect for property rights will always remain a cardinal principle governing the Courts in the resolution of disputes. So sacrosanct are property rights, that no common official is permitted to dispute the validity of title which has been granted through the Government agency entrusted under the law with the grant and registration of titles. When once a property title is duly registered, its status represents a state of legality, which prima facie must prevail; and it may be challenged only by having a judicial adjudication thereupon, followed by the issuance of a valid order or decree. Outside the judicial process, only Parliament itself may, through law-making, change the status of registered property rights; and it is to be remembered that even Parliament's act in this regard must be in conformity with the rights and principles enshrined in the Constitution, in particular, in section 75 thereof which gives protection from deprivation of property.

Subject to those well-defined beacons of legality, a registered proprietor may freely dispose of his or her own property, in accordance with the governing procedural laws. G. FINDINGS AND ORDERS Against this background, it is clear that the attempts by learned counsel for the defendant to contest the injunctive order made by Ransley, J. on 2nd June, 2005 were, with great respect, not imbued with the cardinal

principles of legality. I would reject such endeavours.

The moment the High Court's order was issued and then served upon the defendant it was binding; and disobedience to it cannot be countenanced by this Court. I find and hold that the defendant, and in particular its Chief Officer, has been in contumelious defiance of the lawful order of the Court. I hold that all acts done over the suit lands in violation of the plaintiffs' rights of property since 3rd June, 2005 when service of the Court order was effected upon the County Council of Narok, are null and void. As for the County Clerk of the County Council of Narok, Stanislas Nyagaka Ondimu, who from the evidence it is clear, has prosecuted such illegal courses of action in violation of a Court order, I hereby cite him, Stanislas Nyagaka Ondimu, for contempt, and order that on Monday, 5th December, 2005 at 9.00 a.m. he shall personally appear without fail before a Judge in chambers, to show cause why he should not be committed to jail.

**Orders accordingly**

**DATED and DELIVERED at Nairobi this 2nd day of December, 2005.**

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For 1st, 2nd, 3rd Plaintiffs/Applicants: Mr. Kemboi, instructed by M/s. Katwa & Co.**

**Advocates**

**For 4th, 5th, 6th, 7th Plaintiffs/Applicants: Mr. Katwa, instructed by M/s. Katwa Co.**

**Advocates**

**For Defendant: Mr. Ngatia, instructed by M/s. Ngatia & Associates Advocates**