REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 39 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 165(3), 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 24, 25, 27, 33, 35, 37, 43, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

GIDEON OMARE...PETITIONER

VERSUS

MACHAKOS UNIVERSITY..........................RESPONDENT

RULING

1. The litigation the subject of this ruling has a chequered history.

2. The Petitioner herein was admitted by the Respondent University to undertake Bachelor's Degree in Education. He was a student of the Respondent until 18th December 2018 when he was purportedly expelled from the Respondent's Institution. Aggrieved by the said decision, he challenged the same in Petition No. 11 of 2019 and in its decision delivered on 22nd July, 2019, this court issued the following orders:

> **1. A declaration that the Respondent's Regulations 10(2)(d) to the extent that it unreservedly outlaws picketing, 11(6)(c) to the extent that it does not allow for legal representation and 11(7)(b) to the extent that it does not allow for a hearing; of *Rules and Regulations Governing the Conduct and Discipline of Students of the University* unjustifiably limit the Petitioner's rights under the Constitution and are therefore unconstitutional, null and void.**
>
> **2. A declaration that the suspension and expulsion of the Petitioner from the Respondent University was null and void ab initio for having violated the Petitioner's constitutional rights under the Constitution.**
>
> **3. An order do issue compelling the Respondent to re-admit the Petitioner to join the University's Bachelor of Education year III.**

3. By way of an application dated 16th September, 2019 the Petitioner herein sought the following orders:

> **1. THAT this Application be certified urgent and heard *ex parte* and service be dispensed with at the first instance.**

2. THAT this Honourable Court be pleased to find the Vice Chancellor of the Respondent in contempt of the orders issued by the High Court of Kenya at Machakos on 21st August, 2019.

3. THAT this Honourable Court be pleased to commit the Vice-Chancellor of the Respondent to civil jail for a period of six months for being in contempt of court.

4. THAT this Honourable Court be pleased to issue any further punitive orders in respect of the said contempt and disobedience by the Respondent through its Vice-Chancellor as may be necessary geared towards meeting the ends of justice and towards protecting the dignity and authority of this Honourable Court.

5. THAT this Honourable Court orders the Respondent to produce the academic examination question papers, examination booklets and transcripts to confirm my compliance.

6. THAT the costs of the Application be borne by the Respondent.

4. By its decision of 24th day of October, 2019, this Court found that, on the basis of cold-print affidavits, the petitioner's allegations of contempt had not been proved to the required standards but opined that he was not thereby barred from challenging the decision to discontinue him if the same fell afoul of Article 47 of the Constitution as read together with the provisions of the ***Fair Administrative Action Act*** or any other legal provision.

5. Subsequently, the Petitioner instituted these proceedings in which he sought the following orders:

1. A declaration that the Respondent's Regulation 10(2) and 11(7) of Rules *and Regulations Governing the Conduct and Discipline of Students of the University* to the extent it blanketly and indiscriminately limits the Petitioner's rights to peaceably and unarmed assemble and picket, hold and express opinion, seek legal counsel and/or representation and denies the right to preemption of innocence of an accused person until the contrary is proven, the said Regulation contravenes Articles 24, 25, 33, 37, 48 and 50 of the constitution therefore unconstitutional, null and void.

2. A declaration that the suspension and expulsion of the Petitioner from the Respondent University was null and void ab initio for having violated his Constitutional Rights under Articles 24, 25, 27, 43(1)(f), 48 and 50 of the Constitution of Kenya.

3. An order do issue compelling the Respondent to unconditionally re-admit the Petitioner to join the University's Bachelor of Education year III and further facilitate the re-admission to ensure he completes his studies at the time he was ordinarily supposed to complete his studies but for the unlawful and illegal suspension and expulsion.

4. A declaration that the Petitioner's rights as stated under paragraphs 45-53 of the Petition were violated.

5. An order of compensation including aggravated damages for violation of the Petitioner's rights guaranteed under the Constitution as aforesaid.

6. Costs of this Petition be borne by the Respondent.

7. Such other orders this Honourable Court shall deem fit.

6. By its judgement delivered on 18th August, 2020, this Court issued the following orders:

a) A declaration that the final decision of the Respondent discontinuing the Petitioner was tainted with illegality, irrationality and procedural impropriety.

b) An order of certiorari bringing into this Court the final decision made by the Respondent discontinuing the Petitioner from the Respondent University.

c) An order of mandamus compelling the Respondent to re-hear the Petitioner's appeal in strict compliance with the provisions of Fair Administrative Action Act and to render its decision thereon within 30 days of this decision. In default an order of mandamus shall issue compelling the Respondent to readmit the Petitioner to the University to continue with his degree program in 3rd year.

d) The costs of this petition shall be borne by the Respondent.

7. That decision was based on the fact that the Petitioner's appeal was dismissed without him being afforded an opportunity of being heard thereon.

8. The Petitioner is back before this Court courtesy of an application dated in which he seeks the following orders:

1. SPENT.

2. SPENT.

3. THAT this Honourable Court be pleased to grant an Order of Mandamus compelling the Respondent to re-admit the Applicant to the Respondent's University and allow him to continue with his 3rd year studies uninterrupted owing to the failure by the Respondent to abide by the Orders issued by the High Court of Kenya at Machakos on 18th August, 2020.

4. THAT this Honourable Court be pleased to find the Vice-Chancellor (Prof. Lucy Irungu) of the Respondent in contempt of the Court Orders issued by High Court of Kenya at Machakos on 18th August, 2020.

5. THAT this Honourable Court be pleased to commit the Deputy Vice Chancellor (Prof. Lucy Irungu) of the Respondent to civil jail for a period of six months for being in contempt of Court.

6. THAT this Honourable Court be pleased to issue any further punitive Orders in respect of the said contempt and disobedience by the Respondent through it's Deputy Vice Chancellor as may be necessary geared towards meeting the ends of justice and towards protecting the dignity and authority of this Honourable Court.

7. THAT this Hounourable Court Orders the Respondent to produce the academic examination booklets in their original form and the per unit cumulative marks to confirm compliance by the Applicant.

8. THAT the costs of the Application be borne by the Respondent.

9. According to the Petitioner, following the delivery of this Court's said judgement, the Respondent vide their letter dated 28th August, supplied him with only the minutes of the University Board of examiners dated 11th September, 2020 which did not contain the substance on the discontinuation of his studies. He elaborated that the Respondent did not supply him with the other critical and essential materials which he had requested vide his letter dated 12th November 2019, namely the examination answer booklets and the examination results (The cumulative per unit tabulation of results for both final and CAT marks). He lamented that the Respondent did not supply him anything new apart from the same materials they relied on as a response to his amended petition dated 25th June 2020. It was averred by the Petitioner that vide his dated 2nd September 2020, he reminded the Respondent that they had not supplied him with the most essential materials but the Respondent responded vide its letter dated 7th September 2020, declining to supply him with the aforesaid critical materials on the basis that the materials were NOT necessary for his appeal and for the purposes of enabling him to cross-examine any witness as the appeal was supposed to be disposed of by way of written submissions.

10. It was deposed by the Petitioner that on the 8th September 2020, he wrote to the Respondent informing them that it was his constitutional right to be supplied with all the necessary materials aforesaid and also to be afforded an opportunity to confront opponent evidence and his accusers through cross-examination during oral hearing.

11. It was averred by the Petitioner that on the 9th September 2020, at 10 AM he received an invitation vide email to appear before the Respondent's appeal committee to be held at 2PM same day and therefore barely had 4 hours to prepare for the hearing of the said appeal which time was not adequate as he ought to have been accorded enough time to allow him do so. Further to that, the mode of hearing of the appeal virtually was quite expensive for him as an unemployed student. He nevertheless prepared myself and logged in to virtual hearing at 2PM and the Chairperson, **Dr Makoti**, sought from him whether he was ready to argue his appeal. To this inquiry, the Petitioner drew the Chairperson's attention to the fact that he could not see them vide video link and enquired from him of the number of panelists since I could not see them. He was however informed that it was not necessary for him to see them on video.

12. The Petitioner also informed the chairperson that he had not been fully supplied with the necessary documents for his appeal specifically the examination answer booklets and examination results (per unit cumulative marks). He was however informed that the University had not furnished him with the sought documents and that they could not supply him what they did not have in their possession. Asked why he had not given them his written submissions, the Petitioner retorted that he was not in position to prepare his submissions for the simple reason that the University had blatantly declined to furnish him with the most critical documents which could inform the content of the submissions. After that it was deposed that **c**hair closed the hearing saying that they were retiring to make a determination.

13. According to the Petitioner, it is clear from the foregoing that he was ready and willing to prosecute his appeal before the appeals committee at any given time but was not accorded a fair hearing on grounds that he was not supplied with the most critical materials that he required for his appeal regarding the fact that he did not sit for all examinations as required under the Machakos University statute and the law. In his view, common sense dictated that he had a right to know how they arrived at the conclusion that he had become a failure, obsolete, irrelevant and/or incompetent. Without the said materials, it was his contention that he could not humanly prepare written submissions and present them before the appeal committee.

14. It was averred by the Petitioner that the appeal committee's decision readily acknowledged the fact that he had not sat for CAT examinations and that he had not been supplied with the materials necessary for his appeal. However, inconceivably the appeal committee proceeded blindly to uphold the Board examiner's irregular decision to discontinue his studies contrary to the Machakos University statute (schedule VI Clause 15(2), the law in particular the Fair Administrative Action Act.

15. It was averred by the Petitioner based on sources which he termed as reliable that the sole reason the administration did not want to disclose the contents of his examination booklets is for a simple reason that upon realizing that he had passed the said final examinations, the administration unilaterally, maliciously and unilaterally re-marked his examination answer booklets and doctored the outcome thus failing him. He noted from the virtual hearing that the panelists/appeals committee did not have in their position his said examination answer booklets for the appeal process and according to him, the only reason the Respondent could not avail his examination booklets to the appeals committee was that they were acutely aware that, had they disclosed the contents therefrom, the appellate body could have come to a totally different determination. It was therefore his case that the appeal exercise was a travesty and a mockery of justice.

16. The Petitioner averred that owing to the failure by the Respondent to adhere to the provisions of the Fair Administrative Action Act they were obligated to re-admit him back into the institution which they have failed even after beseeching them through his letter dated 17th December, 2020. and despite being aware of the orders of this Court.

17. It was therefore the Petitioner's position that the contemptuous, unlawful and illegal conduct by the Respondent is still ongoing despite his numerous attempts to go back to the institution for studies and are in violation of the Orders of this Court hence aappropriate punishment ought to be meted out to the Vice Chancellor of the Respondent University.

18. The Petitioner filed a supplementary affidavit in which he reiterated his averments in the supporting affidavit.

19. In response to the application, the Respondent relied on the replying affidavit sworn by **Prof. Joyce J. Agalo** the Deputy Vice - Chancellor (Academic and Student Affairs) at Machakos University in which it was deposed that she has remained fully compliant to the orders of this Court, duly acknowledges the authority and dignity of this Court and is committed to upholding the rule of law.

20. According to the deponent, following the orders of this Court made on the 18th August 2020, the Registrar Academic and Student Affairs wrote to the Applicant through a letter dated 28.8.2020 which was received by the Applicant on same date. The said letter forwarded a copy of the minutes of the proceedings of the Special University Board of Examiners convened on 11.9.2019 pursuant to which the Applicant was discontinued in his studies and informed the Applicant that his appeal dated 25.10.2019 would be heard through written submissions and that he was required to file his written submissions together with any supporting documents within 7 days thereof and also informing him of his right to legal representation through the process.

21. It was averred that the Applicant responded to the said letter through a letter dated 2.9.2020 in which he insisted to be heard in person and requested for the examination booklets. However, on 7.9.2020, the Registrar Academic and Student Affairs responded to the Applicant's letter dated 2.9.2020 that based on the Applicant's grounds of Appeal, examination answer booklets were not necessary documents for him to conduct his appeal; that he was required to make written submissions before the hearing of his appeal on 9.9.2020 and that on 9.9.2020 the Student Appeals Committee would be ready to hear his oral submissions in addition to written submissions; and that the Student Appeals Committee would convene virtually due to the Covid- 19 Restrictions.

22. It was averred that on 8.9.2020, the Student Appeals Committee Secretariat shared a virtual link to the Applicant through his known email address **gidyoma@gmail.com** in preparation for the Appellate body proceedings on 9.9.2020. According to the deponent, the Applicant herein had sufficient time to prepare his written submissions and/or oral testimony in preparation for the hearing of his appeal on 9.9.2020 but failed and/or neglected to do so.

23. On 9.9.2020, the Students Appeals Committee convened to discuss the Applicant's appeal dated 25.10.2020 and the Applicant logged into the meeting via the virtual link and indicated to the committee that he would neither make any oral submissions nor submit his written submissions. The committee thereafter deliberated and upheld the decision of the Board of examiners to discontinue the petitioner and that the applicant was informed of the decision of the Students Appeals Committee to uphold the decision to discontinue him via a letter dated 16.9.2020.

24. It was therefore averred that the Applicant's application dated 29.12.2020 is without merit, does not meet the test for grant of orders sought and prayed that the same be dismissed with costs to the Respondent.

25. Suffice it to state that the Respondent filed a further affidavit which was sworn in response to the Applicant's Supplementary Affidavit.

26. In his submissions the Petitioner contended that this Honourable Court is clothed with the jurisdiction to punish those who are found to be in contempt of court and relied on **Johnson vs. Grant (1923) SC 789 at 790**, **Africa Management Communication International Limited vs. Joseph Mathenge Mugo & another [2013] eKLR** and **Miguna Miguna vs. Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR**

27. According to the Applicant, there is solid and clear evidence before this Court that the Vice-Chancellor of the Respondent disobeyed clear orders of this Court and must be punished for it. The Applicant submitted that he met all the pre-requisite conditions necessary for his readmission to the university to finalize the reminder of his degree programme from since he had passed his 1st and 2nd academic year and was accordingly recommended to proceed to 3rd year degree programme. He relied on the case of **Republic vs. Kenya School of Law & 2 Others Ex parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR** and the case of **Daniel Nyongesa and 4 Others vs Egerton University College [1990] eKLR**.

28. The Petitioner submitted that he was innocent of any wrongdoing and prayed that this Court to finds in his favour that the Respondent is in contempt of court and accordingly punishes her.

29. After setting out the legal regime guiding contempt of court in this country, the Respondent submitted that Application has not demonstrated the particulars of the Respondent's alleged contempt. It was its view that it complied with the Court Order dated 18.8.2020 convened the Student's Appeal Committee to re-hear the Applicant's appeal. The Applicant was given an opportunity to be heard but he chose not to make any oral or written submissions in support of his appeal. It was submitted that contempt proceedings are quasi criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases based on the authority in the case of **Gatharia K. Mutikika wa Baharini Farm Ltd (1985) KLR 227** and **Peter K. Yego & Others vs Pauline Nekesa Kode Nakuru HCC No. 194 of 2004** and contended that although the proceedings are civil in nature, it is trite law that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, the fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. The Respondent relied on **Katsuri Limited vs. Kapurchand Depar Shah (2016) eKLR** for the position that the power to commit for contempt is one to be exercised with great care and an order committing a person to prison for contempt is to be only as a last resort.

30. In this case the Court was urged to note that though the alleged contemnor is the Vice –Chancellor of the Respondent University, she is not a party to these proceedings in her personal capacity and that the University is a legal entity. It was contended that the applicant was given a chance to be heard on his appeal dated 25.10.2019 but he categorically declined to make any written or oral submissions in support of his appeal. According to the Respondent, the present application has been made in bad faith and fashioned to embarrass and taint the Respondent in bad light.

Determination

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

32. The law on contempt in this country is now well settled. Court orders are not made in vain and are meant to be complied with and if for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** **Ibrahim, J** (as he then was) stated:

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

33. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. GulabchandPopatlal Shah & Others Civil Application No. Nai. 39 of 1990**.

34. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte*order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte*and *inter partes*since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte*orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte*order, since such an order stands open to be set aside by simple application, before the very same court…Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant."**

35. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

36. Similarly, in **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458,** it was held that:

> **"It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to**

condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors."

37. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013**:

> **"The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."**

38. It was therefore appreciated by **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431** that:

> **"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."**

39. In **Miguna Miguna vs. Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR** this Court expressed the following views:

> **"In my view obedience of Court orders is one of the tenets of the rule of law and contempt of Court would not be countenanced in a constitutional democracy such as ours where the rule of law is expressly stated in Article 10 to be one of the values and principles of governance that supremely bind all State organs, State officers, public officers and all persons whenever any of them, *inter alia*, enacts, applies or interprets any law or makes or implements public policy decisions…I must send a strong message to those who are intent in disobeying Court orders that such conduct will not be tolerated no matter the status of the contemnors in the society. When persons in authority themselves set out to disobey Court orders with impunity they must remember that they are sending wrong signals to ordinary Kenyans that it is proper to disobey Court orders with impunity which is a recipe for chaos. Such conduct must therefore be nipped in the bud as soon as it is detected. In my view contempt of Court is such a grotesque monster that the courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation. As was held by the Court of Appeal in Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. Therefore it is my view and I so hold that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions. It is therefore my view and I so hold that the Courts are not only empowered to commit for contempt but are under a Constitutional obligation to uphold the rule of law and in doing so to commit for contempt if the conduct of parties invite such course."**

40. A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Having said that, it is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done and that which is breached. The application must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity in the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore, generally the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. See **Republic vs. Commissioner of Lands & 12 Others *Ex Parte* James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002, Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708** and **Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.**

41. In this case there is no dispute regarding knowledge of the terms of the order sought to have been disobeyed by the Respondent. It is however contended that the person against whom the contempt order is directed, the Vice Chancellor of the Respondent is not a party to these proceedings and ought not to be committed for contempt. In ***Halsbury's Laws of England*, 4th Edition Volume 9 at paragraph 52** it is stated:

> **"It is a civil contempt of court to refuse or neglect to do an act required by a Judgment or order of the court within the time specified in the judgment or order…A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation."**

42. Similarly, in **Hadkinson vs. Hadkinson (1952) 2 All ER 56**, the judges of the Court of Appeal of England unanimously held that:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule**

result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt."

43. It is therefore clear that as long as a person is aware of the existence of a court order and is under obligation to obey the same either as a principal or as an agent, he must comply. In this case it is clear that a Vice Chancellor of a University is a principal agent of the institution and where he becomes aware of the existence of an order against the Institution he/she leads, he/she must oblige.

44. In this case, this court issued an order of mandamus compelling the Respondent to re-hear the Petitioner's appeal in strict compliance with the provisions of ***Fair Administrative Action Act*** and to render its decision thereon within 30 days of the decision. It is that part of the order that is contended to have been disobeyed.

45. It is not denied that the Respondent took a step towards the compliance with the said order. The Petitioner/Applicant has however taken issue with the manner in which the Respondent purported to have complied with the said order. According to him, the notice given to him was too short and he was not furnished with the necessary documents to enable him undertake his appeal.

46. As regards the shortness of the notice, the law is that a party to whom insufficient or inadequate notice is given ought to raise the issue with the judicial or administrative body concerned and seek for time to adequately prepare. Section 4(4)(d) of the ***Fair Administrative Action Act*** provides that an opportunity be afforded for a person to request for an adjournment of the proceedings, where necessary to ensure a fair hearing. It is therefore upon the person seeking time to request for adjournment of the proceedings. In these proceedings, there is no indication that the applicants sought for adjournment of the proceedings before the Board. In **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR,** the court held the view that;

> **"The petitioners have argued that they were not accorded a fair hearing as they did not receive the letters inviting them for the disciplinary hearing, and that they were invited by way of short text messages (SMS). I have considered the letters inviting the petitioners for the hearings. The letters are addressed to the petitioners at addresses to which other letters from the respondent to the petitioners contained in the replying affidavit are addressed. It would perhaps have been prudent for the respondent to obtain a certificate of posting or some other evidence of delivery of the letters, but in the end, I am not satisfied that the petitioners' claim in this regard has merit, for two reasons. First, I note that the respondent took the further step of inviting the petitioners to the hearings by way of short text messages and telephones. More importantly, I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing."**

47. In **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** this Court expressed itself on the same issue as follows:

> **"That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so."**

48. In this case by a letter dated 28th August, 2020, the Respondent attached the minutes of the proceedings of the Special University Board of Examiners to enable the Applicant prepare for the appeal and informed him that the appeal would be heard by way of written submissions. He was asked to submit his submissions in support of his appeal attaching all the relevant documents within 7 days of the said communication. According to the Respondent, the Applicant did not send the said submissions as requested.

49. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

> **"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

50. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given in case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

51. Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

52. The right to be afforded an opportunity of being heard must have be distinguished from the necessity to have an oral hearing especially in disciplinary matters. The procedure in such matters is aptly dealt with by **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007 as follows:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

53. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. *Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed*." [Emphasis mine].

54. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but *whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case*." [Emphasis mine].

55. What comes out from the above cases is that whatever form of proceedings adopted by the authority, it must meet the irreducible minimum elements of fairness. In this case, it is clear that the procedure adopted by the Respondent for the hearing of the appeal was by way of written submissions. That procedure is lawful and legally acceptable in such matters. Accordingly, the Applicant had ample time within which to make his submissions and if for any reason he was unable to comply he could seek for more time to do so. Instead of the Applicant sending his submissions, he insisted on being supplied by other documents. It is important to emphasise that what was directed to be re-heard was an appeal and not the first instance hearing. According to ***Ballentines Law Dictionary***, an appeal is:

A process by which the higher court is requested by a party to…review the decision of a lower court. Such reconsideration is normally confined to a review of the record from the lower court, with no new testimony taken nor new issues raised.

56. In this case, apart from the proceedings, the Applicant sought to be supplied with other documents. In my view, since what was before the Respondent was an appeal, the supply of any other extraneous material save for what was presented before the initial tribunal, was at the discretion of the Respondent which had the discretion to supply the same or not to do so since the decision whether or not to admit further material rested with the Respondent and the Respondent cannot be faulted in these proceedings for exercising the discretion one way or the other.

57. In this case it is clear that an opportunity was afforded to the Applicant to present his case in writing. The hearing can take the form of oral hearing or the applicant can present his case in writing. Either way is permitted. What is frowned upon is to completely lock out a party who has invoked the appellate jurisdiction. In **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

58. Based on the material placed before me I am unable to find that the Respondent was in contempt of the orders of this court. There is a distinction between a person who disobeys a court order and one who in purporting to do so arrives at a wrong decision on merits particularly in situations where the compliance with the court order requires him to make its own decision based on the material placed before him as was the case in this matter. While the resultant decision may well be challenged on its merits as being erroneous, it does not by that mere fact necessarily amount to contempt of court. I associate myself with the position in **Re Bramblevale (1970) 1 Ch. 128** as cited in **Re Estate of Pius Kingoo Muthwa (Deceased) [2019] eKLR,** that:

"Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved."

59. Accordingly, the Motion dated 29th December, 2020 fails and is dismissed with no order as to costs.

60. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 1ST DAY OF JULY, 2021.

G. V. ODUNGA

<u>JUDGE</u>

<u>In the presence of:</u>

The Petitioner in person

Mr Musyoka for the Respondent

CA Geoffrey