



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 443 OF 2017

SAMUEL M. N. MWERU & OTHERS.....APPLICANTS

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED....2ND RESPONDENT

NAIROBI CITY WATER COUNTY.....3RD RESPONDENT

RULING

Introduction

1. The factual chronology of the events which triggered these proceedings is essentially common cause or not disputed. The applicant's obtained a court decree in their favour against the Respondents on 18th March 2010 in Land Acquisition Act Appeal Number 42 of 1989. Copies the decree and Certificate of Order against the Government are annexed to the application seeking leave.

2. The applicants filed the substantive application in these proceedings on 26th July 2017 seeking orders of *mandamus* to compel the respondents to pay the decretal sum of Ksh. 3,448,234.16. On 16th March 2018 the court rendered judgment in favour of the applicants and issued an order of *mandamus* compelling the first Respondent either by itself or through the second and third Respondents to pay them an aggregate sum of Ksh. 3,448,234.16 together with interests and costs. The judgment dated 16th March 2018 and the decree are annexed to the application. However, the Respondents failed to satisfy the decree prompting the applicants to file the instant application.

The application

3. The instant application expressed under section 5 of the Judicature Act^[1] seeks orders:-

a. Spent

b. ***That*** this honourable court be pleased to order the Deputy Director, Finance National Land Commission, Mr. Ben Cherutich, the Managing Directors, Nairobi Water & Sewerage Company, Mr. Nahashon Maingi Muguna and the CEC Finance/Treasury, Nairobi County, Mr. Charles Kerich be committed to civil jail for contempt for disobedience of the orders issued on 16th March 2018 in Judicial Review Miscellaneous Application No. 443 of 2017.

c. ***That*** the Deputy Director, Finance, the Managing Director, Nairobi Water & Sewerage Company Limited and the CEC Finance/Treasury Nairobi City County do pay costs of this application.

The grounds

4. The application is premised on the grounds listed on the face of the application and the annexed affidavit of Samuel M. N. Mweru. The core grounds are that the High Court issued an order of *mandamus* compelling the first Respondent either by itself or through the second and third Respondent to pay the applicants Ksh. 3,448,234.16 as per the decree dated 16th March 2010 issued in HCCA No 42 of 1989 plus costs and interests at court rates, which amount stood at Ksh. 53,876,335.16 as at 27th March 2019 plus costs of Ksh. 162,957/=.

5. The applicants state that the Respondents are aware of the court judgment and that they have severally been served with the court decree

and the Notice to pay but the Respondent's officials have refused, neglected and or declined to comply with the courts decree. The applicants state that the Respondents and in particular the above officers are in contempt of court and are in flagrant contempt of this courts orders. Further, the applicants state that the said sum continues to attract interest and as at the time of filing this suit it stood at Ksh. 54,647,692.86.

Second respondent's Replying Affidavit

6. Nahason Muguna, the second Respondent's Acting Managing Director swore the Replying Affidavit dated 30th September 2019. He deposed that his understanding of the judgment was that the first Respondent was to satisfy the judgment and seek compensation from the other Respondents, and, that, the failure to pay is not willful.

7. He deposed that the first Respondent has not contacted the second Respondent regarding this matter, and, that, there is no deliberate intent to disobey the court orders. In addition, he deposed that the second Respondent has been without a board of directors for some time until 19th July 2019 when a new board was inaugurated, and, that only the Board can authorize incurring of expenditure. He deposed that the new Board is settling and it has taken up the matter with the seriousness it deserves. He further averred that the decree was to be enforced primarily against the other respondents and that the second Respondent did not incur the liability in question, but the same was incurred by the successor to the County Government of Nairobi, the City Council of Nairobi. He beseeched the court to decline the orders sought.

Third Respondents grounds of opposition

8. The third Respondent filed grounds of opposition dated 13th August 2019 stating *inter alia* that the application is pre-mature, misconceived, and bad in law and that the Public Finance Management Act vests management and control of public finance in the County Executive Committee member in charge of finance. It also states that the application is fatally incompetent and incurably defective.

The second Respondent

9. The second Respondent did not file a Response to the application.

The applicants' supplementary affidavit

10. Samuel M. N. Mweru, the first applicant swore the supplementary Affidavit dated 4th November 2019. He averred that the court issued an order of *mandamus* compelling the first Respondent either by itself or through the second and third Respondent to pay the applicant the aggregate sum of Ksh 3,448,234.16 as decreed by the high court on 16th March 2010. He averred that it is not correct that the first Respondent was bound to satisfy the judgment and seek compensation from the other Respondents. He deposed that the parties herein are duty bound to satisfy the decree since they were jointly sued. He further deposed that on 6th October 2016, the third Respondent wrote to the second Respondent directing the second Respondent to settle the claim using Asset Recovery Fund, but it failed to pay.

The arguments

11. Mr. Ambani, appearing for the applicants relied on the grounds on the face of the application, the supporting affidavit and the supplementary affidavit referred to above and prayed for the orders sought. He submitted that the existence of the judgment is not disputed, and, argued that there is a deliberate intention not to pay the amount. He cited *Republic v Principal Secretary, Ministry of Defence ex parte George Kariuki Waitihaka*^[2] in which the court found the Respondents guilty of contempt for failing to satisfy a court decree. He also relied on section 3A of the Civil Procedure Act,^[3] Section 5(1) of the Judicature Act^[4] and Article 159 of the Constitution and urged the court to grant the orders sought.

12. M/s Masinde, counsel for the first Respondent submitted that the first Respondent acquired the land on behalf of the second Respondent, and, that under section 111(a) of the Land Act,^[5] the acquiring body is required to deposit all the funds. She submitted that the first Respondent has not been provided with the funds as provided under the said section, hence, the first Respondent has not refused to pay.

13. Mr. Kioko, counsel for the second Respondent relied on the replying affidavit filed on 30th September 2019, and submitted that there is no willful refusal to pay, but due to the difficulties explained in the said affidavit

14. Mr. Maina, counsel for the third Respondent submitted that the third Respondent has pushed the second Respondent to settle the amount and pleaded for patience as they waited for a supplementary budget. He urged the court to issue the orders against the second Respondent since it is the one required to pay.

Determination.

15. It is useful to recall that on 9th November 2018, long before the filing of the instant application, the High Court in *Kenya Human Rights Commission v Attorney General & another*^[6] nullified the Contempt of Court Act.^[7] The instant application is expressed under section of the Judicature Act^[8] Order 50 Rule 1 of the Civil Procedure Rules.

16. Section 38 of the nullified Contempt of Court Act^[9] had repealed section 5 of the Judicature Act,^[10] the section the instant application is premised on. Perhaps I should add that section 39 of the same act repealed section 36 of The High Court (Organization and Administration) Act,^[11] while section 40 repealed section 35 of The Court of Appeal (Organization and Administration) Act.^[12] The question I wish to address is whether after the act was nullified, the sections of the law it had nullified still stand repealed.

17. Courts derive their power from the Constitution and the statutes that regulate them. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Citing I H Jacob *Current Legal Problems*, Freedman C J M adopted the following definition of 'inherent jurisdiction'^[13]

“ . . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them...”

18. Jerold Taitz succinctly describes the inherent jurisdiction of the high court as follows in his book *The Inherent Jurisdiction of the Supreme Court* (1985) pp 8-9:

“ . . . This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.”

19. The inherent jurisdiction of the high court has long been acknowledged and applied by our courts.^[14] However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In this regard in *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd*^[15] the court stated that:-

“While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, “extend to the assumption of jurisdiction not conferred upon it by statute””

20. I am aware of a recent High Court ruling rendered in *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited*^[16] in which the court held as follows:-

“Section 39 (2) (g) of the Act enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. However, the rules to regulate the commencing and prosecuting of contempt of court applications under the Act are yet to be made. The law that previously applied in this regard was the Contempt of Court Act of 2016, until the decision of the High Court (J. Chacha Mwita) made on 9th November 2018 in ***Kenya Human Rights Commission v Attorney General & Another, [2018] e KLR***. The said decision declared the Contempt of Court Act of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.

I am in the circumstances obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court's orders. It was in this respect observed in ***Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008***, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law. In addition, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in ***Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR***. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”

21. I agree with the above reasoning that since the act that repealed section 5 of the Judicature Act^[17] has been declared unconstitutional, the effect is that section 5 of the Judicature Act^[18] still stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section 5 of the Judicature Act^[19] which provides as follows:-

(1) *The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.*

22. Discussing the procedure for instituting Contempt proceedings in Kenya, the High Court in the *John Mugo Gachuki vs New Nyamakima Co. Ltd*^[20] observed as follows:-

"It is unfortunate that nearly 50 years after independence our procedure, with respect to punishment for contempt in our Court is referable to the procedure in High Court of Justice in England. It is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency of enacting our own law relating to such an important aspect of the Rule of Law. That being the position, ours is not to enact the law but to interpret the law as enacted."

23. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the Judicature Act^[21] imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought. This duty was noted by Platt J and Porter J in *the matter of an application by Gurbareesh Singh & Sons Ltd*^[22] as follows:-

"The second aspect concerns the words of Section 5-"for the time being", which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules."(Emphasis supplied)

24. The Court of Appeal In *Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others*^[23] observed as follows:-

"Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act,^[24] the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.

Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:-

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.*
- ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.*
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.*
- iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.*
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.*
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.*
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.*

25. The learned Judges^[25] in the above case correctly pointed out that the rules applicable in the United Kingdom have been applied in Kenya with uneven degree of consistency and cited several examples.^[26] The only consistency in the decided cases is that leave was a requirement.

26. However, following the implementation of the famous Lord Woolf's "Access to Justice Report, 1996," The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. On 1.10.2012, the Civil Procedure (Amendment No.2) Rules, 2012 came into force and Part 81 thereof effectively replaced Order 52 RSC in its entirety. Part 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedure for four different forms of violations.

Rules 81.4 relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

Rule 81.11- Committal for "interference with the due administration of justice" (applicable only in criminal proceedings)

Rule 81.16- Committal for contempt "in the face of the court"), and

Rule 81.17- Committal for "making false statement of truth or disclosure statement."

27. An application under Rule **81.4** (breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

28. In *Christine Wangari Gacheche*^[27] the Court of Appeal correctly pointed out that leave, now called "permission" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. However, leave is still a requirement for applications under Rules **81.12** & **81.17** cited above.

29. After evaluating the above Rules, the Court of Appeal concluded that "we find that on the basis of the new Civil Procedure Rules (of England) contained in the Second Supplement to the 2012 White Book, no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court's order..." On that basis, I find that it was not necessary for the applicant to seek leave before filing this application, hence this application is properly before the court.

30. The jurisdiction relating contempt of court proceedings, as decided cases suggest is rather problematic.^[28] It appears that Kenyan courts have to continuously and perpetually check upon the current law in force in England and apply it in exercise of this jurisdiction. This is both the substantive and procedural law applicable in England as at the time the contempt is committed.^[29] However, now that the Act was nullified by the High Court, (which decision to my knowledge has not been reviewed or overturned on appeal), it is high time Parliament raises to the occasion, and enacts a comprehensive substantive and procedural law to govern contempt matters.

31. A court without contempt power is not a court.^[30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an "oxymoron." Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer's eye, the power of contempt "is inherent in courts, and automatically exists by its very nature."^[31]

32. I now address the question whether the applicants have established any basis for the orders sought to be granted. If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts has to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the Rule of Law and a civilized life in the society. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside courts which tend to undermine their authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.

33. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is 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.^[32]

34. 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 contemnors.^[33] The court does not, and ought not 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.^[34]

35. 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. Article **159(1)** of the Constitution provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. Under Article **10(1)** of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause **(2) (a)** of the same Article the national values and principles of governance include the Rule of Law.

36. It is a crime unlawfully and intentionally to disobey a court order.^[35] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.^[36] The offence has in general terms received a constitutional 'stamp of approval,'^[37] since the Rule of Law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'^[38]

37. In the hands of a private party, the application for committal for contempt is a peculiar amalgam,^[39] for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

38. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*.'^[40] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe

he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.^[41] Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).^[42]

39. These requirements – that is the refusal to obey should be both *wilful* and *mala fides*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.^[43] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa,^[44] underlined the importance to the Rule of Law, of compliance with court orders in the following terms:-

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

40. It is an established principle of law that^[45] in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.^[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*^[47] who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

41. It is the last test in paragraph (d) above that warrants detailed consideration. Unfortunately, the applicant's counsel never addressed it at all. On the face of our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.

42. Two principals emerge. The *first* is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. **In this regard, I am not satisfied that wilful disregard of the court order has been established.**

43. The *second* reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.

44. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.

45. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and *mala fide*, all the requisites of the offence will have been established. And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one' :-

‘The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.’^[48]

46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing

with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.^[49]

47. Applying the principles discussed herein above to the facts of this case, I am not persuaded that the applicants have demonstrated that the Respondents willfully failed, refused and or neglected to obey the court order. It was stated by that second Respondent that a new Board was inaugurated in July 2019. This application was filed barely weeks after its inauguration. Put differently, the applicants have failed to demonstrate the tests for contempt which are a pre-requisite to granting the orders sought.

48. In view of my above analysis and findings, the conclusion becomes irresistible that the applicant's Notice of Motion dated 31st July 2019 does not satisfy the prerequisites for the court to grant the orders sought. Accordingly, I dismiss the applicant's application dated 31st July 2019 with no orders as to costs.

Orders accordingly.

Signed, Dated and Delivered at Nairobi this 17th day of January, 2020.

John M. Mativo

Judge

[1] Cap 8, Laws of Kenya.

[2] {2019} e KLR.

[3] Cap 21, Laws of Kenya.

[4] Cap 8, Laws of Kenya.

[5] Act No. 6 of 2012.

[6] {2018} eKLR.

[7] Act No. 46 of 2016.

[8] Cap 8, Laws of Kenya.

[9] Act No. 46 of 2016.

[10] Ibid.

[11] Act No. 27 of 2015.

[12] Act No. 28 of 2015.

[13] *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, *Current Legal Problems* (1970) p 51.

[14] *Ritchie v Andrews* (1881-1882) 2 EDL 254; *Conolly v Ferguson* 1909 TS 195.

[15] 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

[16] J.R. No. 390 of 2014.

[17] Cap 8, Laws of Kenya.

[18] Ibid.

[19] Ibid

[20] Civil Case No. 456 of 2011.

[21] Cap 8, Laws of Kenya.

[22] Misc Civil Case No. 50 of 1983

[23] Civil Application No. 233 of 2007, {2014}eKLR

[24] Supra

[25] Kihara JA, Maraga JA & Ouko JA

[26] See John Mugo Gachuki vs New Nyamakima Co. Ltd, HCC No. 456 of 2011, Republic vs County Council of Nakuru, ex parte Edward Alera t/a Genesis Reliable Equipment HC JR N. 74 of 2010, National Bank of Kenya Ltd vs County Council of Olekejuado & 2 Others HC Civil Misc (JR) 5 of 2012

[27] Supra note 5

[28] See Peter Gacheru Ng'ang'a, "Contempt of Court by Public Officers in Kenya, Enforcing Orders and the Constitution's Promise", A thesis submitted at the University of Nairobi in partial fulfillment of the Degree of Master of Laws., 2014

[29] See *Slim & Another vs Ngala* {2012} 2KLR 658; *Awadh v Marumbu* {2013} 1KLR 454.

[30] Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337, 342 (1998).

[31] Ronald Goldfarb, *The History of the Contempt Power*, 1 WASH. U. L. Q. 1, 2 (1961).

[32] See *Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 *Ibrahim, J* (as he then was)

[33] See *Awadh vs. Marumbu (No 2) No. 53 of 2004* [2004] KLR 458,

[34] See *Ojwang, J* (as he then was) in *B vs. Attorney General* [2004] 1 KLR 431

[35] *S v Beyers* [1968 \(3\) SA 70](#) (A).

[36] Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) page 166: 'Contempt of court ... may be adequately defined as an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated.' Cf *Attorney-General v Crockett* [1911 TPD 893](#) 925-6 per Bristowe J: 'Probably in the last resort all cases of contempt, whether consisting of disobedience to a decree of the Court or of the publication of matter tending to prejudice the hearing of a pending suit or of disrespectful conduct or insulting attacks, are to be referred to the necessity for protecting the fount of justice in maintaining the efficiency of the courts and enforcing the supremacy of the law.'

[37] *S v Mamabolo* [\[2001\] ZACC 17; 2001 \(3\) SA 409](#) (CC) para 14, per Kriegler J, on behalf of the court (where contempt of court in the form of scandalising the court was in issue).

[38] Per Sachs J in *Coetzee v Government of the Republic of South Africa* [\[1995\] ZACC 7; 1995 \(4\) SA 631](#) (CC) para 61, quoted and endorsed by the court in *Mamabolo* (above). In *Coetzee*, statutory procedures for committal of non-paying judgment debtors to prison for up to 90 days – which the statute classified as contempt of court – were held unconstitutional.

[39] JRL Milton 'Defining Contempt of Court' [\(1968\) 85 SALJ 387](#): 'The concept of contempt of court is one which bristles with curiosities and anomalies. Of the various examples which may be chosen to illustrate this point perhaps the most striking is that of the classification of contempts of court into civil contempt (or contempt in procedure) and criminal contempt.'

[40] *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* [\[1996\] ZASCA 21; 1996 \(3\) SA 355](#) (A) 367H-I; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* [2004 \(2\) SA 602](#)(SCA) paras 18 and 19.

[41] *Consolidated Fish (Pty) Ltd v Zive* [1968 \(2\) SA 517](#) (C) 524D, applied in *Noel Lancaster Sands (Edms) Bpk v Theron* [1974 \(3\) SA 688](#) (T) 691C.

[42] *Noel Lancaster Sands (Edms) Bpk v Theron* [1974 \(3\) SA 688](#) (T) 692E-G per Botha J, rejecting the contrary view on this point expressed *Consolidated Fish v Zive* (above). This court referred to Botha J's approach with seeming approval in *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* [\[1996\] ZASCA 21; 1996 \(3\) SA 355](#) (A) 368C-D.

[43] See the formulation in *S v Beyers* [1968 \(3\) SA 70](#) (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 ('Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it') and CR Snyman *Strafreg* (4ed, 1999) page 329 ('Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike hoedanigheid, of van 'n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitstlag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding').

[44] *Burchell v. Burchell*, Case No 364/2005

[45] See the High Court of South Africa In the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005

[46] *Ibid*, at page 4

[47] Available at ip36.publications.lawcom.govt.nz

[48] In *De Lange vs Smuts* [1998] ZACC 6; 1998 (3) SA 785 (CC) para 147.

[49] *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).