



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISC. APPLICATION NO. 43 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IMRAN LIMITED.....1<sup>ST</sup> APPLICANT**

**REYNOLDS & COMPANY LIMITED.....2<sup>ND</sup> APPLICANT**

**EAST AFRICA MOTOR INDUSTRIES**

**(SALES & SERVICES) LIMITED.....3<sup>RD</sup> APPLICANT**

**MOMENTUM HOLDINGS LIMITED.....4<sup>TH</sup> APPLICANT**

**ABDULMAL INVESTMENT LIMITED.....5<sup>TH</sup> APPLICANT**

**KENBLEST LIMITED.....6<sup>TH</sup> APPLICANT**

**VERSUS**

**CENTRAL BANK OF KENYA.....1<sup>ST</sup> RESPONDENT**

**KENYA DEPOSIT INSURANCE CORPORATION....2<sup>ND</sup> RESPONDENT**

**DR. PATRICK NJOROGE.....3<sup>RD</sup> RESPONDENT**

**MOHAMMED NYAOGA.....4<sup>TH</sup> RESPONDENT**

**RAVI RUPAREL.....5<sup>TH</sup> RESPONDENT**

**NELIUS KARIUKI.....6<sup>TH</sup> RESPONDENT**

**SAMSON CHERUTICH.....7<sup>TH</sup> RESPONDENT**

**CHARITY SELINA KISOTU.....8<sup>TH</sup> RESPONDENT**

**RACHEL BESSIE DZOMBO.....9<sup>TH</sup> RESPONDENT**

**DR. KAMAU THUGGE.....10<sup>TH</sup> RESPONDENT**

MAHMOUD MOHAMMED.....11<sup>TH</sup> RESPONDENT  
PROFESSOR GITHU MUIGAI.....12<sup>TH</sup> RESPONDENT  
JULIUS K. KIPNGETICH.....13<sup>TH</sup> RESPONDENT  
NASIM DEVJI.....14<sup>TH</sup> RESPONDENT  
JEREMY I. NGUNZE.....15<sup>TH</sup> RESPONDENT  
SAMUEL N. KIMANI.....16<sup>TH</sup> RESPONDENT

AND

DIAMOND TRUST BANK LIMITED.....1<sup>ST</sup> INTERESTED PARTY  
KENYA COMMERCIAL BANK LIMITED....2<sup>ND</sup> INTERESTED PARTY  
JOSEPHINE AWINO KOGWENO T/A  
J. K. KOGWENO AND ASSOCIATES.....3<sup>RD</sup> INTERESTED PARTY  
NIC BANK LIMITED.....4<sup>TH</sup> INTERESTED PARTY

### RULING

#### Introduction

1. This ruling is on four Preliminary Objections brought by the Respondents herein. The said Preliminary Objections challenge the Applicants' Notice of Motion application dated 14<sup>th</sup> February 2017, initiating contempt proceedings against the Respondents. The Applicants are shareholders of Imperial Bank (In Receivership), which was Bank placed under receivership by the Central Bank of Kenya, the 1<sup>st</sup> Respondent herein. The 1<sup>st</sup> Respondent consequently appointed the Kenya Deposit Insurance Corporation, which is sued as the 2<sup>nd</sup> Respondent herein, as the Receiver Manager of the said Bank.

2. The Applicants' Notice of Motion dated 14<sup>th</sup> February 2017 is brought pursuant to a judgment delivered herein by Odunga J. on 4<sup>th</sup> November 2016, on judicial review proceedings brought by the Applicants who were aggrieved by actions arising from the said receivership.. The learned Judge granted the following orders in the said judgment:

a) **“An order prohibiting the Respondents, jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns from undertaking or engaging in any exclusion and transfer process of the Bank or any of the assets in any manner other than as prescribed under the applicable Laws including the *Kenya Deposit Insurance Act* and the *Fair Administrative Action Act, 2015*.**

b) **An order of prohibiting the Respondents, jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns from taking any steps which would result cumulatively or otherwise in the liquidation of the Bank unless and until the relevant legal provisions are complied with.**

c) **An order of *mandamus* directed at the Respondents and each of them compelling them to furnish the Ex parte applicants or their servants, agents, representatives and/or their appointees, including financial and legal advisers, with information relating to the process of receivership as long as such information is not prejudicial to the investigations being undertaken.**

d) **An order of *mandamus* directed at the Respondents and each of them compelling them to provide the Ex Parte Applicants herein, together with the other stakeholders including the bondholders and depositors with the information concerning the arrangements entered into with all or any of the Interested Parties, and the manner in which the depositors are to be dealt with.**

e) **An order of *mandamus* directed at the Respondents and each of them compelling them to formally engage the Ex Parte Applicants herein, together with the other stakeholders including the bondholders and depositors of the Bank, with a view to jointly, and to the extent permissible by Law, finding a workable legal framework for an outcome that is in the interests of the Bank and all its stakeholders.**

f) **Save for the foregoing the rest of the prayers are disallowed.”**

3. The Applicants in their Notice of Motion application dated 14<sup>th</sup> February, 2017 now seek the following orders:

a) This Court do issue a thirty (30) day Notice to Dr. Patrick Njoroge , who is the Governor and Accounting Officer of the 1<sup>st</sup> Respondent, Mohamed Nyaoga being the Board Chairman of the 1<sup>st</sup> Respondent and Ravi Ruparel, Nelius Kariuki, Samson Cherutich, Charity Selina Kisotu ,Rachel Bessie Dzombo , Dr. Kamau Thugge who comprise of the 1<sup>st</sup> Respondent's Board of Directors to personally attend Court to show cause why contempt of Court proceedings should not be commenced against them.

b) This Court do Issue a thirty (30) day Notice to Mahmoud, the Chief Executive Officer and Accounting Officer of the 2<sup>nd</sup> Respondent and Dr. Patrick Njoroge , Dr. Kamau Thugge, Professor Githu Muigai , Nasim Devji , Jeremy I. Ngunze , Samuel N. Kimani who comprise of the 2<sup>nd</sup> Respondent 's Board of Directors to personally attend Court, to show cause why contempt of Court proceedings should not be commenced against them.

c) Direction be given as to be a hearing date after the expiry of the thirty (30) days ' Notice period, when the 3<sup>rd</sup> to 16<sup>th</sup> Respondent will appear before the Court as to show Cause in Keeping with Notice to Show Cause issued in prayer (2) and (3) above.

d) This Court be pleased to find that Dr. Patrick Njoroge , the 3<sup>rd</sup> Respondent herein, who is the Governor and Accounting Officer of the 1<sup>st</sup> Respondent , Mohamed Nyaoga Being the Board Chairman of the 1<sup>st</sup> Respondent , and Ravi Ruparel , Nelius Kariuki , Samson Cherutich , Charity Selina Kisotu , Rachel Bessie Dzombo, Dr. Kamau Thugge who comprise the 1<sup>st</sup> Respondent's Board of Director's in contempt of the Judgment and the Court Orders of 4<sup>th</sup> November ,2016, and they be committed to civil jail for a period of six months and/or that they be found accordingly.

e) This Court be pleased to find that Mahmoud Mohamed , the chief executive Officer of the 2<sup>nd</sup> Respondent, Julius K. Kipngetich being the acting Board Chairman of the 2<sup>nd</sup> Respondent and Dr. Patrick Njoroge, Dr. Kamau Thugge, Professor Githu Muigai, Nasim Devji, Jeremy I. Ngunze, Samuel N. Kimani who comprise the 2<sup>nd</sup> Respondent's Board of Directors in contempt's of the Judgment and the Court Orders of 4<sup>th</sup> November,2016 and they be committed to jail for a period of six months and/or that they be fined accordingly.

4. The prayers sought by the Applicants led to a flurry of Preliminary Objections by the Respondents. This Court directed the parties to file written submissions on the preliminary objections, which were also orally highlighted in Court during a hearing held on 18<sup>th</sup> February 2020. A summary of the pleadings and submissions made by the respective parties are as follows.

### **The Preliminary Objections**

#### ***The 1<sup>st</sup> and 3<sup>rd</sup> Respondents Objections***

5. The Preliminary Objection by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents is dated 11<sup>th</sup> July, 2019. The main ground for the objection is that the Notice of Motion dated 14<sup>th</sup> February, 2017 by the Applicants was commenced under Section 3, 4, 5(b), 2A, 28(1), 30(2) and (5) of the Contempt of Court Act of 2016, which was declared unconstitutional by the High Court in **Kenya Human Rights Commission vs Attorney General & Anor (2018) eKLR**. Further, that the Respondents herein have been deemed guilty of contempt of court, and condemned unheard contrary to Article 50 of the Constitution. In their view, the Notice to Show Cause dated 21<sup>st</sup> February, 2017 is unconstitutional and should be set aside forthwith.

6. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents averred that the judgment delivered by Odunga J on 4<sup>th</sup> November, 2016 speaks for itself on many issues but not limited to proposals to revive the bank, and that under sections 51 and 61 of the Kenya Deposit Insurance Act, No. 10 of 2012, the 2<sup>nd</sup> Respondent is autonomous in the conduct of its duties, and exercise of its powers under the Act and is not subject to the direction or supervision of any other entity including the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. Further, that the Act limits the 1<sup>st</sup> Respondent's involvement in the Bank's receivership to the appointment of the Receiver hence does not permit the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to formally engage the Applicants herein in finding a workable legal framework for any outcome in the resolution of receivership. Lastly, they stated that they have fully complied with their mandate as provided by the Central Bank of Kenya Act, Cap 491 of the Laws of Kenya.

7. Mr. Paul Chege from the firm of Amolo & Gacoka Advocates appeared for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, and highlighted their written submissions dated 1<sup>st</sup> July, 2019. The counsel submitted that there were two issues for determination. On the issue whether the present contempt of court proceedings can be heard as framed by the Applicants, counsel submitted that pending the hearing of the instant application, the High Court in **Kenya Human Rights Commission vs The Attorney General & Another, (supra)** declared Section 30 and 35 of the impugned Contempt of Court Act No. 46 of 2016 unconstitutional and the entire Contempt of Court Act No. 46 of 2016 invalid for lack of public participation as required by Article 10 and 118(b) of the Constitution.

8. He further cited the case of **Law Society of Kenya v Kenya Revenue Authority & Another ,(2017) eKLR** for the proposition that once a law has been declared unconstitutional, it has no business remaining in the law books and the fundamental issue that follows is under what circumstances if at all a court can suspend an order declaring a legislation to be invalid. He therefore submitted that the present application and the notice to show cause issued on 21<sup>st</sup> February, 2017 both commenced on the basis of the aforesaid Act ought to be dismissed with costs.

9. On the issue whether the 1<sup>st</sup> and 3<sup>rd</sup> Respondents can be deemed to be in contempt as alleged on the face of the provisions of Sections 51 and 61 of the Kenya Deposit Insurance Act, together with Section 4, 4A, and 13 of the Central Bank of Kenya Act, the counsel reiterated that the only role of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents is to appoint a receiver, and that the 2<sup>nd</sup> Respondent is autonomous and is not subject to the

direction or supervision of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in the discharge of its duties. Further, he submitted that there exists no statutory provision in the Kenya Deposit Insurance Act that donates power to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to act as suggested by the Applicants and therefore, they could not have acted in contempt as alleged and contrary to the orders of 4<sup>th</sup> November, 2016.

10. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents relied on the case of **Kenya Deposit Insurance Corporation vs Richardson & David Limited & Another (2017) eKLR** where the Court of Appeal held that section 5(1) of the Kenya Deposit Insurance Act vests the power to receive, liquidate and wind up an institution in the 2<sup>nd</sup> Respondent only. Further, that the role of the court is to sanction what is done in the right way or invalidate what is improperly done. He therefore urged court to strike out the Notice of Motion dated 14<sup>th</sup> February, 2017 and Notice to Show Cause dated 21<sup>st</sup> February, 2017 for lack of legal basis.

#### ***The 2<sup>nd</sup> and 11<sup>th</sup> Respondents***

11. The Preliminary Objection by the 2<sup>nd</sup> and 11<sup>th</sup> Respondents is dated 17<sup>th</sup> May 2017. It is also based on the grounds that the Notice to Show Cause dated 21<sup>st</sup> February, 2017 issued under section 30 of the Contempt of Court Act, 2016 is unconstitutional to the extent that it was issued in violation of Article 50 the Constitution. It was their contention that Section 30(1) of the Contempt of Court Act contemplates punishment against management of a State Organ, Government Department, Ministry or Corporation which is guilty of contempt of court in respect of any undertaking given to court therefrom. However, that no such undertaking has been given by the 2<sup>nd</sup> and 11<sup>th</sup> Respondents to this Court or at all. Lastly, they argued that the 2<sup>nd</sup> and 11<sup>th</sup> Respondents herein have been deemed guilty of contempt of court, and condemned unheard contrary to section 30 of the Contempt of Court Act and Article 50 of the Constitution.

12. Mr. Philip Murgor from the firm of Murgor and Murgor Advocates appearing for the 2<sup>nd</sup> and 11<sup>th</sup> Respondents, highlighted his written submissions dated 13<sup>th</sup> March, 2019. Counsel submitted that the decision rendered in **Kenya Human Rights Commission vs The Attorney General & Anor (supra)** makes it impossible for this court to hear and determine the Applicants' application as it is placed before the court under an invalidated Act and provisions therein found to be unconstitutional, and any decision rendered therefrom will be *per incuriam*. He went on to submit that it would be tantamount to an absurdity for this court to apply a law that has been declared void as was held by the United States Supreme Court in **William Marbury v James Madison, Secretary of State of the United States** 5 U.S. 1 Cranch 137 (1803) which was cited with approval in **Attorney General v Law Society of Kenya & Anor (2017) eKLR**.

13. The 2<sup>nd</sup> and 11<sup>th</sup> Respondents' counsel further submitted that it is well settled that a court's jurisdiction flows from either the constitution or legislation or both, and the court cannot therefore arrogate itself jurisdiction exceeding that which is conferred upon it as was held in **Samuel Kamau Macharia & Anor v Kenya Commercial Bank Limited & 2 Others, SC Civil Application No. 2 of 2011**. He went on to add that the effect of nullifying a statute or provisions therein for being unconstitutional acts retrospectively, as held by the Court of Appeal in **Paul Posh Aborwa v Independent Election & Boundaries Commission & 2 Others, (2014) eKLR** where the court held that such a pronouncement makes a law invalid from the outset. He also referred to the provisions of section 20 of the Interpretation and General Provisions Act, for the position that the declaration of unconstitutionality of the Contempt of Court Act did not automatically revive the repealed provisions of section 5 of the Judicature Act that previously applied.

14. In view of the above, counsel submitted that it would be impossible for the Applicants to prosecute the instant application before this Court, and further urged the court to find that it has no jurisdiction to hear and determine the application, the Contempt of Court Act having been invalidated. Accordingly, he urged the Court to strike out the Applicants' Notice of Motion Application dated 14<sup>th</sup> February, 2017 and concomitant Notice to Show Cause.

#### ***The 4<sup>th</sup> to 10<sup>th</sup> & 12<sup>th</sup> to 16<sup>th</sup> Respondents***

15. The Preliminary Objections by the 4<sup>th</sup> to 10<sup>th</sup> Respondents and 12<sup>th</sup> to 16<sup>th</sup> Respondents are both dated 23<sup>rd</sup> March 2017. The 4<sup>th</sup> to 10<sup>th</sup> Respondents' objections are grounded on the facts that the Applicants' application is brought against them in their capacity as Chairman and Directors of the 1<sup>st</sup> Respondent, is without jurisdiction, and offends the provision of section 30 of the Contempt of Court Act 2016. Further, that the 4<sup>th</sup> -10<sup>th</sup> Respondents have no role of whatever nature on the management of the 1<sup>st</sup> Respondent neither have they been parties nor participated in the proceedings herein. Furthermore, the orders sought are orders of mandatory nature, directed against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their statutory capacity and that the 4<sup>th</sup>-10<sup>th</sup> Respondents have no role, power or capacity whether in law or in fact to participate in or implement the said orders.

16. Lastly, it is their contention that the orders sought to be enforced were neither served nor notified to the 4<sup>th</sup>-10<sup>th</sup> Respondents. In any event, that the 5<sup>th</sup>-10<sup>th</sup> Respondents were appointed to the Board of the 1<sup>st</sup> Respondent well after the orders were granted as is evident from the relevant Gazette Notices, and the 10<sup>th</sup> Respondent is not a director to the 1<sup>st</sup> Respondent, as the substantive director is the Permanent Secretary to the Treasury or his representative.

17. The Preliminary Objection by the 12<sup>th</sup> to 16<sup>th</sup> Respondents is similarly grounded on the fact that the application against them is in their capacity as Chairman and Directors of the 2<sup>nd</sup> Respondent, and has no basis in law or in fact and is made without jurisdiction. Further, that the 14<sup>th</sup>-16<sup>th</sup> Respondents ceased to be directors of the 2<sup>nd</sup> Respondent by operation of the law following the enactment of the Finance Act 2016. They further contended that the 12<sup>th</sup> Respondent is not a Director of the 2<sup>nd</sup> Respondent, the Attorney General is and the application is without jurisdiction and offends the provision of Section 30 of the Contempt of Court Act 2016. Furthermore, it was their contention that the Board of Directors of the 2<sup>nd</sup> Respondent are by the provisions of the statute not responsible for day to day management of the 2<sup>nd</sup> Respondent.

18. It was also contended that the 12<sup>th</sup> to 16<sup>th</sup> Respondents have neither been parties or otherwise participated in the proceedings herein nor

have they been notified of or served with any process or the order alleged to have been violated. In their view, the orders sought are also mandatory in nature directed against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their statutory capacity and the 12<sup>th</sup>-16<sup>th</sup> Respondents have no role, power or capacity whether in law, fact or otherwise to carry out or comply with the said orders.

19. Mr. George Oraro SC appearing for the 4<sup>th</sup>-10<sup>th</sup> and 12<sup>th</sup>-16<sup>th</sup> Respondents, highlighted written submissions dated 11<sup>th</sup> April, 2019 which were filed by Oraro & Company Advocates. The Senior Counsel submitted that the Notice of Motion dated 14<sup>th</sup> February, 2017, the Applicants has no standing in law, as the Applicants commenced proceedings for committal of the 1<sup>st</sup>-16<sup>th</sup> Respondents for contempt of court under the Contempt of Court Act, which has since been declared unconstitutional by the decision of this Court in **Kenya Human Rights Commission v The Hon. Attorney General & Anor (supra)**.

20. He therefore argued that the application for contempt herein should be struck out on grounds of lack of jurisdiction as the statutory underpinning for the application was nullified, and the Applicants have not undertaken preliminary steps required by the law that is now applicable under the Judicature Act. The Senior Counsel in this regard cited the decision by the Supreme Court of Kenya in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others, (2013) eKLR** where the court dismissed the petition for lack of jurisdiction for the reason that it had in an earlier decision, nullified section 14 of the Supreme Court Act on which the Petition was anchored, as being unconstitutional.

21. Mr. Oraro SC went on to argue that the 4<sup>th</sup>-10<sup>th</sup> Respondents are Chairperson and Directors of the Central Bank of Kenya (the 1<sup>st</sup> Respondent) appointed after the commencement of the proceedings herein, and that it is not disputed that no order was served upon them as evidenced by their Preliminary Objection dated 23<sup>rd</sup> March, 2018. Be that as it may, he argued that their role under the Central Bank of Kenya is provided under Section 10 and 13 of the Central Bank of Kenya Act. Accordingly, the Governor is the Chief Executive Officer of the Bank while the Board of Directors is responsible for general policy making and formulation. In the circumstances, no contempt can issue against persons who are neither parties nor have the capacity to enforce the orders both in fact and by operation of the law.

22. The Senior Counsel further argued that the 12<sup>th</sup> Respondent was only a director of the 1<sup>st</sup> Respondent by virtue of occupying the Office of the Attorney General, which office he has since vacated. In addition, that the 13<sup>th</sup>-16<sup>th</sup> Respondents on their part ceased to be directors of the 2<sup>nd</sup> Respondent by operation of law pursuant to the provisions of Section 55 of the Finance Act 2016 which amended the constitution of the Board of Directors of the 2<sup>nd</sup> Respondent by amending Section 7 of the Kenya Deposit Insurance Act. It was his submission that the said provisions commenced on the 1<sup>st</sup> January, 2017 removing the 13<sup>th</sup>-16<sup>th</sup> Respondents as Directors of the 2<sup>nd</sup> Respondent well before the filing of the contempt proceedings. In any event, the directors of the 2<sup>nd</sup> Respondent are not responsible for the day to day management of the 2<sup>nd</sup> Respondent but the Chief Executive Officer is by dint of Section 10(3) of the Kenya Deposit Insurance Act.

23. Furthermore, that none of the 4<sup>th</sup>-10<sup>th</sup> or 12<sup>th</sup>-16<sup>th</sup> Respondents were concerned with the day to day management of the affairs of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents neither were they conferred the legal or statutory duty to execute any of the matters granted by the Judicial Review order. Accordingly, Mr. Oraro SC cited the case of **Shah v Attorney General (No. 3) ,(1970) EA 543** where the Court held that Mandamus is a prerogative order issued to compel public officers to perform duties imposed on them by common law or by statute, however that, the person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something, the duty itself being of an imperative nature.

24. In addition, that it has not been shown that the Applicants fulfilled the preliminary condition of serving and/or drawing the knowledge of any of the aforesaid Respondents to the orders even assuming that they had authority to act thereon. To buttress this argument Mr. Oraro SC cited the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR** where the Court of Appeal held that it is important that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it and the threshold is quite high as it involves possible deprivation of a person's liberty. In conclusion therefore, he urged the court to allow the Notices of Preliminary Objections both dated 23<sup>rd</sup> March, 2017 and dismiss the Applicant's Notice of Motion dated 14<sup>th</sup> February, 2017 with costs.

#### ***1<sup>st</sup> and 4<sup>th</sup> Interested Parties***

25. The Preliminary Objections were supported by the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties. Mr. Wetangula from the firm of Ochieng, Onyango, Kibet & Ohaga Advocates made oral submissions for the said Interested Parties. He relied on the decision by the Supreme Court of Kenya in **Mary Wambui Munene vs Peter Gichuki** for the position that the effect of a declaration of unconstitutionality of an Act is as from the date of enactment and commencement of the Act.

#### **The Applicant's Reply**

26. Mr. Andrew Wandabwa, counsel from the firm of Wandabwa Advocates, appeared for the Applicants and highlighted his written submissions dated 29<sup>th</sup> March 2019 and 10<sup>th</sup> December, 2019. Counsel submitted that pursuant to Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya, the power and procedure applied by English High Court was to be exercised by the Kenyan High Courts when exercising their jurisdiction to punish for contempt. Additionally, and more fundamentally, he submitted that the High Court has inherent powers to punish for contempt in order to maintain its dignity and in the interest of administration of justice, without it being derived from the constitution or statute.

27. Counsel further submitted that the relevant procedure applicable in England and which was adopted in our jurisdiction was that a party was first required to obtain leave of the court before initiating contempt proceedings and given the quasi-criminal nature of contempt proceedings, courts have generally preferred personal service of the order and contempt application on the alleged contemnor. Reference was made in this regard by counsel to the Court of Appeal decision in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others (2014) eKLR**.

28. It was counsel's further submission that pursuant to Section 36 of the High Court (Organization and Administration) Act No. 27 of 2015, the High Court was empowered to punish for contempt and the Chief Justice was enjoined to promulgate rules on contempt proceedings but this was not done. Subsequently, he submitted that the Contempt of Court Act was promulgated in 2016 and it came into effect on the 13<sup>th</sup> day, 2016, a month or so prior to the filing of the Applicant's application. Further, that the said Act, pursuant to its sections 38 and 39 respectively, repealed section 5 of the Judicature Act which allowed the High Court to punish for contempt in the same manner as the High Court of England, and section 36 of the High Court (Organization and Administration) Act, in which Parliament had empowered the High Court to punish for contempt using rules which the Chief Justice was to promulgate.

29. However, given that the High Court has since declared the Contempt of Court Act to be invalid, Mr. Wandabwa submitted that it follows that its sections that purported to repeal section 5 of the Judicature Act and section 36 of the High Court (Organization and Administration) Act are likewise of no legal effect. In this respect, Mr. Wandabwa submitted that section 20 of the Interpretation and General Provisions Act only applies when an Act is repealed, not when it is declared unconstitutional. As such, he submitted that the invalidation of the said Act has retrospective effect and the courts must operate as if the said Act never came into force as was held in the case of **Nation Media Group Limited v Onesmus Kilonzo (2015) eKLR.**

30. Effectively therefore, it was his submission that the law governing the power and procedure of the High Court to punish for contempt in an application such as the instant one filed in February, 2017, is section 5 of the Judicature Act and section 36 of the High Court (Organization and Administration) Act. However, given that the Chief Justice had not promulgated rules under the High Court (Organization and Administration) Act to govern the procedure of initiation contempt proceedings, he submitted that the procedure applicable is the English one as adopted the Judicature Act, as held in **Republic vs Principal Secretary, Ministry of Defence, Ex parte George Kariuki Waitaha (2019) eKLR.**

31. He argued that a close examination of the contempt application before the court does not fall foul of the said procedure. More specifically, he submitted that the Applicants applied for and were granted leave to commence contempt proceedings, sought the personal attendance of the alleged contemnors and the Respondents have been invited by the Court, by way of a Notice to Show Cause, to show cause why they should not be found culpable for the alleged contempt in keeping with the rules of natural justice and fair administrative purposes. Further, that the application meets the tenets of Article 47 of the Constitution as no one has been adjudged upon as being liable for contempt, and that all they are required to do is to defend themselves against the allegations of contempt.

32. Counsel submitted that to the extent that the High Court enjoys inherent powers to punish for contempt, independent of any constitutional and statutory provisions, the lacuna in the procedure applicable does not disable the court from entertaining contempt proceedings, as held in **Republic v Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008.** Furthermore, to the extent that the application cites provisions of the repealed Act, the court is also enjoined to proceed with without reference to the impugned cited provisions as was held in **Wendano Matuu Co. Limited & 2 Others v Joshua Kimeu Kioko & 6 Others; Philip Muli Munyaka (Interested Party) (2019) eKLR.** In any event, he argued that the citing of the provisions of an invalidated act are curable by amendment, and therefore any application cannot be defeated on account of procedural inadequacies as was held in the case of **Philip Mutuse Kimuyu v Minister of Lands and Settlement & 4 Others , (2018) eKLR.**

33. Regarding the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's Preliminary Objection, he submitted that their interpretation of Section 51 and 61 of the Kenya Deposit Insurance Act is no justification for their disobedience of a lawful court order and the only remedy would have been to repeal and/or have the said order reviewed. On the 4<sup>th</sup> to 10<sup>th</sup> and 12<sup>th</sup> to 16<sup>th</sup> Respondents' Preliminary Objections, he submitted that the 4<sup>th</sup> to 10<sup>th</sup> Respondents sit on the Board of the 1<sup>st</sup> Respondent and pursuant to Section 3 of the Central Bank of Kenya Act, are responsible for ensuring the Board's mandate is fulfilled and providing guidance and supervision to the chief Executive Officer. Further, he submitted that section 34 of the said Act empowers the Central Bank of Kenya to appoint a manager where an institution is in trouble, while section 4 of the Kenya Deposit Insurance Act makes the 2<sup>nd</sup> Respondent a body corporate which by dint of section 7 of the Act, is administered by the Board.

34. Mr. Wandabwa went on to submit that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Boards are culpable for contempt, and he relied on a press release dated 8<sup>th</sup> November 2016 issued by the 2<sup>nd</sup> Respondent for this position. Further, that the persons occupying the said offices are the ones to be cited, as held in the case of **Tarafatullah Mandal and Others v S.N Maitra and Others AIR 1952 Cal 919.**

35. On the issue of service, counsel submitted that the said order was made in the presence of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' advocates and the said order duly served on the respective 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the receipt of which was duly acknowledged by the respective Respondents. In any event, he submitted that personal service on a person intended to be cited for contempt is not necessary as was held in the cases of **Kenya Union of Savings and Credit Cooperative (KUSCO) Ltd vs Nairobi City County & 2 Others, Misc. Application JR No. 596 of 2008** and **Shimmers Plaza Limited vs National Bank of Kenya Limited, C.A No. 33 of 2012.** Accordingly, he urged that the matters raised by the Respondents cannot be dealt with on the basis of preliminary objections but by way of substantive hearing.

### **The Determination**

36. I have considered the submissions made by the Respondents, Applicants and Interested Parties, and I am alive to the circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696,** as follows:

***“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

37. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141,** the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to

proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

38. The first question that this Court therefore needs to ask and answer is whether the grounds raised in the Respondents' preliminary objections raise pure points of law. It only after determining this question, that this Court can proceed to answer the secondary question as to whether the said preliminary objections have merit and should be upheld.

39. It is in this respect evident that from the submissions made the grounds raised by the Respondents can be collapsed into three, the first is that the application has no standing in law as it has been brought pursuant to an Act that has been declared unconstitutional. The second is that there is a misjoinder of the 4<sup>th</sup> to 16<sup>th</sup> Respondents who are joined in their capacity as Chairman and directors of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Third, that there is a misjoinder of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents on account of having no role to play in the enforcement of the orders granted in the judgment delivered herein by Odunga J.

40. In this respect it is not disputed by all the parties that the Applicant's Notice of Motion was brought pursuant to the Contempt of Court Act of 2016. It is also not disputed that the said Contempt of Court Act was declared unconstitutional in a judgment delivered in **Kenya Human Rights Commission v The Hon. Attorney General & Anor (supra)**. To this extent, a pure question of law has been raised as regards the reliance on the Contempt of Court Act by the Applicants, and the effect thereof.

41. It is however evident that the other grounds raised by the Respondents are not only disputed by the Applicants, but are also grounds which need evidence and further argument on the part of the parties to establish the facts alleged therein. This was for example shown by the production of evidence by some of the Respondents of a copy of the Kenya Gazette in their submissions, to show that the Respondents had since vacated office.

42. In addition, the grounds raised as to the misjoinder of the Respondents on the grounds of their knowledge of this court's orders, and their role in the disobedience or enforcement of the said orders are matters of fact that relate to their culpability for contempt, and that cannot be raised in a preliminary objection as they are not pure questions of law. In addition, even where there is misjoinder or non-joinder it was held in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** by the Court of Appeal that:

***“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.***

43. This was also the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. In this respect, misjoinder or non-joinder cannot therefore be the basis for a preliminary objection upon which an otherwise competent application is to be dismissed, as this Court has the discretion to address this irregularity in its findings and orders.

44. Arising from the foregoing findings, this Court will only consider the ground raised by the Respondents as to the effect of application of the Contempt of Court by the Applicants to their application. At the time of filing of the application on 4<sup>th</sup> February 2017, the applicable law on the procedure in contempt of Court proceedings against government officers such as the Respondents herein, was provided in section 30 of the Contempt of Court Act.

45. However, during the pendency of the application, the said section and entire Contempt of Court Act was declared unconstitutional on 9<sup>th</sup> November 2018 by Mwita J. in **Kenya Human Rights Commission vs The Attorney General & Anor (supra)**. For our purposes it suffices that as at the date of hearing of the Respondents' Preliminary Objections, the Contempt of Court Act was not operative and applicable, since no challenge has been raised as regards any previous actions undertaken by the parties under the said Act.

46. Both the Respondents and Applicants in this respect relied on this Court's decision in **Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR** on the effect of the declaration of unconstitutionality of the Act. It was held as follows therein:

***“34. The Contempt of Court Act is however no longer operative as from the date of the judgment declaring it unconstitutional in Kenya Human Rights Commission v Attorney General & Another (supra). I am therefore 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.***

35. 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.

47. This Court then proceeded to find as follows as regards the applicable law:

**“37. The procedure 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 under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertaking. The English law on committal for contempt of court 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.”**

**38. This section was repealed by section 38 of the Contempt of Act, which Act is now no longer operative, however, 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...”**

48. It is notable that like in the present case, the declaration of unconstitutionality was made during the pendency of the judgment in the Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka (supra). However, unlike the present case, the prayer sought in the application in Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka (supra) was that the alleged contemnor therein, who was the **Principal Secretary in the Ministry of Defence, be committed to civil jail for a period of six (6) months or any other period, or any other sanction as the Court deemed fit and appropriate**. In the present case, the prayers in the Applicants’ Notice of Motion dated 14<sup>th</sup> February 2017 were modelled along the procedure set out in section 30 of the Contempt of Court of Act.

49. Subsection (1) of the section 30 of the Contempt of Court Act in this regard provided that if a state organ, government, department, Ministry or corporation is guilty of contempt, the court should serve a 30 days’ notice on the accounting officer requiring the accounting officer to show cause why contempt proceedings should not be commenced against him/her. Subsection (2) stated that contempt proceedings should not be instituted against the accounting officer without the court issuing a thirty days’ notice to the officer and the notice so issued should be served on the accounting officer as well as the Attorney General. Subsection (4) proceeded to provide that if the officer fails to respond to the notice to show cause, the court will proceed to commence contempt proceedings and where the officer is found to be guilty of contempt he/she may with leave of the court be liable to a fine not exceeding two hundred thousand shillings. Similar prayers were sought by the Applicants in their Notice of Motion dated 14<sup>th</sup> February 2017, as illustrated earlier on in this ruling.

50. The procedure in section 30 of the Contempt of Court Act was a specific focus and the subject of specific findings in the judgment in Kenya Human Rights Commission vs The Attorney General & Anor (supra). The learned Judge made the following findings about the said section:

**“82. The jurisdiction of the court to punish for contempt is meant to ensure that court’s decisions and directions are obeyed and enforced. The constitution in Article 27 gives all persons the right to equal protection and benefit of the law. However the impugned section 30, first states that no contempt proceedings can be instituted against a public officer unless a thirty days’ notice is issued and served both on the accounting officer and the Attorney General. And second, that where the accounting officer is found to be guilty of contempt he is to be fined two hundred thousand shillings.**

**83. Courts punish for contempt in order to preserve dignity and integrity of the court process, judicial system and for the benefit of the people by ensuring that its orders and processes are complied with. That notwithstanding, the impugned section requires the court to issue a 30 days’ notice before contempt proceedings are instituted. It must be appreciated that in some instances public officers would be required to comply with court orders or directions and perform some duties immediately to ensure the ends of justice. There would therefore be no rationale why a public officer who is in contempt of court for failure to comply with court orders or directions immediately thus interfering with the course of justice, should be given 30 days before contempt proceedings are initiated against him, taking into account the special nature of contempt proceedings yet others in similar misdeeds are not given such an opportunity.**

**84. This discriminatory and is aimed at hampering the court’s ability to enforce its processes for the benefit of those in whose favour it has found. It is against the principle that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts and the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation” (Tom Bingam; *The Rule of Law*, London Penguin Press, 2010). I find no legitimate, reasonable or justifiable government purpose to be served by this differential treatment accorded to public officers as opposed to private citizens under the impugned provision.**

**85. The section has another problem. It prescribes only a fine of two hundred thousand shillings where an accounting officer has been found guilty of contempt compared to the sanctions in section 28(1) which prescribes a fine of two hundred thousand shillings, or six months imprisonment or both. Section 30 is clearly protectionist in favour of government officials yet both will have committed similar offence(s) of contempt. There can be no justification in a constitutional democracy to give public officers differential treatment to that accorded to other persons though both are in contempt. This is an unjustifiable discrimination that is outlawed by the constitution. It violates the principle that the laws of the land apply equally to all, save to the extent that objective differences justify differentiation”.**

51. It is thus evident that even if this Court has inherent jurisdiction and discretion to proceed with the hearing of the Applicants’ Notice of Motion dated 14<sup>th</sup> February 2017, the prayers and procedure sought in the said Notice of Motion are incompetent, as both have expressly been found by a Court of competent jurisdiction to be unconstitutional. To this extent, this Court is also precluded from applying any

applicable law that would apply in the circumstances, as it is bound by the Applicants' pleadings. I am thus inclined to agree with the Respondents that the Applicants' Notice of Motion dated 14<sup>th</sup> February 2017 is based on an unconstitutional procedure and law, and cannot therefore stand.

52. The Respondents' Preliminary Objections are therefore found to have merit on this ground, and the Applicant's Notice of Motion dated 14<sup>th</sup> February 2017 is accordingly struck out. For the avoidance of doubt, this finding is based on the procedure employed by the Applicants in presenting their application which would have ordinarily been cured by amendment, and the question as to whether the said Respondents are culpable of contempt has not been ventilated upon and still remains undetermined. The Applicants are therefore at liberty to institute a fresh application against the Respondents in this regard.

53. Lastly, as the outcome herein has been caused by a change in the applicable law that was not of the Applicants' making, each party shall bear their own costs of the Respondents' Preliminary Objections.

54. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY 2020**

**P. NYAMWEYA**

**JUDGE**