REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 65 OF 2018

NANCY JEPKURUI TALAI.....1ST APPLICANT

JOSHUA TALAI KIBOR.....2ND APPLICANT

-VERSUS-

GLADYS OGANDA.....RESPONDENT

RULING

[1] The Applicants, **Nancy Jepkurui Talai** and **Joshua Talai Kibor**, first approached the Court vide their Notice of Motion dated **25 May 2018** seeking orders, pursuant to the inherent powers and jurisdiction of the Court and **Article 159(2)(d)** of the **Constitution of Kenya,** that the Respondent herein, **Gladys Oganda,** do avail the patient medical records of the late **Kibor Arap Talai** for the period between **10 January 1995** to **2 August 2012,** which were in her possession by virtue of being the widow of **Dr. A.N. Oganda.** They averred the deceased, a medical practitioner in his lifetime, was the personal doctor of the late **Kibor Arap Talai**; and that they need the documents for use in **Succession Cause No. 50 of 2014** in respect of the estate of **Kibor Arap Talai** (deceased).

[2] It was further the contention of the Applicants that they had severally approached the Respondent for the documents, but that she was adamant in her stance that she could only release the documents to the **Kenya Medical Practitioners and Dentists Board (KMPDB),** or pursuant to a court order. It was against that backdrop that the Applicants filed this Miscellaneous Application, vide the Notice of Motion dated **25 May 2018**. The application was served and was disposed of *ex parte* on **30 July 2018**, upon the Court being satisfied as to service.

[3] Thereafter, the Applicants filed an application for contempt dated **16 May 2019**, seeking to have the Respondent cited for contempt in respect of the orders of **30 July 2018**. That application, along with the Respondent's application dated **4 June 2019** for setting aside the *ex parte* proceedings, were compromised on **27 June 2019** in the following terms:

> **"[1] That the Applicants, namely Nancy Jepkurui Talai and Joshua Talai shall, within 30 days from today's date avail one medical doctor of their choice. The Respondent, Mrs. Gladys Oganda, shall also avail one medical doctor of her choice within the same period of time. The Kenya Medical Practitioners and Dentists Board shall also avail one medical doctor within the same period of time.**
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> **[2] The Respondent, Mrs. Gladys Oganda, shall allow the 3 doctors to access the medical documents she obtained from Market View Clinic to confirm if they are the medical documents for the late Kibor Arap Talai for the period running from 10th January 1995 to 20/10/2009.**
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> **[3] The 3 medical doctors to prepare a detailed report from the treatment notes and medical documents concerning the kind of ailment of the late Kibor Arap Talai.**
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> **[4] The Applicants shall bear the costs of the Doctor from the MPDB and their own doctor. The Respondent shall bear the costs of her own doctor.**
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> **[5] This order to be served on the MPDB immediately.**
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> **[6] Mention on 30/7/2019."**

[4] All indications are that whereas the Applicants complied and availed their doctor and facilitated the attendance of the doctor nominated by the **KMPDB**, the Respondent did not. The impasse necessitated the second Consent dated **24 September 2019**, by which the parties agreed as follows:

[1] That by consent all the medical records in respect of the patients handled by the late Dr. Oganda be availed in court for scrutiny by the parties' respective doctors on the 30/10/2019.

[2] That the Deputy Registrar of the Court shall avail a room where the scrutiny shall take place on 30/10/2019 at 10.00 a.m.

[3] That the doctors of the parties do execute an oath of secrecy and confidentiality in respect of the medical records they will have access to as per this Court's order, before the scrutiny.

[4] The Joint or Individual reports of the doctors to be filed herein within 21 days from 30/10/2019.

[5] This Order be extracted and served on the parties for compliance.

[5] By **30 October 2019**, no progress had been made. Instead, the Respondent instructed **Mr. Ngigi Mbugua** to act for her in place of **Mr. Nyachiro,** and thereby introduced a change of tune from the position taken by her earlier. **Mr. Ngigi Mbugua** addressed the Court on **30 October 2019** questioning the validity of the Consent Orders on the ground that the Respondent was yet to be appointed as the legal representative of her deceased husband; and therefore posited that there was an error apparent on the face of the record in connection with the two Consent Orders to warrant their being set aside. He thus asked for time to put in an appropriate application.

[6] In view of that stance, Counsel for the Applicants filed the instant application for contempt on **1 November 2019**. The application was filed under the inherent powers of the Court as well as **Rule 81.4** of the **English Civil Procedure (Amendment No. 2) Rules. 2012.** They asked for the following orders:

[a] Spent

[b] that the Respondent herein, **Mrs. Gladys Oganda**, be cited for contempt of court, for having disobeyed the Consent Orders made, recorded and issued herein on **24 June 2019** and **24 September 2019.**

[c] That the Respondent be compelled to comply with the said Consent Orders dated **24 June 2019** and **24 September 2019**.

[d] That the Respondent be committed to civil jail for a period of 6 months or such period as the Court may deem just and sufficient for having disobeyed the orders of the Court.

[e] That the Court do impose a mandatory penalty to be paid by the Respondent for disobeying the Consent Orders of **24 June 2019** and **24 September 2019**; and that the Officer Commanding Langas Police Station or the relevant police station with the requisite territorial jurisdiction do execute the orders herein.

[f] That the costs of the application be provided for.

[7] On behalf of the Respondent, **Mr. Ngigi Mbugua** filed Grounds of Opposition in response to the contempt application, contending that:

[a] The Respondent had barely had time to consider and reply appropriately to the said application.

[b] Vide a direction made on **30 October 2019** the Court gave leave to the Respondent to file and serve an application for review of the Consent Orders by **20 November 2019.**

[c] The Respondent is neither the administrator of the estate of the late **Dr. Naboth Oganda** nor is she a doctor carrying on the practice of her late husband.

[d] The Applicants are not intent on following the procedure laid down in the **Medical Practitioners and Dentists Act** for obtaining information from the offices of a deceased doctor;

[e] The proceedings before the Court were commenced pursuant to **Section 89** of the **Civil Procedure Act**, and yet they ought to have been commenced under the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, since both the doctor and the patient are deceased and both estates are in transition.

[f] The Respondent is dissatisfied with the manner in which she was allegedly served with court process and will be requiring to cross-examine the process server who allegedly effected service upon her at **Marriot Hotel.**

[g] The Respondent was not present when the Consent Orders were made and therefore did not endorse the same.

[h] The proceedings as commenced and conducted violate the Respondent's constitutional rights as set out in **Articles 48 and 50** of **the Constitution.**

[8] In addition to the Grounds of Opposition, the Respondent filed a Replying Affidavit sworn by her on **7 November 2019**. She averred therein that, when she became aware of what transpired on **24 June 2019** and **24 September 2019**, she discontinued the services of **M/s Nyachiro Nyagaka & Co. Advocates**. She denied having authorized or endorsed the alleged Consent Orders and therefore asserted that she cannot be cited for contempt in those circumstances. While admitting that she is the widow of the late **Dr. N. A. Oganda**, the Respondent

denied that she is the right person to release the medical records maintained by him as she has not been appointed yet as his personal representative.

[9] The Respondent simultaneously filed her application dated **7 November 2019** praying the following orders:

> **[a]** Spent
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> **[b]** That there be a stay of all the orders made in the instant proceedings and specifically the orders made on **24 June 2019** and **24 September 2019** pending the hearing of the application;
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> **[c]** That the Court be pleased to review, vary or vacate the orders made by the Court with the consent of Counsel on record on **24 June 2019** and **24 September 2019** as there is an error apparent on the face of the record;
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> **[d]** That the Court be pleased to order the cross-examination of the process server who served the application dated **25 May 2019**, one **Kenneth O. Oduor** of P.O. Box 3092 Eldoret, for falsely stating that he served court process upon the Applicant herein at **Marriot Hotel** along the Eldoret/Kisumu Highway;
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> **[e]** That the Court be pleased to scrutinize its records of **24 June 2019** and **24 September 2019** with a view to establishing whether the provisions of **Order 25 Rule 5(1)** of the **Civil Procedure Rules** on the aspect of hearing the parties to a compromise or settlement;
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> **[f]** That upon establishing that the consents were obtained irregularly and without instructions the Court be pleased to set aside the same and order that the respective applications be heard and determined on merit.

[10] The Respondent's application was premised on the grounds that there is an error on the face of the record which needs to be corrected; that she never gave authority to her erstwhile Advocates, **M/s Nyachiro, Nyagaka & Co. Advocates** to record the said consents; and that she has never been invited to Court to endorse the consents either orally or in writing. In her Supporting Affidavit sworn on **7 November 2019**, the Respondent averred that she only became aware of these proceedings through a nephew of hers called **Carey Francis Otieno**, Advocate, and that she was therefore never served with process as purported by the Process Server, **Kenneth O. Oduor**. She annexed the affidavit of **Mr. Otieno**, Advocate, to support here assertions that the initial application was not properly served.

[11] The Applicants opposed the Respondent's application. They relied on the Replying Affidavit sworn by the 1st Applicant on **14 November 2019**, reiterating their stance that the Respondent was duly served with the application dated **25 May 2018;** and that it was on that basis that she instructed Counsel to attend court on her behalf. She also deposed that since it has been demonstrated that the Respondent blatantly disobeyed the Consent Orders, her application is a waste of the Court's time and an abuse of the court process. She relied on her previous affidavits filed herein and urged the Court to dismiss the Respondent's application.

[12] It is necessary to point out at this juncture that, although on **18 November 2019** the hearing date of **4 February 2020** was taken in respect of the three applications dated **16 May 2019, 31 October 2019** and **7 November 2019**, the application dated **16 May 2019** had already been compromised along with the application dated **4 June 2019** and is the subject of the Consent Order dated **27 June 2019**. Hence, the submissions of learned Counsel were confined to the application dated **31 October 2019** filed by the Applicants, and the application dated **7 November 2019** by the Respondent.

[13] In respect of the application dated **31 October 2019, Mr. Jaoko**, learned Counsel for the Applicants submitted that the Consent Orders were clear in terms and provided for compliance within 30 days, which the Respondent ignored. He made reference to the Supporting Affidavit and its annexures including a letter from the Kenya Medical Practitioners & Dentists Board, to demonstrate that the Respondent had no justifiable cause for ignoring the Consent Orders after appointing her own doctor, **Dr. Sokobe**, for the specific purpose of compliance.

[14] As for the application dated **7 November 2019**, it was the submission of **Mr. Jaoko** that **Mr. Nyachiro** who was then on record for the Respondent, had ostensible authority to enter into the impugned Consents on her behalf; and that the Consents Orders cannot be set aside unless there is proof of fraud. In his submission, no fraud was proved. He urged the Court to note that, to the contrary, the Respondent acted on the Consent Order by appointing a doctor and is therefore estopped from challenging the validity of the Consent Orders. **Mr. Jaoko** further urged the Court to note that no affidavit had been obtained from **Mr. Nyachiro** to support the Respondent's assertions and added that there is no requirement in law that the Respondent had to personally endorse the Consent. He relied on the cases of **Mbogo vs. Shah** [1968] EA 93; Kenya **Canners Limited vs Titus Muiruri Doge** [1997] eKLR and **Republic vs. Shinyalu Land Disputes Tribunal & Another** [2005] eKLR, which was extensively referred to by the 1st Applicant in her Supporting Affidavit.

[15] On behalf of the Respondent, **Mr. Ngigi Mbugua** relied on the Respondent's Grounds of Opposition dated **6 November 2019** and submitted that the Respondent has no personal interest in her deceased husband's medical practice other than the earnings thereof. Counsel took the posturing that due process was not followed before the contempt application was made. In particular, Counsel submitted that neither was notice of the Consent Orders given to the Respondent; nor was she served with a Notice to Show Cause as to why she should not be cited for contempt; yet the orders sought have the potential effect of curtailing her constitutional right to liberty. Thus, **Mr. Ngigi Mbugua** urged the Court to put the two applications in perspective and to find merit in the Respondent's application dated **7 November 2019**. He otherwise prayed for the dismissal, with costs, of the Applicant's application dated **31 October 2019.**

[16] I have given due consideration to the two applications, the respective affidavits filed by the parties as well as the submissions made by their Counsel. Since the Respondent's application dated **7 November 2019** seeks to undo the Consent Orders, which form the basis of the contempt application, it is only logical that it be considered first.

The Respondent's application dated 7 November 2019:

[17] The Respondent's application dated **7 November 2019** was filed pursuant to **Articles 19, 20, 21, 22, 23, 25(a) and (c), 28, 29, 31, 47(1) and (2), 48, 50, 159(1), 165(2)(b) and (d)** of **the Constitution of Kenya**. It is also expressed to be brought under **Sections 1A, 1B, 3A and 80** of the **Civil Procedure Act** as well as **Order 44 Rule 1** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. As prayers 1 and 2 are spent, the remaining prayers are:

> **[a]** That the Court be pleased to review, vary or vacate the orders made by the Court with the consent of Counsel on record on **24 June 2019** and **24 September 2019** as there is an error apparent on the face of the record;
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> **[b]** That the Court be pleased to order the cross-examination of the process server who served the application dated **25 May 2019**, one **Kenneth O. Oduor** of P.O. Box 3092 Eldoret, for falsely stating that he served court process upon the Applicant herein at **Marriot Hotel** along the Eldoret/Kisumu Highway;
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> **[c]** That the Court be pleased to scrutinize its records of **24 June 2019** and **24 September 2019** with a view to establishing whether the provisions of **Order 25 Rule 5(1)** of the **Civil Procedure Rules** on the aspect of hearing the parties to a compromise or settlement;
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> **[d]** That upon establishing that the consents were obtained irregularly and without instructions the Court be pleased to set aside the same and order that the respective applications be heard and determined on merit.

[18] The question to pose, in respect of the Respondent's application, is whether sound basis has been made for review or setting aside of the two Consent Orders recorded herein on **27 June 2019** and **24 September 2019**, to pave way for a merit hearing and determination of the application dated **25 May 2018**; and, for purposes of review, **Order 45 Rule 1(1)** of the **Civil Procedure Rules**, amplifies the essence of **Section 80** of the **Civil Procedure Act** and provides that:

> **"Any person considering himself aggrieved-**
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> **(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or**
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> **(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

[19] As stated hereinabove, this matter was commenced by way of a miscellaneous application to enable the Applicants obtain some medical records for use in a Succession dispute. The impugned orders are orders that were made by consent of the parties; and therefore the requirements for review are understandably more stringent. Thus, in **Flora Wasike vs Destimo Wamboko [1988] 1 KAR 625,** it was held that:

> **"It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out."**

[20] As to what would justify the setting aside of a contract, guidance was given in the case of **Brooke Bond Liebig (T) Ltd vs Mallya [1975] EA 266** in which a passage from **Seton on Judgments and Orders, 7th Edition, Vol. 1 p. 124** was quoted with approval thus:

> **"Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."**

[21] The record shows that the parties were represented by their Counsel on both occasions and that they were in full agreement with the terms of the Consents. In particular, the Respondent was represented by **Mr. Nyachiro**, Advocate, and there is no dispute that the said Advocate had instructions at the time to act for the Respondent. There is absolutely no proof of fraud against **Mr. Nyachiro**. All the Respondent had to say was that she never gave authority to her erstwhile Advocates, **M/s Nyachiro, Nyagaka & Co. Advocates** to record the said consents. However, it is now trite that an Advocate has ostensible authority and mandate to compromise a suit or an application on behalf of his client so long as there exist no express contrary instructions by the client. Thus, in **Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd** [1980] eKLR**,** it was held that:

> **"...the making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or an order on one or either of the recognized grounds..." (emphasis added)**

[22] The decision was followed in **Samuel Mbugua Ikumbu vs. Barclays Bank of Kenya Ltd** (supra) wherein it was held that:

"An advocate has general authority to compromise on behalf of his client as long as he is acting *bona fide* and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding." (see also Samuel Wambugu Mwangi vs. Othaya Boys High School (supra)

[23] There was no proof that **Mr. Nyachiro** had express instructions not to compromise; and therefore the Respondent is bound by the position taken by him as her advocate. Likewise, and for the same reason, the contention by the Respondent that she has never been invited to Court to endorse the consents, either orally or in writing, is completely devoid of merit as **Mr. Nyachiro** fully represented her in the crafting and recording of the two Consents. He signed the record in acknowledgement of this fact. It cannot therefore be said that **Order 25 Rule 5** of the **Civil Procedure Rules** was disregarded. In any event, the fact that the Respondent appointed a doctor in compliance with Paragraph 1 of the Consent Order dated **27 Jun 2019** is proof enough that she was fully briefed and was in charge of the situation.

[24] I therefore find no relevance of the constitutional provisions cited by Counsel for the Respondent to the facts hereof. I likewise find no merit in the submission that the consents are against the policy of the Court. I would accordingly find that the Respondent's application dated **7 November 2019** is completely lacking in merit and is for dismissal with attendant costs.

The Applicants' application dated 31 October 2019

[25] The Applicants' Notice of Motion dated **31 October 2019**, basically seeks for an order that the Respondent herein, **Mrs. Gladys Oganda**, be cited for contempt of court, for having disobeyed the Consent Orders made, recorded and issued herein on **24 June 2019** and **24 September 2019.** The obligation to obey court orders was aptly expressed in **Hadkinson vs. Hadkinson** [1952] AllER 567 thus**:**

"It is the plain and unqualified obligation of every person, against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

For, a person 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 question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed."

[26] In similar vein, the rationale behind the obligation to obey was well explicated in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another** [2005] KLR 828, thus:

"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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void."

[27] In line with the foregoing, **Section 5 of the Judicature Act, Chapter 8** of the **Laws of Kenya,** provides that:

(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 such power shall extend to upholding the authority and dignity of the subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court."

[28] Thus, the elements that the Respondent herein needed to prove are:

[a] that the Consent Orders were clear, unambiguous and binding on the 1st Defendant;

[b] that the Respondent had knowledge of or proper notice of the terms of that Order;

[c] that the Respondent has deliberately failed to obey the terms of the Order;

[29] The terms of the Consent Orders were negotiated and presented to the Court by the parties and are explicit enough for purposes of compliance. The parties were fully aware of each other's obligations and while the Applicants had done their part, the Respondent's disobedience made it impossible for the full effect of the Consent Orders to be realized. The belated argument that the Respondent is neither the administrator of the estate of the late **Dr. Naboth Oganda** is untenable. Her own counsel expressly contradicted her position by stating that the deceased's medical practice did not form part of his estate; other than the income therefrom.

[30] Moreover, the argument that the Respondent is not a doctor is no excuse either. Her role was simply to avail the documents to the appointed experts. It is noteworthy too that the Consent Orders incorporated the participation of the Medical Practitioners and Dentists Board; and therefore the Respondent's contention that the Applicants are not intent on following the procedure laid down in the **Medical**

Practitioners and Dentists Act for obtaining information from the offices of a deceased doctor is not only untenable but also belated, in so far as it was raised long after the Consents Orders were negotiated and signed by the two parties.

[31] In **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR,** the Court of Appeal made it clear that:

> **"...this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J in the case of Basil Criticos vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:**
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> **"...the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary."**

[32] In the premises, not much turns on the Respondent's argument that she was personally unaware of the Consent Orders. As has been pointed out herein above, she was represented by Counsel when the Consent was made; and she acted pursuant thereto by appointing a doctor. The bottom-line therefore is that she was fully aware of the order and gave indication of such awareness by acting in partial compliance. In the **Shimmers Plaza Case**, the Court of Appeal went on to state that:

> **"We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:**
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> **"No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as of a right; not as a favour."**

[33] I am therefore satisfied that the Applicants have proved that the Respondent is indeed in contempt of the Consent Order dated **24 September 2019**. The Applicant's application dated **31 October 2019** is therefore meritorious and is hereby allowed and orders granted in respect thereof as hereunder:

[a] that the Respondent herein, **Mrs. Gladys Oganda**, be cited for contempt of court, for having disobeyed the Consent Orders made, recorded and issued herein on **24 June 2019** and **24 September 2019.**

[b] That summons requiring attendance do issue to the said Mrs. Gladys Oganda for purposes of showing cause why she should not be committed to civil jail for contempt of court.

[c] That the costs of the application be borne by the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF MAY, 2020

OLGA SEWE

JUDGE