



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NUMBER 3 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

AND

CABINET SECRETARY FOR TRADE AND INDUSTRIALIZATION.....1ST RESPONDENT

COMMISSIONER FOR COOPERATIVE DEVELOPMENT.....2ND RESPONDENT

AND

KENYA FARMERS ASSOCIATED LIMITED.....1ST INTERESTED PARTY

KINOTI KIRIITHI.....2ND INTERESTED PARTY

BENJAMIN ONKOBA.....3RD INTERESTED PARTY

KIPKORIR MENJO.....4TH INTERESTED PARTY

KIRENGEI KAMAU.....5TH INTERESTED PARTY

STELLA KARANJA.....6TH INTERESTED PARTY

SIMON CHELUGUI.....7TH INTERESTED PARTY

WILLS OLUOCH KASURA.....8TH INTERESTED PARTY

RICHARD MIBEL.....9TH INTERESTED PARTY

SIMON KIPCHUMBA CHEROGONY.....10TH INTERESTED PARTY

AND

TOM LIHRU WANAMBISI.....EX PARTE APPLICANT

CORAM: LADY JUSTICE RUTH N. SITATI

RULING

Background

1. On 7th October 2019, the ex-parte applicant filed an application under **Order 53 Rules 1,2, and 4 of the Civil Procedure Rules** and **Section 8(2),9(1)(b) of the Law Reform Act** seeking *inter alia* leave to commence judicial review proceedings against the respondents for orders of certiorari and prohibition. In a ruling evenly dated, the court ordered *inter alia* leave to the ex-parte applicant to apply for judicial review orders of certiorari and prohibition against the respondents. On 17th October 2019, the court granted further orders *inter alia* that the leave do operate as stay of the intended inauguration of the 2nd to 9th interested parties to assume office of caretaker directors of the 1st interested party or the taking of any further steps to replace the disbanded Board of Directors.

2. The ex-parte applicant filed the substantive application by way of Notice of Motion dated 18th October 2019 seeking for orders THAT:

i. An order of certiorari do issue to bring into this court for purposes of quashing and to quash the respondents' decision of 30th September 2019 of disbanding the Board of Directors of the 1st interested party, the Kenya Farmers Association Limited and of appointing and inaugurating a caretaker Board of Directors to run the affairs and business of the 1st interested party.

ii. An order of prohibition do issue to prohibit the respondents from inaugurating or maintaining in office of the Board of Directors of the 1st interested party, the Kenya Farmers Association Limited, the caretaker team of 9 members comprising the 2nd to 10th interested parties.

3. The application was supported by grounds in the body of the application as well as an affidavit sworn by the ex-parte applicant on 17th October 2019.

4. The 1st interested party replied to the application by way of an affidavit sworn by **James Lesalon Tiampati** on 12th November 2019.

5. In a ruling of the court dated 14th November 2019, the respondents were cited for non-compliance of the court's orders dated 17th October 2019 and further ordered *inter alia* that the stay orders issued on 17th October 2019 applied with equal force to all actions of the respondent including the purported gazette notice number 10384 by the 2nd respondent dated 24th October 2019 and published on 1st November 2019, which was stayed.

6. On 5th December 2019, counsel for the ex-parte applicant moved the court under certificate of urgency and filed a notice of motion application evenly dated, under **section 5 of the Judicature Act** and other enabling provisions of the law seeking *inter alia* that:

1) spent

2) This honourable court be pleased to find that the following persons are in contempt of court:

i. Hon Peter Munya

ii. Geoffrey N. Njang'ombe

iii. Kirengi Kamau

iv. Joyce Nyutu (State Counsel)

v. Kipkorir Menjo

vi. Stella Karanja

vii. Wills Oluoch Kasura

viii. Richard Mibei

ix. Benjamin Onkoba

x. Kinoti Kiriithi

xi. Simon Chelugui

xii. Symon Kipchumba Cherogony

3) The contemnors be committed to jail for six months or such terms as this court shall deem fit to order or each contemnor be fined Kshs. 200,000/- or such sum as this court shall deem fit for disobedience of the orders of court given on the 17th day of October 2019 and orders of the court given on the 14th day of November,2019 in this Kapenguria HC J.R CAUSE NO.3 OF 2019.

4) This honourable court be pleased to grant any other or further orders geared towards protecting the dignity and authority

of the court and the fundamental supremacy of the law.

5) Costs of this application be borne by the respondents.

7. The application dated 5th December 2019 was supported by grounds in the body of the application and an affidavit evenly dated sworn by the ex parte applicant.

8. On the same day, 5th December 2019, it was ordered *inter alia* that the affidavit sworn by James Lesalon Tiampati on 4th December 2019 be deemed as the response of the 1st interested party to the application dated 5th December 2019. The court further ordered that the said application dated 5th December 2019 be disposed of by way of written submissions and that the main application dated 18th October 2019 was to await outcome of the application dated 5th December 2019.

9. The respondents together with their counsel, **Joyce Kinuu** replied to the application dated 5th December 2019 by way of affidavits sworn by all of them on 9th January 2019, though I believe the year indicated was an error and is meant to be "2020". On the same day, the respondents and alleged contemnors filed a notice to raise a preliminary objection

10. The 1st, 2nd, 3rd, 9th and 10th interested parties filed their reply to the application dated 5th December 2019 by way of an affidavit sworn by **Symon K Cherogony**, the 10th interested party herein on 23rd January 2020.

11. As stated before, the application dated 5th December 2019 proceeded by way of written submissions which are on record and is the subject of this ruling.

The ex parte applicant's case and submissions

12. It was the ex parte applicant's case that the orders of the court dated 17th October 2019 were served upon the respondents personally and the Hon, Attorney General on 23rd October 2019; and on the interested parties on 24th October 2019. The ex parte applicant added that the order dated 17th October 2019 was served upon the respondents when the respondents and the interested parties were about to hold a meeting in the office of the respondents in Nairobi. In his affidavit, the ex parte applicant averred that the court order was received by Ms Joyce Nyutu, counsel of the respondents as evidenced by the annexures thereto marked "TLW -1a & b" and; the Attorney General by the annexure marked "TLW -2a & b". The ex parte applicant averred that even after the alleged contemnors were aware of the said court order on 23rd October 2019, the 1st respondent dismissed the court orders as inconsequential quoted him saying "we are in government" and directed the meeting to proceed. The ex parte applicant stated that on 24th October 2019, the respondents gazetted the names of the persons constituting the caretaker board and dissolved the original board of the 1st respondent. The ex parte applicant stated that the alleged contemnors continued conducting business notwithstanding the court's orders which had halted their activities.

13. The ex parte applicant deposed that the court order dated 14th November 2019 was served upon the interested parties on the 18th and 19th November 2019 and on the respondents on 21st November 2019 respectively as evidenced by the annexures thereto marked "TLW -3a,b,c and d"

14. It was the ex parte applicant's submission that he had adequately proved that the respondents were in contempt through the annexures in his supporting affidavit and that the respondents had not challenged the orders of the court given on 17th October 2019 and 14th November 2019 or applied to vary or set them aside.

15. The ex parte applicant further submitted that the application dated 5th December 2019 had been proved to the required standard and that the respondents' actions contravened the court orders given by this honourable court, Mr. Kraido, counsel for the exparte applicant and he urged the court to grant the prayers sought by committing the alleged contemnors to civil jail and/or fine them for being in contempt of court.

16. The ex parte applicant cited various authorities in his submissions in support of his case.

The 1st, 2nd, 3rd, 9th and 10th interested parties' case and submissions

17. **Mr James Lesalon Tiampati** deposed in his affidavit sworn on 4th December 2019, that he is a long serving manager at the 1st respondent and was conversant with the facts of this matter and thus had authority of the 1st respondent to swear the said affidavit. Mr. Tiampati averred that in as much as the court order dated 14th November 2019 was issued in the presence of the state counsel acting for the respondents and even after the order was subsequently served upon the respondents and the interested parties herein, they have continued to disregard, ignore and act in breach of the said orders. Mr Tiampati added that the respondents together with the 2nd to 8th interested parties have continued to hold meetings at the offices of the 1st respondent in sheer impunity as though the orders of the court did not exist. Mr Tiampati deposed that the 2nd to 8th interested parties have continued to threaten and intimidate the Managing Director and staff of the 1st respondent demanding that they ignore and disregard the court orders which orders they admit they are well aware of.

18. Mr Tiampati urged the court to find the respondents and their agents/appointees in contempt for which they ought to be punished. Mr Tiampati added that on 14th November 2019, the respondents herein were granted conditional leave to file and serve their replies only after complying with the foregoing orders which they have not.

19. Mr Tiampati further urged the court to deny audience to the respondents and to strike out any documents filed by them after 14th

November 2019 until they purge their contempt.

20. **Mr Symon K. Cherogony**, the 10th interested party herein deposed that he was the managing director of the 1st interested party and swore the affidavit on 23rd January 2020 on his own behalf and on behalf of the 2nd, 3rd and 9th interested parties, who Mr. Cherogony stated were directors of the 1st interested party. Mr Cherogony stated that he opposed the application dated 5th December 2019 only as against himself, the 2nd, 3rd and 9th interested parties but supported the same as against the other alleged contemnors cited. Mr Cherogony added that he supported the affidavit of Mr Tiampati save only to clarify that the 2nd, 3rd, 9th and 10th interested parties had not in any way contravened or disobeyed the court orders or in any way acted in contempt of court. Mr Cherogony averred that it was actually the respondents and the other contemnors cited who had acted and continued to act in contempt of court by constantly dismissing the court orders and even sought to harass, threaten, intimidate, coerce and/or compel them to ignore and disregard the orders.

21. Mr Cherogony stated that he, together with the 2nd, 3rd and 9th interested parties had been appointed to the impugned caretaker board appointed by the respondents and attended the initial meetings thereafter. Mr Cherogony stated that after the orders of the court dated 17th October 2019 and 14th November 2019 were issued, the 2nd, 3rd, 9th and 10th interested parties became apprehensive about attending meetings and participating in the affairs of the impugned caretaker board, in spite of pressure and threats from the respondents. Mr Cherogony stated that he was the one who was personally served with the orders dated 17th October 2019 and 14th November 2019 on 24th October 2019 and 15th November 2019 respectively and received the same on behalf of the other interested parties.

22. Mr Cherogony deposed that after seeking advice from the 1st interested party's counsel regarding the court orders he was advised that he ought to comply with the same but when he communicated this position to the respondents and the 5th interested party, they all dismissed the said advice and demanded that they should ignore the court orders and continue with the activities of the impugned caretaker board unhindered.

23. Mr Cherogony averred that the respondents' position on the court orders was communicated to them on 4th November 2019 admitting knowledge of the court orders but requiring them to ignore the same. The said correspondences were annexed thereto and marked "SKC4 (a) and (b)"

24. Mr Cherogony also stated that the orders of 17th October 2019 were served upon the interested parties and the respondents just as they were about to get into a meeting but then the 1st respondent told them to ignore the orders with Mr Cherogony quoting him saying "**I am a lawyer myself, and we are Government**".

25. Mr Cherogony stated that after being served with the court orders, together with the 2nd, 3rd and 9th interested parties, they ceased and declined to participate in any further activities of the caretaker board and do not intend to do so unless and until the court orders otherwise.

26. Mr Cherogony averred that he was aware that in spite of the court orders, the respondents and the 5th interested parties but excluding the 2nd, 3rd, 9th and 10th interested parties have continued to purport to convene meetings in sheer impunity and deliberate on the affairs of the 1st interested party.

27. Mr Cherogony reiterated that together with the 2nd, 3rd and 9th interested parties, they have abided by and committed to continue to abide by the orders of the court herein and they have not deliberately or otherwise acted in contravention of the said orders.

28. In their submissions, the 1st, 2nd, 3rd, 9th and 10th interested parties cited a number of authorities including case law in support of their arguments

The respondents' and Joyce Kinuu's (State counsel) case and submissions

29. The 2nd respondent averred that the application dated 5th December 2019 was incurably defective, incompetent and offended mandatory provisions of the **Judicature Act Cap 8 Laws of Kenya and Order 52 Rule 3 of the Rules of the Supreme Court of England** and that the supporting affidavit was full of falsehoods, misrepresentation and hearsay and ought to be dismissed with costs.

30. The 2nd respondent stated that contrary to the allegations by the ex parte applicant and affidavit of service, he has never been personally served with the application dated 7th October 2019 and orders dated 7th October 2019, 17th October 2019 and 14th November 2019 as was directed by the court.

31. It was the contention of the 2nd respondent that the caretaker board was inaugurated into office vide a meeting held on 7th October 2019 and that on 24th October 2019, the caretaker board members' names were gazetted in the Kenya Gazette, the notice taking effect from the date of the appointment, which was 24th September 2019.

32. The 2nd respondent averred that the gazetting was a mere instrument of information to notify the public of the action(s) taken and could not be construed to be what dissolved the board or appointed or inaugurated the caretaker board as these actions were implemented on 24th September 2019 and 7th October 2019 respectively prior to the publication of the said gazette notice

33. The 2nd respondent deposed that by 17th October 2019 when this court issued the orders of stay, non-service thereof notwithstanding, the caretaker board members had already been appointed, inaugurated and were already performing their respective assignments and that "the horse had already bolted" and the order of stay was "**stale**" and "**had already been spent and overtaken by events**". The 2nd respondent

added that the ex parte applicant's counsel knew this and mischievously failed to effect service of the ex parte application dated 7th October 2019 upon the respondents and purposely misled the court

34. It was the 2nd respondent's contention that he acted bonafides and discharged his duties in good faith and in accordance with the law and at no time has there been disobedience of a court order on his part as alleged.

35. The 2nd respondent further deposed that the order dated 14th November 2019 was never served upon him personally and that it would have been practically difficult to implement as the order sought merely to stay a publication of appointments but did not seek to stay appointments made on 24th September 2019 and assumption of office which took place on 7th October 2019. The 2nd respondent added that at the time of issuance of the order dated 14th November 2019, the action sought to be stayed had already taken place and fully implemented and there was nothing left that was capable of being stayed.

36. It was also the 2nd respondent's contention that following the advice by the State Counsel, the application dated 5th December 2019 is bad in law, incompetent and a nullity *ab initio* for the following reasons:

i. That no leave to commence contempt proceedings was ever obtained.

ii. That no leave to enjoin the 1st respondent in these Proceedings was ever sought.

iii. That no statement of facts was filed as mandatorily required by law.

iv. That no mandatory notice of contempt was served upon the Attorney-General.

37. The 1st respondent deposed to more or less similar arguments to those of the 2nd respondent and adopted the same stating in part that he had not been personally served with the orders dated 17th October 2019 and 14th November 2019 or any other order in respect to these proceedings. The 1st respondent denied committing any act of contempt against the said orders and that he together with his officers acted and discharged their statutory duties, functions absolutely in good faith with the sole purpose of streamlining the operations of the 1st interested party with a view to protecting the interests of the over 63,000 members and the public at large who are beneficiaries of services of the 1st interested party.

38. **M/s Joyce Kinuu**, deposed that she was a senior state counsel deployed in the Ministry of Industry, Trade and Co-operatives and adopted the averments of the 2nd respondent. M/s Kinuu stated that the application dated 7th October 2019 and order of even date were never served upon the respondents as was ordered by the court and that the ex parte applicant's counsel misled the court and obtained unfavourable orders without disclosing the obtaining status quo. M/s Kinuu added that had the respondents been served with the said application and order dated 7th October 2019, they would have attended court on 17th October 2019 to offer information on the obtaining status quo and the court would have reached a different conclusion. M/s Kinuu further stated that even after obtaining the orders dated 17th October 2019, the ex parte applicant deliberately failed to serve the said orders upon the respondents on time or at all thereby breaching the directions of the court on the said date.

39. It was the contention of M/s Kinuu that the ex parte applicant's counsel had failed to effect service of all the pleadings upon the respondents which must be regretted and she urged the court to hold the ex parte applicant's counsel liable for disobeying its orders and directions on time or at all.

40. M/s Kinuu further faulted the ex parte applicant's counsel for "whimsical" and "**inconsistence service**" which she said was a deliberate scheme aimed at not only delaying the relaying of information between the Attorney General's chambers and respondents thereby affecting prompt representation in court but also as a ploy affording the ex parte applicant undue advantage through unnecessary oral applications seeking orders outside pleadings hence abuse of the court process.

41. M/s Kinuu stated that the ex parte applicant and his counsel should not continue enjoying orders of this court which they did not deserve because of the blatant falsehoods convoluted and presented by them.

42. M/s Kinuu stated that there was no evidence that either she or the respondents had committed any act of contempt to deserve any punishment by the court and urged the court to dismiss the application.

43. The respondents and M/s Kinuu submitted and cited a number of authorities in support of their arguments.

Issues for Determination

44. Having gone through the pleadings and written submissions by all parties on record and having heard all counsel in their oral summarized submissions, the following are the issues for determination:

a) Whether the application dated 5th December 2019 is incompetent.

b) Whether Hon Peter Munya ,Geoffrey N. Njang'ombe ,Kirengi Kamau, Joyce Kinuu (State Counsel), Kipkorir Menjo, Stella Karanja, Wills Oluoch Kasura, Richard Mibei, Benjamin Onkoba, Kinoti Kiriithi , Simon Chelugui and Symon Kipchumba Cherogony are guilty of contempt of court orders.

c) What are the appropriate orders to be issued by the court

Whether the application dated 5th December 2019 is incompetent

45. The respondents and M/s Joyce Kinuu raised a preliminary point of law that the application dated 5th December 2019 was incompetent based on the grounds:

v. That no leave to commence contempt proceedings was ever obtained.

vi. That no leave to enjoin the 1st respondent in these Proceedings was ever sought.

vii. That no statement of facts was filed as mandatorily required by law.

viii. That no mandatory notice of contempt was served upon the Attorney-General.

46. The court is alive to the fact that the entire *Contempt of Court Act, 2016* was declared unconstitutional by **Chacha Mwita J** in a judgment delivered in the case *Kenya Human Rights Commission v Attorney General & Another [2018] eKLR* on 9th November 2018. This would mean that the applicable law is that which was operative before the enactment of the Contempt of Court of Act which is the English law under **Rule 81.4 of the English Civil Procedure Rules**, (See the Court of Appeal in *Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR* and in *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR*)

47. The English law on committal for contempt of court was applied by virtue of **section 5(1) of the Judicature Act** which provides 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.”

48. In the case of in *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR(supra)* it was held that:

“38. This section was repealed by section 38 of the Contempt of Court 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, 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.

39. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

*40. This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in *Nyamogo & Another v Kenya Posts and Telecommunications Corporation*, (1994) KLR 1, and *Ochino & Another v Okombo & 4 others* (1989) KLR 165 in this respect.*

*41. It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in *Kenya Tea Growers Association vs Francis Atwoli & Others*, Nairobi High Court Constitutional Petition No 64 of 2010, *Husson v Husson*, (1962) 3 All E.R. 1056, *Ronson Products Ltd v Ronson Furniture Ltd* (1966) RPC 497, and *Davy International Ltd vs Tazzyman* (1997) 1 WLR 1256 .*

*42. As regards culpability, the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. The element of contumacy, which requires flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. See in this respect the English House of Lords decision in *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* (1973) AC 15.*

*43. In addition, it was held in *Mwangi H.C. Wangonde vs Nairobi City Commission*, Nairobi Civil Appeal No. 95 of 1998 that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor’s culpability.”*

49. The Court of Appeal, in the case of *F.A.M V H.S.S [2008] eKLR*(S. E. O. BOSIRE, E. O. O’KUBASU,E. M. GITHINJI JJA) held as follows:

“Since the jurisdiction of the High Court and this Court to punish for contempt is by reference derived from the jurisdiction of the High Court for Justice of England the applicable procedure is the English procedure i.e. Order 52 RSC) (see National Hospital Insurance Fund Board of Management vs. Boya Rural Nursing Home Ltd, Kisumu Civil Appeal No. 46 of 2005 (unreported). The rules require that where the contempt is not committed in the face of the court, the applicant must first apply ex parte for leave to make application for committal and thereafter upon obtaining leave, make an application for committal by notice of motion.”

50. In the case of *Cecil Miller v Jackson Njeru & Another [2017] eKLR* that was cited by the 1st, 2nd, 3rd, 9th and 10th interested parties, L. Njuguna J held that:

“As to whether leave is necessary before filing of contempt of court proceedings, the rules of Supreme Court made under the Supreme Court of Judicature Act, 1973 provided the procedure of commencing the contempt of court proceedings. Under the said procedure, 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, but following the implementation of the famous Lord Wolf’s:

“Access to justice Report 1996” the Rules of the Supreme court of England are gradually being replaced with the Civil procedure Rules, 1999. In the year 2012 the Civil Procedure Rules 2012 come into force and PART 81 thereof effectively replaced order 52 RSC in its entirety. PART 8 (Applications and proceedings in relation to contempt of court”

provide different procedure for four different forms of violations.

Rule 81:4 relates to committal for breach of a judgment order or undertaking to do or abstain from doing an act.

Rule 81:11 committal for interference with the due administration of justice. 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.

In the case of Christine Wangari Gachege Civil Case No 456 of 2011, the court of Appeal correctly pointed out that leave now called “permission” is not required where committal proceedings relate to a breach of a Judgment, order or undertaking. However, leave is still a requirement for applications under Rules 81:12 and 81:17 cited above. I concur with that finding by the Court of Appeal.”

51. In the instant application, and more so with regard to the order of the court dated 14th November 2019, the court noted that the respondents had no intention of obeying the orders issued by the court on 17th October 2019 and that the conduct on the part of the respondents was not being taken lightly by court since they ought to lead by example when it comes to obedience of court orders. From this, it can be said that contempt flew and appeared to be committed in the face of the court and for this reason alone, it was not mandatory for leave to be sought to commence contempt proceedings against the alleged contemnors. Furthermore, and as was stated by the Court of Appeal in *Christine Wangari Gachege Civil Case No 456 of 2011(supra)* leave is not required where committal proceedings relate to a breach of an order. To this end, this ground by the respondents fails and is accordingly dismissed.

52. On the ground that no statement of facts was filed by the ex parte applicant as required by the rules of procedure, the Court of Appeal, in the case of *Freight in Time Limited v Image Apparels Ltd [2015] eKLR (WARSAME, SICHALE & KANTAI, JJ.A)* held that while the procedure contained in *Order 52 of the Rules of the Supreme Court(RSC)* provided a procedure to be used in Kenya, it must be remembered that the purpose for the power of committal was to be used for upholding the authority and dignity of the courts, the subordinate courts included. The appellate court was in agreement with the learned trial judge in that case that the filing of an application by way of a Notice of Motion together with a supporting affidavit as opposed to a statement of facts did not render the application fatally defective as contempt of court application arose out of a disobedience of court orders, and was intended to ensure that the dignity of the court was upheld.

53. In the instant application, I am in agreement and bound by the court of appeal in holding that in as much as the ex parte applicant did not file a statement of facts and rather filed a supporting affidavit , this did not render the application fatally defective. This ground by the respondents cannot thus make the application incompetent. The said ground is also dismissed.

54. On the ground that no notice of contempt was served upon the Attorney General, and having found that leave was not necessary to be sought in the instant proceedings since contempt happened in the face of the court and was against an interim order rather than a judgment, the same can be said of the notice to the Attorney General. *Order 52 Rule 2 of the Supreme Court of England* provides that the Crown Office (the Attorney-General in Kenya’s case) ought to be served with the notice of the application for leave. Now that I have found and hold that the application for leave was not necessary, it follows that no notice could thus be given to the Attorney General in the absence of the application for leave. This ground by the respondents cannot therefore stand and dismissed.

55. The other issue that touches on the ex parte applicant’s application’s competence is the issue of personal service of the order. As has been demonstrated hereinabove, personal service of orders and a penal notice is a requirement in contempt of court proceedings unless the court dispenses with that requirement under *rule 81.6 of the English Procedure Rules,1999*. Exceptions to that rule are found in *Rule 81.8* to the effect that personal service will be dispensed with if the court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the court thinks it is just to dispense with service(Also see the Court of Appeal in *Woburn Estate Limited v Margaret Bashforth [2016] eKLR, MAKHANDIA, OUKO & M’INOTI, JJ.A)* It has also been held that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice.

56. The question that falls for determination is whether the alleged contemnors were personally served with the orders of the court dated 17th October 2019 and 14th November 2019 and even if not, whether they were aware or had personal knowledge of the said orders.

57. From the record, on 4th November 2019, one Dennis Wabwire, Senior State Counsel and on behalf of the Attorney General filed a memorandum of appearance dated 23rd October 2019 to appear on behalf of both respondents. On 14th November 2019, one M/s Chebet held brief for the said Denis Wabwire and she did not oppose the submission of Mr. Kraido, counsel for the ex parte applicant that all parties had been duly served. It is for this reason that the court cited the conduct of the respondents as disobeying the orders of the court having been satisfied that they were duly served.

58. A perusal of affidavit of service of one Warren Chemai, sworn on 12th November 2019 and marked “TLW -2(a)” indicates that on 23rd October 2019, the Attorney General was served with the court order dated 17th October 2019 in their chambers in Eldoret at KDVA Plaza, 9th floor, room 908, civil registry; the same physical address indicated by the said David Wabwire in the Memorandum of Appearance. The Court of Appeal, in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR* held that “*There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him to report back to the client all that transpired in court that has a bearing on the clients’ case*”. The appellate court further referred to the decision in the Canadian case of *Bhatnager v Canada Minister of Employment and Immigration [1990] 2 SCR.217*, where the Canadian Supreme Court held that a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed.

59. The record indicates that on 14th November 2019, when the even dated order was delivered, the respondents’ counsel, one M/s Chebet was present. It is thus my considered view that the order dated 17th October 2019, was duly served on the respondents as the same was served upon their counsel on record on 23rd October 2019. I also find and hold that there was constructive knowledge of the order on the respondents’ part. The same can be said of the order dated 14th November 2019 which was made in the presence of the respondents’ counsel. It was the duty of the respondents’ counsel to report to their client on the progress of the case and the happenings of court. Furthermore, the letter of the 2nd respondent dated 4th November 2019 indicates that he was aware of the court order dated 17th October 2019. In sum, it is my finding and holding that the respondents had personal knowledge of the court orders dated 17th October 2019 and 14th November 2019 and that the same were duly served upon them.

60. The same can be said of the interested parties who have not disputed that the said orders were served upon them and received by the 10th interested party on their behalf. The concerned interested parties did not want to obey the court orders because they were “**in Government.**”

61. In the premises, it is my finding that the ex parte applicant’s application dated 5th December 2019 is competent and properly before the court.

Whether Hon Peter Munya ,Geoffrey N. Njang’ombe ,Kirengei Kamau, Joyce Kinuu (State Counsel), Kipkorir Menjo, Stella Karanja, Wills Oluoch Kasura, Richard Mibei, Benjamin Onkoba, Kinoti Kiriithi , Simon Chelugui and Symon Kipchumba Cherogony are guilty of contempt of court orders.

62. At this point in time, there is no dispute that the respondents and the interested parties were all duly served and had knowledge of the court orders dated 17th October 2019 and 14th November 2019, the only question is whether the aforementioned persons are guilty of contempt for disobeying those orders.

63. The respondents’ contention is that the court orders were overtaken by events and there was ‘nothing to stay’ as the caretaker board had already been inaugurated. The respondents admit and do not dispute that the activities of the said caretaker board continued even after issuance of the two court orders.

64. The order of the court dated 17th October 2019 stated in part, “*staying the intended inauguration of the 2nd- 9th interested parties from assuming office of caretaker directors of the 1st interested party or taking any further steps to replace the disbanded Board of Directors....*”. Even with such a clear order, the respondents took further steps and ensured that the 2nd – 9th interested parties were gazetted as the caretaker directors, which was a direct affront of the court’s order which explicitly forbade such steps. I cannot imagine of another blatant disregard of a court order than this. I refuse to buy the respondents’ contention that the gazetting happened in a robotic manner and that there was ‘**nothing they could do**’ or that ‘**their hands were tied**’. In my considered view, the gazetting was not only deliberate but disobedient as well and if they were really keen on obeying the orders of the court, they could have stayed the gazetting of the caretaker directors or even stopped any further meetings of the same, until further orders of the court, but they did not. Even after the order of 14th November 2019 that extended the stay to the purported gazetting, the respondents did not demonstrate that any steps were taken by them to revoke the said gazette notice in light of the court order or issue any communication suspending meetings of the caretaker board until further orders of the court. The disregard of the court is further evident from the letter of the 2nd respondent dated 4th November 2019 where he tells the 1st respondent’s chairman that they were “to carry on with the mandate given to you until you get further directions or instructions from this office”. Not the court, his office. This is quite telling from the 2nd respondent.

65. It is my further considered view that, if the respondents were dissatisfied with how the orders of the court were framed they ought to have sought a review of the same or appealed the orders to have them either varied or set aside. As **Romer LJ** in *Hadkinson -v- Hadkinson (1952) P 285 at 288* held,

“It is 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” (Emphasis added).

66. The Court of Appeal in *Freight in Time Limited v Image Apparels Ltd [above]* similarly cited the same case of *Hadkinson V. Hadkinson [1952] 2 All ER 567* where it was held in part that:

“A party who knows of an order, whether null and void, 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 and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed”.

67. It is not an excuse for a party to disobey or disregard an order because they feel that the order is irregular or defective or that a party is undeserving of the order. A party must comply with the order, no matter what they think of such an order. There was no attempt by the respondents to set aside or vary the said orders of the court and such, the orders remained in force and undischarged and they were bound to obey them. In the foregoing, I have little difficulty finding the respondents, **Hon Peter Munya** and **Geoffrey N. Njang’ombe** knowingly and willfully disobeyed the orders of the court dated 17th October 2019 and 14th November 2019 and find them to be in contempt of the said orders. **Section 56 of the Advocates Act** provides as hereunder:

“Nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the judges of the Court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.”

68. The said contempt by the respondents was aided by their counsel, **Joyce Kinuu** who despite knowing better, advised them to disobey the orders of the court. I also find her to be in contempt of the court’s orders for misadvising and deliberately misleading the respondents to disobey the court’s orders. There was an admitted error on the face of the record giving Joyce Kinuu’s name as Joyce Nyutu. That misspelling is excused by the court because for all intents and purposes both names denote one and the same person, Joyce Kinuu.

69. The 2nd, 3rd, 9th and 10th interested parties, that is **Kinoti Kiriithi, Benjamin Onkoba, Richard Mibei and Simon Kipchumba Cherongony** respectively denied disobeying the court’s orders and stated that they stopped attending the meetings of the caretaker board as soon as they had knowledge of the court’s orders. This has not been challenged by the ex parte applicant and the respondents and in any case, I do not find any evidence to suggest disobedience of the orders on their part.

70. On the other hand, there is evidence that the 5th interested party, that is **Kiringei Kamau** continued the activities of the caretaker board in disregard of the court’s orders and this remains uncontroverted.

71. There was no response from the 4th, 6th 7th and 8th interested parties that is, **Kipkorir Menjo, Stella Karanja, Simon Chelugui and Wills Oluoch Kasura** and the evidence that they continued to attend meetings and participate in the activities of the caretaker board during the subsistence of the court’s orders which they were aware of remains unchallenged. To this end, I find them to be in contempt of the court’s orders.

72. In sum, I find that **Hon Peter Munya, Geoffrey N. Njang’ombe, Joyce Kinuu, Kipkorir Menjo, Stella Karanja, Simon Chelugui and Wills Oluoch Kasura** to have knowingly and willfully disobeyed this court’s orders dated 17th October 2019 and 14th November 2019 respectively. They are therefore all in contempt of the said orders.

What are the appropriate orders to be issued by the court

73. Having found **Hon Peter Munya, Geoffrey N. Njang’ombe, Joyce Kinuu, Kipkorir Menjo, Stella Karanja, Simon Chelugui and Wills Oluoch Kasura** to be in contempt of the court’s orders, the final and most important issue is what is the appropriate punishment in the circumstances.

74. In deciding what sanction to mete out to the above mentioned contemnors, this Court must consider the need to maintain the rule of law and to ensure that the authority and the dignity of our Courts are upheld at all times with a view to stamping the Court’s authority and upholding the values and principles of governance as enshrined in Article 10 of the Constitution. (See the holding of G. V Odunga J in **Miguna Miguna v Fred Matiang’i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR**).

75. **The High Court (Organization and Administration) Act** which was passed in 2015 now expressly donates to the High Court the power to punish for the disobedience of its orders. Section 36(1)(b) and (3) provides as follows:

“36. (1) A person who –

.....

b) willfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;

.....

(3) A person who commits an offence under subsection (1) shall, on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both.”

76. From the above provision, the punishment for contempt is capped and the court can only impose a punishment within the bounds of that provision. The fact that the respondents are public and state officers means that they must have a higher sense of duty in ensuring compliance

with court orders than the ordinary citizens of this country, and they should be at the forefront in respecting the rule of law and the Constitution as a whole. To this end, I hereby impose a fine of Kshs. 100,000/-(One hundred Thousand Shillings) against **Hon Peter Munya and Geoffrey N. Njang'ombe** to be paid within seven (7) days of this ruling, failure to which, the said contemnors shall be arrested and jailed for five (5) days.

77. For the other contemnors, that is **Joyce Kinuu, Kipkorir Menjo, Stella Karanja, Simon Chelugui and Wills Oluoch Kasura** they are each to pay a fine of Kshs. 50,000/-(Fifty thousand shillings) within 7 (seven) days from the date of this ruling failure to which, they shall be arrested and imprisoned for a period of 5 (five) days.

78. Finally I order, the respondents to immediately revoke the gazette notice number 10384 by the 2nd respondent dated 24th October 2019 and published on 1st November 2019, failing which they shall pay a further fine of Kshs.100,000/- (one hundred thousand shillings) in default to be imprisoned for a further period of five (5) days.

Conclusion and Disposition

79. In conclusion, I find and hold that the respondent's objection to the ex parte applicant's application dated 5th December 2019 lacks merit and the same be and is hereby dismissed. The said application, which is properly before this court be and is hereby allowed in terms of the holdings in paragraphs 76, 77 and 78 of this ruling.

Ruling delivered, dated and signed in open court at Kapenguria on this 19th day of May, 2020.

RUTH N. SITATI

JUDGE

In the presence of

M/S Sugut for Kraido and Magana for ex parte applicant and 1st interested party

Mr. Lowasikou for Odongo for respondents and 1st, 2nd, 3rd, and 4th alleged contemnors

Nonappearance for 1st – 3rd, 9th, 10th IPS and 8th, 9th, 10th and 12th contemnors

Juma – court assistant