REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

HCCC NO. 2 OF 2014

WENDANO MATUU CO LIMITED.....1ST PLAINTIFF/APPLICANT

STEPHEN NDAMUBUKI MULI.....2ND PLAINTIFF/APPLICANT

ONESMUS MUISYO KIMATU.....3RD PLAINTIFF/APPLICANT

-VERSUS-

JOSHUA KIMEU KIOKO.....1ST DEFENDANT/RESPONDENT

JAMES KIOKO KIVUVO.....2ND DEFENDANT/RESPONDENT

JOHN BOSCO NDINGA.....3RD DEFENDANT/RESPONDENT

SAMUEL MWANZA NZIOKA.....4TH DEFENDANT/RESPONDENT

JUVENALIS MUSYOKI KAVITA.....5TH DEFENDANT/RESPONDENT

MANGU NGOLO.....6TH DEFENDANT/RESPONDENT

ROSE NDANU MUTUA.....7TH DEFENDANT/RESPONDENT

PHILIP MULI MUNYAKA.....1ST INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion dated 24th June, 2014, the plaintiffs herein seek the following orders:

a) That pending the hearing and determination of the application herein the applicants be granted leave to cite the defendant for contempt of court.

b) That the defendants be summoned to court in person to show cause why they should not be punished for disobeying the court orders hereof.

c) That the defendants be cited for contempt of court having failed to comply with the court orders of 20th day of May 2014.

d) That the defendants be committed to civil jail forthwith.

e) That the costs of this application be borne by the respondents.

2. The facts of this case were that on 19th May, 2014, an order was given by this Court in the presence of the advocates for the defendants in open court which orders restrained "the defendants, employees and or agents from planning, attending and or holding any Extra-ordinary and Annual General Meetings of the 1st plaintiff pending the hearing and determination of the application herein or further orders of the court pending hearing of the inter partes on 25/6/2014". The said order was issued on 20th May, 2014.

3. The only dispute arising from both the replying affidavit and the oral evidence which arose from the cross-examination was whether the said order was duly served on the Defendants.

4. It was however contended that despite the foregoing, the defendants bluntly disregarded the said orders by holding the extra-ordinary meeting on 22nd May, 2014 to dispose of the resources of the 1st plaintiff. It was therefore the Plaintiffs' case that it was very disrespectful for the defendants to ignore the said court orders.

5. In support of the said submissions the Plaintiffs relied on **Hon. Mr. Justice J. E. Gicheru's** article titled ***Independence of the Judiciary: Accountability and Contempt of Court*** published in the Kenya Law Review (2007) Vol. 1:1 for the position that the power to punish for contempt of court is inherent to the constitution of the court as an adjunct to the judicial function. They also relied on the decision of **Wilmot J**. in **R v. Almon (1765) Wilm. 243 at p.254** cited in **Borrie and Lowe on Contempt, at p. 319)** where he said that:

> **"The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice.''**

6. Reliance was also placed on ***Oswald on Contempt of Court*** 2nd ed. (1895) at pp. 10 and 11 where the author states that:

> ***"There is probably no county in which Courts of law are not furnished with the means of vindicating their authority and preserving their dignity by calling in the aid of the executive in certain circumstances without the formalities usually attending a trial and sentence. Of this the simplest instance is where the judge orders the officers to enforce silence or to clear the court.***

7. According to the Plaintiffs, the editors of ***Borrie and Lowe's Law of Contempt*** 2nd ed. 1983 observe that:

> **"The rules embodied in the law of contempt of court are intended to uphold the effective administration of justice. As Lord Simon said in A-G v Times Newspapers Ltd they are the means by which the law vindicates the public interest in the due administration of justice. The law does not exist, as the phrase 'contempt of court' might misleadingly suggest, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of the parties or litigants…Contempt of court plays a key role in protecting the administration of justice. It is an impotent adjunct to the criminal process and provides the final sanction in the civil process."**

8. It was submitted that for a long time, the jurisdiction to punish for contempt in Kenya has been by virtue of Section 5 of the ***Judicature Act***, which is similar to that of the High Court of Justice in England, and section 63(c) of the ***Civil Procedure Act***. In this respect the plaintiffs made references to the said

paper by the former Chief Justice where he stated that:

> ***"The English law that we are obliged to apply has a Contempt of Court Act of 1981 which supplements its common law contempt of court offences. A question may then arise whether the law applicable in Kenya is the common law before the enactment of the Contempt of Court Act, 1981 or the law as it exists today. Section 5 of the Judicature Act appears to import the law as it exists and is applied at the time an application is made as it 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. For the sake of upholding the sovereignty of our State and Parliament, section 5 of the Judicature Act should be repealed and replaced by a substantive enactment on Contempt of Court Act of Kenya. I welcome discussions and contributions on this proposal."***

9. In the Plaintiff's view, it would appear that Parliament heeded the former Chief Justices' sentiments aforesaid as on 23rd December 2016 Kenya the President assented to the ***Contempt of Court Act No. 46 of 2016*** with the commencement date thereof being 13th January 2017 whose objective was to define and limit the powers of courts in punishing for contempt of court and for connected purposes. As expected, section 38 of the said ***Contempt of Court Act*** amended the ***Judicature Act*** by deleting Section 5 thereof. However, the applicants submitted that it is instructive to note that section 36 of the ***Contempt of Court Act*** states *inter alia* that the Act shall be in addition to and not in derogation of other laws relating to contempt with the proviso that the said Act shall supersede any other written law relating to contempt of court. The Plaintiffs opined that this is particularly important because a perusal of the said Kenyan ***Contempt of Court Act*** reveals that its provisions are not as comprehensive and instructive as other contempt of court laws in other jurisdictions such as the ***Contempt of Court Act of 1981*** in England. This is particularly in respect to civil contempt.

10. As regards the issue of personal service the plaintiffs referred to the decision of **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR** where the Court of Appeal expressed itself as hereunder:

> **"On the other hand however, 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 the 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"**(Emphasis added).
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> **This position has been affirmed by this Court in several other cases including the Wambora case (supra)…It is important however 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. The threshold is quite high as it involves possible deprivation of a person's liberty. This standard has not changed since the old celebrated case of *Ex parte Langley 1879, 13Ch D. 110 (C.A)*, where Thesiger L.J stated as follows. at p. 119:**
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> > **"...the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made" And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that**

there was such a notice ought to prove it beyond reasonable doubt."

11. In view of the foregoing the Applicants submitted that the Respondents had notice of the order of this Honourable Court given on 19th May 2014 as their duly authorized Counsel on record was present in Court when the said order was given. In this regard the Plaintiffs relied on the ***Black's Law Dictionary***, 9th Edition which defines notice as follows:

> ***A person has notice of a fact or condition if that person- Has actual knowledge of it;***
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> ***Has received information about it; Has reason to know about it; Knows about a related fact;***
>
> ***Is considered as having been able to ascertain it by checking an official filing or recording.***

12. It was therefore submitted that knowledge of the order of this Honourable Court given on 19th May 2014 by the Advocate for the Respondents suffices for purposes of contempt proceedings and reliance was placed on **Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 6 Others [2014] eKLR** where a three judge bench of **Hon. Ong'udi, J**, **Hon. Githua J** and **Hon. Olao J** held as follows:

> **"270. We are alive to the 5th and 6th Respondents submissions that a finding on disobedience of court orders cannot be made unless there is evidence of personal service. For this proposition Mr. Njenga relied on the holding by Lenaola J in the case of Kariuki & 2 Others v Minister for Gender, Sports, Culture and Social Services & 2 Others (Supra) where he expressed himself in the following terms;**
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> > **"....But in our law, service is higher than knowledge and since the service here was frustrated....I shall hold in accordance with the existing law that there was no service"**
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> **271. In our view, that was the law then, which has since changed. The law as it stands today is that knowledge supersedes personal service. In support of our position, we cite the case of Kenya Tea Growers Association v Francis Atwoli & 5 Others Petition No. 64 of 2010 where Lenaola J opined as follows;**
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> > **"In the case before me, I am more than satisfied that even at the higher level beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the court order had stopped it. He went further to interpret it as made without jurisdiction and that only the workers court (Industrial Court) had Jurisdiction to determine the matter. He did not do so once but on a number of occasions as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding"**
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> **272. Further in Basil Criticos v Attorney General & 8 Others (2012) e KLR while referring to the above quote in Kenya Tea Growers Association Case (Supra), the Lenaola J stated as follows in regard to service of court orders;**
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> > **"The point above is that 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. That should be the correct legal position and I subscribe to it".**
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> **273. We are in agreement with the Learned Judge. If a party can prove that there was knowledge of court orders then in our view that would be sufficient to form a basis for the**

finding of contempt of court orders. That being the case, we now pause to answer the question whether the 5th and 6th Respondents had knowledge of Court orders as at 28th January 2014when the motion for removal of the 1st Petitioner was deliberated upon."

13. In the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & Another [2014] eKLR**the, it was submitted that the Court of Appeal re-affirmed that the requirement for personal service in contempt of court proceedings had since changed. In the said case the Court of Appeal while upholding the decision in **Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 6 Others 2014] eKLR** stated as follows:

"The trial court was correct in holding that the law as then was in contempt of court had since changed; the law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings."

14. It was contended that the Court of Appeal in the said case of **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR** held the same view when it posited thus:

"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. 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/her to report back to the client all that transpired in court that has a bearing on the client's case.

This is the position in other jurisdictions within and outside the commonwealth. In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in Bhatnager v. Canada (Minister of Employment and Immigration), [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that: -

> **"In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Minister's of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister." (Emphasis by underline)**

The Court went on to state that;

> **"On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt....Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved.(See Avery v. Andrews(1882) 51LJ Ch. 414) (Emphasis by underline)**

In United States v. Revie 834 F.2d 1198, 1203 (5th Cir. 1987) the court held that the defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order."

15. In the Plaintiffs' view, the duty to obey the law by all individuals is paramount in the maintenance of

the rule of law, good order and the due administration of justice and as stated by **Romer, L.J.** in **Hadkinson –vs- Hadkinson, (1952) ALL ER 567,**

> **"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. Lord Cottenham, L.C., said in Chuck –vs- Cremer (1) (1 Coop. temp.Cott 342):**
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> > **"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed."**

16. Reference was also made to the Court of Appeal decision in **Refrigeration and Kitchen Utensils Ltd. –vs- Gulabchand Popatlal Shah & Another; Civil Application No.39 of 1990**:

> **"... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times."**

17. Again the Court of Appeal in the case **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR** had this to say in conclusion:

> **"Unfortunately what we have now is persons both ordinary mortals and persons in authority treating Court orders with unbridled contempt with blatant impunity. Was the respondent one such person? Unfortunately the answer to this question is in the affirmative. The order was made in presence of counsel for the respondent who as stated earlier must be presumed to have informed the respondent of the same. He went ahead and transferred the property before the due date of the judgment seemingly impatient to have this matter concluded once and for all. He acted in clear contempt of this Court. Government institutions, State officers, banks, and all and sundry are enjoined by law to comply with Court orders. We must deprecate in the strongest terms possible the worrying trend in this country where court orders are treated with tremendous contempt by persons and institutions which think wrongly of course, that they are above the law. 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 a right; not as a favour''.***
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> **The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy .We think we have said enough to send this important message across."**

18. It was submitted that in the present case not only was the Counsel for the Respondents present in Court when the orders of this Court were given on 19th May 2014, the said orders were subsequently served on the said Counsel and the 1st Respondent before the impugned meeting of 22nd May 2014.

19. To the Plaintiffs, now that it is evident that the Respondents had due notice of the order aforesaid by virtue of due service by the process server and/or knowledge of the same by virtue of their Counsel having been present in Court when the said order was given, the issue that this Court should now address is whether the Respondents disobeyed the order of this Honourable Court given on 19th May 2014. They submitted that the Respondents blatantly and deliberately disobeyed the order of this Court given on 19th May 2014 which order was explicit in its terms and the extent of the prohibition therein. The order *inter alia* restrained the Defendants from planning, attending and or holding any extra ordinary and annual general meeting of the 1st Plaintiff Company pending the hearing and determination of the application or further orders of the court. At paragraph 13 of the Respondents Further Affidavit sworn by the 1st Respondent on 30th October 2017 and filed on the same day aforesaid, the Respondents confirm that indeed there was a special annual general meeting that was held on 22nd May 2014. Minutes of the said meeting as annexed thereto confirm that the 1st Respondent was the Chairman and further that the said meeting was convened pursuant to the notice published in the *Daily Nation* Newspaper on 30th April 2014. The said notice was signed by the same Chairman, **Joshua Kimeu Kioko**, the 1st Respondent herein and one of the Defendants expressly restrained from planning, attending and or holding any extra ordinary and annual general meeting aforesaid. The same notice of 30th April 2014 was the subject of the Applicants Notice of Motion Application filed on 8th May 2014 that gave rise to the orders of 19th May 2014 aforesaid. The Respondents Further Affidavit filed on 30th October 2017 aforesaid at paragraph 13 thereof confirms that the said illegal meeting attended and held in contravention of the orders of this Honourable Court passed a resolution purportedly mandating the Board of Director to sell part of the 1st Applicant Company's land.

20. It was submitted that this resolution was the product of an illegal meeting held in brazen contravention of a Court orders and it therefore falls that it is null and void *ab initio.*

21. It was in any case submitted that even if the fact of the Notice of Motion Application dated 8th May 2014 and the order thereof was not brought to their attention until 30th May 2014 as they alleged, the fact of the order of this Court was brought to the attention of the Respondents long before they implemented the resolutions passed at the impugned meeting of 22nd May 2014. Having learnt of the existence of the said order prohibiting the said impugned meeting and having had notice that the said meeting was held in contravention of the order thereby impeaching any resolution made thereon, the Respondents neither put on hold the implementation of the resolutions thereof nor approached the court to regularize their action and seek the setting aside and or variation of the order of this Court. They instead went ahead and implemented the said resolution including selling off the 1st Applicant Company's property with Title Number Donyo Sabuk/Kiboko Block 1/1812 to **Canon Aluminium Fabricators Limited**, the 2nd Interested Party herein, as confirmed in the Application filed herein on 28th September 2017 oblivious of the order of this Honourable Court aforesaid.

22. In conclusion, the Plaintiffs submitted that under section 5(b) of the ***Contempt of Court Act 2016***, this Honourable Court has the requisite jurisdiction to punish for contempt of court and as was stated earlier herein by the Court of Appeal in **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR,** the courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre as this would amount to abdication of our sacrosanct duty bestowed on us by the Constitution.

23. As to the effect of the Respondents' failure and or refusal to obey the orders of this Court given on 19th May 2014, the Plaintiffs relied on **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others 2014] eKLR** where the Court held as follows:

> **280. On the effect of disobedience of court orders, we cannot put it better than the Court did in Hadkinson v Hadkinson (1952) 2 ALL ER 211 where it was stated as follows;**
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> **"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. 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 be obeyed. Such being the nature of this obligation, two consequences will in general follow from its breach. The first is that anyone who disobeys an order of the Court is in contempt of Court and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt."

281. We however find the reasoning in Clarke and Others v Chadburn& Others (1985) 1 ALL ER (P.C) 211 most attractive in regard to our instant case. In this case it was held as follows;

"An act done in wilful disobedience of an injunction or court order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others. I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Wilful disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done....but the legal consequences of what has been done in breach of the law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them, even if the Defendants thought that the inJunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it".

282. We are in agreement with the above authorities, to the effect that anything done in disobedience of court orders is null and void ab initio and is a nullity in law. Therefore the 6th Respondent having proceeded to pass a resolution for the removal of the 1st Petitioner from office in defiance of court order means that the resolution was a nullity. It is like that the resolution was never passed in the first place. In the circumstances, there was no valid resolution which could have been forwarded to the Speaker of the Senate for action under Section 33(2) of the Act. The subsequent actions of the Senate are a nullity including the decision to remove the first Petitioner from office."

24. This Court was similarly urged to find that the resolution passed at the illegally convened and held meeting of 22nd May 2014 and any transaction entered into pursuant thereof is a nullity and void *ab initio.* Further in light of the Respondents brazen disobedience of the orders of this Honourable Court, and thereafter the wilful refusal to purge the said contempt by putting on hold the implementation of any resolution obtained at the illegally convened, this Honourable Court ought to exercise its discretion and refuse to hear the Respondents any further until the contempt is purged and *inter alia* the sale of the 1st Applicant Company's property is halted and/or nullified forthwith. In this regard the Plaintiffs cited the Court of Appeal in **A.B & another v R.B [2016] eKLR** where it stated as follows:

"The reason why, depending on the circumstances of each case, the court must retain the

discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened. The Constitutional Court of South Africa, in Burchell v. Burchell Case No 364/2005 underlined the importance to the rule of law, of compliance with court orders in the following terms:

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

In the application before us, there are orders issued by the High Court and affirmed by this Court more than six months ago directing the applicants to give the respondent possession of her matrimonial home. Not only have the applicants refused to comply with those orders, but the home or part of the home where the Court ordered the respondent to be restored have been demolished in circumstances that prima facie suggest the applicants complicity or involvement. The applicants have in the meantime conveniently retreated to India from where they seek stay of the orders of the High Court.

In the peculiar circumstances of this case where the rule of law is at risk of being deliberately undermined, we decline to hear the applicants until they have complied in full with the orders of the High Court or until further orders of that court."

25. The Plaintiffs therefore prayed that the Notice of Motion Application dated 24th June 2014 be allowed as prayed with costs, that the Respondents be found to be in contempt of court having disobeyed the orders this Court given on 19th May 2014, and further that this Court safeguards its dignity and declare that any action, resolution and or transaction emanating from the special general meeting of 22nd May 2014 is a nullity in law, void *ab initio* and of no consequence in law.

26. In a rejoinder, the applicants deposed that the issue of contempt was never addressed in Civil Suit No. 129 of 2014 as alleged by the Respondents.

27. In opposing the application, the Respondents averred that on 19/5/2014) the Court granted orders in terms of prayer No. 2 in which order (dated 19/5/2014) was extracted and issued/signed by this Honourable Court's Deputy Registrar on 20/5/2014 and which reads, inter alia, as follows:-

> ***"an order be, and is hereby issued restraining the defendants, employees and or agents from planning, attending and or holding any Extra-ordinary and Annual General Meetings of the 1st plaintiff pending the hearing and determination of the application herein or further orders of the court pending hearing of the inter partes on 25/6/2014".***

28. The Defendants then proceeded to challenge the fact of service of the order by the process server on the defendants. Contending that contempt of court proceedings are by their very nature criminal and that the standard of proving such contempt is beyond any reasonable doubt relying on **Ochino & another – vs- Kombo & 4 others [1989] KLR** where it was held that:-

> "as a general rule, no order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or to abstain from doing the act in question."

According to the defendants, they were NOT served, personally or otherwise, with the order dated/given

by this court on 19/5/2014, and DID NOT become aware of it until 30/5/2014 when a copy thereof was given to them by their advocate on record, long after a Special General Meeting of Wendano Matuu Company Limited had been held on 22/5/2014. Accordingly, the 2nd and 3rd defendants have NOT proved quilt on the part of the defendants, either beyond any reasonable doubt or at all.

29. It was however contended that the said order was NOT clear and unambiguous as it is NOT clear on whose employees and agents had been restrained from planning attending and holding Extra-ordinary meetings of the 1st plaintiff and whether other forms of meeting of the 1st plaintiff, other than Extra-ordinary and Annual General Meetings, could still be held. To the said defendants, while the 2nd and 3rd defendants are accusing the defendants of having held a Special General Meeting on 22/5/2014, they have NOT demonstrated and/or proved beyond any reasonable doubt that an Extra- ordinary meeting or Annual General Meeting was held.

30. The said defendants further contended that while in the Notice of Motion dated 24/6/2014, the 2nd and 3rd plaintiffs are asking this court to punish the defendants for failing to comply with the court orders of 20th day of May 2014, no orders were given by this court on 20/5/2014.

31. The said defendants therefore prayed that the Notice of Motion dated 24/6/2014 be dismissed with costs, payable by the 2nd and 3rd plaintiff/applicants.

Determination

32. I have considered the application, the affidavits both in support of and in opposition to the application.

33. This Court is aware that in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR**, **Mwita, J** declared that the entire Contempt of Court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and encroaches upon the independence of the Judiciary. I respectfully agree with that decision. I gather support for this position from **the Supreme Court of India's holding in Bar Association vs. Union of India & Another [1998] 4 SCC 409** where the court dealt with constitutional powers vested in it under Article 129 read with Article 142(2) of the Constitution of India and those of the High Court under Article 215 of the Constitution to punish for contempt and remarked that no act of Parliament can take away the inherent jurisdiction of the Court of record to punish for contempt. The court expressed itself as follows:

> ***"Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts, though such a legislation may serve as a guide for the determination of the nature of punishment which this court may impose in the case of established contempt."***

34. **The same court once again observed in Sudhakar Prasad vs. Government of Andhara Pradesh & Others [2001] SCC 516,** that the powers of contempt are inherent in nature and the provisions of the Constitution only recognize the said pre-existing situation and that the provisions of the ***Contempt of Courts Act, 1971***, are in addition to and not in derogation of Articles 129 and 215 of the Constitution and that the provisions of Contempt of Courts Act cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the two Articles. In my view the objective of the ***Contempt of Court Act*** was to sanitise contemptuous actions of state officers by making it frustrating and difficult to find them guilty of contempt and even then giving them a slap in the wrist literally where they are found in contempt. I therefore agree with the lamentations of **Sellers, LJ** in **Attorney General vs. Harris** (1961) 1 QB 74 **Sellers LJ** that:

> **"it cannot, in my opinion, be anything other than public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it... courts have the power to ensure that their decisions or orders are complied with by all and sundry,**

including organs of state. And in doing so, courts are not only giving effect to the rights of the successful litigant but also more importantly, by acting as guardians of the constitution, asserting their authority in the public interest." (Nthabiseng Pheko vs. Ekurhuleni Metropolitan Municipality & Another CCT 19/11(75/2015)**)** (supra)**."**

35. It was on that note that **Kriegler, J** that opined that:

> **"In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State." (S v Mamobolo** [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (para 16).

36. **Mahomed CJ**, on his part explained that:

> **"..Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem with which the Judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity."** ("The Role of the Judiciary in a Constitutional State - Address at the First Orientation Course for New Judges" (1998) 115 SALJ 111 at 112).

37. Accordingly, this application will be determined without reference to the provisions of that Act.

38. In the absence of the said legislation, we must revert to the position that prevailed pre-its enactment. Before the enactment of the Contempt of Court Act which deleted section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya, the first port of call with respect to the procedure for institution contempt of Court proceedings in this country was and therefore is section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya. That section provides:

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

39. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the ***Judicature Act***.

40. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf's** "***Access to Justice Report, 1996***", the ***Rules of the Supreme Court*** of England are being replaced with the ***Civil Procedure Rules, 1999*** and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the ***Civil Procedure (Amendment No. 2) Rules***, 2012, came into force and Part 81 thereof effectively replaced Order 52 of the ***Rules of the Supreme Court*** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is nolonger required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.

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

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

42. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social**

limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice… Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court… Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant".

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

44. In **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR,** the Court of Appeal was categorical 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 26thPresident of the United States of America once said:-"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 a right; not as a favour''. The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty best owed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy…'

45. A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under theConstitution. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c)

makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law.

46. **Musinga, J** in **Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 "A" of 2004** was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement. Contemnors, the learned Judge held, undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute.

47. I further associate myself with the decision of **Mabeya, J** in **Africa Management Communication International Limited vs. Joseph Mathenge Mugo & Another [2013] eKLR** in which he expressed himself as follows:

> **"As early as 1778, Chief Justice McKean of the United States, when dealing with a case of a party in Civil litigation who refused to answer interrogatories is noted to have stated:-**
>
> > **"Since however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case." (The History of contempt of Court (1927) P 47).**
>
> **In Johnson Vs Grant (1923) SC 789 at 790 Clyde L J noted:-**
>
> > **"The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged." (Emphasis mine).**
>
> **Closer home, in the case of TEACHERS SERVICE COMMISSION v KENYA NATIONAL UNION OF TEACHERS & 2 others [2013] eKLR Ndolo J observed that:-**
>
> > **"38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."**
>
> **I am of the same persuasion. The reason why power is vested in courts to punish for contempt of court is but to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice McKean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise."**

48. **Nkabinde, J,** in **Nthabiseng Pheko vs. Ekurhuleni Metropolitan Municipality & Another** CCT 19/11(75/2015), quite appropriately observed that:-

"The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

49. In **Canadian Metal Co. Ltd vs. Canadian Broadcasting Corp (N0.2)** [1975] 48 D.LR (30), the court rationalised the power to punish for contempt by stating that:

"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn… if the remedies that the courts grant to correct… wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society."

50. A similarly view was expressed in **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458, where** it was held that:

"It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors."

51. In **Carey v Laiken [2015] SCC 17** it was held that:

"Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect."

52. According to **James Francis Oswald**, ***Oswald's Contempt of Court: Committal, Attachment, and Arrest upon Civil Process*** (Butterworth & Company, 1910, p. 9:

"**punishing through contempt of court is the means by which courts sanction non-compliance with its orders, judgments and decrees, and a court of justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community. Without such protection, courts of justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible"**.

53. According to the editors of ***Borrie and Lowe's Law of Contempt*** 2nd ed. 1983:

"The rules embodied in the law of contempt of court are intended to uphold the effective administration of justice. As Lord Simon said in A-G v Times Newspapers Ltd they are the means by which the law vindicates the public interest in the due administration of justice. The law does not exist, as the phrase 'contempt of court' might misleadingly suggest, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of the parties or litigants…Contempt of court plays a key role in protecting the administration of justice. It is an impotent adjunct to the criminal process and provides the final sanction in the civil process."

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

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

55. As indicated hereinabove, the most serious challenge to the order was that there was no personal service on the Respondent. The general rule is that where a party is seeking committal to civil jail against the other party on the grounds that the order delivered by the court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must have a Penal Notice appended to it. See **Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708.**

56. However, where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, this Court cannot turn a blind eye to the same. As was held in **Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227:**

> **"It is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt… The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught."**

57. I therefore associate myself with **Lenaola, J** in **Basil Criticos vs. Attorney General & 4 Others [2012] eKLR**, **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** that:

> **"…the law has changed and so as it stands today, knowledge supersedes personal service and for good reason…where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."**

58. This position was adopted by **Musinga, J** in **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** and **Kimaru, J** in **Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR**. In the former case the learned Judge expressed himself as follows:

> **"Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon**

him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court."

59. This is akin to the position taken by **Akiwumi, J** (as he then was) in **Kenya Tourist Development Corporation vs. Kenya National Capital Corporation Limited & Another Nairobi HCCC No. 6776 of 1992** when he expressed himself as follows:

> **"An injunction in prohibitory form operates from the time it is pronounced, not from the date when the order is drawn up and completed. Consequently the party against whom it is made will be guilty of contempt if he commits a breach of the injunction after he has received notice of it, even though the order has not been drawn up...Where an order requires a person to abstain from doing an act, it may be enforced, notwithstanding that service, of a duly endorsed copy of the order has not been served, if the Court is satisfied that pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order is made or being notified of the terms of the order whether by telephone, telegram or otherwise...It is of high importance that orders of the Court should be obeyed. Wilful disobedience to an order of the Court is punishable as a contempt of court and such disobedience may properly be described as being illegal...Those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."**

60. As stated in ***Halsbury's Laws of England***, 4th Edn. Vol. 5 para 65:

> **"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise."**

61. In this case the Respondents were represented at the time when the order was made. It is therefore presumed that they were aware of the order as the advocate was their agent and ought to have notified them of the same. There is no affidavit from the advocate that they derelicted their duty of updating the Respondents of the Court proceedings of that day. If the Respondents proceeded to ignore the order under the pretext that they were not served by the order, this Court will not countenance such impunity.

62. In **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR**, the Court of Appeal held that:

> **"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. 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/her to report back to the client all that transpired in court that has a bearing on the client's case.**
>
> **This is the position in other jurisdictions within and outside the commonwealth. In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in Bhatnager v. Canada (Minister of Employment and Immigration), [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that: -**
>
> > **"In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Minister's of the Crown who**

administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister." (Emphasis by underline)

The Court went on to state that;

> **"On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt....Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved.(See Avery v. Andrews(1882) 51LJ Ch. 414) (Emphasis by underline)**

In United States v. Revie 834 F.2d 1198, 1203 (5th Cir. 1987) the court held that the defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order."

63. The Court of Appeal proceeded to hold that:

> **"On the other hand however, 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 the purposes of contempt proceedings… This standard has not changed since the old celebrated case of *Ex parte Langley 1879, 13Ch D. 110 (C.A)*, where Thesiger L.J stated as follows. at p. 119:**
>
> > **"...the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made" And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."**

64. In **Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 6 Others [2014] eKLR**, a three judge bench of **Ong'udi, Githua J** and **Olao JJ,** held as follows:

> **"270. We are alive to the 5th and 6th Respondents submissions that a finding on disobedience of court orders cannot be made unless there is evidence of personal service. For this proposition Mr. Njenga relied on the holding by Lenaola J in the case of Kariuki & 2 Others v Minister for Gender, Sports, Culture and Social Services & 2 Others (Supra) where he expressed himself in the following terms;**
>
> > **"....But in our law, service is higher than knowledge and since the service here was frustrated....I shall hold in accordance with the existing law that there was no service"**
>
> **271. In our view, that was the law then, which has since changed. The law as it stands today is that knowledge supersedes personal service. In support of our position, we cite the case of Kenya Tea Growers Association v Francis Atwoli & 5 Others Petition No. 64 of 2010 where Lenaola J opined as follows;**

"In the case before me, I am more than satisfied that even at the higher level beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the court order had stopped it. He went further to interpret it as made without jurisdiction and that only the workers court (Industrial Court) had Jurisdiction to determine the matter. He did not do so once but on a number of occasions as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding"

272. Further in Basil Criticos v Attorney General & 8 Others (2012) e KLR while referring to the above quote in Kenya Tea Growers Association Case (Supra), the Lenaola J stated as follows in regard to service of court orders;

"The point above is that 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. That should be the correct legal position and I subscribe to it".

273. We are in agreement with the Learned Judge. If a party can prove that there was knowledge of court orders then in our view that would be sufficient to form a basis for the finding of contempt of court orders. That being the case, we now pause to answer the question whether the 5th and 6th Respondents had knowledge of Court orders as at 28th January 2014when the motion for removal of the 1st Petitioner was deliberated upon."

65. The said position was affirmed by the Court of Appeal in **Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 6 Others 2014] eKLR** when it stated as follows:

"The trial court was correct in holding that the law as then was in contempt of court had since changed; the law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings."

66. The Respondents cannot therefore be permitted to hide behind the issue of lack of personal service to evade punishment for their unlawful actions. As was held in **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR**:

"Unfortunately what we have now is persons both ordinary mortals and persons in authority treating Court orders with unbridled contempt with blatant impunity. Was the respondent one such person? Unfortunately the answer to this question is in the affirmative. The order was made in presence of counsel for the respondent who as stated earlier must be presumed to have informed the respondent of the same. He went ahead and transferred the property before the due date of the judgment seemingly impatient to have this matter concluded once and for all. He acted in clear contempt of this Court. Government institutions, State officers, banks, and all and sundry are enjoined by law to comply with Court orders. We must deprecate in the strongest terms possible the worrying trend in this country where court orders are treated with tremendous contempt by persons and institutions which think wrongly of course, that they are above the law. 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: -

"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 a right; not as a favour''.

> **The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across."**

67. The Respondents contended that the order was ambiguous. However as was held in **Republic vs. The Kenya School of Law & Another Miscellaneous Application No. 58 of 2014**:

> **"Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification."**

68. In other words, vagueness or lack of clarity in an order, does not entitle a party to disregard it. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.

69. I therefore find that the Respondents were guilty of contempt of Court and must be punished accordingly.

70. However, what are the consequences of failure to obey Court orders? In **Petition no. 3 of 2014 Hon. Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 5 Others** in which it was held;

> **"We are in agreement with the above authorities, to the effect that anything done in disobedience of court orders is null and void ab initio and is a nullity in law....We must state at this point that disobedience of court order is a grave issue as it undermines the rule of law. Article 10 of the Constitution identifies the rule of law as one of the national values and principles of governance. Article 3 of the Constitution is very clear that every person has an obligation to respect and defend the Constitution. So that any person who disobeys a court order also violates the Constitution."**

71. Where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993.**

72. However, in this case it is alleged that certain properties were disposed of by the Respondents. To nullify the said disposal without affording the third party purchasers an opportunity of being heard would amount to a violation of the rules of natural justice.

73. Therefore in order to maintain the rule of law and in order that the authority and the dignity of our Courts are upheld at all times and to stamp the authority of this Court and ensure the values and principles of governance enshrined in Article 10 of the Constitution are adhered to, I hereby direct the Respondents herein to personally appear before this Court for the purposes of mitigation and sentencing.

74. It is so ordered.

Read, signed and delivered in open Court at Machakos this 21st day of January, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Watta for Mrs Nzei for the Respondents

Mr Muema for Mr Gitonga for the Applicants

CA Geoffrey